

BOLI ORDERS

Final Orders Issued By The Commissioner
Of The Oregon Bureau of Labor and Industries

VOLUME 12

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BOLI ORDERS

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INTRODUCTORY NOTE

This twelfth volume of BOLI ORDERS contains all of the Final Orders of the Commissioner of the Oregon Bureau of Labor and Industries that were issued between July 20, 1993, and May 26, 1994.

Each Final Order is reported in full text under the official title of the order. Preceding each Final Order is a synopsis, which provides immediate identification of the subject matter of the case and of the primary rulings contained in the order. In the caption of each case the charged party is referred to as the "Respondent." Within the body of some cases the charged party is referred to as the "Employer," the "Contractor," or the "Applicant."

A complete table of the Final Orders in this volume begins on page v. For each Final Order the table shows the page at which the order begins in this volume.

The Bureau of Labor and Industries Digest of Final Orders contains an outline of classifications for BOLI ORDERS. Case holdings and points of Wage and Hour and of Civil Rights law are arranged under classification numbers. The Digest contains a table of the Final Orders and a subject index for the complete set of BOLI ORDERS volumes.

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**In the Matter of
RARE CONSTRUCTION
INCORPORATED,
Respondent.**

Case Number 38-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 20, 1993.

SYNOPSIS

Respondent ordered Complainant to install concrete roofing tiles on a steeply pitched roof over 20 feet above the ground without a safety rope or other safety equipment. Complainant refused to work based upon a reasonable apprehension of serious injury or death. Respondent's discharge of Complainant for refusing to work under those conditions was an unlawful employment practice in violation of ORS 654.062(5)(a), and the Commissioner awarded Complainant \$4,121 in lost wages and \$2,000 for the emotional distress caused by the unlawful termination. ORS 654.062(1), (5)(a) and (b); OAR 839-06-020(4)(a) and (b).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 17, 1993, in Room 220 of the Eugene State Office Building, 165 E Seventh Street, Eugene, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the

Agency. Alfred Moss (Complainant) was present throughout the hearing. Rare Construction Incorporated, a corporation (Respondent), although properly notified of the time and location of the hearing, failed to answer the Specific Charges and had no representative at the hearing.

The Agency called as witnesses Complainant; State of Oregon Department of Insurance and Finance Occupational Safety and Health Administration (OR-OSHA) Safety Compliance Officer Dave Wooley; and Agency Civil Rights Division Senior Investigator Miguel Bustamante.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –
PROCEDURAL**

1) On September 30, 1992, Complainant Alfred Moss filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment practices of Respondent.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondent in violation of ORS 654.062(5)(a).

3) The Agency initiated conciliation efforts between Complainant and Respondent, conciliation failed, and on February 17, 1993, the Agency prepared and served on Respondent Specific Charges, alleging that

Complainant's expression of safety and health concerns on the job caused Respondent to terminate his employment in violation of ORS 654.062(5)(a).

4) The Specific Charges herein were transmitted through the US Postal Service by certified mail to Richard C. Reister, Respondent's Registered Agent, 3150 Kinsrow, #290 / PO Box 70344, Eugene, Oregon 97401, and were received for on February 23, 1993, per USPO Domestic Return Receipt P 138 181 058.

5) With the Specific Charges, the following were served on Respondent: a) Notice of Hearing setting forth the time and place of the hearing in this case; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process (OAR 839-30-020 to 839-30-200); and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On March 17, 1993, the Agency filed a motion to amend the Specific Charges to add Richard C. Reister personally as a respondent party and a motion for an order of default against Respondent, no answer having been filed on behalf of the corporation.

7) On March 23, 1993, the Forum issued a ruling allowing Respondent and Richard C. Reister until April 2, 1993, to respond to both motions, and ruling that Respondent must be represented by an Oregon attorney in order to do so. The ruling was transmitted to Richard C. Reister by regular mail at PO Box 70344, Eugene, Oregon 97401, and at 3150 Kinsrow, #290,

Eugene, Oregon 97401. The ruling also provided that henceforth the participants would have five days in which to respond to any subsequent filings.

8) On March 25, 1993, the Agency filed a second motion to amend the Specific Charges, seeking to add Richard A. Reister, rather than Richard C. Reister, personally as a respondent party.

9) On April 7, 1993, the Hearings Referee ruled on the Agency's second motion to amend, noting that neither Respondent nor Richard C. Reister had responded to the Agency's first motion or within five days to the Agency's second motion, and that OAR 839-30-075(1) allowed the Agency to amend as a matter of course where no responsive pleading is filed. The referee granted the Agency's second motion to amend and joined Richard A. Reister as a respondent party. The Referee also noted that Respondent Rare Construction Incorporated was in default as to the original Specific Charges, but granted Respondent and Richard A. Reister 20 days in which to answer the amended Specific Charges, with leave granted to the Agency to reapply for a ruling of default if either failed to respond to the amended Specific Charges. The rulings of April 7 were sent by regular mail to Richard C. Reister, 3150 Kinsrow, #290, Eugene, Oregon 97401, and at PO Box 70344, Eugene, Oregon 97401, and by certified mail to Richard A. Reister, 2555 Erin Way, Eugene, Oregon 97401.

10) In the meantime, on March 25, 1993, the US Postal Service returned undelivered the ruling of March 23 sent to Richard C. Reister, PO Box 70344,

Eugene, Oregon 97401, noted "Box closed unable to forward return to sender," and the one sent to Richard C. Reister, 3150 Kinsrow, #290, Eugene, Oregon 97401, noted "moved left no address unable to forward return to sender."

11) Between April 10 and 12, 1993, the US Postal Service returned undelivered the ruling of April 7 sent to Richard C. Reister at PO Box 70344 and at 3150 Kinsrow, with the same notations as before and returned the ruling of April 7 sent to Richard A. Reister, 2555 Erin Way, Eugene, Oregon 97401, noted "moved left no address unable to forward return to sender."

12) Effective April 12, 1993, the Commissioner adopted temporary Oregon Administrative Rules 839-50-000 to 839-50-420, governing contested case hearings. Those rules applied to all pending proceedings, including this proceeding. All procedures herein on or after April 12, 1993, are in accordance with those rules. The Hearings Unit's attempts to transmit copies of the temporary rules to Respondent through its registered agent, Richard C. Reister, resulted in undelivered mailings as above.

13) On May 4, 1993, the Agency renewed its motion for a ruling of default as to Respondent. On June 2, 1993, the Hearings Referee ruled that Respondent was in default as to the original Specific Charges, there being no answer as required by OAR 839-50-130 (former OAR 839-30-060). Respondent was in default under both sets of rules. The Hearings Unit's attempts to transmit copies of that ruling to Respondent through its registered

agent, Richard C. Reister, resulted in undelivered mailings as above.

14) Prior to hearing, the Agency made due and diligent but unsuccessful efforts to locate and subpoena Complainant's former co-workers, Troy Sisk and Rick Morley, as witnesses to testify at the hearing of June 17, 1993. In the alternative, the Hearings Referee allowed the Agency to present the results of interviews with each of them during the investigation of Complainant's administrative complaint.

15) At the commencement of the hearing, the Hearings Referee noted that no representative of Respondent was in attendance and found from the files and records herein that Respondent had received a Notice of Hearing with the original Specific Charges, had failed to answer the latter, and was in default as to them. The Hearings Referee took evidence for the purpose of a prima facie case as to those charges. The amended Specific Charges were never served and are held for naught. The Hearings Referee also found from the files and records herein that Respondent had received a Notice of Contested Case Rights and Procedures with the Specific Charges.

16) Pursuant to ORS 183.415(7), Complainant and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) Following the hearing, the Agency developed information that Respondent's Construction Contractors Board registration #80936 was suspended by action of the Board in late November 1992, that Respondent failed to pay a board fine in conjunction

therewith, and that Respondent apparently ceased doing business at that time. This information was transmitted to the Forum by the Agency. Based on the record herein, the Forum was unable to relay these findings to Respondent.

18) The Proposed Order, which included an Exceptions Notice, was issued on June 30, 1993. Exceptions were to be filed by July 12, 1993. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was an Oregon corporation operating a construction business in Eugene, Oregon, which engaged or utilized the personal service of one or more employees. Respondent through its officers and agents reserved the right to control the means by which such service was performed.

2) Complainant was hired by Respondent through Richard A. (Rick) Reister, an individual around 25 years old whom he met in a Eugene restaurant. Rick Reister and his father, Richard C. Reister, an individual about 45 to 50 years old, were known to Complainant as officials of Respondent.

3) Complainant began working as a roofer for Respondent on August 13, 1992, at \$10.00 an hour. He usually worked at least 40 hours per week. He had no prior roofing experience.

4) Prior to August 13, 1992, Complainant had been working for Green Hill Arco and for Gargan Research. Each job paid \$5.50 an hour, neither was full time.

5) Complainant's duties with Respondent included packing concrete roofing tiles from the ground to roof as

high as the ridge, and cutting and installing the tiles which measured about 12 inches by 12 inches and weighed approximately 10 pounds each. Rick Reister was Complainant's immediate supervisor. There was no union or collective bargaining agreement.

6) Complainant worked for Respondent in at least two locations in north Eugene: off Coburg Road and off Harlow Road, installing concrete tile roofs on new residential construction. When Complainant began working for Respondent, his co-workers were Troy Sisk and his cousin, Danny. Later, one of his co-workers was Rick Morley. Each of them had the same duties as Complainant.

7) The concrete roofing tiles were glazed on the top flat surface and described as "color through." They were installed in courses, or rows, with the bottom course nailed through nail holes cast in the tile. Each successive course was laid or stacked loose, edge to edge, against the one below it. The tiles were two to three inches thick, flat, with a nub or lip on the upper edge to engage the batten, a wood one inch by six inches extending from side to side of the roof and placed every 12 to 13 inches from bottom edge to ridge. The tiles were laid like bricks, so that alternating courses required half pieces at the roof edge. The course at the ridge-line (top) was also nailed, as were the ridge pieces at the peak. Half pieces were either nailed or fastened with adhesive.

8) On September 3, 1992, Complainant was working on a site off Coburg Road. Morley was also present. Rick Reister told Complainant to climb onto the edge of a gable with a steep

pitch* to install half pieces. The peak of the gable was about 25 to 30 feet off the ground and the bottom was 20 to 25 feet off the ground.

9) Complainant asked for either a safety rope or for the installation of toe jacks. The work area to which he had been directed had the steepest pitch of the entire roof.

10) To Complainant, a safety rope was merely an anchored rope he could hang onto as he worked; he believed, although he was not certain, that such a rope should hook through a belt or harness worn by the worker. Respondent had never provided such equipment. If Complainant used a safety rope at all while working for Respondent, he merely hung onto the rope with one hand and worked with the other.

11) Toe jacks were metal angles or brackets designed to fasten to the roof and support a two foot by six foot plank from which a worker could work.

12) Rick Reister said neither a safety rope nor toe jacks were necessary. Complainant pointed out the tiles were loose and slick, the pitch was severe, there was metal reinforcing bar and scrap lumber strewn on the ground below, men were working below him, and the roof edge was 20 feet or more above ground. Complainant believed that he would risk serious injury or death in installing end pieces on the edge of the steeply pitched roof without safety equipment.

13) Rick Reister said do it or get off the roof. Complainant understood that to mean work or be fired.

14) Complainant said he would not do the job without safety equipment, that he would clock out when Rick took him back to his car, and came down and sat in Rick Reister's truck. Reister gave Complainant a ride back to his car, during which time they had a "very heated discussion" which almost became physical. Reister made it clear to Complainant that he was fired.

15) Rick Morley overheard the discussion on the roof between Complainant and Rick Reister. Morley had previous roofing experience. He later told Complainant that he would also have refused to do the job without proper equipment.

16) Complainant had safety concerns previously during his employment with Respondent. Jobs were run for production and speed. Broken tiles were tossed off the roof without regard to other workers below. Several tiles at a time were thrown across the roof from worker to worker. After a nearly completed roof was hosed down to remove dust, roofers were sometimes ordered back onto the wet surface to finish the job. Complainant expressed his concern about each of these practices to Rick Reister, who told him that was how it was done. Reister told Complainant that if OR-OSHA ever came out to the job, it was against the law for an OSHA representative to talk to Complainant and that he should say nothing and just keep working.

* "pitch," n., *Architecture*, the slope of the sides of a roof, expressed by the ratio of its height to its span. *Webster's New World Dictionary*, Simon & Schuster (1986). Thus, a pitch of 10/12 would describe a 10-inch rise in height for every 12 horizontal inches of span.

17) Respondent obtained ropes after Rick Reister heard that an OR-OSHA inspector had been in the area. The ropes were tied to the end of the battens to make it appear that there were safety ropes on the roof. Anchored in such a manner, they would not have stopped a fall; they were there for appearance.

18) Rick Reister instructed the roofers on climbing and on cutting and laying tiles, with speed being the most important. Complainant was concerned about falling. Reister told him that if Complainant was doing his job right, i.e., Reister's way, Complainant would fall off the roof within a year. He said every roofer fell off and that it was the only way to learn roofing. He said that ropes were useless, that they just slowed down the work.

19) At times material, Dave Wooley had been a Safety Compliance Officer with OR-OSHA, Eugene Field Office for three years. His duties were to investigate industrial accidents including fatalities, audit the safety of industrial premises, and take and investigate worker complaints, looking for violations of the Oregon Safe Employment Act. His specialty areas were logging and construction. Prior to employment with OR-OSHA, he acted as a loss control consultant in connection with the SAIF corporation, an insurer, also concerned with logging and construction. Before that he worked in the logging industry and in the construction trade.

20) Reacting to a complaint of unsafe practices, Wooley inspected three of Respondent's job sites in the Eugene area in late September 1992. One of the sites inspected was the one

on which Complainant had worked on September 3. It was not active when Wooley saw it, so no actual measurement was made, but the distance to the peak of the roof from the ground appeared to be 25 to 30 feet. The houses had dormers which exceeded a 10/12 pitch.

21) OR-OSHA rates seriousness of safety violations considering probability and severity of accident, including physical harm or death to the worker. In assessing violations, OR-OSHA considers death as the consequence of a fall from a roof with a 16-foot or more eaves height. Death or serious injury often occurs at a lower height.

22) In residential construction, OR-OSHA requires a safety belt and lanyards (fixed ropes) on any pitch greater than 8/10. On a 10/12 pitch roof, a belt with a lanyard is required which would allow a fall no greater than six feet. Fall protection, including roofing brackets, catch platforms, scaffold platforms, and the like vary depending upon the pitch and heights involved.

23) Unless otherwise provided through collective bargaining, it is the employer's obligation to provide, furnish, and purchase safety equipment and apparel required for residential roofing operations.

24) Complainant's refusal to install the half pieces under the conditions described by Complainant on September 3, 1992, was reasonable and in accordance with OR-OSHA regulations.

25) At times material, Miguel Bustamante was a Senior Investigator for the Civil Rights Division of the Agency.

He investigated Complainant's complaint against Respondent. On October 26, 1992, he interviewed Rick Morley, who worked with Complainant for Respondent at times material and who confirmed Complainant's version of the events of September 3, 1992.

26) Bustamante also interviewed Troy Sisk who worked with Complainant for Respondent at times material. Sisk confirmed Rick Reister's lack of concern about safety; he was instructed by Reister to inform OR-OSHA that he didn't know how to locate Reister.

27) Complainant felt embarrassed and humiliated by being fired. He had self-doubt that he might be thought less of because he hadn't taken the risk to do the job. He was depressed by the fact that he had given up what jobs he had in order to work for Respondent. He became apprehensive over possible physical confrontation with Rick Reister, who is well over six feet tall and who knocked Morley down over a demand for pay.

28) Complainant was unemployed for over three weeks after September 3, 1992, and then returned to Gargan Research, which had only 15 hours per week at \$5.50 an hour available. He lived partially on his savings and became anxious about his financial obligations, including food and rent. It upset him to be unable to meet his obligations, and he became concerned about his credit rating. He continued to seek full-time work. On May 1, 1993, he obtained a job with Country Coach at \$6.00 per hour for a 40-hour week.

29) Between September 4 and November 30, 1992, when Respondent ceased operating, Complainant earned

\$759 from Gargan Research. Had he remained employed by Respondent, he would have earned \$4,880 during the same period of time. He lost \$4,121 in wages during that period.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent was an Oregon corporation operating a construction business in Oregon, engaging or utilizing the personal service of employees, and reserving the right to control those employees.

2) Complainant worked for Respondent as a roofer from August 13 to September 3, 1992, at a rate of \$10.00 an hour for a 40-hour week.

3) Richard A. (Rick) Reister directed and supervised the workers, including Complainant, for Respondent.

4) Rick Reister repeatedly instructed Respondent's roofers in unsafe practices. Complainant protested several such practices without result.

5) On September 3, 1992, Rick Reister ordered Complainant to complete an installation on a steeply pitched roof edge between 20 and 30 feet above ground without safety equipment.

6) Complainant refused to make the installation without safety equipment, fearing that serious injury or death could result in a fall from that height.

7) Rick Reister stated that safety equipment was not necessary and that Complainant should complete the installation or be terminated.

8) Safety ropes or other devices were required to be furnished by the employer at the roof height and pitch where Complainant was told to work.

9) Respondent discharged Complainant for refusing to risk serious injury or death by working without required safety equipment.

10) Complainant experienced wage loss of \$4,121 due to termination of his employment by Respondent.

11) Complainant experienced severe and continued emotional distress due to termination of his employment by Respondent.

CONCLUSIONS OF LAW

1) ORS 654.005 provides, in pertinent part:

"As used in this chapter, ***

"(5) 'Employer' means any person who has one or more employees, ***

"(7) 'Person' means one or more *** corporations ***"

At times material herein, Respondent was an employer subject to the provisions of ORS 654.001 to 654.295 and 654.750 to 654.780.

2) ORS 654.062 provides, in pertinent part:

"(1) Every employee should notify the employer of any violation of law, regulation or standard pertaining to safety and health in the place of employment when the violation comes to the knowledge of the employee.

"(5)(a) It is an unlawful employment practice for any person to *** discharge from employment *** any employee *** because such employee has opposed any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780 ***.

"(b) Any employee *** who believes that the employee has been *** discharged from employment *** by any person in violation of this subsection may *** file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659.040. Upon receipt of such complaint, the commissioner shall process the complaint and case under the procedures, policies and remedies established by ORS 659.010 to 659.110 and 659.505 to 659.545 and the policies established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices based upon race, religion, color, national origin, sex or age under ORS 659.030(1)(f)."

ORS 659.040 provides, in pertinent part:

"(1) Any person claiming to be aggrieved by an alleged unlawful employment practice, may *** make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the *** employer *** alleged to have committed the unlawful employment practice complained of and which complaint shall set forth the particulars thereof."

The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and the subject matter herein.

3) OAR 839-06-020 provides, in pertinent part:

"(4) An employee can refuse to expose [the employee] to [a] dangerous condition and be protected from subsequent discrimination, if:

"(a) The employer requires the employee to work under conditions which the employee reasonably believes pose an imminent risk of serious injury or death *** and

"(b) The employee has reason to believe that there is insufficient time or opportunity to seek effective redress from the employer or to resort to regular statutory enforcement channels ***."

The conduct of Respondent in ordering Complainant to work or be fired on September 3, 1992, left Complainant with no effective means of redress and the ultimate discharge of Complainant was a violation of ORS 659.062.

4) The actions, inactions, statements, and motivations of Richard A. (Rick) Reister are properly imputed to the Respondent herein.

5) Pursuant to ORS 654.062, 659.040, 659.010(2), and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award to this Complainant lost wages resulting from the unlawful discharge and to award money damages for emotional distress sustained and to protect the rights of Complainant and of others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are appropriate exercises of that authority.

OPINION

Respondent, although properly served through its registered agent, failed to answer the Specific Charges or to appear at the hearing in this matter. Under the Oregon Administrative Procedures Act and the rules of this Forum, the Agency must present a prima facie case supporting those charges in order to prevail. The credible testimony of the Agency's witnesses and the documentary evidence submitted have been accepted and relied upon herein.

ORS 654.062, a portion of the Oregon Safe Employment Act, urges employees to report unsafe practices and thus contribute to a safer work environment. The employee's reporting can, under the statutory scheme, be either to the employer or to a regulatory agency such as OR-OSHA. The statute makes it an unlawful employment practice for an employer to retaliate against an employee who does so.

Reporting an unsafe practice is one form of opposing it. Remonstrating with the employer over the practice is another. Both are protected activities under the statute. The ultimate form of remonstrance or opposition is a refusal to work in the unsafe conditions. Not all unsafe conditions justify such a refusal. There must be an imminent risk to the employee of serious injury or death, and there must be no viable alternative, such as a complaint to OR-OSHA. *In the Matter of Associated Oil Company*, 6 BOLI 240 (1987).

Complainant feared approaching the steeply pitched roof's edge as he had been ordered to do without safety equipment. He knew he could be seriously injured or killed if he fell. Wooley,

the OR-OSHA compliance officer, left the Forum with no doubt that OSHA classified the conditions existing on September 3 as a risk of serious injury or death to the employee. Complainant was ordered to work above a height rated by OR-OSHA as life-threatening on a segment of roof with a pitch requiring certain minimum safety equipment.

Respondent did not provide any or adequate safety equipment, and through Rick Reister, Respondent gave Complainant no alternative. Either he must risk "life and limb" or he would be fired. That is contrary to the statute. The discharge of Complainant under such circumstances subjects Respondent to liability for Complainant's wage loss and for any emotional damage he suffered.

I have found that Complainant lost \$4,121 in wages and that Complainant suffered emotional distress due to the sudden and undeserved discharge, to the economic dislocation that followed, and to the humiliation of being fired. The sum of \$2,000 is reasonable compensation for Complainant's emotional distress.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, RARE CONSTRUCTION INCORPORATED is hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Alfred Moss, in the amount of:

a) FOUR THOUSAND ONE HUNDRED TWENTY-ONE DOLLARS (\$4,121), representing wages Complainant lost between September 3 and November 30, 1992, as a result of Respondents' unlawful practice found herein; PLUS

b) INTEREST AT THE ANNUAL RATE OF NINE PERCENT on said amount from November 30, 1992, until paid, computed and compounded annually; PLUS,

c) TWO THOUSAND DOLLARS (\$2,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondents' unlawful practice found herein; PLUS

d) Interest on said damages for mental distress, at the legal rate, accrued between the date of the Final Order herein and the date Respondent complies therewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any employee because that employee has reported or opposed unsafe practices in the work place.

In the Matter of
JOHN MATHIOUDAKIS,
dba Family Pancake & Steakhouse,
Respondent.

Case Number 39-93

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 30, 1993.

SYNOPSIS

Claimant, a cook, was not exempt from overtime pay as an executive employee and was not relieved of all duties during his meal periods, and thus meal periods should not be deducted from his hours worked. Respondent willfully failed to pay Claimant all wages due upon termination, in violation of OAR 839-20-030 (overtime wages) and ORS 652.140(2), and the Commissioner ordered Respondent to pay wages due and civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2); 652.150; 653.020(3); 653.045; 653.055(1), (2); 653.261(1); OAR 839-20-005(1); 839-20-030(1); and 839-20-050(1), (2).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 7, 1993, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracovich, an employee of the Agency.

Elroy Meryl McGuire (Claimant) was present throughout the hearing. John Mathioudakis (Respondent) was represented by Robert G. Black, Attorney at Law.

The Agency called the following witnesses (in alphabetical order): Ramona DeMars, Respondent's employee; Nancy Gruelle, Respondent's former employee; Mary Houser, Agency Administrative Specialist; Sarah Mayhugh, Respondent's employee; Elroy McGuire, the Claimant; and Margaret Trotman, Agency Compliance Specialist.

Respondent called the following witnesses (in alphabetical order): Ascension (Chonie) Matthews, Respondent's employee; and John Mathioudakis, Respondent.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On November 3, 1992, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

2) At the same time that he filed the wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On December 18, 1992, the Commissioner of the Bureau of Labor and Industries served on Respondent

an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Respondent owed a total of \$2,588.93 in wages and \$2,357 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

4) On December 31, 1992, Respondent, through his attorney, filed an answer to the Order of Determination and a request for a contested case hearing. The answer denied that Respondent owed Claimant unpaid wages and set forth two affirmative defenses: 1) all or some of Claimant's claim is barred by the applicable statute of limitations, and 2) Claimant was given a one-hour meal period each day he worked, and Respondent is entitled to deduct all of that time from Claimant's recorded hours.

5) On February 14, 1993, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200. On April 8, 1993, the Hearings Unit sent the participants a copy of the Forum's temporary contested case hearings rules,

OAR chapter 839, division 50, effective April 12, 1993.

6) On June 10, 1993, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency and Respondent each submitted a timely summary.

7) On June 17, 1993, the Agency filed a motion to amend the Order of Determination to revise the period covered by Claimant's wage claim, the alleged number of hours worked, and the alleged wages earned and due. Respondent did not respond to the motion, and on June 28 the Hearings Referee granted it.

8) On July 28, 1993, Respondent's attorney, Robert Black, requested a postponement of the hearing because he had recently joined the law firm representing Respondent and been assigned this case, and he had other matters scheduled that conflicted with the hearing date. The Agency objected the motion and the alternative schedule proposed by Respondent. The Hearings Referee denied Respondent's request, pursuant to OAR 839-50-150(5), because it was untimely and "the internal management of counsel's office" did not qualify as good cause for a postponement.

9) During a prehearing conference, Respondent and the Agency stipulated to certain facts, which were read into the record by the Hearings Referee at the beginning of the hearing.

10) At the start of the hearing, Respondent's attorney said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

11) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

12) At the start of the hearing, the Agency moved to amend the Order of Determination to revise the dates on which interest would begin to accrue. Respondent did not object, and the Hearings Referee granted the motion. Respondent dropped his statute of limitations defense.

13) Following the hearing, Respondent's attorney filed a memorandum as a supplement to his oral argument given at hearing. Respondent's brief was not requested by the Hearings Referee and was therefore disregarded. OAR 839-50-155.

14) On August 5, 1993, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the Certificate of Mailing, including the Respondent. Participants had 10 days to file exceptions to the Proposed Order. No exceptions were received by the Hearings Unit. On August 12, 1993, the Hearings Unit re-

ceived a letter from the Agency clarifying a procedural finding of fact.

FINDINGS OF FACT - THE MERITS

1) During all times material herein, the Respondent, a person, did business as Family Pancake & Steak House in Portland, Oregon. He employed one or more persons in the State of Oregon.

2) Respondent hired Claimant around November 1, 1989, as a cook.

3) During the period December 23, 1990, to October 31, 1992, Respondent employed Claimant.

4) Respondent and Claimant entered into an oral agreement that Claimant would perform work for \$1,585 per month.

5) Claimant's duties included food preparation and cooking customers' orders. In an eight-hour shift Claimant would spend around six hours cooking and two hours doing preparation work. All the cooks were responsible for putting foods away properly. Claimant did not order food or supplies for the restaurant; he would advise Respondent what supplies were needed, and Respondent did the ordering.

6) Respondent kept no time records for Claimant. Claimant kept a record of his hours on a home calendar.

7) Between November 1991 and February 1992, the Agency investigated an anonymous complaint about Respondent's restaurant. The complaint concerned employment of child labor, and Respondent's deduction of one-half hour meal periods from employees' wages when no meal periods were taken. During an investigation of that complaint, Respondent told Agency Compliance Specialist

Margaret Trotman that Claimant was a salaried cook with no hiring or firing authority and no supervisory duties. Claimant was Respondent's only salaried employee. Respondent said that Claimant was not paid overtime, although Claimant regularly worked 47 hours per week. Trotman determined that Claimant was not exempt from overtime pay. She explained to Respondent the law about overtime, why Claimant was not exempt, and that overtime pay was due to Claimant. Respondent told Trotman that he kept no records on Claimant. Trotman explained the law's recordkeeping requirements, instructed Respondent to change his payroll practice concerning Claimant, and told him he needed to keep records for Claimant. Trotman computed that at that time Respondent owed Claimant \$3,169.92 in back overtime pay. Trotman interviewed Claimant, who agreed that he was not paid overtime, and had no hire or fire authority or supervisory duties.

Other employees interviewed said that they did not get a meal period where they were relieved of all duties, but that Respondent always deducted one-half hour for lunch from their timesheets.

On February 3, 1992, Trotman wrote Respondent that he was in violation of several wage and hour laws and rules, including failure to pay Claimant overtime. Trotman gave Respondent copies of Oregon's minimum wage and overtime rules, child labor rules, information on how to compute overtime for salaried employees, record-keeping requirements, rules regarding meal and rest periods, and other information. The rules sent included those

that contain the requirements for employees who are exempt from overtime. She also sent letters and wage claim forms to three employees, including Claimant.

8) Soon after the Agency's investigation, Respondent gave Claimant the choice of either working for \$8.00 per hour and taking a cut in hours (so that he would not work over 40 hours per week) or signing a form saying he was the salaried kitchen manager. Claimant agreed to sign the form because he did not want a cut in pay, and he was afraid he would lose his job if he did not sign it. Respondent had earlier told Claimant that if the Agency enforced the wage and hour laws, Respondent would terminate all of the employees and hire all new ones. The form, handwritten by Respondent's daughter, stated:

"I, Elroy Mcguire, work as a kitchen manager, at the Family Pancake and Steak House Restaurant. Since October first, nineteen ninety one, with a monthly salary of one thousand five hundred eighty five dollars.

"The duties of the kitchen manager are; to make sure the kitchen operates efficiently and smoothly, make a list of the items that need to be prepared or ordered for the next day, all items in cooler should be properly covered, restock the sandwich table and cover foods properly. The kitchen manager also needs to make sure the dishwasher keeps the floors and cooler clean, and that the dishwasher prepares french fries, hashbrowns, peals [sic] potatoes, for mash potatoes. Salads need

also to be prepared by dishwasher. I agree to take responsibilities [sic] of all these duties.

[signed] Elroy McGuire
Employee"

After he signed this form, Claimant's duties did not change from those he performed before he signed.

9) During all times material, Claimant had no supervisory duties; he did not direct the work of two or more other employees. He did not supervise the other cook (Moni) on Sunday mornings, and did not supervise the dishwasher, Ascension "Chonie" Matthews. Claimant worked with Matthews for at most three hours per day, three days per week. He did not supervise any other dishwasher. He did not work with the other cook, Sarah Mayhugh. He had no power to hire or fire other employees. Respondent never sought Claimant's opinion about hiring or firing employees.

10) Respondent told Trotman during the investigation that Claimant had hire/fire authority. He later admitted that Claimant did not have that power. He told Trotman that Claimant supervised Matthews and Mayhugh. Respondent made similar assertions at hearing, including that Claimant supervised a second dishwasher. This is inconsistent with what he told Trotman and what his accountant alleged on his behalf, before hearing Respondent never claimed that Claimant supervised another dishwasher besides Matthews. In addition, Claimant never worked with Mayhugh; Respondent never told Mayhugh that Claimant was her supervisor until after Claimant had quit. The Forum finds Respondent's

statements inconsistent and unreliable. Respondent is attempting to characterize Claimant as an executive employee, who would be exempt from overtime pay, when the overwhelming weight of credible evidence contradicts him. No credible evidence corroborates his position. Accordingly, Respondent's testimony regarding Claimant's duties is not credible and has been disbelieved by the Forum.

11) Claimant took rest and meal periods when he was caught up with his work. Claimant was not relieved of all duties during these rest or meal periods; as customers' orders arrived or other duties required, Claimant had to return to work. Except for his shift on Sundays when two cooks worked together, Claimant was the only cook on duty during his shifts. Other employees took breaks, but were not relieved of all duties during them. Despite this, if an employee worked over six hours in a day, Respondent automatically subtracted a one-half hour meal period from the employee's work time for that day.

12) Claimant regularly worked Wednesdays (8 hours), Thursdays (8 hours), Fridays (8 hours), Saturdays (12 hours), and Sundays (11 hours). He had Mondays and Tuesdays off. The restaurant was closed on July 4, Thanksgiving Day, and Christmas Day each year, and Claimant had those days off.

13) The Forum takes official notice that Christmas Day 1990 was on Tuesday, December 25, 1990; July 4, 1991, was on a Thursday; Thanksgiving Day 1991 was on Thursday, November 21, 1991; Christmas Day 1991 was on Wednesday, December 25,

1991; and July 4, 1992, was on a Saturday. Claimant's calendars show he worked on each of those holidays except Christmas Day 1990 (which was his regular day off) and Christmas Day 1991 (on which date Claimant's calendar shows the holiday off). Respondent testified that one year, when July 4 was on a Thursday, Claimant took that day and the following days off until the next Wednesday. Respondent also testified that Claimant took a week off when his father died "last year" (which the Forum finds was 1992), and a week off after an injury. Respondent's testimony is contradicted by Claimant, who testified that he missed only one work day in the three years he worked for Respondent. For the reasons given in the opinion below, the Forum has found that Claimant did not work on any of the holidays listed in this Finding of Fact, that Claimant did not take the week off after July 4, 1991, and that he did not take the other weeks off as asserted by Respondent.

The Forum has reduced the total number of hours worked by 28 (eight hours from each of July 4 and November 21, 1991, and 12 hours from July 4, 1992), the total number of straight time hours worked by seven (one hour each from July 4 and November 21, 1991, and five hours from July 4, 1992), the total number of overtime hours worked by 21 (seven hours from each week in which July 4 and November 21, 1991, and July 4, 1992, fell), and the total number of days worked by three (one for each of the three holidays). Claimant was credited with holiday pay for these holidays, as he was originally for Christmas 1991.

Calculations were adjusted accordingly.

14) Claimant's records and testimony, as modified by the previous Finding of Fact, reveal that during the period between December 23, 1990, and October 31, 1992, he worked a total of 4,476 hours in 476 days. Of those hours, 3,832 hours were "straight time hours," that is, hours worked up to 40 per work week. The remaining 644 hours were "overtime hours," that is, hours worked in excess of 40 hours per work week.

15) Pursuant to ORS chapter 653 (regarding Minimum Wages), OAR 839-20-030 (Payment of Overtime Wages) and Agency policy, the Hearings Referee calculated Claimant's total earnings to be \$37,608.52. Claimant's hourly wage rate equaled \$7.78 (\$1,585 per month times 12 months, divided by 52 weeks equals \$365.77 per week, divided by 47 hours (the number of hours Claimant worked per week) equals \$7.78 per hour). Claimant's overtime rate of pay was \$11.67 per hour (one and one-half times his hourly rate of \$7.78). Claimant's total earnings reflect the sum of the following:

3,832 hrs at \$7.78/hr =	\$29,812.96
644 hours at \$11.67/hr =	7,515.48
Holiday Pay 7-4-91 (8 hours at \$7.78/hr) =	62.24
Holiday Pay 11-21-91 (8 hours at \$7.78/hr) =	62.24
Holiday Pay 12-25-91 (8 hours at \$7.78/hr) =	62.24
Holiday Pay 7-4-92 (12 hours at \$7.78/hr) =	<u>93.36</u>
TOTAL EARNED	\$37,608.52

16) During the wage claim period December 23, 1990, to October 31, 1992, Respondent paid Claimant \$35,321.24 (58 hours at \$7.78 per hour for the period December 23-31, 1990, which equals \$451.24; plus 22 months at \$1,585 per month for the period January 1991 through October 1992, which equals \$34,870).

17) Claimant quit on Saturday, October 31, 1992. Claimant gave Respondent two weeks' notice of his intent to quit. The next business day that was not a Saturday, Sunday, or holiday was Monday, November 2, 1992.

18) Civil penalty wages were computed, in accordance with Agency policy, as follows: \$37,328.44 (the total wages earned, minus the holiday pay) divided by 476 (the number of days worked during the claim period) equals \$78.42 (the average daily rate of pay). This figure of \$78.42 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$2,352.60, rounded to \$2,353 pursuant to Agency policy.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person doing business as Family Pancake & Steak House in the State of Oregon. He employed one or more persons in the operation of that business.

2) Respondent employed Claimant as a cook from December 23, 1990, to October 31, 1992.

3) It was not Claimant's primary duty to manage the restaurant or any department or subdivision thereof. He did not customarily and regularly direct the work of two or more other

employees. He did not have the authority to hire or fire employees, and his suggestions or recommendations as to the hiring or firing or any other change of status of other employees was not given particular weight.

4) During this period, Respondent and Claimant had an oral agreement whereby Claimant's rate of pay was \$1,585 per month.

5) Claimant did not receive a meal period of not less than 30 minutes during which he was relieved of all duties. He continued to perform duties or remained on call during his meal periods.

6) Claimant quit employment with Respondent on October 31, 1992. He gave Respondent not less than 48 hours' notice, excluding Saturdays, Sundays, and holidays, of his intention to quit employment.

7) During the period December 23, 1990, to October 31, 1992, Claimant earned \$37,608.52 in wages. Respondent paid him a total of \$35,321.24. Respondent owes Claimant \$2,287.28 in earned and unpaid compensation.

8) Respondent willfully failed to pay Claimant all wages earned and unpaid immediately upon his quitting on October 31, 1992. More than 30 days have elapsed from the due date of those wages.

9) Civil penalty wages for Claimant, computed in accordance with Agency policy and ORS 652.150, equal \$2,353.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to

652.200, 652.310 to 652.405, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) Prior to the commencement of the contested case hearing, the Forum informed the Respondent of his rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

4) ORS 653.020 provides, in part: "ORS 653.010 to 653.261 does not apply to any of the following employees:

"(3) An individual engaged in administrative, executive or professional work who:

"(a) Performs predominantly intellectual, managerial or creative tasks;

"(b) Exercises discretion and independent judgment; and

"(c) Earns a salary and is paid on a salary basis."

OAR 839-20-005 provides, in part:

"As used in ORS 653.010 to 653.261 and in these rules, unless the context requires otherwise:

"(1) 'Executive Employee' means any employee:

"(a) Whose primary duty consists of the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof ***; and

"(b) Who customarily and regularly directs the work of two or more other employees therein; and

"(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

"(d) Who customarily and regularly exercises discretionary powers; and

"(e) Who earns a salary and is paid on a salary basis pursuant to ORS 653.025 exclusive of board, lodging, or other facilities."

Claimant was not an executive employee. ORS 653.010 to 653.261 apply to him.

5) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides in part:

"[A]ll work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Respondent was obligated by law to pay Claimant one and one-half times his regular hourly rate, which in this case is based upon his salary, for all hours worked in excess of 40 hours in a week. Respondent failed to so pay Claimant.

6) OAR 839-20-050 provides, in part:

"(1) Every employer shall provide to each employee an appropriate meal period and an appropriate rest period.

"(2) 'Appropriate meal period' means:

"(a) A period of not less than 30 minutes for each work period of not less than six or more than eight hours for a meal to be taken between the second and fifth hour worked (if the work period is seven hours or less) or between the third and sixth hour worked (if the work period is more than seven hours) and during which the employee is relieved of all duties; or

"(b) A period in which to eat for each work period of not less than six or more than eight hours while continuing to perform duties or remain on call which is not deducted from the employee's hours worked. This is permitted only in

those cases where the employer can show that the nature or circumstances of the work prevent the employee from being relieved from all duty."

Claimant's meal periods should not be deducted from his work hours because he was not relieved of all duties during those periods.

7) ORS 652.140 provides, in part:

"(2) When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. ***

"(3) For the purpose of this section, if employment termination occurs on a Saturday, Sunday or holiday, payment of wages is made "immediately" if made no later than the end of the first business day after the employment termination."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid no later than November 2, 1992, which was the first business day after the employment termination.

8) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the

wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

9) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

OPINION

The two primary disputed issues in this case are: 1) whether Claimant was a manager exempt from the law's overtime requirements, and 2) whether Claimant received a one-hour meal period each day that should have been deducted from his hours worked.

Overtime Exemption

The overwhelming weight of credible evidence persuades the Forum that Claimant was a cook and not an executive employee exempt from overtime. In the Forum's view, Claimant's job met none of the definitional requirements for an executive employee,

except that he received a salary. Respondent's attempts to show otherwise were unconvincing.

Respondent testified that if only the Agency had told him of all the requirements for an exempt employee, he would have written them into the form Claimant signed and complied with the law. This argument fails for two reasons. First, the Forum finds arguments like this – that the Agency is to blame for a respondent's violations because the Agency didn't make the respondent aware of the law's requirements – to be fashionable but not persuasive. In a recent child labor case in which a similar argument was made, the Commissioner said:

"The Forum finds this suggestion has no merit. Employers have a legal duty to know and comply with the law. The Agency makes educational materials and seminars available to employers. Employers cannot sit back and wait for someone to come out and train them, and then claim mitigation when no one has done so. Again, the duty is on employers to become aware of the laws that apply to them." *In the Matter of Panda Pizza*, 10 BOLI 132, 146 n.14 (1992).

Here, Trotman's credible testimony is convincing that she told Respondent why Claimant was not exempt. It's reasonable to infer that she described to Respondent the requirements for the exemption. Moreover, Respondent, like all employers, has a duty to know what the law requires and to comply with it. *Id.* He was clearly on notice as early as November 1991 that Claimant was not exempt from

overtime requirements, and he had the means to inform himself of the exemption's exact requirements. On February 3, 1992, the Agency assisted Respondent by providing him with copies of the rules now involved in this wage claim. In spite of that, Respondent's only action was to call Claimant a kitchen manager, require him to perform normal cook duties, and put him in charge of one dishwasher. None of these actions or duties, even if carried out, satisfies the requirements for an exempt executive employee. Respondent failed to make the changes necessary to satisfy the law's requirements, and the fault for this failure lies solely and squarely on his shoulders.

Second, even if Trotman didn't describe all of the exemption's requirements to Respondent, he knew of at least one requirement. During her interview with him about Claimant and overtime pay, Trotman questioned Respondent about whether Claimant had the authority to hire or fire employees. I find that Respondent knew of at least this hire/fire requirement. He never gave Claimant that authority. Thus, he didn't attempt to satisfy one of the requirements he knew of, much less the ones he claims he didn't know of.

ORS 653.055(1) provides that

"[a]ny employer who pays an employee less than the [minimum wage and overtime] is liable to the employee affected:

"(a) For the full amount of the wages, less any amount actually paid to the employee by the employer;

" * * * and

"(c) For civil penalties provided in ORS 652.150."

ORS 653.055(2) states that

"[a]ny agreement between an employee and an employer to work at less than the [minimum wage and overtime] is no defense to an action under subsection (1) of this section."

Credible evidence based on the whole record establishes that Respondent failed to pay Claimant overtime as required by OAR 839-20-030. The fact that Claimant signed the form stating he was a manager, and the fact that he didn't complain to Respondent about not getting overtime pay, is no defense.

Hours Worked

In wage claim cases such as this, the Forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying his burden of proof, the court analyzed the situation as follows:

"An employee who brings suit under 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle

for the employee. Due regard must be given to the fact that it is the employer who has the duty under 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact

performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-88.

Here, ORS 653.045 requires an employer to maintain payroll records. Respondent kept no such records of Claimant's work. Pursuant to the analysis then, the employee, or in this case the Agency, has the burden of first proving that the employee "performed work for which he was improperly compensated." The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. This Forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work — where that testimony is credible. See *In the Matter of Sheila Wood*, 5 BOLI 240, 254 (1986); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). Here, Claimant's testimony and his records were credible. The fact that he failed to note the three holidays referred to in Finding of

Fact 13 does not render the remainder of his records and his consistent testimony untrustworthy. The Forum concludes that Claimant was employed and was improperly compensated, and the Forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimant. Despite Respondent's conflicting testimony that Claimant took three weeks off during the wage claim period, he did not produce persuasive "evidence to negate the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens Pottery Co.*, 328 US at 687-88.

Meal Periods

The evidence was uncontroverted that Claimant was able to eat, smoke, and read the paper during some breaks. Claimant testified that often he ate while he worked. Respondent asserted that Claimant took an hour off each day for a meal. Irrespective of this conflicting testimony, it was uncontroverted that Claimant was not relieved of all duties during his meal periods. He either continued to perform his duties while he ate or remained on call. Based upon Finding of Fact 11, Ultimate Finding of Fact 5, and Conclusion of Law 6, it is clear that Claimant's meal periods should not be deducted from his hours worked.

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent testified repeatedly that he did not intend to violate the law. However, an intentional violation of the law is not required in order to find that an employer has acted "willfully" under ORS 652.150.*

Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent knew he was paying Claimant a salary for all hours worked and intended to pay only that salary. He knew he was not paying Claimant overtime wages and intentionally failed to pay those wages. Evidence showed that Respondent acted voluntarily and was a free agent. He must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150.

* Cf. OAR 839-19-025(5) ("Willful * * * violation" of the law). "Unlike ORS 652.150 and the language interpreted by the *Sabin* court, however, OAR 839-19-025(5) is addressed to '[w]illful . . . violations,' not a willful act which constitutes a violation. Thus, in ORS 652.150, the statute prescribes penalties for an act, the intentional failure to pay wages due. OAR 839-19-025(5), on the other hand, sets a minimum penalty by reference to a violation of law, and requires that the violation be willful." *In the Matter of Panda Pizza*, 10 BOLI 132, 142 (1992).

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Wayton and Willies, Inc.*, 7 BOLI 68, 72 (1988).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders JOHN MATHIOUDAKIS to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR ELROY MERYL MCGUIRE in the amount of FOUR THOUSAND SIX HUNDRED FORTY DOLLARS AND TWENTY-EIGHT CENTS (\$4,640.28), representing \$2,287.28 in gross earned, unpaid, due, and payable wages; and \$2,353 in penalty wages, PLUS interest at the rate of nine percent per year on the sum of \$2,287.28 from January 1, 1993, until paid, and nine percent interest per year on the sum of \$2,353 from February 1, 1993, until paid.

**In the Matter of
Calvert Harris, fdba
RJ's ALL AMERICAN
RESTAURANT,
Respondent.**

Case Number 43-93

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 30, 1993.

SYNOPSIS

Respondent sexually harassed Complainant in violation of ORS 659.030(1)(b) where, over a two day period, he twice grabbed her around the waist and then reached up and touched Complainant's breasts, and once suggested that Complainant could pay him for cigarettes by giving him sexual favors. The Commissioner found that Complainant's involuntary resignation was caused by Respondent's sexual conduct, and constituted a constructive discharge in violation of ORS 659.030(1)(a). The Commissioner awarded Complainant back pay and compensation for her mental suffering. ORS 659.030(1)(a) and (b); OAR 839-07-550.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 15, 1993, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries

(Agency) was represented by Judith Bracanovich, an employee of the Agency. Kathleen Stadelman (Complainant) was present throughout the hearing. Calvert Harris (Respondent) arrived before the hearing and left voluntarily prior to the start of the recorded hearing. Respondent did not appear during the hearing in person or through a representative.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On May 21, 1991, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent had discriminated against her on the basis of sex, in that Respondent had sexually harassed her to such an extent that she was forced to quit.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices, under ORS 659.030, by Respondent.

3) The Agency attempted to resolve the complaint by conference, conciliation, and persuasion, but was unsuccessful.

4) On March 12, 1993, the Agency prepared and duly served on Respondent Specific Charges that alleged that he discriminated against Complainant because of her sex, in violation of ORS 659.030(1)(b), and constructively

discharged her in violation of ORS 659.030(1)(a).

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings. On April 8, 1993, the Hearings Unit sent the participants a copy of the Forum's temporary contested case hearings rules, OAR chapter 839, division 50, effective April 12, 1993.

6) On April 2, 1993, the Forum received Respondent's answer, in which he stated that he sold RJ's All American Restaurant on March 11, 1991, to Sherrie Carson and consequently was not the owner after that date.

7) On June 28, 1993, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by July 7, 1993. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency submitted a timely summary. Respondent failed to submit one.

8) On July 13, 1993, the Hearings Referee designated to hear the case

was changed from Warner W. Gregg to Douglas A. McKean.

9) At the time and place set forth in the Notice of Hearing for this matter, the Respondent appeared but then voluntarily left before the hearing started. At that time, the Hearings Referee found Respondent in default, pursuant to OAR 839-50-330(1)(b), and proceeded with the hearing.

10) Pursuant to ORS 183.415(7), the Agency was verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) The Proposed Order, which included an Exceptions Notice, was issued on August 12, 1993. Exceptions were required to be filed by August 23, 1993. No exceptions were received by the Hearings Unit.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a person doing business as RJ's All American Restaurant in Portland, Oregon. On March 11, 1991, he signed a seven-year lease for the restaurant premises. Thereafter, he hired several employees, including Complainant. He told Complainant and two other employees, Bridgett Flynn and John Nelson, that he was the owner of the restaurant. He operated the restaurant until at least July 23, 1991, when Multnomah County Environmental Health conducted a food service inspection at the restaurant. He was the business licensee. Although Respondent asserted in his answer that he sold the restaurant to Sheri Carson on March 11, 1991,

Carson's father told the Agency that Carson never owned the restaurant.

2) Complainant is female.

3) At times material, Complainant was 20 years old. Her previous work experience was at a coffee house-bistro. She had recently moved to Portland and needed a job desperately.

4) Complainant was employed by Respondent as a counter server and manager on March 14, 1991. Respondent was Complainant's immediate supervisor.

5) On Thursday, March 14, Respondent called Complainant into his office. Respondent came up behind Complainant, put his hands on her waist, and then moved his hands up to her breasts. Complainant jerked away. Complainant told a co-worker, John Nelson, about this incident.

6) Complainant was shocked by Respondent's touching her and did not know what to do. She thought Respondent should not treat her that way. She felt put down. She felt that she "was nothing, to where he could feel that he could do this to [her]." She was completely humiliated. Later she became very angry about it.

7) On Friday, March 15, Respondent again came up behind Complainant, put his hands on her waist, then brought his hands up to her breasts. Complainant elbowed Respondent in the stomach and jerked away. Complainant told Nelson about this incident. Nelson found the work environment very hostile and offensive, and he was offended by Respondent's behavior. Later that day, Respondent was going to a store and asked the employees if

they needed anything. Complainant said she needed cigarettes, and as she was getting money for them, Respondent said, "No, come back by the coolers. You can pay for it another way." Complainant interpreted Respondent's comment in a sexual way, and said, "No way." Respondent said, "You're no fun," and Complainant said, "That's right."

8) Complainant warned another employee, Bridgett Flynn, about Respondent, because Flynn would be working alone at night with Respondent. Complainant was aware that Respondent had embraced Flynn, and Flynn was very upset about it. Complainant was also aware that Respondent made a show of speaking with and sitting by attractive female customers.

9) Respondent's sexual behavior created an atmosphere of tension and humiliation for Complainant. Although she needed a job, and this one had managerial opportunities, Complainant knew after the first two days that she could not work with Respondent. She knew Respondent's behavior was not going to change.

10) During the weekend of March 16 and 17, Respondent was not around the restaurant very much, and Complainant did not have to be alone with him. On Monday, March 18, Complainant felt compelled to quit. Because of Respondent's sexual behavior, Complainant did not want to be confronted by him or feel all of the emotions of being around him. She left the restaurant just before Respondent arrived at 4 p.m. Complainant left Respondent a note saying she quit because of his inappropriate behavior, in

both speaking to her and touching her in a sexual way. Complainant told all of the employees that she was quitting and why.

11) During her employment with Respondent, Complainant earned \$4.75 per hour, and was supposed to work 40 hours per week. From March 14 to 18, 1991, she worked each day, and a total of 36.5 hours. She did not work a full shift on March 14, the day she was hired. She did not work her full shift on March 18, the day she quit. She earned a total of \$173.38, of which only \$20 was paid in a draw against her wages.

12) After she quit, she had to borrow money from her parents, which hurt her pride. She had to live with friends for about three weeks because she could not afford her own place to live. She suffered loss of sleep, felt "uptight and tense," and worried. Respondent's behavior affected Complainant's personal life because her boyfriend was upset about the incidents, and Complainant felt that the boyfriend blamed her for Respondent's conduct. Complainant did nothing by her dress or manner to encourage Respondent's sexual behavior.

13) After March 18, 1991, Complainant consistently sought other employment. She used an employment agency and went through the want ads in the newspaper. Complainant had difficulty in job interviews after she left Respondent's employment because, with male interviewers, she would "freeze up" and do very poorly. During the last week in April 1991 (which the Forum finds to be April 29, 1991), Complainant found two new jobs. One was in a job where everyone was

female and the other was in a job where Complainant's manager was female. In a subsequent job, she had a "wonderful" male boss, but she had to tell him not to touch her because of her experience with Respondent. Before working with Respondent, Complainant had never felt uncomfortable with affectionate touching by males.

14) Between March 18 and April 29, 1991, there were six weeks. At 40 hours per week, Complainant would have worked for Respondent 240 hours during that period (6 weeks times 40 hours per week) had she not involuntarily resigned. At her rate of pay, \$4.75 per hour, Complainant would have earned \$1,140 (240 hours times \$4.75 per hour).

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an employer in the State of Oregon with one or more employees subject to the provisions of ORS 659.010 to 659.435.

2) Complainant was employed by Respondent.

3) Complainant is female.

4) Respondent engaged in a course of verbal and physical conduct of a sexual nature toward Complainant while she worked for Respondent.

5) Respondent's conduct was directed toward Complainant because of her sex.

6) Respondent's conduct was offensive and unwelcome to Complainant.

7) Respondent's conduct had the effect of creating an intimidating, hostile, and offensive working environment.

8) Respondent's conduct that created the intimidating, hostile, and offensive working environment was deliberate.

9) Respondent's conduct created a working environment that a reasonable person would have found intolerable.

10) Complainant was forced to involuntarily resign her employment with Respondent because of the intolerable working environment created by Respondent's deliberate sexual conduct.

11) On April 29, 1991, Complainant found employment equivalent to the job she lost with Respondent. Complainant lost \$1,140 in wages due to the termination of her employment with Respondent.

12) Complainant suffered humiliation, distress, and impaired human dignity because of Respondent's conduct and her involuntary resignation. In addition, she acquired an aversion to working for men and became uncomfortable when men touched her.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

3) ORS 652.030(1) provides:

"For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340, and 659.400 to 659.460 and 659.505 to 659.545, it is an unlawful employment practice:

"(a) For an employer, because of an individual's *** sex, *** to refuse to hire or employ or to bar or discharge from employment such individual. However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

"(b) For an employer, because of an individual's *** sex, *** to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

OAR 839-07-550 provides:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Respondent violated ORS 659.030 (1)(a) and (b).

4) Pursuant to ORS 659.060 and by the terms of 659.010, the Commissioner of the Bureau of Labor and

Industries has the authority to issue a Cease and Desist Order requiring Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

Default

Respondent was found in default, pursuant to OAR 839-50-330(1)(b), for failing to appear at the scheduled hearing. In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6); OAR 839-50-330(2).

Prima Facie Case

To present a prima facie case of a violation of ORS 659.030(1) for sexual harassment, the Agency must present evidence on the following elements:

1. The Respondent is a Respondent as defined by statute;
2. The Complainant is a member of a protected class;
3. The Complainant was harmed by an action of the Respondent;
4. The Respondent's action was taken because of the Complainant's membership in the protected class. OAR 839-05-010(1); *In the Matter of C. Vogard Amezcu*, 11 BOLI 197, 203 (1993).

The Agency has established a prima facie case. The credible testimony of Agency witnesses together with documentary evidence submitted

was accepted and relied upon herein. Regarding the first three elements, the evidence showed that:

1. Respondent was a person who in this state engaged or utilized the personal service of one or more employees. See ORS 659.010(6) and (12), and OAR 839-07-505(3).
2. Complainant is female.
3. The constructive discharge and sexual harassment Complainant endured during her employment (described below) harmed her both financially and caused her mental suffering.

Regarding the fourth element, that is, the causal connection between Respondent's action and Complainant's membership in the protected class, credible evidence showed that Respondent deliberately engaged in both verbal and physical conduct toward Complainant because of her sex. He twice grabbed her waist and then slid his hands up until he was touching Complainant's breasts. He also suggested that she could pay him for cigarettes by giving him sexual favors. The atmosphere at the restaurant was further sexually charged by Respondent's physical conduct with another employee (Flynn) and his attention to attractive female customers. Respondent's conduct was unwelcome to Complainant, and a reasonable person would have found this working environment intimidating, hostile, and offensive.

Although Respondent submitted no evidence for the record during the hearing, Respondent's answer says that he was not the owner of the restaurant at times material. However,

the great weight of the credible evidence on the record controverts Respondent's position. The evidence showed that he signed a lease for the restaurant three days before he hired Complainant. He told Complainant, Flynn, and Nelson he was the owner. He was operating the restaurant until at least July 23, 1991, when a food inspection was made at the restaurant by an agent of Multnomah County; Respondent was listed as the business licensee. He hired Complainant and other employees. This evidence persuasively controverts Respondent's unsworn and unsubstantiated assertion in his answer, and the Forum finds that he was Complainant's employer.

Alleged Violation of ORS 659.030(1)(a)

This Commissioner set forth the standard for constructive discharge in *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192, 215 (1981), *aff'd without opinion, West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983), wherein the Commissioner stated:

"The general rule, which this forum adopts, is that 'if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge * * *.' *Young v. Southwestern Savings and Loan Association*, 509 F2d 140, 144 (5th Cir 1975)."

In *In the Matter of Tim's Top Shop*, 6 BOLI 166, 187 (1987), the Commissioner stated:

"that 'deliberately' does not mean that the employer's imposition of 'intolerable' working conditions need be done with the intention of either forcing the employee to resign or relieving himself of that employee. The term 'deliberately' refers to the imposition of the working conditions; that is, it means the working conditions were imposed by the deliberate or intentional actions of the employer." (Emphasis in original.)

In *West Coast Truck Lines, supra* at 215, the Commissioner ruled that:

"To find a constructive discharge, this forum must be satisfied that 'working conditions * * * so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign' caused the employee to resign and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. *Alicea Rosado v. Garcia Santiago*, 562 F2d 114, 119 (1st Cir 1977); *Calcote v. Texas Educational Foundation*, 578 F2d 95, 97-98; and EEOC Decision 272-2062 (June 22, 1972)."

* * *

"The final rule concerning constructive discharge is that if there has been a constructive discharge, an employer is liable for any unlawful conduct involved therein as if the employer had formally discharged the employee. *Young, supra*, 509 F2d at 144."

There was no evidence on the record that Respondent's verbal and physical conduct was anything other

than deliberate. That conduct created hostile and offensive working conditions for Complainant. The Forum is satisfied that the working conditions were so difficult or unpleasant that a reasonable person in Complainant's shoes would have felt compelled to resign. The evidence was undisputed that Respondent's conduct was the cause of Complainant's resignation.

Respondent's deliberate imposition of intolerable working conditions on Complainant and her resulting resignation, as described in the Findings of Fact, constitute a constructive discharge. Therefore, Respondent violated ORS 659.030(1)(a).

Damages

The purpose of back pay awards in employment discrimination matters is to compensate a complainant for the loss of wages and benefits which the complainant would have received but for the respondent's unlawful discrimination. Such awards are calculated to make the complainant whole for injuries suffered because of the discrimination. In *In the Matter of K-Mart Corporation*, 3 BOLI 194, 202 (1982).

Credible evidence showed that Complainant made an adequate search for work after she quit her employment with Respondent. She found equivalent employment on April 29, 1991, and accordingly lost back wages of \$1,140 due to Respondent's unlawful constructive discharge.

Pursuant to OAR 839-50-260(5), Respondent had the burden of showing that Complainant failed to mitigate her damages. See also *In the Matter of Lucille's Hair Care*, 3 BOLI 286, 301 (1983), *aff'd, remanded for interest*

computation, *Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189 (1985), on remand, 5 BOLI 13, 28 (1985). Respondent presented no evidence on this issue.

Awards for mental suffering depend on the facts presented by each complainant. Here, Complainant experienced mental suffering due to Respondent's sexual harassment and constructive discharge, as described in Findings of Fact 6, 9, 12, and 13. She suffered both mentally and physically from that conduct. The trauma of a sudden and unexpected termination, coupled with the anxiety and uncertainty connected with the loss of employment income, are compensable. *In the Matter of Pzazz Hair Designs*, 9 BOLI 240, 257 (1991).

The harassment she suffered at Respondent's restaurant caused her to have difficulties working around men, for which Respondent is directly liable. Given Complainant's age, her small amount of work experience, the type of discrimination (sexual harassment and constructive discharge), the short duration of the harassment, the severity of the harassment, and the effects and duration of her mental distress, the Forum awards Complainant \$10,000 to compensate her for her mental suffering. *Id.*

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondent, CALVERT HARRIS, is hereby ORDERED to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street #32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for KATHLEEN STADELMAN, in the amount of:

a) ONE THOUSAND ONE HUNDRED FORTY DOLLARS (\$1,140), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) TWO HUNDRED FIFTY-SIX DOLLARS AND TWENTY-NINE CENTS (\$256.29), representing interest on the lost wages at the annual rate of nine percent accrued between May 1, 1991, and August 31, 1993, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between September 1, 1993, and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

d) TEN THOUSAND DOLLARS (\$10,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any current or future employee because of the employee's sex.

**In the Matter of
Norman Baldwin and
CRYSTAL HEART BOOKS CO.,
Respondents.**

Case Number 45-93

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 30, 1993.

SYNOPSIS

Claimant worked for Respondent Crystal Heart Books Co. as an employee, and not as a copartner. ORS 68.110(1), 652.310(2). Respondent failed to pay Claimant all wages due upon termination, in violation of ORS 653.025(3) (minimum wages), OAR 839-20-030 (overtime wages), and ORS 652.140(2). Respondent's failure to pay the wages was wilful, and the Commissioner ordered Respondent Crystal Heart Books Co. to pay civil penalty wages, pursuant to ORS 652.150. ORS 68.110(1); 652.140(2); 652.150; 652.310(1), (2); 653.010(3), (4); 653.025(3); 653.045; 653.055(1), (2); 653.261(1); and OAR 839-20-030 (1).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 8, 1993, in Room 1004 of the Portland State Office Building, 800 NE

Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Catherine Sue Conkey (Claimant) was present throughout the hearing. Norman Baldwin (Respondent) and Crystal Heart Books Co. (Respondent CHBC) were represented by David Berentson, Attorney at Law. Mr. Baldwin, on his own behalf and as Respondent CHBC's representative, was present throughout the hearing.

The Agency called the following witnesses (in alphabetical order): Norman Baldwin, Respondent; Claimant; Gary Conkey, Claimant's domestic partner at times material (husband at the time of hearing); Beth Jungkurth, Claimant's house mate at times material; Judi Hager, Claimant's friend; Steve Malone, an Agency intern; and William Pick, an Agency Compliance Specialist.

Respondent called the following witnesses (in alphabetical order): Norman Baldwin, Respondent; Claimant; Marsha James, co-owner of Respondent CHBC; and Mike Rinell, tax accountant.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

* At times material, Claimant's name was Catherine Sue Butler. Most references and exhibits in the record refer to her by this name.

FINDINGS OF FACT – PROCEDURAL

1) On around October 23, 1991, Claimant filed a wage claim with the Agency. She alleged that she had been employed by Respondents and that Respondents had failed to pay wages earned and due to her.

2) At the same time that she filed the wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondents.

3) On April 23, 1992, the Commissioner of the Bureau of Labor and Industries served on Respondents an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Respondents owed Claimant a total of \$2,272 in wages and \$2,350.34 in civil penalty wages. The Order of Determination required that, within 20 days, Respondents either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

4) On around May 7, 1992, Respondents, through their attorney, filed an answer to the Order of Determination and requested a contested case hearing. Respondents denied that they owed Claimant unpaid wages, and set forth the affirmative defenses that (1) all wages due and owing to Claimant had been paid to her in full, (2) Claimant was never an employee of Respondent because he never personally paid or agreed to pay her a fixed rate for personal services, and (3) Claimant was not an employee of Respondent CHBC prior to September 14, 1991, because Respondent CHBC

did not pay or agree to pay Claimant at a fixed rate for personal services performed by her prior to that date, and Claimant agreed that she would not be paid for personal services performed prior to the date the business opened – September 14, 1991.

5) On March 8, 1993, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondents, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200. On April 8, 1993, the Hearings Unit sent the participants a copy of the Forum's temporary contested case hearings rules, OAR chapter 839, division 50, effective April 12, 1993.

6) On May 5, 1993, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The Agency and Respondents submitted timely case summaries.

7) At the start of the hearing, Respondents' attorney said he had reviewed the Notice of Contested Case Rights and Procedures and had no questions about it.

8) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

9) Respondents and the Agency stipulated to certain facts, which were admitted into the record by the Hearings Referee at the beginning of the hearing.

10) During the hearing, the Agency moved to amend the Order of Determination to specifically mention overtime wages earned pursuant to ORS 653.261 and OAR 839-20-030 (regarding overtime). Respondents did not object, and the Hearings Referee granted the motion, pursuant to OAR 839-50-140(2).

11) The Hearings Referee left the hearing record open until June 18, 1993, to allow the Respondents to submit evidence that Respondent CHBC's corporate status had been reinstated. The document submitted by Respondents was received and marked.

12) On June 22, 1993, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the Certificate of Mailing, including the Respondents. Participants had 10 days to file exceptions to the Proposed Order. On July 2, 1993, the Hearings Unit received Respondent's timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) On July 20, 1991, Respondent told Claimant that he had money to invest and was interested in starting a

business, possibly a furniture store. Respondent and Claimant had previously worked together in two furniture stores. Claimant suggested in jest that Respondent should start a new age bookstore. Claimant had a personal interest in new age subjects and experience working in a new age bookstore. After considering that idea for a couple of days, Respondent contacted Claimant for more serious discussions about starting a bookstore. Respondent had no experience in owning or operating a bookstore. Around July 23, they talked with Marsha James to find out if she wanted to invest in a bookstore business. During July, Respondent set up a checking account for the business. Initially, Respondent provided all of the financial backing for the store. Around August 1, Claimant told Respondent that if she was going to go into this business and operate it, she should ask for 50 percent of the business. Respondent and Claimant talked about being partners, but Claimant told Respondent she could not afford to invest any money. She was unemployed and was living on a savings account. Respondent told her that he had no intention of giving up control of the business, that 50 percent was unrealistic, and that Claimant needed to propose something else. Claimant never proposed another ownership arrangement.

2) Around August 1, 1991, Respondent, Claimant, and James met for a couple of hours with Mike Rinell, a tax accountant, about the different forms a business can take – sole proprietorship, partnership, corporation, and Subchapter S corporation. During this meeting, Rinell understood that

Respondent, Claimant, and James were going into business together, that a Subchapter S corporation was appropriate, and that Respondent would be the majority shareholder and Claimant and James minority shareholders. Rinell advised them to get an attorney to put their business agreement in writing, but they never did that.

3) The only agreement between Respondents and Claimant was that, for her work prior to the store opening, Claimant could buy (with her wages earned after the store opened) stock in the corporation for up to one year from August 1, 1991; once the bookstore opened, Respondent CHBC would pay Claimant \$8.00 per hour for her work. Respondent would always be the majority stock holder, and Claimant and James could each buy up to 24 percent of the stock; this idea never changed before the store opened on September 14, 1991. Respondent's other idea - to give Claimant 10 percent of the stock in the business at the end of one year, if she stayed - was never offered to her.

4) Although Respondent promised Claimant that he would put their agreement in writing, he told her that he needed to talk to his attorney and accountant first. During all times material, Respondents and Claimant had no written agreements.

5) On or about August 13, 1991, Claimant began working with Respondent to start a new age bookstore. Over the next month, Claimant selected and ordered all books and music and video tapes to be sold in the store. After Respondent leased a store space, Claimant did construction work on the store, preparing it for

opening. At times, she enlisted the help of friends to make book selections. Claimant kept a budget to work within. She was involved in the decision-making regarding the store's name and location.

6) On August 16, 1991, Respondent CHBC was incorporated in Oregon by Respondent and Marsha James. Respondent was the corporation's registered agent and president. Marsha James was its vice president. Respondent invested \$20,000 in the business, and James invested \$8,000. When stock in the corporation was issued in November 1991, Respondent was the majority stockholder, with 100 shares, and James was the only other stockholder, with 40 shares. The corporation was involuntarily dissolved on October 9, 1992, and reinstated on June 10, 1993. Respondent CHBC engaged in retail sales of books, merchandise, and services.

7) Around August 17 and 18, Claimant made a trip with Respondent and James to a Seattle trade show to select merchandise for the store. During their trip, Respondent advised Claimant and James to stay focused on buying merchandise for the store, and not spend time buying things for themselves, which Respondent referred to as "employee purchases." Claimant responded that she was not an employee.

8) Claimant believed Respondents would compensate her for her work performed before the store opened.

9) When Respondent later told Claimant that no one would be paid for his or her work performed before the store opened, Claimant "had some major concerns with that."

10) "Approximately two weeks or so into it" (which the Forum finds to mean around the last week of August 1991), Claimant told Respondent and James that she did not know if she could continue to work without being paid. She said she needed to look for other work. Respondent told Claimant that

"if that was something that she felt that she needed to do, that we understood and that she was free to go do whatever she wanted to do, that she wasn't tied to the business, and that we understood that she had that right to go out and look for work."

Claimant continued working for Respondent CHBC.

11) When the store opened on September 14, 1991, Respondent CHBC treated Claimant as an employee. During all times material, Claimant derived no benefits other than wages from her work for Respondents. She was not an incorporator of Respondent CHBC. She was never an officer of Respondent CHBC. Claimant never bought any stock in Respondent CHBC, had no ownership interest in it, and received no share of the profits from the business. Respondent reimbursed Claimant for her expenses incurred while working for Respondent CHBC. The lease, insurance, and utilities were all signed for by Respondent. Because Claimant had a poor credit history, she said she should not sign on the lease.

12) Claimant's records and testimony, which are accepted as fact, reveal that during the period between August 16 and September 13, 1991, she worked 244 total hours in 26 days.

Of those hours, 66 were hours worked in excess of 40 hours per week. Claimant and Respondent had no agreement about a rate of pay for Claimant's work during this period and no agreement about overtime hours or pay.

13) For the period August 16 to September 13, 1991, Respondents kept no time records for Claimant.

14) At times material, the minimum wage in Oregon was \$4.75 per hour, pursuant to ORS 653.025(3).

15) During the period September 14 to 28, 1991, Claimant worked at the store 81 hours at \$8.00 per hour. Respondent CHBC paid Claimant \$648 as wages for that work.

16) Respondent and James believed the wage rate of \$8.00 per hour was inflated, but wanted Claimant to earn enough so that she could begin to buy into and have a share of the business. Respondent believed he needed Claimant to be a partner in the business, and he and James thought of her as a business partner.

17) Pursuant to ORS 653.025, 653.261, and OAR 839-20-030 (Payment of Overtime Wages), Claimant's total earnings for the period August 16 to September 13, 1991, were \$1,316.08. The total reflects the sum of the following:

178 hours @ \$4.75 per hour	
(the minimum wage) =	\$ 845.50
66 hours at the overtime rate of \$7.13 (one and one-half times the minimum wage of \$4.75) =	470.58
TOTAL EARNED	\$1,316.08

18) Claimant quit on September 28, 1991. On around October 1, 1991, Claimant gave Respondent a note

requesting payment of her wages. To date, Respondents have not paid Claimant any wages for her work during the period of her claim – August 13 to September 13, 1991.

19) Civil penalty wages, computed in accordance with Agency policy, are as follows: \$1,316.08 (the total wages earned) divided by 26 (the number of days worked during the period August 16 to September 13) equals \$50.62 (the average daily rate of pay). This figure of \$50.62 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$1,518.60, rounded to \$1,519 pursuant to Agency policy.

20) The Hearings Referee carefully observed the demeanor of each witness. The Claimant's testimony was credible. She had the facts readily at her command, and her statements were supported by documentary records. There is no reason to determine the testimony of the Claimant to be anything except reliable and credible.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent CHBC was an Oregon corporation engaged in the retail sale of books, merchandise, and services, and employed one or more persons in the State of Oregon.

2) During the period of August 16 to September 13, 1991, Claimant was not a co-owner of Respondent CHBC. She had no ownership interest in the business, and no right to share in the profits, or liability to share losses, or right to exert some control over the business of Respondent CHBC.

3) Respondent CHBC suffered or permitted Claimant to render personal services to it wholly in this state from August 16 to September 13, 1991.

4) The state minimum wage during 1991 was \$4.75 per hour.

5) During the period August 16 to September 13, 1991, Claimant earned \$1,316.08. Respondent CHBC owes Claimant \$1,316.08 in earned and unpaid compensation.

6) Claimant quit employment with Respondent CHBC on September 28, 1991.

7) Respondent CHBC willfully failed to pay Claimant all wages within five days, excluding Saturdays, Sundays, and holidays after she quit, and more than 30 days have elapsed from the date her wages were due.

8) During the period August 16 to September 13, 1991, Claimant worked 26 days. Claimant's average daily rate for this period of employment was \$50.62 (\$1,316.08 earned divided by 26 days equals \$50.62 average rate per day). Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$1,519 (Claimant's average daily rate, \$50.62, continuing for 30 days).

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent CHBC herein. ORS 652.310 to 652.405.

2) Prior to the commencement of the contested case hearing, the Forum informed the Respondents of their rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the

information described therein to the participants at the start of the hearing.

3) The actions or inactions of Respondent, an agent or employee of Respondent CHBC, are properly imputed to Respondent CHBC.

4) ORS 68.110(1) provides: "A partnership is an association of two or more persons to carry on as coowners a business for profit." Claimant was not a co-owner or co-partner with Respondent and James in the business of Respondent CHBC.

5) ORS 653.010 provides, in part:

"(3) 'Employ' includes to suffer or permit to work; ***.

"(4) 'Employer' means any person who employs another person * * *"

ORS 652.310 provides, in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees * * *.

"(2) 'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

ORS 653.025 requires that:

**** for each hour of work time that the employee is gainfully employed, no employer shall employ

or agree to employ any employee at wages computed at a rate lower than:

"(3) For calendar years after December 31, 1990, \$4.75."

During all times material herein, Respondent CHBC was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. Respondent was not an employer. Respondent CHBC was required to pay Claimant at a fixed rate of at least \$4.75 per hour.

6) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides, in part:

"[A]ll work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides,

spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Respondent CHBC was obligated by law to pay Claimant one and one-half times her regular hourly rate, in this case the minimum wage of \$4.75, for all hours worked in excess of 40 hours in a week. Respondent CHBC failed to so pay Claimant.

7) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent CHBC violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit employment.

8) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such

employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent CHBC is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

9) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent CHBC to pay Claimant her earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

OPINION

Claimant Worked as an Employee

The chief issue in this case is whether Claimant worked for the bookstore as an employee or as a co-partner. Respondents claim that Claimant performed work not as an employee, as that term is defined in ORS 652.210(2) and 652.310(2), but as a co-partner. Respondents never claimed that Claimant was a volunteer. And although in argument Respondents asserted that Claimant was an independent contractor, no evidence supports that position. During the period August 16 to September 13, 1991,

Respondent had the right to control and direct the details and methods of Claimant's work. Claimant worked exclusively for Respondent CHBC and derived no benefit other than expected wages from her work and an option to buy stock. Respondent supplied the store space and all of the materials Claimant used in her job. Claimant was a subordinate party, dependent on Respondent CHBC. Based on these factors, the Forum finds that Claimant was not an independent contractor. See *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264, 274-78 (1982), and the cases cited therein.

The two statutes cited, ORS 652.210(2) and 652.310(2), are not directly applicable to this case. ORS 652.210(2) applies to ORS 652.210 to 652.230, which deal with wage discrimination cases. ORS 652.310(2) applies to ORS 652.310 to 652.405, which deal with enforcement of wage claims by the Commissioner. The Forum knows of no applicable statutory definition of "employee" for the purposes of ORS 652.140 and 652.150, and ORS chapter 653.

In a case involving a claim for unpaid wages and civil penalty wages under ORS 652.140 and 652.150, the Oregon Supreme Court said, "while it is not controlling as a matter of statutory construction, we nonetheless find the distinction between employees and co-partners in ORS 652.210(2) and 652.310(2) valid for the purposes of this case, and we adopt it." *Lamy v. Jack Jarvis & Co., Inc.*, 281 Or 307, 574 P2d 1107, 1111 (1978). The Forum will follow that reasoning and adopts the definition of "employee" in

ORS 652.310(2) for the purposes of interpreting ORS 652.140 and 652.150 in this case. (See Conclusion of Law 5.)

The facts show that, initially, Claimant, Respondent, and James talked about being partners in a bookstore business. They discussed what their ownership interests could be, what their relationship should be, and what legal form the business should take. During these discussions, it was evident that Claimant could not afford to invest in the business. Respondent and Claimant came up with an agreement about how Claimant could buy into the business in the future. And although all three of them wanted to be partners, Claimant never obtained any ownership interest in the business. She never acquired any right to profits from the business, and no evidence suggests she was liable for any losses from it. The only benefit she derived from her work was wages earned after the store opened. Early on, Claimant expressed her need to be paid for her work. By the end of August, she said she would have to find another job because she was not being paid. Respondent told her to do what she had to do and "that she wasn't tied to the business." Although Respondent and James consulted with her before making decisions, and Claimant had responsibility for ordering books and tapes, no evidence establishes that Claimant had any right to exert some control over the business. Contrary to Respondents' argument in their exceptions, Claimant never employed Judi Hager or Martha Powers.

Beginning on August 16, 1991, Respondent and James incorporated the

business. Both of them acquired ownership interest in it, and Respondent, as he had from the beginning, retained the majority interest and control of it. The agreement with Claimant was that she could work, earn wages, and have the option to buy stock in the corporation.

ORS 68.110(1) defines a partnership as "an association of two or more persons to carry on as coowners a business for profit." The Oregon Supreme Court has held that "[t]he essential test in determining the existence of a partnership is whether the parties intended to establish such a relation"; that "in the absence of an express agreement * * * the status may be inferred from the conduct of the parties," and "when faced with intricate transactions that arise, this court looks mainly to the right of a party to share in the profits, his liability to share losses, and the right to exert some control over the business." *Stone-Fox, Inc. v. Vandehey Development Co.*, 290 Or 779, 626 P2d 1365, 1367 (1981) (quoting from *Hayes v. Killinger*, 235 Or 465, 470, 385 P2d 747 (1963)). A partnership is never presumed, hence

the burden of proving partnership is upon the party alleging it." *Jewell v. Harper*, 199 Or 223, 258 P2d 115, rehearing denied, 199 Or 223, 260 P2d 784 (1953); *Burke Machinery Co. v. Copenhagen*, 138 Or 314, 6 P2d 886 (1932); *In the Matter of Superior Forest Products*, 4 BOLI 223, 230-31 (1984).

Here, while at one time the parties may have intended to create a partnership, as of August 16, when the corporation was formed by Respondent and James, Claimant was not a co-partner. She never had any ownership in a partnership or the corporation and, at best, had an option to acquire stock in the future. The essential elements of a partnership did not exist with respect to Claimant. Respondents have failed to prove by a preponderance of the evidence that Claimant was a co-partner for the period August 16 to September 13, 1993.

Respondents claim in their exceptions that Claimant went into the relationship with Respondent and James with the expectation of being a partner and that she acted accordingly. Respondent and James thought of her as a partner. The Forum agrees that,

* Respondents argue that in this hearing, the question concerns Claimant's status, not whether or not a partnership existed. Respondent correctly notes that the Agency had the burden of proving that Claimant was an employee of Respondent CHBC. Respondents assert that the Agency failed to prove by a preponderance of the evidence that Claimant was an employee during the period August 16 to September 13, 1991. The Agency presented sufficient evidence to show that Claimant worked for Respondent CHBC as an employee. The Forum finds no difference between trying to prove a partnership existed among Claimant, Respondent, and James and trying to prove that Claimant was a co-partner of Respondent and James. The law does not presume such a relationship existed and says that Respondents have the burden of proving it. Respondents presented evidence in defense to prove that Claimant worked as a co-partner. The preponderance of evidence supports the conclusion that Claimant was an employee. (See Ultimate Findings of Fact 2 and 3, and Conclusion of Law 5.)

early on, this was the parties' intention. However, the Forum finds that, once Respondent and James incorporated Respondent CHBC, their intentions had changed. By their conduct, Respondent and James demonstrated that, while Claimant might acquire an ownership interest in the corporation in the future, she did not have partnership status when they incorporated the business. Naturally Respondent wanted to work with Claimant, since she had the experience and knowledge necessary to begin the business. But Respondent's desire that Claimant buy into the business in the future is simply not enough to convert her from an employee to a partner.

Respondents argue that, of Claimant's "inflated" wage of \$8.00 per hour, \$3.00 per hour was "the 'return' on her 'investment' of time – that is the sharing of the profits – that is the proof positive that Respondent Baldwin still considered Claimant a co-partner, even after she left the store for good, but certainly while she was still there." This argument is unsupported by the facts. Respondent's and Claimant's only agreement was that, for her work prior to the store opening, Claimant could buy (with her wages earned after the store opened) stock in the corporation for up to one year. (See Finding of Fact 3.) No evidence establishes that any amount of Claimant's "inflated" wage was intended to compensate her for her work before the store opened or was considered payment of profit to her as a partner. Respondent's payment of wages to Claimant raises no inference that she shared profits from the business. ORS 68.120(4)(b). In any event, Complainant was employed

by and paid by the corporation, and so no part of her wage can be construed as payment of partnership profits.

Claimant's status did not change on September 13, when Respondent started paying her \$8.00 per hour as an employee. Her status changed when she was not included as a co-owner of the business on August 16. Her status during the period August 16 to September 13 was no different than her status after September 13. The plain fact is that from August 16, when the corporation was formed, to September 28, 1991, when she quit, Claimant was neither one of Respondent CHBC's co-owners, nor a co-owner of some partnership with Respondent and James. She worked for the corporation with an option to buy stock in the future from her wages. This does not make her a partner under ORS 68.110(1).

"Employee" means any individual who otherwise than as a co-partner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate * * *." ORS 652.310(2).

Based on that definition of "employee," the Forum finds that Claimant worked as an employee between August 16 and September 13, 1991, not as a co-partner or independent contractor. For the days prior to August 16 (and particularly the first three days of Claimant's wage claim – August 13 to 15), the Forum finds that Claimant, Respondent, and James were intending to form a partnership, and their conduct during these early days does not

suggest otherwise; they were exploring the viability of what they hoped would be a common enterprise. Thus the Forum does not find that Claimant was an employee during this period.^{*} Respondent's and James's conduct of creating Respondent CHBC without Claimant persuades the Forum that, from August 16 forward, the intent to be partners with Claimant was only a future possibility, and only if Claimant opted to buy stock in Respondent CHBC from her wages. Thus, Claimant was not a co-partner from August 16 to September 13, 1991.

Claimant had an expectation of being compensated for her work in starting the bookstore. In their exceptions, Respondents argue that Respondent did not pay or agree to pay Claimant at a fixed rate for personal services rendered, and thus she was not an employee. Respondent and Claimant never had a wage agreement during the wage claim period. And it is true that Respondents never paid Claimant for her work during that period. However, the analysis does not end there.

When employers characterize their workers as volunteers, independent contractors, or partners, they do not automatically or necessarily comply with statutes covering minimum wage, workers' compensation insurance, unemployment compensation insurance, and taxation, to name a few. Upon investigation, these workers often do not meet legal definitions of volunteer or

independent contractor or partner, and the employer is then required to pay back minimum wages and overtime, workers' compensation insurance premiums, unemployment compensation taxes, and other employment taxes, along with penalties and interest. The point is that, just because Respondent CHBC did not pay Claimant the minimum wage required does not take Claimant out of the definition of "employee." If it were otherwise, every employer who mischaracterized a worker as a volunteer, independent contractor, or partner, who did not have an agreement for payment of a fixed rate, and who failed to pay the worker a fixed rate, could claim the worker was not an employee and avoid paying minimum wage. Such a result would defeat the purposes of the wage statutes.

The Forum finds that, for purposes of the definition of "employee" in ORS 652.310(2), an "employer who pays or agrees to pay an individual at a fixed rate" includes an employer who is required by law to pay a minimum wage to workers, regardless of whether this legal obligation has been met. Thus, the absence of an agreement to pay or the absence of actual payment to a worker will not take the worker out of the definition of "employee," where a minimum wage law requires that worker to be paid a minimum wage. Here the law requires employers to pay employees at a fixed minimum wage rate, and that rate was \$4.75 per

^{*} This is not to say that Claimant, Respondent, and James were partners before August 16. Though their intention to become partners may have been expressed or implied, the evidence is clear that there never was a meeting of the minds. *Jewell v. Harper*, 199 Or 223, 258 P2d 115, *rehearing denied*, 260 Or 223 (1953). While it is unnecessary to the decision in this case, the Forum is of the opinion that Claimant was never a partner with Respondent or James.

hour. ORS 653.025(3). Claimant was Respondent CHBC's employee despite the fact that Respondent CHBC did not pay her at that fixed rate. In addition, the law requires that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay. ORS 653.261; OAR 839-20-030. Respondent CHBC was required to comply with this law and rule.

Wages Due

In wage claim cases such as this, the Forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying his burden of proof, the court analyzed the situation as follows:

"An employee who brings suit under 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to

know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to

come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-88.

Here, ORS 653.045 requires an employer to maintain payroll records. Respondents kept no such records of Claimant's work before September 14. Pursuant to the analysis then, the employee, or in this case the Agency, has the burden of first proving that the employee "performed work for which he was improperly compensated." The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. This Forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work — where that testimony is credible. See *In the Matter of Sheila Wood*, 5 BOLI 240, 254 (1986); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). Here, Claimant's testimony and other evidence was credible. The Forum concludes that Claimant was employed and was improperly compensated, and the Forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimant. The Respondents did not produce persuasive "evidence to negate the reasonableness of the

inference to be drawn from the employee's evidence." *Mt. Clemens Pottery Co.*, 328 US at 687-88.

ORS 653.025 prohibits employers from paying their workers at a rate less than \$4.75 for each hour of work time. ORS 653.055(1) provides that

"[a]ny employer who pays an employee less than the [minimum wage and overtime] is liable to the employee affected:

"(a) For the full amount of the wages, less any amount actually paid to the employee by the employer;

**** and

"(c) For civil penalties provided in ORS 652.150."

ORS 653.055(2) states that

"[a]ny agreement between an employee and an employer to work at less than the [minimum wage and overtime] is no defense to an action under subsection (1) of this section."

Credible evidence based on the whole record establishes that Claimant worked 244 hours, of which 66 were overtime hours. At minimum wage with overtime, Claimant earned \$1,316.08, no part of which has been paid.

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette*

Western Corp., 279 Or 1083, 557 P2d 1344 (1976). Respondent CHBC, as an employer, had a duty to know the amount of wages due to its employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent CHBC knew it was not paying Claimant wages for her work before the bookstore opened and intentionally failed to pay any wages. Evidence showed that Respondent CHBC acted voluntarily and was a free agent. Respondent CHBC must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150.

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Waylon & Willes, Inc.*, 7 BOLI 68, 72 (1988).

Respondents' Exceptions

The Forum has addressed many of Respondents' exceptions in this opinion. Based on the facts found, the conclusions of law reached, and the reasoning explained in the Opinion above, the Forum hereby rejects Respondents' remaining exceptions that are inconsistent herewith.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders CRYSTAL HEART BOOK COMPANY to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR CATHERINE SUE CONKEY in the amount of TWO THOUSAND EIGHT HUNDRED THIRTY-FIVE DOLLARS AND EIGHT CENTS (\$2,835.08), representing \$1,316.08 in gross earned, unpaid, due, and payable wages; and \$1,519 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$1,316.08 from November 1, 1991, until paid, and nine percent interest per year on the sum of \$1,519 from December 1, 1991, until paid.

In the Matter of FRED MEYER, INC., Respondent.

Case Number 56-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued October 5, 1993.

SYNOPSIS

The Forum withdrew a Notice of Default where Respondent filed an answer late, but before the Agency filed a motion for default and before the Hearings Referee issued the Notice of Default. Respondent challenged the Commissioner's jurisdiction because the Specific Charges were not filed within one year of the administrative complaint or within 90 days of the Administrative Determination. The

Commissioner ruled that time limitations expressed in ORS 659.095 and 659.121 pertain to filings in circuit court under those statutes and do not effect the Commissioner's jurisdiction so long as the Agency issues an Administrative Determination timely. Complainant, a compensably injured worker, was properly placed on light duty and, when medically released to her regular, available, existing position, was entitled to reinstatement. Finding that Complainant failed to report to work, the Commissioner ruled that Respondent did not fail to reinstate Complainant under ORS 659.415 and did not violate ORS 659.410. The Commissioner dismissed the complaint and specific charges. ORS 659.095; 659.121; 659.410(1); 659.415(1), (3), (4); OAR 839-06-105(1); and 839-50-230.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary W. Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon, on August 12, 1993, in Room 1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Doris Loehr (Complainant) was present throughout the hearing. Fred Meyer, Inc. (Respondent), a corporation, was represented by R. Kenney Roberts, Attorney at Law, Portland. Jana Chilson, of Respondent's store director training program, was present throughout the hearing.

The Agency called as witnesses Complainant and her daughter, Renee Loehr. Respondent called as witnesses Juanita Bursell, former service deli manager, and Jana Chilson, former food manager of its Johnson Creek store.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Rulings, Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULING ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

At the commencement of the hearing, Respondent moved to dismiss the proceeding for lack of jurisdiction. Noting that the Agency Case Presenter was precluded from arguing about jurisdiction by OAR 839-50-230, the Hearings Referee heard the presentation of Respondent's counsel and ruled on the motion without Agency argument.

Respondent's argument was that the Specific Charges herein were untimely filed, based upon counsel's reading of ORS 659.095. Respondent stated that the Forum lacked jurisdiction because the Specific Charges (filed May 14, 1993) were not filed within one year of Complainant's administrative complaint (filed October 29, 1991) or within 90 days of the Administrative Determination (issued October 29, 1992), and that the Agency has thus lost jurisdiction. Respondent cited *Macy v. Zusman Metals Company, Inc.*, 314 Or 320, 838 P2d 591 (1992), in support of its position.

Respondent submitted copies of documents from the Agency's investigative file in support of its view.

The Hearings Referee denied Respondent's motion, holding that the limitations expressed in ORS 659.095 and in ORS 659.121 pertain to filings under those statutes in circuit court and do not effect the Commissioner's jurisdiction so long as, in accordance with ORS 659.095(1), an administrative determination has been issued within one year of the filing of the administrative complaint. That ruling is confirmed. *Zusman* is not to the contrary, and rulings of the Forum prior to *Zusman* are in accord. See *In the Matter of Willamette Electric Products Company*, 5 BOLI 32, 33-35 (1985); *In the Matter of Scottie's Auto Body Repair, Inc.*, 4 BOLI 283, 285 (1985).

RULING ON AGENCY MOTION TO AMEND SPECIFIC CHARGES

At the close of the Agency's case in chief, the Agency moved to amend its Specific Charges to include an allegation of violation of ORS 659.420. ORS 659.420 imposes a duty on the employer to provide, upon demand, available and suitable work to an injured worker while the worker is disabled from performing the duties of the worker's former regular employment. The Agency argued that there was evidence that Respondent had, following Complainant's release to light duty, assigned her to duties beyond the scope of the light duty release. Respondent objected to the amendment as untimely and unsupported by evidence. The Hearings Referee found that, although there was opportunity for the attending physician to evaluate Complainant's assignment, there was no

medical evidence that the duties assigned were unsuitable. The Hearings Referee further found that, under the evidence in this case, the mere release to "light duty," without more, was insufficient to enable the trier of fact to determine the suitability of the work assignment. The Agency's motion was denied. That ruling is confirmed.

FINDINGS OF FACT – PROCEDURAL

1) On October 29, 1991, Complainant Doris Loehr filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondent.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondent in violation of ORS 659.410 and 659.415.

3) The Agency initiated conciliation efforts between Complainant and Respondent and conciliation failed. On May 14, 1993, the Agency prepared and served on Respondent Specific Charges, alleging that Respondent failed to reinstate Complainant following a compensable injury to her former position after she was medically released and made timely demand for reinstatement, thus violating ORS 659.415. The Specific Charges also alleged that Respondent discharged Complainant based on her invoking and utilizing the provisions of Oregon's workers' compensation statutes in connection with her injury, thus violating ORS 659.410.

4) With the Specific Charges, the following were served on Respondent:
a) Notice of Hearing setting forth the

time and place of the hearing in this case; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's temporary administrative rules effective April 12, 1993, regarding the contested case process (OAR 839-50-000 to 839-50-420); and d) a separate copy of the specific rules regarding responsive pleadings.

5) On June 16, 1993, Respondent filed an answer to the Specific Charges. On June 18, 1993, the Agency filed a motion for an order of default, noting that Respondent's answer was due May 7, 1993. Finding that Respondent was served on May 17, 1993, through its registered agent and that an answer was due under OAR 839-50-330(1)(a) on June 7, 1993, the Hearings Referee issued a notice of default on June 23, 1993, based on Respondent's failure to answer the Specific Charges as required. The notice of default contained information concerning the procedure for seeking relief from default and acknowledged receipt of the answer filed June 16.

6) On July 1, 1993, within 10 days of the Forum's notice of default, Respondent filed a motion for relief from default, accompanied by affidavits of Deborah L. Fitch, a paralegal, and R. Kenney Roberts, Attorney at Law, of Respondent's attorneys.

7) On July 14, 1993, the Hearings Referee ruled on Respondent's motion. Finding that Respondent filed its answer on June 16, 1993, and that the Agency did not move for default until

June 18, 1993, the Hearings Referee ruled as follows:

"In this case, Respondent's answer was filed prior to any motion or finding of default. OAR 839-50-050(1) provides that a document which is filed beyond the established number of days for submittal may be, but not must be, ignored by the Hearings Referee. The rules define when default occurs and Respondent was in default. The question is whether a response to charges, filed prior to a motion or notice of default, might cure the defect. The Forum is of the opinion that in the instant case it should. The answer herein was filed before a ruling of default. Under such circumstances, where an answer was tendered, the Notice of Default should not have been issued and is hereby withdrawn."

The Hearings Referee accepted Respondent's answer and found the case at issue for the scheduled hearing.

8) On July 16, 1993, the Hearings Referee issued a correction to a date mentioned in his ruling of July 14, 1993. Also on July 16, the Hearings Referee served upon the participants a discovery order calling for case summaries to be filed by August 3, 1993, pursuant to OAR 839-50-200 and 839-50-210.

9) On July 26, 1993, Respondent filed a motion to quash a subpoena issued by the Agency on July 20, 1993. Relying on OAR 839-50-200(3), Respondent asserted that there had been no attempt at informal exchange of

information and that the information sought by subpoena was not relevant and, in addition, was intrusive and violated the privacy of others.

10) On July 28, the Agency responded to Respondent's motion. On July 29, the Hearings Referee denied Respondent's motion, pointing out that the cited rule differentiated between a participant-generated subpoena and a Hearing Referee's discovery order, that comparative data on other employees may well be relevant in a discrimination case, and that the co-worker privacy issue was without merit. Respondent filed further response to the Agency on July 30, which did not alter the ruling.

11) On August 2, 1993, the participants timely filed their respective case summaries under the ruling of July 16.

12) At the commencement of the hearing, Respondent's attorney stated that he had reviewed the Notice of Contested Case Rights and Procedures and had no questions about it.

13) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

14) At the commencement of the hearing, the Hearings Referee ruled that several exhibits submitted by the participants were identical and would be identified and admitted as joint exhibits.

15) At the commencement of the hearing, Respondent stipulated that two Agency exhibits obtained by the investigator from Respondent were authentic.

16) The Proposed Order, which included an Exceptions Notice, was issued on September 9, 1993. Exceptions were to be filed by September 19, 1993. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was a foreign corporation operating retail stores in Oregon and was an employer in this state utilizing the personal services of 21 or more employees.

2) Complainant had been employed by Respondent in Eve's Restaurants from 1973 to 1978. In 1978, she worked at the Gresham Eve's. After 1978, she worked at an Elk's club for nine years and had various office jobs. She applied for employment with Respondent in March 1991.

3) Complainant was employed by Respondent as a deli worker in the Food Department of Respondent's Johnson Creek store beginning on April 18, 1991.

4) During times material, Juanita Bursell was service deli manager at Respondent's Johnson Creek store and was Complainant's direct supervisor.

5) At the time of hearing, Jana Chilson was in Respondent's Store Director Training program. She was Food Manager at Respondent's Johnson Creek store at times material. She supervised several departments, including the service deli. Bursell reported to her.

6) Complainant was hired at \$5.00 per hour with the expectation she would work a 20-hour week. For approximately one month following her hire, she was engaged in training for

* "Participants" includes both Respondent and the Agency. OAR 839-50-020(13).

her position, which included weighing and packaging foods such as cheese, marking prices, making pizzas, waiting on retail customers, emptying garbage, and wiping and cleaning.

7) On May 15, 1991, her first day at her regular duties following her training, while stocking shelves, Complainant sustained a compensable injury when a co-worker dropped a heavy can of beans on her foot. Bursell obtained an accident report form for Complainant. Complainant completed the form and went home.

8) Complainant's right big toe was fractured. She was treated by her physician, Dr. Vincent Hansen, who instructed her to stay off the foot. She reported to Chilson that she was unable to work. Complainant received workers' compensation medical benefits and was off work until she was placed on light duty with the approval of her physician on July 2, 1991.

9) Complainant received workers' compensation in the form of time loss benefits for temporary total disability from May 16 to July 1, 1991, and for temporary partial disability from July 2 to August 26, 1991. Respondent was self-insured for workers' compensation.

10) On light duty, Complainant packaged and marked meats and cheese, wiped tables in the cafeteria, and emptied garbage. She was unaware whether the duties she was performing were different from regular duties because she had only done her regular job for about two hours before her injury.

11) Complainant's hours on light duty were the same as she had

expected before her injury. The hours were assigned by Bursell, and the schedule was posted one week before the workweek. Complainant left one hour early one day during the light duty period due to pain.

12) Between July 2 and August 27, 1991, while Complainant was on light duty, she was assigned to wiping tables, weighing cheese, and any other duty that did not put stress on her foot. Light duty for a deli worker included food demonstration, preparing chicken and pizza, doing public announcements, cleaning tables, and placing garbage on a wheeled cart. Bursell let Complainant determine whether a duty caused pain; if it did, Complainant was assigned to something else. The duties which Complainant performed were among the regular duties of a deli worker, but she did not do all of the duties of that position.

13) Respondent's only instructions to Bursell about Complainant's injury were to give her light duty and assist and accommodate her in doing her modified job.

14) During the course of her temporary disability, Complainant received several light duty releases from her doctor. None included specific limitations or restrictions on types of work permissible other than the general description "light duty."

15) Between July 2 and August 27, 1991, while Complainant was on light duty, she was concerned about her ability to keep up with the rest of the employees. She expressed to Bursell on several occasions her concern over whether she could be as fast as her co-workers, noting that the pace of the job was too much. Complainant had

watched her co-workers and commented to Bursell that she didn't believe she could do the work they were doing. Bursell kept Chilson informed of Complainant's concerns. Complainant initiated discussions with Chilson about performance, expressing concern about her ability to keep up with other employees. Chilson attempted to encourage Complainant, pointing out that she was on light duty.

16) Bursell told Complainant not to work, that she was on light duty. Complainant was anxious about her ability to do the job regardless of the injury. On one occasion, Complainant voiced her concern about being able to keep up and stated that she was considering a different job or a different department. Bursell did not tell Complainant that she wouldn't be retained.

17) Chilson did not initiate any formal evaluation or corrective discussion with Complainant regarding her performance, which she would have done if she was concerned. The object of such a process would be to afford the employee an opportunity for improvement.

18) Complainant mentioned several times to Chilson that the work was heavy, that she was slow, that she thought she was unable to do the job, and that she was thinking of quitting.

19) Chilson told Complainant on more than one occasion that she would have to move three times faster than she had on light duty when she was released to regular duty. This was in response to Complainant's repeated inquiries regarding how she was doing.

20) On August 27, 1993, Complainant was seen by Dr. Hansen. He

released her to full duty. Complainant called Chilson that same day to tell her of the release to regular duty. At that time, Complainant asked Chilson if she thought Complainant could handle her position. Complainant was concerned on August 27 about the pace of the job. She also asked if there was something easier for her at Respondent. Chilson told her everything was hard, that the work was demanding. Complainant asked about restaurant work at Respondent's Gresham store, which was close to her home.

21) Complainant asked Chilson if she thought Complainant should quit. Chilson told Complainant that only she could decide that, but if Complainant believed she should quit, then perhaps she should. Chilson did not tell Complainant not to come back to work.

22) Chilson thought Complainant was excited on August 27 about the possibility of working in the Gresham restaurant. Chilson attempted to find a position for Complainant at the Gresham restaurant. There were no positions available.

23) Renee Loehr, Complainant's daughter, lived eight miles from her mother but had frequent contact at times material. She was aware of the compensable injury and subsequent assignment to light duty. On August 27, 1991, around noon, Complainant called her, sounding upset, and reported that she had spoken to Chilson about the doctor releasing her to full duty and that Chilson told Complainant to resign. Complainant told her daughter that Chilson told her to apply at other Respondent facilities and that was what she intended to do. From the conversation, Complainant's

daughter understood that Respondent wanted to get rid of Complainant.

24) Complainant spoke with her physician on the evening of August 27 and informed him she had been asked to resign. She was upset and crying, and Dr. Hansen expressed sympathy.

25) For the week beginning August 25, 1991, Complainant was scheduled to work on Sunday, August 25, and on Wednesday, August 28, through Saturday, August 31, four hours each day. That schedule was posted one week before August 25.

26) Complainant worked on August 25, 1991. Complainant had worked Sunday, Thursday, Friday, and Saturday during the week beginning August 4; Sunday, Wednesday, Thursday, Friday, and Saturday during the week beginning August 11; and Sunday, Wednesday, Thursday, Friday, and Saturday during the week beginning August 18. She usually worked four hours each day.

27) Complainant was aware that she was scheduled to work August 28 through August 31, four hours each day.

28) Complainant did not come to work on August 28. Complainant did not call in to advise Bursell that she was quitting.

29) On August 28, Bursell reported to Chilson that Complainant had not come to work. Based on the schedule, Bursell was surprised when Complainant did not show up. Chilson assumed that Complainant had quit.

30) Generally, one unscheduled absence was enough for an employee to be terminated. Bursell probably reported Complainant's subsequent no

shows to Chilson. She never knew why Complainant ceased coming in. Complainant did not appear on the schedule for September 1, 1991.

31) Complainant applied for work at Respondent's Gresham restaurant on August 27 or 28 and was interviewed. She applied at Respondent's Gateway store around September 10. She waited to hear from those applications. She made no other job search. She did not apply for unemployment compensation.

32) Chilson saw Complainant in early September when she picked up her check. There was no conversation. She saw Complainant a few weeks after that, in Respondent's coffee shop, and understood that Complainant planned to visit a son in Australia. There was no discussion of Complainant's employment or employment status.

33) Bursell saw Complainant in late September in Respondent's coffee shop. Complainant showed her pictures of her son's home in Australia and appeared to be looking forward to a visit there. She did not appear to be upset with Bursell or with Respondent. There was no discussion of her employment with Respondent.

34) In the fall of 1991, after the month of August, Renee Loehr learned of the possibility of her mother's visit to Australia.

35) Complainant believed she had been told to resign. She became discouraged and thought she was treated unfairly by Respondent. The termination of her employment made her feel very bad, like she was kind of worthless. She doubted she would be hired

after the injury. She lost sleep and did not search for other work "in any depth" after returning from Australia because of problems with her leg.

36) Complainant subsequently took the termination of her job status with Respondent very hard. It was all Complainant would talk about with her daughter. She sounded angry and frustrated. She reported to her daughter that when she inquired about work at Respondent's Gresham facility, she was told it was busier than Johnson Creek.

37) Complainant visited her son in Australia between December 12, 1991, and January 14, 1992. Her son and a daughter paid her expenses.

38) Had she remained employed with Respondent at 20 hours per week at \$5.00 an hour, Complainant would have earned \$1,500 between August 28, 1991, and December 12, 1991, a period of 15 weeks. She became unavailable for work on December 12 while visiting Australia.

39) As a witness, Complainant was argumentative and evasive, and her testimony was not consistent. She insisted in her initial testimony that she did not know she was scheduled to work August 28 through 31. She said she did not report on August 28 because she was asked to resign, but acknowledged that she was not actually fired. She stated she did not plan on going to Australia until November, but acknowledged that her conversations with Bursell and Chilson about Australia probably occurred in September. She stated she did not know if she had telephoned about receiving her paycheck, then stated she telephoned and got it from Chilson. She stated she

needed the job and possible benefits from it, but took almost no active steps to become employed elsewhere. Based upon these inconsistencies and upon a preponderance of other evidence, the Forum has credited only that portion of Complainant's testimony which was uncontroverted or which was supported by other evidence.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent corporation was an Oregon employer utilizing the personal services of 21 or more employees.

2) Complainant was employed by Respondent beginning on April 18, 1991, part-time, at \$5.00 per hour.

3) Juanita Bursell was Complainant's direct supervisor, and Jana Chilson was Food Manager. Bursell reported to Chilson.

4) Complainant sustained a compensable injury, filed for workers' compensation, and received medical and time loss benefits for temporary total disability from May 16 to July 1, 1991, and for temporary partial disability from July 2 to August 26, 1991. Respondent placed her on light duty with the approval of her physician on July 2, 1991.

5) On August 27, 1991, Complainant's physician released her to full duty. Complainant informed Respondent of the release on that date.

6) On August 28, 1991, Complainant failed to report to work in her former regular position without medical reason.

7) On August 28, 1991, Complainant quit her employment with Respondent.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

2) The actions, inactions, statements, and motivations of Jana Chilson and Juanita Bursell are properly imputed to Respondent herein.

3) ORS 659.040 provides, in pertinent part:

"(1) Any person claiming to be aggrieved by an alleged unlawful employment practice may * * * make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the * * * employer * * * alleged to have committed the unlawful employment practice complained of and which complaint shall set forth the particulars thereof."

ORS 659.410(1) provides:

"It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656 or of 659.400 to 659.460 or has given testimony under the provisions of such sections."

ORS 659.415(4) provides that any violation of ORS 659.415 is an unlawful employment practice. The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and the subject matter herein.

4) 659.415 provides, in pertinent part:

"(1) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position. * * * A certificate by the attending physician that the physician approves the worker's return to the worker's regular employment or other suitable employment shall be prima facie evidence that the worker is able to perform such duties.

" * * *

"(3) Notwithstanding subsection (1) of this section:

"(a) The right to reinstatement to the worker's former position under this section terminates when whichever of the following events first occurs:

"(A) A medical determination by the attending physician or, after appeal of such determination to a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656 has been made, that the worker cannot return to the former position of employment.

" * * *

"(D) The worker refuses a bona fide offer from the employer of light duty or modified employment which is suitable prior to becoming medically stationary.

"(b) The right to reinstatement under this section does not apply to:

" * * *

"(D) A worker whose employer employs 20 or fewer workers at the time of the worker's injury and at the time of the worker's demand for reinstatement."

OAR 839-06-105(1) provides:

"Demand' means the injured worker informs the employer that the worker seeks reinstatement/reemployment."

Complainant was properly placed on light duty. Complainant was released to her regular, available, existing position, was not disabled from performing the duties of the position, and was entitled to be reinstated to the position.

5) Respondent Fred Meyer, Inc., did not retaliate against Complainant because she invoked or utilized the procedures of Oregon's workers' compensation statutes. Respondent did not violate ORS 659.410(1), did not fail to reinstate Complainant within the meaning of ORS 659.415, and did not violate that statute.

OPINION

The Specific Charges alleged that Respondent failed to reinstate Complainant, a compensably injured worker, to her regular, existing, and available position following her medical release to full duty on or about August 27, 1991. The charges further alleged that on or about said date, Respondent discharged Complainant in retaliation for her having filed for workers' compensation benefits.

The evidence at hearing confirmed the injury, a timely filing of claim, a

temporary disability resulting from the injury, an assignment to light duty by Respondent within the restrictions of the release from Complainant's physician, and a full duty release by the same doctor. When she learned of that release, Complainant reported her status to Respondent's manger. Those facts appeared to have been accepted by both Complainant and Respondent, except that Complainant questioned whether her duties during her light duty assignment were within the restriction of "light duty."

There was no evidence that the duties Complainant performed during her temporary disability were considered by her physician to be beyond the medical restrictions he imposed. There was evidence that Complainant thought the work too hard for her condition, but no evidence that she discussed this with the doctor. Each time she experienced discomfort while working, Respondent modified her duties. Respondent assigned duties compatible with the term "light duty." During this period, Complainant repeatedly expressed doubt and concern over her ability to perform all of the aspects of the job of deli service worker. She discussed this with her immediate supervisor Bursell and with food manager Chilson on several occasions. While some of her doubt related to her light duties, much of it had to do with the full range of duties of the position, which she admitted she knew she would have to perform when she recovered. She was particularly apprehensive about being able to match the speed of her co-workers.

When she reported the full medical release to Chilson, Complainant again

expressed some doubt about handling the regular job. She asked Chilson if there was easier work available, about the availability of restaurant work with Respondent near Complainant's home, and whether Chilson thought Complainant should quit; Chilson said that only Complainant could decide that. Chilson offered to see if there was an opening at the Gresham restaurant. At no time during that conversation did Chilson discharge her or insist that she resign.

Complainant's version of the conversation of August 27 was unpersuasive. So, too, was her reasoning for not reporting for scheduled shifts on August 28 or thereafter, or for not calling in. At first, she testified that she did not know that she was to work on the 28th because she hadn't seen the posted schedule. She later admitted that she had seen the schedule, but insisted that she had been told to resign.

Respondent's duty to reinstate Complainant once she was fully released was conditioned upon the existence and accuracy of the release, upon a timely demand, and upon Complainant's availability for work. There was no question that the doctor had restored Complainant to regular duty. There is a question whether Complainant's equivocal conversation of August 27 constituted a demand (request) for reinstatement to her regular duties. There is no question that Respondent was precluded from carrying out any reinstatement to duty on August 28, 1991, when Complainant failed to report for work.

Even if Chilson had suggested that Complainant resign, there was no evidence that would link such a

suggestion to Complainant's injured worker status. There was nothing to suggest that Chilson or Bursell retaliated against Complainant because she had a compensation claim.

Whatever Complainant's subjective belief was about what she was told on August 27, the objective facts fail to support any violation by Respondent of either ORS 659.410 or 659.415.

ORDER

NOW, THEREFORE, as Respondent Fred Meyer, Inc. has not been found to have engaged in any unlawful practice charged, the complaint and the specific charges against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

**In the Matter of
Yolanda Dvorshak, dba
SECRETARIAL LINK,
Respondent.**

Case Number 59-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued October 5, 1993.

SYNOPSIS

Finding that Respondent employer failed to attend the hearing although properly served with notice of time and place, the Commissioner found that both wage Claimants worked for Respondent at \$6.40 per hour, both quit

without notice, and neither was paid all wages due within five working days of termination. The Commissioner accepted Claimants' records of hours worked and awarded them, respectively, \$204.55 in unpaid wages and 30 days penalty wages of \$883, and \$361.20 in unpaid wages and 30 days penalty wages of \$1,062, plus interest. The Commissioner denied the Agency's motion at hearing to increase the wages claimed, ruling that in a default case the Agency was limited to the pleading served on respondent. ORS 652.140; 652.150.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 10, 1993, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Trista Corinne Goetz (Claimant Goetz) was present throughout the hearing. Dorothy Marie Carter (Claimant Carter) did not attend the hearing. Yolanda Dvorshak, dba Secretarial Link (Respondent), although properly served with notice of the hearing, did not attend the hearing and was found in default.

The Agency called the following witnesses: Claimant Trista Corinne Goetz and Agency Compliance Specialist Vickie King.

Having fully considered the entire record in this matter, I, Mary Wendy

Roberts, Commissioner of the Bureau of Labor and Industries, make the following Ruling on Motion, Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULING ON MOTION

At the close of its evidence, the Agency moved to amend the Order of Determination to conform to the proof presented by increasing the wages owed to Claimant Goetz to \$412.40 and increasing the penalty wages owed to Claimant Goetz to \$1,092. These increases were based on Claimant Goetz's testimony that, in addition to the hours claimed as reflected in the Order of Determination, she worked at least three additional hours in running errands for Respondent before normal office hours. The Hearings Referee took the motion under advisement.

Respondent in this case did not attend the hearing. The Agency's motion was based on evidence adduced at hearing. Respondent had no notice of this evidence or of the claimed amount resulting from it. The Agency's motion to amend is denied. In a default situation, the amounts stated in the Order of Determination set the limit on the relief the Forum can award. *In the Matter of Ebony Express, Inc.*, 7 BOLI 91, 97 (1988).

FINDINGS OF FACT – PROCEDURAL

1) On or about September 25, 1991, Claimant Carter filed a wage claim with the Agency. She alleged that she had been employed by Respondent and that Respondent had

failed to pay wages earned and due to her.

2) At the same time that she filed the wage claim, Claimant Carter assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Carter, all wages due from Respondent.

3) On around October 1, 1991, Claimant Goetz filed a wage claim with the Agency. She alleged that she had been employed by Respondent and that Respondent had failed to pay wages earned and due to her.

4) At the same time that she filed the wage claim, Claimant Goetz assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Goetz, all wages due from Respondent.

5) On August 25, 1992, the Commissioner of the Bureau of Labor and Industries served on Respondent through the Multnomah County Sheriff's office, at 3356 NE 77th, Portland, Oregon 97213, an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination found that Respondent owed Claimant Carter a total of \$204.55 in wages and \$883.20 in civil penalty wages, and found that Respondent owed Claimant Goetz a total of \$361.20 in wages and \$1,062.30 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

6) On around September 20, 1992, Respondent submitted a letter

response, with return address of 3356 NE 77th, Portland, Oregon 97213, to the Order of Determination wherein she denied owing any money to Claimant Carter and acknowledged owing \$70.00 to Claimant Goetz. Respondent alleged that she had no records of the hours worked by either Claimant because her records were destroyed by her landlord. She further alleged that Claimant Carter had not worked the hours claimed and that the \$70.00 she admitted owing Claimant Goetz was payment in full. Respondent alleged that Secretarial Link was no longer in business and was "bankrupt," but had not filed bankruptcy.

7) The Agency did not consider Respondent's September 20 letter a proper response to its order because it contained no request for either a contested case hearing or a court trial over the Determination Order. The Agency so notified Respondent and extended the time in which Respondent could request a hearing or court trial to October 5, 1992.

8) On October 5, 1992, Respondent submitted a letter response, with return address of 3356 NE 77th, Portland, Oregon 97213, to the Agency's extension of time and requested a hearing, stating that the claim of Claimant Carter was false and that the sum sought for Claimant Goetz was false. She again admitted owing Claimant Goetz \$70.00 and reiterated her alleged inability to find Claimant Goetz to pay her. Respondent repeated that Claimant Carter had worked only a short time and was paid in full.

9) On April 21, 1993, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit

issued a Notice of Hearing to Respondent at 3356 NE 77th, Portland, Oregon 97213, to the Agency, and to the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-50-000 to 839-50-420.

10) On August 16, 1993, the Hearings Referee issued a discovery order to Respondent at 3356 NE 77th, Portland, Oregon 97213, and to the Agency, directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). Under that rule, the Agency was required to submit a summary in accordance with the Hearings Referee's order, and Respondent, being an individual not represented by counsel, could do so voluntarily. The Agency submitted a timely case summary.

11) On August 31, 1993, the Agency requested a one-day delay in the commencement of the hearing in order to accommodate a schedule conflict on the part of the Agency Case Presenter. On September 2, 1993, noting that the hearing was originally scheduled for September 9 and successive days thereafter, the Hearings Referee granted the Agency's request and delayed the commencement of the hearing to 9 a.m., Friday, September 10, 1993. That ruling was mailed

to Respondent at the 3356 NE 77th, Portland, Oregon 97213.

12) At the start of the hearing, the Hearings Referee noted that, according to the files and records herein, Respondent received, prior to the hearing, the "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413.

13) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

14) At the hearing which commenced at 9 a.m. on September 10, 1993, the Hearings Referee found Respondent in default for non-attendance under OAR 839-50-330(1)(b), confirming that finding at 9:45 a.m. The files and records herein reveal that none of the various mailings to Respondent at 3356 NE 77th, Portland, Oregon 97213, were returned undelivered.

15) The Proposed Order, which included an Exceptions Notice, was issued on September 15, 1993. Exceptions were to be filed by September 25, 1993. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) On or about August 26, 1991, Claimant Carter began working for Respondent at 1012 SW King Avenue, Portland. Her duties included medical transcription, billing, and some telemarketing for a gift basket business owned by Respondent.

2) Claimant Carter had been referred to Respondent by the Bradford School. She was to be paid \$6.40 an hour. She kept a record of the hours

she worked, which was roughly four to six hours per day, each weekday except September 2 from August 26 through September 9, 1991.

3) Claimant Carter worked a total of 46 hours before she quit without prior notice on September 9, earning a total of \$294.40. She received a check from Respondent in the amount of \$89.85. There was no withholding information with the check, and Respondent never obtained a W-4 form from Claimant Carter. Respondent never established a regular payday. Respondent made no further payment to Claimant Carter.

4) On or about August 9, 1991, Claimant Goetz began working for Respondent at 1012 SW King Avenue, Portland. Her duties were those of a secretary, including filing, typing, answering the telephone, sorting mail, setting up a filing system, greeting customers, and setting up appointments.

5) Claimant Goetz had been referred to Respondent by the Bradford School. She was to be paid \$6.40 an hour. She was unsure whether Respondent kept a record of the hours she worked. Her own record showed that she worked five hours per day each week day from August 9 to September 2, 1991, except that on August 9 she worked 10 hours, August 26 she did not work, and August 30 she worked 8 hours.

6) Claimant Goetz worked a total of 83 hours before she quit without prior notice on September 2, earning a total of \$531.20. She received a check from Respondent in the amount of \$170. There was no withholding information with the check, and Respondent never obtained a W-4 form from

Claimant Goetz. Respondent never established a regular payday. Respondent made no further payment to Claimant Goetz.

7) Vickie King was a Compliance Specialist with the Wage and Hour Division of the Agency at times material. She reviewed Claimants' wage claims forms, wage calendars, and the wage transcription and computation sheets in Claimant's files and determined that all were completed in accordance with Agency policy. King verified the wage agreements with Complainants and the Bradford School and contacted Respondent.

8) Respondent told King that Claimant Carter had worked for her about two weeks, that Respondent had recorded Claimant Carter's hours of work, and that Claimant Carter had been paid in full. Respondent stated further that she could not provide payroll records because her landlord locked her out of her office and she wasn't sure the records still existed. Respondent stated she had copies of canceled checks used to pay Claimant Carter and agreed to send them to King. They were never received.

9) Respondent told King that Claimant Goetz had worked for her about three weeks and that her record of Goetz's hours were with those locked up by the landlord. Respondent admitted owing Claimant Goetz only \$70.00, and said that Claimant Goetz failed to pick up her paycheck and that Respondent was unable to contact her. Respondent stated she had copies of canceled checks used to pay Claimant Goetz and agreed to send them to King. King never received those checks.

10) For Claimant Carter, civil penalty wages computed in accordance with Agency policy were as follows: \$294.40 (the total wages earned) divided by 10 (the number of days worked during the claim period) equaled \$29.44 (the average daily rate). That figure multiplied by 30 (the number of days for which penalty wages continued to accrue) totaled \$883 (rounded according to Agency policy).

11) For Claimant Goetz, civil penalty wages computed in accordance with Agency policy were as follows: \$531.20 (total wages earned) divided by 15 (number of days worked) equals \$35.41 (average daily rate). That figure multiplied by 30 totaled \$1,062 (rounded according to Agency policy).

12) Claimant Goetz worked an additional three hours for Respondent when she picked up printing orders on her way to work for Respondent on two workdays during the claim period.

13) Respondent submitted no records or other evidence either prior to the hearing or at the hearing.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent was doing business as Secretarial Link and employed one or more persons in the operation of that business in Oregon.

2) Respondent employed Claimant Carter in Oregon between August 26 and September 9, 1991, during which time Claimant Carter earned \$294.40 at an agreed rate of \$6.40 an hour.

3) Respondent employed Claimant Goetz in Oregon between August 9 and September 2, 1991, during

which time Claimant Goetz earned \$531.20 at an agreed rate of \$6.40 an hour.

4) Respondent paid Claimant Carter \$89.85 and owed Claimant Carter \$204.55 when Claimant Carter quit without notice, no amount of which has been paid.

5) Respondent paid Claimant Goetz \$170 and owed Claimant Goetz \$361.20 when Claimant Goetz quit without notice, no amount of which has been paid.

6) Respondent willfully failed to pay the respective Claimants all wages within five days, excluding Saturdays, Sundays, and holidays, after each quit, and more than 30 days have elapsed from the date that the wages of each Claimant were due.

7) Claimant Carter's average daily rate was \$29.44. Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$883.

8) Claimant Goetz's average daily rate was \$35.41. Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$1,062.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 and 652.405.

2) Prior to the commencement of the contested case hearing, Respondent received notice of her rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants present at the start of the hearing.

3) ORS 652.310 provides, in part:

"(1) 'Employer' means any person who in this state, directly *** engages personal services of one or more employees ***.

"(2) 'Employee' means any individual who *** renders personal services *** in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services ***"

During times material herein, Respondent employed Claimants as employees and was subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. Respondent was required to pay Claimants at a fixed rate of \$6.40 per hour.

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimants all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimants quit employment.

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Regarding each Claimant, Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation when due as provided in ORS 652.140.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay each Claimant her respective earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on each sum until paid.

OPINION

Respondent's Default

Evidence established that Respondent was personally served by the Multnomah County Sheriff with the Order of Determination, pursuant to OAR 839-50-030(1). Respondent requested a contested case hearing pursuant to

OAR 839-50-070. The Hearings Unit notified Respondent of the time, date, and place of hearing by regular mail as required by OAR 839-50-030(1). The Hearings Unit and the Agency both thereafter transmitted documents by regular mail to Respondent in connection with the hearing, including a notice which delayed the hearing by one day. None of the mailings were returned undelivered. The Forum finds that Respondent received notice of the date and location of the hearing. Respondent did not attend the hearing and was found in default. In a default situation, the Forum's task is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. ORS 183.415(5) and (6); OAR 839-50-330(2); *In the Matter of Mark Vetter*, 11 BOLI 25, 30 (1992); *In the Matter of William Sama*, 11 BOLI 20, 24 (1992); *In the Matter of Rainbow Auto Parts and Dismantlers*, 10 BOLI 66, 73 (1991).

Respondent submitted letters which the Forum treated as an answer. Respondent failed to appear at hearing and in such an instance the Forum may review the answer to determine whether Respondent has set forth any evidence or defense to the charges. *Vetter, supra*. Where a respondent's total contribution to the record is a request for hearing and some unsworn and undocumented assertions, those assertions are overcome wherever they are controverted by any credible evidence on the record. *Vetter, supra*; *Sama, supra*; *Rainbow Auto Parts, supra*.

The Agency established a prima facie case. A preponderance of

credible evidence on the whole record showed that Respondent employed Claimants during the respective wage claim periods and willfully failed to pay all of the wages, earned and payable, that were due them. Credible, persuasive evidence established that Respondent owes Claimant Carter \$204.55 and Claimant Goetz \$361.20.

Penalty Wages

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 279 Or 1083, 557 P2d 1344 (1976); *State ex rel Nilsen v. Johnston et ux*, 233 Or 103, 377 P2d 331 (1962). Respondent, as an employer, had a duty to know the amount of wages due to her employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Respondent knew she did not pay either Claimant the full amount owed when they ceased employment. Respondent's letter contains an unsupported statement that Respondent was "bankrupt," but it speaks as of September 1992, rather than a year earlier when the wages were due. Respondent presented no evidence in support of any affirmative defense of financial inability to pay when the wages came due. The Forum infers that Respondent acted voluntarily and was a free agent when she failed to pay Claimants, and thus acted willfully and is liable for penalty wages under ORS 652.150.

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Wayton & Willies, Inc.*, 7 BOLI 68, 72 (1988).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders YOLANDA DVORSHAK, dba SECRETARIAL LINK, to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DOROTHY MARIE CARTER in the amount of ONE THOUSAND EIGHTY-SEVEN DOLLARS AND FIFTY-FIVE CENTS (\$1,087.55), representing \$204.55 in gross earned, unpaid, due, and payable wages, and \$883 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$204.55 from September 14, 1991, until paid, and nine percent interest per year on the sum of \$883 from October 14, 1991, until paid; and

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR TRISTA CORINNE GOETZ in the amount of ONE THOUSAND FOUR HUNDRED TWENTY-THREE DOLLARS AND TWENTY CENTS (\$1,423.20), representing \$361.20 in gross earned, unpaid, due, and payable wages, and \$1,062 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$361.20 from September 7, 1991, until paid, and nine percent interest per year

on the sum of \$1,062 from October 7, 1991, until paid.

**In the Matter of
DANIEL BURDICK,
dba Wind Wedge and Airpro
Corporation, Respondent.**

Case Number 04-94
Final Order of the Commissioner
Mary Wendy Roberts
Issued November 10, 1993.

SYNOPSIS

Respondent gave Claimant four nonnegotiable paychecks, which he never honored, and willfully failed to pay Claimant wages owed when he quit. The Commissioner ordered Respondent to pay back wages and penalty wages, rejecting his defenses that the agreed hourly rate was changed to a piece rate basis and that deductions for spoiled product and broken tools were authorized. Finding that Respondent failed to supply records to the Agency during the investigation and ignored the Hearings Referee's pre-hearing discovery order, the Commissioner confirmed the Referee's exclusion of Respondent's documents at hearing. ORS 652.110; 652.140(2); 652.150; 652.310(1), (2); 652.610(3); 653.045; OAR 839-50-200(1), (2), and (8); and 839-50-330(2).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 16, 1993, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Alberto Rivas-Castro (Claimant) was present throughout the hearing. Daniel Burdick, dba Wind Wedge and Airpro Corporation (Respondent), properly served with notice of the hearing, arrived over 10 minutes late and left before completion of the Agency's evidence.

The Agency called the following witnesses: Claimant, former Agency paralegal Steve Malone, and Agency Compliance Specialist Eduardo Sifuentez. Respondent called no witnesses and presented no evidence.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Rulings on Motions, Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS ON MOTIONS

At the commencement of the hearing, the Agency moved to strike that portion of Respondent's answer which purported to state a defense that Claimant's hourly rate had been amended to a piece rate basis and which outlined a work rule that allowed Respondent to deduct from Claimant's

earnings spoiled product and broken tools. There was no allegation that Claimant had agreed to such deductions in writing and no allegation that any such agreement was for Claimant's benefit. The Hearings Referee took the motion under advisement, at that point ruling that Respondent might introduce evidence under the defense, but that the Hearings Referee might later rule that it was not a defense to earned but unpaid wages.

During the hearing, Respondent attempted to cross-examine Claimant using what was purported to be a portion of Claimant's payroll records. The Agency objected, based on OAR 839-50-200(8), and moved to exclude any documents offered by Respondent, pointing out that Respondent had failed to comply with the Hearings Referee's discovery order of August 20, 1993, under OAR 839-50-210(1)(a) and (b) and (2), in that Respondent failed to submit a list of documents he intended to use at hearing and a list of witnesses he intended to call. At the referee's request, the Agency presented evidence regarding Respondent's failure to cooperate during the investigation of Claimant's wage claim and further evidence of Respondent's avoidance of process and a discovery subpoena in connection with this hearing.

For reasons more fully explained in the Opinion section herein, the Hearings Referee granted the Agency's motion under OAR 839-50-200(8) to exclude Respondent's documentary evidence and granted the Agency's motion to strike Respondent's purported defense of authorized deductions.

FINDINGS OF FACT -- PROCEDURAL

1) On or about January 5, 1993, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent, who had failed to pay wages earned and due to him.

2) At the same time that he filed the wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On May 15, 1993, the Commissioner of the Bureau of Labor and Industries served on Respondent through the Multnomah County Sheriff's office, at 8424 SE 32nd Avenue, Portland, Order of Determination No. 92-239 (Determination Order) based upon the wage claim filed by Claimant and the Agency's investigation. The Determination Order found that Respondent owed Claimant a total of \$715.59 in wages and \$1,092 in civil penalty wages. The Determination Order required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

4) On around June 7, 1993, Respondent submitted a request for hearing together with his "section by section answer to Order of Determination No. 92-239." Respondent denied owing any unpaid wages to Claimant and set forth the allegation that:

"On the date of August 28, 1992 the claimant was notified of a change in his pay scale due to previous problems with other employees. The changed pay scale was

based on a piece production basis, whereby a person was paid per job instead of per hour. All employees were changed to this new pay scale. part [sic] of this changed pay scale was a deduction, from the employees pay, for any defects, in employer's products, caused by said employee (this also applied to any tools broken by said employee)."

5) On August 5, 1993, the Agency sent the Hearings Unit a request for a hearing date. On August 9, the Hearings Unit issued a Notice of Hearing to Respondent at 8424 SE 32nd Avenue, Portland, Oregon 97202, by regular US mail, to the Agency and to Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-50-000 to 839-50-420.

6) On August 12, 1993, the mailing of August 9 to Respondent was returned to the Hearings Unit as improperly addressed. On August 16, the Hearings Unit issued the Notice of Hearing and accompanying documents described in Finding of Fact -- Procedural 5 above to Respondent at 8424 SE 32nd Avenue, Portland, Oregon 97222, by regular US mail. That mailing was not returned.

7) On August 20, 1993, the Hearings Referee issued a discovery order to Respondent at 8424 SE 32nd Avenue, Portland, Oregon 97222 by regular US mail, and to the Agency, according to the provisions of OAR

839-50-210(1). Under that rule, in accordance with the Hearings Referee's order, the participants' were each directed and required to submit a Summary of the Case, including a list of the witnesses to be called and the identification, description, and copies of any document to be offered into evidence. That mailing was not returned.

8) Submissions under the August 20 discovery order were due September 3. The order provided further:

"Failure to comply with this Discovery Order may result in sanctions described in OAR 839-50-200(8), including the refusal to admit evidence that has not been disclosed in response to this order."

The Agency submitted a timely case summary. Respondent did not submit a case summary.

9) At the start of the hearing on September 16, at 9:05 a.m., Respondent was not in attendance. The Hearings Referee noted that, according to the files and records herein, Respondent received, prior to the hearing, the "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413.

10) At 9:10 a.m., Respondent having failed to appear and not having notified the Forum, the Hearings Referee ruled Respondent in default under OAR 839-50-330(1)(b) and recited his intent to confirm that ruling 30 minutes after the scheduled time for hearing, as suggested by the rule. At about 9:12 a.m., Respondent arrived in the hearings room. Respondent acknowledged receiving the notice of hearing.

The Hearings Referee withdrew the finding of default based upon Respondent's representation of traffic delay.

11) Pursuant to ORS 183.415(7), the referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

12) During the presentation of the Agency's case, after the Hearings Referee had excluded Respondent's documents based on non-compliance with the discovery order, Respondent voluntarily left the hearing.

13) The Proposed Order, which included an Exceptions Notice, was issued on September 22, 1993. Exceptions were to be filed by October 4, 1993. No exceptions were received.

FINDINGS OF FACT -- THE MERITS

1) On or about July 27, 1992, Claimant began working for Respondent at 2384 SE Ochoco Street, Portland. His duties involved production of fiberglass air deflectors for installation on motor vehicles.

2) Claimant learned of the job with Respondent through a newspaper ad which listed the pay at \$5.50 an hour. He worked at least six and one-half hours per day, five days a week, or about 32½ hours per week. He sometimes worked overtime. When he was paid, it was at the rate of \$5.50 an hour. His regular payday was Friday.

3) The business for which Claimant worked at the Ochoco Street address was known to him as Wind Wedge. It was owned by Respondent,

* "Participants" includes both Respondent and the Agency. OAR 839-50-020(13).

who provided tools and supplies and controlled and directed the work.

4) Respondent was sometimes as much as a week or more late in paying Claimant. Claimant was not fully paid for October 1-16, 1992. Each time Claimant questioned or attempted to question Respondent about his wages, Respondent claimed to be too busy to discuss it. Claimant noted that other employees appeared to get paid.

5) Claimant finally threatened to quit, and Respondent, in early November 1992, issued four checks to Claimant. Two of these checks were dated November 2 and were in the amount of \$86.91 and \$100, respectively. The other two checks were dated November 3 and were in the amount of \$137.18 and \$100, respectively. The checks, totaling \$424.09, were serially numbered. Respondent instructed Claimant not to cash them all at once. All four were dishonored by Respondent's bank.

6) Claimant questioned Respondent about the dishonored checks and was assured that Respondent would pay them in cash when he could. Claimant returned the original checks to Respondent after making copies. When Claimant asked Respondent thereafter about payment, Respondent told him he had no time or to inquire again "tomorrow." Respondent never paid Claimant the amounts represented by the checks.

7) Between November 30 and December 9, 1992, Claimant worked a total of 53 hours, earning \$291.50, before he quit without prior notice on December 9. Respondent did not pay Claimant for this period, either within five business days of December 9 or at

any time thereafter. To the best of Claimant's knowledge, Respondent's other employees, of whom there were four or five, were paid during October to December 1992 and did not have paychecks dishonored.

8) There was no withholding information with any paychecks Claimant received. Claimant did not sign anything that allowed deductions for damaged product or broken tools, or agreeing to any method of pay other than the hourly rate of \$5.50 per hour.

9) Eduardo Sifuentez was a Compliance Specialist with the Wage and Hour Division of the Agency at times material. He received Claimant's wage claim for investigation. He forwarded a demand letter on February 16, 1993, to Respondent as Airpro Corporation, 2384 Ochoco Street, SE, Portland, Oregon 97222-7320, requiring that Respondent either pay the amount demanded or forward records and an explanation regarding Claimant within 10 days of the letter. The letter was not returned. Respondent did not respond to the letter.

10) Sifuentez made numerous attempts to reach Respondent by telephone in order to discuss Claimant's claim, but was not successful. If he talked to Respondent at all, it was after March 25, 1993, when he submitted his report and recommendation.

11) Sifuentez found that Wind Wedge was an assumed business name registered to Respondent and that Airpro Corporation was a corporation with Respondent as its sole incorporator at 8424 SE 32nd, Portland, Oregon 97222. The assumed business name was not renewed in January 1992, and the corporation became

delinquent for nonpayment of fees on December 20, 1991. The corporation's registered agent resigned in August 1992.

12) While he worked on Ochoco Street between July and December 1992, Claimant observed that Respondent appeared to avoid visitors who came to the office. Respondent instructed others to say he was not there. At least twice, the person avoided was a deputy sheriff.

13) Steve Malone was a paralegal working for the Agency prior to the hearing. He obtained updated information on Respondent's assumed business name and corporation. He also obtained information on several other assumed names used by Respondent. On August 12, 1993, he requested quarterly reports from the Tax Section of the Oregon State Employment Division on both Wind Wedge and Airpro Corporation. Respondent had not filed the required quarterly reports for payroll tax purposes. For the purpose of assessing unemployment compensation taxes, the section had run a partial audit and had obtained from Respondent some time cards involving Claimant. All information was based on an hourly rate of \$5.50.

14) On or about August 12, Malone prepared a subpoena for payroll records and time cards for the relevant period to be served on Respondent at 8424 SE 32nd Avenue, Portland, returnable August 26, 1993, at the Agency.

15) Malone knew that the Airpro/Wind Wedge business location was 2384 SE Ochoco Street, Portland. On August 16, in an attempt to serve the subpoena, he went to that site. He

could hear a radio and the sound of machinery, but the doors were locked. He knocked repeatedly on a front and side door without response. He knocked on a garage door and finally got an answer. The young man who answered the door stated that Daniel Burdick was not in, but would return around noon. At 12:16 p.m., Malone returned and again tried all three doors. The machinery stopped, but there was no other response. After 10 minutes of knocking, Malone left and went to 8424 SE 32nd, which he knew to be Respondent's residence. He received no response to his knocking, although someone peeked out of a window.

16) On August 17, Malone photographed the building at 2384 SE Ochoco Street. The photographs clearly suggest it to be the place of business of Wind Wedge. On August 18, he again got no response to his repeated knocking at 2384 SE Ochoco Street. On his visits to that address, Malone observed several vehicles he found to be registered to Respondent.

17) Multnomah County Sheriff civil deputies note attempts involving process assigned for service as part of that department's business record. The notes accompanying the Determination Order, which the Agency requested be served on Daniel Burdick, 8424 SE 32nd Avenue, Portland, stated:

"Deputy	Date	Time	Remarks
"RJ	5/4	1440	
"NR/Two(2)			Dead Bolts No Door Knob 'Beware of Dog'
"RJ	5/10	1443	NR
"Jon	5/11	1245	

"Served him 6 mos ago. He avoided, chased him into Gladstone to get him.

"Jon 5/13 0835

"Old little p/u in drive. His vehicle not there

"Jon 5/14 0900

"old p/u out front - his vehicle not there

"RJ 5/17 1445 NR

"RJ 5/17 1900 NR"

The official return showed that the Determination Order was served at 8:40 a.m., May 18, 1993, by Deputy Jon Woodward.

18) When Malone could not serve the subpoena, the Agency sent it to the Multnomah County Sheriff for service on Daniel Burdick, 8424 SE 32nd Avenue, Portland. The deputies' notes accompanying the subpoena stated:

"Deputy Date Time Remarks

"RJ 8/23 1950 Closed

"Jon 8/24 1000 NR He lives here, have had him in past, will avoid.

"Mat 8/25 1405 NR Return Pl: Date"

The official return showed that the subpoena was returned unserved to the Agency.

19) For Claimant, civil penalty wages were as follows: \$291.50 (the total wages earned, November 30 to December 9, 1992) divided by eight (the number of days worked during the claim period) equaled \$36.43 (the average daily rate). That figure multiplied by 30 (the number of days for which penalty wages continued to accrue) totaled \$1,092 (rounded according to Agency policy).

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent was an individual doing business under the names Wind Wedge and Airpro Corporation and employed one or more persons in the operation of that business in Oregon.

2) Respondent employed Claimant in Oregon between July 27 and December 9, 1992, during which time Claimant worked at an agreed rate of \$5.50 an hour.

3) Respondent attempted to pay Claimant \$424.09 for the period October 1 to October 16, 1992, on or about November 2 and 3, 1992, with a series of four checks which were returned unpaid by Respondent's bank. No portion of that amount was ever paid.

4) Claimant earned the sum of \$291.50 from November 30 to December 9, 1992, when Claimant quit without notice. No amount of that sum has been paid.

5) Respondent willfully failed to pay Claimant all wages within five days, excluding Saturdays, Sundays, and holidays, after he quit, and more than 30 days have elapsed from the date those wages were due.

6) Claimant's average daily rate for November 30 to December 9, 1992, was \$36.43. Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$1,092.

7) Respondent avoided the Agency's attempts to obtain wage information and failed to comply with the Forum's Discovery Order for this proceeding.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has

jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

2) Prior to the commencement of the contested case hearing, Respondent received notice of his rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

3) ORS 652.310 provides in part:

"(1) 'Employer' means any person who in this state, directly * * * engages personal services of one or more employees * * *."

"(2) 'Employee' means any individual who * * * renders personal services * * * in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services * * *."

During times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. Respondent was required to pay Claimant at a fixed rate of \$5.50 per hour.

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and

payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit employment.

5) ORS 652.110 provides, in part:

"No person engaged in any business * * * in this state shall issue, in payment of or as evidence of indebtedness for wages due an employee, any * * * check * * * unless the same is negotiable, and is payable * * * in cash on demand at some bank * * * where a sufficient amount of funds have been provided * * * for the payment of such * * * check * * * when due. Such person shall, upon presentation and demand, pay any such * * * check * * * in lawful money of the United States."

By issuing insufficient fund checks to Claimant, Respondent willfully violated ORS 652.110.

6) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or

compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation when due as provided in ORS 652.140.

7) ORS 653.025 provides, in part: " * * * for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than: * * *

"(3) For calendar years after December 31, 1990, \$4.75."

ORS 653.045 provides, in part:

"(1) Every employer required by ORS 653.025 * * * to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner for not less than two years, a record or records containing:

"(a) The name, address and occupation of each of the employer's employees.

"(b) The actual hours worked each week and each pay period by each employee.

* * * *

"(2) Each employer shall keep the records required by subsection (1) of this section open for inspection or transcription by * * * the Commissioner's designee at any reasonable time."

Respondent was required, as an employer subject to Oregon's minimum wage law, to keep and make available to the Agency records regarding Claimant's employment and failed to do so.

8) ORS 652.610(3) provides:

"No employer may withhold, deduct or divert any portion of an employee's wages unless:

"(a) The employer is required to do so by law;

"(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books;

"(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer, and that such deduction is recorded in the employer's books; or

"(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party."

Respondent's purported reason for not paying Claimant in full, that Claimant had broken tools and damaged product, was not a legal defense under the facts presented.

9) OAR 839-50-330(2) provides:

"When a party fails to appear at the specified time and place for the contested case hearing, the hearings referee shall take evidence to establish a prima facie case in support of the charging document and shall then issue a Proposed Order to the commissioner and all

participants pursuant to OAR 839-50-370. Unless notified by the party, the hearings referee shall wait no longer than thirty (30) minutes from the time set for the hearing in the notice of hearing to commence the hearing."

Respondent having arrived at the hearing within 30 minutes of the specified time for the contested case hearing, the Hearings Referee exercised his discretion and relieved Respondent of default.

10) OAR 839-50-200 provides, in part:

"(1) In his or her discretion, the hearings referee may order discovery by a participant in appropriate cases. This rule does not require the hearings referee to authorize discovery. If the hearings referee does authorize discovery, the hearings referee shall control the methods, timing and extent of discovery, but nothing in this rule prevents informal exchanges of information. Where the hearings referee orders discovery, the hearings referee shall notify the participants of the possible sanction, pursuant to section (8) of this rule, for failure to provide the discovery ordered.

"(2) Discovery may include but is not limited to one or more of the following:

* * * *

"(b) disclosure of names and addresses of witnesses expected to testify at the hearing;

"(c) production of documents;

* * * *

"(8) The hearings referee may refuse to admit evidence which has not been disclosed in response to a discovery order * * *."

OAR 839-50-210 provides, in part:

"(1) Prior to any contested case hearing, the hearings referee may issue a discovery order directing the participants to prepare a summary of the case containing any or all of the following:

"(a) A list of all persons to be called as witnesses, * * * at the hearing * * *

"(b) Identification and description of any document or other physical evidence to be offered into evidence at the hearing, together with a copy of any such document, * * *

"(2) Where a party is unrepresented by counsel, the hearings referee may order the party to produce a summary of the case containing only the information and documents described in subsections (1)(a) and (b) of this rule. * * *

* * * *

"(4) Where the hearings referee orders a summary of the case, the hearings referee shall notify the participants of the possible sanction, pursuant to OAR 839-50-200(8), for failure to provide a summary of the case.

"(5) If a participant fails to comply with the hearings referee's discovery order issued pursuant to this rule, the hearings referee shall apply the provisions of OAR 839-50-200(8)."

Under the facts and circumstances of this record, the Hearings Referee

properly excluded any document which Respondent attempted to introduce.

11) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay to Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on each sum until paid.

OPINION

Respondent's Failure to Provide Discovery

The Hearings Referee granted the Agency's motion under OAR 839-50-200(8) to exclude Respondent's documentary evidence. It was established that Respondent was personally served by the Multnomah County Sheriff with the Determination Order, pursuant to OAR 839-50-030(1). He requested a contested case hearing pursuant to OAR 839-50-070. The Hearings Unit notified him of the time, date, and place of hearing by regular mail as required by OAR 839-50-030(1). The Hearings Unit and the Agency both thereafter transmitted documents by regular mail to Respondent in connection with the hearing, including a Discovery Order requiring Respondent to submit a list of witnesses and potential exhibits. None of the mailings were returned undelivered. The Forum finds that Respondent received notice of the date and location of the hearing and that Respondent received the Discovery Order.

Respondent failed to comply with the Discovery Order, which merely called for a list of witnesses and

identification and production of documents. The Agency moved to exclude any documents offered by Respondent, relying on OAR 839-50-200(8). Where there is no explanation of a failure to disclose and the exclusion would not violate the duty to conduct a full and fair inquiry, the rule leaves the admission of such undisclosed evidence to the discretion of the Referee. "The hearings referee may refuse to admit evidence which has not been disclosed in response to a discovery order * * *." (Emphasis supplied.) The Hearings Referee took evidence regarding Respondent's failure to cooperate in the investigation of Claimant's wage claim and Respondent's avoidance of process. The Forum finds that Respondent's failure to comply with the Discovery Order was part of Respondent's pattern of non-compliance, and the exclusion of Respondent's documents is confirmed.

Respondent's Piece Rate Defense

Respondent alleged in response to the Determination Order that Claimant's hourly rate was, at some unspecified time, changed to a piece rate basis and that Respondent thereafter deducted for spoiled material and damaged tools. No such assertion was made during the investigation or in response to the Agency's demand letter. Respondent's failure to provide payroll data precluded any evaluation of whether a piece rate provided Claimant with minimum wage for the hours worked, let alone whether the supposedly authorized deductions would result in a wage below minimum wage. Respondent's attempted defense of broken tools and product spoilage had no basis in either fact or law, since

there was no evidence or suggestion that any purported deduction was for Claimant's benefit or would not go in Respondent's pocket. Under the evidence, the Agency's motion to strike the defense was properly granted.

Prima Facie Case

Respondent attended the hearing and was not in default, but he left voluntarily without presenting testimony. In such a situation, as in a default situation, the Forum's task is to determine if a prima facie case supporting the Determination Order was made on the record. ORS 183.415(5) and (6), OAR 839-50-330(2); *In the Matter of Secretarial Link*, 12 BOLI 58, 65 (1993).

The Agency established a prima facie case. A preponderance of credible evidence on the whole record showed that Respondent employed Claimant during the wage claim period and willfully failed to pay all of the wages, earned and payable, that were due him. Credible, persuasive evidence established that Respondent owes Claimant \$291.45 in wages plus \$424.09 for the dishonored paychecks. Respondent's total contribution to this record was a request for hearing and some unsworn and undocumented assertions. Respondent's assertions were overcome wherever they were controverted by the Agency's credible evidence.

Penalty Wages

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is done

intentionally, with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willemette Western Corp.*, 279 Or 1083, 557 P2d 1344 (1976); *State ex rel Nilson v. Johnston et ux*, 233 Or 103, 377 P2d 331 (1962). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Respondent knew he did not pay Claimant the full amount owed when Claimant ceased employment. He had previously knowingly "paid" Claimant with insufficient fund checks, which he had not replaced and which was an undeniably willful act. There was no evidence and no claim of the affirmative defense of financial inability to pay when the wages came due. The Forum infers that Respondent acted voluntarily and was a free agent when he failed to pay Claimant, and thus acted willfully. He is liable for penalty wages under ORS 652.150. Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Wayton & Willies, Inc.*, 7 BOLI 68, 72 (1988). An average daily rate was not calculated for the period covered by the dishonored checks because there was no evidence of the exact number of days actually worked between Thursday, October 1, and Friday, October 16, 1992.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders DANIEL BURDICK, dba Wind Wedge and

Airpro Corporation, to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR ALBERTO RIVAS-CASTRO in the amount of ONE THOUSAND EIGHT HUNDRED SEVEN DOLLARS AND FIFTY-NINE CENTS (\$1,807.59), representing \$424.09 in dishonored paychecks, \$291.50 in gross earned, unpaid, due, and payable wages; and \$1,092 in penalty wages; PLUS interest at the rate of nine percent per year on the sum of \$424.09 from November 3, 1992, until paid, interest at the rate of nine percent per year on the sum of \$291.50 from December 16, 1992, until paid, and interest at the rate of nine percent per year on the sum of \$1,092 from January 15, 1993, until paid.

**In the Matter of
SALEM CONSTRUCTION
COMPANY, INC.,
dba Main Street Diner, and James
Kent Stagias, Respondents.**

Case Number 67-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 9, 1993.

SYNOPSIS

Respondent Stagias, who was the president of the corporate Respondent and Complainant's supervisor, discharged Complainant after she repeatedly rejected his social invitations and his attempts to visit her at home in the evening. The Commissioner held that the corporate Respondent engaged in quid pro quo sexual harassment through Stagias, in violation of ORS 659.030(1)(a), that Stagias aided and abetted the corporation, in violation of ORS 659.030(1)(g), but that Respondents did not create a hostile environment. The Commissioner awarded Complainant back wages and \$10,000 for her mental distress. ORS 659.030(1)(a), (b), and (g); OAR 839-07-550.

The above-entitled matter came on regularly for hearing before Kelly T. Hagan, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 23, 1993, in the Conference Room of the offices of the Oregon Bureau of Labor and Industries, 3865 Wolverine NE, Suite E-1, Salem, Oregon. Alan

McCullough, Case Presenter with the Civil Rights Division of the Bureau of Labor and Industries (the Agency), represented the Agency. Patti A. Loucka (Complainant) was present throughout the hearing and was not represented by counsel. Respondents Salem Construction Company, Inc., dba Main Street Diner, and James Kent Stagias did not appear at the hearing in person or through representatives.

The Agency called the following witnesses (in order of appearance): Patti Loucka (Complainant); Daryl Palaniuk, a patron of Main Street Diner; Holly Priddy, a patron and former employee of Main Street Diner; Marcy Loveberg, a former employee of Main Street Diner; Jenny Loucka, Complainant's younger sister; Miguel Bustamante, formerly a Senior Investigator with the Agency's Civil Rights Division; and Sandra Loucka, Complainant's mother.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Rulings on Motions, Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS ON MOTIONS

The Agency moved at hearing to amend the charging document's demand for damages to include, first, the additional costs of commuting to Complainant's new job and, second, an increase in compensation for Complainant's mental suffering from \$20,000 to \$30,000. Both motions were allowed at hearing. Those rulings were in error. This Forum has previously held

that in cases of default the issues raised and the relief requested in the charging document set limits on both the theories and damages on which the Forum can rule. The implied consent to evidence adduced at hearing without objection, on which a motion to amend to conform is based, is absent in the case of defaults. *In the Matter of Secretarial Link*, 12 BOLI 58, 59 (1993); *In the Matter of Ebony Express, Inc.*, 7 BOLI 91, 97 (1988); *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987).

Following hearing, by letter dated September 27, 1993, the Agency also moved to amend the caption of the instant action to add the designation "Inc." to "Salem Construction Company." That letter and motion are hereby incorporated into the record. OAR 839-50-140 provides that, once hearing has begun, "a participant may amend its pleading only by permission of the hearings referee or by written consent of the other participants; permission shall be freely given when justice so requires." As service in this matter was made personally on the registered agent for Salem Construction Co., Inc., and in that capacity, and all subsequent communications by the Forum have been directed to Respondent Diner in its corporate capacity, the Forum concludes that no prejudice or surprise may be reasonably claimed in these circumstances and that justice is best served by granting the Agency's motion to amend the caption of the charging document.

**FINDINGS OF FACT –
PROCEDURAL**

1) On November 12, 1992, Complainant filed a verified complaint with

the Civil Rights Division of the Agency. She alleged that Respondents had discriminated against her because of her sex, in that she was sexually harassed and her employment was terminated on September 4, 1992, because she was unwilling either to join Respondent Stagias at a local bar or to "get rid of" her boyfriend and allow Respondent Stagias to come over to her apartment late that night.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices by Respondent in violation of ORS 659.030(1)(a) and (b).

3) The Agency subsequently initiated conciliation efforts between the Complainant and Respondent, but was unsuccessful.

4) On May 26 and 27, 1993, the Agency prepared and attempted to serve on Respondents Specific Charges which alleged that Respondent Stagias had sexually harassed Complainant in violation of ORS 659.030(1)(a), (b), and (g). Service was not completed.

5) On June 1, 1993, the Agency moved to amend the Specific Charges to add allegations of "quid pro quo" harassment. On June 2, 1993, the Hearings Referee notified the participants of the Agency's motion to amend and set a time for response. No response was received, and the Hearings Referee granted the motion on June 9, 1993.

6) On June 9, 1993, the Hearings Referee issued a discovery order requiring the Agency and Respondents

to submit a case summary by June 22, 1993.

7) On June 18, 1993, the Agency moved to postpone hearing in this matter on the grounds that service had not been completed on either Respondent. The motion was granted by the Hearings Referee on June 21, 1993, and a new hearing date was set for September 23, 1993.

8) On June 23, 1993, L. F. Erpelding, registered agent for Respondent Salem Construction Company, Inc., was personally served with Specific Charges in the instant matter.

9) On August 3, 1993, Respondent James Kent Stagias was served with Specific Charges in the instant matter by means of substituted service as authorized by ORCP 7D(2)(b).

10) With the Specific Charges, Respondents also had served upon them the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

11) On September 7, 1993, the Agency moved for an order of default against both Respondents on the grounds that neither Respondent had made answer as required by OAR 839-50-130. Pursuant to OAR 839-50-330(1), on September 13, 1993, the Hearings Referee issued to Respondents a "Notice of Default," which notified Respondents that their failure to

file a responsive pleading within the required time constituted a default to the Specific Charges, pursuant to OAR 839-50-330. The notice advised Respondents that they had 10 days in which to request relief from the default and that if they failed to file such a request or if such request were denied, they would not be allowed to present evidence at hearing. As of the date of hearing, September 23, 1993, no such request was received by the Hearings Unit.

12) On September 13, 1993, pursuant to OAR 839-50-210, the Hearings Referee issued a discovery order requiring the participants to submit a Summary of the Case by September 20, 1993.

13) The Agency timely filed a Summary of the Case including documents from the Agency's file. The Agency mailed the Summary of the Case to Respondents at the addresses at which service of the Specific Charges and accompanying documents had been accomplished.

14) Respondents failed to appear at the hearing held at the time and place set forth in the Notice of Hearing.

15) Pursuant to ORS 183.415(7), the Agency was verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) The Proposed Order, which included an Exceptions Notice, was issued on October 21, 1993. Exceptions, if any, were to be filed by November 1, 1993. Exceptions were filed by the Agency in a timely manner and

are dealt with in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) Respondent Salem Construction Company, Inc., dba Main Street Diner (hereinafter Diner), owned and operated a restaurant in Aurnsville, Oregon, which was managed by James Kent Stagias (hereinafter Stagias), who was also corporate president of the Diner. Stagias is in his thirties.

2) Complainant, who is female, was employed full time by the Diner from April 3, 1990, until her termination on September 4, 1992, as a waitress, head waitress, and service supervisor. She was 20 years old when she began working for Respondents. In March 1992, Complainant began work at the Diner's present location and was promoted from waitress to head waitress and "service supervisor."

3) Complainant worked 40 hours per week, 6 a.m. to 2 p.m., Friday through Tuesday. She was paid \$5.25 per hour and received tips in the average amount of \$40.00 per day. In addition to normal waitressing duties, Complainant supervised other waitresses' schedules, handled the till, filled in on occasion for other waitresses, and made bank deposits for the Diner. She was always "on-call" to fill in when necessary.

4) Approximately a month prior to Complainant's termination, Stagias was talking to Daryl Palaniuk, a patron of the Diner and acquaintance of Stagias, in Stagias's office. Stagias told Mr. Palaniuk that he "would like to get into [Complainant's] pants."

5) Both Complainant and other employees of the Diner had noticed indications of possessiveness and jealousy in Stagias toward Complainant during her employment at the Diner. When Complainant's boyfriend would come into the Diner, Stagias would become visibly irritated and emotional. These other employees also noticed that Stagias singled Complainant out for special attention, wanting her immediately whenever he went looking for her, and frequently calling her into his office and closing the door during his conversations with her.

6) Complainant's sister, Jenny Loucka, age 13, had accompanied Complainant and Stagias to a local swimming spot some time before Complainant's termination. Stagias asked Jenny to undo her sister's swimming suit top. When Jenny refused, Stagias told her it was okay because he had done it before.

7) On September 2, 1992, Stagias accompanied Complainant to Salem on an errand to purchase a washer and dryer for her personal use. On the return trip, Stagias pulled into the parking lot of the Blue Willow Restaurant and Lounge in Salem and invited Complainant in for dinner. Complainant declined, stating that she needed to get home to call around for used washer and dryer sets. Stagias was irritated by Complainant's refusal and, on the way back to Aumsville, Stagias explained to Complainant that he was dying of cancer and would appreciate her company. Complainant continued to decline his invitations for dinner or drinks, and Stagias drove her home.

8) Later on the night of September 2, at approximately 8:30 p.m., Stagias

called Complainant at home from Frankie's bar in Turner, Oregon, about seven miles from Aumsville. Stagias asked Complainant either to join him at the bar or to let him come to Complainant's home. Complainant refused both requests. Nevertheless, Stagias showed up at Complainant's house a short time later, obviously intoxicated and with a beer in his hand, and asked Complainant to go out for a drink with him. Complainant asked Stagias to leave and tried to get him to do so by telling him that she herself needed to leave in order to look at some used washers and dryers. Stagias initially refused to leave, however, telling Complainant that, "I'm your boss, I don't have to leave and you have to listen to me." Complainant responded that his visit was not about work and that if that was his attitude, she would rather quit her job. Complainant finally got Stagias out the door, but he remained outside ringing her doorbell for 20 to 30 minutes. Complainant would not answer the door, and Stagias finally left.

9) The next day, September 3, 1992, between approximately 2 p.m. and 3 p.m., Complainant found a large arrangement of wildflowers on her porch with a note saying, "Good luck with the party, I'm sorry. Love, Dudley." Complainant had a birthday party for her sister Jenny planned for that evening.

10) Complainant had previously received bouquets of flowers at work from an unknown person signing notes "Dudley" on August 6, 7, and 10, 1992. Stagias had told Pam Klum that he had purchased flowers for Complainant on at least three occasions.

11) On September 4, 1992, Complainant worked at the Diner from 11 a.m. to 5 p.m. A group of employees, including Stagias, were planning to go to dinner after work. Complainant told Stagias that she was uncomfortable being in the group with him because of what had happened the night of the 2nd. Stagias got angry and told Complainant that it was her obligation to go. Complainant nevertheless declined and went home after work, arriving around 5:30 p.m. Sometime later she began work on evaluations of six other waitresses, part of her duties as head waitress.

12) At approximately 7:30 p.m. that evening, Stagias called Complainant at home. Stagias asked Complainant what her boyfriend was doing that evening, and Complainant told him that her boyfriend was sleeping on her couch. Stagias asked Complainant to call him at home once the evaluations were done and to read them to him over the phone. About an hour later, Complainant called Stagias at home and left a message on his answering machine.

13) Stagias called Complainant back at 9:30 p.m., and Complainant began to read the evaluations to him. Stagias asked Complainant why she had been flirting with Bryan, a cook at the Diner, an accusation Complainant denied, and made repeated critical comments about Bryan and the waitresses. Complainant asked Stagias if he had been drinking, and he admitted that he had. He also asked Complainant if her boyfriend was still there and, when she replied that he was, he asked Complainant if her boyfriend was going to spend the night and

whether she was going to "fuck" him. Complainant then hung up on Stagias.

14) Stagias called Complainant right back and asked her to meet him at Frankie's Bar, where they could go over the evaluations or to "get rid of" her boyfriend so that he could come over. When Complainant told Stagias she would do neither, Stagias told her that she was fired. Complainant told Stagias that he could not do that and hung up. Complainant was unsure about whether Stagias really meant what he said or whether his intent would change once he was sober.

15) Complainant called her mother soon after she hung up on Stagias. Complainant's "call waiting" beeped continually, and Complainant found Stagias on the other line. He was laughing and repeating that she was fired. Complainant hung up on Stagias and completed her conversation with her mother. The call waiting kept beeping throughout the 20-minute conversation Complainant had with her mother.

16) The phone rang a few more times after Complainant got off the phone with her mother, but Complainant, believing the caller to be Stagias, did not answer.

17) Sometime after 2 a.m., Complainant heard a car horn outside her house and she looked outside and saw Stagias's van. Stagias was "laying on his horn" outside Complainant's house for about 15 minutes before leaving. Stagias had previously told her that he carried a gun in his van, and Complainant asked her boyfriend not to go outside to confront Stagias out of fear for his safety. About 15 minutes after Stagias left, sometime

between 2:30 and 3 a.m., the phone rang again. Complainant did not answer it.

18) At 5:10 a.m., Complainant received her usual wake-up call from a co-worker, Carl, who opened up the restaurant. Stagias called shortly thereafter and asked her what she was doing. When Complainant indicated she was getting ready for work, Stagias reiterated his intent to fire Complainant. Still uncertain about Stagias's sobriety and his ability to fire her for what she believed was an improper reason, Complainant went into work anyway at the normal time of 6 a.m.

19) When Complainant arrived, co-worker Jackie Williams told her that Stagias had called the Diner and told her that she was to send Complainant home and call in another waitress to work Complainant's shift.

20) While Complainant and Williams talked, Stagias called the Diner several times, and there were several exchanges between Complainant and Stagias. Stagias claimed to have a credit report on Complainant's mother and, alluding to Complainant's statement that her mother had told her that Stagias could not treat her this way, Stagias advised Complainant not to take advice from someone with her mother's credit rating. Stagias told Complainant "You're finished," reiterated that his reason for firing her was that Complainant would not get rid of her boyfriend the night before, told Complainant to "get the fuck out of my restaurant," leave his money alone, and called her a "bitch." During the last telephone call from Stagias before Complainant left the Diner, Complainant asked Stagias why he was doing

this to her and he replied that he loved her.

21) Throughout the remainder of the morning and into the afternoon, Stagias called Complainant's home and the Diner looking for Complainant.

22) Complainant called the Aumsville Police Department the morning of September 5 and complained of harassing phone calls from Stagias. She informed the police of her termination and that she had been fired for not going out with Stagias.

23) The Aumsville police came to Complainant's home on September 5. They advised Complainant to purchase a machine used in cases of harassment which records the originating number of local phone calls. Complainant purchased a conventional telephone answering machine later that day.

24) One week following her termination at the Diner, on September 13, 1992, Complainant obtained employment at a restaurant in Salem, Neufeldt's, for 30 hours per week at a rate of \$4.75 an hour. She received no tips during her first week of employment but has since averaged tips in an amount comparable to her work at the Diner. Complainant's wages increased to \$5.00 per hour on December 23, 1992, and since March 11, 1993, Complainant has worked 35 hours per week at a rate of \$5.00 per hour. As compared to her 40 hour per week schedule at the Diner and wages there of \$5.25 per hour, Complainant lost \$370 in wages while unemployed between September 6 and 12, 1992. Complainant's earnings the week of September 13-19, 1992, were diminished in the amount of \$227.50 owing

to fewer hours, a lower hourly rate, and no tips. From September 20 to December 23, 1992, the Complainant lost wages in the amount of \$945 due to fewer hours and a lower hourly rate. From December 23, 1992, to March 10, 1993, Complainant lost wages in the amount of \$600 on the basis of fewer hours worked and a lower hourly rate. From March 11, 1993, to the date of hearing, Complainant lost wages on the same basis in the amount of \$980.

25) Neufeldt's is 24 miles round-trip from Complainant's residence in Aumsville, compared to less than a mile for the Diner.

26) On September 15 and 16, 1992, Stagias called and left messages on Complainant's telephone answering machine. At several points in these messages, Stagias admitted to unspecified misconduct vis-a-vis Complainant, that he felt guilty, that he was sorry, and, specifically, that he was "sorry if I hassled you or harassed you."

27) Stagias tried to contact Complainant subsequently, placing calls to her new place of work and, seven months following her termination, calling Complainant at home after midnight from The Squeeze-Inn, a tavern only three or four houses from Complainant's home. Stagias had asked Carl, Complainant's former co-worker, to place the call, and after Complainant questioned the authenticity of Carl's invitation to come down to the Squeeze Inn, Carl admitted that Stagias was at the tavern and had asked him to call Complainant. Complainant said good-bye to Carl and hung up. Stagias called in person a few minutes later

and asked Complainant to come down for a drink. Complainant declined and asked Stagias not to call her again. Complainant was sufficiently alarmed by Stagias's call from the Squeeze-Inn that she contacted the Aumsville Police Department, which put extra patrol on around Complainant's home that evening and for some number of subsequent evenings. Complainant also called the bartender at the Squeeze-Inn to ask him to call her if Stagias left the Squeeze-Inn heading for her home.

28) For five or six months following her termination, Complainant spent several evenings a week on the phone with her mother or visiting her mother in Salem. Their repeated conversations centered on Complainant's anxieties over the events surrounding her termination and Complainant's feelings of self-doubt and responsibility for what happened.

29) Complainant was extremely upset by Stagias's conduct on the night of September 4 and was crying and hysterical when she called her mother. Subsequent conversations with Stagias by phone during the following day also left her distraught. She was particularly upset by her inability to understand why Stagias was doing what he was doing and deeply troubled by fears that she had done something to bring about his treatment of her. Complainant was depressed for several months, breaking into tears in conversations with others about the incidents surrounding her termination.

30) Stagias's attempts to contact her at her new place of employment and at her home made Complainant fearful of Stagias and of the prospect of

his returning to her home, where she lived alone.

31) Complainant's upset persisted for several months and, to a lesser degree, up to the time of hearing. She slept poorly for months after the incident, and she still talks frequently about it with family and friends. She cried the night before the hearing during discussions of her testimony. Complainant continues to miss her old job and her regular customers. She is anxious about seeing Stagias around town in Aumsville. Complainant's feelings now center on the pain of Stagias's betrayal of her trust as a friend and loyal employee of the Diner. Complainant has found it difficult to "warm up" to her new employers and feels her experience with Stagias has limited her personal and business relationship with them.

32) Complainant's testimony was straightforward, consistent, credible, and was supported by other reliable evidence in the record.

33) Daryl Palaniuk's testimony was straightforward and concise. His testimony was credible.

34) Holly Priddy's testimony was straightforward and her demeanor credible. Her testimony was consistent with other reliable evidence in the record.

35) Marcy Loveberg's testimony, while consistent with other reliable evidence in the record, revealed a strong bias against Stagias. Ms. Loveberg admitted to a personality conflict with Stagias and to leaving her employment with the Diner for that reason. Ms. Loveberg's testimony was viewed with this bias in mind and credited only in

corroboration of the testimony of other witnesses.

36) Jenny Loucka, although young at 13 years of age, impressed the Hearings Referee with her maturity and appreciation of the seriousness of the proceedings and the importance of her testimony. Her testimony was straightforward and consistent with other reliable evidence in the record and was found by the Forum to be credible.

37) Sandra Loucka, Complainant's mother, struggled to remain calm through much of her testimony. When composed, her testimony was straightforward and credible and was corroborated by other reliable evidence in the record.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Diner was an employer in the State of Oregon with one or more employees. Respondent Stagias was president of Respondent Diner and Complainant's supervisor.

2) Complainant was employed by Respondent Diner.

3) Complainant is female.

4) Respondent Stagias made sexual advances and engaged in other conduct of a sexual nature toward Complainant while she worked for Respondent.

5) Respondent Stagias's advances and conduct were directed toward Complainant because of her sex.

6) Respondent Stagias's sexual advances and other conduct of a sexual nature were unwelcome by Complainant.

7) Complainant rejected Respondent Stagias's sexual advances and conduct.

8) Following Complainant's rejection, Respondent Stagias terminated Complainant's employment.

9) Respondent Stagias made rejection of his sexual advances and other conduct of a sexual nature the basis for his decision to terminate Complainant's employment.

10) Complainant made adequate efforts to seek work following her termination by Respondent.

11) Complainant suffered anger, embarrassment, humiliation, and frustration because of Respondent Stagias's conduct and his termination of her employment with Respondent Diner. Complainant's experience with Respondent Stagias gave rise to substantial and protracted upset and self-doubt. Following her employment with Respondent, Complainant felt uncomfortable establishing a personal and professional relationship with her new employers.

12) Complainant suffered financial losses due to Respondent's termination of her employment. Complainant lost \$3,122.50 in wages between September 5, 1992, and September 23, 1993.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Diner was an employer subject to the provisions of ORS 659.010 to 659.110. ORS 659.010(6); OAR 839-07-505(3).

2) At all times material herein, Respondent Stagias was president of Respondent Diner and Complainant's immediate supervisor. Respondent

Stagias's actions and conduct are properly imputed to Respondent Diner.

3) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein. ORS 659.010 to 659.121.

4) ORS 659.030(1) provides:

"For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340 and 659.400 to 659.435, it is an unlawful employment practice:

"(a) For an employer, because of an individual's *** sex, *** to refuse to hire or employ or to bar or discharge from employment such individual. However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

"(b) For an employer, because of an individual's *** sex, *** to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

"(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110, 659.400 to 659.460 and 659.505 to 659.545 or to attempt to do so."

OAR 839-07-550 provides:

"Harassment on the basis of sex is a violation of ORS 659.030. It is

discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

"(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Respondent Diner violated ORS 659.030(1)(a), and Respondent Stagias violated ORS 659.030(1)(g).

5) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondents: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

Respondents were found in default, pursuant to OAR 839-50-330(1)(a), for failing to file an answer to the Specific Charges. Respondents made no request for relief from default. OAR 839-50-340. Respondents also failed to appear at the scheduled hearing.

In default situations, the Agency must present evidence to prove a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6); OAR 839-50-330(2). To present a prima facie case of a violation of ORS 659.030(1) for sexual harassment, the Agency must present evidence on the following elements:

1. The Respondent is a respondent as defined by statute;
2. The Complainant is a member of a protected class;
3. The Complainant was harmed by an action of the Respondent; and
4. The Respondent's action was taken because of the Complainant's membership in the protected class.

OAR 839-05-010(1); *In the Matter of Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989); *In the Matter of Colonial Motor Inn*, 8 BOLI 45, 54 (1989). The Agency has established a prima facie case. The credible testimony of Agency witnesses and the documentary evidence submitted were accepted and relied upon herein. Regarding the first three elements, the evidence showed that:

1. Respondent Diner was a person who in this state engaged or utilized the personal service of one or

more employees. See ORS 659.010 (6) and (12); OAR 839-07-505(3). Respondent Stagias was a person who, acting as the agent of Respondent Diner, aided and abetted Respondent Diner in the doing of acts forbidden by ORS 659.030(1)(a). See ORS 659.010(6) and (12), 659.030(1)(g).

2. Complainant is female.

3. The termination of Complainant from her employment harmed Complainant financially and caused her mental suffering.

Regarding the fourth element, the evidence showed that Respondent Stagias was sexually and romantically attracted to Complainant. He made sexual advances to Complainant in the form of repeated social invitations and, ultimately, demands. The night and morning of his marathon telephone dismissal of Complainant, he made comments of a sexual nature concerning Complainant's relationship with her boyfriend, and he unmistakably characterized the boyfriend's presence at Complainant's home as an obstacle to his own romantic designs on Complainant. Respondent flatly stated and then reiterated that the reason he was firing her was because she would not get rid of her boyfriend so that he could come over to her home in the late evening and early morning hours of September 4 and 5, 1992. Complainant's testimony was clear that Respondent Stagias's overtures were unwelcome and rejected. Complainant's refusal to submit to his demands was the explicit basis for Respondent Stagias's termination of Complainant's employment. This is "quid pro quo" harassment. See EEOC: Policy Guidance on Sex-

ual Harassment (March 19, 1990), 8 FEP Manual 405:6681 (BNA 1990).

The Agency has also alleged that Respondent Stagias's sexual conduct had the purpose or effect of creating an intimidating, hostile, or offensive working environment. Prior to the September 2, Respondent Stagias had not made sexual advances or otherwise engaged in sexual conduct towards Complainant. In the evening of September 2, Respondent Stagias had asked Complainant to go out with him and had made an unwelcome visit to Complainant's home while intoxicated. On September 3, 1992, a day off for Complainant, Complainant received a large flower arrangement which, while signed "Dudley," she concluded had come in apology from Respondent Stagias. During the workday of September 4, Complainant was uncomfortable around Respondent Stagias because of his conduct on the evening of the 2nd, and told him that she felt uncomfortable accompanying a group of employees which included him for an after-work dinner. Complainant's discomfort reflected her understandable concern over the events on the evening of the 2nd and her intent to keep her relationship with Respondent Stagias strictly professional, but it does not establish a working environment so permeated by Respondent Stagias's unwelcome attentions that it had become intimidating, hostile, or offensive. On this record, the Forum cannot say Respondent's conduct from the evening of September 2 through the evening of September 4, 1992, prior to the discharge of Complainant, was sufficiently severe and pervasive so as to

create an intimidating, hostile, or offensive working environment.

The credible evidence on the whole record is conclusive that Respondent Diner, aided and abetted by its agent, Respondent Stagias, discriminated against Complainant because of her sex in violation of ORS 659.030(1)(a). The evidence is also conclusive that Respondent Stagias discharged Complainant from her employment because she rejected his sexual advances, in violation of ORS 659.030(1)(g).

Damages

The purpose of back pay awards in employment discrimination matters is to compensate a complainant for the loss of wages and benefits which the complainant would have received but for the respondent's unlawful discrimination. Such awards are calculated to make the complainant whole for injuries suffered because of the discrimination. *In the Matter of K-Mart Corporation*, 3 BOLI 194, 202-04 (1982).

Complainant wasted no time in obtaining another job after she was discharged. The period for measuring back pay began on September 6, 1992, and ended on September 13, 1992, when Complainant obtained employment. A combination of lower wages, fewer hours, and a period in which tips were not forthcoming produces a financial loss to Complainant of \$3,122.50 in tips and wages as a direct consequence of Respondents' illegal actions.

Awards for mental suffering depend on the facts presented by each Complainant. The Forum finds that

Complainant experienced substantial and protracted mental suffering due to Respondent's sexual harassment and illegal termination, as described in Findings of Fact 28 through 31. The sum awarded in the Order below is intended to compensate Complainant for her mental distress. Although Respondent Stagias attempted intermittent contact with Complainant after her discharge, which Complainant found upsetting, the Forum has considered only the events of September 2 through September 5 in determining its award of mental suffering damages. While no doubt exacerbating the effects of the events surrounding her discharge, these later episodes are outside the scope of remedies available under ORS 659.030(1).

At hearing, the Agency moved to amend its claim for damages to include the cost of the additional commuting required by Complainant's subsequent employment at Neufeldt's restaurant in Salem. For the reasons stated in the Rulings on Motions, above, these damages are disallowed.

Exceptions

The Agency filed timely exceptions to two aspects of the Proposed Order herein. The Agency argues, first, that the Hearings Referee erred in finding insufficient evidence of an intimidating, hostile, or offensive working environment. In support of its exception, the Agency reiterates the evidence of Complainant's discomfort at work on September 4 as a result of the incidents of the evening of September 2 and the receipt of a bouquet of flowers on September 3. As indicated above, the Forum does not doubt that the Complainant's experienced discomfort

on the job on September 4. What the Forum cannot concede, however, is that this discomfort was of sufficient duration or severity to rise to the level of an intimidating, hostile, or offensive working environment.

For its second exception, the Agency argues for an increase in the amount of damages awarded for mental suffering, citing two other awards by this Forum: *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183 (1992) (awarding \$10,000) and *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206 (1991) (awarding \$15,000). However, the Forum concludes that the case comparisons offered by the Agency cases suggest that the award of \$10,000 is appropriate. The \$10,000 proposed here equals the award in *Chalet*. That case involved both quid pro quo harassment and an additional finding of hostile environment discrimination on the basis of events occurring over a far more substantial period of time than is involved in the present case. In awarding a sum in this case equivalent to that in *Chalet*, the Forum has taken into account the instant Complainant's relatively greater youth and inexperience. Similarly, the facts of *Allied* involve harassment both more prolonged and more egregious than is presented here, involving at least two weeks of abuse including outright and repeated propositions to commit sexual acts and the sexual touching of the Complainant's buttocks and breasts. Given that the *Allied* Complainant's youth and experience was roughly equivalent to Complainant in this case, the additional \$5,000 awarded in *Allied*

is explained by the more egregious conduct involved.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found, Respondents Salem Construction Company, Inc., and James Kent Stagias, jointly and severally, are hereby ordered to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for PATTI A LOUCKA, in the amount of:

a) THREE THOUSAND ONE HUNDRED TWENTY-TWO DOLLARS AND FIFTY CENTS (\$3,122.50), representing wages Complainant lost as a result of Respondents' unlawful practice found herein; PLUS,

b) THREE HUNDRED TWENTY DOLLARS AND FIFTY-NINE CENTS (\$320.59), representing interest on the lost wages at the annual rate of nine percent accrued between September 5, 1992, and September 23, 1993, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between September 24, 1993, and the date Respondents comply herewith, to be computed and compounded annually; PLUS,

d) TEN THOUSAND DOLLARS (\$10,000), representing compensatory damages for the mental distress Complainant suffered as a result of

Respondents' unlawful practices found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any current or future employee because of the employee's sex.

3) Post in a conspicuous place in Respondent Diner's offices a copy of ORS 659.030, together with a notice that anyone who believes that he or she has been discriminated against on the basis of sex may notify the Oregon Bureau of Labor and Industries.

**In the Matter of
JOHN MALLON**

and Betty Mallon, dba Forest Improvement, Inc., Respondents.

Case Number 54-93

Final Order of the Commissioner
Mary Wendy Roberts
Issued December 10, 1993.

SYNOPSIS

Where farm labor contractors failed to submit certified true copies of payroll records seven times on five federal forestation contracts, and where payroll records that were submitted were

defective and underreported the number of workers on the contracts, the Commissioner found that the farm labor contractors violated ORS 658.417(3) and OAR 839-15-300 seven times. The Commissioner found the Respondents' reliability and competence made them unfit to act as farm labor contractors, and denied them licenses under ORS 658.420, OAR 839-15-145(7), and 839-15-520(2), (3)(a) and (f).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The case was submitted on a written record made up of stipulations and stipulated evidence. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. John and Betty Mallon (Respondents) were represented by David Moule, Attorney at Law.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –
PROCEDURAL**

1) On around February 9, 1993, the Agency issued a "Notice of Proposed Denial of Farm Labor Contractor Licenses" (charging document) to Respondents. The charging document

notified Respondents that the Commissioner intended to deny licenses to them and assess civil penalties against them in the amount of \$3,500. The basis for the Agency's proposed action was Respondents' alleged repeated failure to provide certified true copies of all payroll records to the Commissioner for work performed in forestation on five government contracts, in violation of ORS 658.417(3) and OAR 839-15-300.

2) The charging document was served on Respondents by certified mail on February 14 and 16, 1993, and by personal service on Tonya Cheney, as registered agent of Forest Improvement, Inc., on February 16, 1993.

3) By a letter dated February 28, 1993, Respondents requested a hearing on the Agency's intended action and submitted their answer.

4) On March 25, 1993, the Agency requested a hearing from the Hearings Unit.

5) On March 26, 1993, the Hearings Unit issued to Respondents and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent to Respondent a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 through 839-30-200.

6) On March 31, 1993, the Agency requested a postponement of the hearing set to begin on April 29, 1993, and attached supporting affidavits. On April

1, Respondents' attorney, David Moule, called the Hearings Referee and said he had no objection to the postponement. Pursuant to OAR 839-30-070(7)(c), the Hearings Referee granted the Agency's motion in order to accommodate the participants' schedules and give them more time to prepare for hearing. Following the postponement, the Agency notified the Hearings Unit that the case was reassigned from Alan McCullough to Judith Bracanovich. An amended Notice of Hearing was issued to the Respondents and the Agency setting the hearing for August 30, 1993. This date was later adjusted to August 31.

7) Effective April 12, 1993, the Commissioner adopted Temporary Oregon Administrative Rules 839-50-000 to 839-50-420 governing contested case hearings. The rules applied to all pending proceedings, including this case. All procedures herein on or after April 12, 1993, are in accordance with those rules. The Hearings Unit sent copies of the new rules to the participants. The rules became permanent on September 3, 1993.

8) On July 15, 1993, the Hearings Referee issued a Discovery Order to the participants directing them each to submit a Summary of the Case, due by August 23, 1993.

9) On August 10, 1993, the Agency advised the Hearings Unit that the participants would submit this case to the Forum on stipulated evidence. On August 19, the participants submitted their stipulated evidence, written stipulations, and agreed amendments to the Agency's appendices 1 through 5, which were attached to the charging document.

10) On August 31, 1993, the Forum closed the record herein.

11) On October 21, 1993, a Proposed Order in this matter was issued and mailed to all persons listed on the face of the Certificate of Mailing at their last known addresses. Included in the Proposed Order was an Exceptions Notice that allowed 10 days for the filing of any exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all material times, Respondents were licensed farm/forest labor contractors, as defined by ORS 658.405, doing business in the State of Oregon as Forest Improvement, Inc.

2) Between May 16, 1990, and May 16, 1991, Respondents were persons acting as farm labor contractors through the employment of crews to perform forestation labor on the following contracts within the State of Oregon: Bureau of Land Management (BLM) #H 952-C-1-1032 (#1032); BLM #H 952-C-1-3061 (#3061); US Forest Service (USFS) #52-0467-0-01933

(#01933); BLM #H 110-P-1-5016 (#5016); and USFS #52-05K3-1-06247e (#06247e)

3) Respondents paid their employees directly on the five forestation contracts listed in Finding of Fact 2 above.

4) Civil penalties are no longer sought by the Agency.

5) On contract #1032, Respondents' crews first started work on January 8, 1991. By state law and rule, a certified true copy of Respondents' payroll records was required to be submitted at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. Respondents' first certified payroll record (CPR) was due by February 12 (35 days after January 8). Respondents' second CPR was due by March 19 (35 days after February 12). The Agency received Respondents' uncertified payroll records on March 26, 1991. They were defective. The Agency received Respondents' corrected uncertified records on September 9, 1991.

* ORS 658.417 requires that one who acts as a farm labor contractor with regard to the forestation and reforestation of lands must, among other requirements, obtain a special indorsement authorizing such activity and pay a higher fee than a farm labor contractor not involved with forestation or reforestation. OAR 839-15-004 defines such a farm labor contractor as a "forest labor contractor." In this Order, the Forum will use only "farm labor contractor."

** The Agency has adopted Form WH-141 for farm labor contractors' use in submitting certified true copies of payroll records to the Commissioner. Any person can use this form or use a similar form, provided it contains all of the elements of Form WH-141. See OAR 839-15-300(3), and Exhibit A-9. On Form WH-141, the farm labor contractor must certify, in short, that (1) the employees have been paid in full, and no rebates or deductions have been made, except as allowed by law; (2) the payrolls submitted for the period reported are correct and complete, the wage rates are correct based on the contract, and the worker classifications conform with the work performed; and (3) where the federal Service Contract Act applies, fringe benefits are paid to an appropriate plan or are paid to the employees in cash. The certification must be signed by the farm labor contractor, with the contractor's name and title.

6) Regarding contract #1032, a comparison of the number of workers reported by Respondents in their payroll records (PR) and the number of Respondents' workers reported in the government's daily diaries reveals the information in Table 1.

7) On contract #3061, Respondents' crews first started work on February 1, 1991. Respondents' first certified payroll record was due by March 8, 1991 (35 days after February 1). Respondents' second CPR was due by April 12 (35 days after March 8). The Agency received Respondents' uncertified payroll records on March 26, 1991. They were defective. Respondents resubmitted the records on June 25. They too were defective. The Agency received Respondents' corrected uncertified records on September 9, 1991.

8) Regarding contract #3061, a comparison of the number of workers reported by Respondents in their payroll records (PR) and the number of Respondents' workers reported in the government's daily diaries reveals the information in Table 2.

9) On contract #01933, Respondents' crews first started work on April 11, 1990. Respondents' CPR was due by May 16, 1990 (35 days after April 11). The Agency received Respondents' uncertified payroll records on May 29, 1990.

10) Regarding contract #01933, a comparison of the number of workers reported by Respondents in their

payroll records (PR) and the number of Respondents' workers reported in the government's daily diaries reveals the information in Table 3.

11) On contract #5016, Respondents' crews first started work on March 25, 1991. Respondents' CPR was due by April 29, 1991 (35 days after March 25). The Agency received Respondents' uncertified payroll records on June 25, 1991. They were defective. The Agency received Respondents' corrected uncertified records on September 9, 1991.

12) Regarding contract #5016, a comparison of the number of workers reported by Respondents in their payroll records (PR) and the number of Respondents' workers reported in the government's daily diaries reveals the information in Table 4.

13) On contract #06247e, Respondents' crews first started work on April 1, 1991. Respondents' CPR was due by May 6, 1990 (35 days after April 1). The Agency received Respondents' uncertified payroll records on June 25, 1991. They were defective. The Agency received Respondents' corrected uncertified records on September 9, 1991.

14) Regarding contract #06247e, a comparison of the number of workers reported by Respondents in their payroll records (PR) and the number of Respondents' workers reported in the government's daily diaries reveals the information in Table 5.

* Both the BLM and USFS use "Contract Diary" or "Contract Daily Diary" forms to report the progress on each of their forestation contracts. Based on daily inspections of each project, a Contracting Officer's Representative (COR) or a Project Inspector (PI) reports on, among other things, the number and classification of workers on the job.

TABLE 1

Payroll Period Week End Date	Number of Workers Reported in the Payroll Report	Number of Workers Per Diaries	Number of Workers Not Reported in the Payroll Report	
Jan. 11, 1991	13	Jan. 8	44	31
		Jan. 9	42	
		Jan. 10	43	
		Jan. 11	42	
Jan. 18, 1991	5	Jan. 14	21	
		Jan. 15	22	17
		Jan. 16	22	
		Jan. 17	22	
		Jan. 18	21	
Feb. 2, 1991	31	Jan. 28	51	20
		Jan. 29	51	
		Jan. 30	51	
		Jan. 31	51	
		Feb. 1	51	
		Feb. 4	10	-
Feb. 9, 1991	20	Feb. 5	14	
		Feb. 6	14	
		Feb. 7	14	
		Feb. 8	14	
		Feb. 11	14	-
Feb. 16, 1991	14	Feb. 12	14	
		Feb. 13	14	
		Feb. 14	14	
		Feb. 15	14	
		Feb. 19	14	14
		Feb. 20	14	
Feb. 23, 1991	No Record	Feb. 21	14	
		Feb. 22	14	
		Feb. 25	12	-
		Feb. 26	12	
		Feb. 27	No Count	
Mar. 3, 1991	12	Feb. 28	No Count	
		Mar. 1	12	
		Mar. 4	13	-
		Mar. 5	13	
		Mar. 6	13	
		Mar. 7	No Count	
		Mar. 8	13	
		Mar. 15, 1991	14	

TABLE 2

Payroll Period Week End Date	Number of Workers Reported in the Payroll Report	Number of Workers Per Diaries	Number of Workers Not Reported in the Payroll Report	
Feb. 9, 1991	29	Feb. 1	12	
		Feb. 2	52	
		Feb. 4	63	
		Feb. 5	71	
		Feb. 6	73	
		Feb. 7	68	
		Feb. 8	74	
		Feb. 9	66	57
		Feb. 11	50	
Feb. 17, 1991	16	Feb. 12	52	
		Feb. 13	47	
		Feb. 14	48 + subcontractors	
		Feb. 15	51 + subcontractors	
		Feb. 16	82 + subcontractors	68
Feb. 22, 23, 1991	46	Feb. 18	66 + subcontractors	20
		Feb. 19	No Count	
		Feb. 20	57	
		Feb. 21	57 + subcontractors	
		Feb. 22	No Count	
		Feb. 23	14	
		Feb. 25	54 + subcontractors	
Mar. 1, 1991	17	Feb. 26	54 + subcontractors	
		Feb. 27	57 + subcontractors	40
		Feb. 28	56 + subcontractors	
		Mar. 1	55	
Mar. 9, 1991	47	Mar. 2	15	
		Mar. 4	56 + subcontractors	
		Mar. 5	54	
		Mar. 6	15	
		Mar. 7	58	
		Mar. 8	56 + subcontractors	
		Mar. 9	70	23
		Mar. 12	82 + subcontractors	
Mar. 15, 16, 18, 20, 1991	76	Mar. 13	64	
		Mar. 14	70	
		Mar. 15	91	15
		Mar. 18	68	

TABLE 3

Payroll Week	Period End Date	Number of Workers Reported in the Payroll Report	Number of Workers Per Diaries	Number of Workers Not Reported in the Payroll Report	
April 27, 1990		14	April 11	14	
			April 12	14	
			April 13	14	
			April 16	14	
			April 17	14	
			April 18	14	
			April 19	14	
			April 20	14	
			April 23	12	
			April 24	14	
			April 25	28	
			April 26	30	16
			April 27	29	
			April 11, 1990		14
May 1	14				
May 2	14				
May 3	14				
May 4	13				
May 7	11				
May 8	16				
May 9	29				
May 10	29				
May 11	30	16			
May 14	12				

TABLE 4

Payroll Week	Period End Date	Number of Workers Reported in the Payroll Report	Number of Workers Per Diaries	Number of Workers Not Reported in the Payroll Report	
Mar. 28, 1991		16	Mar. 25	81	
			Mar. 26	82	66
			Mar. 27	82	
			Mar. 28	28	
			Mar. 29	12	

TABLE 5

Payroll Week	Period End Date	Number of Workers Reported in the Payroll Report	Number of Workers Per Diaries	Number of Workers Not Reported in the Payroll Report	
April 5, 1991		34	April 1	25	
			April 2	25	
			April 3	28	
			April 4	27	
			April 5	26	
April 14, 1991		18	April 8	27	
			April 9	27	
			April 10	Stop Work	
			April 11	30	12
			April 12	None	

ULTIMATE FINDINGS OF FACT

1) During all material times, Respondents were farm labor contractors, as defined by ORS 658.405, doing business in the State of Oregon.

2) Between May 16, 1990, and May 16, 1991, Respondents acted as farm labor contractors by employing crews to perform forestation labor on the following contracts within the State of Oregon:

BLM #H 952-C-1-1032 (#1032);

BLM #H 952-C-1-3061 (#3061);

USFS #52-0467-0-01933 (#01933);

BLM #H 110-P-1-5016 (#5016);

USFS #52-05K3-1-06247e (#06247e).

Respondents paid their employees directly on these five forestation contracts.

3) On contract #1032, Respondents twice failed to timely provide the Commissioner of the Bureau of Labor and Industries with certified true copies of payroll records for work done as farm labor contractors. The first payroll records submitted were defective. Re-submitted payroll records did not

accurately report the number of workers on the contract and underreported the number of workers for four of eight payroll periods. The payroll records were not certified.

4) On contract #3061, Respondents twice failed to timely provide the Commissioner with certified true copies of payroll records for work done as farm labor contractors. The first payroll records submitted were defective. Re-submitted payroll records underreported the number of workers for each of six payroll periods. The payroll records were not certified.

5) On contract #01933, Respondents failed to timely provide the Commissioner with certified true copies of payroll records for work done as farm labor contractors. The payroll records submitted underreported the number of workers for each of two payroll periods. The payroll records were not certified.

6) On contract #5016, Respondents failed to timely provide the Commissioner with certified true copies of payroll records for work done as farm

labor contractors. The first payroll records submitted were defective. Re-submitted payroll records under-reported the number of workers for the one payroll period. The payroll records were not certified.

7) On contract #06247e, Respondents failed to timely provide the Commissioner with certified true copies of payroll records for work done as farm labor contractors. The first payroll records submitted were defective. Re-submitted payroll records under-reported the number of workers for each of two payroll periods. The payroll records were not certified.

8) Respondents' reliability and competence make them unfit to act as farm labor contractors.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the persons herein. ORS 648.405 to 658.503.

2) ORS 658.417 provides, in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such

times and shall contain such information as the commissioner, by rule, may prescribe."

OAR 839-15-300 provides, in part:

"(1) Forest Labor Contractors engaged in the forestation or reforestation of lands must, unless otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or contractor's agent pays employees directly.

"(2) The certified true copy of payroll records shall be submitted at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submissions may be made.

"(3) The certified true copy of payroll records may be submitted on Form WH-141. This form is available to any interested person. Any person may copy this form or use a similar form provided such form contains all the elements of Form WH-141."

By failing seven times to provide to the Commissioner a certified true copy of all payroll records for work done as farm labor contractors at least once every 35 days starting from the time work first began on each forestation contract, when they paid employees directly, Respondents violated ORS 658.417(3) and OAR 839-15-300 seven times.

3) ORS 658.420 provides, in part:

"(1) The Commissioner of the Bureau of Labor and Industries shall conduct an investigation of each applicant's character, competence and reliability, and of any

other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor.

"(2) The commissioner shall issue a license within 15 days after the day on which the application therefor was received in the office of the commissioner if the commissioner is satisfied as to the applicant's character, competence and reliability."

OAR 839-15-145 provides in part:

"The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules includes, but is not limited to, consideration of:

"(7) Whether a person has violated any provision of ORS 658.405 to 658.485."

OAR 839-15-520 provides, in part:

"(2) When the applicant for a license *** demonstrates that the applicant's *** character, reliability or competence makes the applicant *** unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the license application be denied ***.

"(3) The following actions of a Farm or Forest Labor Contractor license applicant *** demonstrate that the applicant's *** character, reliability or competence make the applicant *** unfit to act as a Farm Labor Contractor:

"(a) Violations of any section of ORS 658.405 to 658.485;

"(f) Repeated failure to file or furnish all forms and other information required by ORS 658.405 to 658.485 and these rule ***"

Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may deny a license to Respondents to act as farm labor contractors.

OPINION

The Agency proposed to deny farm labor contractor licenses to Respondents because they repeatedly violated ORS 658.417(3), which violations demonstrate that their character, competence, or reliability make them unfit to act as farm labor contractors. See ORS 658.420; OAR 839-15-145(7); and 839-15-520(2), and (3)(a) and (f).

ORS 658.420 provides that the Commissioner shall conduct an investigation of each applicant's character, competence, and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor. The Commissioner shall issue a license if she is satisfied as to the applicant's character, competence, and reliability.

In making that determination, the Commissioner considers whether a person has violated any provision of ORS 658.405 to 658.485. OAR 839-15-145(7), 839-15-520(3)(a). Here, the stipulated evidence showed that, on five contracts, Respondents failed to submit a single timely certified payroll record; they submitted uncertified

payroll records late seven times. On four of the contracts the first submission was defective, and on every submission Respondents underreported the true number of their employees.

Based on this evidence, the Forum has found that Respondents violated ORS 658.417(3) seven times. Such actions by a license applicant demonstrate that the applicant's character, reliability, or competence make the applicant unfit to act as a farm labor contractor. OAR 839-15-520(3)(a) and (3)(f). Therefore, the Forum is not satisfied as to Respondents' competence and reliability, and finds them unfit to act as farm labor contractors. Denial of Respondents' farm labor contractor license applications is appropriate, and the Order below is a proper disposition of their applications.

Pursuant to ORS 658.415(1)(c), OAR 839-15-140(1)(c), and 839-15-520(4), where an application for a farm labor contractor license has been denied, the Commissioner will not issue the applicant a license for a period of three years from the date of the denial.

ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, the Commissioner of the Bureau of Labor and Industries hereby denies JOHN MALLON and BETTY MALLON, dba FOREST IMPROVEMENT, INC., each a license to act as a farm labor contractor, effective on the date of the Final Order. JOHN MALLON and BETTY MALLON are prevented from reapplying for a license for a period of three years from the date of denial, in accordance with ORS 658.415(1)(c) and OAR 839-15-520(4).

In the Matter of S.B.I., INC., Respondent.

Case Number 64-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 10, 1993.

SYNOPSIS

Respondent, a corporation that defaulted by failing to appear at hearing represented by an attorney, willfully failed to pay Claimant all wages due upon termination, in violation ORS 652.140(2). The Commissioner ordered Respondent to pay the wages owed and civil penalty wages, pursuant to ORS 652.150, but allowed Respondent to set off \$20.00 based on Claimant's acknowledged unpaid loan from Respondent in that amount. ORS 652.140(2), 652.150, 652.610(4).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 8, 1993, at the Bureau of Labor and Industries office at 3865 Wolverine Street NE, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Moises Hernandez (Claimant) was present throughout the hearing. S.B.I., Inc. (Respondent), after being duly notified of the time and

place of this hearing, failed to appear represented by counsel.

The Agency called the following witnesses (in the order of appearance): Moises Hernandez, Claimant; Terry Statler, Contracting Officer's Representative, US Forest Service; Shirley Morales, Claimant's domestic partner, and Raul Pena, Compliance Specialist, Wage and Hour Division, the Agency.

Juan Mendoza, appointed by the Forum and under proper affirmation, acted as an interpreter for Claimant. Vasilie Shimanovski, an employee of the Agency appointed by the Forum and under proper affirmation, acted as an interpreter for Simon Burkoff, Respondent's president.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On August 18, 1992, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him. Claimant cannot speak, read, or write English, and he cannot read or write Spanish. At his direction, Claimant's domestic partner, Shirley Morales, filled out and signed Claimant's wage claim and other forms for him. Claimant gave Ms. Morales the information provided on the forms.

2) At the same time that he filed the wage claim, Claimant assigned to

the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On December 29, 1992, the Agency served on Simon Burkoff (Respondent's registered agent, owner, and president) an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Respondent owed Claimant a total of \$1,353.60 in wages and \$2,388.60 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

4) On January 15, 1993, Respondent, through its attorney Mandi Tribble, filed an answer to the Order of Determination. Respondent's answer contained a request for a contested case hearing. Respondent denied that it owed Claimant any unpaid wages, and set forth four affirmative defenses.

5) On April 9, 1993, attorney Mandi Tribble withdrew from representing "Simon Burkoff/S.B.I." because Mr. Burkoff had failed to contact her office as requested. Ms. Tribble advised Mr. Burkoff that "all corporations must be represented by an attorney, and that any attorney appearing at the hearing on your behalf must be a member of the Oregon State Bar." Ms. Tribble gave Mr. Burkoff the telephone number for the Oregon State Bar Lawyer Referral Service.

6) On May 26, 1993, the Agency sent the Hearings Unit a request for a hearing date. On June 2, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the

Claimant indicating that the hearing would be held on September 8, 1993, at the Agency's office in Salem. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's temporary contested case hearings rules, OAR 839-50-000 to 839-50-420. The rules became permanent on September 3, 1993.

7) On August 12, 1993, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by August 30, 1993. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency submitted a timely summary. Respondent failed to submit one.

8) On August 13, 1993, attorney Mandi Tribble notified the Hearings Unit by telephone and by letter that she no longer represented Respondent.

9) On August 16, 1993, the Hearings Referee sent a letter to Mr. Burkoff advising him that Respondent needed to be represented by an attorney and attached a copy of the discovery order dated August 12.

10) On August 25, 1993, the Agency moved for a discovery order, with an attached exhibit showing the

Agency's attempts to obtain Respondent's records through an informal exchange of information. On August 26, the Hearings Referee granted the Agency's motion with the provision that Respondent could file objections to the motion by September 3. The Hearings Referee issued a discovery order directing Respondent to provide, among other things, "all records showing hours worked by [Claimant] in May and June, 1992," and copies of all checks paid out to Claimant by S.B.I., Inc. in 1992. Respondent was ordered to provide those records by September 3, 1993. The Hearings Referee reminded Mr. Burkoff that Respondent needed to be represented by an attorney. Respondent did not provide any records to the Agency or to the Hearings Unit before the hearing.

11) On September 2, 1993, the Hearings Unit received from Mr. Burkoff a request for a postponement of the hearing. He wrote, "To date, due to unforeseen financial difficulties, we have not been able to secure an attorney, after our normal attorney withdrew from the case. We, therefore, request a postponement of the hearing until we have secured proper legal representation." On September 2, the Forum denied Mr. Burkoff's request. The Hearings Referee found that Respondent failed to show good cause, pursuant to OAR 839-50-150(5), because the request should have been made by an attorney, the request was untimely (in that Mr. Burkoff had had nearly five months to hire an attorney after Ms. Tribble withdrew), and Mr. Burkoff had previously failed to notify the Agency or the Hearings Unit of Respondent's failure to get an attorney,

despite two letters from the Hearings Referee concerning that requirement and two discovery orders to Respondent. The Hearings Referee found that it was unacceptable to postpone a hearing to some indefinite date when Mr. Burkoff decided Respondent was financially able to retain an attorney. The referee advised Mr. Burkoff that the hearing would begin as scheduled on September 8 and that if Respondent was not represented by counsel at the hearing, then it would be found in default.

12) At the time and place set forth in the Notice of Hearing for this matter, the Respondent did not appear represented by an attorney. Mr. Burkoff requested a postponement of the hearing in order to retain an attorney. He asserted that he fired his first attorney (who he later said was Mandi Tribble) because "he" (the attorney) did not do anything. Mr. Burkoff claimed he did not receive Tribble's letter in which she withdrew from representing Respondent. Mr. Burkoff never contacted another lawyer after that. He next claimed that he left Oregon in April or May 1993, had been in Alaska fishing for about four months, and had returned to Oregon on around August 29, 1993. He said his sister had been receiving his mail while he was in Alaska, and she had not been forwarding it to him because he could not get mail out on the ocean. He said he did not receive the Notice of Hearing until he returned to Oregon. The Agency argued that the Forum had sent the notice to the corporation's registered agent, and the registered agent chose not to keep himself informed (by not receiving his mail). The Agency stated it

had four witnesses ready to testify, and it was prepared to go ahead. The Hearings Referee denied Mr. Burkoff's request for a postponement, because (1) it had been five months since Respondent's attorney withdrew; (2) before Mr. Burkoff left for Alaska he knew this case would be set for hearing and that the corporation needed an attorney; (3) it was his responsibility to make sure Respondent was represented by an attorney; and (4) he failed to inform the Agency or the Hearings Unit until three working days before hearing that Respondent had no attorney. Pursuant to OAR 839-50-330 (1)(b), the Hearings Referee found Respondent in default as to the Order of Determination and proceeded with the hearing. Soon after the hearing started, Mr. Burkoff left the hearing to attend to other business.

13) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

14) On September 20, 1993, the Agency moved to reopen the record to submit newly discovered evidence regarding the issue of Mr. Burkoff's credibility and when he received the Notice of Hearing in this matter. Respondent did not respond to the motion and the Hearings Referee granted it. The Agency submitted two affidavits, which the Hearings Referee received into the record. In the first affidavit, Orrin Corak, an employee of the US Forest Service (USFS) in the Ochoco National Forest, swore that:

"On approximately June 24, 1992, as part of my job duties, I met in

my Prineville office with a person representing Trails West, Inc. who identified himself as 'Sam Berkot.' This man was dark-haired, husky, spoke with a Russian accent, and had a young boy with him. On September 9, I was FAX'd a picture of Simon Burkoff by Raul Pena of the Oregon Bureau of Labor and Industries. A copy of the FAX that was sent to me is attached to this affidavit. The individual shown in the picture appears to be the individual I spoke with on approximately June 24, 1993. At the time of our meeting he was wearing a ball cap."

In the second affidavit, William Foster, an employee of the Oregon State Department of Forestry, swore that:

"On or about August 24, 1993 I met with a representative of Trails West in Elkton, Oregon at the Department's Elkton nursery. The representative of Trails West who met with me identified himself as 'Sam.' On September 9, I was FAX'd a picture of Simon Burkoff by Raul Pena of the Oregon Bureau of Labor and Industries. A copy of the FAX that was sent to me is attached to this affidavit. The individual shown in the picture appears to be the individual I spoke with on or about August 24, 1993 in Elkton."

Attached to both affidavits were pictures of Simon Burkoff. Mr. Burkoff is dark haired and husky, and speaks English with a Russian accent.

15) On October 29, 1993, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all

persons listed on the Certificate of Mailing, including the Respondent. Participants had 10 days to file exceptions to the Proposed Order. No exceptions were received by the Hearings Unit.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent was an Oregon corporation engaged in the forestation or reforestation business. Respondent employed one or more persons in the State of Oregon. Simon Burkoff was its sole stockholder, registered agent, and president. The corporation was involuntarily dissolved by the Corporation Division on February 26, 1993.

2) From January 1992 to on or about June 11, 1992, Respondent employed Claimant. He was hired for an indefinite period.

3) From May 15 to 17, 1992, Claimant worked for 24 hours on a forest fire in a national forest at a minimum rate of \$6.30 per hour. At that rate of pay, Claimant earned \$151.20 (\$6.30 per hour times 24 hours). Simon Burkoff was Claimant's crew boss. Respondent has not paid Claimant for that work.

4) From May 28 to June 5, 1992, Claimant worked for nine days performing tree thinning in the Siuslaw National Forest, Mapleton Ranger District, at a rate of \$100 per acre. Claimant finished one acre per day. At that rate of pay, Claimant earned \$900 (\$100 per acre times nine acres). Respondent has not paid Claimant for that work. Respondent loaned Claimant \$20.00, which Claimant never paid back.

5) From June 6 to 8, 1993, Claimant worked for 36 hours on the Blue Kettle forest fire near La Grande at a minimum rate of \$6.30 per hour. At that rate of pay, Claimant earned \$226.80 (\$6.30 per hour times 36 hours). Respondent has not paid Claimant for that work.

6) On June 10 and 11, 1993, Claimant worked for at least 12 hours on a sage fire near Sisters at a minimum rate of \$6.30 per hour. At that rate of pay, Claimant earned \$75.60 (\$6.30 per hour times 12 hours). Respondent has not paid Claimant for that work.

7) Claimant did not keep written records of his hours worked, but gave the information described in Findings of Fact 3 through 6 to the Agency in August 1992 when these events were fresh in his memory.

8) When Claimant asked for his pay for the jobs described in these findings, Mr. Burkoff said that he had lost money on all of those jobs and he did not pay anyone.

9) In the last six years, all firefighting was performed through the State Department of Forestry. The state minimum wage for firefighting was \$6.30 per hour. On the firefighting jobs, Claimant was not sure what his rate of pay was supposed to be. Pena calculated Claimant's wages due using the state minimum wage for firefighting.

10) Claimant quit on around June 11, 1992.

11) Civil penalty wages were computed on the Agency Wage Transcription and Computation Sheet as follows: \$1,353.60 (the total wages earned)

divided by 17 (the number of days worked during the claim period) equals \$79.62 (the average daily rate of pay). This figure of \$79.62 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$2,388.60. This figure is set forth in the Order of Determination. Pursuant to Agency policy, the civil penalty amount is rounded to the nearest dollar.

12) The testimony of Claimant and the other Agency witnesses was credible. At hearing, Claimant's memory was weak, but on important points his statements were supported by documentary records that were made at a time when his memory was fresher.

13) The testimony of Simon Burkoff was unreliable. To begin with, it lacked internal consistency. For example, in his motion for a postponement, he wrote that "our normal attorney withdrew from the case." However, at hearing he insisted that he had fired the attorney because "he" was not doing anything on the case. In addition, the affidavits submitted after the hearing cast serious doubt on Burkoff's testimony that he was in Alaska from May through August 29. Further, his excuse for not having mail sent to him in Alaska (he could not get mail delivered out on the ocean) stretches credibility because of the improbability that he never returned to land for the entire four months he was fishing. Based upon this evaluation and the Hearings Referee's close observation of his demeanor at hearing, the Forum finds that Simon Burkoff's testimony was not credible. Much of his testimony was not believed even when it was not contradicted by other evidence.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an Oregon corporation and employed one or more persons in the State of Oregon.

2) Respondent employed Claimant from January to June 11, 1992.

3) The state minimum wage for firefighting during all times material was \$6.30 per hour.

4) During the period May 28 to June 5, 1992, Respondent and Claimant had an oral agreement whereby Claimant's rate of pay was \$100 per acre.

5) Claimant quit employment with Respondent without notice on June 11, 1992.

6) During the period May 15 to June 11, 1992, Claimant worked 17 days and earned \$1,353.60. Respondent failed to pay Claimant \$1,353.60 in earned, due, and payable wages.

7) Respondent willfully failed to pay Claimant all wages within five days, excluding Saturdays, Sundays, and holidays, after he quit, and more than 30 days have elapsed from the date his wages were due.

8) Civil penalty wages for Claimant, computed in accordance with Agency policy and ORS 652.150, equal \$2,389.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the

Respondent herein. ORS 652.310 to 652.405.

3) The actions or inactions of Simon Burkoff, an agent or employee of Respondent, are properly imputed to Respondent.

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit employment without notice.

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no

case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

OPINION**Default**

The Respondent failed to appear at the hearing, and thus defaulted to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. See *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); see also OAR 839-30-185.

Where a respondent submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when

making findings of fact. Where a respondent fails to appear at hearing, the Forum may review the answer to determine whether the respondent has set forth any evidence or defense to the charges. *In the Matter of Richard Niquette*, 5 BOLI 53, 60 (1986); *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987). In a default situation where the respondent's total contribution to the record is his or her request for a hearing and an answer which contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Mongeon, supra*.

Wages Due

The Agency has established a prima facie case. A preponderance of the credible evidence on the whole record showed that Respondent employed Claimant during the period of the wage claim and willfully failed to pay him all wages, earned and payable, when due. That evidence, which established that Respondent owes Claimant \$1,353.60, was credible, persuasive, and the best evidence available, given Respondent's failure to appear at the hearing. Having considered all the evidence on the record, the prima facie case has not been contradicted or overcome.

The record establishes that Respondent violated ORS 652.140 as alleged. Two of Respondent's affirmative defenses allege that Claimant took a "draw" from Respondent that exceeded what Respondent owed Claimant and that Claimant owed Respondent \$65.16. Since it was in default, Respondent presented no evidence to

support these counterclaims. However, Claimant acknowledged borrowing \$20.00 from Respondent and that he had not repaid that loan. Accordingly, the Forum will allow a setoff against wages owed in the amount of \$20.00. ORS 652.610(4).

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to its employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent knew it was not paying Claimant wages for his work and intentionally failed to pay any wages. Evidence showed that Respondent acted voluntarily, and was a free agent. Respondent must be deemed to have acted willfully under this test, and thus is liable for penalty wages under ORS 652.150.

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Wayton & Willes, Inc.*, 7 BOLI 68, 72 (1988).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders S.B.I., INC. to

deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR MOISES HERNANDEZ in the amount of THREE THOUSAND SEVEN HUNDRED TWENTY-TWO DOLLARS AND SIXTY CENTS (\$3,722.60), representing \$1,333.60 in gross earned, unpaid, due, and payable wages; and \$2,389 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$1,333.60 from July 1, 1992, until paid and nine percent interest per year on the sum of \$2,389 from August 1, 1992, until paid.

**In the Matter of
Thomas J. Jannarone, dba
TOM'S TV & VCR REPAIR,
Respondent.**

Case Number 10-94
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 10, 1993.

SYNOPSIS

Respondent advertised and performed work as a service dealer on consumer electronic entertainment equipment without a service dealer license, as required by ORS 702.090.

FINDINGS OF FACT – PROCEDURAL

The Commissioner held that Respondent violated ORS 702.050(1) and (3), and imposed a civil penalty of \$1500 pursuant to ORS 702.995. ORS 702.050(1) and (3), 702.090, 702.995 (1), and OAR 839-35-285.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 14, 1993, in Suite 220 of the State Office Building, 165 East Seventh Avenue, Eugene, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Susan Courser, an employee of the Agency. Thomas Jannarone (Respondent), after being duly notified of the time and place of this hearing, failed to appear in person or through a representative.

The Agency called the following witnesses: Frances O'Halloran, Administrative Specialist with the Licensing Unit of the Agency (by telephone); Dr. Vance Culpepper, Umpqua Free Press (by telephone); John Lessel, Compliance Specialist Supervisor, Wage and Hour Division of the Agency (by telephone); and June Miller, Compliance Specialist, Wage and Hour Division of the Agency.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

1) On June 24, 1993, the Agency issued a Notice of Intent to Assess Civil Penalties (Notice of Intent) to Respondent. The Notice of Intent cited the following bases for the civil penalties: (1) indicating or representing that a person was in the business of repairing consumer electronic entertainment equipment where a person does not possess the license required by ORS 702.090, in violation of ORS 702.050(3); and (2) servicing any type of consumer electronic entertainment equipment where the service dealer has not obtained a license provided for by ORS 702.090 for that type of consumer electronic entertainment equipment, in violation of ORS 702.050(1). Civil penalties of \$1,500 were assessed pursuant to OAR 839-35-285.

2) On July 8, 1993, the Notice of Intent was personally served on Respondent.

3) By letter dated July 26, 1993, Respondent filed an answer and a request for a contested case hearing in this matter. Respondent's answer stated that an advertisement run in the Umpqua Free Press was never proofed by Respondent, and it was not intended to read "repair." Respondent also asserted that he could legally repair commercial equipment, auto audio equipment, and anything he owned at the time he repaired it.

4) On August 9, 1993, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondent and the Agency indicating the time and place of the hearing. Together with the Notice of Hearing, the

Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's temporary contested case hearings rules, OAR 839-50-000 to 839-50-420. On September 3, 1993, those rules became permanent.

5) On August 30, 1993, the Hearings Referee issued a Discovery Order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by September 8, 1993. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency submitted a timely summary. Respondent failed to submit one.

6) On August 31, 1993, the Agency moved for a Discovery Order, with an attached exhibit showing the Agency's attempt to obtain Respondent's records through an informal exchange of information. After giving Respondent an opportunity to respond to the motion, on September 13 the Hearings Referee granted the Agency's motion and issued a Discovery Order directing Respondent to provide all documents, to the extent they existed, that were listed in the Agency's motion. Respondent did not provide any records before the hearing. On October 8, 1993, the Hearings Unit received from Respondent a letter and the unopened envelope with the

ruling of September 13; Respondent advised the Hearings Unit that he did not think he could legally open the letter because it was addressed to him and his business name, and he said he no longer did business under that name.

7) On September 13, 1993, during a prehearing conference by telephone with Respondent and the Agency, Respondent stated he had no records to provide to the Agency, and he requested that the hearing be moved from Eugene to Roseburg. The Hearings Referee denied that motion as untimely. OAR 839-50-150(2), 839-50-090. Respondent then stated that he would not attend the hearing, which was scheduled to begin the next day. The Hearings Referee advised Respondent that if he failed to appear, he would be in default.

8) At the time and place set forth in the Notice of Hearing for this matter, the Respondent did not appear or contact the Agency or the Hearings Unit. Pursuant to OAR 839-50-330, the Hearings Referee found Respondent in default as to the Notice of Intent, and proceeded with the hearing.

9) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

10) On October 29, 1993, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the Certificate of Mailing, including the Respondent. Participants had 10 days to file exceptions to the Proposed Order. No

exceptions were received by the Hearings Unit.

FINDINGS OF FACT – THE MERITS

1) On around May 28, 1992, Respondent ran the following advertisement in the Umpqua Free Press:

"TOM'S TV & VCR Repair & Sales, Country Village Mall, 1030 Old Pacific Hwy. One day service on VCR's that need cleaning & minor repairs. All makes & models. Repairs guaranteed. Free Estimates. Same Day VCR Cleaning. All makes and models. Used TV's \$50-\$100. All repairs warranted [sic]."

2) On around July 21, 1992, the Agency received a complaint from a consumer electronic entertainment equipment service dealer that Respondent was operating an unlicensed television (TV) and video cassette recorder (VCR) repair business. The service dealer had received a complaint from a customer about repair service provided by Respondent. On July 21, the Agency sent Respondent a letter notifying him that he had to obtain a proper license before he could advertise or operate a consumer electronic entertainment equipment service business. The Agency advised Respondent about possible civil penalties for unlicensed activities and provided him with license application materials. The Agency advised Respondent that if he did not respond by August 11, 1992, the matter would be referred for investigation and enforcement.

3) Respondent called the Agency and said he had been operating for years, but was not aware of Oregon's

licensing requirements because he was from another state.

4) On September 28, 1992, the Licensing Unit of the Agency referred this matter to the Compliance Section of the Wage and Hour Division.

5) On November 5, 1992, June Miller, a Compliance Specialist with the Agency, visited Respondent's shop. The shop had a sign outside saying, "TOM'S TV AND VCR REPAIR FREE ESTIMATES." A second, small wooden sign hung inside the window, saying "Tom's TV." Another sign next to the building read, "TOWN TALK 24 Hour Answering Service Secretarial Service 863-6400." Around the entryway of the shop, TVs, VCRs, and microwaves were "stacked" with small yellow tags on them. Farther inside, more TVs and VCRs were stacked with yellow tags on them. Miller spoke with Ms. Tucker, who ran the answering service. Tucker said she took in equipment for Respondent. Miller left a license application packet with Tucker for Respondent. Later that day, Respondent called Miller by phone and they discussed licensing requirements and the license examination.

6) Also on November 5, Miller talked with Jim Burke, the landlord of the building housing Tom's TV. Burke was aware that the tenants were repairing TVs, but he did not know who the TVs belonged to.

7) On November 6, Miller sent Respondent a letter, in which she advised him of the licensing requirements of ORS chapter 702 and the possible civil penalties for unlicensed activities, and discussed arrangements for him to take the technician's test. Miller

required that Respondent send in his license application by November 16.

8) Later in the investigation, Respondent alleged that he did not do any consumer electronic entertainment equipment repairs, but that he did only commercial equipment repairs. Respondent refused to tell Miller to whom the pieces of equipment belonged. Miller could find no video stores in the area that took their equipment to Respondent for repair.

9) On November 23, 1992, the Agency received Respondent's application for a technician license. On December 28, 1992, Respondent took an exam necessary to obtain a technician license. On January 8, 1993, the Agency notified Respondent that he had failed the exam and could retake it after January 11, 1993. On January 25, 1993, Respondent reviewed his test.

10) On June 16, 1993, John Lessel, a Compliance Specialist Supervisor with the Agency, called Respondent at telephone number 863-6400, and asked for "Tom." After Respondent said, "I'm Tom," Lessel identified himself as a potential customer with a problem with his VCR or TV. Respondent asked Lessel about the model of TV and VCR he had, and told Lessel to bring his VCR in for a repair estimate. He said a cleaning would be \$35.00, and if Lessel brought the equipment in by 10 a.m., he could pick it up that evening.

ULTIMATE FINDINGS OF FACT

1) During all times material, Respondent was not licensed in Oregon as a service dealer or technician to service consumer electronic entertain-

ment equipment, as those terms are defined in ORS 702.010.

2) Respondent serviced two types of consumer electronic entertainment equipment, TVs and VCRs.

3) By advertising his TV and VCR repair services in a local newspaper, by posting two signs at his place of business indicating he repaired TVs and VCRs, and by telling a potential customer that he serviced TVs and VCRs, Respondent indicated or represented that he was in the business of repairing consumer electronic entertainment equipment.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 702.010(1), 702.160.

2) ORS 702.010 provides in part:

"* * *

"(2) 'Consumer electronic entertainment equipment' means equipment normally used for the reception, production, reproduction and processing of audio, video and other electronic data for the consumer, but not including coin-operated consumer electronic entertainment equipment.

"* * *

"(4) 'Service' means the installation, testing, repair, maintenance and modification of consumer electronic entertainment equipment but does not include testing of television and radio tubes by owners or sellers of such tubes in retail establishments.

"(5) 'Service dealer' means any person who provides service and makes a charge therefor."

During all times material, Respondent was a service dealer who serviced consumer electronic entertainment equipment.

3) ORS 702.050 provides in part:

"(1) No service dealer shall service any type of consumer electronic entertainment equipment unless the service dealer has obtained a license provided for by ORS 702.090(1) for that type of consumer electronic entertainment equipment.

"* * *

"(3) Unless a person is licensed under the provisions of ORS 702.090 or is exempt under ORS 702.020, a person may not indicate or tend to indicate in any manner or represent that the person is in the business of repairing consumer electronic entertainment equipment."

Respondent violated ORS 702.050(1) by servicing two types of consumer electronic entertainment equipment without a license. Respondent violated ORS 702.050(3) by indicating or representing that he was in the business of repairing consumer electronic entertainment equipment, when he was neither licensed under ORS 702.090 nor exempt under ORS 702.020.

4) ORS 702.995(1) provides:

"In addition to any other liability or penalty provided by law, a person who violates ORS 702.050 is subject to payment of a civil penalty to the Bureau of Labor and Industries

in an amount of not more than \$1,000 for each offense."

OAR 839-35-285 provides in part:

"(2) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed:

"(a) The history of the person or service dealer in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude and seriousness of the violation; and

"(d) Whether the person or service dealer knew or should have known of the violation.

"* * *

"(7) When the Commissioner determines to impose a civil penalty for servicing any type of consumer electronic entertainment equipment without a license for that type of equipment, or for indicating or representing that the person, who is not licensed under ORS 702.090 or exempt under ORS 702.020, is in the business of servicing consumer electronic entertainment equipment, the minimum penalty shall be as follows:

"(a) \$500 for the first offense[.]"

Under the facts and circumstances of this record, and in accordance with ORS 702.995 and OAR 839-35-285, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for each violation found herein. The assessment of the

civil penalty specified in the Order below is an appropriate exercise of that authority.

OPINION

Respondent failed to appear at the hearing, and thus defaulted to the charges set forth in the Notice of Intent to Assess Civil Penalties. Respondent's only contribution to the record was his answer and a request for a hearing. In default cases, the task of this Forum is to determine if a prima facie case supporting the Agency's notice has been made on the record. ORS 183.415(6); OAR 839-50-330.

Where a respondent submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. *In the Matter of Richard Niquette*, 5 BOLI 53, 60 (1986); *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987). In a default situation, where the respondent's total contribution to the record is his or her request for a hearing and an answer that contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome whenever they are controverted by other credible evidence on the record. *Mongeon, supra*.

Based on the credible evidence produced at the hearing, the Forum finds that the Agency has established a prima facie case. That case has not been overcome by Respondent's unsupported assertions in his answer. The Forum is convinced that Respondent operated a business servicing consumer electronic entertainment equipment, and advertised that business orally and with signs and printed

advertising, in violation of ORS 702.050(1) and (3).

Respondent's history of taking all necessary measures to prevent or correct violations reveals that, after the Agency advised him in July 1992 of the licensing requirements for service dealers, he was still operating without a license in November 1992. A contact by the Agency in June 1993 confirmed that he continued to operate after he clearly knew the licensing requirements and after he had attempted and failed a technician's exam. These facts seriously aggravate the violation of ORS 702.050(1), which prohibits a service dealer from servicing any consumer electronic entertainment equipment without a license. His continued representations that he would service TVs and VCRs in June 1993 also aggravate the violation of ORS 702.050(3), which prohibits unlicensed persons from representing that they are in the business of servicing consumer electronic entertainment equipment.

OAR 839-35-285(7) provides that the minimum penalty for these two violations is \$500 each. The Agency sought a \$500 penalty for the violation of ORS 702.050(3) and a \$1,000 penalty for the violation of ORS 702.050(1). Based on this record, imposition of those penalties is entirely appropriate.

ORDER

NOW, THEREFORE, as authorized by ORS 702.995, THOMAS J. JANNARONE is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, a certified check

payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500), plus any interest thereon, which accrues at the annual rate of nine percent between a date 10 days after the issuance of this Order and the date Respondent complies with this Order. This assessment is the sum of the following civil penalties against Respondent: \$1,000 for one violation of ORS 702.050(1) and \$500 for one violation of ORS 702.050(3).

into by it in its capacity as a farm labor contractor by failing to pay workers' compensation insurance premiums, in violation of ORS 658.440(1)(d), the Commissioner assessed a \$3,000 civil penalty against each Respondent, pursuant to ORS 658.453(1), and denied a farm labor contractor license to each Respondent, pursuant to ORS 658.420. ORS 658.410(1), 658.415(1), 658.417(1), 658.420, 658.440(1)(d), 658.440(3)(a), 658.453(1), OAR 839-15-145, 839-15-508, 839-15-512, and 839-15-520.

**In the Matter of
ALEJANDRO LUMBRERAS
and Crystal Pine, Inc.,
Respondents.**

Case Number 02-94
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 14, 1993.

SYNOPSIS

Where two farm labor contractors, an individual and his corporation, willfully made a misrepresentation and false statement on their license application regarding the fact that the corporation was a defendant in a court action, in violation of ORS 658.440(3)(a); and the individual acted as farm labor contractor without a license, in violation of ORS 658.410(1), 658.415(1), and 658.417(1); and the corporation breached a valid contract entered

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was scheduled for October 12, 1993. On October 11, 1993, Respondents' attorney advised the Hearings Referee that Respondents waived their right to a hearing, and the Agency and Respondents agreed to submit the case for decision based on documents previously submitted for the record. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Alejandro Lumbreras (Respondent Lumbreras) and Crystal Pine, Inc. (Respondent Crystal Pine) were represented by Paul A. Dakopolos, Attorney at Law.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate

Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On May 12, 1993, the Agency issued a "Notice of Proposed Denial of Farm Labor Contractor License Application and to Assess Civil Penalties" (Notice of Intent) to Respondents. The notice informed Respondents that the Agency: (1) intended to deny Respondents' application for a farm labor contractor's license, pursuant to ORS 658.420(1), and (2) intended to assess civil penalties against them in the amount of \$6,000, pursuant to ORS 658.453. The notice cited the following bases for the Agency's intended actions: (1) making misrepresentations or false statements, or willfully concealing information on the license application; (2) failure to pay workers' compensation insurance premium payments when due; and (3) acting as a farm labor contractor without a valid license issued by the Commissioner.

2) The Notice of Intent was served on Respondents on May 13, 1993.

3) On July 7, 1993, the Agency received Respondents' answer to the Notice of Intent. In their answer, Respondents denied the Agency's allegations of violations. They requested a hearing on the Agency's intended action.

4) On July 8, 1993, the Agency requested a hearing from the Hearings Unit.

5) On July 23, 1993, the Hearings Unit issued to Respondents and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated

Hearings Referee. With the hearing notice, the Hearings Unit sent to Respondent a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's temporary administrative rules regarding the contested case process – OAR 839-50-000 to 839-50-420. The rules became permanent on September 3, 1993.

6) On July 22, 1993, the Agency filed a motion to amend its Notice of Intent to make a correction and add a new allegation as grounds for the proposed denial of Respondents' license. The Agency alleged that Respondents had an unsatisfied circuit court judgment, which demonstrated Respondents' character, competence, and reliability made them unfit to act as farm labor contractors. Following an extension of time to respond to the motion, Respondents filed no response, and on August 24 the Hearings Referee granted the motion.

7) On September 15, 1993, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by October 4, 1993. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency and Respondents each submitted a timely summary.

8) On September 20, 1993, the Agency requested an extension of time to file a motion for partial summary judgment, pursuant to OAR 839-50-150(4). The Hearings Referee granted that extension of time.

9) On September 22, 1993, the Agency filed a motion for partial summary judgment. Respondents filed no response, and on October 5, 1993, the Hearings Referee granted the motion. On October 6, 1993, Respondents requested reconsideration of the motion for summary judgment concerning allegation number 3. The Agency responded, and on October 11, the Hearings Referee denied the motion to reconsider.

10) On October 11, 1993, by conference call with the Hearings Referee and the participants, Respondents' attorney advised the Forum that Respondents waived their right to a hearing and wished to present no evidence regarding mitigation for the record. The Agency's Case Presenter said the Agency had no need to present additional evidence of aggravating circumstances beyond what was already in the record. The participants agreed there was no need to hold a hearing, and the Hearings Referee could prepare a Proposed Order based upon the documentary evidence already in the record. Accordingly, the Hearings Referee canceled the hearing scheduled to begin on October 12, 1993.

11) On November 10, 1993, the Hearings Unit issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed 10 days for filing

exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent Lumbreras, a natural person, owned and operated a corporation, Respondent Crystal Pine, which recruited, solicited, supplied, or employed workers in Oregon to perform labor for another in the forestation or reforestation of lands. Respondent Crystal Pine was incorporated on June 9, 1988. Respondent Lumbreras was its president, secretary, and registered agent, and he owned 100 percent of the corporation.

2) Respondents were previously licensed as farm labor contractors. Their licenses expired on June 30, 1991. They submitted a new license application (for forestation or reforestation of lands) on February 25, 1993. The application was sworn to on oath by Respondent Lumbreras. Respondents were issued a temporary permit on March 25, 1993. The permit expired on May 24, 1993.

3) On the license application, in response to question number 22, "Are you a defendant in any court action or proceedings?" Respondents checked the box "no."

4) The information sought by question 22 on the application is substantive and influential in the Commissioner's or her designee's decision to grant or deny a license.

5) On June 25, 1991, Liberty Northwest Insurance Corporation (Liberty) canceled Respondent Crystal Pine's workers' compensation insurance policy, which had been issued for the policy period September 1, 1990,

to September 1, 1991. The reason for the cancellation was nonpayment of premiums.

6) On January 8, 1993, Liberty filed a civil complaint against Respondent Crystal Pine for \$61,714 in unpaid workers' compensation insurance premiums, plus \$6,026 in accrued interest. Respondent Lumbreras was served with that complaint and summons on January 30, 1993. Respondent Crystal Pine did not answer and made no appearance. On March 3, Liberty filed a motion for an order of default and a default judgment against Respondent Crystal Pine. On March 8, 1993, the court issued an order of default and a default judgment against Respondent Crystal Pine for \$61,714, plus accrued interest through March 2 of \$6,878. On April 14, 1993, the same court issued a writ of garnishment against Respondent Crystal Pine to satisfy this judgment. As of August 10, 1993, the judgment was unsatisfied.

7) During the last quarter of 1991 and during 1992, Respondent Lumbreras, Cristobal Lumbreras, and Fremont Forest Systems, Inc. solicited, recruited, and/or employed workers in Oregon to labor in Idaho on a tree planting contract awarded to Progressive Forestry Services, Inc.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, Respondents were acting as farm labor contractors, as defined by ORS 658.405, doing business in the State of Oregon. Respondent Lumbreras was Respondent Crystal Pine's agent or employee. Their farm labor contractor licenses expired on June 30, 1991. The Agency issued Respondents a

temporary permit on March 25, 1993. The permit expired on May 24, 1993. At no time after June 30, 1991, did Respondents have a farm labor contractor license (FLC license).

2) On January 30, 1993, Respondents were served with a complaint and summons in which Respondent Crystal Pine was the named defendant. Respondents submitted a new license application on February 25, 1993. On the license application, in response to question number 22, "Are you a defendant in any court action or proceedings?" Respondents answered "no." Respondents' answer intended to mislead or deceive the Agency. The answer was a false statement and a misrepresentation in the application for a license. It was given knowingly, intentionally, and voluntarily, and therefore willfully.

3) Information about whether a license applicant is a defendant in any court action or proceeding is substantive information that is influential in the Commissioner's decision to grant or deny a license.

4) Respondent Crystal Pine failed to make workers' compensation insurance premium payments when due and, thereby, failed to comply with the terms and provisions of the legal and valid insurance policy contract Respondent Crystal Pine had entered into, in its capacity as a farm labor contractor, with Liberty Northwest Insurance Corporation.

5) Since March 8, 1993, Respondent Crystal Pine has had an unsatisfied judgment against it.

6) During the last quarter of 1991 and for some period in 1992,

Respondent Lumbreras knowingly acted in Oregon as a farm labor contractor with regard to the forestation or reforestation of lands without a valid license issued to him by the Commissioner of the Bureau of Labor and Industries and without the endorsement required by ORS 658.417(1).

7) Respondents' character, reliability, and competence make them unfit to act as farm labor contractors.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the persons herein. ORS 648.405 to 658.503.

2) The actions, inactions, and statements of Respondent Alejandro Lumbreras are properly imputed to Respondent Crystal Pine, Inc.

3) ORS 658.405 provides, in part:

"As used in ORS 658.405 to 658.503 and 658.830 and 658.991(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, and clearing, piling and disposal of brush and slash and other related activities * * *"

OAR 839-15-004 provides, in part:

"As used in these rules, unless the context requires otherwise:

"* * *

"(5) 'Forest Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the forestation or reforestation of lands; or

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the forestation or reforestation of lands; * * *

"* * *

"(7) 'Forestation or reforestation of lands' includes, but is not limited to:

"(a) The planting, transplanting, tubing, precommercial thinning, and thinning of trees and seedlings; * * *

"* * *

"(15) 'Worker' means any individual performing labor in the forestation or reforestation of lands * * *. A 'worker' includes, but is not limited to employees and members of a cooperative corporation."

ORS 658.410(1) provides, in part:

"No person shall act as a farm labor contractor with regard to forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1)."

ORS 658.415(1) provides, in part:

"No person shall act as a farm labor contractor unless the person has first been licensed by the

commissioner pursuant to ORS 658.405 to 658.503 ***"

ORS 658.417 provides, in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands."

Respondents were farm labor contractors. By acting as farm labor contractor with regard to the forestation or reforestation of lands without a valid license issued to him by the Commissioner, Respondent Lumbreras violated ORS 658.410(1), 658.415(1), and 658.417(1).

4) ORS 658.440(1) provides, in part:

"Each person acting as a farm labor contractor shall:

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

Respondent Crystal Pine violated ORS 658.440(1)(d) by failing to pay workers' compensation insurance premiums when due.

5) ORS 658.440(3) provides, in part:

"No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

"(a) Make any misrepresentation, false statement or willful concealment in the application for a license."

In their application for a license, Respondents misrepresented and made a false statement that Respondent Crystal Pine was not a defendant in a court action, in violation of ORS 658.440(3)(a).

6) ORS 658.453(1) provides, in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.503 and 658.830, recruits, solicits, supplies or employs a worker.

"(c) A farm labor contractor who fails to comply with ORS 658.440(1), *** or (3).

"(e) A farm labor contractor who fails to comply with ORS 658.417(1) ***"

OAR 839-15-508 provides, in part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

"(a) Acting as a farm or forest labor contractor without a license in violation of ORS 658.410;

"(f) Failing to comply with contracts or agreements entered into as a contractor in violation of ORS 658.440(1)(d);

"(k) Making misrepresentations, false statements or willful concealments on the license applications in violation of ORS 658.440(2)(a) [sic: 658.440(3)(a)];

"(2) In the case of Forest Labor Contractors, in addition to any other penalties, a civil penalty may be imposed for each of the following violations:

"(a) Failing to obtain a special endorsement from the Bureau to act as a Forest Labor Contractor in violation of ORS 658.417(1).]"

OAR 839-15-512 provides, in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm or forest labor contractor without a valid license, the minimum civil penalty shall be as follows:

"(a) \$500 for the first offense;

"(b) \$1,000 for the second offense;

"(c) \$2,000 for the third and each subsequent offense."

Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Respondents. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

7) ORS 658.420 provides, in part:

"(1) The Commissioner of the Bureau of Labor and Industries shall conduct an investigation of each applicant's character, competence and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor.

"(2) The commissioner shall issue a license within 15 days after the day on which the application therefor was received in the office of the commissioner if the commissioner is satisfied as to the applicant's character, competence and reliability."

OAR 839-15-145 provides, in part:

"The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules includes, but is not limited to, consideration of:

"(2) A person's reliability in adhering to the terms and conditions of any contract or agreement between the person and those with

whom the person conducts business.

* * *

"(4) Whether a person has unsatisfied judgments or felony convictions.

* * *

"(6) Whether a person has paid worker's compensation insurance premium payments when due.

"(7) Whether a person has violated any provision of ORS 658.405 to 658.485."

OAR 839-15-520 provides, in part:

"(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny * * * a license application * * *.

"(a) Making a misrepresentation, false statement or certification or willfully concealing information on the license application;

* * *

"(k) Acting as a farm or forest labor contractor without a license.

"(2) When the applicant for a license * * * demonstrates that the applicant's * * * character, reliability or competence makes the applicant * * * unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the license application be denied * * *.

"(3) The following actions of a Farm or Forest Labor Contractor license applicant * * * or an agent of the license applicant * * * demonstrate that the applicant's * * * character, reliability or competence make the applicant * * * unfit to act

as a Farm or Forest Labor Contractor:

"(a) Violations of any section of ORS 658.405 to 658.485;

* * *

"(h) Willful misrepresentation, false statement or concealment in the application for a license;

* * *

"(j) Failure to make workers' compensation insurance premium payments when due[.]"

Respondent Lumbreras's violations of ORS 658.410(1), 658.415(1), 658.417(1), and 658.440(3)(a), and Respondent Crystal Pine's violations of ORS 658.440(1)(d) and 658.440(3)(a), as well as Respondent Crystal Pine's unsatisfied judgment, demonstrate Respondents' unfitness to act as farm labor contractors. Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may deny licenses to Respondents to act as farm labor contractors.

OPINION

1. Summary Judgment

Pursuant to OAR 839-50-150(4), the Agency filed a motion for summary judgment on its amended Notice of Intent. It asserted that no genuine issue of fact existed and the Agency was entitled to judgment as a matter of law as to the alleged violations. The Hearings Referee granted that motion. Subsection (c) of OAR 839-50-150(4) provides that, where the Hearings Referee grants the motion, the decision shall be set forth in the proposed order. This

order has been issued according to that procedure.

2. Acting as a Farm Labor Contractor Without a License

A person acts as a farm labor contractor if the person "recruits, solicits, supplies or employs" a worker for the purpose of forestation or reforestation of lands. Such activity by a person without an FLC license must take place in Oregon in order for there to be a violation. That the forestation or reforestation work was performed in the State of Idaho is not material. *In the Matter of Leonard Williams*, 8 BOLI 57, 72-74 (1989). ORS 658.405 to 658.503 were enacted to protect Oregon workers from unlawful employer activity in the forestation and reforestation of lands. Allowing unlicensed recruitment in Oregon for work in another state would not accomplish this purpose. To recruit, solicit, or employ workers in Oregon to work in the forestation or reforestation of lands, wherever located, is an activity requiring an FLC license with the appropriate endorsement. *Williams, supra*, at 73.

Here, the preponderance of credible evidence on the whole record shows that Respondent Lumbreras recruited, solicited, or employed workers in Oregon to work in the forestation or reforestation of lands in Idaho. Respondent Lumbreras did not have an FLC license then. Thus, he acted as a farm labor contractor with regard to the forestation or reforestation of lands without a valid license or the endorsement required by ORS 658.417(1), in violation of ORS 658.410(1), 658.415(1), and 658.417(1).

3. Misrepresentation and False Statement on the License Application

The Agency alleged that Respondents made a willful concealment in their license application, in violation of ORS 658.440(3)(a). The statute prohibits a license applicant from making "any misrepresentation, false statement or willful concealment" in the license application.

For purposes of ORS 658.440(3)(a) and OAR 839-15-520(1)(a), a "misrepresentation" is an assertion made by a license applicant that is not in accord with the facts, where the applicant knew or should have known the truth of the matter asserted, and where the assertion is of a substantive fact that is influential in the Commissioner's decision to grant or deny a license. *In the Matter of Raul Mendoza*, 7 BOLI 77, 82 (1988).

A "false statement" means an incorrect statement made with knowledge of the incorrectness or with reckless indifference to the actual facts and with the intention to mislead or deceive. The "false statement" must be about a substantive matter that is influential in the Commissioner's decision to grant or deny a license. *Mendoza, supra*, at 83.

A "willful concealment" means a withholding of something that an applicant knows and which the applicant, in duty, is bound to reveal; said withholding must be done knowingly, intentionally, and with free will. The "willful concealment" must be of a substantive matter that is influential in the Commissioner's decision to grant or deny a license. *Mendoza, supra*, at 83-84.

The Forum will apply the clear and convincing evidence standard to the alleged violation of ORS 658.440(3)(a). In the Matter of Rogelio Loa, 9 BOLI 139, 146 (1990). Under that standard, the Forum finds that Respondents made a misrepresentation and a false statement on the license application. Undisputed evidence showed that Respondents answered "no" to the application question, "Are you a defendant in any court action or proceedings?" That answer was not in accord with the facts, and Respondents knew the truth that Respondent Crystal Pine was a defendant in a court action or proceeding. They had been served 26 days earlier with a complaint and summons naming Respondent Crystal Pine as the defendant in a lawsuit claiming over \$61,000 in unpaid workers' compensation insurance premiums, plus interest. The Forum has found that Respondents' answer was intended to mislead or deceive the Agency and that the information sought by the question on the application was substantive and influential in the Commissioner's or her designee's decision to grant or deny a license. *Mendoza, supra*, at 83.

This is not a "willful concealment" case, because that occurs when an applicant fails to reveal the existence of some fact known to the applicant; i.e., the applicant gives no information, when the applicant has a duty to reveal it. *Mendoza, supra*, at 84. However, because the Agency alleged a violation of ORS 658.440(3)(a), it is not critical that the Agency characterized Respondents' action as a "willful concealment," rather than as a "misrepresentation" or "false statement." The

evidence was clear and convincing that Respondents made a misrepresentation and false statement on the license application, in violation of ORS 658.440(3)(a).

Because a license application may be denied based upon a willful misrepresentation, false statement, or concealment in the license application (OAR 839-15-520(3)(h)), it is necessary for the Forum to decide whether Respondents' false answer was made willfully. "Willfully" means:

"action undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have know[n] the thing to be done or omitted. * * * For purposes of this rule, the farm labor contractor * * * is presumed to know the affairs of their business operations relating to farm or forest labor contracting." OAR 839-15-505(1).

Based on the uncontested evidence, Respondents had actual knowledge of the court action against Respondent Crystal Pine and knowingly gave a false answer on the license application. The Forum finds that Respondents' misrepresentation-false statement was made willfully.

4. Failure to Pay Workers' Compensation Insurance Premiums When Due

The Agency alleged that, in violation of ORS 658.440(1)(d), Respondents failed to pay their workers' compensation insurance premiums when due, in breach of a valid contract entered into between them and Liberty Northwest Insurance Corporation. The uncontroverted evidence shows that

Liberty and Respondent Crystal Pine had a written agreement (signed by Respondent Lumbreras) whereby Respondent Crystal Pine requested that Liberty provide it with workers' compensation insurance; that Liberty provided that insurance; that the reasonable value of that insurance was over \$61,000 plus interest; that Respondent Crystal Pine paid nothing; and that, despite Liberty's demand, Respondent Crystal Pine failed and refused to pay those amounts. Liberty canceled Respondent Crystal Pine's insurance for nonpayment and obtained a judgment against it for \$68,592.93 in unpaid premiums and interest. That judgment is still unpaid.

This evidence shows that Respondent Crystal Pine failed to comply with the terms and provisions of a legal and valid agreement entered into by it in its capacity as a farm labor contractor, in violation of ORS 658.440(1)(d).

5. Civil Penalties

The Agency proposed to assess civil penalties for (1) Respondents' acting as farm labor contractors without licenses, in violation of ORS 658.410, 658.415, and 658.417; (2) Respondents' failure to comply with the terms and provisions of their agreement with Liberty Northwest Insurance Corporation, in violation of ORS 658.440(1)(d); and (3) Respondents' misrepresentation in the application for a license, in violation of ORS 658.440(3)(a).

The Commissioner may assess a civil penalty not to exceed \$2,000 for each of these violations. ORS 658.453(1)(a), (c), and (e); OAR 839-15-508(1)(a), (f), (k), and (2)(a). The Commissioner may consider mitigating and aggravating circumstances

when determining the amount of any penalty to be imposed. OAR 839-15-510(1). It shall be the responsibility of the Respondent to provide the Commissioner with any mitigating evidence. OAR 839-15-510(2). No mitigating evidence was presented.

The Forum finds that Respondent Lumbreras's acting as a farm labor contractor without a license, in violation of ORS 658.410, 658.415, and 658.417, is aggravated by the fact that he was previously licensed, and he either knew or should have known that his unlicensed farm labor contractor activities violated Oregon law. In addition, since licensure is at the heart of the state's effort to regulate farm labor contractors, this Forum always regards acting as a farm labor contractor without a license to be a serious violation.

Respondent Crystal Pine's violation of ORS 658.440(1)(d) for failing to comply with the terms and provisions of its agreement with Liberty is aggravated because Respondent Lumbreras (as Crystal Pine's owner and president) either knew or should have known of the violation. Respondents failed to prevent or correct the violation and have failed to satisfy the judgment that arose from Respondent Crystal Pine's breach of the agreement. This violation, being based as it is on the failure to pay for workers' compensation insurance, is very serious because it resulted in the cancellation of Respondent Crystal Pine's insurance, which the Farm Labor Contractor Law required it to provide. ORS 658.417(4).

Respondents' willful misrepresentation on the license application in violation of ORS 658.440(3)(a) is aggravated by the fact that Respondents

knew the answer they gave on the application was false. In addition, the subject of the court action about which they lied involved Respondent Crystal Pine's failure to pay its workers' compensation insurance premiums. As mentioned above, farm labor contractors are required by law to provide such insurance for their workers. The failure to pay those premiums, and Respondents' subsequent lie to the Agency about the resulting court action, make the violation of ORS 658.440(3)(a) very serious.

The Agency requested a \$2,000 civil penalty for each violation. The Forum assesses Respondent Lumbreras a \$2,000 civil penalty for the violation of ORS 658.410, 658.415, and 658.417; and \$1,000 for the violation of ORS 658.440(3)(a). The Forum assesses Respondent Crystal Pine a \$2,000 civil penalty for the violation of ORS 658.440(1)(d) and \$1,000 for the violation of ORS 658.440(3)(a). Total civil penalties assessed against both Respondents equal \$6,000.

6. License Denial

The Agency proposed to deny farm labor contractor licenses to Respondents because they violated various provisions of ORS 658.405 to 658.503, which violations demonstrated that their character, competence, or reliability make them unfit to act as farm labor contractors. See ORS 658.420; OAR 839-15-145(2), (4), (6), and (7); and 839-15-520(1)(a) and (k), (2), and (3)(a), (h), and (j).

ORS 658.420 provides that the Commissioner shall investigate each applicant's character, competence, and reliability, and any other matter relating to the manner and method by

which the applicant proposes to conduct and has conducted operations as a farm labor contractor. The Commissioner shall issue a license if she is satisfied as to the applicant's character, competence, and reliability.

In making that determination, the Commissioner considers whether a person has violated any provision of ORS 658.405 to 658.485. OAR 839-15-145(7), 839-15-520(3)(a). Here, Respondents have violated several of those provisions. Acting as a farm labor contractor without a license is a violation that the Commissioner considers to be of such magnitude and seriousness that she may propose to deny a license application. OAR 839-15-520(1)(k). Failure to make workers' compensation insurance premium payments when due is a violation that the Commissioner considers to be of such magnitude and seriousness that she shall propose to deny a license application. OAR 839-15-520(2), (3)(j). Similarly, making a willful misrepresentation or false statement on a license application is a violation the Commissioner considers to be of such magnitude and seriousness that she shall propose to deny a license application. OAR 839-15-520(1)(a), (2), (3)(h). In addition, the Commissioner shall consider that Respondent Crystal Pine has an unsatisfied judgment. OAR 839-15-145(4).

Based upon the whole record of this matter, and under the administrative rules applicable here, the Forum is not satisfied as to Respondents' character, competence, and reliability, and finds them unfit to act as farm labor contractors. The Order below is a proper disposition of Respondents'

application for farm labor contractor licenses.

Pursuant to ORS 658.415(1)(c), OAR 839-15-140(3), and 839-15-520(4), where an application for an FLC license has been denied, the Commissioner will not issue the applicant a license for three years from the date of the denial.

ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, the Commissioner of the Bureau of Labor and Industries hereby denies ALEJANDRO LUMBRERAS and CRYSTAL PINE, INC. each a license to act as a farm labor contractor, effective on the date of the Final Order. ALEJANDRO LUMBRERAS and CRYSTAL PINE, INC. are each prevented from reapplying for a license for three years from the date of denial, according to ORS 658.415(1)(c) and OAR 839-15-520(4).

FURTHER, as authorized by ORS 658.453, ALEJANDRO LUMBRERAS is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of THREE THOUSAND DOLLARS (\$3,000), plus any interest thereon, which accrues at the annual rate of nine percent between a date 10 days after the issuance of the Final Order and the date ALEJANDRO LUMBRERAS complies with this Order.

AND FURTHER, CRYSTAL PINE, INC. is hereby ordered to deliver to the Bureau of Labor and Industries (at the

address given above) a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of THREE THOUSAND DOLLARS (\$3,000), plus any interest thereon, which accrues at the annual rate of nine percent between a date 10 days after the issuance of the Final Order and the date CRYSTAL PINE, INC. complies with this Order.

These assessments are civil penalties against Respondents for violating ORS 658.410(1), 658.415(1), 658.417(1), 658.440(1)(d), and 658.440(3)(a).

**In the Matter of
CLACKAMAS COUNTY
COLLECTION BUREAU, INC.,
Respondent.**

Case Number 60-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 7, 1994.

SYNOPSIS

After Complainant, a black collection agent, gave notice that he would quit in eight days, Respondent, a collection agency, immediately terminated his employment. The Commissioner found that Respondent did not terminate Complainant because of his race, but treated him differently than a white coworker (who had also given notice that he would quit, but who was not

terminated) for legitimate, nondiscriminatory reasons, including low production, lack of enthusiasm, an absenteeism problem, and a fear that the Complainant might take Respondent's customer list when he quit. ORS 659.030(1)(a), OAR 839-05-010(2)(b).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 24 and November 18, 1993, in Room 1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (Agency) was represented by Linda Lohr, an employee of the Agency. Rickie C. Story (Complainant) was present throughout most of the hearing and was not represented by counsel. Clackamas County Collection Bureau, Inc. (Respondent) was represented by Ira S. Feitelson, Attorney at Law. Deryl Sandgren was present throughout the hearing as Respondent's representative.

The Agency called the following witnesses (in alphabetical order): Phil Donaldson, Respondent's former collector; Cathy Fox, Respondent's former administrative assistant (by telephone); Jane MacNeill, Senior Investigator, Civil Rights Division, the Agency; Susan Parker, Respondent's former secretary-receptionist (by telephone); Elijah Sims, Jr., Respondent's former collector (by telephone); and Rickie C. Story, Complainant.

Respondent called the following witnesses (in alphabetical order): Keith Green, Respondent's former manager, and Deryl Sandgren, Respondent's president.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On April 18, 1992, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondent discriminated against him because of his race/color in that, on April 23, 1991, Respondent terminated him.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice by Respondent in violation of ORS 659.030(1)(a).

3) The Agency attempted to resolve the complaint by conference, conciliation, and persuasion, but was unsuccessful.

4) On May 14, 1993, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent had discharged Complainant from employment because of his race. The Specific Charges alleged that Respondent's action violated ORS 659.030(1)(a).

5) With the Specific Charges, the Agency served on Respondent the following: a) a Notice of Hearing setting

forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On June 7, 1993, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges.

7) On July 15, 1993, the Hearings Referee sent the Agency and Respondent a discovery order requiring them to file Summaries of the Case, pursuant to OAR 839-50-200 and 839-50-210. The Agency and Respondent each filed a timely Summary of the Case.

8) A prehearing conference was held on August 24, 1993, at which time the Agency and Respondent stipulated to facts that were admitted by the pleadings. Those facts were admitted into the record by the Hearings Referee at the beginning of the hearing.

9) At the commencement of the hearing on August 24, 1993, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

10) Pursuant to ORS 183.415(7), the Agency and Respondent were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) The Proposed Order, which included an Exceptions Notice, was

issued on September 22, 1993. Exceptions were required to be filed by October 4, 1993. On October 5, 1993, the Civil Rights Division received Complainant's exceptions (dated October 4), which were later routed to the Hearings Unit.

12) On October 20, 1993, the Agency filed a motion to reopen the record, pursuant to OAR 839-50-410, to present the testimony of Phil Donaldson. The Agency attached five exhibits to show that it had used due diligence before hearing to secure Mr. Donaldson's testimony and to show what his testimony was expected to include. Respondent filed timely objections to reopening the record. On November 2, 1993, the Hearings Referee granted the Agency's motion, finding that Mr. Donaldson's testimony was necessary to adjudicate this case fully and fairly, and that the Agency made a diligent effort to contact and subpoena Mr. Donaldson before hearing. A notice of the new hearing date was issued on November 4.

13) On December 15, 1993, the Hearings Referee issued an amended Proposed Order, which included an Exceptions Notice. Pursuant to OAR 839-50-380(3) and 839-50-040, participants had until December 27, 1993, to file exceptions. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation engaged in credit reporting, adjustment, and collection. Respondent was an employer in this state utilizing the personal services of one or more employees and was subject to the provisions of ORS 659.010 to 659.435.

2) At times material, Respondent was owned by Deryl Sandgren. Keith Green was Respondent's manager. Sandgren and Green are white (Caucasian).

3) As manager, Green's responsibilities included hiring and firing, interviewing, reviewing employee performance, reviewing contact sheets (which the collectors filled out daily as they made contact with their accounts), and keeping statistics concerning phone contacts and payment agreements. Statistics were reviewed weekly. Green gave daily comments to the collectors regarding the importance of contacts. He used an upbeat, positive approach in his comments to the collectors; he gave them "pep talks." Sandgren also reviewed the daily contact sheets. He knew which collectors were producing and which were not. Sandgren discussed the contact sheets with Green.

4) Around February 21, 1991, Deryl Sandgren hired Phil Donaldson, who is white (Caucasian). Donaldson had no previous investigative or collection experience. He had recently graduated from college and had some sales experience. Respondent hired Donaldson to perform collector and outside sales duties; however, Donaldson performed sales duties only during April 1991. He was paid a base salary of \$1,000 plus a commission (called a "bonus") for collections above \$2,500 per month. Sandgren worked with Donaldson to develop his sales and collection skills. Green also gave Donaldson training. During the period of Donaldson's employment, he made no sales and earned no bonuses.

5) Complainant was employed by Respondent as a collector on or about March 13, 1991.

6) Complainant is black (African American).

7) Before he was hired by Respondent, Complainant was interviewed by Keith Green. Complainant had prior experience as an investigator and collector. He had worked for 19 months for the Oregon Employment Division as a Job Services Representative, for 18 months for Woodland Park Hospital as an investigator and account representative, for 25 months for the Los Angeles County Department of Collections as an investigator – special accounts, and for 37 months for Amfac Commercial Credit (in California) as an investigator.

8) Once per week, Respondent held a staff meeting to discuss collection procedures and talk about their work.

9) Green supervised Complainant and Donaldson. Green advised them about the company's goals and standards, their production, the number of telephone calls and letters expected, the number of contacts expected, and the kinds of "pitches" to use in their collection activities. Green advised Complainant about the company's "quotas."

10) Among Complainant's job duties, he sent notices to new debtor accounts and attempted to make telephone contact with them. Telephone contact was by far more effective than written notices for collecting money. Complainant could make from 30 to 50 telephone calls per hour to debtors. If he got a payment promise, Complainant recorded it on a log.

11) During times material, Respondent had the following company policy on payment plans: on accounts up to \$100, payment in full; on accounts from \$100 to \$300, one-third down, and the balance in two payments; on accounts from \$300 to \$500, one-third down, and the balance in three payments; and on accounts of \$500 and up, one-third down, and the balance in four, five, or six payments. If a debtor could not agree to this plan, the collector was supposed to get Green's approval to arrange a different payment plan. Neither Donaldson nor Complainant remembered this policy. Green always wanted the collectors to get payment in full. Donaldson was told to collect as much as he could from each debtor and that something was better than nothing. He was advised to avoid agreements for low payments, such as \$5.00 per month. Complainant and Donaldson negotiated payment arrangements without first talking to Green. Green believed that 95 percent of long-term payment plans did not work, and the debtor had to be contacted again. Green believed that Complainant made plans where the payments were too low and over too much time.

12) Respondent's collection accounts were divided into three units: A, B, and C. Respondent attempted to keep Units A and B effectively equal in size and complexity. They were made up of accounts from the same clients, but were divided so that Unit A handled debtors whose last names began with the letters "A" through "K", and Unit B handled debtors whose last names began with the letters "L" through "Z". Unit C was smaller than Units A and B.

It was made up mostly of medical and commercial accounts from another collection business, MCA, Inc. (Medical and Commercial Adjustment Company), which was owned by Deryl Sandgren.

13) During times material, Green handled Unit A, Complainant handled Unit B, and Donaldson handled Unit C. Before Donaldson began working on Unit C in February, that unit had not been worked for some time. During April 1991, Donaldson worked on outside sales between 10 and 12 hours per week. Respondent employed no other collectors.

14) During times material, Respondent had the following monthly collection "quotas" or "goals" for each of the units: Unit A – \$5,000, Unit B – \$5,000, and Unit C – \$3,600. Each unit also had a "break even point" or "BEP": Unit A – \$4,000, Unit B – \$4,000, and Unit C – \$2,500. The "quota" was the amount of income the company encouraged each collector to achieve per month for the respective unit. The "break even point" was the amount of income each unit needed to collect to cover the company's overhead, including the salary for the collector. Half of the income collected was sent to Respondent's clients. Each collector earned a commission (or "bonus") on income collected over the break even point. For example, if a collector brought in \$5,000 to Unit B, which had a break even point of \$4,000, then the collector would receive a commission on the \$1,000 collected over the break even point. The collectors were aware of the quotas and break even points, and reviewed daily how close they were to the BEP.

These numbers were written on the daily banking deposit analysis, which showed how much money each unit had collected that day and that month-to-date. Turnover of collector employees was high because of the difficulty in reaching the BEP and because Respondent offered no benefits.

15) Complainant's agreed rate of pay was \$1,000 per month, plus a 20 percent commission on collections above the "break even point."

16) Some of Respondent's collection accounts were pursued through legal action, such as through small claims court. Deryl Sandgren handled most of these accounts, although the collectors did the initial work, such as skip tracing and contacting the debtor. It typically took at least a month to collect money through legal action. The collector got credit on his unit's accounts for money collected through legal actions. The money was credited to the unit in the month in which it was received by Respondent. A new collector received credit for such collections, although collection work on the account may have occurred months before the collector was employed by Respondent.

17) On some occasions when Complainant was not at work, Green would take an account out of Complainant's files to return a telephone call to the debtor. When Green arranged for payments on one of Complainant's accounts, Complainant got credit for the collection when money was received.

18) During February 1991, Unit A collected \$5,710.78 (\$380.04 from legal actions), Unit B collected \$2,473.07 (\$846.21 from legal actions), and Unit

C collected \$1,624.05 (\$383.79 from legal actions).

19) During March 1991, Unit A collected \$4,773.79 (\$268.61 from legal actions), Unit B collected \$2,977.47 (\$1,002.58 from legal actions), and Unit C collected \$2,220.50 (\$602.67 from legal actions).

20) During April 1991, Unit A collected \$3,257.90 (\$549.90 from legal actions), Unit B collected \$3,287.66 (\$1,424.21 from legal actions), and Unit C collected \$2,398.51 (\$1,193.42 from legal actions).

21) During May 1991, Unit A collected \$7,880.04 (\$1,961.41 from legal actions), Unit B collected \$5,883.78 (\$521.10 from legal actions), and Unit C collected \$1,971.70 (\$1,170.96 from legal actions).

22) Green's unit, Unit A, decreased in March and April because he had to spend time supervising Complainant and Donaldson. After they left, Green's collections increased in May. Green believed his collections went up because he did not have to "baby-sit" Complainant.

23) In May 1991, a new collector, Rich Radamaker (phonetic), was hired to work on the accounts in Unit B. The collections in Unit B increased substantially over March and April. Some of the collections received in May could have been the result of payment plans made by Complainant before May.

24) From March 13 to March 31, 1991, Complainant worked 98 hours in 13 days; he missed one day of work. From April 1 to April 22, 1991, Complainant worked 100.5 hours in 13 days; he missed three and one-half days of work. Normally, he worked

eight hours per day. Complainant either prearranged his days off or called in on the mornings he was going to miss work.

25) On the last day that Complainant missed work, he called in about an hour and a half after he was supposed to start work and talked to Donaldson. Green was upset that Complainant did not talk with him (Green).

26) Respondent did not have a formal written absentee policy and did not keep written records of disciplinary actions. Respondent had no policies handbook; it relied on the American Collectors Association handbook for most of its policies.

27) Green thought that Complainant's absenteeism was excessive because the work of the collectors was critical to Respondent's profit. Green and Sandgren believed that no other collector missed as much work as Complainant over the same amount of time. Green spoke to Complainant at least twice about his absences. Green thought that Complainant was not productive in the amount of money collected and in the number of contacts made.

28) Respondent never gave Complainant a written performance appraisal.

29) Complainant had one or two notebooks filled with Oregon Revised Statutes and administrative rules. He got them from the Oregon Employment Division while he worked there. He showed them to Green on one occasion while they were working on an account together. When Green asked Complainant how he got the notebooks, Complainant only smiled "slyly."

Green, who had worked for the Oregon Department of Revenue, did not believe that such books were given to employees who were leaving state employment. Complainant led Green to believe that he (Complainant) had "sneaked" the notebooks away from the Employment Division.

30) Green and Sandgren believed that Donaldson was very trainable, was enthusiastic about his work, and worked hard. Green thought Donaldson was upbeat and positive, and desired to do well. Sandgren believed that Donaldson made more contacts per month than Complainant. Green believed that, while Complainant had a lot of experience, he had a bad attitude and was not very trainable. Complainant wanted to spend too much time sending out notices rather than working on the telephone. Green wanted Complainant to spend more time on the phone and make at least 15 contacts with debtors per day. When Complainant disagreed with Green, he would argue his point to Donaldson, which Green thought undermined what he was trying to teach. Complainant believed and sided with debtors who claimed poverty. Donaldson, who was uncomfortable being a collector, also told Green it was difficult to ask welfare recipients for money.

31) While Complainant was employed by Respondent, he was looking for other employment because Respondent's pay was low and it offered no benefits. Complainant had a family to support. Green was somewhat aware that Complainant was looking for other work and knew Complainant wanted to be self-employed.

32) Donaldson also was looking for other work. He and Complainant applied for jobs with First Consumers National Bank. On or about April 17, 1991, Donaldson notified Respondent that he had accepted a job with the bank and would work through April 30, 1991. He was not terminated. After Donaldson gave his notice, Deryl Sandgren tried to persuade him to stay with Respondent. Donaldson unequivocally declined, because the bank job offered a higher salary and benefits he needed for his family, plus it offered to pay for his schooling. Both Green and Sandgren asked Donaldson to reconsider his decision to quit.

33) On April 22, 1991, Complainant notified Respondent that he had accepted a job elsewhere and indicated he would work through April 30, 1991.

34) On April 23, 1991, Respondent terminated Complainant.

35) Green told Complainant that he was terminated because of his "loyalty." Green told Donaldson he fired Complainant because, if he stayed, it would disrupt the office.

36) Before he terminated Complainant, Green consulted with Sandgren. Sandgren told Green that he (Green) did not need to keep Complainant until the end of the month. Sandgren was aware of Complainant's absenteeism from talking with Green and reviewing the time cards. Sandgren thought that after Complainant gave his notice, Complainant would not be worth much to Respondent, and Respondent should start looking for a new collector. He believed that Complainant's attitude would go down, and Respondent would lose clients. Sandgren felt that Donaldson was a

producer and Complainant was not, and that Donaldson was more effective than Complainant.

37) Green's reasons for firing Complainant included: (1) Complainant's production was low, and Green was dissatisfied with his performance; (2) Complainant was not receptive to constructive criticism and was not enthusiastic; (3) Complainant had materials from a previous employer, which made Green uncomfortable because he thought Complainant stole them; (4) Complainant had an absenteeism problem; and (5) Green was afraid Complainant might take Respondent's customer list and start his own business. Green knew that Complainant wanted to work for himself, and other collectors had taken Respondent's customer lists when they left.

38) Green never discussed Complainant's performance with Donaldson. Donaldson thought that Complainant did a good job and did as well as he did.

39) Before Respondent terminated him, Complainant never felt that Respondent treated him differently than white employees. None of Respondent's employees made derogatory remarks to Complainant. Complainant felt that he got along well with Green.

40) Donaldson never heard any adverse comments about Complainant based on race. During one conversation among Green, Donaldson, and Complainant, Green used the word "jigaboo" in a conversation about Native Americans. Green was embarrassed that he used the word and apologized for using it. On another occasion, Donaldson overheard Deryl Sandgren say something like, "That's where the

darkies live." Donaldson did not know the context of Sandgren's conversation, and he was unsure what Sandgren meant by the comment. Donaldson did not think that Sandgren was racist.

41) Elijah Sims, Jr. worked for Respondent as a collector from around September to November 1990. Sims is black. He earned \$1,200 per month, plus a commission (or bonus). Sims had to collect a "base" amount of money to earn the bonus; he never earned a bonus. Sims arranged with Kevin Sandgren, Deryl Sandgren's son, to have a day off to arrange for telephone service. The day after his day off, Kevin discharged Sims for missing the day of work. Sims had previously missed three days of work. Sims was surprised by the termination. Deryl Sandgren understood that Kevin Sandgren was going to fire Sims because he was not collecting enough money for his unit, Unit B. There were no racial remarks at Respondent's business before Sims's termination, and he was treated fairly.

42) In February 1991, Respondent terminated a collector, Cindy Miller, who is white, after she gave notice of her intent to quit. Respondent terminated her because of her performance. She left immediately upon termination. Miller had worked on the accounts in Unit B.

43) During 1990, Respondent employed Susan Parker for three or four months as a secretary and receptionist. During that time, Respondent employed Kevin Sandgren and Brian Sites (phonetic) as collectors. Parker, Sandgren, and Sites are white. Deryl Sandgren and his wife also worked at

the business, but they were rarely there. Kevin Sandgren was in charge of the business when Deryl was not there. Respondent never informed Parker about an absentee policy. During her employment with Respondent she took time off with prior approval. No one was fired for absenteeism.

44) From November 1991 to September 1992, Respondent employed Cathy Fox as an administrative assistant. She worked three days per week, three or four hours per day. During that time, Kevin Sandgren and Keith Green were the only collectors. Green was the office manager. Fox was never given any written personnel policies by Respondent. There was no policy regarding absenteeism. There was never a problem with taking time off work. Fox always gave Respondent notice before taking time off. Fox was "laid off" by Green. He allowed Fox to work until the end of the month (two extra weeks) because her welfare check had already been generated based upon her working until the end of the month.

45) When a collector was absent from work, it had a drastic financial effect on Respondent's business. When a secretary or receptionist was absent, it had little effect on the company's profit or on the work of the collectors. It was more important for the collectors than for the secretaries to show up for work.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent employed one or more persons within the State of Oregon.

2) Complainant was employed by Respondent.

3) Complainant is black (African American).

4) Respondent discharged Complainant.

5) Respondent treated Complainant differently than Donaldson, who is white (Caucasian), because of legitimate, nondiscriminatory factors.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110. ORS 659.010(6).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.040, 659.050.

3) ORS 659.030(1) provides, in part:

"For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:

"(a) For an employer, because of an individual's race * * * to refuse to hire or employ or to bar or discharge from employment such individual."

Respondent did not violate ORS 659.030(1)(a).

4) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order

dismissing the charge and the complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

In this case, the primary issue was whether a causal connection tied the Respondent's action (discharging Complainant) to the Complainant's protected class membership. The Agency alleged that, in violation of ORS 659.030(1)(a), Respondent treated Complainant differently than Phil Donaldson because of Complainant's race and not because of legitimate, nondiscriminatory factors.

The Forum has applied the Different or Unequal Treatment Test, as described in OAR 839-05-010(2)(b).^{*} Different treatment exists where:

"the Respondent treats members of a protected class differently than others who are not members of the protected class. When the Respondent makes this differentiation because of the individual's protected class and not because of legitimate, nondiscriminatory factors, unlawful discrimination exists. The Complainant, at all times, has the burden of proving that his/her protected class membership was the reason for the Respondent's alleged unlawful action. The Complainant begins this process by showing that he/she was harmed

by an action of the Respondent under circumstances which make it appear that the Respondent treated the Complainant differently than comparably situated individuals who were not members of the Complainant's protected class. The Respondent must then rebut this showing. If the Respondent fails to rebut this showing, the [Civil Rights] Division will conclude that substantial evidence of unlawful discrimination exists. To accomplish the rebuttal, the Respondent has to produce clear and reasonably specific evidence, but does not have to prove, that it acted upon legitimate, nondiscriminatory factors. The Complainant must then have a full and fair opportunity to show that the reasons the Respondent gave are a pretext for discrimination. Pretext can be shown directly through evidence that the Respondent was more likely motivated by a discriminatory motive or indirectly by showing that the Respondent's explanation is unworthy of credence."

The Agency presented sufficient evidence to support a prima facie case of unlawful discrimination. Evidence showed that Complainant was harmed by Respondent's discharge and revealed circumstances surrounding Complainant's discharge that made it appear that Respondent treated Complainant, who is black, differently than a comparably situated individual, Donaldson, who is white. Specifically, evidence showed that both men worked as collectors for Respondent, both gave their notices of intent to quit, both asked to work until the end of the

month, Donaldson was permitted to continue working, and Complainant was discharged immediately. He was not permitted to work until the end of the month.

Respondent produced clear and reasonably specific evidence that it acted upon legitimate, nondiscriminatory factors. Specifically, Respondent presented Keith Green's credible testimony and corroborating evidence to show that Green discharged Complainant because: (1) Complainant's production was low, and Green was dissatisfied with his performance; (2) Complainant was not receptive to constructive criticism and was not enthusiastic; (3) Complainant had materials from a previous employer, which made Green uncomfortable because he thought Complainant stole them; (4) Complainant had an absenteeism problem; and (5) Green was afraid Complainant might take Respondent's customer list and start his own business. Green knew that Complainant wanted to work for himself, and other collectors had taken Respondent's customer lists when they left. Green's testimony was supported by credible testimony from Deryl Sandgren.

Complainant was given a full and fair opportunity to show that Respondent's reasons were a pretext for discrimination. "Pretext can be shown directly through evidence that the Respondent was more likely motivated by a discriminatory motive or indirectly by showing that the Respondent's explanation is unworthy of credence." OAR 839-05-010(2)(b). First, the Agency presented evidence of Green's use of the word "jigaboo" and Sandgren's reference to "darkies." Second, the

* While this rule describes a theory and procedure used by the Civil Rights Division to enforce the state's civil rights statutes, this Forum has long applied the different treatment test in civil rights contested cases. See, e.g., *In the Matter of N. H. Kneisel, Inc.*, 1 BOLI 28 (1976); *In the Matter of Franko Oil Company*, 8 BOLI 279, 289, 290 (1990). Here, the Agency must prove its allegations by a preponderance of the evidence. *Oregon State Correctional Institution v. Bureau of Labor and Industries*, 98 Or App 548, 780 P2d 743, 748 (1989).

Agency attempted to show that Complainant was a good producer and gave his job 100 percent effort; he responded to Green's pep talks and was enthusiastic; the statutes and other materials he had were public information, and there was nothing wrong with his possession of them; Respondent had no absenteeism policy and had never fired or disciplined an employee for absences; and Respondent had no list or other information that Complainant would want to steal before he left Respondent's employment.

The Agency's evidence failed to show that Respondent's reasons were pretextual. First, evidence in the record showed that, before he was discharged, Complainant never felt that Respondent treated him differently than white employees. Donaldson never heard any adverse comments about Complainant based on race. Sims, who is black, never heard any racial remarks while he worked for Respondent and felt he was treated fairly. No evidence in the record suggests that Respondent was motivated by a discriminatory motive except Green's use of the word "jigaboo" and Sandgren's reference to "darkies." Green's use of "jigaboo" referred to Native Americans; it was not directed to Complainant or black people, and Green apologized to Donaldson and Complainant for using of the word. Evidence of Sandgren's reference to "darkies" did not include the context in which the word was used. Donaldson, who overheard the reference, did not think that Sandgren was racist. Given all the evidence in the whole record, the Forum finds that the single reference to "jigaboo" and single reference

to "darkies" are not persuasive that, in discharging Complainant, Respondent was more likely motivated by a discriminatory motive than by the reasons given.

Second, the Agency's evidence did not persuade the Forum that Respondent's given reasons for Complainant's discharge were unworthy of credence. Despite differences in how Green and Donaldson perceived Complainant's performance and attitude, the Forum finds Green's testimony credible and persuasive concerning his reasons for discharging Complainant. Therefore, the Forum finds that Respondent had legitimate, nondiscriminatory reasons for the discharge. The Agency did not prove by a preponderance of the evidence either that Complainant's "protected class membership was the reason for the Respondent's alleged unlawful action" or that Respondent committed an unlawful employment practice.

ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the complaint and the specific charges filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

**In the Matter of
Elizabeth Thompson, dba
BOX/OFFICE DELIVERY,
Respondent.**

Case Number 31-94
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 7, 1994.

SYNOPSIS

Where Respondent argued that Claimant was a trainee and had not been hired, and that Respondent thus owed him only the minimum wage for hours worked instead of the agreed rate, the Commissioner held that Claimant was an employee, and that Respondent willfully failed to pay him (at the agreed rate) all wages due upon termination, in violation of ORS 652.140(1). The Commissioner rejected Respondent's argument that the terms of employment described in an Employment Division job order were merely an advertisement and did not constitute a job offer, and her argument that civil penalty wages were limited to the amount of money the Claimant would have made in the 30 days prior to termination. The Commissioner ordered Respondent to pay the wages owed and civil penalty wages (at the Claimant's average daily rate, continuing for 30 days), pursuant to ORS 652.150.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau

of Labor and Industries for the State of Oregon. The hearing was held on November 30, 1993, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Edward C. Kay (Claimant) was present throughout the hearing. Elizabeth Thompson (Respondent) was present and represented herself.

The Agency called the following witnesses: Edward Kay, the Claimant, and June Miller, a Compliance Specialist with the Wage and Hour Division of the Agency. Respondent called herself as her only witness.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On February 2, 1993, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

2) At the same time that he filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

3) On June 14, 1993, the Commissioner of the Bureau of Labor and Industries served on Respondent an Order of Determination based upon

the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Respondent owed a total of \$80.85 in wages and \$713 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

4) On June 15, 1993, Respondent filed an answer to the Order of Determination. Respondent later requested a contested case hearing. Respondent's answer alleged that Claimant was "in 'JOB TRAINING'" (emphasis original), and he had not been hired by Respondent. Respondent claimed that Claimant worked 13 hours and was paid \$4.75 per hour, or \$61.75. She attached a job order form and a list of work time for Claimant.

5) On September 30, 1993, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-50-000 to 839-50-420.

6) On November 3, 1993, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, according to the provisions of

OAR 839-50-210(1). The Agency and Respondent each submitted a timely summary.*

7) On November 5, 1993, Respondent requested a delay in the starting time of the hearing. Following an opportunity for the Agency to respond, the Hearings Referee granted the Respondent's request. An amended Notice of Hearing was issued on November 16, 1993.

8) At the start of the hearing, Respondent said she had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

9) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

10) On December 16, 1993, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to Respondent, Claimant, and the Agency. Participants had 10 days to file exceptions to the Proposed Order. On December 23, the Hearings Unit received Respondent's request for an extension of time to file exceptions. On December 27, the Hearings Referee granted that request. On December 28, 1993, the Hearings Unit received Respondent's timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Respondent, a person, did business as Box/Office Delivery, a private mail delivery service located in Beaverton, Oregon. She employed one or more persons in the State of Oregon.

2) In August 1992, Respondent placed a job order with the state Employment Division for a "part-time courier position delivering parcels in the S.W., Tigard [or] Tualatin area." The job described was for 10 hours per week, with a split shift of 1.5 hours in the morning and half an hour in the afternoon. Respondent required a driver's license, a good driving record, a vehicle, and vehicle insurance. Pay was listed as "\$10/hr. or \$20/day."

3) Claimant read the job order, and on December 14, 1992, the Employment Division referred Claimant to Respondent for employment. Claimant called Respondent, who asked him to report for work the next day.

4) From December 15, 1992, to January 6, 1993, Respondent employed Claimant as a part-time delivery driver. Claimant was hired for an indefinite period. Respondent detailed and controlled how Claimant was to perform his duties. Claimant and other employees were paid on an hourly basis. Claimant derived no benefits other than wages.

5) Respondent told Claimant that she would train him how to perform his duties and would show him the routes he would drive. Beginning on December 15, Respondent and Claimant began working together picking up and delivering mail. On the first day, they drove in Respondent's car. Thereafter,

they used Claimant's car because Respondent's car was out of order.

6) After he started work, Claimant showed Respondent his driver's license. He obtained and gave Respondent a copy of his driving record and gave her a card from his vehicle insurance company as proof that he had such insurance. Respondent found that Claimant's car was reliable. Respondent never verified Claimant's insurance.

7) At no time during Claimant's employment with Respondent did Respondent tell Claimant that his rate of pay would be anything other than the \$10.00 per hour or \$20.00 per day that was listed on the job order form from the Employment Division. Respondent never told Claimant that his training time would be unpaid or paid at minimum wage.

8) On January 6, 1993, Claimant asked Respondent when he would get paid. Respondent told Claimant that he would not be paid for that time because that was training time. She told Claimant that he was a good worker and that she would call him for future work. Respondent never called Claimant to work again. At hearing, Respondent claimed she had not paid Claimant the minimum wage because she was "tardy and negligent," and she knew she owed him wages.

9) Respondent kept no time record for Claimant during his employment. Respondent later created a record of hours, which she sent to the Agency during the investigation of this wage claim. Respondent created another record of Claimant's hours, which she attached to her answer and provided as discovery. Those two records

* Due to an administrative oversight, the Hearing Referee's Discovery Order was not marked, offered, or received during the hearing. The Forum hereby marks it and receives it into the record.

are different, but contain the same information. They show that Claimant worked 13 hours in eight days, from December 15 to January 7. Those records were unreliable because they were created months after Claimant's employment, they were not based on records kept at that time, and they were not complete.

10) Claimant kept track of his hours worked in a notebook. When he filed his wage claim with the Agency on February 7, 1993, he wrote down how many hours he worked each day in hours and minutes. His memory of his hours worked was fresh when he recorded the work time for the Agency. Claimant's records reveal the following information, which is accepted as fact. He worked six days, from December 15 to January 6; he worked a total of 14.26 hours at the agreed rate of \$10.00 per hour; and he earned \$142.60 in wages (14.26 hours x \$10.00 per hour = \$142.60). Claimant was paid \$61.75 (13 hours at \$4.75 per hour); the balance of earned, unpaid, due, and owing wages equals \$80.85.

11) After Claimant filed his wage claim with the Agency, the Agency contacted Respondent. During the investigation, Respondent agreed to pay Claimant minimum wage for the 13 hours she claimed he worked. On March 25, 1993, Respondent paid \$61.75 to the Agency for Claimant. See Finding of Fact 10, above. Back in June 1992, Compliance Specialist Miller advised Respondent about record-keeping requirements under Oregon law and sent her a copy of Oregon Revised Statutes (ORS) chapter 652 (regarding hours, wages, and

records). Miller advised Respondent then that training time was work time that had to be paid for at the agreed wage rate.

12) Civil penalty wages were computed, according to Agency policy, on the Wage Transcription and Computation Sheet as follows: \$142.60 (the total wages earned) divided by six (the number of days worked during the claim period) equals \$23.77 (the average daily rate of pay). This figure of \$23.77 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$713 (rounded to the nearest dollar). This figure is set forth in the Order of Determination.

13) Claimant's testimony was credible. He had the facts readily at his command, and his statements were supported by documentary records. There is no reason to determine the testimony of the Claimant to be anything except reliable and credible.

14) Respondent's testimony that Claimant was not her employee was not credible. Her position was that she had not hired Claimant and, therefore, that she did not have to pay him for his work. Although Respondent later agreed to pay Claimant the minimum wage, she still insisted she had not hired him because he was in "training and probation." Respondent's assertions were directly contradicted by the credible testimony of June Miller. Miller testified that she had investigated a similar wage claim against Respondent during 1992. She advised Respondent then that training time was work time, which had to be paid at the agreed wage rate. Miller testified

credibly that she advised Respondent about her duties under the wage and hour laws. Given this testimony about what she knew when she employed Claimant, Respondent's testimony regarding Claimant's status was not credible. In addition, her testimony about why she did not hire Claimant was inconsistent. Further, Respondent insisted that she created only one record of Claimant's hours. This also undermined her credibility, because the evidence presented to her at hearing clearly showed two different records that she said were written by her. Accordingly, the Forum has disbelieved Respondent's testimony, except when it was corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person who employed one or more persons in the State of Oregon.

2) Respondent employed Claimant as a delivery driver from December 15, 1992, to January 6, 1993.

3) During the wage claim period, Respondent and Claimant had an agreement whereby Claimant's rate of pay was \$10.00 per hour or \$20.00 per day.

4) Claimant's last day worked was January 6, 1993. After that, Respondent never called Claimant for work and thereby terminated Claimant's employment.

5) Claimant worked 14.26 hours in six days. He earned \$142.60 in wages. Respondent paid him a total of \$61.75 and owes him \$80.85 in earned and unpaid compensation.

6) Respondent willfully failed to pay Claimant \$80.85 in earned, due, and payable wages. Respondent has not paid Claimant the wages owed, and more than 30 days have elapsed from the due date of those wages.

7) Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$713 (Claimant's average daily rate, \$23.77, continuing for 30 days).

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) ORS 652.140(1) provides:

"Whenever an employer discharges an employee, or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately ****"

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid immediately upon terminating his employment on January 6, 1993.

4) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such

employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

5) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

Claimant Worked as an Employee

The initial issue in this case is whether Claimant worked for Respondent as an employee. This Forum has previously accepted the definition of "employee" in ORS 652.310(2) for the purposes of ORS 652.140 and 652.150, and likewise accepts it here. See *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 40-41(1993) (relying on *Lamy v. Jack Jarvis & Co.*, 281 Or 307, 574 P2d 1107, 1111 (1978)).

ORS 652.310(2) provides:

"Employee" means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal service wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

Using this definition of "employee," the Forum finds that Claimant worked as an employee between December 15, 1992, and January 6, 1993, and not as a co-partner or independent contractor. Respondent's argument that she did not hire Claimant simply does not comport with the facts or the law. While an employer may put a new employee on probation, or may give the new employee training, these actions do not change the fact that the employee is rendering services to the employer. Further, Respondent's argument is unpersuasive because she admitted she owed, and she paid, the minimum wage for Claimant's work. By doing so, Respondent effectively admits that she hired Claimant as her employee.

"Employ" includes to suffer or permit to work. ORS 653.010(1). Work time is all the time an employee is required to be on the employer's premises, on duty, or at a prescribed work place. Training time is considered a cost of doing business for an employer. *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). Thus, the time Claimant spent training was compensable work time. See OAR 839-20-044.

During his employment, Claimant gave Respondent over 14 hours of his labor and provided his vehicle to make Respondent's deliveries. Since she had been advised by the Agency in June 1992 that training time was by law compensable work time, Respondent's claims in this case that she had not hired Claimant, and that his work was uncompensated training time, were at least baseless, if not outright fabrications.

Hours Worked

In wage claim cases such as this, the Forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying his burden of proof, the court analyzed the situation as follows:

"An employee who brings suit under 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to

know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to

come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-88.

Here, ORS 653.045 requires an employer to maintain payroll records. Respondent's records offered at hearing were unreliable. Pursuant to the analysis then, the employee, or in this case the Agency, has the burden of first proving that the employee "performed work for which he was improperly compensated." The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. This Forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work — where that testimony is credible. See *In the Matter of Sheila Wood*, 5 BOLI 240, 254 (1986); *Dan's Ukiah Service, supra*, at 106. Here, Claimant's testimony and records were credible. The Forum concludes that Claimant was employed and was improperly compensated. The Forum may rely on evidence produced by the Agency regarding the number of hours worked and the rate of pay for Claimant. The Respondent did not produce persuasive "evidence to negative the reasonableness of the inference to be drawn from the

employee's evidence." *Mt. Clemens Pottery Co.*, 328 US at 687-88.

Wage Rate

Only one wage rate is in evidence in this case: the one Respondent offered in the job order she placed with the Employment Division. Claimant responded to this job order and was referred by the Employment Division to Respondent. Respondent told Claimant to report the next day for training. By going to work for Respondent, Claimant accepted Respondent's job offer, including the \$10.00 per hour or \$20.00 per day rate of pay. This became the agreed wage rate, and Respondent never changed it. She owes Claimant that rate of pay for all hours worked. Nothing in the facts of this case or the law justifies Respondent's claim that she could pay Claimant only the minimum wage while he was in training.

In her exceptions, Respondent correctly noted that an employer is free to set the terms and conditions of the work and of the compensation, and the employee may accept or reject those conditions. *Roberts v. Public Finance Co.*, 294 Or 713, 716, 662 P2d 330, 332 (1983). In addition, the usual elements of an employment agreement include the term of employment, the amount of compensation, the place of employment, the type of employment, and a general description of the duties to be performed. *Gaswint v. Case*, 265 Or 248, 254, 509 P2d 19, 22 (1973).

Respondent argued that, because she and Claimant never discussed a rate of wage, there was no agreed hourly wage. She argued that it was incorrect to "import the job order into

the employment agreement between the parties" and asserted that the job order was a mere advertisement, not a contractual offer. The Forum disagrees.

"An offer clearly need not be stated in words. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act * * * by the offeree amounts to an offer. The most common illustration of this principle is where performance of work or services is requested. * * * [I]f the request is made under such circumstances that a reasonable person would infer an intent to pay for the performance, the request amounts to an offer and a contract is created by the performance of the work." *Williston on Contracts*, § 4.17 "Offers Inferred or Implied in Fact," pp. 389-91 (4th ed 1990).

This is not a case of a newspaper advertisement or circular posted in a grocery store to buy or sell goods. This is a case where an employer placed a job order with the Employment Division, seeking job applicants. Respondent's job order set out the job title, the job description, the number of hours per week, the duration ("Part Time"), the employment location, the employment requirements, and the amount of compensation. The Forum finds that these terms were sufficiently definite, clear, and complete to meet the requirements that make an offer binding. Respondent hired Claimant, and he performed the duties of the job; by his conduct Claimant accepted Respondent's job offer. Respondent never told Claimant his compensation

would be different from that offered in the job order.

From these facts, the Forum finds that Respondent and Claimant had an implied employment agreement, and the wage rate was the one offered in the job order. The agreement can be implied from the facts and circumstances: Respondent's unambiguous conduct clearly manifests an intention that Claimant would perform work and that Respondent would compensate him for his performance. Respondent knew that Claimant was performing work for her pursuant to the referral he received from the Employment Division, which was based on her job order. These circumstances show that compensation was expected and intended. No evidence suggests that Claimant intended to render his services to Respondent gratuitously or as a favor. Claimant was justified in taking Respondent's job terms literally; he had a right to act on them as a real and intended offer. His job performance was for her direct benefit.

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette West-ern Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to her employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence

established that Respondent knew she was not paying Claimant wages for his work and intentionally failed to pay any wages. Her later payment of the minimum wage for Claimant's work does not change the fact that she willfully failed to pay the agreed rate. Evidence showed that Respondent acted voluntarily and was a free agent. Respondent must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150.

Pursuant to Agency policy, civil penalty wages were computed as follows: \$142.60 (the total wages earned) divided by six (the number of days worked during the claim period) equals \$23.77 (the average daily rate of pay). This figure of \$23.77 was multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$713 (rounded to the nearest dollar). Pursuant to policy, penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68, 72 (1988).

In her exceptions to the Proposed Order, Respondent took issue with the Agency's method of calculating civil penalty wages. Relying on *McGinnis v. Keen*, Respondent argued that ORS

652.150 "is supposed to allow as penalty wages to a claimant the same amount of money the claimant would have made the 30 days prior to termination." Respondent argued that Claimant would have earned approximately \$400 had he been working for 30 days before termination, based on five days per week and a maximum of \$20.00 per day. Respondent concluded that the statute "is not intended to pay the employee more than he would have earned on the job in 30 days."

In *McGinnis v. Keen, supra*, the court was considering whether the civil penalty statute -- § 102-604, OCLA, as amended by Oregon Laws 1947, chapter 193 -- applied to pieceworkers. In that case, the wage claimants worked as fallers and buckers, and were paid on the basis of the quantity of work done. In dictum, the court said:

"The penalty recovery is not the amount which the employee seemingly would have earned had his employment continued, but is equal to the amount he earned in the period immediately preceding the cessation of his employment. Thus, if the penalty recovery extends over the entire permissible

period of thirty days, its amount is the counterpart of the sum which the employee earned in the thirty days immediately preceding the cessation of his employment." 221 P2d at 911.

Five years after it decided the *McGinnis* case, the court decided *Nordling v. Johnston*, 205 Or 315, 283 P2d 994, 287 P2d 420 (1955). In that case, too, the wage claimants worked as fallers and buckers, and were paid on the basis of the quantity of work done. The court said:

"ORS 652.150 provides that upon a willful failure to pay an employee his wages when due, 'as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages continue for more than 30 days.' We think that the statute means what it says. The length of time that a man has worked for a particular employer and the amount he has earned, have no bearing on the amount of the penalty except as it may be necessary to consider these factors in order to determine the rate at which he was paid. The statute really requires no construction, for it plainly provides for the continuance of the workman's wages or compensation for a period not to exceed 30 days at the same rate at which he was being paid while he was working. If, for example, a man works 30 days at a wage of \$5 per day, the penalty would be \$5 per day for every day that

payment is withheld, and would continue for 30 days if the wages are then unpaid, unless action was commenced before the period of 30 days has elapsed. If the man works only one day at that rate the penalty would be exactly the same. Where, however, he does what is in the nature of piece work, as here, and is not paid a fixed daily or weekly wage but is paid on the basis of the quantity of work done, then, in order to apply the statute it becomes necessary to arrive at the rate per day by computation. This the trial judge did in that part of his instruction which told the jury that the penalty should not exceed \$19.80 per day. * * * But the part of the instruction which further limited the penalty to 'an amount equal to what they earned in the period immediately preceding the termination of the employment' was erroneous, for the reasons already given. The defendant relies as support for the instruction on the following dictum in the *McGinnis* case, 'The penalty recovery is not the amount which the employee seemingly would have earned had his employment continued, but is equal to the amount he earned in the period immediately preceding the cessation of his employment' 189 Or 454, 221 P2d 911. The latter part of this statement happened to be true under the facts of the *McGinnis* case, but it cannot be followed as a rule since, as we have said, the statute does not mean that the penalty is to be determined by the amount which the employee earned, but by the rate of pay at

* As quoted by the court, § 102-604, OCLA, as amended, read:

"Whenever an employer discharges an employe, or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately * * *.

"* * * In the event that an employer being financially able to pay shall willfully [sic] fail to pay any wages or compensation of any employe who is discharged or who quits his employment, as in this section provided, then as a penalty for such nonpayment the wages or compensation of such employe shall continue from the due date thereof at the same rate until paid, or until an action therefor shall be commenced; provided, that in no case shall such wages continue for more than thirty days. * * *." *McGinnis v. Keen*, 189 Or 445, 221 P2d at 910.

which he worked." 283 P2d at 10. (Emphasis in original.)

In 1978, the Oregon Supreme Court again applied the *Nordling* formula for computing civil penalty wages. In affirming the jury's calculation of the civil penalties, the court in *Braddock v. Capfer*, 284 Or 237, 586 P2d 340, 341 (1978), stated:

"* * * ORS 652.150 provides the penalty shall be computed by multiplying the daily wage by the number of days the claimant remained unpaid, not to exceed 30 days. *Nordling v. Johnston*, 205 Or 315, 283 P2d 994, 287 P2d 420 (1955).

"Determining the daily wage is the difficult problem in a case such as this in which only two days were worked and no pattern was fixed on the number of hours normally to be worked. The jury apparently computed the daily wage by determining the rate per hour (i.e., total pay divided by number of hours worked), multiplying by eight (the number of hours in a 'normal' workday), then multiplying by three (the number of persons working). They then multiplied by 30 (the number of days of penalty wages to be assessed). The total penalty resulting from that calculation is \$5,616.00 – the amount awarded by the jury."

As these cases illustrate, an appropriate method for determining civil penalty wages is to compute the daily rate and multiply it by the number of days (up to 30) the claimant remained unpaid. This is the same method used by the Agency in this case. Evidence on the record does not establish that the \$20.00 per day wage rate was

either a maximum or a minimum. Because of that, calculating a penalty wage based on the \$10.00 per hour rate and on the hours and days worked is a reasonable and reliable method.

Also, it is clear from *Nordling* that the penalty wages assessed can exceed the amount of wages earned in the 30 days before discharge. The Forum has previously considered and rejected the argument that civil penalty wages are limited by the amount of wages the employee earned in the 30 days before termination. In *In the Matter of Central Pacific Freight Lines, Inc.*, 7 BOLI 272 (1989), the employer argued that the civil penalty could not exceed the claimant's monthly salary. Finding that the "average daily rate method to calculate civil penalties * * * is an appropriate method of determining an employee's rate of pay based on actual earnings," the Forum stated:

"the average daily rate method is the Commissioner's established method for determining a claimant's rate of pay when calculating civil penalties. Claimant's average daily rate, based upon his actual earnings during the wage claim period, is the 'same rate' for purposes of ORS 652.150 as his agreed rate. A 30 day civil penalty could be more than Claimant's monthly salary because the penalty accrues each day, for no more than 30 consecutive days, while Claimant's employment agreement allowed for, and in fact Claimant took, days off. This [average daily rate] method accurately measures the rate of pay per day that Claimant received

under his agreement." *Id.* at 280. (Citations omitted.)

Accordingly, the Forum does not find the *McGinnis* case controlling on the issue of calculating penalty wages under ORS 652.150. The civil penalty of \$713, calculated according to the Agency's established method, will not be disturbed.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders ELIZABETH THOMPSON to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR EDWARD C. KAY in the amount of SEVEN HUNDRED NINETY-THREE DOLLARS AND EIGHTY-FIVE CENTS (\$793.85), representing \$80.85 in gross earned, unpaid, due, and payable wages; and \$713 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$80.85 from February 1, 1993, until paid, and nine percent interest per year on the sum of \$713 from March 1, 1993, until paid.

In the Matter of
CLARA PEREZ RODRIGUEZ,
dba Ag Labor Services; Jose Lopez
Rodriguez, aka Joe L. Rodriguez;
and Jaime Perez Rodriguez,
Respondents.

Consolidated Cases Numbered
49-93, 50-93, and 51-93

Final Order of the Commissioner
Mary Wendy Roberts
Issued March 28, 1994.

SYNOPSIS

Where one Respondent employed her husband and her son (the other two Respondents) in her farm labor contractor business and failed to pay workers on Christmas tree harvest contracts, the Commissioner found that she did not fail to disclose a partnership with the other two Respondents, but that she assisted each of them as unlicensed persons to act as a farm labor contractors, and failed to pay when due to at least 187 workers all money entrusted to her, thereby failing to honor wage agreements with at least 187 workers. The Commissioner found that the husband, to whom the Commissioner had previously denied a farm labor contractor license, acted as a farm labor contractor, failed to display or provide a copy of a farm labor contractor license or temporary permit to a farmer before commencing work on a harvest contract, failed to post a notice of a surety bond or cash deposit on the premises where workers were employed, and assisted the son, an unlicensed person, to act as a farm labor contractor. The Commissioner

found further that the unlicensed son acted as a farm labor contractor, failed to display or provide a copy of a farm labor contractor license or temporary permit to a farmer before commencing work on a harvest contract, failed to post a notice of a surety bond or cash deposit on the premises where workers were employed, and assisted the unlicensed father to act as a farm labor contractor. The Commissioner assessed civil penalties for the violations found. The Commissioner did not assess civil penalties for violations of ORS 658.437, finding that the civil penalty statute does not authorize a civil penalty against a contractor for this violation, and the administrative rule so providing is not valid. ORS 658.405(1); 658.410(1); 658.415(1)(d), (15); 658.437(1)(a), (b), (2)(a), (b); 658.440(1)(a), (c), (d), (3)(a), (e); 658.453(1)(c), (f); OAR 839-15-130(8)(a); and 839-15-508(1)(a), (b)(A) and (B), (c), (e), (f), (o).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on July 20, 21, and 22, 1993, in the conference room of the Bureau of Labor and Industries Office, 3865 Wolverine Street NE, Building E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Respondent Clara Perez Rodriguez, dba Ag Labor Services (Respondent Clara Rodriguez), represented herself and was present

throughout the hearing. Respondent Jaime Perez Rodriguez (Respondent Jaime Rodriguez) represented himself and was present throughout the hearing. Respondent Jose Lopez Rodriguez, aka Joe L. Rodriguez (Respondent Jose Rodriguez), was present throughout the hearing and was represented by Andrew P. Ostitis, Attorney at Law, Salem. Juan Mendoza, Salem, was appointed interpreter by the Forum pursuant to ORS 183.418(3)(b) and OAR 839-50-300, and, under proper affirmation, translated for witnesses who could not readily communicate in the English language, but could do so in the Spanish language.

The Agency called the following witnesses (in alphabetical order): farm workers Andre Francisco Alonzo and Hector Alvarado; Christmas tree grower Jerry Barry; former Agency employees Lee Bercot and Maria Cazares; Garcia Brothers proprietor's wife Shirley J. Garcia; Woodburn area farmer Doug Hopper; farm workers Lucas P. Jacinto and Miguel Jacinto; Oregon Legal Services legal assistant Robert Mendoza; Agency Compliance Specialist Raul Pena; Respondents Clara, Jaime, and Jose Rodriguez; egg farmer Myron Satrum; and Christmas tree broker Duane Trygg.

Respondent Jose Rodriguez called the following witnesses (in alphabetical order) in addition to himself: office worker Alma Bejarano, farm worker Nico Pardo, Compliance Specialist Pena, Respondents Clara and Jaime Rodriguez, and farm worker Leopoldo Rosas Lopez. Respondents Clara Rodriguez and Jaime Rodriguez called no witnesses.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On February 15, 1993, the Agency issued a "Notice of Intent to Assess Civil Penalty" (Notice of Intent) to Respondent Clara Rodriguez. The Notice of Intent cited the following bases for this assessment:

"1. Making Misrepresentations and Willfully Concealing Information On Contractor's License Application * * * [by concealing the identities and financial interests in her farm labor contractor operations of her alleged partners, Jose Lopez Rodriguez and Jaime Perez Rodriguez] * * * in violation of ORS 658.415(1)(d), 658.440(3)(a) and OAR 839-15-508(1)(k). * * * Civil Penalty of \$2,000.00.

"2. Assisting Unlicensed Persons To Act In Violation Of ORS 658.405 To ORS 658.485 * * * [between June, 1992 and October 2, 1992, during which time she performed the activities of farm labor contractor as surrogate for her alleged partners, Jose Lopez Rodriguez and Jaime Perez Rodriguez] * * * in violation of ORS 658.440(3)(e) and OAR 839-15-508(1)(o) * * * Civil Penalty of \$4,000.00.

"3. Failure to Pay, When Due, To Workers Entitled Thereto, All

Money Entrusted To Contractor By Any Person For That Purpose * * * [in October, 1992, Respondent, in partnership with Jaime Perez Rodriguez, recruited, supplied and employed workers for Jerry Barry, dba Barry's Christmas Trees, and between November 5 and December 4, 1992, Barry entrusted Respondent with \$42,530 to pay those workers and Respondent] failed to pay at least 187 workers * * * in violation of ORS 658.440(1)(c) and OAR 839-15-508(1)(e) * * * Civil Penalty of \$18,700.00.

"4. Failure To Comply With Contracts Entered Into By Contractor * * * [Respondent, in connection with the Barry tree harvest between November 5 and December 4, 1992] failed to honor wage agreements with at least 187 workers [thus failing to comply with contracts entered into] * * * in violation of ORS 658.440(1)(d) and OAR 839-15-508(1)(f) * * * Civil Penalty of \$18,700.00.

"5. Failure to Execute A Written Agreement With Each Worker Containing Terms and Conditions Of Employment Including Workers Rights and Remedies * * * in violation of ORS 658.440(1)(g) and OAR 839-15-508(1)(g) * * * Civil Penalty of \$18,700. [Allegation withdrawn post hearing by the Agency].

"6. Failure To Furnish Each Worker At The Time Of Hiring, Recruiting, Soliciting, Or Supplying With A Written Disclosure Statement Concerning Terms and Conditions of Employment * * * in

violation of ORS 658.440(1)(f) and OAR 839-15-508(1)(h) * * * Civil Penalty of \$18,700. [Allegation withdrawn post hearing by the Agency].

"7. Failure To Furnish Each Worker At The Time Of Hiring, Recruiting, Soliciting, Or Supplying With A Written Disclosure Statement Concerning Terms and Conditions of Employment * * * in violation of ORS 658.440(1)(g) and OAR 839-15-508(1)(i) * * * Civil Penalty of \$18,700." [Allegation withdrawn post hearing by the Agency]."

2) The Notice of Intent was served on Respondent Clara Rodriguez through Andrew P. Ositis, Attorney at Law, her then authorized agent, on February 17, 1993. On March 5, 1993, the Agency received from Respondent Clara Rodriguez, through counsel, an answer to the Notice of Intent and a request for hearing before an "independent hearings referee," rather than an Agency employee.

3) On February 15, 1993, the Agency issued a "Notice of Intent to Assess Civil Penalty" (Notice of Intent) to Respondent Jose Rodriguez. The Notice of Intent cited the following bases for this assessment:

"1. Acting As A Farm Labor Contractor Without A License * * * [alleging that in November 1992, after he was denied a farm labor license October 22, 1992, Respondent in partnership with and/or employed by Clara Perez Rodriguez and Jaime Perez Rodriguez recruited, employed and transported workers] for Duane Trygg dba Christmas Trees

Unlimited while Respondent did not possess a valid farm labor contractor license in violation of ORS 658.410(1), 658.415 and OAR 839-15-508(1)(a). * * * Civil Penalty of \$2,000.00

"2. Failure To Display And Provide, Prior To Beginning Work On A Contract, A Copy Of A Valid Farm Labor Contractor's License To A Person To Whom The Workers Are To Be Provided [alleging that Respondent, before beginning the work alleged in paragraph 1, failed to display a valid license consistent with ORS 658.410(2)(b) and OAR 839-15-135(2) to Trygg] * * * in violation of ORS 658.437(1) and OAR 839-15-508(1)(b) * * * Civil Penalty of \$2,000.00.

"3. Failure To Post Notice Of A Surety Bond Or Cash Deposit On The Premises Where Employees Of Contractor Were Employed * * * [Respondent failed to so post in connection with the Trygg tree harvest] * * * in violation of ORS 658.415(15) and OAR 839-15-508(1)(c) * * * Civil Penalty of \$2,000.

"4. Failure to Pay, When Due, To Workers Entitled Thereto, All Money Entrusted To Contractor By Any Person For That Purpose * * * [between November 24 and December 8, 1992, Respondent, in partnership with Clara Perez Rodriguez, recruited, supplied and employed workers for Trygg and between November 24 and December 8, 1992, Trygg entrusted Clara Perez Rodriguez with \$25,000 to pay those workers and Respondent failed to pay at least six workers] \$1,553.37 [with

money entrusted to him for that purpose] * * * in violation of ORS 658.440(1)(c) and OAR 839-15-508(1)(e) * * * Civil Penalty of \$12,000.

"5. Failure To Comply With Contracts Entered Into By Contractor * * * [Respondent, in connection with the Trygg tree harvest between November 24 and December 8, 1992] failed to honor wage agreements with at least 6 workers [thus failing to comply with contracts entered into] * * * in violation of ORS 658.440(1)(d) and OAR 839-15-508(1)(f) * * * Civil Penalty of \$12,000.00.

"6. Failure to Execute A Written Agreement With Each Worker Containing Terms and Conditions Of Employment Including Workers Rights and Remedies * * * in violation of ORS 658.440(1)(g) and OAR 839-15-508(1)(g) * * * Civil Penalty of \$12,000. [Allegation withdrawn post hearing by the Agency].

"7. Failure To Furnish Each Worker At The Time Of Hiring, Recruiting, Soliciting, Or Supplying With A Written Disclosure Statement Concerning Terms and Conditions of Employment * * * in violation of ORS 658.440(1)(f) and OAR 839-15-508(1)(h) * * * Civil Penalty of \$12,000. [Allegation withdrawn post hearing by the Agency].

"8. Failure To Furnish Each Worker At The Time Of Hiring, Recruiting, Soliciting, Or Supplying With A Written Disclosure Statement Concerning Terms and Conditions of Employment * * * in

violation of ORS 658.440(1)(g) and OAR 839-15-508(1)(i) * * * Civil Penalty of \$12,000. [Allegation withdrawn post hearing by the Agency].

"9. Assisting Unlicensed Persons To Act In Violation Of ORS 658.405 To ORS 658.485 * * * in that [Respondent] from September 1989 to the present assisted Jaime Perez Rodriguez, an unlicensed person, to act as a farm labor contractor in a partnership * * * in violation of ORS 658.440(3)(e) and OAR 839-15-508(1)(o) * * * Civil Penalty of \$2,000."

4) The Notice of Intent was personally served on Respondent Jose Rodriguez on February 17, 1993. On or about March 5, 1993, the Agency received from Respondent Jose Rodriguez, through counsel, an answer to the Notice of Intent and a request for hearing before an "independent hearings referee," rather than an Agency employee.

5) On February 16, 1993, the Agency issued a "Notice of Intent to Assess Civil Penalties (Amended)" (Amended Notice of Intent) to Respondent Jaime Rodriguez. The Amended Notice of Intent cited the following bases for this assessment:

"1. Acting As A Farm Labor Contractor Without A License alleging that Respondent, in or about October, 1992, in partnership with Respondent Clara Perez Rodriguez recruited, employed and transported workers for Jerry Barry, dba Barry's Christmas Trees, after [Respondent] bid upon and/or submitted prices for such labor * * * [and] did not possess a

valid farm labor contractor license * * * in violation of ORS 658.410 (1), 658.415 and OAR 839-15-508(1)(a). * * * Civil Penalty of \$2,000.00.

"2. Failure To Display And Provide, Prior To Beginning Work On A Contract, A Copy Of A Valid Farm Labor Contractor's License To A Person To Whom The Workers Are To Be Provided [alleging that Respondent failed to display a valid license consistent with ORS 658.410(2)(b) and OAR 839-15-135(2) to Barry in or about October 1992] * * * in violation of ORS 658.437(1) and OAR 839-15-508(1)(b) * * * Civil Penalty of \$2,000.00.

"3. Failure To Post Notice Of A Surety Bond Or Cash Deposit On The Premises Where Employees Of Contractor Were Employed * * * [Respondent] failed to so post in connection with the Barry tree harvest * * * in violation of ORS 658.415(15) and OAR 839-15-508(1)(c) * * * Civil Penalty of \$2,000.

"4. Failure to Pay, When Due, To Workers Entitled Thereto, All Money Entrusted To Contractor By Any Person For That Purpose * * * between November 5 and December 4, 1992, [Barry entrusted Respondent with \$42,530 to pay workers and Respondent] failed to pay at least 187 workers * * * in violation of ORS 658.440(1)(c) and OAR 839-15-508(1)(e) * * * Civil Penalty of \$18,700.

"5. Failure To Comply With Contracts Entered Into By Contractor * * * [in connection with the Barry tree harvest Respondent]

failed to honor wage agreements with at least 187 workers * * * in violation of ORS 658.440(1)(d) and OAR 839-15-508(1)(f) * * * Civil Penalty of \$18,700.00.

"6. Failure to Execute A Written Agreement With Each Worker Containing Terms and Conditions Of Employment Including Workers Rights and Remedies * * * in violation of ORS 658.440(1)(g) and OAR 839-15-508(1)(g) * * * Civil Penalty of \$18,700. [Allegation withdrawn post hearing by the Agency].

"7. Failure To Furnish Each Worker At The Time Of Hiring, Recruiting, Soliciting, Or Supplying With A Written Disclosure Statement Concerning Terms and Conditions of Employment * * * in violation of ORS 658.440(1)(f) and OAR 839-15-508(1)(h) * * * Civil Penalty of \$18,700. [Allegation withdrawn post hearing by the Agency].

"8. Failure To Furnish Each Worker At The Time Of Hiring, Recruiting, Soliciting, Or Supplying With A Written Disclosure Statement Concerning Terms and Conditions of Employment * * * in violation of ORS 658.440(1)(g) and OAR 839-15-508(1)(i) * * * Civil Penalty of \$18,700. [Allegation withdrawn post hearing by the Agency].

"9. Assisting An Unlicensed Person To Act In Violation Of ORS 658.405 To ORS 658.485 * * * in that [Respondent] from June 30, 1990 to the present assisted Respondent Jose Lopez Rodriguez, an unlicensed person, to act as a

farm labor contractor in a partnership * * * in violation of ORS 658.440(3)(e) and OAR 839-15-508(1)(o) * * * Civil Penalty of \$2,000."

6) The Amended Notice of Intent was personally served on Respondent Jaime Rodriguez on February 16, 1993. On or about March 5, 1993, the Agency received from Respondent Jaime Rodriguez, through counsel, an answer to the Amended Notice of Intent and a request for hearing before an "independent hearings referee," rather than an Agency employee.

7) On March 19, 1993, the Agency requested a hearing date for cases 49-93, 50-93, and 51-93 from the Hearings Unit and filed a request for an order consolidating the three cases. On March 25, the Hearings Referee advised Respondents' counsel of a time for filing any objections to the request for consolidation and, in view of the request of each Respondent for an independent hearings referee, for filing a motion to disqualify the assigned referee under the rules of the Forum.

8) On March 26, 1993, the Forum issued to Respondent Clara Rodriguez, her counsel, and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process - OAR 839-30-020 through 839-30-200.

9) On April 5, 1993, the Commissioner received correspondence from the office of Attorney Mark Feuer, Los Angeles, California, regarding Respondent Clara Rodriguez. The Commissioner's office advised Mr. Feuer that Respondent Clara Rodriguez was represented in this Forum by Oregon counsel and that communications on her behalf should be made through counsel of record.

10) On April 5, 1993, the Forum received from each of the Respondents a motion to disqualify the Hearings Referee and from Respondent Clara Rodriguez an objection to consolidation of these cases. The motions for disqualification were grounded on the Referee having previously heard a case involving Respondent Jose Rodriguez as the respondent and Respondent Jaime Rodriguez as a witness and the credibility findings made therein. The objection to consolidation challenged the existence of any factual basis for charging the three Respondents together, and alleged that the prior involvement of Respondent Jose Rodriguez as a farm labor contractor tainted the case of Respondent Clara Rodriguez.

11) Effective April 12, 1993, the Commissioner adopted temporary Oregon Administrative Rules 839-50-000 to 839-50-420, governing contested case hearings. Those rules applied to all pending proceedings, including these proceedings. All procedures herein on or after April 12, 1993, were under those rules. The Hearings Unit transmitted copies of temporary OAR 839-50-000 to 839-50-420 to each participant* on April 8,

* "Participant" refers to the Respondents and to the Agency. OAR

1993. OAR 839-50-000 to 839-50-420 were made permanent on September 3, 1993.

12) On April 22, 1993, the Hearings Referee denied the respective Respondents' motions to disqualify the Hearings Referee, pointing out that they did not, in affidavit form or otherwise, aver a conflicting pecuniary or familial interest as required by OAR 839-50-160 (former 839-30-065) and that mere prior dealing with the referee was insufficient, absent a showing of actual prejudice or bias. Under OAR 839-50-190 (former 839-30-095), the Hearings Referee granted the Agency's motion to consolidate, noting that the standard of two or more cases involving common questions of law or fact was met.

13) On April 28, 1993, Attorney Ostitis advised the Forum that he would not be representing any of the Respondents, that his services had been terminated, and that Mr. Reuer [sic] had been engaged as substituted counsel.

14) On June 25, 1993, the Hearings Referee wrote to the participants and to Mr. Feuer reviewing the ruling to consolidate, the setting of all three sets of charges for hearing on July 20, 1993, in Salem, and the understanding that counsel had been substituted. The Referee's letter reminded all that counsel must be or appear with a member of the Oregon Bar. The Referee's letter also contained a discovery order under OAR 839-50-210 seeking lists of witnesses and documents.

15) On June 29, 1993, the Hearings Referee received a response to

the June 25 letter from the office of Owen T. Mascott, Attorney, Los Angeles, California. The letter represented that Feuer was reluctant to represent Respondent Clara Rodriguez and that Mascott would do so under certain conditions, including a suggested special appearance without associating Oregon counsel. On June 30, the Hearings Referee denied the requested special appearance and repeated the requirement that counsel be or be associated with Oregon counsel.

16) On June 30, the Hearings Unit received notice from Mr. Ostitis that he would be representing Respondent Jose Rodriguez and that Respondent Jaime Rodriguez would be representing himself. On July 6, 1993, the Hearings Unit received notice from Mr. Feuer that he did not then or previously represent any of the Respondents. On July 7, Respondent Jaime Rodriguez filed a list of potential witnesses and documents and confirmed that he would be representing himself.

17) On July 7, 1993, the Agency filed a motion for postponement of the hearing, setting forth certain schedule changes and requirements of the Case Presenter as reasons and reciting that Mr. Ostitis had no objection to the postponement. On July 8, the Hearings Referee noted the Agency's concerns, found that not all participants had agreed to a postponement, pointed out that workload was generally not good cause for postponement, and denied the motion while extending the time for filing of summaries under the discovery order by eight days. A copy of that

ruling was transmitted by fax to Mr. Mascott.

18) On July 13, 1993, the Hearings Referee had a telephone conversation with Mr. Mascott, who had called to verify the time and place of hearing and the order and length of presentation. The Referee confirmed time and location, explained that he expected the hearing to take several days, and suggested that Mr. Mascott speak with the Agency about the length of the Agency's presentation. The Referee requested that Mr. Mascott confirm in writing the identity of his Oregon associate. A written summary of this conversation was sent to the participants.

19) On July 15, 1993, Respondent Jose Rodriguez and the Agency each filed a Summary of the Case.

20) On July 16, 1993, by fax, Respondent Clara Rodriguez requested a postponement because Mr. Mascott and his unnamed Oregon associate were unable to represent her, due in part to the anticipated length of the proceeding, and she had neither the time nor the funds to find other counsel prior to the hearing. She stated that Respondent Jaime Rodriguez had no objection. Counsel for Respondent Jose Rodriguez, by fax, had no objection.

21) On July 16, the Hearings Referee noted that hearings were scheduled months in advance with the anticipated length built into the schedule, and that the Agency's request for postponement had been denied within the past week with the result that witnesses were scheduled for hearing on July 20. The referee noted that the cases had been scheduled since March 26, that Respondent Clara Rodriguez had been unsuccessful in

obtaining counsel since April 26, and that there was no assurance that she would be any more successful at any future date. The Hearings Referee denied the postponement request. By letter dated July 14, Mr. Mascott confirmed his withdrawal.

22) At the commencement of the hearing, Respondents Clara and Jaime Rodriguez and counsel for Respondent Jose Rodriguez stated that each Respondent had received a Notice of Contested Case Rights and Procedures and had no questions about it.

23) Pursuant to ORS 183.415(7), the Agency and the Respondents were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

24) At the close of testimony, pursuant to OAR 839-50-360, the Hearings Referee requested post-hearing briefs from the participants. The Forum announced a schedule for the submission of factual and legal argument and rebuttal thereto, and confirmed that schedule by letter on July 26, 1993. The Agency consulted the Attorney General's office, and the schedule was modified twice at the request of the Agency. The participants made timely submissions of briefs and argument under the schedule as modified, and the record herein closed on September 21, 1993.

25) During the hearing, pursuant to discussion among the participants, the Hearings Referee ruled that he would officially notice two prior final orders of the Commissioner, each of which involved a Respondent herein and facts

alleged by the Agency herein: *In the Matter of Jose Rodriguez*, 11 BOLI 110 (1992), and *In the Matter of Clara Perez*, 11 BOLI 181 (1993). For convenience of reference, a copy of each order is hereby admitted as both an administrative exhibit and as substantive evidence.

26) The Proposed Order, which included an Exceptions Notice, was issued on December 8, 1993. Exceptions were due by December 20, 1993. None were received.

FINDINGS OF FACT – THE MERITS

1) Respondent Clara Perez Rodriguez is a natural person who was licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor under the name Clara Perez, dba AG Labor Service,* from July 31, 1991, to July 31, 1992, and from August 7, 1992, until revoked on February 3, 1993. She was born in Mexico, raised in Texas, and has a sixth-grade education. She was married in 1958 and raised five children.

2) Respondent Jose Lopez Rodriguez is a natural person who was licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor under the name Jose L. Rodriguez, dba J & J Farm Labor Contracting, in 1988 and 1989, and who attempted to renew that license in 1990. The renewal was denied by the Agency in June 1991 and finally denied by Commissioner's Order on October 22, 1992. Prior to 1988, he operated J & J Farm Labor Contracting as a partnership with Respondent

Jaime Perez Rodriguez for several years in California. He was born in Texas and has a third-grade education.

3) Respondent Jaime Perez Rodriguez is a natural person who is the son of Respondents Clara Rodriguez and Jose Rodriguez. He was described as office manager of the Oregon J & J Farm Labor Contracting and as office manager of Ag Labor Services. He has a BS degree from Fresno State and attended one year of law school at Willamette University. During all times material herein, Respondent Jaime Rodriguez was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

4) In 1989, Respondents Jose Lopez Rodriguez and Jaime Perez Rodriguez each made application with the United States Department of Labor, Wage and Hour Division (USDOL), for a certificate of registration as a farm labor contractor under federal law.

5) In 1989, Guadalupe Rodriguez, uncle of Respondent Jaime Rodriguez, and George Rodriguez, brother of Respondent Jaime Rodriguez, each made application with USDOL for a certificate of registration as a farm labor contractor employee under federal law. Each identified himself as a field supervisor for Respondent Jaime Rodriguez, his employer.

6) In 1991, Respondent Jose Rodriguez again made application with USDOL for a certificate of registration

as a farm labor contractor under federal law, and Respondent Jaime Rodriguez made application with USDOL for a certificate of registration as a farm labor contractor employee under federal law. On his 1991 employee registration application, Respondent Jaime Rodriguez identified himself as business manager for Respondent Jose Rodriguez, his employer.

7) The federal Seasonal Migrant Worker Protection Act requires that contractors and their principal employees who recruit and transport workers each register as a contractor.

8) Prior to 1991, Respondent Clara Rodriguez had experience as a farm worker and as a nursery foreman. She had never worked as a farm labor contractor and did not participate in the contracting end of J & J Farm Labor Contracting. She worked as a checker in strawberries for J & J in 1989. Until at least 1990, her usual residence had been in California. She lived at 1288 E Lincoln, Woodburn, when in Oregon.

9) In 1991, Respondent Clara Rodriguez decided to become a contractor and made application to the Agency. She applied under the name Clara Perez with a home address in California. She gave the business name as Ag Labor Service and the business address as 975 Pacific Highway, Woodburn, a location which Respondent Jaime Rodriguez found. She listed a mailing address as PO Box 922, Woodburn. On July 30, 1991, the Agency issued a temporary permit to Clara Perez, dba Ag Labor Service, at 975 Pacific Highway/PO Box 922, Woodburn.

10) 1288 E Lincoln was the home address of Respondent Jose Rodri-

quez and the business address of J & J Farm Labor Contracting from 1989 to 1991. PO Box 922, Woodburn, was the mailing address of J & J Farm Labor Contracting from 1989 to 1991.

11) In connection with her license application, Respondent Clara Rodriguez supplied \$10,000 as surety under the farm labor contractor licensing statutes. She borrowed the funds from Rita Fuentes, a friend in the State of Washington. When Respondent Clara Rodriguez passed the statutorily required written contractor's examination, the Agency issued a license.

12) Based on an application dated June 26, 1992, the Agency on August 7, 1992, issued a temporary permit as a farm labor contractor to Clara Perez, dba Ag Labor Services, at 1288 E Lincoln Street, Woodburn. On October 2, 1992, the Agency issued a 1992 license to Clara Perez/Ag Labor Service, 975 Pacific Highway, Woodburn.

13) In her 1991 and 1992 farm labor contractor applications, Respondent Clara Rodriguez did not list any other person as having a financial interest, whether as partner, shareholder, associate, or profit-sharer, in her operations as a farm labor contractor.

14) At times material, Douglas Hopper, together with his brother Dennis, was a Woodburn area farmer engaged in the growing of strawberries, vegetables, and wheat under the name Hopper Brothers (Hopper Bros.). Hopper Bros. hired farm labor contractors and had, prior to July 1991, dealt with J & J Farm Labor Contracting. Respondent Jose Rodriguez was known to Hopper as "Joe" and as the owner of J & J. Although much of the

* Throughout the testimony and documents and throughout this Order, the entity registered to Respondent Clara Perez (Rodriguez) was referred to as "Ag Labor Service," as "Ag Labor Services," and as "Ag Labor." Each variation of the name refers to the same entity.

negotiation was handled by Respondent Jaime Rodriguez, J & J business decisions appeared to Hopper to be mutual.

15) J & J had a contract in June 1990 to harvest strawberries for Hopper Bros. J & J had a contract in July 1990 to harvest cucumbers for Hopper Bros. Both contracts were signed for J & J by Respondent Jose Rodriguez and by Respondent Jaime Rodriguez. Doug Hopper wanted Respondent Jaime Rodriguez's signature.

16) In 1991, Hopper Bros. contracted with J & J for strawberries. In July, Doug Hopper was aware that J & J was not available for cucumbers and that Respondent Clara Rodriguez had not yet obtained a license. Hopper had received correspondence from Garcia Brothers Contracting (Garcia Bros.) and had asked Respondent Jaime Rodriguez for his recommendation about them.

17) At times material, Juan Garcia was a proprietor of Garcia Bros., assisted by his wife, Shirley. Hopper called Garcia Bros. and said Ag Labor had licensing problems and that Hopper Bros. needed Garcia Bros. to harvest cucumbers. They met with Respondent Jaime Rodriguez, who said he had workers ready to go and that Respondent Jose Rodriguez could act as foreman. Garcia Bros. had borrowed money from Respondent Jaime Rodriguez to get their workers' compensation coverage.

18) Respondent Jose Rodriguez and Respondent Clara Rodriguez were observed together at the Ag Labor office in July 1991.

19) Hopper Bros. contracted with Garcia Bros. for the first portion of the cucumber harvest. When Respondent Clara Rodriguez became licensed as Ag Labor Service, the existing Garcia Bros. contract was canceled and Hopper Bros. contracted with Ag Labor. Hopper Bros. then contracted with Garcia Bros. for other work.

20) Respondent Clara Rodriguez had been reluctant to contract with Hopper Bros. in July because she was uncertain whether she would be licensed and whether she would have workers' compensation coverage.

21) On or about July 30, 1991, Garcia Bros., acting as contractor, entered into a subcontract with Respondent Jaime Rodriguez for harvesting Hopper Bros.'s cucumbers. Shirley Garcia knew Respondent Jaime Rodriguez worked with J & J. She finally drew up a written agreement, after mid-August. She then knew that the subcontractor was Ag Labor. Respondent Jaime Rodriguez obtained Respondent Clara Rodriguez's signature on the back-dated agreement.

22) The initial grade slip presented to Hopper Bros. on the Garcia Bros. contract was on a J & J statement. Hopper Bros. sent it to Shirley Garcia. Hopper Bros. wanted it to be from Garcia Bros., with whom they had contracted. It totaled \$6,309, was dated August 7, 1991, and covered 8,412 buckets picked July 30, July 31, August 2, and August 3. A grade slip presented to Hopper Bros. on a statement headed "Garcia Bros. Contractors" totaled \$6,309, was dated August 7, 1991, and covered 8,412 buckets picked July 30, July 30 [sic], August 2, and August 3. On an unheaded

statement form dated August 7, 1991, Respondent Jaime Rodriguez acknowledged in writing receipt of \$6,500 for Ag Labor Service from Garcia Bros.

23) Hopper Bros. paid Garcia Bros. for picking the cucumbers. Garcia Bros. and Ag Labor split the proceeds after paying the workers. Garcia gave Respondent Jaime Rodriguez \$6,500 to pay workers on August 7. On other paydays, Shirley Garcia paid the pickers in cash in exchange for picking slips. Until Ag Labor had its own picking slips, slips from J & J were used. Ag Labor later sued Garcia Bros. over pay for hourly workers.

24) Doug Hopper generally checked the work on site and drew contracts for Hopper Bros. He was acquainted with Respondent Jose Rodriguez and did not recall seeing him with Ag Labor during the 1991 cucumber harvest. The workers used by Ag Labor in cucumbers were the same as those used by Garcia Bros.

25) Respondent Jose Rodriguez worked on the Garcia subcontract at Hopper Bros.

26) At times material, Duane Trygg was a Christmas tree broker engaged in buying and selling Christmas trees. He hired licensed and bonded farm labor contractors to harvest trees he had purchased. He had not heard of J & J Farm Labor Contracting. He first dealt with Ag Labor in early 1992. At that time he dealt with Respondent Jaime Rodriguez, who sent a cost outline letter with an hourly bid and license and bond information. There was no written agreement. Trimming work done by Ag Labor at that time was satisfactory and Trygg decided to offer Ag Labor work at harvest.

27) In discussing his needs from Ag Labor for the 1992 Christmas tree harvest, Trygg dealt with Respondent Jaime Rodriguez. Trygg met Respondent Jose Rodriguez in the fall of 1992. Respondent Jaime Rodriguez told Trygg that Respondent Jose Rodriguez was an experienced tree harvester. Respondent Jaime Rodriguez gave Trygg a written bid proposal. Trygg and Respondent Jaime Rodriguez had numerous discussions negotiating an agreement for the harvest. The first time Trygg saw Respondent Clara Rodriguez was on October 16, 1992, when the harvest contract was signed at the Ag Labor office. He understood at that time that she was the legal owner of Ag Labor.

28) When the work started, Respondent Jaime Rodriguez's brother Joel was active in recruiting, supervising, and bringing the workers in, and appeared to Trygg to be the main boss. The original plan was that Respondent Jose Rodriguez would do this.

29) Trygg saw Respondent Clara Rodriguez twice during the harvest after October 16, 1992. Both occasions regarded her need for money to pay workers. The second meeting, at which she suggested a loan from Trygg, was a "desperate cry for more money" by Respondent Clara Rodriguez.

30) At times material, Jerry Barry was a Salem area Christmas tree grower. He contracted with labor contractors for the harvest of trees. In 1989, he contracted with J & J for tree harvesting after negotiating with Respondent Jaime Rodriguez. The written agreement referred to "Joe and

Jaime Rodriguez dba J & J Farm Labor Contracting" and was signed by Barry and his foreman and by both Respondent Jose Rodriguez and Respondent Jaime Rodriguez.

31) In 1991, Barry contracted with Ag Labor for slinging and packing 97,000 trees after negotiating with Respondent Jaime Rodriguez. The written agreement referred to "Ag Labor Service of P.O. Box 922, Woodburn, Ore 97071." It was signed by Barry's foreman and Respondent Clara (Perez) Rodriguez on November 5, 1991.

32) In 1992, Barry contracted with Ag Labor for tree harvesting after negotiating with Respondent Jaime Rodriguez. The written agreement referred to "Jaime P. Rodriguez and Clara Perez dba Ag Labor Services" before Respondent Jaime Rodriguez's name was crossed out. It was signed by Barry and Respondent Clara (Perez) Rodriguez on October 29, 1992, but on a separate page, also signed October 29, Respondent Jaime Rodriguez guaranteed the normal, timely, and "husbandrylike" conduct of the contract. Respondent Clara Perez Rodriguez agreed to work exclusively for Barry during the time period of the contract (November 5 to December 12, 1992).

33) Respondent Jaime Rodriguez visited the Trygg site near North Plains. He did not see Respondent Jose Rodriguez there, but knew through Joel Rodriguez that Respondent Jose Rodriguez was on the site, acting as an unpaid "assistant supervisor," which involved obtaining supplies, moving equipment, and showing workers where to work.

34) Respondent Jose Rodriguez worked at the North Plains worksites in November and December 1992.

35) There was no record of wage payments to or a wage claim by Respondent Jose Rodriguez.

36) At times material, Raul Pena was a Compliance Specialist with the Farm Labor Unit of the Wage and Hour Division of the Agency. On about December 3, 1992, he received a call from the City of Woodburn Police Department about a disturbance at the office of Ag Labor Services, 975 Pacific Highway, Woodburn. About one week before, Pena had spoken with Respondent Clara Rodriguez urging her to establish a regular payday because of complaints from workers about not being paid on time.

37) When he arrived at the Ag Labor office, Pena found between 30 and 50 persons who stated they had not been paid and who refused to leave. Alma, an office worker, stated there was no money with which to pay them. No wage claims had been filed at the time. Some of the workers stated they were due one week's wages. Some stated they were due two weeks' wages.

38) Pena spoke with Respondent Clara Rodriguez that evening. She agreed to meet him the following day with the money. Pena knew that Ag Labor had a tree harvest contract with Barry. Respondent Clara Rodriguez told him of the contract with Trygg. She said she would obtain funds from the farmers or from a friend. Pena also spoke with Respondent Jaime Rodriguez, who stated he was Ag Labor's business manager.

39) Funds available on December 4 were limited. Barry had canceled the Ag Labor contract, and Respondent Clara Rodriguez was reluctant to pay anyone. Pena urged that she pay what she could in order to avoid a riot. She then determined to pay the Trygg contract workers first. Pena spoke by phone with Respondent Jaime Rodriguez, who determined on his own responsibility to pay the workers on an hourly basis rather than piece rate. Some workers were paid that evening.

40) Pena asked Respondents Clara and Jaime Rodriguez for documentation such as time sheets, etc., in order that the Agency could determine who was paid and what was owed. He received some of the requested information over the next two days and on Tuesday, December 8. He assisted the Ag Labor office in transferring information and asked particularly for the Barry contract list because he had no documented problem at the time with the Trygg employees, although some of them had said they were not paid.

41) After the data was on the Agency's computer, a number of wage claims were filed. Pena compared those with Ag Labor's records. In December 1992, 280 employees were unpaid, only partially paid, or paid late. At the time of hearing, 190 of these had been fully paid with funds originating from Barry.

42) The Agency processed the wage claims received according to its usual process. After a claimant signed a wage claim form and assignment, the employer was sent a demand letter and, if there was no response in 10 days, an order of determination was issued. Pena accepted claims directly

from several workers on the Trygg contract. Each of them stated they worked for a contractor in Woodburn (Ag Labor), and some identified one of the supervisors or foremen as Respondent Jose Rodriguez.

43) For the Trygg Christmas tree harvest, a sample written contractual agreement between Ag Labor and the worker, required by Oregon law to be provided by the contractor, specified a \$.01 per tree bonus, in addition to a per tree harvested payment, if the worker worked through the entire harvest. Workers did not receive the written agreement. Workers stated that they understood that, in addition to \$4.75 per hour during harvest, a \$.25 per hour bonus would be paid if the worker worked through the entire harvest. Those who missed a work day or who quit before the end of the harvest could not collect a bonus. Many of the workers quit working when they were not paid timely.

44) Trygg had paid at least \$25,000 on the contract by about December 1, 1992. On or about December 7, he obtained written acknowledgment from Respondent Jaime Rodriguez that Trygg had exceeded his contract obligation up to that time. Trygg looked to Respondent Jaime Rodriguez rather than to Respondent Clara Rodriguez for compliance with the agreement. Respondent Jaime Rodriguez made all decisions as to which workers were assigned and where.

45) The trees harvested were purchased by Trygg from four different land owners and were located on four or five different parcels of land near North Plains, Oregon. Trygg was

present at each site several times during the harvest. Ag Labor supplied a foreman on each parcel, including Joel Rodriguez and Respondent Jose Rodriguez. Respondent Jose Rodriguez brought or led groups of workers to the job sites in a green pickup. During the harvest, Trygg was in daily communication with Joel Rodriguez, Respondent Jaime Rodriguez, and Respondent Jose Rodriguez by mobile telephone.

46) All payments made by Trygg for labor were made to Ag Labor with the exception of two that were payable to individual groups of workers who stated they had not been paid. Trygg met with Respondents Jaime and Clara Rodriguez sometime before December 15 and was told that Ag Labor still owed between \$4,000 and \$6,000 to workers. This was less than the claims of non-payment Trygg had learned of from workers, from landowners, from Oregon Legal Services, and from the Agency.

47) Respondent Clara Rodriguez purchased a deli in the fall of 1992. She was involved with the operation of the deli for about three weeks. It was located next to the Ag Labor office.

48) At times material, Myron Saturn was a Woodburn-area egg farmer who had previously used J & J Farm Labor Contracting for labor to move poultry. He always negotiated with Respondent Jaime Rodriguez; he was aware that Respondent Jose Rodriguez was the licensed contractor. He did not use J & J for several months and received a mailing from Ag Labor. He knew that Respondent Jose Rodriguez had lost his license as J & J. He was aware that Respondent

Clara Rodriguez was involved with Ag Labor and was Respondent Jaime Rodriguez's mother. All of his dealings and negotiations with Ag Labor in 1991 and 1992 were with Respondent Jaime Rodriguez. Respondent Jaime Rodriguez brought the workers to the job. Saturn explained the work to him and to the workers.

49) In August 1992, Robert Mendoza, a legal assistant with Oregon Legal Services since 1987, was assisting in an investigation involving the alleged non-payment of wages and transporting of workers by Ag Labor. At about 5:50 a.m. on August 20, he was present at the Ag Labor office when Respondent Jaime Rodriguez and Respondent Jose Rodriguez drove vehicles containing workers to a location near Molalla known as "the hole."

50) When Respondent Jaime Rodriguez worked for Ag Labor in 1991 and 1992, his duties included supervision of one to two office workers responsible for time sheets, payroll, and billing statements. He also kept track of three to four field supervisors. There were approximately 6 to 10 contracts active at any one time, with a total of about 25 contracts while Ag Labor was active. In August 1991, there were only two or three active contracts. Respondent Clara Rodriguez took care of the banking. He did some on-site supervision in connection with the Christmas tree contracts.

51) Respondent Jaime Rodriguez drew a monthly salary at Ag Labor, and at the time of hearing was collecting unemployment benefits based on those earnings.

52) Ag Labor's normal hiring procedure was for workers to report to the

office in Woodburn and complete the paperwork for hiring. They were then dispatched, usually the following day, to a job site after Respondent Clara Rodriguez hired them.

53) Workers sometimes heard of work by word of mouth. If they knew the location, they reported there. Field supervisors were supposed to use a list supplied by the Ag Labor office, but may have put to work anyone who showed up. Respondent Clara Rodriguez did not question that those persons who made wage claims against Ag Labor actually worked on the Christmas tree harvest.

54) Several workers who hired on at the North Plains worksite learned of the work at a labor camp and were hired and supervised by Joel Rodriguez and Respondent Jose Rodriguez. They reported to the job site and did not sign up at Ag Labor's office or fill out papers. They understood that they earned \$4.75 an hour. None had been paid. Some had difficulty identifying Respondent Jose Rodriguez in person at hearing, but knew the additional names of Joel Rodriguez and Jaime Rodriguez and had seen Respondent Jaime Rodriguez at the worksite. None of the Respondents provided transportation to the job.

55) At first, these workers did not know the names Ag Labor or Clara Perez (Rodriguez), or who the main contractor was, and were looking to Respondent Jose Rodriguez for pay because that's who they worked for. All eventually learned of the names Ag Labor and Clara Perez or Clara Rodriguez when they began inquiring about being paid. Some workers had

been to an office in Woodburn to try to get paid, and all made wage claims.

56) The workers described in Findings 22, 54, and 55 who testified at the hearing spoke a native dialect and spoke Spanish as a second language. They could not read or write Spanish. They could not speak or read English. Not all understood the concept of "hire," or its Spanish equivalent. They did understand that they were to be paid \$4.75 an hour, or \$5.00 if they earned a bonus. Those who testified and several others whose testimony would have been cumulative had worked at one or more of the North Plains sites and were still owed wages.

57) Respondent Jose Rodriguez testified that he was the sole owner of J & J Farm Labor Contracting in Oregon in 1989 to 1991 and that Respondent Jaime Rodriguez was his office manager, had no hiring authority, and assisted him with contract negotiations because of language problems. He stated that he was present at the North Plains worksite for the Christmas tree harvest at the request of his son Joel, who was inexperienced with tree harvesting. In helping Joel, he did not expect to be paid. He denied ever working for Ag Labor or acting as a crew boss for Ag Labor, and displayed upset at the mention of the name Ag Labor. He denied working in the cucumber harvest in 1991 or 1992 and stated he was out of the country in August 1992. He stated that he had sometimes been next door to the Ag Labor office at a refreshment stand where he would meet Respondent Jaime Rodriguez or his other sons for lunch, but that he did not visit the Ag Labor office. The "refreshment stand"

was the same deli that Respondent Clara Rodriguez had purchased in November. His memory was unreliable regarding the USDOL applications, the number and type of vehicles owned, and when Respondent Jaime Rodriguez began working for J & J. He testified that he had not lived at the family home at 1288 E Lincoln, Woodburn, since early 1991, that he had not worked as a farm labor contractor since July 1991, and that he had no interest in or knowledge about Respondent Clara Rodriguez's farm labor contractor license or business. He stated he had only passed by the Hopper Bros. cucumber fields in August 1991, that he had never met Shirley Garcia, and that his brother, Feliciano, was in Oregon in 1991. Because much of his testimony was contradicted by reliable sources or circumstances, the Forum has viewed his statements with distrust and credited only that testimony which was verifiable from other evidence or which was not material to the ultimate decisions herein.

58) Respondent Jaime Rodriguez testified that he was merely the office manager for J & J Farm Labor Contracting and later for Ag Labor Service. He denied he had any hiring authority over field workers at J & J or at Ag Labor, and denied that he recruited, solicited, or hired them for either business. He stated that he only negotiated with farmers on contracts in each instance in order to assist his parent and the farmer because of the language problem. He stated that he sometimes signed farm harvest contracts when requested to do so by the farmer, but that he did not do so as the contractor.

He testified that his parents, Respondents Jose and Clara Rodriguez, had been separated since early 1991 due to marital difficulties. He testified that the billing to Hopper Bros. in early August 1991 was an error by an Ag Labor office employee who had just returned to work and was unaware that J & J was not in business, and later suggested that the billing was a sample, although unable to explain why it was sent to Hopper Bros. He suggested that the sighting of his father working for Ag Labor in 1992 was really his father's brother Feliciano in August 1991. He stated that his mother decided to pay the workers hourly, although there was evidence he had stated that was his decision. He suggested that Trygg may have publicized the work at North Plains in order to attract more workers and finish sooner. He denied that Respondent Jose Rodriguez hired, solicited, recruited, or employed workers for Respondent Clara Rodriguez as Ag Labor. He attempted to explain that his parents were seen together at the Ag Labor offices after their separation because of his sister's domestic difficulties. He testified that from the spring of 1991, he and his brothers were estranged because of the brothers' feeling that he was responsible either for his parent's separation or their failure to reunite. In a prior proceeding, he testified that he and his father were estranged in the spring of 1991 over the rental of a house which workers used. Because much of his testimony was contradicted by reliable sources or circumstances, the Forum has viewed his statements with distrust and credited only that testimony which was verifiable from other evidence or which

was not material to the ultimate decisions herein.

59) Respondent Clara Rodriguez's testimony was characterized by an inaccurate and failing memory. She could not recall how she contacted Hopper Bros., she denied knowledge that Respondent Jose Rodriguez was having difficulty with the J & J license, and attributed her getting a license to the marital breakup. She couldn't remember whether J & J was involved with the Hopper Bros. contract or the exact date she began living at 1288 E Lincoln after Respondent Jose Rodriguez moved out. She didn't remember the various vehicles on her license applications and denied that Respondent Jose Rodriguez or Respondent Jaime Rodriguez had any ownership interest in Ag Labor Service or any financial interest in the business. She stated that the per tree bonus information on the Trygg sample contract was an office worker's mistake and she intended an hourly wage, and that the J & J grade slip on the Garcia Bros. contract was an office worker's mistake. She denied any knowledge of Respondent Jose Rodriguez working on the Trygg sites, then later stated that Joel Rodriguez told her he was there. Because much of her testimony was contradicted by reliable sources or circumstances, the Forum has viewed her statements with distrust and credited only that testimony which was verifiable from other evidence or which was not material to the ultimate decisions herein.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, and particularly from July 1991 until February 1993, Respondent Clara

Perez Rodriguez was a licensed farm labor contractor, as defined by ORS 658.405, doing business in the State of Oregon.

2) Respondent Clara Perez Rodriguez, on her applications for farm labor contractor's licenses in 1991 and 1992, did not conceal the identities and financial interests of any partners in her farm labor contractor operations.

3) At times between June and October 2, 1992, Respondent Clara Perez Rodriguez assisted Respondent Jose Lopez Rodriguez, who was not a licensed farm labor contractor, to recruit, solicit, supply, or employ workers to perform work for another in the production or harvesting of farm products.

4) At times between June and October 2, 1992, Respondent Clara Perez Rodriguez assisted Respondent Jaime Perez Rodriguez, who was not a licensed farm labor contractor, to transport, recruit, solicit, supply, or employ workers to perform work for another in the production or harvesting of farm products and to bid or submit prices on contract offers for the harvesting of farm products.

5) In 1992, and particularly between November 5 and December 4, 1992, Respondent Clara Perez Rodriguez failed, when due, to pay to at least 187 workers entitled thereto, all money entrusted to her by Jerry Barry, dba Barry's Christmas Trees.

6) In 1992, and particularly between November 5 and December 4, 1992, Respondent Clara Perez Rodriguez failed to honor wage agreements with at least 187 workers.

7) In November 1992, Respondent Jose Lopez Rodriguez, who was

not a licensed farm labor contractor, as an employee or agent of Respondent Clara Perez Rodriguez, recruited and employed workers for harvesting of farm products of Duane Trygg, a Christmas tree grower.

8) Respondent Jose Lopez Rodriguez, in November 1992, did not display or provide a valid farm labor contractor license to Trygg before commencing the harvest work described in Ultimate Finding of Fact 7 above.

9) Respondent Jose Lopez Rodriguez, in November 1992, did not post notice of a surety bond or cash deposit on the premises where the workers on the Trygg harvest were to be employed.

10) Respondent Jose Lopez Rodriguez did not have money entrusted to him by Trygg between November 24 and December 8, 1992, and did not fail to pay workers.

11) Respondent Jose Lopez Rodriguez did not, between November 24 and December 8, 1992, fail to honor wage agreements with at least six workers on the Trygg harvest.

12) At times from September 1989 through July 1991, Respondent Jose Lopez Rodriguez assisted Respondent Jaime Perez Rodriguez, who was not a licensed farm labor contractor, by allowing him to recruit, solicit, supply, or employ workers to perform work for another in the production or harvesting of farm products, and by allowing him to bid or submit prices on contract offers for the harvesting of farm products.

13) During October 1992, Respondent Jaime Perez Rodriguez, who was

not a licensed farm labor contractor, recruited, solicited, supplied, or employed workers to perform work for Jerry Barry, dba Barry's Christmas Trees, in the harvest of farm products after Respondent Jaime Perez Rodriguez had bid upon or submitted prices for such labor.

14) Respondent Jaime Perez Rodriguez in October 1992 did not display or provide a valid farm labor contractor license to Barry before commencing the harvest work described in Ultimate Finding of Fact 13 above.

15) Respondent Jaime Perez Rodriguez in October 1992 did not post notice of a surety bond or cash deposit on the premises where the workers on the Barry harvest were to be employed.

16) Respondent Jaime Perez Rodriguez did not have money entrusted to him by Barry between November 5 and December 4, 1992, and did not fail to pay at least 187 workers

17) Respondent Jaime Perez Rodriguez did not fail to honor wage agreements with at least 187 workers on the Barry harvest.

18) At times from July 1991 through December 1992, Respondent Jaime Perez Rodriguez, individually and as an employee or agent of Respondent Clara Perez Rodriguez, assisted Respondent Jose Lopez Rodriguez, who was not a licensed farm labor contractor, to recruit, solicit, supply, or employ workers to perform work for another in the production or harvesting of farm products.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein. ORS 648.405 to 658.485.

2) ORS 658.415(1) provides in part that the farm labor contractor license application form shall include questions asking:

"(d) The names and addresses of all persons financially interested, whether as partners, shareholders, associates or profit-sharers, in the applicant's proposed operations as a farm labor contractor, together with the amount of their respective interests, and whether or not, to the best of the applicant's knowledge, any of these persons was ever denied a license under ORS 658.405 to 658.503 and 658.830 within the preceding three years, or had such a license denied, revoked or suspended within the preceding three years in this or any other jurisdiction."

ORS 658.440(3) provides, in part:

"No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

"(a) Make any misrepresentation, false statement or willful concealment in the application for a license."

ORS 658.453(1)(c) and OAR 839-15-508(1) provide for imposition of civil penalty for violation of ORS 658.440(3)(a). Respondent Clara Perez Rodriguez did not conceal or fail to disclose a partnership with Respondent Jose Lopez Rodriguez or

Respondent Jaime Perez Rodriguez in her farm labor contracting operation.

3) ORS 658.405 provides, in part: "As used in ORS 658.405 to 658.485 and 658.991(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in * * * the production or harvesting of farm products; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities; * * * or who bids or submits prices on contract offers for those activities; * * *"

OAR 839-15-130 provides, in part:

"The following persons are not required to obtain a farm or forest labor contractor's license:

"* * *

"(8) An employee of a farm * * * labor contractor except for any employee who:

"(a) recruits, solicits, supplies or employs workers on behalf of the Farm * * * Labor Contractor."

ORS 658.440(3) provides, in part:

"No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

"* * *

"(e) Assist an unlicensed person to act in violation of ORS 658.405 to 658.503 and 658.830."

ORS 658.453(1)(c) and OAR 839-15-508(1)(o) provide for imposition of civil

penalty for violation of ORS 658.440(3)(e). Respondent Clara Perez Rodriguez assisted Respondent Jose Lopez Rodriguez, an unlicensed person, to act as a farm labor contractor in violation of ORS 658.440(3)(e). Respondent Clara Perez Rodriguez assisted Respondent Jaime Perez Rodriguez, an unlicensed person, to act as a farm labor contractor in violation of ORS 658.440(3)(e).

(4) ORS 658.440(1) provides, in part:

"Each person acting as a farm labor contractor shall:

"(c) Pay or distribute promptly, when due, to the individuals entitled thereto all money or other things of value entrusted to the labor contractor by any person for that purpose."

ORS 658.453(1)(c) and OAR 839-15-508(1)(e) provide for imposition of civil penalty for violation of ORS 658.440(1)(c). Between November 5 and December 4, 1992, Respondent Clara Perez Rodriguez failed, when due, to pay to at least 187 workers entitled thereto, all money entrusted to her by Jerry Barry, in violation of ORS 658.440(1)(c).

5) ORS 658.440(1) provides, in part:

"Each person acting as a farm labor contractor shall:

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

ORS 658.453(1)(c) and OAR 839-15-508(1)(f) provide for imposition of civil penalty for violation of ORS 658.440(1)(d). Between November 5 and December 4, 1992, Respondent Clara Perez Rodriguez failed to honor wage agreements with at least 187 workers.

6) ORS 658.410(1) provides, in part:

"*** no person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries."

ORS 658.415(1) provides, in part:

"No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.485."

ORS 658.453(1)(c) and OAR 839-15-508(1)(a) provide for imposition of civil penalty for violation of ORS 658.410. In November 1992, Respondent Jose Lopez Rodriguez, who was not a licensed farm labor contractor, violated ORS 658.410 by acting as a farm labor contractor.

7) ORS 658.437 provides:

"(1) Prior to beginning work on any contract or other agreement the farm labor contractor shall:

"(a) Display the license or temporary permit to the person to whom workers are to be provided, or to the person's agent; and

"(b) Provide the person to whom workers are to be provided, or the person's agent with a copy of the license or temporary permit.

"(2) Prior to allowing work to begin on any contract or other agreement with a farm labor contractor, the person to whom workers are to be provided, or the person's agent shall:

"(a) Examine the license or temporary permit of the farm labor contractor; and

"(b) Retain a copy of the license or temporary permit provided by the farm labor contractor pursuant to paragraph (b) of subsection (1) of this section."

ORS 658.440(1) provides, in part:

"Each person acting as a farm labor contractor shall:

"(a) Carry a labor contractor's license at all times and exhibit it upon request to any person with whom the contractor intends to deal in the capacity of a farm labor contractor."

ORS 658.453(1) provides, in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(c) A farm labor contractor who fails to comply with ORS 658.440(1) ***

"(f) Any person who uses an unlicensed farm labor contractor without complying with ORS 658.437."

OAR 839-15-508(1) provides, in part:

"Pursuant to ORS 658.453, the Commissioner may impose a civil

penalty for violations of any of the following statutes:

"(b) Failure of the farm or forest labor contractor to, before beginning work on any contract or other agreement:

"(A) Display the license or temporary permit to the person to whom workers are to be provided, or to the person's agent; or

"(B) Provide to the person to whom the workers are to be provided, or to the person's agent, a copy of the license or temporary permit pursuant to ORS 658.453(f) [sic]."

The failure of Respondent Jose Lopez Rodriguez to display or provide a copy of a farm labor contractor license or temporary permit to Trygg before commencing work on the Trygg harvest contract violated ORS 658.437, but did not subject Respondent Jose Lopez Rodriguez to the civil penalty charged.

8) ORS 658.415(15) provides:

"Every farm labor contractor required by this section to furnish a surety bond or a letter of credit, or make a deposit in lieu thereof, shall keep conspicuously posted upon the premises where employees working under the contractor are employed, a notice in both English and any other language used by the farm labor contractor to communicate with workers specifying the contractor's compliance with the requirements of this section and specifying the name and Oregon address of the surety on the bond or the name and address of the letter of credit issuer

or a notice that a deposit in lieu of the bond has been made with the commissioner together with the address of the commissioner."

OAR 839-15-508(1)(c) provides for imposition of civil penalty for violation of ORS 658.415(15). Respondent Jose Lopez Rodriguez, in November 1992, failed to post notice of a surety bond or cash deposit on the premises where the workers on the Trygg harvest were employed, in violation of ORS 658.415(15).

9) Between November 24 and December 8, 1992, Respondent Jose Lopez Rodriguez did not violate ORS 658.440(1)(c).

10) Between November 24 and December 8, 1992, Respondent Jose Lopez Rodriguez did not violate ORS 658.440(1)(d).

11) Respondent Jose Lopez Rodriguez assisted Respondent Jaime Perez Rodriguez, who was an unlicensed person, to act as a farm labor contractor, in violation of ORS 658.440(3)(e).

12) In October 1992, Respondent Jaime Perez Rodriguez, who was not a licensed farm labor contractor, violated ORS 659.410 by acting as a farm labor contractor.

13) The failure of Respondent Jaime Perez Rodriguez to display or provide a copy of a farm labor contractor license or temporary permit to Barry before commencing work on the Barry harvest contract violated ORS 658.437, but did not subject Respondent Jaime Perez Rodriguez to the civil penalty charged.

14) Respondent Jaime Perez Rodriguez, in October 1992, failed to

post notice of a surety bond or cash deposit on the premises where the workers on the Barry harvest were to be employed, in violation of ORS 658.415(15).

15) Between November 5 and December 4, 1992, Respondent Jaime Perez Rodriguez did not violate ORS 658.440(1)(c).

16) Between November 5 and December 4, 1992, Respondent Jaime Perez Rodriguez did not violate ORS 658.440(1)(d).

17) Between July 1991 and December 1992, Respondent Jaime Perez Rodriguez assisted Respondent Jose Lopez Rodriguez, an unlicensed person, to act as a farm labor contractor, in violation of ORS 658.440(3)(e).

18) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against each of the Respondents. The assessments of the civil penalties specified in the Order below are appropriate exercises of that authority.

OPINION

Many of the violations alleged by the Agency against the three Respondents in this case were based on there being a partnership between or among all of them. There was no evidence of a written partnership agreement, and all Respondents denied any partnership relationship among them.

The Agency previously has asserted as policy the Uniform Partnership Law (UPL), adopted as ORS 68.010 to 68.650, which defines a partnership as:

"[A]n association of two or more persons to carry on as co-owners a business for profit.' The UPL defines certain elements which must be present in order for an entity to qualify as a partnership." *In the Matter of Leonard Williams*, 8 BOLI 57, 76 (1989)

This Forum has dealt more recently with the existence of a partnership:

"ORS 68.110(1) defines a partnership as 'an association of two or more persons to carry on as co-owners a business for profit.' The Oregon Supreme Court has held that '[t]he essential test in determining the existence of a partnership is whether the parties intended to establish such a relation'; that 'in the absence of an express agreement * * * the status may be inferred from the conduct of the parties,' and 'when faced with intricate transactions that arise, this court looks mainly to the right of a party to share in the profits, his liability to share losses, and the right to exert some control over the business.' *Stone-Fox, Inc. v. Vandehey Development Co.*, 290 Or 779, 626 P2d 1365, 1367 (1981) (quoting from *Hayes v. Killinger*, 235 Or 465, 470, 385 P2d 747 (1963)). A partnership is never presumed, hence the burden of proving partnership is upon the party alleging it [footnote omitted] *Jewell v. Harper*, 199 Or 223, 258 P2d 115, rehearing denied, 199 Or 223, 260 P2d 784 (1953); *Burke Machinery Co. v. Copenhagen*, 138 Or 314, 6 P2d 886 (1932); *In the Matter of Superior Forest Products*, 4 BOLI 223,

230-31 (1984)." *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 42 (1993).

The evidence submitted did not establish a partnership under those standards. While it is probable that these Respondents may have acted in concert, or with a similar purpose, there was no proof that profits (or losses) from the enterprise were to be shared. At least one of the alleged partners was salaried, and none of the other formalities of a partnership were observed. Thus, the Forum has found violations on an individual basis. Because some of the violations alleged as to a particular Respondent were based only on that individual's supposed partnership liability, the Forum has found no violation.

The evidence did not establish, therefore, that Respondent Clara Perez Rodriguez falsified her farm labor contractor applications in respect to whether at the time she had one or more partners or profit-sharers. She enabled or assisted the other Respondents to act as farm labor contractors, but the evidence did not suggest that that carried out a partnership agreement.

There was no question, in fact it was admitted, that Respondent Clara Perez Rodriguez failed to pay when due hundreds of her employees with funds entrusted to her on the Barry contract. All payments were made on that contract and on the Trygg contract to or on behalf of Ag Labor. While there was evidence that some payment was made, the record established that none of the wages were paid in a timely fashion, that is, when due. Some wages were never paid.

The record amply established the failure to timely pay the number alleged by the Agency. Each instance of late or no payment from entrusted funds is a violation of ORS 658.440(1)(c). Similarly, Respondent Clara Perez Rodriguez's failure to pay her workers as agreed violated her employment agreements with them. Each such failure constitutes a violation of ORS 658.440(1)(d). *In the Matter of Jose Solis*, 5 BOLI 180, 203 (1986); *In the Matter of Francis Kau*, 7 BOLI 45, 53 (1987).

The evidence supported the Agency's allegation that Respondent Jose Lopez Rodriguez acted as a farm labor contractor when he had no license. He did so as Respondent Clara Perez Rodriguez's employee and not as part of a partnership. Respondent Jose Lopez Rodriguez did not display and provide a license or copy before working as a farm labor contractor, and he failed to post the surety bond notice. The fact that he had no license or bond to display or post is immaterial if he acts as a farm labor contractor. In addition to the requirement for a license, such a contractor must display the license and must post notice of the contractor's bond or deposit. To eliminate the latter requirements for an unlicensed contractor would render the statute meaningless.

In connection with Respondent Jose Lopez Rodriguez's failure to display a valid farm labor contractor license, the Notice of Intent alleged, in part:

"that [Respondent], prior to beginning work for Trygg, failed to display or provide to Trygg, the

person for whom the workers were provided, a copy of a valid farm labor contractor's license consistent with the provisions of ORS 658.410(2)(b) and OAR 839-15-135(2), in violation of ORS 654.437(1) [sic] and OAR 839-15-508(1)(b). Civil Penalty of \$2,000."

ORS 658.437(1) imposes the duty on the contractor to display the license, before work commences, to the person to whom the workers are to be provided. ORS 658.437(2) imposes the duty on the person to whom the workers are to be provided, before allowing work to commence, to examine and retain a copy of the license. The only penalty authorized by ORS 658.453 for violation of ORS 658.437 is for use of an unlicensed contractor by a person to whom the workers are to be provided, without compliance with ORS 658.437. Thus, the rule cited by the Agency, OAR 839-15-508(1)(b), which purports to authorize imposition of penalty on the contractor for violation of ORS 658.437, is beyond the authority granted by the statute and is not valid.

Respondent Jose Lopez Rodriguez was not a partner of Respondent Clara Perez Rodriguez on the Trygg contract, and there was no money entrusted to him by Trygg for the payment of workers. Similarly, it was not established that he was responsible for any wage agreements. The evidence was clear that he assisted his unlicensed son, Respondent Jaime Perez Rodriguez, to act as a farm labor contractor.

The evidence supported the Agency's allegation that Respondent Jaime Perez Rodriguez acted as a

farm labor contractor when he had no license. He, too, did so as Respondent Clara Perez Rodriguez's employee and not as part of a partnership. Respondent Jaime Perez Rodriguez also failed to display or provide a license or copy before working as a farm labor contractor, and he failed to post the surety bond notice. Again, the fact that he had no license or bond to display or post is immaterial if he acts as a farm labor contractor.

In connection with Respondent Jaime Perez Rodriguez's failure to display a valid farm labor contractor license, the Notice of Intent alleged, in part:

"that [Respondent], prior to beginning work on the contract alleged herein, failed to display or provide to Barry, for whom the workers were provided, a copy of a valid farm labor contractor's license consistent with the provisions of ORS 658.410(2)(b) and OAR 839-15-135(2), in violation of ORS 654.437(1) [sic] and OAR 839-15-508(1)(b). Civil Penalty of \$2,000."

Again, the only penalty authorized by ORS 658.453 for violation of ORS 658.437 is for use of an unlicensed contractor by a person to whom the workers are to be provided, without compliance with ORS 658.437. Thus, the rule cited by the Agency, OAR 839-15-508(1)(b), which purports to authorize imposition of penalty on the contractor for violation of ORS 658.437, is beyond the authority granted by the statute and is not valid.

Respondent Jaime Perez Rodriguez was not a partner of Respondent Clara Perez Rodriguez on the Barry contract, and there was no money

entrusted to him by Barry for the payment of workers. Similarly, it was not established that he was responsible for any wage agreements. There was evidence that he assisted his unlicensed father, Respondent Jose Lopez Rodriguez, to act as a farm labor contractor.

The answers filed by Respondents suggested that the Agency and the Commissioner were estopped or otherwise unable to proceed in these cases due to prior proceedings or to the passage of time or both. Respondent Clara Rodriguez asserted that the proposed action in this case would subject her "to being punished twice for the same acts, contrary to [her] constitutional rights." Respondent Jose Rodriguez asserted that his acts while doing business as "J & J Farm.Labor Contracting are barred from agency action as they were included in a prior administrative proceeding before the agency." The prior proceeding involving Respondent Clara Rodriguez was not a criminal proceeding, nor is the within proceeding, so no "double jeopardy" is involved. The first case was under the Agency's expedited hearings rules, designed to allow the Forum to order prompt license revocation where there is evidence to support such an action. ORS chapter 183, the Administrative Procedures Act, controls contested case proceedings and contains no prohibition to obtaining separate remedies for the same violation. ORS 658.453(1) allows the imposition of civil penalties in addition to "any other penalty provided by law." Thus, the Agency may seek revocation and a civil penalty in separate proceedings.

As to the timing of bringing the proceeding which results in the contested

case hearing, limitations contained in ORS chapter 12, Limitations of Actions and Suits, generally do not apply to the state, even if they were intended to apply to administrative proceedings. The equitable doctrine of laches could apply, but only on a proper showing. See, e.g., *Clackamas County Fire Protection District v. Bureau of Labor and Industries*, 50 Or App 337, 624 P2d 141 (1981).

The violations found herein were serious and material. The Forum is assessing the penalties sought by the Agency for those violations which the Agency established.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, Respondent Clara Perez Rodriguez is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FORTY-ONE THOUSAND FOUR HUNDRED DOLLARS (\$41,400), plus any interest thereon, which accrues at the annual rate of nine percent, between a date 10 days after the issuance of this Order and the date said Respondent Clara Perez Rodriguez complies herewith. This assessment is the sum of the following civil penalties against Respondent Clara Perez Rodriguez:

As penalty for two violations of ORS 658.440(3)(e), \$4,000.

As penalty for 187 violations of ORS 658.440(1)(c), \$18,700.

As penalty for 187 violations of ORS 658.440(1)(d), \$18,700.

NOW, THEREFORE, as authorized by ORS 658.453, Respondent Jose Lopez Rodriguez is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of SIX THOUSAND DOLLARS (\$6,000), plus any interest thereon, which accrues at the annual rate of nine percent, between a date 10 days after the issuance of this Order and the date said Respondent Jose Lopez Rodriguez complies herewith. This assessment is the sum of the following civil penalties against Respondent Jose Lopez Rodriguez:

As penalty for violation of ORS 658.410(1), \$2,000.

As penalty for violation of ORS 658.415(15), \$2,000.

As penalty for violation of ORS 658.440(3)(e), \$2,000.

NOW, THEREFORE, as authorized by ORS 658.453, Respondent Jaime Perez Rodriguez is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of SIX THOUSAND DOLLARS (\$6,000), plus any interest thereon, which accrues at the annual rate of nine percent, between a date 10 days after the issuance of this Order and the date said Respondent Jaime Perez Rodriguez complies herewith. This assessment is the sum of the following civil penalties against Respondent Jaime Perez Rodriguez:

As penalty for violation of ORS 658.410(1), \$2,000.

As penalty for violation of ORS 658.415(15), \$2,000.

As penalty for violation of ORS 658.440(3)(e), \$2,000.

(1)(c), (e); OAR 839-15-004(5)(a); 839-15-145(1)(b), (g); 839-15-300(1), (2), (3); 839-15-505(2); 839-15-508(1)(f), (o), (2)(b); 839-15-512(1), (2); 839-15-520(1)(e), (2), (3)(a), (f).

**In the Matter of
ROBERT F. GONZALEZ
and Jacksonville Corporation,
Respondents.**

Case Number 61-93
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 28, 1994.

SYNOPSIS

After the Commissioner withdrew a proposed license denial and issued a forest labor contractor license to Respondent corporation and its principal shareholder based on their assurances in a Consent Order that they would report the use of subcontractors and otherwise comply with the farm labor contractor laws, the Commissioner refused to renew Respondents' license and assessed them civil penalties of \$7,500 for their subsequent use of an unlicensed farm labor contractor, failure to timely report subcontractors, and failure to file certified payroll reports. ORS 658.405; 658.410(1); 658.415(1); 658.417(1), (3); 658.420(1), (2); 658.440(1)(d), (3)(e); 658.453

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on September 28, 1993, in the conference room of the Bureau of Labor and Industries Office, 165 East Seventh Street, Eugene, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Jacksonville Corporation (Respondent corporation) and Robert F. Gonzalez (Respondent) were represented by Daryl E. Johnson, Attorney at Law, Roseburg. Respondent was present throughout the hearing.

The Agency called the following witnesses (in alphabetical order): former Agency Case Presenter Lee Bercoot, Agency Farm Labor Unit Administrative Specialist Leslie Laing, and Agency Licensing Unit Administrative Specialist Frances O'Halloran.

Respondents called the following witnesses (in alphabetical order): former Agency Compliance Specialist Florence Blake, Respondent corporation former payroll clerk Anne Brink, Parkway Ford dealership owner Gerald Bruce (by telephone), Respondent Gonzalez, and Respondent corporation contract representative Keith Nichols.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On January 20, 1993, the Agency issued a "Notice of Proposed Refusal to Renew Farm Labor Contractor License and to Assess Civil Penalties" (Notice of Intent) to Respondents. The notice informed Respondents that the Agency: a) intended to refuse to renew Respondents' farm labor contractor's licenses, pursuant to ORS 658.445(1) and (3); and b) intended to assess civil penalties against them in the amount of \$9,000, pursuant to ORS 658.453. The notice cited the following bases for the Agency's intended actions:

"1. Failure To Comply With The Terms and Provisions Of All Legal and Valid Agreements Entered Into In Contractor's Capacity As Farm Labor Contractor [alleging nine instances of failure to timely notify the Agency regarding the use of sub-contractors, in breach of a prior Consent Order] * * * in violation of ORS 658.440(1)(d). * * * Civil Penalty of \$4,500 [and alleging aggravation].

"2. Failure To Comply With The Terms and Provisions Of All Legal and Valid Agreements Entered Into In Contractor's Capacity As Farm Labor Contractor [alleging failure to timely submit to the Agency certified copies of payroll

records, in breach of a prior Consent Order] in violation of ORS 658.440(1)(d). * * * Civil Penalty of \$500 [and alleging aggravation].

"3. Repeated Failure To Provide Certified True Copies of All Payroll Records To The Commissioner [alleging six instances of failure to timely submit to the Agency certified copies of payroll records] * * * in violation of ORS 658.417(3) and OAR 839-15-300 * * * Civil Penalty of \$3,000 [and alleging aggravation].

"4. Assisting An Unlicensed Person To Act In Violation of ORS Chapter 658 [alleging assistance of an unlicensed contractor in performing contractor work on USFS contract #52-04R3-0-2-A] in violation of ORS 658.440(3)(e). * * * Civil Penalty of \$500 [and alleging aggravation].

"5. Assisting An Unlicensed Person To Act In Violation of ORS Chapter 658 [alleging assistance of an unlicensed contractor in performing contractor work on USFS contract #52-0467-0-01922] in violation of ORS 658.440(3)(e). * * * Civil Penalty of \$500 [and alleging aggravation]."

The Notice of Intent was served on Respondents on February 3, 1993.

2) By letters dated February 25, 1993, and March 17, 1993, Respondents requested a hearing on the Agency's intended action.

3) On April 12, 1993, the Agency received Respondents' answer to the Notice of Intent. In the answer, Respondents denied each of the five allegations in the Notice of Intent. In

addition, Respondents set up the following separate defenses to the respective allegations:

"Regarding allegations 1., 2., and 3., any failure to timely report sub-contractors was inconsequential and not sufficient to warrant license denial; the consent order was executed under duress and coercion by the Agency; the Agency used selective enforcement of the terms of the consent order which was discriminatory and unfair; the Agency never advised Respondent that failure to file the report would be used as basis for denying license renewal."

"Regarding allegations 4. and 5., at all material times, Respondent reasonably believed that Douglas Reforestation was the assumed business name of Douglas Construction, Inc., a licensed contractor; the Agency used selective enforcement of the terms of the consent order which was discriminatory and unfair; the Agency never advised Respondent that the use of Douglas Reforestation would be used as basis for denying license renewal."

4) The Agency requested a hearing from the Hearings Unit, and on May 13, 1993, the Hearings Unit issued to the participants a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit

sent to Respondents a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's temporary administrative rules regarding the contested case process – OAR 839-50-000 through 839-50-420. Those rules became permanent on September 3, 1993.

5) On September 14, 1993, the Hearings Referee issued a Discovery Order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by September 21, 1993. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency and Respondents each submitted a timely summary.

6) On September 21, 1993, the Agency filed a motion to amend its Notice of Intent by making several corrections as to dates, which corrections the Agency alleged did not prejudice Respondents. Respondents filed no response, and on the date of hearing, the Hearings Referee granted the amendments.

7) Also on September 21, 1993, the Agency requested that the Forum admit into the record as an

* The pleadings use the term "Contractor" for Respondents; the amended answer uses "the State" or "BOLI" when referring to actions by the Agency. The Forum uses its usual terminology for these entities.

** "Participant" or "participants" includes both the Respondents and the Agency. OAR 839-50-020(13).

administrative exhibit the tape recording of the proceedings of May 29, 1990, wherein a previous enforcement action involving Respondents was resolved. Respondents did not object, and the Hearings Referee ordered the tape of the proceedings of May 29, 1990, transcribed, admitted the original transcript into the record, and supplied copies to the Agency and to Respondents' counsel.

8) On September 27, 1993, the Hearings Unit received Respondents' amended answer and affirmative defenses, to which the Agency did not object. The Hearings Referee allowed the amendments, which admitted count number 1 of the Notice of Intent, denied the remaining counts, and again set up separate defenses to the respective allegations.

9) At the commencement of the hearing, the Agency moved to dismiss count number 2 of the Notice of Intent in its entirety. The Agency also moved to exclude witnesses under OAR 839-50-150(3), specifically Respondent corporation's contract representative Nichols, arguing that Respondent Gonzalez could represent the corporation's interests. In addition, the Agency moved to strike the following portions of Respondents' amended answer.

1. b) "If [Respondent] failed to timely report, said failure is inconsequential and is not sufficient to deny [Respondents'] license."

1. e) "The [Agency] never advised [Respondent] that failure to timely file [the] report would be used as the basis for denying the renewal of [the] license."

3. b) "If [Respondent] failed to timely report, said failure is inconsequential and is not sufficient to deny [Respondents'] license."

3. c) "The consent order signed by [Respondent] was executed under duress and was the direct result of coercive action by the [Agency]."

3. d) "The [Agency] has used selective enforcement of the terms of the consent order which is discriminatory, unfair and not in the best interests of the State of Oregon."

3. e) "The [Agency] never advised [Respondent] that failure to timely file its report would be used as the basis for denying the renewal of [the] license."

4. b) "At all material times herein [Respondent] reasonably believed Douglas Reforestation was the assumed business name of Jacksonville Construction, Inc., an Oregon corporation, which was at all times while performing, a licensed farm labor contractor."

4. c) "The [Agency] has used selective enforcement of the terms of the consent order which is discriminatory, unfair and not in the best interests of the State of Oregon."

4. d) "The [Agency] never advised [Respondent] that failure to timely file its report would be used as the basis for denying the renewal of [the] license."

5. b) "At all material times herein [Respondent] reasonably believed Douglas Reforestation was the assumed business name of Jacksonville Construction, Inc., an

Oregon corporation, which is a licensed farm labor contractor."

5. c) "The [Agency] has used selective enforcement of the terms of the consent order which is discriminatory, unfair and not in the best interests of the State of Oregon."

5. d) "The [Agency] never advised [Respondent] that failure to timely file its report would be used as the basis for denying the renewal of [the] license."

Counsel for Respondents objected to the motions to strike on the basis of timeliness in that some of the allegations moved against were in the original answer. Counsel objected to the exclusion of Nichols, arguing that Respondent Gonzalez was present as an individually charged party and that OAR 839-50-110(3) entitled Respondent corporation to a separate individual natural person to assist in its case. The Agency argued that the Forum's rules do not state a time limit on motions to strike and that Respondent Gonzalez was a corporate officer who could assist in Respondent corporation's defense.

10) Noting the arguments of the participants, the Hearings Referee:

a) Dismissed count 2 of the Notice of Intent.

b) Denied the Agency's motion to exclude Nichols.

c) Allowed the Agency's motion to strike 1b and 3b because the allegation that a violation is inconsequential does not state a defense in that whether a violation merits license denial is a question of appropriate penalty

and not of whether a violation occurred.

d) Allowed the Agency's motion to strike 1e, 3e, 4d, and 5d, because the allegation that the Agency never advised Respondents that the alleged violations could be the basis of denial of license renewal does not form a defense, in that the Respondents are charged with knowledge of the law.

e) Allowed the Agency's motion to strike 3c, 3d, 4c, and 5c, because the terms of the consent order are not involved in those allegations of statutory violation.

f) Denied the Agency's motion to strike 4b and 5b because the reason for Respondents' belief is a factual matter.

11) At the commencement of the hearing, counsel for Respondents stated that Respondents had received a Notice of Contested Case Rights and Procedures and had no questions about it.

12) Pursuant to ORS 183.415(7), the Agency and Respondents were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) At the commencement of the hearing, Respondents' counsel questioned whether Respondent Gonzalez could be charged with breach of the prior consent order since only Respondent corporation was a party to the order. Counsel stated that the admission of facts alleged in count 1 was on behalf of the corporate Respondent only. The Hearings Referee reserved ruling, noting that Respondent Gonzalez was a principal shareholder of Respondent

corporation and was thus required by statute and rules to be a licensee along with Respondent corporation.

14) At the close of the hearing, the participants and the Hearings Referee agreed that closing arguments be submitted in writing, with initial arguments due simultaneously by 5 p.m., Monday, October 4, 1993, and rebuttal arguments, if any, due by 5 p.m., Friday, October 8. The participants' written arguments were submitted timely under this schedule and the record herein closed on October 13, 1993.

15) The Proposed Order, which included an Exceptions Notice, was issued on January 4, 1994. Exceptions, originally due January 14, were due by February 14, 1994, under an extension of time requested by Respondents. Respondents' exceptions were timely filed and are dealt with at the end of the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent, a natural person, was principal shareholder of a California corporation, Respondent Jacksonville Corporation, which, among other activities, recruited, solicited, supplied, or employed workers in Oregon to perform labor for another in the forestation or reforestation of lands.

2) From 1986 to November 1992, Lee Bercot was a Case Presenter with the Agency. Among his primary duties were the preparation and presentation of evidence of violation at contested case hearings in connection with enforcement of Oregon's farm labor contractor laws. In 1989, the Agency proposed denial of a farm labor

contractor license to Respondent corporation, which sought a contested case hearing over the proposed action. In June 1990, that enforcement action was resolved by execution and acceptance of a Consent Order. That disposition was placed on the hearing record of contested case number 32-90 on May 29, 1990, in a telephone conference involving Bercot, Hearings Referee McKean, and counsel for Respondent corporation. The hearing was canceled and the hearing record was closed. During his tenure as Agency Case Presenter, Bercot was involved in the disposition of enforcement actions through Consent Orders on a routine basis, perhaps as many as two to three a month.

3) In the Consent Order, Respondent corporation admitted assisting an unlicensed person to act as a farm labor contractor (between 1987 and 1989) and agreed to pay \$5,000 civil penalty and agreed to specific items of future compliance, including notifying the Agency on a monthly basis whenever Respondent made use of a subcontractor on a forestation contract. Conditioned upon Respondent corporation's assurances, the Commissioner (and the Agency) agreed to issue to Respondent corporation a farm labor contractor license with forestation endorsement.

4) Thereafter, between July 10, 1990, and June 1991, Respondent corporation failed on nine separate occasions to timely report the use of a subcontractor on forestation contracts.

5) By its terms, the Consent Order resolved "all allegations or pending allegations between the Commissioner and [Respondent corporation] of which

the Commissioner has notice" and did not prevent the Commissioner (the Agency) from alleging any future violation of law or of the Consent Order. In the telephone conference, two items of pending enforcement were discussed and specifically excepted with the approval of the Hearings Referee. Both involved facts of which the Commissioner and the Agency already had notice. The Agency did not intend to include or "merge" any violations of which it did not have notice.

6) The Consent Order was signed by Keith Nichols as secretary/treasurer of Respondent corporation on June 5, 1990. It was signed by the Agency's Wage and Hour Administrator on behalf of the Commissioner on June 8. On or about June 26, 1990, Respondent corporation's counsel wrote to Bercot, suggesting that the Consent Order meant that "No other claims will be filed against Jacksonville Corporation which occurred prior to the Consent Order with the exceptions noted." Bercot did not feel it necessary to make a written response to the letter concerning the already executed order.

7) Bercot dealt with both Respondent and counsel for Respondent corporation regarding the Consent Order and prior matters. Discussions were always cordial and businesslike. There was no suggestion that Respondent or counsel felt coerced or forced to settle.

8) During times material herein, Leslie Laing was an Administrative Specialist with the Farm Labor Unit of the Agency. Her primary duties were the receipt, filing, and tracking of the copies of certified payroll records (CPRs), which by law must be filed with the Agency on each forestation contract by forest labor contractors. All CPRs were date stamped when received by the Agency, forwarded to her, and placed in an alphabetical file pending processing.

9) In processing the CPRs, Laing noted receipt date, contractor name, pay period, contract identification and location, employee names and social security numbers, hours worked and pay rates, piece rate pay if appropriate, gross and net pay and deductions, and whether the form was properly signed or "certified" by the contractor or representative. Each was then logged into a separate file maintained for the individual contractor with date of receipt, pay period, and contract number.

10) Laing maintained a contact file on each contractor wherein she recorded conversations, correspondence, and reports concerning the contractor. The Agency generally learned of forestation contracts through copies of bid award letters from public agencies such as the United States Forest Service (USFS) and the United States Bureau of Land Management (BLM), but might also learn of them from wage claims, from other

* ORS 658.417 requires that one who acts as a farm labor contractor with regard to the forestation and reforestation of lands must, among other requirements, obtain a special indorsement authorizing such activity and pay a higher fee than a farm labor contractor not involved with forestation or reforestation. OAR 839-15-004 defines such a farm labor contractor as a "forest labor contractor."

contractors, from Oregon Legal Services, or from other state agencies. If there was no CPR within a reasonable time after the awarding of a forestation contract, the Agency sent a compliance letter to the contractor. Laing routinely requested verifying information from USFS and BLM. All CPRs were routed through her. The CPRs and other file information were retained for a minimum of three years.

11) Laing did not know how many compliance letters were sent to contractors because of missing CPRs. An individual Compliance Specialist (investigator) might send a CPR inquiry in connection with investigation of other suspected violations. The size of the licensed entity was not a factor in deciding to request CPRs, as long as the licensed entity was not exempt (for instance, less than three employees). The determiner was the absence of CPRs for a known bid award or when checking a license record prior to renewal. She recommended further investigation to her supervisor where there were CPRs missing or late or she received no response. She had no information on how many of the CPR inquiries she recommended resulted in further investigation or eventual enforcement action for civil penalty or other sanction.

12) Laing performed the described duties in connection with Respondent corporation during 1990 and 1991. On July 18, 1990, having notice of initial awards to Respondent corporation of USFS contracts 52-04R3-0-2A (0-2A) and 52-0467-0-01922 (1922) and no corresponding CPRs for approximately 60 days, Laing sent CPR compliance letters over the signature of her

supervisor, William Pick, to Respondent corporation.

13) On August 1, 1990, the Agency received a response from Ruth Cloudt for Respondent corporation stating that USFS contracts 0-2A and 1922 had been subcontracted to Douglas Reforestation, Inc. (Douglas). Copies of the subcontracts were enclosed. The letter was the first notice to the Agency that Respondent had made use of a subcontractor on USFS contracts 0-2A and 1922.

14) The subcontracts between Respondent corporation and Douglas on 0-2A and 1922 were dated February 27 and March 2, 1990, respectively. Each was signed by Respondent for Respondent corporation and by Agustin Cortez for Douglas.

15) Douglas, with the knowledge of Respondent corporation, was authorized to begin work on 0-2A on April 10, 1990. Douglas, with the knowledge of Respondent corporation, began work on 1922 on or about May 14, 1990.

16) At the time of the hearing, Francis O'Halloran was an Administrative Specialist in the Agency's licensing unit and was custodian of the records of farm labor contractor licenses.

17) Respondent corporation was licensed as a farm labor contractor with forestation indorsement expiring October 31, 1991, and applied for renewal of the license on or about October 15, 1991. Pursuant to statute, Respondent was licensed as the majority shareholder of Respondent corporation, which was authorized to do business in this state.

18) On January 16, 1990, the Agency licensing unit received the

application for license as farm labor contractor with forestation indorsement of Agustin S. Cortez as owner of Douglas Reforestation, Inc., a corporation. On March 26, 1990, the Agency licensing unit issued temporary permit number 90-028, with special forest indorsement to Cortez and Douglas Reforestation, Inc. Neither had previously been licensed as a farm labor contractor in Oregon. The temporary permit expired May 29, 1990.

19) On August 17, 1990, the Agency licensing unit received the application for license as farm labor contractor with forestation indorsement of Agustin S. Cortez as owner of Jacksonville Construction, Inc., a corporation.

20) On July 15, 1991, the Agency received CPRs from Respondent corporation on USFS contract 52-04KK-1-02674 (2674) covering pay periods May 1 to May 15, May 16 to May 31, and June 1 to June 15, 1991. On August 15, 1991, the Agency received additional CPRs from Respondent corporation on 2674 covering the same periods. The Agency had not previously generated a CPR inquiry regarding 2674.

21) Using 14 cents per day worked, which Respondent corporation deducted per worker for workers' compensation premium, Laing calculated that the latest date during the initial pay period of May 1 to May 15 that work could have begun on 2674 was May 8, 1991. Thirty-five calendar days after May 8, 1991, was June 12, 1991. Thirty-five calendar days thereafter was July 17, 1991.

22) On July 15, 1991, the Agency received a CPR from Respondent

corporation on USFS contract 52-04NO-1-040C (40C) covering the pay period May 16 to May 31, 1991. The Agency had not previously generated a CPR inquiry regarding 40C.

23) Using the same method, Laing calculated that the latest date during the initial pay period of May 16 to May 31 that work could have begun on 40C was May 27, 1991. Thirty-five calendar days after May 27, 1991, was July 1, 1991.

24) On August 15, 1991, the Agency received CPRs from Respondent corporation on BLM contract H952-C-13 138 (138) covering the pay period June 16 to June 31 [sic], 1991. The Agency had not previously generated a CPR inquiry regarding 138.

25) Using the same method, Laing calculated that the latest date during the initial pay period of June 15 to June 30 that work could have begun on 138 was June 19, 1991. Thirty-five calendar days after June 19, 1991, was July 24, 1991.

26) On August 15, 1991, the Agency received CPRs from Respondent corporation on BLM contract H952-C-1-1137 (1137) covering pay periods June 16 to June 30, July 1 to July 15, and July 16 to July 31, 1991. On August 26, 1991, the Agency received an additional CPR from Respondent corporation on 1137 covering July 16 to July 31, 1991. On August 30 and on September 18, 1991, the Agency received additional CPRs from Respondent corporation on 1137 covering August 1 to August 15, 1991. The Agency had not previously generated a CPR inquiry regarding 1137.

27) Using the same method, Laing calculated that the latest date during the initial pay period of June 15 to June 30 that work could have begun on 1137 was June 26, 1991. Thirty-five calendar days after June 26, 1991, was July 31, 1991. Thirty-five calendar days thereafter was September 4, 1991.

28) Florence Blake was a Compliance Specialist with the Agency in Medford from February 1990 to June 1992. She investigated wage claims and alleged licensing violations, and had dealt with Respondent on wage claims against Respondent corporation. She found Respondent cooperative. In her experience, the failure to file or to timely file CPRs was common among the licensees she investigated.

29) Keith Nichols was contract representative with Respondent corporation at times material. After Respondent corporation had been awarded USFS contracts 02-A and 1922, Nichols drafted the language and provided the instructions for the preparation of the subcontracts with Douglas.

30) In early 1991, Respondent corporation hired Anne Brink, who took over the payroll function. Respondent corporation had contracts in Oregon, California, Idaho, and Montana. In about March to June 1990, there were about 30 contracts and in the same period in 1991, approximately 26. The number of employees varied between 60 and 100 each year.

31) Brink was employed by Respondent corporation as payroll clerk from February 1991 to October 31, 1991. She replaced Ruth Cloudt. In April or May, Brink was part of a conference call to the Agency by Nichols

to determine what reports were behind. She was advised that all were caught up. Thereafter, she submitted CPRs to the Agency.

32) Brink took a leave of absence from Respondent corporation on October 31, 1991. No one replaced her as payroll clerk. At the time of the hearing she was employed as bookkeeper by Tapa Jalisco, Inc., a construction corporation of which Respondent was president and the principal office of which was located at the same address as that of Respondent corporation.

33) Respondent was first associated with Respondent corporation in 1985 and was president and principal stockholder. The company dealt with forestation, right-of-way clearing and underground utility construction in Oregon, Washington, Idaho, Montana, and Nevada. Respondent signed the subcontracts with Douglas. In January 1993, Respondent executed a forest labor contractor application in the name of Tapa Jalisco, Inc.

34) Gerald Bruce was the owner of Parkway Ford, Roseburg, Oregon, at time of hearing. He also had an interest in Douglas County Forest Products, a lumber manufacturer, and Chemco Equipment of Eugene, a leasing company. He had been acquainted with Respondent for 10 to 12 years, both socially and professionally. They have general business discussions monthly or more often. Bruce found Respondent competent and reliable, and believed that Respondent had a generally good business character in the community. Bruce did not do business with Respondent in the forest or farm labor field and was not familiar

with the details of that business, with the laws governing it, or with whether Respondent was in compliance with those laws.

35) Wallace Farmer was a senior vice president of the Umpqua State Bank, Roseburg, Oregon, at time of hearing. He had been acquainted professionally with Respondent for a number of years. Farmer found Respondent competent and reliable, and believed that Respondent had a generally good business character in the community. Farmer did business with Respondent in the financial area of the corporation, but was not familiar with the details of the forest labor business, with the laws governing it, or with whether or not Respondent or Respondent corporation was in compliance with those laws.

36) The testimony of Keith Nichols was not wholly credible. He testified that he knew that Cortez was in the process of obtaining a forest labor contractor license and that his instructions to Ruth Cloudt, an employee of Respondent corporation, were to prepare the subcontracts after Cloudt determined that Cortez had a permit. Nichols testified that the Douglas subcontracts were not executed by Respondent until Cloudt verified the Cortez-Douglas permit with the Agency. Other testimony and the contract dates suggested that they were prepared earlier.

37) The payroll exhibits presented through the testimony of Brink were not reliable. She testified that she submitted CPRs at least monthly,

generally after each pay period, and that the Agency advised her that some had not been received. She said that she sent some a second time, was again advised of non-receipt, and that she finally submitted CPRs by certified mail. The printouts of payroll data appeared identical to the information introduced by the Agency. Copies of Respondent corporation's transmittal letters and copies of the WH-141 forms introduced through Brink were not identical to those from the Agency files. Those submitted through Brink were handwritten. The copies from the Agency's records had some typed entries, and the dates of the forms differed between the two sources. None of the copies of cover letters referred to prior submissions, and no certified mail receipt was offered. Brink testified that she had prepared the exhibits the day before her testimony, and the Forum assumes that the WH-141's she submitted were reconstructions rather than copies of what was sent to the Agency. The most reliable date of receipt by the Agency of the payroll records in question was that suggested by the Agency's evidence.

38) The testimony of Respondent Gonzalez was not wholly credible. He testified that he was occupied in recent years with the construction operations of Respondent corporation and that Nichols ran the day-to-day forest labor operations. He stated that he had been advised to get out of the forest labor field and that he was going to concentrate on construction, but he acknowledged signing the recent Tapa

* Form WH-141 was a two-sided form that a contractor could use in submitting payroll records. It contained the certification for signature by the person submitting the records on behalf of the contractor.

Jalisco, Inc. application for a forest labor contractor license. He stated that the dates on the Douglas subcontracts indicated when they were typed and not the actual time he signed them, and that he did not sign them until it had been verified that Cortez-Douglas had a permit number. Despite the wording of the Consent Order and evidence from the Agency that only known violations were covered, he testified that his understanding of the Consent Order was that it covered any and all violations up to the date of its execution and entry. He sought to avoid personal responsibility by stating that Nichols handled the forestation work and that written discrepancies were secretarial errors. Because of these inconsistencies, the Forum has credited only those portions of Respondent's testimony which were verified by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, Respondent corporation was a licensed farm labor contractor with forestation indorsement as defined by ORS chapter 658, and Respondent was licensed as its principal shareholder. The Agency's proposed denial of the renewal of Respondent corporation's license expiring October 31, 1991, is the subject of this proceeding.

2) In early June 1990, in connection with a pending proposal by the Agency to deny Respondent corporation a forest labor contractor license, Respondent corporation entered into a Consent Order with the Agency wherein Respondent corporation admitted the use of an unlicensed contractor, agreed to pay a civil penalty,

and agreed to report on a monthly basis the use of subcontractors.

3) Based upon the payment of a penalty and assurances of compliance, the proposed denial was withdrawn and the Commissioner issued a forest labor contractor license to Respondent corporation and Respondent as principal shareholder.

4) Respondent corporation did not timely advise the Agency of subcontracts on nine occasions following execution of the Consent Order.

5) On February 27, 1990, and on March 2, 1990, Respondent corporation entered into subcontracts with Douglas Reforestation, Inc. for forestation activities on USFS contracts awarded to Respondent corporation in the State of Oregon.

6) On February 27, 1990, and on March 2, 1990, Douglas Reforestation, Inc. was not licensed by the Commissioner to perform forestation activities.

7) On June 12, 1991, Respondent corporation failed to timely file certified copies of payroll records for two pay periods for workers on USFS contract 52-04KK-1-02674, which had been awarded to Respondent corporation in Oregon and upon which work had commenced on or before May 8, 1991. On July 15, 1991, Respondent corporation timely filed certified copies of payroll records due July 17, 1991, 35 days after Respondent corporation's initial filing was due on June 12.

8) On July 1, 1991, Respondent corporation failed to timely file certified copies of payroll records for workers on USFS contract 52-04NO-1-040C, which had been awarded to Respondent corporation in Oregon and upon

which work had commenced on or before May 27, 1991.

9) On July 24, 1991, Respondent corporation failed to timely file certified copies of payroll records for workers on BLM contract H952-C-13 138, which had been awarded to Respondent corporation in Oregon and upon which work had commenced on or before June 19, 1991.

10) On July 31, 1991, Respondent corporation failed to timely file certified copies of payroll records for two pay periods for workers on BLM contract H952-C-1-1137, which had been awarded to Respondent corporation in Oregon and upon which work had commenced on or before June 26, 1991. On August 26 and on August 30, 1991, Respondent corporation timely filed certified copies of payroll records due September 4, 1991, 35 days after Respondent corporation's initial filing was due on July 31.

11) On September 4, 1991, Respondent corporation failed to timely file other certified copies of payroll records for workers on BLM contract H952-C-1-1137, which were due 35 days after Respondent corporation's initial filing had been due July 31, 1991, and which were not received until September 18.

12) The character, reliability, and competence of Respondent corporation and of Respondent make them unfit to act as farm labor contractors.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the persons herein. ORS 648.405 to 658.503.

2) As a person licensed and acting as a farm labor contractor with regard to the forestation or reforestation of lands in the State of Oregon, Respondent corporation was and is subject to the provisions of ORS 658.405 to 658.503. As a principal shareholder of a corporation so licensed and acting, Respondent was and is subject to the provisions of ORS 658.405 to 658.503.

3) ORS 658.405 provides, in part: "As used in ORS 658.405 to 658.503 * * * unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, and clearing, piling and disposal of brush and slash and other related activities * * * or who bids or submits prices on contract offers for those activities; or who enters into a subcontract with another for any of those activities. * * *

OAR 839-15-004 provides, in part:

"As used in these rules, unless the context requires otherwise:

* * *

"(5) 'Forest Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor

for another in the forestation or reforestation of lands * * *."

ORS 658.410(1) provides, in part:

"No person shall act as a farm labor contractor with regard to forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1)."

ORS 658.415(1) provides, in part:

"No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.503 * * *."

ORS 658.417 provides, in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands."

ORS 658.440 provides, in part:

"(3) No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

* * * *

"(e) Assist an unlicensed person to act in violation of ORS 658.405 to 658.503 and 658.830."

On February 27, 1990, and on March 2, 1990, by assisting Douglas Reforestation, Inc., which had no license to act as a farm labor contractor, Respondent corporation twice violated ORS 658.440(3)(e).

4) The actions, inactions, and statements of Keith Nichols, Anne Brink, and Respondent Gonzalez are properly imputed to Respondent corporation.

5) ORS 658.417 provides, in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

* * * *

"(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such times and shall contain such information as the commissioner, by rule, may prescribe."

OAR 839-15-300 provides, in part:

"(1) Forest Labor Contractors engaged in the forestation or reforestation of lands must, unless otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or contractor's agent pays employees directly.

"(2) The certified true copy of payroll records shall be submitted

at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submissions may be made.

"(3) The certified true copy of payroll records may be submitted on Form WH-141. This form is available to any interested person. Any person may copy this form or use a similar form provided such form contains all the elements of Form WH-141."

By failing at least four times to provide to the Commissioner a certified true copy of all payroll records for work done as a forest labor contractor at least once every 35 days starting from the time work first began on each forestation contract, when it paid employees directly, Respondent corporation violated ORS 658.417(3) and OAR 839-15-300 four times.

6) ORS 658.440(1) provides, in part:

"Each person acting as a farm labor contractor shall:

* * * *

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

By failing to report its subcontracts, Respondent corporation failed to comply on nine occasions with the Consent Order to which it agreed and thereby violated ORS 658.440(1)(d) nine times.

7) ORS 658.420 provides, in part:

"(1) The Commissioner of the Bureau of Labor and Industries shall conduct an investigation of each applicant's character,

competence and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor.

"(2) The commissioner shall issue a license * * * if the commissioner is satisfied as to the applicant's character, competence and reliability."

OAR 839-15-145 provides, in part:

"(1) The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules includes, but is not limited to, consideration of:

* * * *

"(b) A person's reliability in adhering to the terms and conditions of any contract or agreement between the person and those with whom the person conducts business.

* * * *

"(g) Whether a person has violated any provision of ORS 658.405 to 658.485."

OAR 839-15-520 provides, in part:

"(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to * * * refuse to renew a license application * * *:

* * * *

"(e) Assisting an unlicensed person to act as a Farm or Forest Labor Contractor, * * *

* * * *

"(2) When the applicant for a license * * * demonstrates that the

applicant's *** character, reliability or competence makes the applicant *** unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the license application be denied ***.

"(3) The following actions of a Farm or Forest Labor Contractor license applicant or licensee *** demonstrate that the applicant's or the licensee's character, reliability or competence make the applicant or licensee unfit to act as a Farm or Forest Labor Contractor:

"(a) Violations of any section of ORS 658.405 to 658.485;

"(f) Repeated failure to file or furnish all forms and other information required by ORS 658.405 to 658.485 and these rules."

Respondents' violations of ORS 658.417(3), 658.440(1)(d), and 658.440(3)(e) demonstrate Respondents' unfitness to act as farm labor contractors. Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may deny a license to Respondents to act as farm labor contractors.

8) ORS 658.453(1) provides, in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(c) A farm labor contractor who fails to comply with ORS 658.440 (1) *** or (3).

"(e) A farm labor contractor who fails to comply with ORS 658.417 *** (3)."

OAR 839-15-505 provides, in part:

"(2) 'Violation' means a transgression of any statute or rule, or any part thereof and includes both acts and omissions."

OAR 839-15-508 provides, in part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

"(f) Failing to comply with contracts or agreements entered into as a contractor in violation of ORS 658.440(1)(d);

"(o) Assisting an unlicensed person to act as a contractor in violation of ORS 658.440(3)(e)

"(2) In the case of Forest Labor Contractors, in addition to any other penalties, a civil penalty may be imposed for each of the following violations:

"(b) Failing to provide certified true copies of payroll records in violation of ORS 658.417(3)."

OAR 839-15-512 provides, in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the

facts and on any mitigating and aggravating circumstances.

"(2) Repeated violations of the statutes for which a civil penalty may be imposed are considered to be of such magnitude and seriousness that a minimum of \$500 for each repeated violation will be imposed when the Commissioner determines to impose a civil penalty."

Under the facts and circumstances of this record, and in accordance with ORS 658.453 and related portions of ORS 658.405 to 658.503 and of Oregon Administrative Rules, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for each violation found herein.

OPINION

1. Failure to Comply with the Consent Order

The amended answer submitted by Respondents admits that Respondent corporation failed to report the use of subcontractors, contrary to the express provisions of the Consent Order disposing of the previous enforcement action. The answer admitted the Agency's allegation that this occurred nine times following entry of the Consent Order. This evidence shows that Respondent corporation failed to comply with the terms and provisions of a legal and valid agreement entered into by it in its capacity as a farm labor contractor, in violation of ORS 658.440 (1)(d). Each failure to comply with a statute constitutes a separate violation. *In the Matter of Jose Solis*, 5 BOLI 180 (1986); *In the Matter of John Paauwe*, 5 BOLI 168 (1986); *In the Matter of*

Michael Burke, 5 BOLI 47 (1985). "Each violation is a separate and distinct offense." OAR 839-15-507.

2. Failure to File Certified True Copies of All Payroll Records

The Agency presented evidence of receipt of CPRs on several of Respondent corporation's contracts in 1991. The Agency also presented testimony concerning its method of determining from the payroll information the latest date work could have commenced on the various contracts. There was no evidence of a later date, and the Forum accepts the calculations used. Thus, Respondent corporation started work on contract 2674 on or before May 8, 1991, and the first CPR was due 35 days later on June 12. No CPRs were received until July 15. A second report on this ongoing contract would have been due 35 days after June 12, on July 17. The final CPR on 2674 was included in the July 15 submission and was therefore timely.

Respondent corporation started work on contract 40C on or before May 27, 1991, and the first CPR was due 35 days later on July 1. No CPRs were received until July 15.

Respondent corporation started work on contract 138 on or before June 19, 1991, and the first CPR was due 35 days later on July 24. No CPRs were received until August 15.

Respondent corporation started work on contract 1137 on or before June 26, 1991, and the first CPR was due 35 days later on July 31. No CPRs were received until August 15. A second report on this ongoing contract would have been due 35 days after July 31 on September 4. CPRs on

1137 were received on August 28 and August 30 and were timely. A final CPR on 1137 was received September 16 and was not timely. Based on this evidence, the Forum has found that Respondent corporation violated ORS 658.417(3).

3. Assisting an Unlicensed Person to Act in Violation of ORS chapter 658 (Two Counts)

Evidence established that Respondent corporation entered into two subcontracts with Douglas Reforestation, Inc. The dates of the two agreements were February 27 and March 2, 1991. Until March 26, Douglas was not a licensed forest labor contractor. There was unpersuasive testimony that, despite the dates of the documents, they were actually signed after Douglas had been issued a temporary permit. No witness could verify a specific date of signing. The Forum believes the documents are the best evidence of their execution. Accordingly, Respondent corporation contracted with an unlicensed contractor (as it admitted in the Consent Order having done previously), and twice violated ORS 658.440(3)(e).

4. Respondents' Defenses

Respondents asserted various defenses. Among these were allegations that the Consent Order was executed under duress and that Respondents were singled out for selective enforcement. There was no substantial evidence presented to support these claims. The Agency's dealings with Respondents were arm's length and businesslike. There was no evidence that other forest labor contractors were not the subject of enforcement action by the Agency in similar situations or

that the sanctions proposed by the Agency were uncharacteristically severe.

Respondents argued that ORS 658.440(1)(d) did not encompass the Consent Order. Because it was entered into by Respondent corporation in its capacity as a farm labor contractor and because it encompasses the contractor's agreement, the Consent Order was an agreement contemplated by the statute.

Respondent Gonzalez argued that the violations were corporate acts for which his license was not chargeable. He argues that the signature of an authorized corporate representative other than himself cannot be charged to him. ORS 658.410(2) clearly sets out that the majority shareholder's license is a derivative of the license issued to the corporation. There is but one license, not two or more, where a corporation is the licensee. To treat the majority shareholder separately from the corporation would defeat the apparent purpose of the statute.

As to the certified payroll records, Respondents argued that the statute and rules speak of submission of the certified copies to the Agency rather than the receipt of them by the Agency. As the Agency pointed out, however, the required reports were late under either standard. Respondents seem to downplay these violations. The Forum considers repeated failure to file certified payroll records to be serious.

Respondents' collective defenses failed. Applicants for forest labor licenses, and licensees, receive copies of the pertinent statutes and rules, and swear on the application to conduct

their contractor business in accordance with those regulations. Respondents' positions reflect badly on their competence to conduct operations as forest labor contractors.

5. License Denial

The Agency proposed to refuse renewal of the forest labor contractor license because of violation of various provisions of ORS 658.405 to 658.503, which violations demonstrated that Respondents' character, competence, or reliability make them unfit to act as farm labor contractors.

An application for a farm or forest labor contractor license is considered to be pending until the license is either granted or denied. Thus, a decision to grant or deny a license is effective for the license year in which the decision is made and not necessarily for the license year in which the application is received. *In the Matter of Demetrio Ivanov*, 7 BOLI 126, 133 (1988); *In the Matter of Raul Mendoza*, 7 BOLI 77, 85 (1988) (license application denials); *see also In the Matter of Highland Reforestation, Inc.*, 4 BOLI 185, 211 (1984); *In the Matter of Desiderio Salazar*, 4 BOLI 154, 174 (1984) (license renewal refusals).

Based upon the whole record of this matter, the Forum is not satisfied as to Respondent corporation's character, competence and reliability, and finds it unfit to act as a farm or forest labor contractor. The Order below is a proper disposition of Respondent corporation's application for renewal.

Pursuant to ORS 658.415(1)(c), OAR 839-15-140(3) and 839-15-520(4), where an application for an FLC license has been denied, the

Commissioner will not issue the applicant a license for three years from the date of the denial.

6. Civil Penalties

The Agency proposed to assess civil penalties for the following: (1) Failure to Comply with the Consent Order as nine violations of 658.440(1)(d); (2) Failure to File Certified True Copies of All Payroll Records, four violations of 658.417(3); (3) Assisting an Unlicensed Person to Act in Violation of ORS chapter 658, two violations of ORS 658.440(3)(e).

The Commissioner may assess a civil penalty not to exceed \$2,000 for each of these violations. ORS 658.453(1)(a), (c), and (e); OAR 839-15-508(1)(a), (f), (k), and (2)(a). The Commissioner may consider mitigating and aggravating circumstances when determining the amount of any penalty to be imposed. OAR 839-15-510(1). It shall be the responsibility of the Respondent to provide the Commissioner with any mitigating evidence. OAR 839-15-510(2). No mitigating evidence was presented.

7. Respondents' Exceptions

Concerning Respondents' Exceptions to the Findings of Fact (FOF), the Forum has changed the language in FOF 4 and 33 in conformity with Exceptions 1 and 4, respectively, that the admitted failures were to "timely" report, and that Respondent was the "principal" rather than the "only" stockholder. Exception 2, that there was "no substantial evidence to substantiate" FOF 5 and 6, is rejected by the Forum. Bercol's testimony was bolstered by the clear language of the document signed by Respondent corporation that

it resolved "all allegations or pending allegations between the Commissioner and [Respondent corporation] of which the Commissioner has notice" (emphasis supplied). As to Exception 3, whether Douglas Reforestation and Jacksonville Construction were one corporation or separate entities is immaterial; neither was licensed at times material to the violations. The Forum rejects Exceptions 5 and 6 regarding FOF 36, 37, and 38. Nichols stated that he ordered the subcontracts prepared after a permit was verified; Gonzalez testified that the subcontracts were prepared as of their stated dates. The remainder of these credibility findings were self-explanatory. Credibility (weight) to be given testimony can be determined by its inherent probability or improbability, the possible internal inconsistencies, whether or not it is corroborated or contradicted by other testimony or evidence, and whether or not human experience demonstrates it as logically incredible. *In the Matter of Glenn Walters Nursery, Inc.*, 11 BOLI 32 (1992); *In the Matter of Albertson's, Inc.*, 10 BOLI 199 (1992); *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 602 P2d 1161 (1979).

As to the remainder of Respondent's exceptions concerning the Proposed Ultimate Findings of Fact, the Proposed Conclusions of Law, the Proposed Opinion, and Proposed Order, the Forum rejects them as without merit, except that a typographical omission in Proposed Conclusion 3 (cited by Respondents as 4) has been corrected. Most of those exceptions deal with the purported inconsequential nature of the violations found, the severity of sanctions, and the alleged

selective enforcement. Respondents thus chose to ignore the point of the entire proceeding. The Commissioner, in a prior proceeding, allowed Respondent corporation to continue operating as a forest labor contractor upon solemn assurance that certain conditions would be met. Respondent could not, after that, expect that it would not be the subject of the Agency's further scrutiny in order to assure that the conditions were met. While there was testimony that in one prior employee's opinion, violations in the filing of CPRs was common, there was no evidence that they were not pursued or particularly that contractors operating under consent orders resulting from previous violations were not pursued. The statute authorizes a civil penalty of up to \$2,000 for each violation. The penalties proposed and herein assessed are reasonable.

Finally, Respondents suggest that ORS 658.440(1)(d) does not and is not intended to encompass Consent Orders and that its statutory purpose is "to require farm labor contractors to abide by contracts in the reforestation business." While that is a true statement so far as it goes, Respondents' reading of the statute is much too limited. This Forum has long held that the statutory duty to "[c]omply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractors capacity as a farm labor contractor" applies to all agreements or contracts in connection with the reforestation business. It has been held to include contracts with the US Forest Service (*In the Matter of Francis Kau*, 7 BOLI 45 (1987)), with a contractor's payroll service (*In the*

Matter of Stencil Jones, 9 BOLI 233 (1991)), with a subcontractor (*In the Matter of Deanna Donaca*, 6 BOLI 212 (1987)), and with workers (*In the Matter of Clara Perez*, 11 BOLI 181 (1993)), as well as to include a Consent Order (*In the Matter of Azul Corporation, Inc.*, 10 BOLI 156 (1992)). Respondent corporation's execution of the Consent Order agreement was clearly the execution of an agreement entered into in Respondent corporation's capacity as a farm labor contractor. That interpretation is within the intent of the legislature as expressed in both the text and the context of the statute. That is all that Oregon law requires. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).

ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, the Commissioner of the Bureau of Labor and Industries hereby denies Jacksonville Corporation and Robert Gonzalez renewal of a license to act as a farm or forest labor contractor, effective this date. Jacksonville Corporation and Robert Gonzalez are prevented from reapplying for a license for a period of three years from this date, in accordance with ORS 658.415(1)(c).

NOW, THEREFORE, as authorized by ORS 658.453, Jacksonville Corporation and Robert Gonzalez are hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of SEVEN THOUSAND FIVE HUNDRED

DOLLARS (\$7,500), plus any interest thereon, which accrues at the annual rate of nine percent, between a date 10 days after the date of this Order and the date Respondents comply herewith. This assessment is the sum of the following civil penalties against Respondents:

- 1) Four Thousand, Five Hundred Dollars for nine violations of ORS 658.440(1)(d);
- 2) Two Thousand Dollars for four violations of ORS 658.417(3); and
- 3) One Thousand Dollars for two violations of ORS 658.440(3)(e).

**In the Matter of
Larry Allen, dba
SHORT STOP CAFE,
Respondent.**

Case Number 05-94
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 28, 1994.

SYNOPSIS

Respondent discharged Complainant because her mother had worked for Respondent, and thus violated ORS 659.340. Respondent failed to file a timely answer to the Agency's specific charges and was found in default. The Commissioner found that Complainant lost earnings and suffered emotional distress as a result of the

unexpected and unlawful termination, and awarded her \$1,200 in lost wages and \$1,000 for emotional distress. ORS 659.340; OAR 839-05-010(1).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on November 16, 1993, in conference room 1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Respondent Larry Allen, dba Short Stop Cafe (Respondent), was previously held in default, did not attend the hearing, and was not represented by counsel. Christie Reed (Complainant) and her mother and guardian ad litem, Veronica Webster, were present throughout the hearing and were not represented by counsel.

The Agency called as witnesses Complainant and Veronica Webster.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On March 9, 1993, Complainant filed a verified complaint with the Agency and thereafter Complainant, through her guardian ad litem Veronica

Webster, filed an amended verified complaint, alleging that she was the victim of the unlawful employment practice of Respondent. After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding that Respondent violated ORS 659.340(1)(b).

2) The Agency initiated conciliation efforts between Complainant and Respondent, conciliation failed, and on August 12, 1993, the Agency prepared and served on Respondent Specific Charges, alleging that Respondent discriminated against her by terminating her employment and in refusing to rehire her thereafter, all based upon the fact that Complainant's mother had also been employed by Respondent, and that the termination and refusal to rehire were due to Complainant's family relationship with her mother, thus violating ORS 659.340(1)(b).

3) With the Specific Charges, the Agency served on Respondent the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of Oregon Administrative Rules (OAR) regarding the contested case process (temporary OAR 839-50-000 to 839-50-420, effective April 12, 1993); and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) Effective September 3, 1993, the Commissioner adopted permanent Oregon Administrative Rules 839-50-000 to 839-50-420, governing contested case hearings. Those rules

applied to all pending proceedings, including this proceeding, on and after September 3, 1993.

4) On September 13, 1993, the Agency filed a motion for order of default, alleging that Respondent had failed to answer the Specific Charges and that more than 20 days had elapsed since he had received them.

5) On September 15, 1993, the Hearings Referee found that Respondent received the Specific Charges with Notice of Hearing and other accompanying documents by certified mail at PO Box 486, Odell, Oregon 97044 on August 16, 1993. Under OAR 839-50-130(1), Respondent's answer was due on or before September 7, 1993. Finding that none was received, the Hearings Referee issued a Notice of Default. That ruling also contained the information that under OAR 839-50-340, a party in default has 10 days to show good cause, as defined in OAR 839-50-020(9), for relief from default.

6) On September 20, 1993, the Hearings Unit received a letter dated "9-16-93" signed by Respondent. The post mark on the envelope was September 17, 1993. The letter read as follows:

"Dear Sir,

"This is my response to why I failed to file my response to allege charges against me. When reading the charges I thought I didn't have to do anything on it until Nov. 12, 1993. I failed to understand that I had only 20 days for written response. I gave a verbal

explanation over the phone to your office. I sincerely apologize for my misunderstanding.

"Any question please call me.

"Larry Allen

"Short Stop Cafe

"354-3242"

With the letter was a two-page handwritten document containing Respondent's comment, explanation, and/or denial on each of the specific charges.

7) On September 24, 1993, the Hearings Referee issued a ruling finding that Respondent's response to the Notice of Default, which the Referee treated as a request for relief from default, did not demonstrate good cause. The Referee ruled that Respondent's request failed to show either circumstances beyond Respondent's control or an excusable mistake which prevented Respondent from filing a timely answer. The Referee denied Respondent's request for relief. That ruling is confirmed.

8) On November 5, 1993, the Agency requested a new hearing date based on the necessity for Complainant to attend a high school youth conference in Seattle on November 12, the date set for hearing. Finding that the schedule of the defaulting Respondent was not a consideration, the Referee changed the date of hearing to November 16, 1993, and notified all participants,* including the defaulting Respondent.

9) At the commencement of the hearing, the Hearings Referee found from the files and records that Respondent received a Notice of Contested

* "Participants" or "participant" refers to both Respondent and the Agency. OAR 839-50-020(13).

Case Rights and Procedures with the Specific Charges.

10) Pursuant to ORS 183.425(7), the Hearings Referee advised the participants present of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) The Proposed Order, which included an Exceptions Notice, was issued on January 28, 1994. Exceptions were due by February 7, 1994. None were received.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent was the owner and operator of the Short Stop Cafe, a restaurant located in Odell, Oregon, where Respondent engaged or utilized the personal service of one or more employees.

2) Respondent opened the Short Stop Cafe on or about March 7, 1992. At that time, he employed his wife and Veronica Webster. Shortly after he opened, he hired Complainant, who was Webster's daughter, as a waitress. At the time of the hearing, Complainant was 17 years old.

3) Complainant generally worked for Respondent from 5 to 8 p.m., Wednesday through Saturday, about 12 hours per week. She was in high school at the time. For about three to four months, she received only tips. Respondent then began paying her \$3.00 an hour, plus tips, then \$4.75 an hour, plus tips. It was Complainant's first job. Her tips averaged about \$120

per month. Respondent voiced no complaints about Complainant's work.

4) Veronica Webster had been friends with Respondent and his wife. In an unwritten agreement, she and Respondent agreed that Webster would work as a waitress for tips plus 10 percent of Respondent's profit until such time as he could pay her an hourly rate in keeping with her duties. It was not intended that she be a partner or part owner.

5) Beginning in March 1992, Webster worked from 6 a.m. to 2 p.m., Monday through Friday, and, for a few weeks, 5 to 8 p.m. on Saturday. She worked with Complainant at least two Saturdays.

6) Odell is near Hood River, Oregon, in an area where fruit orchards are a major industry. Webster took an agreed upon leave of absence to work at her family orchard in the fruit harvest on or about August 1, 1992. She planned to return to the cafe after the harvest was completed. Respondent agreed to that arrangement.

7) Respondent's wife worked briefly for Webster in the harvest. Respondent's wife returned to the orchard frequently thereafter. Respondent believed that his wife was meeting someone at the orchard and that Webster was covering for her. He took Complainant off the schedule for a while.

8) Webster talked to Respondent, and he called Complainant back in late November. When harvest was completed, Webster asked about going back to work with Respondent. He

told Webster he would fit her in. He did not do so, and about Christmas, Webster asked if she was to come back to work and he said "no." Webster told Respondent that they should figure her pay under their agreement. Respondent had paid her some wages during the last of July.

9) On January 15, 1993, a dispute arose over whether Respondent owed Webster \$2,000 or \$3,000. Webster and Respondent argued about her pay. Respondent offered time payments if he could have Webster's original records for analysis. Webster offered copies.

10) Later on January 15, 1993, Respondent called Complainant in and told her she was a great worker, but that he needed to fire her because of difficulties he was having with her mother over Webster's claim for wages. Complainant said that had nothing to do with her and Respondent said that it did because she was Webster's daughter. Complainant had not previously discussed her mother's claim with Respondent. She was aware of the dispute through her mother.

11) Complainant knew that Webster had talked to Respondent earlier that day. Respondent had seemed different after that. When Respondent told Complainant she was fired, she left the workplace upset and was in tears when her step-father picked her up. Later, she was in tears when she told Webster about being fired.

12) Webster called Respondent and asked why he had fired Complainant. He told Webster not to call him and that he could fire anyone for any

reason, such as "the wrong color socks." Complainant got her final check about five days later.

13) At the time Complainant was discharged, Chris Rose, Connie Rose, and Mark Dodge worked for Respondent. Complainant believed that Connie Rose worked Complainant's next shift following her discharge. She heard that those employees were later laid off and then rehired. Respondent never called Complainant to return to work.

14) At the time of the hearing, Webster had heard the allegation that other employees were laid off, but believed at least one Rose and another waitress were working. She did not know of anyone other than Complainant who was actually fired. She had not spoken with Respondent since early 1993 and had an attorney working on her claim for wages.

15) Complainant looked for other work and found a job at Papa Aldo's at \$4.75 an hour, with no tips. She worked there about 9 to 15 hours per week (an average of 12) up to the time of the hearing. Her hourly earnings were approximately the same, but she lost tip income of \$120 per month for 10 months, or \$1,200.

16) Complainant was very upset by being discharged. She had always been happy with the work and was surprised and hurt by Respondent's action. She felt betrayed. She could not understand what she had done to deserve being fired. She still thought often of the situation up to the time of the hearing.

17) The testimony of Complainant and Webster was credible and

* The Forum notes that Complainant's testimony outlined a wage violation by Respondent. This Forum also enforces Oregon's minimum wage laws. Respondent was not charged in this proceeding with the wage violation.

straightforward. The Forum has no reason to doubt that their testimony correctly depicted the events it described and has relied on that testimony herein.

ULTIMATE FINDINGS OF FACT

1) During times material herein, and particularly from March 1992 through January 1993, Respondent was an employer in this state.

2) Complainant was employed by Respondent from March 1992 to January 15, 1993.

3) Complainant's mother, Veronica Webster, was also employed by Respondent from March to August 1, 1992. After the harvest season, Respondent refused to rehire Webster as he had previously agreed. There was a dispute over wages Respondent owed to Webster.

4) On January 15, 1993, following an argument with Webster over Webster's wages, Respondent discharged Complainant.

5) Respondent discharged Complainant due to his difficulties with her mother.

6) As a result of the discharge, Complainant suffered mental distress characterized by tears and upset, surprise and disappointment, and a feeling of betrayal. The discharge resulted in lost earnings in the amount of \$1,200.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110. ORS 659.010(6).

2) The Commissioner of the Bureau of Labor and Industries has

jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.040, 659.050.

3) ORS 659.340 provides, in part:

"(1) * * * it is an unlawful employment practice for an employer solely because another member of an individual's family works or has worked for that employer to:

* * * *

"(b) Bar or discharge from employment an individual;

* * * *

"(3) As used in this section:

"(a) 'Employer' has the meaning for that term provided in ORS 659.010.

"(b) 'Member of an individual's family' means the * * * mother * * * of the individual.

"(4) Subsections (1) to (3) of this section shall be enforced by the Commissioner of the Bureau of Labor and Industries in the same manner as provided in ORS 659.040 to 659.110 for enforcement of an unlawful employment practice. Violation of subsections (1) to (3) of this section subjects the violator to the same civil and criminal penalties as provided for violation of ORS 659.010 to 659.110 and 659.505 to 659.545."

By discharging Complainant because her mother had worked for him, Respondent violated ORS 659.340.

4) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to

issue a Cease and Desist Order requiring Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated. The amounts awarded in the Order below are a proper exercise of that authority.

OPINION

Respondent was found in default, pursuant to OAR 839-50-330(1)(a), for his failure to timely file an answer to the Specific Charges. The Forum held that Respondent's subsequent request for relief from default under OAR 839-50-340 did not establish good cause for relief. Respondent did not attend the scheduled hearing.

The rules of the Forum and the statutes governing administrative contested case hearings require that where the Respondent is in default, the Agency must present evidence to prove a prima facie case in support of the Specific Charges and to establish damages. OAR 839-50-330(2); ORS 183.415(6).

1. Prima Facie Case

In establishing a prima facie case of a violation of ORS 659.340, the Agency must present evidence on the following elements:

1. That Respondent is an employer;
2. That Complainant is a member of a class of persons protected by the statute;

3. That Complainant was harmed by an employment action taken by Respondent; and

4. That the harmful action was taken because of Complainant's membership in the protected class.

See OAR 839-05-010(1); *In the Matter of City of Umatilla*, 9 BOLI 91, 104 (1990), *aff'd without opinion*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991). The Agency has established a prima facie case. The credible testimony of the witnesses, together with the documentary evidence admitted, were accepted and relied upon herein. Proof includes both facts and inferences. *City of Umatilla, supra*. The evidence at hearing showed that:

1. Respondent was a person who in this state engaged or utilized the personal services of one or more employees.

2. Complainant and her mother were employed by Respondent.

3. Complainant's discharge from employment by Respondent resulted in economic and emotional harm to Complainant.

4. Respondent admitted that the reason he discharged Complainant was because of difficulties he had with her mother due to the mother's employment by him.

There was no suggestion that Complainant's discharge was in any way performance related. Respondent told her she was a "great worker." In justifying to Complainant's mother his reason for discharging Complainant, Respondent suggested that he could fire an employee for any arbitrary

reason he chose. Generally, an "at will" employee can be discharged for any reason, or for no reason at all, so long as the true reason is not prohibited by contract or statute, or attributable to a "socially undesirable motive." *In the Matter of Franko Oil Company*, 8 BOLI 279, 290 (1990) (citing *Holien v. Sears, Roebuck and Co.*, 298 Or 76, 689 P2d 1292, 1295 (1984)). That is of no assistance to this Respondent, as his admitted motivation was that Complainant was Webster's daughter and that is the precise practice made unlawful by the statute. The credible evidence was that Respondent clearly violated ORS 659.340.

2. Remedy

Back pay awards in employment discrimination cases are intended to compensate the victim of an unlawful practice for loss of earnings and benefits the victim would have earned but for that practice. They are calculated to make the victim whole. *In the Matter of C. Vogar'd Amezcu*, 11 BOLI 197, 204 (1993). The Complainant found other employment quickly at the same hourly rate, and for approximately the same hours per week, but no longer made the \$120 per month in tips she made with Respondent. She lost \$1,200 as a result of Respondent's violation of statute.

Awards for emotional distress and mental suffering experienced by the victim of an unlawful employment practice are likewise designed to make that victim whole. Such awards are dependent upon the facts presented in each case. This young Complainant, in her first job, was unexpectedly and undeservedly fired based upon Respondent's dispute with her mother.

She was upset at the time as described in Findings of Fact 11 and 16, and Ultimate Finding 6. The sums awarded below are intended to compensate Complainant for her economic loss and mental distress.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found, Respondent LARRY ALLEN, dba SHORT STOP CAFE, is hereby ordered to:

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for VERONICA WEBSTER, as guardian ad litem of CHRISTIE REED, a minor, in the amount of:

ONE THOUSAND TWO HUNDRED DOLLARS (\$1,200) representing earnings CHRISTIE REED lost between January 15 and November 15, 1993, as a result of Respondent's unlawful practice found herein, PLUS interest thereon at the legal rate from December 1, 1993, until paid, PLUS,

ONE THOUSAND DOLLARS (\$1,000) representing compensatory damages for the mental and emotional distress suffered by CHRISTIE REED as a result of Respondent's unlawful practice found herein, PLUS interest at the legal rate on said compensatory damages from the date of the Final Order herein until Respondent complies therewith.

2) Cease and desist from discriminating against any employee based upon the employee's family

relationship with current or former employees.

**In the Matter of
Patrick P. Williams, dba Blue Ribbon
Christmas Trees, and
BLUE RIBBON
CHRISTMAS TREES, INC.,
Respondents.**

Case Number 11-94
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 28, 1994.

SYNOPSIS

Where some wage Claimants agreed to work for an hourly wage and others agreed to work on a piece rate basis, and none were fully paid, the Commissioner held that Respondent corporation willfully failed to pay Claimants all wages due upon termination, in violation of ORS 652.140(2). The Commissioner ordered Respondent corporation to pay wages owed and civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2), 652.150.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on

December 2, 1993, in the conference room of the Bureau of Labor and Industries office, 3865 Wolverine Street NE, # E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. A number of wage claimants were present throughout the hearing and are identified herein by their testimony. They were not represented by counsel. Patrick P. Williams (Respondent Williams) did not attend the hearing and was not represented by counsel. Blue Ribbon Christmas Trees, Inc., a corporation (Respondent corporation), was not represented by counsel. Both Respondent Williams and Respondent corporation were found in default, having been duly notified of the time and place of the hearing and thereafter having failed to appear in person or through a representative. Juan Mendoza, Salem, appointed as interpreter by the Forum pursuant to ORS 183.418(3)(b) and OAR 839-50-300, under proper affirmation, translated for witnesses who could not readily communicate in the English language, but could do so in the Spanish language.

The Agency called the following witnesses: Claimants Emiliano Aguilar-Garcia, Antonio Ceja, Jose Cervantes, Daniel Flores, Jose Maria Melara, Godofredo Mendoza-Chavez, Ramon Oroasco, Jose Manuel Paes Perez, Raul Rodriguez, and Maximino Sanchez; landowner Howard E. Lyon (by telephone); restaurant owner Jose Ruelas Pintor; George Garcia-Elias, brother of wage claimant Raul Garcia-Elias; Camella Reyes; and Agency Compliance Specialist Raul Pena.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On the dates indicated, the following Claimants each filed a wage claim with the Agency alleging that he had been employed by Blue Ribbon Christmas Trees and that the employer had failed to pay wages earned and due to him:

- a) Daniel Flores, August 21, 1992;
- b) Jose Maria Melara, August 24, 1992;
- c) Emiliano Aguilera-Garcia, October 19, 1992;
- d) Ramon Orosco, October 19, 1992;
- e) Mateo Ramirez-Ramirez, October 18, 1992;
- f) Xavier Viloa-Salazar, October 19, 1992;
- g) Manuel Perez-Paes, October 19, 1992;
- h) Jose Cervantes, October 19, 1992;
- i) Raul Rodriguez, September 29, 1992;
- j) Roberto Rodriguez, September 29, 1992;
- k) Felipe Rodriguez, September 29, 1992;

l) Jose Arciga-Acosta, October 19, 1992;

m) Antonio Ceja, August 21, 1992;

n) Godofredo Mendoza-Chavez, October 19, 1992;

o) Mariano Martinez, October 19, 1992;

p) Raul Garcia-Elias, May 29, 1992;

q) Maximino Sanchez, October 19, 1992;

r) Soledad Cejas, August 21, 1992;

s) Luis Aguilar-Gomez, October 19, 1992; and

t) Mauricio Aguilera, October 19, 1992.

2) At the same time they filed their wage claims, Claimants assigned to the Commissioner of Labor, in trust for Claimants, all wages due from the employer.

3) The wage claims of the 20 Claimants were brought within the statute of limitations (six years).

4) On March 27, 1993, the Commissioner of the Bureau of Labor and Industries through the Sheriff of Polk County, Oregon, served on Respondent Williams at 320 NW 55th Avenue, Salem, Order of Determination Number 92-209 (Determination 92-209), based upon the wage claims filed by Claimants and upon the Agency's investigation. Determination 92-209 found that Respondent Williams owed wages and civil penalty wages. Determination 92-209 required that, within 20 days, Respondent Williams either pay the named sums in trust to the Agency or request an administrative

hearing and submit an answer to the charges.

5) On or about April 13, 1993, Respondent Williams filed a request for contested case hearing on Determination 92-209. On April 16, 1993, the Agency extended the time in which Respondent Williams must file a written answer to Determination 92-209, and on May 4, 1993, the Agency received a letter on the letterhead of "Blue Ribbon Christmas Trees." The letter addressed the claims in terms of three different work crews and again asked for a contested case hearing. The letter stated that one crew had been paid in full for the work done, that the second crew was paid and was claiming a higher than agreed price, and that the third crew was paid for work completed except for an amount that was never billed. The letter was signed "Patrick Williams, President Blue Ribbon Christmas Trees." The handwritten return address on the envelope read "Blue Ribbon Christmas Trees Inc., 320 55th Ave NW Salem Ore 97304."

6) The Agency requested a hearing date, and on September 28, 1993, the Hearings Unit issued a Notice of Hearing to Respondent Williams at 320 NW 55th Avenue, Salem, Oregon 97304, to the Agency, and to the Claimants, indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Fo-

rum's contested case hearings rules, OAR 839-50-000 to 839-50-420.

7) On November 2, 1993, the Agency submitted to the Hearings Unit a motion to amend Determination 92-209. The amendment sought reflected that the Agency had determined that "Blue Ribbon Christmas Trees, Inc." was an Oregon corporation. The Agency sought to add the corporation as a respondent, but requested to retain Respondent Williams as a respondent in the event the evidence should show a proprietorship as to any of the Claimants. A copy of the Agency's motion was served on Respondent Williams.

8) On November 10, 1993, the Hearings Referee allowed the Agency's motion for amendment and changed the name of this case to the caption appearing on this order. A copy of the Hearings Referee's ruling was sent to Respondent Williams, individually, and a copy was sent to Respondent Williams as president of Blue Ribbon Christmas Trees, Inc. Both were addressed to him at 320 NW 55th Avenue, Salem, Oregon 97304. The mailings were not returned.

9) The ruling of November 10 provided further that the amended Determination 92-209 be served on the corporation and included a reminder to Respondent Williams individually and as president of Respondent corporation regarding the necessity for Respondent corporation to be represented by counsel in order to avoid default. No response to the amended determination or to the Hearings Referee's letter was received.

* Wage claim forms filed by Claimants and Claimants' responses thereon are in Spanish.

* The Notice of Contested Case Rights and Procedures sent to each Claimant was in Spanish.

10) On November 15, 1993, the Agency notified the Hearings Referee by letter of revisions in the amounts claimed for several of the Claimants. A copy of the letter was sent to Respondent Williams. The amendments reduced slightly the total amounts sought both as wages and as civil penalty.

11) On November 23, 1993, the Hearings Referee issued a discovery order based on the Agency's earlier motion for discovery. The order was directed to Respondent Williams, both individually and as president of Respondent corporation at 320 NW 55th Avenue, Salem, Oregon 97304. It directed Respondents to provide certain payroll records. It also directed that the Agency and Respondents provide case summaries pursuant to the rules of the Forum.

12) On November 24, 1993, the Agency timely filed its case summary. Respondent Williams did not file a case summary prior to hearing. Respondent corporation did not file a case summary prior to hearing.

13) On November 24, 1993, the Agency filed a motion for an order finding Respondent corporation in default. The motion and accompanying documents recited the history of service of amended Determination 92-209 on Respondent Williams as president and registered agent of Respondent corporation by regular mail on November 10, 1993. The motion recited further that the Agency had received no response to amended Determination 92-209 or to the Agency's November 15 proposed revision of claim and that neither had been returned undelivered by the US Postal Service. The Agency's motion for order of default was served by

regular mail on "Patrick Williams, President and Registered Agent, Blue Ribbon Christmas Trees, Inc., 320 N.W. 55th Ave., Salem, Oregon 97304."

14) At the time and place set forth in the Notice of Hearing for this matter, Respondent Williams did not appear or contact the Agency or the Hearings Unit. At that time and place, Respondent corporation did not appear by counsel, and counsel did not contact the Agency or the Hearings Unit on Respondent corporation's behalf. Pursuant to OAR 839-50-330(2), the Hearings Referee waited approximately 35 minutes after the time set for hearing before commencing the hearing. At that time, neither Respondent Williams nor counsel on behalf of Respondent corporation had appeared or contacted the Agency or the Hearings Unit. The Hearings Referee granted the Agency's previous motion and found Respondent corporation in default as to the amended Determination 92-209, pursuant to OAR 839-50-330(1)(a), for failure to file an answer. The Hearings Referee found both Respondent Williams and Respondent corporation in default, pursuant to OAR 839-50-330(2), for failure to attend the hearing.

15) The Hearings Referee found from the files and records herein that both Respondent Williams and Respondent corporation through its registered agent had received a "Notice of Contested Case Rights and Procedures."

16) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the

procedures governing the conduct of the hearing.

11) The Proposed Order, which included an Exceptions Notice, was issued on February 25, 1994. Exceptions were due by March 7, 1994. None were received.

FINDINGS OF FACT – THE MERITS

1) During times material herein, and on and after September 20, 1991, Respondent corporation was an Oregon corporation with Respondent Williams listed as its registered agent, president, and secretary. Respondent corporation's address and that of its registered agent and officer was 320 55th NW, Salem, Oregon 97304.

2) At times material, Howard E. Lyon owned approximately 144 acres at 6320 Red Prairie Road, Sheridan, Oregon. About half of that acreage was planted in Christmas trees.

3) On July 26, 1991, Lyon and his wife, as sellers, entered into a contract of sale for a portion of their land to Patrick P. Williams (Respondent) as buyer. The contract provided that the Christmas trees growing on the property were part of the real property sold and acknowledged that Respondent Williams was entitled to cut and market the trees. The contract called for annual payments.

4) A neighboring plot of land of about the same size as that which Lyon sold to Respondent Williams was also planted in Christmas trees. Respondent Williams rented that land.

5) On April 15, 1993, Lyon obtained a decree of strict foreclosure on the sales contract divesting Respondent Williams, and any entity claiming through or under him, of any interest in the Lyon land at Sheridan.

6) While he was in possession of the land purchased from Lyon and the neighboring rented land, Respondent Williams harvested Christmas trees from both parcels. He brought in both domestic and Mexican laborers for this purpose.

7) Daniel Flores (Lopez) had worked for Respondent Williams near Monroe, Oregon, in 1991. Respondent Williams located him in McMinnville in 1992. Using Jose Ruelas (Pintor), proprietor of the "Heart of Mexico" restaurant as interpreter, Claimant Flores went to the Lyon field to meet Respondent Williams. Respondent Williams said he liked the work they had done before and told Claimant Flores he would pay \$6.50 an hour for Claimant Flores and \$5.25 an hour for the other laborers. The others involved were Claimants Melara, Antonio, and Soledad Ceja, and another young man named Ephriam. Claimant Flores was paid periodically, but not in full.

8) Claimant Flores and his companions kept a written record of the hours they worked at shearing, topping, and staking the trees. Respondent Williams provided some tools, including machetes. Claimant Flores knew that Respondent Williams had not paid them fully. When he asked

* When he was sworn in, the witness gave his name as "Flores Lopez." Several of the wage claimants used the paternal-maternal form in stating their names. In order to minimize confusion, the Forum has referred to each Claimant by the name used in the documents filed with the Agency.

Respondent Williams for their pay, Respondent would promise it for another day. That day did not arrive.

9) When Claimant Flores filed a wage claim with the Agency, Claimant Antonio Ceja assisted him with the form and the claim calendar. Between June 17 and July 30, 1992, at \$6.50 an hour, he earned \$1,748.49, including overtime. He was paid \$400.

10) Claimant Jose Maria Melara was hired by Respondent Williams for \$5.25 an hour and worked with Claimant Flores at the Lyon field. He worked with Claimants Antonio and Soledad Ceja and Flores, who kept the hours. Claimant Melara used a machete provided by Respondent Williams and marked "BRCTI." Between June 18 and July 31, 1992, he earned \$1,649.63, including overtime. He was paid \$550. When Claimant Melara asked Respondent Williams about pay, Respondent always said "tomorrow." Claimant Melara quit because Respondent would not pay him.

11) Claimant Antonio Ceja (Garcia) was hired by Respondent Williams for \$5.25 an hour and worked with Claimant Flores at the Lyon field. He worked with Claimants Melara, Soledad Ceja, and Flores, who kept the hours. Claimant Antonio Ceja used a machete provided by Respondent Williams and marked "BRCTI." Between June 18 and July 30, 1992, he earned \$1,869.51, including overtime. He was paid \$400. His father, Soledad, who worked with him and also filed a wage claim, was in Mexico at the time of the hearing.

12) Jose Ruelas Pintor was the owner of "Curazon de Mexico" (Heart of Mexico) restaurant in McMinnville,

Oregon, at times material. In December 1991, Camelio Reyes brought him to the Lyon farm to deliver some food. He met Respondent Williams there. In 1992, Respondent Williams came to the restaurant and asked Ruelas Pintor to find Flores. Respondent Williams wanted Flores and others to work for him at the Lyon farm. They met with Flores and others at the farm. Respondent Williams said he would pay the workers \$5.25 an hour and that Flores would get more than that. He promised to pay more if they did well.

13) After the workers began the job, Ruelas Pintor became aware that they were having trouble getting paid because they were frequently looking for Respondent Williams. On one occasion, Respondent Williams left \$700 with Ruelas Pintor for the workers. Ruelas Pintor gave the money to Flores, who distributed it.

14) Through Ruelas Pintor, Respondent Williams called a meeting of Flores and his companions at the restaurant, telling them to bring their timecards so that he could make out their checks accurately. The workers brought the timecards to Respondent Williams, who placed them on the table and commented about how pleased he was with the work they were doing. He then paid Ruelas Pintor for the dinner, told the workers he would pay them the next morning, and went out through the kitchen. He left the timecards on the table. This meeting was in the summer, after May.

15) Following the meeting where Respondent Williams bought dinner and left without the timecards, he called the restaurant at least twice to have Ruelas Pintor tell the workers that

he would be at Lyon farm the next morning to pay them, but he was never there.

16) Camelio Reyes worked for Respondent Williams in 1992 and was not paid. In late December 1992, Respondent Williams gave Reyes a document reading as follows:

"12/28/92

"Balance owed Camelio Reyes for work completed on Blue Ribbon Christmas tree Farm is 995.00. Balance to be paid by 1/15/92 [sic] [signed] Patrick Williams Pres.

"Blue Ribbon Christmas Trees Inc"

17) In December 1992, Respondent Williams signed a check on the account of Blue Ribbon Christmas Trees, drawn on the Key Bank of Oregon West Salem Branch, in the amount of \$250 to Aurelio Campusano, who had worked for Respondent Williams and who was living with Reyes at the time. Campusano gave Reyes the check for his rent. The bank refused to honor it. The account was closed.

18) George Garcia-Elias is the brother of Claimant Raul Garcia-Elias, who was in Mexico at time of hearing. Raul lived with George at the time Raul worked for Respondent Williams in the harvest of Christmas trees in October 1991. Raul was not paid all of what he was owed. George accompanied Raul when Raul filed a wage claim with the Agency for \$444 and completed a claim calendar in May 1992.

19) Claimant Jose Manuel Paes Perez worked for Respondent Williams shearing Christmas trees in

September and October 1992 in the Lyon field. He worked with Claimants Orosco, Ramirez, and Aguilera-Garcia. He was to be paid by the tree, depending on the size. Claimant Aguilera-Garcia kept a record of the trees that Claimant Paes Perez completed. Claimant Paes Perez told a person at the Agency the number of hours he worked each day, which was put on a calendar. He was never paid for his work.

20) Claimant Emiliano Aguilera-Garcia worked for Respondent Williams training Christmas trees in September and October 1992 in the Lyon field. He learned of the job through Lyon, and Respondent Williams needed workers and hired him. He was to be paid by the tree, depending on the size. He worked with Claimants Sanchez, Cervantes, Ramirez, Paes, Orosco, Martinez, his brother Mauricio Aguilera, Mendoza-Chavez, Aguilar-Gomez, Acosta, and Viloa-Salazar. He rode with Claimant Orosco. He kept a record of the number of trees completed by himself and by each of his co-workers. Of the \$800 mentioned on his wage claim as money paid to him by Respondent Williams, he actually retained \$400. The rest went to his crew. His girlfriend helped him with the wage claim forms and hourly calendar.

21) Claimant Aguilera-Garcia's record consisted of five pages with columns headed by numbers as "03, 04," etc. That represented the amount in cents claimed for each tree completed. In the columns below those amounts are the numbers of trees in that

* The documents in the Agency's file are in the name "Perez-Paes." This witness stated at hearing that the reverse was his preference.

category which was completed. Claimant Aguilera-Garcia used the same method in recording the trees completed at each rate by the other workers in his crew.

22) On October 9, 1992, Respondent Williams gave Claimant Emiliano Aguilera-Garcia a document which both signed on that date and which read as follows:

"10/09/92

"To Emiliano Aguilera Garcia

"I have paid 800.00 and he has received for payroll check which was returned and a balance plus charge owing [sic] of 1,097.17 to be paid as soon as I receive.

"[signed] Patrick Williams

"[signed] Emiliano Aguilera-Garcia"

23) The check mentioned in the document of October 9 was in the amount of \$1,897.17, dated October 2, 1992, was payable to Claimant "Emiliano Aguilera-G" and was drawn on the First National Bank of Anchorage, Kuskokwin Branch, Bethel, Alaska. The account name was handwritten in a style similar to the October 9 document as "Patrick Williams, P.O. Box 787, Bethel Ak 99559." Respondent Williams was the maker. The check was returned by the bank "Account Closed."

24) Claimant Emiliano Aguilera-Garcia deposited the October 2 check, paid money from it to others, and then had to repay his own bank when the check "bounced." Respondent Williams claimed that there was plenty of money, but there was an old account and a new account, the bank had made a mistake and he would check with his bank. Claimant Aguilera-

Garcia never saw Respondent after that.

25) Claimant Maximino Sanchez (Jiminez) worked for Respondent Williams shearing Christmas trees in September and October 1992 in the Lyon field. He worked with Claimants Orosco, Ramirez, Paes, Mendoza-Chavez, and Aguilera-Garcia. Respondent Williams told him through Claimant Aguilera-Garcia that he was to be paid by the tree, depending on the size. Claimant Aguilera-Garcia kept a record of the trees that Claimant Sanchez completed. Claimant Sanchez received a check for \$485.26 from Respondent Williams. It bounced, and Respondent replaced it with cash. The Agency assisted him with the claim calendar. He was never fully paid for his work.

26) Claimant Ramon Orosco worked for Respondent Williams shearing Christmas trees in September and October 1992 in the Lyon field. He worked with Claimants Cervantes, Aguilera-Garcia, and others. He supplied transportation to the work site in his van. Respondent Williams told him through Claimant Aguilera-Garcia that he was to be paid by the tree, depending on the size. Claimant Aguilera-Garcia kept a record of the trees that Claimant Orosco completed. Claimant Orosco was paid \$351.57. Claimant Aguilera-Garcia assisted him with the claim calendar. He was never fully paid for his work.

27) Claimant Jose Cervantes worked for Respondent Williams shearing Christmas trees in September and October 1992 in the Lyon field. He worked with Claimants Orosco, Sanchez, Viloa-Salazar, Aguilera-

Garcia, and others. Respondent Williams told him through Claimant Aguilera-Garcia that he was to be paid by the tree, depending on the size. Claimant Aguilera-Garcia kept a record of the trees that Claimant Cervantes completed. Claimant Cervantes was paid \$64.26. Claimant Aguilera-Garcia assisted him with the claim calendar. He was never fully paid for his work.

27) Claimant Godofredo Mendoza-Chevez worked for Respondent Williams shearing Christmas trees in September and October 1992 in the Lyon field. He worked with Claimants Orosco, Ramirez, Sanchez, Aguilera-Garcia, and others. Respondent Williams told him through Claimant Aguilera-Garcia that he was to be paid by the tree, depending on the size. Claimant Aguilera-Garcia kept a record of the trees that Claimant Mendoza-Chevez completed. Claimant Aguilera-Garcia assisted him with the claim calendar. He was never paid for his work.

28) Claimant Raul Rodriguez (Chavez) worked for Respondent Williams pruning Christmas trees in June and July 1992 in the Lyon field. He worked with his brothers, Claimants Felipe and Roberto Rodriguez, who were in Mexico at time of hearing. Respondent Williams told him that he was to be paid by the tree. Claimant kept a record of the trees that he and his brothers completed. Respondent Williams paid \$100 to Claimant Raul Rodriguez, \$150 to Claimant Roberto Rodriguez, and \$150 to Claimant Felipe Rodriguez. They never could find Respondent Williams again after receiving those partial payments, and they were never fully paid for their work.

29) At times material, Raul Pena was a Compliance Specialist with the Farm Labor Unit of the Agency. He is fluent in spoken and written Spanish and English. He was assigned to the investigation of the wage claims against Respondent Williams and Respondent corporation. He personally received the wage claims involved herein. He reviewed all of the wage claim forms, assignment forms, work lists, and calendars. From each set of documents for each Claimant, Pena completed a Wage Transcription and Computation Sheet.

30) For hourly workers, Pena took the number of hours claimed times the hourly rate, included time and one-half for overtime, and subtracted any amount paid to determine what was owed. For the piece rate workers, he computed the amount earned at the piece rate and divided by the number of days, and hours worked if known, to determine whether the earnings met minimum wage standards (\$4.75 an hour). He then subtracted from the earnings any amount paid to determine what was owed.

31) In order to compute penalty wages for each Claimant, Pena took the greater of the total hourly earnings or the total piece rate earnings and divided that by the number of days worked to establish the average daily rate. This daily rate was then multiplied by the number of days that wages remained unpaid (in all cases the statutory limit of 30 days) to establish the penalty wages. All of the calculations described by Pena were in accordance with the law and Agency policy.

32) Respondent Williams did not allege in his answer an affirmative defense of financial inability to pay the wages due at the time they accrued, nor did he provide any such evidence for the record. Respondent corporation provided no answer or affirmative defense.

33) Testimony of all Claimants who testified was found to be credible. They had the facts readily at their command, and their statements were supported by documentary records. The wage claims of those Claimants who were unable to attend the hearing were authenticated and corroborated by the witnesses that testified.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent corporation was an Oregon corporation which was engaged in the growing and harvesting of Christmas trees and which employed one or more persons in the operation of that business in the State of Oregon.

2) During all times material herein, Respondent Williams was a person who was a registered agent and an officer of Respondent corporation.

3) As shown in Table 1, Respondent corporation employed the following Claimants in the growing and harvesting of Christmas trees on the dates listed, during which each Claimant had the earnings listed and were paid the amounts listed. Respondent corporation owes to the respective Claimants the sums indicated.

4) Respondent corporation willfully failed to pay the respective Claimants all wages within five days, excluding Saturdays, Sundays, and holidays, after each Claimant ceased working;

more than 30 days have elapsed from the date the respective Claimants' wages were due.

5) Each Claimant's average daily rate for the wage claim period of employment was the total earned divided by the days worked. Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal the amounts shown in Table 2 for the respective Claimants, all of whom remained unpaid for over 30 days.

6) There was no showing that Respondent corporation was financially unable to pay Claimants' wages at the time they accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent corporation was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.405.

3) The actions or inactions of Respondent Patrick Williams, as registered agent and officer of Respondent corporation, are properly imputed to Respondent corporation.

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of

TABLE 1

Claimant	Dates	Earned	Paid	Owed
Daniel Flores	6/17 - 7/30/92	\$2,966.01	\$400.00	\$1,966.01
Jose Maria Melara	6/18 - 7/30/92	\$1,715.56	\$550.00	\$1,165.56
Emiliano Aguilera-Garcia	9/24 - 10/9/92	\$1,907.59	\$400.00	\$1,507.59
Ramon Orozco	9/24 - 10/9/92	\$915.21	\$351.57	\$563.64
Mateo Ramirez-Ramirez	8/29 - 9/19/92	\$301.56	\$ 0.00	\$301.56
Xavier Vico-Salazar	10/5 - 10/8/92	\$258.02	\$ 0.00	\$258.02
Manuel Paes-Perez	9/24 - 10/9/92	\$351.57	\$ 0.00	\$351.57
Jose Cervantes	9/24 - 10/9/92	\$422.62	\$64.26	\$358.36
Raul Rodriguez	8/28 - 7/6/92	\$480.00	\$100.00	\$380.00
Roberto Rodriguez	8/28 - 7/6/92	\$480.00	\$150.00	\$330.00
Felipe Rodriguez	8/28 - 7/6/92	\$480.00	\$150.00	\$330.00
Jose Arziga-Acosta	10/8 - 10/9/92	\$122.97	\$ 0.00	\$122.97
Antonio Ceja	6/18 - 7/30/92	\$1,863.88	\$ 400.00	\$1,463.88
Godofredo Mendoza-Chavez	8/29 - 9/11/92	\$365.10	\$ 0.00	\$365.10
Mariano Martinez	10/8 - 10/7/92	\$61.50	\$ 0.00	\$61.50
Raul Garcia-Elias	10/8 - 10/20/91	\$444.00	\$ 0.00	\$444.00
Maximino Sanchez	9/24 - 10/9/92	\$1,067.18	\$486.26	\$581.92
Soledad Cejas	6/27 - 7/30/92	\$1,446.51	\$ 400.00	\$1,046.51
Luis Aguilera-Gomez	10/5 - 10/8/92	\$106.75	\$ 0.00	\$106.75
Mauricio Aguilero	9/28 - 10/8/92	\$238.78	\$ 0.00	\$238.78

intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs".

Respondent corporation violated ORS 652.140(2) by failing to pay Claimants all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimants ceased employment.

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay

TABLE 2					
Claimant	Earnings	+ Days Worked	Average Daily Rate	x 30 Days	Penalty
Daniel Flores	\$2,366.01	35	\$67.80	x 30	\$2,028.00
Jose Maria Melara	\$1,715.58	32	\$53.81	x 30	\$1,608.00
Emiliano Aguilera-Garcia	\$1,907.59	9	\$123.07	x 30	\$3,692.00
Ramon Orozco	\$915.21	8	\$114.40	x 30	\$3,432.00
Mateo Ramirez-Ramirez	\$301.56	6	\$50.26	x 30	\$1,508.00
Xavier Vilca-Salazar	\$258.02	4	\$64.51	x 30	\$1,935.00
Manuel Paes-Perez	\$351.57	8	\$43.95	x 30	\$1,319.00
Jose Cervantes	\$422.62	8	\$52.83	x 30	\$1,585.00
Raul Rodriguez	\$480.00	8	\$60.00	x 30	\$1,800.00
Roberto Rodriguez	\$480.00	8	\$60.00	x 30	\$1,800.00
Felipe Rodriguez	\$480.00	8	\$60.00	x 30	\$1,800.00
Jose Arcoiga-Acosta	\$122.97	2	\$61.49	x 30	\$1,845.00
Antonio Ceja	\$1,863.88	34	\$58.25	x 30	\$1,748.00
Godofredo Mendoza-Chavez	\$365.10	6	\$60.85	x 30	\$1,826.00
Mariano Martinez	\$81.50	2	\$30.75	x 30	\$923.00
Raul Garcia-Elias	\$444.00	11	\$40.36	x 30	\$1,211.00
Maximino Sanchez	\$1,067.18	9	\$118.58	x 30	\$3,557.00
Soledad Cejas	\$1,446.51	26	\$55.84	x 30	\$1,669.00
Luis Aguilar-Gomez	\$106.75	4	\$2669.00	x 30	\$801.00
Mauricio Aguilero	\$238.78	3	\$79.60	x 30	\$2,388.00

the wages or compensation at the time they accrued."

Respondent corporation is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to each Claimant when due as provided in ORS 652.140.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent corporation to pay each Claimant his earned, unpaid, due, and payable wages and the civil

penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

1. Default

Both Respondent corporation and Respondent Williams failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. See *In the Matter of Judith Wilson*, 5 BOLI 219,

226 (1986); *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); see also OAR 839-50-330(2).

Where a respondent submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. Where a respondent fails to appear at hearing, the Forum may review the answer to determine whether the respondent has set forth any evidence or defense to the charges. *In the Matter of Richard Niquette*, 5 BOLI 53, 60 (1986); *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987). In a default situation where the respondent's total contribution to the record is his or her request for a hearing and an answer which contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Mongeon, supra*, at 201.

The Agency has established a prima facie case. A preponderance of the credible evidence on the whole record showed that Respondent corporation employed Claimants during the various periods of the wage claims and willfully failed to pay them all wages, earned and payable, when due. That evidence, which established that Respondent corporation owes the respective Claimants the sums listed in Ultimate Finding of Fact 3, was credible, persuasive, and the best evidence available, given the failure of both Respondents to appear at the hearing. Having considered all the evidence on the record, the Forum finds that the

prima facie case has not been contradicted or overcome.

2. Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent corporation, as an employer, had a duty to know the amount of wages due to its employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Evidence established that Respondent through its officer knew it was not paying Claimants the wages for their work on the Christmas trees. At least twice, Respondent Williams gave account-closed checks to workers for their wages and, when the checks were dishonored, acknowledged that the wages were still owed. He repeatedly told several of the Claimants, and the restaurant proprietor Rueles Pintor, that the wages were owed and he would get them paid. Respondent Williams intentionally failed to pay wages. Evidence showed that he acted voluntarily and as a free agent. His acts are imputed to the Respondent corporation, which must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150.

The record established that Respondent corporation violated ORS 652.140 as alleged and owes the respective Claimants the sums listed in

Ultimate Finding of Fact 5 as civil penalty wages pursuant to ORS 652.150. Pursuant to Agency policy, civil penalty wages due under ORS 652.150 were rounded to the nearest dollar. *In the Matter of Wayton & Willies, Inc.*, 7 BOLI 68, 72 (1988).

3. Respondent Williams Was Not an Employer

Respondent Williams used the name "Blue Ribbon Christmas Trees" as well as his own name in dealing with Claimants and others. The manner in which he signed the note to the witness Reyes suggested he acted in that instance in a corporate capacity, but there was no testimony that he told any of the Claimants about Respondent corporation. Many of them were aware, however, that the business name was "Blue Ribbon Christmas Trees." He purchased the Lyon land in his own name. He paid, or attempted to pay, at least one Claimant with a personal check. The other check in evidence does not disclose that "Blue Ribbon Christmas Trees" was a corporation. All Claimants testified that Respondent Williams was the "patron."

The Forum has dealt before with a factual situation in which an individual dealt with employees and others but was representing a corporation. In that case, the Commissioner discussed the difficulty in "piercing the corporate veil," that is, removing the corporate immunity from one purportedly acting for a corporation. The Commissioner found that even if an individual were the sole owner of a corporation, the individual still might not be personally liable. The state's corporation law is explained in *Amfac Foods, Inc. v. International Sys-*

tems & Controls Corporation, 294 Or 94, 654 P2d 1092 (1982):

"Ownership of all the stock of the corporation by one person, in and of itself, is insufficient to breach the wall of immunity created by ORS [60.151]. Nor is the control of the corporation by a shareholder, in and of itself, sufficient to support a claim for recovery that the shareholder's immunity should be disregarded * * *." *Quoted in In the Matter of Microtran Smart Cable*, 11 BOLI 128, 138 (1992).

Not only must the individual have actual control, but there must be a relationship between some improper form of corporate shareholder or officer conduct and the inability of the creditor to collect. In other words, in order to lose corporate immunity, the questioned agent must do something harmful to the corporation. While it appeared that Respondent Williams was the sole owner and shareholder, there was no actual proof of that or, indeed, of any corporate insolvency. Corporate immunity exists to foster legitimate business risk. Unfortunately, it may also form a shield for the unscrupulous. The Forum cannot, on this record, hold Respondent Williams personally liable.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent BLUE RIBBON CHRISTMAS TREES, INC. to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR those Claimants listed in Ultimate Findings of Fact 3 and 5 herein as their interests may appear, in the amount of FIFTY THOUSAND FOUR HUNDRED EIGHTEEN DOLLARS AND SEVENTY-TWO CENTS (\$50,418.72), representing \$11,943.72 in gross earned, unpaid, due, and payable wages, less legal deductions previously taken by the Respondent; and \$38,475 in penalty wages, PLUS

2) Interest at the rate of nine percent per year on the sum of \$11,943.72 from October 14, 1992, until paid, PLUS

3) Interest at the rate of nine percent per year on the sum of \$38,475 from November 13, 1992, until paid.

**In the Matter of
BOYD YODER
and Karen Yoder, dba The Y-4 Farm,
Respondents.**

Case Number 18-94

Final Order of the Commissioner
Mary Wendy Roberts
Issued March 28, 1994.

SYNOPSIS

Respondents, proprietors of a farm, did not examine or retain a copy of a farm labor contractor's license or temporary permit because the contractor

claimed to be doing only dayhaul work. The unlicensed contractor was a landlord to some of the workers and not entitled to the dayhaul exemption. The Commissioner held that Respondents, as persons to whom workers were to be provided, violated ORS 658.437(2) when they failed to examine and retain a copy of the farm labor contractor's license or permit prior to commencement of work, and assessed them a \$500 civil penalty. ORS 658.405(1)(a); 658.410(1); 658.437(1), (2); 658.453(1)(f); OAR 839-15-004(4), (12); 839-15-130(4), (5); 839-15-508(3); 839-15-510; 839-15-512.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 7, 1994, in the conference room of the Bureau of Labor and Industries Office, 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Respondents Boyd Yoder (Respondent) and Karen Yoder (Respondent Karen Yoder) were present throughout the hearing and were not represented by counsel.

The Agency called the following witnesses: Agency Farm Labor Unit Licensing Specialist Frances O'Halloran (by telephone) and Agency Farm Labor Unit Compliance Specialist Raul J. Pena. Respondents called themselves as their only witnesses.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On June 10, 1993, the Agency issued a "Notice of Intent to Assess Civil Penalty" (Notice of Intent) to Respondents. The Notice of Intent cited the following basis for this assessment:

"Failure to Examine the License or Temporary Permit of a Farm Labor Contractor or Retain a Copy of the License or Temporary Permit Provided by the Farm Labor Contractor Prior to Allowing Work to Begin on Any Contract or Agreement With a Farm Labor Contractor. ORS 658.437(2); ORS 658.453(1)(f); OAR 839-15-508(3). [alleging that Respondents had in 1992 entered into an agreement with Linda Garcia, an unlicensed farm labor contractor, to perform work at The Y-4 Farm, and that Garcia performed work without Respondents first examining her license or temporary permit and without their retaining a copy of same] CIVIL PENALTY OF \$500. (ONE VIOLATION)."

The notice was served on Respondents on June 21, 1993.

2) By a letter dated June 26, 1993, and received by the Agency June 29, 1993, Respondent denied the violation cited in the Notice of Intent and alleged that Garcia had "never acted as a

Labor Contractor for the Y-4 Farm. The duties she performed for me pursuant to 839-15-130 of the administrative rules." Respondent requested the evidence upon which the charges were based and requested a hearing.

3) Thereafter, the Agency requested a hearing date from the Hearings Unit, and on October 15, 1993, the Forum issued to Respondents and the Agency (together, "the participants") a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearing Referee. With the hearing notice, the Forum sent to Respondents a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-50-000 through 839-50-420.

4) On November 2, 1993, the Agency Case Presenter mailed to Respondent the "documents responsive to your June 1993 request for documents upon which the charges in this case are based."

5) At the commencement of the hearing Respondent stated that he had received the Notice of Contested Case Rights and Procedures and had no questions about it.

6) At the commencement of the hearing, pursuant to ORS 183.415(7), the participants were advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

7) The Proposed Order, which included an Exceptions Notice, was

issued on March 11, 1994. Exceptions were due by March 21, 1994. None were received.

8) On March 17, 1994, Respondents tendered to the Agency the sum of \$500, representing the civil penalty recommended in the Proposed Order.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondents owned a farm near Canby, Clackamas County, Oregon, known as "The Y-4 Farm." Respondents grew food crops for harvest on that farm.

2) Respondent hired Linda and Javier Garcia in May 1992. They came by the farm looking for "supervisor" work. Either Javier or Linda Garcia showed Respondent a copy of OAR 839-15-130(5) and stated that it exempted them from the farm labor licensing requirement. They provided a business card for "Field & Farm Labor Supervisor" bearing both of their names and the telephone number 873-5146.

3) Respondent knew that neither Garcia had a farm labor contractor license. He did not ask to see such a license.

4) At times material, Raul J. Pena was a Compliance Specialist in the Farm Labor Unit of the Wage and Hour Division of the Agency. Part of his duties were enforcement of the farm and forest labor laws of Oregon. He is fluent in both Spanish and English.

5) On May 18, 1992, Pena learned from a Hispanic worker on Heinz Road near Canby, Oregon, that he had been recruited by "a Hispanic male and an Anglo female" to work for "Boyd" at a farm nearby. Pena went to the nearby Y-4 farm, identified himself, and spoke with Respondent Karen Yoder. When Pena asked her who was supplying the farm labor, she gave the name of Linda Garcia.

6) Pena informed Respondent Karen Yoder that Linda Garcia might not be licensed and stated he would check. Linda Garcia had recently received a licensing packet from Pena, but had not returned it completed to his knowledge.

7) At the time of hearing, Frances O'Halloran had worked as an Administrative Specialist in the Licensing Unit of the Wage and Hour Division of the Agency since September 1993. Her duties were to maintain the records of Farm Labor Contracting licenses and applications. These records, of which she was custodian, consisted of physical files and a computer database. All such records were maintained for a minimum of three years and included unsuccessful applications as well as applications from which such licenses were issued.

8) The Agency records showed an application for a farm labor contractor license dated June 8, 1993, from Linda Garcia, also known as Linda Franks. No license was issued based on that application. In 1991, the Agency wrote to Linda Garcia, aka Franks,

* OAR 839-15-130(5) exempts from the farm labor contractor licensing requirement persons "engaged only in the solicitation or recruitment of workers for agricultural day-haul work and not engaged in arranging for board or lodging for migrant workers and not performing as an employer of the workers."

cautioning her that she should obtain such a license based on her activities. She was never licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

9) Pena returned to the Y-4 farm on May 21 and noticed 60 to 70 workers beginning the harvest of strawberries. He spoke with Respondent and identified himself. Respondent told Pena that Linda Garcia was employed on an hourly basis as a supervisor.

10) Pena spoke with Linda Garcia, who was doing paperwork. She told him she had been unable to obtain a contractor license due to finances. Pena cautioned her that she would need a license unless she was a full-time employee of one farmer exclusively. He told her that if she worked for more than one farmer, she was not exempt from the licensing requirement. She stated that she would be working for Respondent.

11) Pena questioned several of the workers, who were Hispanic migrants, in Spanish. He had noted the arrival of a van occupied by workers and driven by Javier Garcia, Linda Garcia's husband. The workers told Pena that Linda Garcia had told them about the job and provided transportation.

12) About two weeks later, accompanied by Agency Compliance Specialist Gabriel Silva, Pena visited Linda Garcia's home at 419 S High Street, Silverton, Oregon. Hers was an upstairs apartment in a four-apartment building. Pena spoke briefly with her.

13) There were several Hispanic individuals living at 419 S High Street. Some of them lived in a converted garage in the rear of the building. In

Spanish, Pena and Silva questioned them and others whom they found living at 12151½ S Water Street, Silverton. Both groups were migrant farm workers who stated that they had been working for Respondent and for G & C Farms, and that Linda Garcia had told them of the jobs and had taken them to work. Pena observed pay stubs from both farms. The workers also stated that Linda Garcia had shown them the quarters in which they lived and that Javier Garcia collected the rent.

14) On July 31, 1992, Pena and Silva wrote statements in English from several workers whom they questioned in Spanish at the Water Street address. The process was to read back to the witness in Spanish the answers they were putting down and then ask the witness to sign the statement if it was correct. Each worker stated that he worked for Javier and Linda Garcia and had worked at Respondent's farm and at G & C Farms, as well as others.

15) At times material, Linda Garcia (aka Franks) and Javier Garcia were lease tenants at 419 S High Street and at 12151½ S Water Street, Silverton.

16) During his investigation, Pena received a handwritten letter from Respondent which read:

"Raul Pena,
"The agreement between me Boyd Yoder and Linda Garcia and Javier Garcia was as follows:
"They were hourly employees in charge of hiring firing and supervision of my strawberry employees. They were paid 10.00 per hour for their service plus a 4,000.00 bonus for doing a good job.
"Boyd Yoder"

17) Respondents' payroll records showed that he paid Linda Garcia an hourly rate of \$10.00 for less than full-time work (less than 40 hours per week) between May 14 and June 12, 1992. A total of \$860 was paid. On June 4, 1992, Respondent issued a check in the amount of \$4,000 to Linda Garcia.

18) Respondents' payroll records showed that he paid Javier Garcia an hourly rate of \$10.00 for less than full-time work (less than 40 hours per week) between May 26 and June 12, 1992. A total of \$650 was paid.

19) The payroll records of G & C Farms showed that Javier Garcia was paid an hourly rate of \$10.00 for less than full-time work (less than 40 hours per week) between May 22 and June 25, 1992, and was paid \$2,244.72 in addition based on strawberries harvested. A total of \$3,769.72 was paid.

20) The Salem-Keizer telephone directory Yellow Pages for May 1992/1993 carried a listing under "Farm Management Service" reading:

"Field & Farm
"Migrant Labor Supervisor
Contract or Leasing
"Silverton
"873-5146"

21) On December 10, 1992, Pena called 873-5146, Silverton, and spoke to both Linda and Javier Garcia, who were seeking Christmas tree workers at the time.

22) Respondent Karen Yoder saw Linda Garcia do paperwork and supervise and transport workers during the 1992 strawberry harvest. She described the workers as "Mexican." Neither she nor Respondent speak

Spanish. The Y-4 Farm is 200 acres in the name of both Respondents.

23) Neither Respondent was entirely credible. Both Respondent Boyd Yoder and Respondent Karen Yoder stated that the recruiting of workers was done by word of mouth and by signs posted near the farm, despite evidence, including their own testimony, that the Garcias brought workers to the farm. Respondent stated that he did not hire Linda Garcia to recruit, although she told him she knew people needing work. He stated that the \$4,000 bonus he paid to Linda Garcia was based on her having done a "good job." He could not estimate the poundage of strawberries harvested. There was no evidence that Respondent, before or since, had paid any employee such a sizable bonus, or any bonus. He stated that in 1991, he merely posted signs and used word of mouth to get pickers, whom he supervised himself, despite his earlier testimony that he spoke no Spanish. Respondent represented himself. His demeanor was characterized by apparent resentment of the proceeding and of regulation of his enterprise. He exhibited a calculated misunderstanding of the issues. He attempted to impugn the investigator's methods and motivation by suggesting that typographic or inadvertent errors in the investigator's field contact reports somehow demonstrated unprofessional conduct. Respondent Karen Yoder disclaimed any knowledge regarding the operation of the farm business or of the definition of a farm labor contractor. She testified that her husband managed the Y-4 Farm, that she did not hire and fire, that she was employed

outside the home and did the yard work and some picking, that compensation was Respondent's decision, and that she was unaware of the arrangement with Linda Garcia. Because of the inconsistencies in both Respondents' testimony, the Forum has discounted that which was contradicted by more credible documents or testimony.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, Respondents were owners and operators of Y-4 Farm in this state and were engaged in the production and harvesting of farm products.

2) In May 1992, Respondent hired Linda and Javier Garcia for an agreed remuneration or rate of pay. The Garcias recruited, solicited, and supplied workers to perform work for Respondent in the production or harvesting of farm products.

3) During all times material herein, neither Linda Garcia nor Javier Garcia were permanent employees of Respondents.

4) During all times material herein, neither Linda Garcia nor Javier Garcia were licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

5) During all times material herein, some of the workers recruited, solicited, or supplied to Respondent by Linda Garcia and Javier Garcia were migrant workers and did not reside permanently in the local area.

6) During all times material herein, Linda Garcia and Javier Garcia were engaged in arranging for lodging for or furnished lodging for some of the mi-

grant workers recruited, solicited, or supplied to Respondents.

7) At no time prior to allowing work to begin by the migrant workers recruited, solicited, or supplied by Linda Garcia and Javier Garcia did Respondents, or either of them, examine a farm labor contractor license or temporary permit for Linda Garcia or Javier Garcia and retain a copy thereof.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the persons herein. ORS 648.405 to 658.485.

2) ORS 658.405 provides, in part:

"As used in ORS 658.405 to 658.503 and 658.830 and 658.991(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in * * * the production or harvesting of farm products; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in those activities; or who, in connection with the recruitment or employment of workers to work in those activities, furnishes board or lodging for such workers; * * * However, 'farm labor contractor' does not include:

"(a) Farmers, * * * their permanent employees, * * * or individuals engaged in the solicitation or recruitment of persons for dayhaul work in connection with the

growing, production or harvesting of farm products;"

OAR 839-15-004 provides, in part:

"As used in these rules, unless the context requires otherwise:

* * *

"(4) 'Farm Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the production or harvesting of farm products; or

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the production or harvesting of farm products; or

"(c) Any person who furnishes board or lodging for workers in connection with the recruiting, soliciting, supplying or employing of workers to be engaged in the production or harvesting of farm products."

By recruiting, soliciting, and supplying workers for an agreed rate of pay to perform labor for Respondent in the harvest of farm products and by furnishing lodging for such workers, Linda and Javier Garcia acted as farm labor contractors during times material.

3) ORS 658.410(1) provides, in part:

"* * * no person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries."

OAR 839-15-004 provides:

"As used in these rules, unless the context requires otherwise:

* * *

"(12) 'Individuals engaged in the solicitation or recruitment of persons for day-haul work' means individuals who solicit or recruit only persons:

"(a) who reside permanently in the local area; and

"(b) who do not, temporarily or otherwise, reside on the farm on which they are working; and

"(c) who are not employed by the individuals; and

"(d) who are transported to the farm each day."

OAR 839-15-130 provides:

"The following persons are not required to obtain a farm or forest labor contractor's license:

* * *

"(4) A permanent employee of a farmer * * * so long as the employee is engaged solely in activities which would not require the employer to be licensed if the employer were performing the activity. * * *

"(5) A person engaged only in the solicitation or recruitment of workers for agricultural day-haul work and not engaged in arranging for board or lodging for migrant workers and not performing as an employer of the workers."

By recruiting, soliciting, and supplying workers for Respondent who were not permanent residents of the local area, by furnishing lodging for such workers, and by being temporary or seasonal employees of Respondent, Linda

Garcia and Javier Garcia were not exempt from the requirement to be licensed as farm labor contractors during times material.

4) ORS 658.437 provides:

"(1) Prior to beginning work on any contract or other agreement the farm labor contractor shall:

"(a) Display the license or temporary permit to the person to whom workers are to be provided, or the person's agent; and

"(b) Provide the person to whom workers are to be provided, or the person's agent with a copy of the license or temporary permit.

"(2) Prior to allowing work to begin on any contract or agreement with a farm labor contractor, the person to whom workers are to be provided, or the person's agent shall:

"(a) Examine the license or temporary permit of the farm labor contractor; and

"(b) Retain a copy of the license or temporary permit provided by the farm labor contractor pursuant to paragraph (b) of subsection (1) of this section."

By failing to examine a farm labor contractor license or temporary permit for Linda Garcia or Javier Garcia or to retain a copy thereof prior to the commencement of work by the workers they recruited, solicited, or supplied, Respondents violated ORS 658.437 in May 1992.

5) ORS 658.453 provides, in part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor

and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(f) Any person who uses an unlicensed farm labor contractor without complying with ORS 658.437."

OAR 839-15-508(3) provides:

"The Commissioner may impose a civil penalty on a person to whom workers are to be provided *** when the person uses an unlicensed farm *** labor contractor without having first:

"(a) examined the license or temporary permit of the farm *** labor contractor; or

"(b) retained a copy of the license or temporary permit provided to the person by the farm *** labor contractor, pursuant to ORS 658.453(1)(f)."

OAR 839-15-510 provides, in part:

"(1) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the Commissioner finds to be appropriate:

"(a) The history of the *** person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude and seriousness of the violation;

"(d) Whether the *** person knew or should have known of the violation.

"(2) It shall be the responsibility of the *** person to provide the Commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

"(3) In arriving at the actual amount of the civil penalty, the Commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the *** person in violation of any statute or rules.

"(4) Notwithstanding any other section of this rule, the Commissioner shall consider all mitigating circumstances presented by the *** person for the purpose of reducing the amount of the civil penalty to be imposed."

OAR 839-15-512 provides, in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances."

Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Respondents. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

OPINION

1. Acting as a Farm Labor Contractor Without a License

The evidence showed by a preponderance that the persons hired by Respondents as "supervisors" in fact acted as farm labor contractors. A person acts as a farm labor contractor if

the person "recruits, solicits, supplies or employs" a worker for another for the purpose of producing or harvesting farm products or who furnishes lodging for such workers. Linda Garcia, as well as Javier Garcia, recruited, transported, and furnished lodging to migrant (i.e., non-resident) workers. The ORS 658.405(1)(a) "dayhaul" exception to the licensing requirement as interpreted by OAR 839-15-130(5), simply did not apply, particularly in view of the OAR 839-15-004 definition of "individuals engaged in the solicitation or recruitment of persons for dayhaul work." That definition provides that the recruited workers must be permanent residents of the local area in order for the recruitment to be exempt from the licensing requirement. The workers in this case were not.

2. Failure to Examine and Retain Copy of Farm Labor Contractor License or Permit

Based upon Respondents' own testimony, they failed to examine or copy a farm labor license before work commenced. Respondents thus violated ORS 658.437(2). While there was no showing that Respondents had knowledge that the Garcias were also the landlords of some of the workers, they had no reason to assume that the workers supplied were permanent residents of the local area. By not demanding a farm labor contractor license and by supposedly relying on an Agency rule without inquiring further, Respondents took their chances.

ORS 658.405 to 658.503 was enacted to protect workers from unlawful employer activity in farm and forest labor. *In the Matter of Leonard Williams*, 8 BOLI 57, 73 (1989). The statutory

scheme was intended to protect migrant agricultural workers from unlicensed contractors. Allowing farmers to condone or encourage unlicensed recruitment for production or harvesting work would not accomplish the statutory purpose.

3. Civil Penalty

The Commissioner may assess a civil penalty not to exceed \$2,000 for this violation. The Commissioner may consider mitigating and aggravating circumstances when determining the amount of any penalty to be imposed. It was the responsibility of Respondents to provide the Commissioner with any mitigating evidence. No mitigating evidence was presented. The Agency alleged no aggravating circumstances and the Forum finds none. The Agency requested and the Forum hereby assesses a first offense \$500 civil penalty for the violation.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, Respondents BOYD YODER and KAREN YODER, dba The Y-4 Farm, are hereby ordered to and have delivered to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FIVE HUNDRED DOLLARS (\$500), representing the civil penalty assessed herein.

**In the Matter of
R. J. Puentes, dba La Estrellita
Mexican Restaurants, and
LA ESTRELLITA, INC.,
Respondents.**

Case Number 30-94
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 28, 1994.

SYNOPSIS

Where Respondent's records were incomplete, the Commissioner accepted a wage Claimant's representation of hours worked, where they appeared verified, and found that Claimant was on duty over 40 hours per week, was paid a flat weekly wage, and was paid less than minimum wage plus overtime for the hours he was permitted to work. Finding that Respondent willfully failed to pay Claimant in full at termination, the Commissioner ordered Respondent to pay the wages owed plus civil penalty wages. The Agency failed to establish the claim of a second Claimant who did not attend the hearing, and whose claimed hours were disputed by Respondent and were not supported by other evidence. ORS 652.140(2), 652.150, 652.310(1), (2); 653.010(3), (4); 653.025(3); 653.045; 653.055(1), (2); 653.261(1); OAR 839-20-030(1).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau

of Labor and Industries of the State of Oregon. The hearing was held on December 9 and 10, 1993, in the conference room of the Bureau of Labor and Industries Office, 3865 Wolverine Street NE, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Respondents Robert J. Puentes (Respondent) and La Estrellita, Inc., a corporation (Respondent corporation), were both represented by David A. Hilgemann and Raymond A. Reid, Attorneys at Law, Salem. Wage Claimant Jose Reynaldo Lopez (Claimant Lopez) was present throughout the hearing and was not represented by counsel. Wage Claimant Fidel A. Bermudez (Claimant Bermudez) did not attend the hearing and was not represented by counsel. Juan Mendoza, Salem, was appointed interpreter by the Forum pursuant to ORS 183.418(3)(b) and OAR 839-50-300, and, under proper affirmation, translated for witnesses who could not readily communicate in the English language, but could do so in the Spanish language.

The Agency called the following witnesses (in alphabetical order): Claimant Lopez, Respondent, Benjamin Quintanilla, former Corvallis La Estrellita employee Miguel Quintanilla, former West Salem La Estrellita employee Martin Reyes, and Agency Compliance Specialist Gabriel Silva. Respondents called the following witnesses in addition to Respondent Puentes (in alphabetical order): Respondent corporation's current employ-

ees Hector Bermudez, Rudolfo Thomas Godina, and Doug Hamilton.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On December 18, 1992, Claimant Lopez filed a wage claim with the Agency, alleging that he had been employed by "La Estrellita Restaurant/Roberto Puentes," Salem, and that he had not been paid all wages earned and due to him.

2) On April 23, 1993, Claimant Bermudez filed a wage claim with the Agency, alleging that he had been employed by "La Estrellita /Roberto Puentes," Salem, and that he had not been paid all wages earned and due to him.

3) At the time each filed a wage claim, each Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from the employer.

4) On July 26, 1993, the Agency served on Robert J. Puentes through the Sheriff of Polk County, Oregon, Order of Determination No. 93-102 (Determination 93-102), based on the Agency's investigation of the wage claims filed by Claimants.

5) On July 23, 1993, the Agency served Determination 93-102 on Ray Reid, Attorney at Law, as associate of David A. Hilgemann, registered agent

* Wage claim documents signed by the Claimants, and Claimants' responses therein, are in Spanish.

of La Estrellita Restaurant, Inc., through the Sheriff of Marion County, Oregon.

6) Determination 93-102 found that Respondent La Estrellita Restaurant, Inc., owed Claimant Bermudez \$381.55 in unpaid wages and owed Claimant Lopez \$9,060.20 in unpaid wages. Determination 93-102 sought penalty wages based on Respondent corporation's willful failure to pay the earned wages due, finding a penalty amount of \$1,344.30 penalty wages due on the claim of Claimant Bermudez and finding a penalty amount of \$1,953.90 penalty wages due on the claim of Claimant Lopez.

7) On August 2, 1993, the Agency received Respondent corporation's timely answer and request for hearing filed by counsel.

8) On November 3, 1993, at the Agency's request, the Hearings Unit issued a Notice of Hearing to Claimants, to Respondent corporation, and to Respondents' counsel indicating the time and place of the hearing. A document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Oregon Administrative Rules (OAR) regarding the contested case process, OAR 839-50-000 to 839-50-420, accompanied the Notice of Hearing.

9) On November 23, 1993, the Hearings Referee corrected the time of day for the commencement of the hearing on December 9, corrected the case name to *In the Matter of La Estrellita, Inc.*, in order to reflect the

correct name of Respondent corporation, and set a time for the participants to file case summaries pursuant to OAR 839-50-200 and 839-50-210

10) On December 1, 1993, the participants timely filed their respective case summaries.

11) At the commencement of the hearing, counsel for Respondents stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

12) Pursuant to ORS 183.415(7), Respondents and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) At the close of the Agency's case in chief, the Agency moved to amend Determination 93-102 to include Respondent Puentes, doing business as La Estrellita Mexican Restaurants. Evidence having been received from Respondent Puentes without objection regarding the various La Estrellita restaurants and the accompanying business structures, the Hearings Referee allowed the amendment. The case name thus became *In the Matter of R. J. Puentes, dba La Estrellita Mexican Restaurants, and La Estrellita, Inc., Respondents*, as reflected in the caption of this Order.

14) The Proposed Order, which included an Exceptions Notice, was issued on February 23, 1994. Exceptions were due by March 5, 1994. None were received.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent owned, operated, and did business as La Estrellita Mexican Restaurant in Corvallis, West Salem, Keizer, and on Silverton Road in Salem. Respondent engaged the personal services of one or more employees in each of said restaurants. Respondent corporation, La Estrellita, Inc., was incorporated in January 1993. At the time of the hearing, Respondent was the sole shareholder of Respondent corporation. At the time of the hearing, Respondent corporation owned the Corvallis and West Salem restaurants.

2) Claimant Lopez began working at La Estrellita Mexican Restaurant in West Salem in November 1991 as a dishwasher. In January 1992, he began working at La Estrellita Mexican Restaurant in Corvallis. Respondent owned and operated both locations. In approximately October 1992, Claimant was again assigned to West Salem.

3) At times material, Respondent sometimes assigned an employee temporarily from one restaurant to another to fill in for an absent worker. Less frequently, Respondent would transfer an employee from one location to another.

4) At times material, Respondent had standardized the operation of his restaurants. Ninety percent of the food and sauces were prepared at a central kitchen at Silverton Road and transported to each local restaurant by the local restaurant manager. The cook at the local restaurant placed servings on plates, added cheese and garnish, and prepared items such as tacos or enchiladas.

5) At times material, the restaurants were staffed by a manager, a number one cook, a dishwasher, a bus boy, and one or more waiters. Head-waiter duties were usually performed by the manager. The number one cook was relieved on Friday and Saturday afternoons by the number two cook, who was usually the dishwasher. On Friday and Saturday evenings, the number one and number two cooks worked together.

6) The restaurants opened at 11 a.m. They closed at 9 p.m., Sunday through Thursday, and 10 p.m., Friday and Saturday. In the wintertime, they closed an hour earlier. Whether summer or winter, if business was slow, the local manager could close from one half hour to an hour early. Depending on how busy the restaurant was, the manager could also send the employees home early.

7) Because there was very light business following lunch, it was intended that most of the employees worked a split shift. With the exception of the manager and the number one cook position, Respondent's procedure in each restaurant was that the other employees were generally off between 2 p.m. and 5 p.m. and would return at 5 p.m. and work until closing.

8) If the particular restaurant was unusually busy in the afternoon or an employee was absent, Respondent would require or allow the manager to require that one or more of the split shift employees stay and work. Otherwise, the manager or the number one cook and the manager handled any customers. Both of those positions were salaried.

* "Participant" or "participants" refers to the Agency and the Respondents. OAR 839-50-020(13).

9) Respondent paid Claimant Lopez minimum wage of \$4.75 an hour. At first, Claimant Lopez kept a timecard. Respondent paid a flat amount amounting to 87 hours straight time plus a variable amount of overtime hours in each pay period. Respondent testified that after about January 1992, the overtime allowance was an estimate based on the needs of the position, but that he paid any actual overtime accrued above the allowance and never reduced the allowance if the employee worked only straight time.

10) Records submitted by Respondent were incomplete but tended to verify that overtime was an estimate rather than a result of actual time keeping.

11) Claimant Lopez worked six days per week, with Monday off. He began training as number two cook in West Salem. Because his net check was frequently in the same amount each payday, Claimant Lopez understood himself to be on salary.

12) Claimant Lopez kept his time at first on timecards provided by Respondent. He acknowledged that many of the entries on the few cards produced at hearing were made by him. He also stated that some were made by the restaurant manager.

13) When he was at West Salem in November and December 1991, Claimant Lopez went home between 2 p.m. and 5 p.m. one or two days a week. He testified that because he was on salary, he considered that to be work time. He further believed that he had to be present all day as a salaried employee. No one told him to leave between 2 and 5 p.m., and the

manager, at least in Corvallis, told him to work. While he was on the premises, both in West Salem and later in Corvallis, he worked cleaning and at other duties between 2 and 5 p.m.

14) Martin Reyes had worked in West Salem as a waiter for Respondent in 1987. He again worked there with Claimant Lopez in November 1991. Reyes sometimes worked past 2 p.m. at management's request. During the time that Claimant Lopez was a dishwasher learning to be a cook, Reyes noted him working between 2 p.m. and 5 p.m. Reyes noted that on the evenings he worked until closing, Claimant Lopez was also working. Reyes was a waiter at West Salem when Claimant Lopez returned to West Salem from Corvallis as a cook.

15) On paydays, Claimant Lopez stated to Reyes that he was not getting paid for all of his overtime and that he hoped his next check would make it up.

16) Benjamin Quintanilla was a friend of Claimant Lopez. Both were from El Salvador and were roommates when Claimant Lopez first worked at West Salem in 1991. He gave Claimant Lopez a ride to work each day around 10 a.m., picked him up some evenings at 10 p.m. or after 11 p.m. on Friday and Saturday. After Claimant Lopez returned from Corvallis and had his own apartment, he would call Benjamin Quintanilla for a ride in the evening.

17) In Corvallis, Claimant Lopez generally arrived at work at 9:30 a.m. The doors opened at 11 a.m., but there was cleaning and preparatory work to do before that. He worked straight through until closing on most days,

usually about 9:30 p.m. Francisco Ayala was the number one cook, and Oscar Ayala was the manager. Oscar told Claimant Lopez to work when Francisco was gone. This happened at least twice a week.

18) Miguel Quintanilla, Benjamin's brother, was also from El Salvador. He worked for Respondent as a dishwasher in Corvallis while Oscar Ayala was manager. He often saw Claimant Lopez working between 2 and 5 p.m. He acknowledged that the schedule gave him 2 to 5 p.m. off, but he often worked himself during that time because there was so much work and only one person in the kitchen. The manager (Oscar Ayala) did not always open and close. Sometimes the cook, Francisco, did that. Miguel Quintanilla was fired about the time Claimant Lopez transferred back to West Salem.

19) When Claimant Lopez became a number two cook, his pay went up to 87 hours straight time plus 16 hours overtime each pay period. Claimant Lopez was placed in that position by Oscar Ayala in Corvallis. Ayala was instructed not to let any employee paid on the 87-8 or 87-16 rate work over the allowed hours. Respondent visited Corvallis weekly or less while Claimant Lopez was there. Respondent was not entirely certain what hours Claimant Lopez may have worked there. He was adamant that Claimant Lopez had no cook's duties or hours in 1991.

20) Rudolfo Godina was manager at West Salem when Claimant Lopez was first hired and became manager at Corvallis. He had the only key and opened and closed the restaurant. In November and December 1991, Claimant Lopez was not scheduled to

work between 2 and 5 p.m. Claimant Lopez got on-the-job training as a cook in the morning before dishwashing was needed. Godina checked and corrected Claimant Lopez's timecard because he thought it was inaccurate. He did not supervise Claimant Lopez in February 1992, but he did supervise him for a short time in Corvallis before Claimant Lopez returned to West Salem.

21) At West Salem in 1991, Godina worked 12 to 13 hours a day as manager. He stated it was "unlikely" that Claimant Lopez worked 11.5 hours a day. Claimant Lopez never complained to him about his pay. He believed that Claimant Lopez rode with Hector Bermudez, a waiter, and that the crew arrived and left together. He acknowledged that Claimant Lopez might stay between 2 and 5 p.m. when he had no transportation.

22) Doug Hamilton was manager of the Keizer restaurant at the time of hearing. He began at West Salem in May 1991, but had left there before Claimant Lopez was hired. He had substituted as manager at West Salem while Claimant Lopez was a cook there. Hamilton also acted as liquor buyer for Respondent's restaurants, and when he visited West Salem in connection with those duties, he had observed Claimant Lopez at work. While he substituted and when he visited, he did not see Claimant Lopez working between 2 and 5 p.m. His experience was that employees many times stayed and watched television between 2 and 5 p.m. He thought a dishwasher would average 35 to 45 hours per week and a cook would average 45 to 50 hours per week.

23) Hector Bermudez is the brother of Claimant Fidel Bermudez. He had been a waiter at West Salem since 1987. At time of hearing, he was Respondent's only salaried waiter. He was there when Claimant Lopez started in 1991. He sometimes gave Claimant Lopez a ride home from work. He did so two or three times between 2 and 5 p.m. Claimant Lopez sometimes worked between 2 and 5 p.m. after he came back from Corvallis. Claimant Fidel Bermudez never complained to his brother about his pay.

24) Claimant Lopez believed that Hector Bermudez was the person in charge at West Salem in late 1992 when Respondent or a substitute manager was not present. He complained to Hector about his checks.

25) In November and December 1992, Claimant Lopez was the only cook at West Salem.

26) Respondent determined to demote Claimant Lopez from number one cook to dishwasher in early December 1992. Claimant Lopez ceased working for Respondent at that time.

27) Shortly after Claimant Lopez ceased working for Respondent, he asked Hector Bermudez to sign two written statements. One statement attests that Claimant Lopez complained to Respondent about his wages being incorrect in reference to the hours worked; the second statement stated that Claimant Lopez worked from 10 a.m. to 9:30 or 10 p.m., Tuesday to Sunday. At hearing, Hector Bermudez admitted signing both, but testified that

he had not read them carefully. He denied that he was a manager, but acknowledged that Claimant Lopez had complained about his checks.

28) Not all of Respondent's restaurants had time clocks at times material. Respondent hit upon the idea of giving flat amounts of overtime as a means of raising earnings without raising the hourly rate. For instance, Claimant Lopez was credited with 10 hours overtime in May 1992 and 12 hours the next month.

29) Respondent, with others, owned an interest in each of several corporations, which in turn each owned a La Estrellita restaurant at time of hearing: PSH corporation, Keizer; Two Guys From San Jose, Silverton Road; Three Amigos, Inc., Mollala; and Mara's, Inc., Aumsville. Other than Respondent, none of the witnesses who testified held any ownership interest in any of the restaurants.

30) At times material, Gabriel Silva worked as a Compliance Specialist for the Agency. As part of his duties, he investigated the wage claims of Claimants.

31) Records submitted by the Agency on behalf of Claimant Lopez consisted of a series of forms WH 127/3-92, the claim calendar form, for November 1991 through December 1992. The forms were filled in by Silva in consultation with Claimant Lopez. Silva interviewed Claimant Lopez, determined the number of hours per day Claimant claimed to have worked in each month, and calculated from that the hours claimed for each pay period

(i.e., the 1st to the 15th and the 16th to the last day of the month).

32) The number of hours per day, Tuesday through Sunday, claimed by Claimant Lopez varied from 10.5 in November and December 1991, to 11.5 in January through April 1992, to 10.5 in May through August 1992, to 13.5 for the first half of September to 12 for the balance of September through December 7, 1992, which was the last day worked.

33) Claimant Lopez provided Silva with a partial list of check stubs, from which Silva could determine the amounts actually paid to Claimant. Based upon the hours claimed, Silva calculated the regular and overtime hours for each pay period, calculated the regular and overtime pay at minimum wage based on those hours, deducted the actual pay acknowledged by Claimant, and determined thereby that the amounts actually paid were less than minimum wage for the hours claimed to have been worked.

34) Having determined that there were apparently some wages and overtime due according to the calculations, Silva sent a demand letter to Respondent. That letter outlined the result of Silva's calculations and set a timeline for Respondent to either pay the claimed amount or to submit records and an explanation of any amount due. Silva received no reply. He attempted to reach Respondent by telephone but was not successful. Finally, Silva obtained and had served on Respondent a subpoena asking for time records for Claimant Lopez and copies of canceled checks or receipts for amounts paid to Claimant Lopez

from November 1, 1991, to December 7, 1992.

35) Respondent's only response to the subpoena was a computer printout entitled "Payroll Detail Report" listing gross wages, net wages, and deductions for Claimant Lopez from November 30, 1991, through December 19, 1992. These records reflected only one pay period payment each for November and December 1991, and showed no information for any payments made in October 1992.

36) At hearing, Respondent submitted a copy of the computer printout on Claimant Lopez given in response to the Agency's subpoena, W-2 forms for Claimant Lopez for 1991 and 1992, and timecards for Claimant Lopez covering portions of January, February, March, and August 1992. These records were the only records submitted by Respondent concerning Claimant Lopez.

37) Claimant Bermudez began working at La Estrellita Mexican Restaurant in West Salem in February 1993, as a waiter and bus boy. Respondent corporation operated that location.

38) Records submitted by the Agency on behalf of Claimant Bermudez consisted of claim calendar forms, for March and April 1993. The forms were filled in by Silva in consultation with Claimant Bermudez. Silva interviewed Claimant Bermudez, determined the number of hours per day Claimant claimed to have worked in each month, and calculated from that the hours claimed for each pay period.

39) The number of hours per day claimed by Claimant Bermudez varied

* The statements were written in Spanish. They were translated at hearing by the interpreter.

from 8 to 9.5 hours, Monday through Saturday, for the months involved.

40) Claimant Bermudez provided Silva with a copy of a check stub, copies of his timecards for March and April, and information on the amounts actually paid to Claimant. Based upon the hours claimed, Silva calculated the regular and overtime hours for each pay period, calculated the regular and overtime pay at minimum wage based on those hours, deducted the actual pay acknowledged by Claimant, and determined thereby that the amounts actually paid were less than minimum wage for the hours claimed to have been worked.

41) Having determined that there were apparently some wages and overtime due according to the calculations, Silva sent a demand letter by certified mail to Respondent. That letter, which Respondent received, outlined the result of Silva's calculations and set a timeline for Respondent to either pay the claimed amount or to submit records and an explanation of any amount due. Silva received no reply. He did not issue a subpoena in connection with Claimant Bermudez. He included the claim in his report and recommendation for the Determination Order.

42) At hearing, Respondents submitted a computer printout entitled "Payroll Detail Report" listing gross wages, net wages, and deductions for Claimant Bermudez from pay periods covering late February through late April 1993. This record was the only one submitted by Respondents concerning Claimant Bermudez.

43) Respondent testified that he did not respond to Silva's demand

letters because he had previously had "bad experiences" with the Agency involving a wage and child labor dispute and a pending civil rights complaint. He stated that he had moved his office and records after Claimant Lopez had worked for him and had been unable to find original records other than the partial records submitted at hearing.

44) When an employee is not fully paid at termination, penalty wages are calculated by dividing total earnings by the number of days worked to establish the average daily rate, then multiplying the average daily rate by the number of days, up to 30, that wages remain unpaid.

ULTIMATE FINDINGS OF FACT

1) During times material herein, and particularly from November 1991 through December 1992, Respondent was an employer in this state.

2) During February, March, and April 1993, Respondent corporation was an employer in this state.

3) Claimant Lopez was employed by Respondent from November 1991 to December 7, 1992.

4) Claimant Lopez was properly compensated in November and December 1991 at Respondent's West Salem restaurant.

5) Claimant Lopez worked an average of at least 10 hours per day, six days a week, from January through September 1992 at Respondent's Corvallis restaurant.

6) Claimant Lopez worked at least 12 hours per day, six days a week, from October through December 7, 1992, at Respondent's West Salem restaurant.

7) Respondent owed Claimant Lopez 1,530 hours straight time at \$4.75 per hour, plus 745 hours overtime, less amounts paid, for his employment at Corvallis in 1992, or \$3,783.36.

8) Respondent owed Claimant Lopez 394 hours straight time at \$4.75 per hour, plus 314 hours overtime, less amounts paid, for his employment at West Salem in 1992, or \$1,685.50.

9) Claimant Bermudez was employed by Respondent corporation from February to April 1993.

10) The average daily rate for Claimant Lopez was \$73.18 ($\$16,685.95 \div 228 = 73.18$). Penalty wages would equal \$2,195.40.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant Lopez was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) During all times material herein, Respondent corporation was an employer and Claimant Bermudez was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.405.

4) The actions or inactions of Oscar Ayala, as an agent or employee of Respondent, are properly imputed to Respondent.

5) The actions or inactions of Respondent in 1993 are properly imputed to Respondent corporation.

6) ORS 653.010 provides, in part:
" * * *

"(3) 'Employ' includes to suffer or permit to work; * * *"

"(4) 'Employer' means any person who employs another person * * *"

ORS 652.310 provides, in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees * * *"

"(2) 'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

ORS 653.025 requires that:

" * * * for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

" * * *

"(3) For calendar years after December 31, 1990, \$4.75."

Respondent was required to pay Claimant Lopez at a fixed rate of at least \$4.75 per hour for each hour of work time. Respondent failed to do so. Respondent corporation was required to pay Claimant Bermudez at a fixed rate of at least \$4.75 per hour for each

hour of work time. Evidence was insufficient to show that Respondent corporation failed to do so.

7) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides, in part:

"[A]ll work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Respondent was obligated by law to pay Claimant Lopez one and one-half times his regular hourly rate, in this case the minimum wage of \$4.75, for all hours worked in excess of 40 hours in a week. Respondent failed to so pay Claimant Lopez.

8) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimant Lopez all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimant Lopez terminated employment.

9) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant Lopez when due as provided in ORS 652.140.

10) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant Lopez his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

1. Minimum Wage and Overtime

Respondent and Respondent corporation did not assert and the Hearings Referee did not find any exemption or exclusion from the coverage of the Minimum Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS chapter 652, for Respondents or Claimant.

ORS 653.025 prohibits employers from paying their workers at a rate less than \$4.75 for each hour of work time. ORS 653.055(1) provides that "[any employer who pays an employee less than the [minimum wage and overtime] is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer; * * * and (c) For civil penalties provided in ORS 652.150." ORS 653.055(2) states that "[a]ny agreement between an employee and an employer to work at less than the [minimum wage and overtime] is no defense to an action under subsection (1) of this section." Credible evidence based on the whole

record establishes that Respondent paid Claimant Lopez at a rate less than \$4.75 per hour. An agreement between the employer and the wage claimant to accept less would not be a defense. Neither would the acceptance by the employee of less than the minimum.

Respondent established a system whereby he paid some employees based on the usual hours required of the position, including a set estimate of overtime. Employers are free to compensate employees at any rate, so long as that rate does not result in an employee earning less than minimum wage for all the hours worked. Thus, a salary based on minimum or near minimum wage may not pay enough to cover overtime. OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half the regular rate of pay. Respondent herein was obligated by law to pay Claimant Lopez one and one-half times the regular hourly rate, in this case the minimum rate, for all hours worked in excess of 40 hours in a week.

2. Work Time

"Employ" includes to suffer or permit to work. ORS 653.010(3). Work time is all time an employee is required to be on the employer's premises, on duty, or at a prescribed work place. There is no requirement on the part of the employee for mental or physical exertion. Work time includes time spent waiting to perform work for the benefit and at the request of the employer. Unless an employee is specifically relieved from duty and the time period is sufficiently long for the

employee to use for his or her own purposes, the employer must compensate the employee for time spent waiting. *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). In this case, Claimant Lopez was at the work-site during those times which Respondent designated as not being part of his shift. But there was testimony from which the Forum could conclude that Claimant Lopez not only was present between 2 and 5 p.m. when he worked in Corvallis and when he was a cook in West Salem, but also that he was performing his regular duties during those times and had been requested to do so. The testimony of Claimant Lopez was not as precise on times as the Forum would prefer, and the claim record he created with the assistance of the Agency was not totally reliable. The hours claimed at West Salem when he was first a dishwasher there were placed in question by other evidence. Also, despite the best efforts of the interpreter, there were portions of Claimant Lopez's testimony that were inconsistent. But Respondent offered little other than denials to refute the Lopez claim, and there was testimony which supported it in part. It appeared more likely than not that Claimant Lopez worked more than the hours credited to him on Respondent's meager records, but not as much as the Agency's claim calendars showed. For these reasons, the Forum has adjusted Claimant Lopez's claim, particularly where the claimed hours did not comport with his duties.

3. Hours Worked

ORS 653.045 requires an employer to maintain payroll records. Where the Forum concludes that a

claimant was employed and was improperly compensated, it becomes the burden of the Respondent to produce all appropriate records to prove the precise amounts involved. This is the case under both state and federal law. *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). In wage claim cases such as this, the Forum has long followed policies derived from *Mt. Clemens Pottery Co.* The Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." Commenting that the law requires the employer to keep accurate records, and that employees seldom do so, the court went on to say:

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee

has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-88.

Thus, where the employer produces no records, the Commissioner may rely on the evidence produced by the Agency "to show the amount and extent of [claimant's] work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate." 328 US at 687-88. Therefore, the Forum may rely on the Agency's evidence regarding the number of hours worked and rate of pay for each Claimant.

Respondent is a successful businessman who has built one restaurant into multiple restaurants and expanded from a proprietorship to several corporate interests. It is inconceivable to the Forum that the records of the employment of both these Claimants consist of no more than a printout. It is equally inconceivable that, despite the moving and reorganization of his office and enterprises, Respondent could not locate

more complete records in the 10 or 11 months following the Agency's initial demand letter on Claimant Lopez. That a few timecards appeared, widely separated by date, suggests to the Forum that there may well have been more available.

4. The Bermudez Claim

Claimant Bermudez did not appear, having apparently returned to El Salvador. His claim was supported by timecards which he submitted to the Agency. Respondent corporation denied that any additional wages were owed. The evidence was clearly hearsay. While hearsay is admissible in administrative hearings, there was no further evidence to corroborate the hours claimed. Unlike the situation of Claimant Lopez, there were no witnesses to confirm Claimant Bermudez's presence or work efforts. Respondent's printout was more complete than in the case of Claimant Lopez. In short, the Agency's evidence for the Bermudez claim did not create a preponderance in favor of the claim.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders R. J. PUENTES to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JOSE REYNALDO LOPEZ in the amount of SEVEN THOUSAND SIX HUNDRED SIXTY-THREE DOLLARS AND EIGHTY-SIX

CENTS (\$7,663.86), representing \$5,468.86 in gross earned, unpaid, due, and payable wages, less legal deductions previously taken by the Respondent; and \$2,195 in penalty wages, PLUS

2) Interest at the rate of nine percent per year on the sum of \$5,468.86 from December 12, 1992, until paid, PLUS

3) Interest at the rate of nine percent per year on the sum of \$2,195 from January 11, 1993, until paid.

**In the Matter of
The Ivory Group of Companies, Inc.,
dba NORTHWEST FITNESS
SUPPLY COMPANY
and Eugene Athletic Supply Com-
pany, Respondent.**

Case Number 21-94
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 17, 1994.

SYNOPSIS

Respondent subjected the black male Complainant to insulting and demeaning remarks and comparisons based on his race, thus creating discriminatory terms and conditions of employment. Complainant's discharge was not due to his race or that of a white female co-worker with whom he had an intimate relationship. The

Commissioner awarded Complainant \$10,000 for emotional distress attributable to the on-the-job treatment, and dismissed the portion of the Specific Charges involving discharge. ORS 659.010(2), (6); 659.030(1)(a), (b); 659.060(1), (2), (3).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on October 28 and November 1 and 2, 1993, in Room 1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. The Ivory Group of Companies, Inc., a corporation doing business as Northwest Fitness Supply Company and Eugene Athletic Supply Company (Respondent), was represented by William F. Gary and Ellen Adler, Attorneys at Law, Eugene. James T. Ivory, president of Respondent corporation, was present throughout the hearing. Complainant Marquis M. McNeil (Complainant) was present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses (in alphabetical order): Respondent's former warehouse manager Phyllis Armour, former retail employee Nancy Benson, former retail employee Harrison Branch III, former commercial sales vice president Dennis W. Brown, former retail employee Trisha Hunter-Howard, former Sandy store general manager Kenneth L.

Latham, former administrative assistant and bookkeeper Christina L. Latham-Brown, Complainant, and Agency Senior Investigator Joseph Tam. Respondent called the following witnesses (in alphabetical order): Respondent's apparel merchandiser Stephanie Burback, corporate president and sole owner James Ivory, Sandy store general manager Michael Ivory, former Sandy store retail manager David Minton, and current Sandy store retail manager Kim Moore.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –
PROCEDURAL**

1) On June 16, 1992, Complainant Marquis M. McNeil filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment practices of Respondent.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

3) The Agency initiated conciliation efforts between Complainant and Respondent, conciliation failed, and on September 9, 1993, the Agency prepared and served on Respondent Specific Charges, alleging that Respondent had discriminated against Complainant in the terms and

conditions of his employment based on his race, and had discharged him due to his race and/or due to the race of a person with whom he associated, all in violation of ORS 659.030(1)(a) and (b).

4) With the Specific Charges, the Agency served on the Respondent the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of Oregon Administrative Rules (OAR) regarding the contested case process (OAR 839-50-000 to 839-50-420, effective September 3, 1993); and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On September 30, 1993, Respondent filed a motion to strike and alternative motion for summary judgment, and on October 12 Respondent filed its answer to the Specific Charges.

6) On October 12, 1993, the Hearings Referee denied portions of Respondent's motion to strike, granted other portions of the motion, denied the Agency's October 8 motion for default, and issued a pre-hearing discovery order calling for the participants' to file case summaries pursuant to OAR 839-50-200 and 839-50-210.

7) On October 20, 1993, the participants timely filed their respective case summaries.

8) At the commencement of the hearing, counsel for Respondent stated that Respondent had received a Notice of Contested Case Rights and

* "Participants" or "participant" refers to both Respondent and the Agency. OAR 839-50-020(13).

Procedures with the Specific Charges and had no questions about it.

9) At the commencement of the hearing, pursuant to ORS 183.425(7), the Hearings Referee advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) At the close of the hearing on November 2, the Agency requested additional time to supplement the record with information concerning a bank account. The Hearings Referee granted the Agency until November 12 to do so and granted Respondent to November 17 to respond if it wished to do so. The Agency obtained partial information but was untimely in its request for additional time to complete the submission. The record herein closed on November 23, 1993.

11) The Proposed Order, which included an Exceptions Notice, was issued on February 14, 1994. Exceptions, originally due by February 24, were due by March 10, 1994, under an extension of time requested by Respondent. None were received.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent was a corporation operating several enterprises including retail outlets for athletic equipment, clothing, and supplies under the names Northwest Fitness Supply Company and Eugene Athletic Supply Company. Respondent engaged or utilized the personal service of one or more employees in this state.

2) Complainant is a black male who began working for Respondent at its store on NE Sandy Boulevard

(Sandy store) in Portland in November 1986. Respondent had a second store in Eugene. At the time, there were four or five employees at the Sandy store, and Complainant had multiple duties. His main duties were in the men's department retail sales, but he also assisted the store general manager with advertising. Initially, the retail portion of his duties, in which he was supervised by retail manager David Minton, took about 80 percent of his work time.

3) During times material herein, the president and sole owner of Respondent, which was originally known as Eugene Athletic Supply Co., Inc., was James Ivory. He oversaw several enterprises: Eugene Athletic Supply (Eugene), Northwest Fitness Supply (Portland: Sandy store, Beaverton, 23rd and Hoyt), as well as a trading company and an advertising entity in Eugene. In 1984, he acquired Oregon Athletic Supply, which became the Northwest Fitness Sandy store. His experience and education were in merchandising, marketing, and advertising.

4) Kenneth L. Latham spent over nine years with Respondent. He was corporate vice president of operations for the last five or six years. Sometime in 1985 or 1986, he became general manager of the Sandy store. He also had some responsibility for other Portland area stores when they began operating. He had hire and fire authority with occasional recommendation from Eugene. He approved the hiring of Complainant.

5) At times material, David Minton was retail manager at the Sandy store. He had hire and fire authority. He hired Complainant with Latham's approval.

6) The advertising budget was about 5 percent of the projected retail sales and was divided between print and electronic media. Ads were targeted to specific clientele. Respondent attempted to target the age and income of potential customers such as persons who were runners, or, for home exercise equipment, persons over 40. Complainant was known as the print advertising manager and was part of store management. Christina Latham-Brown handled the TV advertising.

7) Latham was Complainant's supervisor in regard to his advertising duties. Complainant helped Latham with newsprint, radio, and small TV ads. As the store grew, Latham needed him more frequently in advertising. At first, Complainant spent 8 to 12 hours a week on advertising. His duties expanded and by 1991, developing an overall budget set by James Ivory, Complainant and Latham planned the print advertising. Complainant developed themes, sought out the needs of each department, and coordinated advertising. By that time, there were 43 employees.

8) Complainant's hours varied, depending on his duties. The store was usually open from 10 a.m. to 7 p.m. In retail, he tried to work within those hours, but sometimes when he did inventory and stocking and sometimes in advertising, he arrived at 6 a.m. He did layouts and developed advertising budgets.

9) Complainant received periodic performance evaluations from Latham. They were positive and included suggestions for improvement. Latham encouraged him. Customers wrote letters

commending his performance. He had access to the cash register and keys to the store.

10) Complainant suggested placing advertising in the Skanner, a newspaper with primary circulation in Northeast Portland among the black community. Latham said that it was a corporate decision not to do so. Complainant could design and place ads in the Oregonian, the Downtowner, This Week, and Willamette Week, but the ultimate decision regarding placement was James Ivory's. Complainant discussed this with James Ivory, who said that management did not want to attract the clientele the Skanner would reach. Complainant perceived this to mean that Respondent did not wish to cater to black customers.

11) There was a system in place at the Sandy store to alert employees to possible shoplifting risk. When an employee suspected that shoplifting might occur, the employee was to announce code 22 by loudspeaker. All employees, including office and warehouse help, were expected to immediately come to the sales floor, thus providing more watchers and security against theft. There was some stock on display on the porch near the door. Retail manager Minton instructed employees in store meetings about "code 22." He said that employees should call a code 22 whenever there were two or more blacks entering the store.

12) Complainant challenged as derogatory Minton's standards for calling code 22 regarding blacks, stating that not all black kids would steal. Minton said "most do" or words to that affect. Minton's remarks angered Complainant.

13) It appeared that code 22 was always called when there were two or more blacks in the store. Even those who had not heard Minton's instructions observed that when code 22 was called, it was usually for black customers.

14) Complainant reported Minton's attitude to Latham, who said he would talk to Minton. Latham did so, but no lasting change occurred. Minton used what he perceived to be "black" terminology in greeting Complainant and referred to a black female employee as Complainant's "sister." Complainant felt he was being patronized and that his efforts as an employee were not appreciated.

15) Latham believed that advertising in the Skanner would not be aimed at the core market. He knew that James Ivory would not approve the expenditure. Minton and Complainant had numerous discussions regarding treatment of black customers. Latham did not recall discussions with Complainant of any specific incidents regarding treatment of Complainant by Minton because of Complainant's race. He knew that Complainant believed that code 22 was most often used for black customers by Minton or due to Minton's instructions. Latham observed that shoplifters arrested were mostly white. He also saw that many of the employees were apprehensive or nervous when black customers were present. Because he was not constantly on the floor to make personal judgments, he allowed Minton and the employees to use their own judgment as to when to use code 22.

16) Minton refused to hold summer company parties in northeast Portland.

He stated at a store meeting that he would not go to a function in that area for fear of him or his family being shot by gang members. Functions were held in Beaverton.

17) When Complainant suggested to Minton that they hire two young black Benson students who were regular customers, Minton responded by saying that they already had their quota of blacks. When Complainant had his ear pierced, Minton suggested that Complainant would next shave his head, referring to a black TV character, Mr. T. It seemed to Complainant that Minton was constantly making negative "black" comments. This upset and angered Complainant. He frequently told Latham, who was Minton's supervisor. Latham would promise to speak to Minton, and the situation would improve briefly.

18) When there were black customers in the store, Minton would ask Complainant or Harrison Branch, III, another black employee, if they knew the customer. Michael Ivory followed the same practice. Black customers were watched more closely than others.

19) Nancy Benson, a white female, was hired by Minton to work in retail for Respondent at the Sandy Boulevard store in November 1990. She was inexperienced in retail, but Minton told her he would train her as an assistant manager.

20) Minton's wife, Carolyn Minton, was a close friend of Benson and sister to Respondent's employee Trudi Lemonds. Carolyn Minton's (and Lemonds's) mother, who was also close to Benson, passed away on January 15, 1992.

21) Nancy Benson and Complainant became friends. Both were married, and they discussed their children. They went to lunch together, perhaps weekly or more. Sometimes, when their lunch schedules matched, they ate lunch in the kitchen at work. Both went to lunch with others, as well. Minton eventually mentioned that they were together too often. Latham never expressed any concern.

22) Phyllis Armour mentioned to Complainant that perhaps he and Benson were seen together too often, that Minton had mentioned it to her, suggesting an affair. Complainant asked Minton if he should quit going to lunch with Benson, and Minton said not to listen to what people were saying. Complainant preferred lunch with Benson because the conversation was not always work oriented as it was with others.

23) In January 1992, Michael Ivory asked Armour to make a written memorandum of her conversation with Complainant concerning people talking about Complainant and Benson.

24) In about August 1991, a close physical relationship developed between Complainant and Benson. They believed that their behavior at work did not change. Complainant remained a dedicated employee. They denied holding personal conversations during work hours or indulging in physical displays of affection.

25) At first, Minton thought Complainant and Benson were just friends, although he cautioned both concerning rumors about them.

26) In about August 1991, Benson went to the Ram's Head tavern with

Minton after work. Minton, who was retail manager over both Complainant and Benson, told Benson that her relationship with Complainant might lead to her not having the manager position he had promised. Minton had asked if she was having an affair with Complainant, and she denied it. Minton told her that there would be competition for the position and suggested that she give up seeing Complainant. This was the first time any competition had been mentioned.

27) At the Ram's Head, Minton told Benson he was in love with her. After that, Benson avoided Minton at work because of her friendship with his wife.

28) Minton reported to Latham that Complainant and Benson were spending too much time together and weren't doing their jobs. Latham did not necessarily agree, because he was at the Sandy store daily and saw Complainant's work. More than once, with Minton present, he counseled Complainant and Benson regarding what "I've been told." He told them that his concern was that the job get done, not whether there was an affair. It was not one of Latham's major concerns. Minton's repeated reports triggered the meetings. The last such discussion involved a letter supposedly written by Benson's husband. No employee other than Minton reported concerns about Complainant and Benson to Latham.

29) Complainant was aware that there was speculation about his relationship with Benson. He and she used to joke about being alone together at work. Both denied doing anything unprofessional when they worked together.

30) Harrison Branch, III, a black male, worked in retail sales of shoes and equipment from February 1991 to February 1992. He worked with Complainant and Benson and saw one hug and no kisses between them. He noted that a rumor about them started at about the time of the summer 1991 tent sale, but he never heard further rumor. He thought it was none of his business what his co-workers did on their own time.

31) Employees of Respondent socialized on a friendly basis. Complainant appeared to be welcomed socially by his co-workers. There was no written or verbal policy against dating co-workers or concerning physical displays of affection. Respondent's employees sometimes exchanged hugs to express happiness or sympathy. Kisses of greeting were sometimes exchanged. Comforting hugs from co-workers were not unusual when an employee was upset by marital or family problems. Minton encouraged after work social meetings or attendance at movies together. There was no policy against employees fraternizing.

32) There was a friendly, playful atmosphere among some of Respondent's employees at the store. Hugging was common as were congratulatory slaps on the rear. Phyllis Armour, Kim Moore, and Stefanie Burbach participated. There was never any concern shown by management over these activities.

33) Latham hired his ex-wife, Christina Latham-Brown, to work as bookkeeper at the Sandy store in August 1988. She became administrative assistant and handled electronic

advertising. She kept the Sandy store personnel files.

34) In connection with a black applicant who had applied for a retail position, Minton commented to Latham-Brown, indicating the application, that "We don't need any more of these, we've already got Marquis," or words to that effect. She considered that an extremely rude comment and told Minton so.

35) Latham-Brown was aware of the rumor concerning an affair between Complainant and Benson. She heard it from Minton and others. She never observed them in any affectionate display at work.

36) Dennis W. Brown (Latham-Brown's husband) worked for Respondent at the Sandy store beginning in October 1988. He was vice president in charge of commercial sales and worked with Latham on personnel issues and policies, including leave, overtime, and vacation. There were no published or informal policies about dating, fraternization, or socializing. He observed demonstrations of affection between employees, such as friendly hugs and kisses. He never saw Complainant kiss anyone. His office was next to the one in which Complainant carried out his advertising duties.

37) Brown was aware through rumor of an alleged affair between Complainant and Benson. He heard of it first from Minton.

38) When Brown challenged Minton regarding his code 22 standard regarding blacks, Minton said "You know what I meant," or something similar.

39) In November 1991, Complainant's wife, who is white, received a

letter post-marked in Eugene November 11, which stated:

"Mrs. McNiel [sic]

"Your husband is having an affair with my wife Nancy. I hope we can put a stop to it.

"Steve Benson"

40) Complainant's wife was upset by the letter. He took it to work. Benson stated it was not her husband's writing. Complainant showed the letter to Latham. He told Latham that he thought Minton had sent it.

41) Benson knew the letter was not in her husband's handwriting. She showed a copy to Carolyn Minton, who said it looked like David Minton's handwriting.

42) Latham, Minton, Complainant, and Benson met off the store premises to discuss the letter shortly after it was received. Complainant expressed his concern over the authorship. Latham stated that the discussion should "stay here," meaning he did not want them to return to the store and talk about the letter. The following day, several co-workers asked Complainant about the letter, saying they learned of it from Minton. Complainant told Latham that Minton was telling others about the letter. When questioned by Latham, Minton stated that he had mentioned the letter in an effort to identify the author.

43) Latham learned of and saw the letter and, despite speculation, he never knew who wrote it. Minton denied writing it when Latham had a meeting outside the store with Minton, Nancy Benson, and Complainant. Latham suggested that they put it behind them, do their job and keep personal involvement out of the

workplace. He did not recall saying that the letter or its subject should be kept confidential. He did not recall discussing co-worker relationships with James Ivory in November 1991.

44) James Ivory began to be concerned about the Sandy store in late 1989. There were accounting and control problems. Portland was attempting to become more independent. He decided in mid-1991 to make some changes in Portland. Ken Latham, Christina Latham-Brown, and Dennis Brown were fired December 27, 1991. At an all staff meeting on December 28, he explained the changes. Staff was upset and had lost confidence in management. Michael Ivory was installed as manager, and the core group was established to deal with the unsettled situation.

45) James Ivory was in charge of advertising for Respondent. He determined the market target, such as active persons from 25 to 35 years old for apparel and those up to 55 years old for exercise equipment. The placement of print and TV ads were his decisions. When Complainant asked him about using the Skanner in January 1991, James Ivory wanted to know the circulation and the cost. It was a question of cost effectiveness. He had heard the suggestion before through Latham and thought it was an example of Portland's "independence." Complainant had handled print in the Portland area, and Latham-Brown did TV. Ivory found that he could do it better himself by centralizing TV in Eugene. After December 28, Complainant only assisted on print. Ivory wanted Complainant in sales.

46) In late December 1991, when James Ivory's brother Michael Ivory replaced Latham, Complainant's job duties changed. He was assigned as a retail salesperson and relieved of most of his advertising duties. He was required to turn in his store keys, and none were reissued. He was relieved of any responsibility regarding the vending machine. He saw all of this as a demotion from his advertising manager position. His salary remained the same. James Ivory took over the Portland advertising. Complainant did not know Michael Ivory before December 27, 1991.

47) Complainant had obtained Latham's permission to have a vending machine on premises so long as it was no expense or administrative bother to Respondent. Complainant stocked the machine and handled the funds in an account he established with his signature in the Northwest Fitness name at a Lloyd Center bank. Complainant's recollection that he had opened the vending machine account at the First Interstate Lloyd Center Branch was in error. The account usually had a small two-figure balance. The funds were used to restock the machine. After December 28, he turned the account information over to Michael Ivory. Trudi Lemonds, an office worker, then became responsible for the account.

48) In late December 1991 or early January 1992, while Complainant was using the photocopier on the second floor, he overheard Michael Ivory say to someone "watch Marquis and the other black guy because I don't trust them." Complainant confronted Michael Ivory about this remark. Michael

Ivory swore and denied making the remark. Complainant again felt angered, insulted, and unappreciated.

49) James Ivory first heard of an involvement between Complainant and Benson in the fall of 1991. He gathered from Latham in November that the relationship was causing disruption. He instructed Latham to counsel them and to fire one or both if a problem continued.

50) Following a store meeting on December 28 about the management change, Complainant and Nancy Benson asked to speak with James Ivory. They intended to tell him that Minton was spreading rumors about an affair between them. They also wanted to express their concern if Minton was to become general manager. They had no opportunity to do so. James Ivory immediately brought up their relationship. He told them he did not approve of extramarital affairs, but that he couldn't control what they did on their own time. He stated that he wanted no further disruption of business. They denied that they were having such an affair on work time and denied disruption. He warned them against open displays but mentioned no specific behaviors. He said that if he found that they were engaging in intimacy that interfered with their job performance, he would either discharge one of them or transfer one of them to the downtown store.

51) Complainant understood that Ivory meant by intimacy such things as handholding, kissing, hugging, and touching during store hours at the store. Complainant and Nancy Benson were having a personal physical relationship at the time, but not at work.

Complainant denied that the relationship had any effect on his work. The relationship terminated in March 1992.

52) When he met with Complainant and Benson on December 28, James Ivory was concerned with the effect on others working around them and with them not getting their job done.

53) At the time she and Complainant met with James Ivory on December 28, Benson believed that if she admitted an affair with Complainant, she would be fired. She understood James Ivory's remarks meant that the relationship was to be kept out of the workplace.

54) When Michael Ivory became general manager of the Sandy store December 28, 1991, he removed Complainant's duties on the vending machines because it was not part of the retail sales job description. He gave it to the office manager. He supervised Complainant's duties with print advertising; James Ivory did the advertising.

55) Michael Ivory found a hostile environment. Employees were unhappy that Latham had been fired, and they resented Michael Ivory. He felt pressure as a result and lost his temper at times. There were changes in security. There had been numerous keys to the store distributed among the employees. He changed the locks and reissued about six keys. Only managers and those employees who opened or closed needed them. Complainant was strictly retail and never closed.

56) Michael Ivory knew that James Ivory met with Complainant and Benson on December 28. He was told that their relationship had been disruptive.

He observed them at lunch in the office kitchen with the door closed. He never saw anything physical between them.

57) After December 28, 1991, James Ivory took a much more active interest in the operation of the Sandy store. He formed a core group of employees to assist him in dealing with issues, subject to his veto. The core group met on Tuesdays, beginning December 31. The group included Stefanie Burback, Kim Moore, Tammi Goodloe, Phyllis Armour, Dave Minton, and Michael Ivory.

58) Complainant, on an occasion in mid-January 1992, placed his arm around Benson at work and gave her a "peck" on the cheek. He was attempting to comfort her over the news of the imminent death of her close friend's mother.

59) Complainant recalled the incident as happening either in the early morning or the early afternoon and was certain it was on January 14, 1992.

60) When Complainant and Nancy Benson spoke with James Ivory in late December 1991, they consistently denied that they were having an affair during store hours. James Ivory told them that unacceptable conduct between Complainant and Benson at work would result in discharge for either one or both of them. He did not describe what conduct was unacceptable. Benson recalled that the only hug occurring at the store was in January 1992, when she was upset by the impending death of Carolyn Minton's mother and Complainant comforted her.

61) Phyllis Armour worked for Respondent from September 1986 to October 1, 1993. She was warehouse manager at the Sandy Boulevard store in December 1991 and became part of the newly formed core group. The group met weekly beginning in January 1992. She recalled only two meetings before Complainant and Benson were discharged. Her employee Judd saw them hugging and told Tim Vistica (phonetic) who reported it to her. She in turn either reported the matter to the core group or to Michael Ivory. Judd had said that on January 14 he saw Complainant and Benson hugging and kissing. Although she relied on Judd as the source through Tim, she did not speak directly with Judd about it. Armour later doubted Judd's motives, as well as his ability to see what he claimed from where he was. She did not express her doubt because she was afraid to do so. Michael Ivory talked to Judd and typed a statement for Judd to sign. Judd, with Armour and Michael Ivory as witnesses, signed the statement on a Friday afternoon because it had to be presented that day. In the core meetings, the members discussed when to fire Benson and Complainant, not whether to do so. Armour did not recall a discussion of work performance as such, except that the focus was on the alleged time spent together off the retail floor during operating hours. She did not supervise or work directly around them. She did take a call advising of the mother's death, which was on a Wednesday in mid-January. It did not seem connected with Benson and Complainant, and no one suggested that it might be. She had lunch with and was friendly with Tim Vistica.

Their friendly relationship did not interfere with their duties. She was on good terms with James Ivory, but not with Michael. She recalled no discussion regarding Complainant's race in connection with his relationship with Benson.

62) Complainant's relationship with Benson was a subject of discussion for three weeks in the core group. According to Burback and Moore, Complainant and Benson were off the retail floor too much, took long lunches, and generally had a disruptive effect on the operation. Michael Ivory never spoke to Complainant or Benson about it. At a core meeting in January, Armour reported that her employee, Brian Judd, had observed physical activity on the job between Complainant and Benson. Michael Ivory talked to Judd and convened the core group in a "focus forum." He was tired of dealing with the issue, and it was not improving. The group recommended discharging both Complainant and Benson. Michael Ivory typed a statement for Judd's signature. He also typed the termination letters after discussing the contents with James Ivory.

63) The discharge recommendation was unanimous at the January "focus forum." There was no discussion of work performance at that time. That had occurred at prior meetings, specifically with Burback's and Moore's complaints about Complainant's and Benson's unavailability on the retail floor. There was no suggestion of discussion with the accused.

64) Complainant was discharged by Respondent on January 24, 1992. He received written notification of his termination containing the following:

"THE REASON FOR YOUR DISMISSAL ARE [sic] DIRECTLY RELATED TO YOUR INVOLVEMENT WITH A FELLOW EMPLOYEE ON A PERSONAL BASIS. THIS INVOLVEMENT IS CAUSING DISRUPTION AND CONCERN INSIDE THE BUSINESS AT NORTHWEST FITNESS SUPPLY CO. I CONFRONTED AND TALKED OPENLY WITH BOTH OF YOU, ABOUT THIS ISSUE, ON DECEMBER 28 1991, AT 9:30 AM, AT THAT TIME BOTH OF YOU DENIED HAVING ANY PERSONAL INVOLVEMENT WITH EACH OTHER. ON JANUARY 14 1992 YOU WERE SEEN BY AN EYE WITNESS, NEAR THE DRINKING FOUNTAIN, HUGGING AND KISSING NANCY BENSON. THE EYE WITNESS SAID IF CHALLENGED, THEY [sic] WOULD TESTIFY IN COURT. THIS TYPE OF BEHAVIOR WILL NOT BE TOLERATED ON STORE PREMISES DURING BUSINESS HOURS."

65) The dismissal notice of January 24, 1992, over the signature of James T. Ivory, was addressed to:

MARQUIS McNEIL ADVERTISING MGR
/RETAIL SALES
EUGENE ATHLETIC SUPPLY CO. dba:
NORTHWEST FITNESS SUPPLY C [sic]
1338 NE SANDY BLVD
PORTLAND ORE 97232

66) The memo copy handed to Complainant with the dismissal letter read as follows:

"JANUARY 22 1992
"TO WHOM IT MAY CONCERN,
" ON JANUARY 14TH 1992 I BRIAN JUDD I WAS PAINTING THE BACK WALL IN THE BOXING AREA, NEXT TO THE FREE WEIGHTS, WHEN I WITNESSED MARQUIS McNEIL AND NANCY BENSON OVER BY THE DRINKING FOUNTAIN GIGGLING, EMBRACING, RUBBING CHEEKS AND KISSING EACH OTHER ON THE CHEEKS AND LIPS.
"BRIAN JUDD

"/s/ Brian A. Judd Jr
"1-22-92 WITNESS
/s/ Michael P. Ivory 1-22
WITNESS
/s/ Phyllis M. Armour 1-22"

67) Present at the end of the day on January 24 when Complainant was handed the dismissal letter were Michael Ivory, James Ivory, and Nancy Benson. Accompanying the letter was the written memo of Brian Judd.

68) James Ivory asked for store keys and other company property. Complainant had none. Complainant asked to speak to Judd. James Ivory said no, that Complainant no longer worked there. At the hearing, Complainant denied the events described in Judd's memo. He had no opportunity to do so on January 24, 1992.

69) Benson also received a dismissal letter on January 24 with Judd's memo attached. James Ivory asked her for store keys and company property. She had none. She was very surprised and left immediately. At the hearing, she denied that Judd's description of events was accurate.

70) James Ivory, through Michael Ivory, had instructed that the core group deal with the Benson-Complainant problem. He considered it a productivity question. He did not attend the dismissal meeting of the core group. When Michael Ivory called him, he dictated the dismissal letters. He made sure that the decision was unanimous and that there was a plan for replacement. He was aware that Complainant might mention race, but he had Judd's report. He was aware of the good reports in Complainant's record.

71) Complainant believed he was fired because he was a black having a relationship with a white woman and because Minton and Michael Ivory were racist. At the time of the hearing, Complainant was still adversely affected by his discharge and by the atmosphere created by the racist remarks. He asked Michael Ivory by telephone for a letter of reference; Michael Ivory hung up. He had contributed to the company, had given it his heart and soul, had come in early and stayed late, had filled in when others were absent, and had been a good employee while enduring the negative racial comments. He felt outraged and betrayed. He suffered depression and was frustrated by refusals of employment. He was upset, mad, and hurt by the atmosphere as well as by the discharge.

72) Benson never told Complainant that Minton's concern about their relationship was due to Complainant's race. She told Complainant that Minton said that he (Minton) was in love with her. Complainant continued to believe that Minton's concern was based on race.

73) James Ivory believed that Latham was fair to employees; he never heard any complaints initiated by Complainant. Ivory did not recall any negatives about Complainant other than the Benson issue. Minton was relieved eventually of his manager duties. He could not run retail on his own. Ivory found that Minton was untruthful as to his scheduling. He was offered a transfer to retail and quit.

74) Joseph Tam was a Senior Investigator with the Agency who investigated the complaint filed by Complainant.

He interviewed witnesses and made notes of his interviews. He interviewed Complainant in August 1992. Throughout the investigation, Complainant denied to Tam that there had been any affair between himself and Nancy Benson and denied that there was disruption at work because of it. Complainant called Tam later and acknowledged that he and Benson had an affair.

75) The testimony of David Minton was not wholly credible. Minton denied discussing hiring decisions with Latham-Brown, denied any racially inappropriate remarks to or about Complainant, or about black people. While several witnesses testified credibly to the contrary, he specifically denied using young blacks as examples of when to implement the shoplifting alert, code 22. He denied any discussions with Latham regarding code 22. He admitted being attracted to Benson but denied telling her he loved her. Because of these and other inconsistencies, the Forum has credited only those portions of Minton's testimony which were verified by other credible evidence or inference in the whole record.

76) Michael Ivory did not recall that Complainant was assigned the vending machine by Latham. There was no evidence that Complainant profited personally from the vending machine. There was no evidence that Respondent lost any money from Complainant's operation of the vending machines.

77) There was testimony concerning rumors about other personal relationships among Respondent's employees, including rumors about James Ivory and a female employee, about

Armour and Tim Vistica, about Brad Weiss and Betty Lou, about Christie Curtis and Jason Cooper, and about Latham and Burbach. There was no evidence that any of these alleged relationships involved marital infidelity or formed any disruptive influence in the workplace.

78) In 1992, January 15 fell on Wednesday.

79) At the time he was discharged, Complainant was earning \$1,550 per month. He received unemployment compensation for about a year thereafter, during which time he engaged in a job search for both advertising and retail positions. He used the same résumé that he had used when he was hired by Respondent, updated for his time with Respondent. It showed over 15 years' experience in retail sales, merchandising, and advertising. He applied at numerous employers, including among others, Incredible Universe, R.E.I., Pendleton Woolen Mills, J. C. Penney, Meier & Frank, Nordstrom, and other retailers. He had as many as 8 or 10 interviews with employers, some of them second interviews, but did not obtain employment. At the time of the hearing, he was the owner of M & M Toy Factory, Gresham, which he started in March 1993.

80) From the time of his discharge until March 1993, when he started his own business, a period of 13 months, Complainant would have earned a minimum of \$20,150 (13 x \$1,550), had he remained employed with Respondent.

81) The atmosphere created by the remarks of Minton and Michael Ivory made Complainant feel insulted,

devalued, and demeaned. They resulted in his perception that each change in his status following the change in management was due to his race. These effects persisted until the time of the hearing.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent did business in this state and engaged or utilized the personal service of one or more employees.

2) At times material herein, Complainant was a black male who worked for Respondent as advertising manager and retail salesperson.

3) While Complainant worked for Respondent, he became involved in a close physical relationship with Benson, a white female co-worker.

4) While Complainant worked for Respondent, his supervisor, Minton, and a subsequent supervisor, Michael Ivory, made disparaging remarks concerning blacks and concerning Complainant in particular, based on his race.

5) While Complainant worked for Respondent, Respondent's upper management was suddenly changed.

6) Following the change in management, Complainant was warned not to allow his relationship with Benson to disrupt the workplace.

7) Co-workers thereafter reported that both Complainant and Benson left the retail floor together and neglected duties and customers.

8) Complainant and Benson were observed in an embrace during business hours at work.

9) Respondent discharged both Complainant and Benson on January

24, 1992, for disruptive behavior on store premises during business hours.

10) Neither the race of Complainant nor that of his female co-worker Benson were factors in his discharge.

11) Complainant suffered humiliation based on his race as a result of the atmosphere created by Minton and Michael Ivory.

CONCLUSIONS OF LAW

1) Under ORS 659.010 to 659.110, the Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein.

2) The actions, inactions, statements, and motivations of James Ivory, Michael Ivory, David Minton, and Kenneth Latham are properly imputed to Respondent herein.

3) ORS 659.030(1) provides, in part:

"For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:

"(a) For an employer, because of an individual's race * * * or because of the race * * * of any other person with whom the individual associates, * * * to refuse to hire or employ or to bar or discharge from employment such individual. * * *

"(b) For an employer, because of an individual's race * * * or because of the race * * * of any other person with whom the individual associates * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Respondent did not discharge Complainant due to his race, black, and did not violate ORS 659.030(1)(a).

4) Respondent did not discharge Complainant due to the race of a person with whom he associated and did not violate ORS 659.030(1)(a).

5) Respondent subjected Complainant to discriminatory terms and conditions of employment by subjecting him, through his managers, to insulting and demeaning remarks and comparisons based on his race, black, whereby Respondent violated ORS 659.030(1)(b)

6) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated. The amount awarded in the Order below is a proper exercise of that authority.

OPINION

The Specific Charges alleged that Respondent subjected Complainant to a racially negative atmosphere and discharged him due to his race and/or due to the race of a person with whom he associated. The credible evidence showed that there were remarks and attitudes on the part of Complainant's immediate supervisors which were racially discriminatory. He endured frequent and repeated suggestions

through Minton that persons of Complainant's race were untrustworthy as both customers and potential employees. He overheard a similar evaluation from Michael Ivory.

Respondent's representatives who displayed the racially biased attitudes were managers. While under such circumstances, Respondent was deemed to know of the biased remarks, in this instance there was actual knowledge. Complainant repeatedly voiced his concerns about his supervisor, Minton, to the general manager, Latham. Latham's recall of Complainant's complaints was such that it was not possible to discern what, if any, immediate and appropriate corrective action Respondent took to eliminate the offensive atmosphere. Respondent had an affirmative duty to take such corrective action. *In the Matter of United Grocers, Inc.*, 7 BOLI 1, 35 (1987).

Page 259lf Respondent demonstrated, intentionally or otherwise, a racial bias, then the question of whether that bias was involved in Complainant's discharge is a legitimate one. Proof includes both facts and inferences. *In the Matter of City of Umatilla*, 9 BOLI 91, 104 (1990), *aff'd without opinion*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991).

Complainant, whose wife is white, was involved in an extramarital relationship with a married white woman who was a co-worker. There were, in the workplace, several male-female interpersonal relationships among white employees. While there was gossip that there had been intimate relationships between employees in the past,

there was no credible evidence that either of the parties involved in each of those alleged liaisons were being unfaithful to a spouse or that any of those relationships had become physical (i.e., sexual), or that any of them caused concern to management by affecting the work or work effort of the employees involved. Thus, there is not a preponderance of evidence to suggest that it was the race of Complainant, or that of Benson, that brought about their mutual discharge. There was credible testimony that Complainant's attention to Benson, and hers to him, at work, took them away from their duties. James Ivory made it clear on December 28, 1991, that that would not be tolerated. There was evidence that it occurred thereafter and was the subject of discussion in the core group.

The incident in mid-January reported by Judd was a clear violation of James Ivory's mandate. While there may not have been any prohibitions to romantic physical encounters between co-workers prior to December 28, they were clearly prohibited thereafter, even in the minds of Complainant and Benson. It is within an employer's rights, absent an unlawful motive, to order cessation of an activity which disrupts the workplace and to discipline when that order is not heeded. However harsh and unyielding the sanction approved by James Ivory, it cannot be said that it was based on Complainant's race or upon the race of Nancy Benson.

Nonetheless, Complainant suffered mental distress from his on-the-job treatment concerning his race. This accounted for him suspecting that Respondent's disapproval of his affair with

Benson was based on race rather than upon job disruption and marital infidelity. Respondent is responsible for the demonstrated and damaging racial attitudes of its managers and for failing to take immediate and appropriate corrective action in regard to the repeated insulting and demeaning racial comments. The effects created discomfort for Complainant during his employment and lingered thereafter. Racial invective and disparagement directed at members of Complainant's race were as offensive as if they were directed at him. The Forum is awarding Complainant the sum of \$10,000 to compensate him and to help eliminate the effects of the mental distress due to the unlawful practice.

ORDER

NOW, THEREFORE, as authorized by ORS 659.030(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found, Respondent THE IVORY GROUP OF COMPANIES, INC., dba North West Fitness Supply Company and Eugene Athletic Supply Company, is hereby ordered to:

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for MARQUIS McNEIL, in the amount of TEN THOUSAND DOLLARS (\$10,000), representing compensatory damages for the mental and emotional distress suffered by MARQUIS McNEIL as a result of Respondent's unlawful practice found herein, PLUS interest at the legal rate from the date of this Order until Respondent complies herewith, and

2) Cease and desist from discriminating against any employee based upon the employee's race.

IT IS FURTHER ORDERED that the portion of the Specific Charges alleging that Respondent discharged Complainant based on his race and/or on the race of a person with whom he associated be, and is hereby, DISMISSED.

**In the Matter of
Gary D. Martin, dba
MARTIN'S MERCANTILE,
Respondent.**

Case Number 43-94
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 25, 1994.

SYNOPSIS

Wage Claimants worked as employees, not as co-partners or independent contractors. ORS 652.310(2). Respondent willfully failed to pay Claimants all wages due upon termination, in violation of ORS 652.140(1), 653.025(3) (minimum wages), and OAR 839-20-030 (overtime wages). An agreement between the Claimants and Respondent to work at less than minimum wage was no defense. ORS 653.055(2), 652.360. The Commissioner ordered Respondent to pay the wages owed (less a setoff for rent)

FINDINGS OF FACT – PROCEDURAL

1) On September 30, 1992, the Claimants each filed a wage claim with the Agency. They alleged that they had been employed by Respondent and that he had failed to pay wages earned and due to them.

2) At the same time that they filed the wage claims, Claimants assigned to the Commissioner of Labor, in trust for Claimants, all wages due from Respondent.

3) On May 11, 1993, the Agency served on Respondent an Order of Determination based upon the wage claims filed by the Claimants and the Agency's investigation. The Order of Determination found that Respondent owed Claimant Dennis Bartow a total of \$3,076.60 in wages and \$577.50 in civil penalty wages, and he owed Claimant Donna Bartow a total of \$3,161.41 in wages and \$577.20 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency or request a contested case hearing and submit an answer to the charges.

4) On June 2, 1993, Respondent filed a request for a contested case hearing. Following an extension of time, on June 18, 1993, Respondent, through his attorney, filed an answer to the Order of Determination. Respondent denied that he owed Claimants unpaid wages or civil penalty wages and set forth the affirmative defense that the Claimants were not his employees, but "were either independent contractors, partners, or otherwise engaged in a non-employer/employee relationship" with Respondent.

plus civil penalty wages, pursuant to ORS 652.150. ORS 652.140(1); 652.150; 652.360; 652.610(4); 653.025(3); 653.045; 653.055(1), (2); 653.261(1); OAR 839-20-030(1).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 23, 1994, in Suite 220 of the State Office Building, 165 East Seventh Avenue, Eugene, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Dennis D. Bartow and Donna J. Bartow (Claimants) were present throughout the hearing. Gary D. Martin (Respondent) represented himself and was present throughout the hearing.

The Agency called the following witnesses: Dennis Bartow, Claimant; Donna Bartow, Claimant; Mark Boss, foster son of Donna Bartow; Margaret Pargeter, a screener with the Wage and Hour Division of the Agency; and Judy Thayer, consignor. Respondent called himself and Lavon Martin, his wife, as witnesses.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

5) On November 11, 1993, Respondent's attorney withdrew as Respondent's counsel.

6) On January 14, 1994, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-50-000 to 839-50-420.

7) On February 14, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by March 14, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency submitted a timely summary. Respondent failed to submit one.

8) On March 17, 1994, the Agency moved for a discovery order requiring Respondent to provide certain documents because Respondent had not responded to informal efforts to obtain the discovery. The Hearings Referee granted the motion and issued a discovery order directing Respondent to provide, among other things, payroll

records and records of hours worked by both Claimants, any written agreements regarding the Claimants' employment with Respondent, any checks written to Claimants, and any written rental agreements between them. Respondent was ordered to provide those records by March 21, 1994. Respondent did not provide any records before the hearing.

9) At the start of the hearing, Respondent said he had reviewed the "Notice of Contested Case Rights and Procedures." The Hearings Referee answered all of his questions about his rights and the contested case hearing procedures.

10) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

11) At the beginning of the hearing, Respondent requested a postponement because he wanted to get an attorney. The Hearings Referee denied Respondent's request pursuant to OAR 839-50-110(2) and because he had not shown good cause for a postponement.

12) At hearing, Respondent offered documents that he purported were business records from his store, Martin's Mercantile (store). The Agency objected to admission of the documents because of Respondent's failure to comply with the discovery orders. The Hearings Referee found that Respondent did not offer a satisfactory reason for having failed to provide the documents as ordered and found that excluding the documents would not violate the duty to conduct a full and

fair hearing. Accordingly, the Hearings Referee refused to admit the documents into evidence, pursuant to OAR 839-50-200(8).

13) On April 14, 1994, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the Certificate of Mailing, including the Respondent. Participants had 10 days to file exceptions to the Proposed Order. The Hearings Unit received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Respondent, a person, did business as Martin's Mercantile, a retail store selling new and used merchandise in Eugene, Oregon. Respondent was the sole owner of the business.

2) In October 1991, Claimants moved to Eugene from Newport. On October 29, 1991, Respondent met Claimant Dennis Bartow in a grocery store. They had known each other previously. Bartow said he was out of work and homeless. Respondent offered to rent Claimants two rooms in his store as living quarters. That night, after inspecting the rooms, Claimants accepted and paid Respondent's son the first month's rent of \$150. One room had a refrigerator and a table and chair. They shared the refrigerator with a man named Ben Creech, who had worked in the store. A bathroom was in a different part of the building. Respondent asked Claimants to open his store in the morning occasionally, and Claimants agreed. About a week and a half later, Respondent asked them to open and run the store every day, and Claimants agreed. Respondent advised Claimants that the store

was losing money, and he wanted them to build up the business.

3) On or about November 11, 1991, Respondent and Claimants entered into an oral agreement that Claimants would operate the store for 10 percent of gross sales. Respondent told Claimants several times that, as soon as he could, he would pay Donna Bartow \$5.00 per hour and pay Dennis Bartow \$8.00 per hour for running the store.

4) From November 11, 1991, to August 3, 1992, Respondent employed Claimants to run the store. Claimants were hired for an indefinite period. Respondent furnished all the equipment and supplies Claimants used on the job. Claimants restocked the store's merchandise as the store's income allowed. Respondent set the store's hours. Claimants had no authority to hire employees. For their work, Claimants derived no benefits other than a percentage of the income from sales. On six occasions, Respondent gave Claimants cash from his pocket or the till, which was in addition to their percentage. Claimants had no ownership interest in Respondent's store. There was no partnership agreement between Respondent and Claimants.

5) Dennis Bartow's duties included managing the store, helping customers, cleaning, taking in merchandise on consignment, running errands, buying goods, and restocking the store. Respondent obtained a Costco membership card for Dennis Bartow so he could buy merchandise from Costco for the store.

6) Donna Bartow's duties included helping customers, cleaning, book-

keeping, taking in merchandise on consignment, paying bills, and operating the cash register. She could sign checks for the store.

7) Around the end of November or early December 1991, Dennis Bartow told Respondent that he (Bartow) needed to get another job because he was not earning enough money working for Respondent. Bartow sold items on consignment on his own time. Respondent told Bartow that he worked for Respondent, and if he sold other merchandise, the sales had to go through the store. Respondent told Bartow he had to give Respondent a percentage of the gross sales from any merchandise Bartow sold. On one occasion, Donna Bartow bought some breakfast cereal in bulk. She tried to sell it on her own in the store. Respondent told her to get the cereal out of the store. He told her not to sell her own goods in his store. He said she could not take over the store with her things, because it was his business and Claimants were there to sell his merchandise.

8) From November 25, 1991, to July 30, 1992, Claimants also worked for Paul Spotten, who operated a store adjacent to and in the same building as Respondent's store. Respondent hoped to take over Spotten's store, which also sold consignment items, as well as items such as stepping stones, trampolines, and cotton candy. Claimants had no ownership interest in Spotten's store.

9) Claimants used a hot plate in the store to prepare meals. They prepared meals and ate in the store when the store was open. Eventually, at Claimants' request, Respondent

adjusted the store's closing time from 6 p.m. to 5:30 p.m. so Claimants could go to a local soup kitchen for their dinner each night. Occasionally, they made their evening meal on the hot plate. The store had a television set in it. At times when the store was open, Claimants would watch the TV.

10) Respondent kept no time records of either Claimant's work. Respondent visited the store only two or three times per month. He did not come to the store unless Claimants called him first.

11) At first, Donna Bartow kept on a wall calendar a record of the hours she and Dennis Bartow worked at the store. Later, she kept such records in a spiral notepad. Between November 11 and 24, 1991, Claimants worked every day in the store. The first three days, they each worked from 11 a.m. to 4:30 p.m., or five and one-half hours each. From November 14 to 24, they each worked from 10 a.m. to 6 p.m., or eight hours each. From November 25, 1991, to July 30, 1992, Claimants operated both Respondent's store and Paul Spotten's store. From November 25, 1991, to January 7, 1992, Claimants kept both stores open from 10 a.m. to 6 p.m. They divided their time equally between the stores. Thus, each Claimant worked four hours per day in Respondent's store. From January 8 to July 30, 1992, Claimants kept both stores open from 10 a.m. to 5:30 p.m. They divided their time equally between the stores. Thus, each Claimant worked three and three-fourths hours per day in Respondent's store. Beginning on February 16, and throughout the remainder of their employment with Respondent, Claimants

normally took one or two days off each week. Usually, on Claimants' days off, the store was run by either a man named Bill or another man named Ron. From February to August 1992, the store was closed a total of 10 days. On around July 24, Dennis Bartow had surgery for a hernia and did not work again until July 29. He injured himself moving a trampoline while working for Paul Spotten's store. Between July 31 and August 3, 1992, Claimants worked only at Respondent's store. They each worked seven and one-half hours on July 31 and August 1, and six hours on August 3.

12) Following Dennis Bartow's injury on around July 24, he planned to file a workers' compensation insurance claim against Paul Spotten. After that, Mr. Spotten refused to pay Claimants for their work that week. On July 30, 1992, Mr. Spotten came to the store. He yelled at Claimants and threatened them because he thought Dennis Bartow was going to file the claim. Donna Bartow called the police, who eventually ordered Mr. Spotten to leave the premises. As a result of this incident, Claimants were afraid to live in the building because Mr. Spotten had keys to Claimants' living quarters.

Claimants moved their possessions out of the building. The next Monday morning, August 3, Claimants told Respondent that they had moved out, but that they were willing to continue operating the store. Respondent told Claimants that, under the circumstances, it would be better to get someone else to run the store. Respondent terminated the Claimants' employment. August 3, 1992, was Claimants' last day of work.

13) Claimant Donna Bartow's records reveal the following information, which is accepted as fact: during the period November 11, 1991, to August 3, 1992, Dennis Bartow worked for Respondent a total of 818.5 hours, of which 802 were straight time hours (i.e., hours worked up to and including 40 hours per week) and 16.5 hours were overtime hours (i.e., hours worked in excess of 40 hours per week). He worked 203 days during that period.

14) Claimants' records reveal the following information, which is accepted as fact: for the period November 11, 1991, to August 3, 1992, Donna Bartow worked for Respondent a total of 838.25 hours, of which 821.75 were straight time hours (i.e.,

* Donna Bartow's record of hours worked shows August 3 as the last entry. She recorded no hours worked on August 4. Dennis Bartow's wage claim form shows the time period of the claim ending on August 3. The Agency calculated both Claimants' wages due based on August 3 being their last day. Both Claimants testified that August 3 was their last day of work. However, Donna Bartow's wage claim form shows the claim period ending on August 4, and the store's business records (which are in Ms. Bartow's handwriting) show two entries on August 4. Thus, some evidence shows that Donna Bartow performed some work on August 4. The Charging Document also shows the termination date as August 4. The Forum is relying on Donna Bartow's records of the hours worked. Given the lack of evidence on the number of hours worked on August 4, the Forum will not speculate about it. Accordingly, the Forum finds that August 3, 1991, was Claimants' last day of work.

hours worked up to and including 40 hours per week) and 16.5 hours were overtime hours (i.e., hours worked in excess of 40 hours per week). She worked 208 days during that period.

15) Respondent paid Claimants \$230 cash from his pocket or the till, plus \$265.17 cash from the till based on 10 percent of sales, for a total of \$495.17. Claimants did not pay Respondent rent from December 1991 through July 1992, a period of eight months. Claimants agreed that, at \$150 per month, they owed Respondent \$1,200 for rent.

16) At times material, the minimum wage in Oregon was \$4.75 per hour. ORS 653.025(3). The rate of pay for overtime, based upon the minimum wage, was \$7.13. ORS 653.261 and OAR 839-20-030.

17) Pursuant to ORS chapter 653 (Minimum Wages), OAR 839-20-030 (Payment of Overtime Wages), and Agency policy, the Agency calculated Claimant Dennis Bartow's total earnings to be \$3,927.15^{*}. The total reflects the sum of the following:

802 hours at \$4.75 per hour (the minimum wage (MW)) =	\$ 3,809.50
16.5 hours at \$7.13 per hour (the overtime rate: 1.5 x MW) =	117.65
TOTAL EARNED	\$ 3,927.15

18) Pursuant to ORS chapter 653 (Minimum Wages), OAR 839-20-030 (Payment of Overtime Wages), and Agency policy, the Agency calculated Claimant Donna Bartow's total earnings to be \$4,020.96^{**}. The total reflects the sum of the following:

821.75 hours at \$4.75 per hour (the minimum wage (MW)) =	\$ 3,903.31
16.5 hours at \$7.13 per hour (the overtime rate: 1.5 x MW) =	117.65
TOTAL EARNED	\$ 4,020.96

19) Civil penalty wages were computed for Dennis Bartow, according to Agency policy, as follows: \$ 3,927.15 (the total wages earned) divided by 203 (the number of days worked during the claim period) equals \$19.35 (the average daily rate of pay). This figure of \$19.35 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$580.50^{***}.

20) Civil penalty wages were computed for Donna Bartow, according to Agency policy, as follows: \$ 4,020.96 (the total wages earned) divided by 208 (the number of days worked during the claim period) equals \$19.33 (the average daily rate of pay). This figure of \$19.33 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$579.90^{****}.

* The Agency's figures showed a total of \$3,927.06. There was a nine cent error in the overtime calculated for November 23, 1991.

** The Agency's figures showed a total of \$4,020.87. Again, there was a nine cent error in the overtime calculated for November 23, 1991.

*** The Agency originally calculated the civil penalty wages based on 204 days worked, rather than the 203 days found from the evidence at hearing. As a result, the charging document alleged that \$577.50 in civil penalty wages was due, rather than \$580.50. The difference is \$3.00. The Forum amended the charging document to conform to the evidence. OAR 839-50-140(2)(c).

**** Here, the Agency calculated civil penalty wages based on 209 days worked, rather than the 208 days found from the evidence. The charging docu-

21) Testimony of Claimants was found to be credible. They had the facts readily at their command, and their statements were supported by documentary records. There is no reason to determine the Claimants testimony to be anything except reliable and credible.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person who employed one or more persons in the State of Oregon.

2) During the period of November 1991 to August 1992, Claimants were not co-owners of Respondent's business. They had no ownership interest in the business and no right to share in the profits or liability to share losses. Claimants were not co-partners with Respondent. Nor were Claimants independent contractors.

3) Respondent employed Claimants Dennis Bartow and Donna Bartow from November 11, 1991, to August 3, 1992. Respondent suffered or permitted Claimants to render personal services to Respondent.

4) The state minimum wage during 1991 and 1992 was \$4.75 per hour.

5) From November 11, 1991, to August 3, 1992, Respondent and Claimants had an oral agreement whereby Claimants would be paid 10 percent of the gross sales from Respondent's store.

6) Claimants' last day worked was August 3, 1992, the day Respondent terminated Claimants' employment.

7) Claimant Dennis Bartow worked 818.5 hours, of which 802 were straight time hours (i.e., hours worked up to and including 40 hours per week) and 16.5 hours were overtime hours (i.e., hours worked in excess of 40 hours per week). He worked 203 days.

8) Claimant Donna Bartow worked 838.25 hours, of which 821.75 were straight time hours (i.e., hours worked up to and including 40 hours per week) and 16.5 hours were overtime hours (i.e., hours worked in excess of 40 hours per week). She worked 208 days.

9) Claimant Dennis Bartow earned \$3,927.15 in wages, and Claimant Donna Bartow earned \$4,020.96 in wages. Respondent paid both Claimants a total of \$495.17; split equally, they each received \$247.59. Claimants acknowledge owing Respondent \$1,200 for rent, or \$600 each. In wages and rent, each Claimant received \$847.59. Accordingly, Respondent owes Claimant Dennis Bartow \$3,079.56 in earned and unpaid compensation. Respondent owes Claimant Donna Bartow \$3,173.37 in earned and unpaid compensation.

10) Respondent willfully failed to pay Claimants all wages owed immediately when employment was terminated, and more than 30 days have elapsed from the date Claimants' wages were due and payable.

11) Civil penalty wages for Claimant Dennis Bartow, computed according to Agency policy and ORS 652.150, equal \$580.50.

ment alleged that \$577.20 in civil penalty wages was due, rather than \$579.90. The difference is \$2.70. Again, the Forum amended the charging document to conform to the evidence. OAR 839-50-140(2)(c).

12) Civil penalty wages for Claimant Donna Bartow, computed according to Agency policy and ORS 652.150, equal \$579.90.

CONCLUSIONS OF LAW

1) Before the start of the contested case hearing, the Forum informed the Respondent of his rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415 (7) by explaining the information described therein to the participants at the start of the hearing.

2) ORS 68.110(1) provides:

"A partnership is an association of two or more persons to carry on as coowners a business for profit."

Claimants were not co-owners or co-partners with Respondent in his store.

3) ORS 653.010 provides, in part:

"* * *

"(3) 'Employ' includes to suffer or permit to work * * *."

"(4) 'Employer' means any person who employs another person * * *."

ORS 652.310 provides, in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees * * *."

"(2) 'Employee' means any individual who otherwise than as a co-partner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of

operations accomplished, or quantity produced or handled."

During all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

5) ORS 653.025 requires that

"* * * for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

"* * *

"(3) For calendar years after December 31, 1990, \$4.75."

Respondent was prohibited from employing or agreeing to employ Claimants at a wage rate lower than \$4.75 for each hour of work time. Respondent violated ORS 653.025.

6) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid,

but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides, in part:

"[A]ll work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Respondent was obligated by law to pay Claimants one and one-half times their regular hourly rate, in this case the minimum wage of \$4.75, for all hours worked in excess of 40 hours in a week. Respondent failed to pay Claimants overtime, and thereby violated OAR 839-20-030(1).

7) ORS 652.140(1) provides:

"Whenever an employer discharges an employee, or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately."

Respondent violated ORS 652.140(1) by failing to pay Claimants all wages earned and unpaid immediately upon termination of Claimants' employment.

8) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the

wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimants when due as provided in ORS 652.140.

9) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimants their earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

A preponderance of the credible evidence on the whole record showed that Respondent employed Claimants during the period of the wage claim and willfully failed to pay them all wages, earned and payable, when due. The record establishes that Respondent has violated ORS 652.140 as alleged, and that he owes Claimants civil penalty wages pursuant to ORS 652.150.

Claimants Worked as Employees

The initial issue in this case is whether Claimants worked for

Respondent as employees. This Forum has previously accepted the definition of "employee" in ORS 652.310(2) for the purposes of ORS 652.140 and 652.150 and likewise accepts it here. See *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 41 (1993) (relying on *Lamy v. Jack Jarvis & Co.*, 281 Or 307, 574 P2d 1107, 1111 (1978)).

ORS 652.310(2) provides:

"Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal service wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

Using this definition of "employee," the Forum finds that Claimants worked as employees between November 11, 1991, and August 3, 1992, and not as co-partners or independent contractors. First, Respondent admitted at hearing that Claimants were not his partners and had no ownership interest in the store. Second, the evidence does not support Respondent's claim that Claimants were independent contractors.

Oregon statutory law does not define "independent contractor" for purposes of wage claim law. This Forum has previously followed Oregon case law to ascertain the distinction between an employee and an independent contractor. See *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264, 273-78 (1982), and the Oregon

cases cited therein; and *In the Matter of Rainbow Auto Parts and Dismantlers*, 10 BOLI 66, 74 (1991). Oregon case law holds that the primary question is: to what extent does the employer have the right to control and direct the details and manner of performance of the worker's work. It focuses on control over the manner and means of accomplishing a result rather than the result itself, that is, control over how work will be done rather than just what work will be done. The inquiry focuses on the existence, rather than the actual exercise, of such a right. *All Season Insulation, Inc., supra*. If answering the question above establishes that the worker is the subordinate party, depending on the employer's business, the worker is an employee rather than an independent contractor.

In this case, the evidence on the record establishes that Respondent had the right to control and direct the details and methods of Claimants' work. Respondent controlled the hours Claimants worked. Claimants provided services that were an integral part of Respondent's business. They were employed for an indefinite period. Claimants used only Respondent's facilities, equipment, and supplies. They sold his merchandise and were prohibited from selling their own merchandise in the store once he learned of that. They derived no benefit from their work besides a commission based on gross sales. They were not authorized to hire employees. Claimants were subordinate parties, and I find that they were not independent contractors.

"Employee' means any individual who otherwise than as a copartner

of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate ***." ORS 652.310(2).

For purposes of this definition, an "employer who pays or agrees to pay an individual at a fixed rate" includes an employer who is required by law to pay a minimum wage to workers, but has failed to do so. *In the Matter of Crystal Heart Books Co., supra*, at 44. Thus, the absence of an agreement to pay or actual payment to a worker will not take the worker out of the definition of "employee," where a minimum wage law requires that worker to be paid a minimum wage. Here the law requires employers to pay employees at a fixed minimum wage rate. ORS 653.025(3). Claimants were Respondent's employees, although he did not pay them at that fixed rate.

Minimum Wage and Overtime

Respondent did not assert and the Hearings Referee did not find any exemption or exclusion from the coverage of the Minimum Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS chapter 652, for Respondent or Claimants.

ORS 653.025 prohibits employers from paying their workers at a rate less than \$4.75 for each hour of work time. ORS 653.055(1) provides that

"[a]ny employer who pays an employee less than the [minimum wage and overtime] is liable to the employee affected:

"(a) For the full amount of the wages, less any amount actually

paid to the employee by the employer;

*** * * and

"(c) For civil penalties provided in ORS 652.150."

ORS 653.055(2) states that:

"[a]ny agreement between an employee and an employer to work at less than the [minimum wage and overtime] is no defense to an action under subsection (1) of this section."

See also ORS 652.360. Credible evidence based on the whole record establishes that Respondent paid Claimants at a rate less than \$4.75 per hour. The commission agreement between Respondent and Claimants is no defense.

OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half the regular rate of pay. The Respondent is obligated by law to pay Claimants one and one-half times the regular hourly rate for all hours worked in excess of 40 hours in a week.

Hours Worked

ORS 653.045 requires an employer to maintain payroll records. Where the Forum concludes that a claimant was employed and was improperly compensated, it becomes the burden of the respondent to produce all appropriate records to prove the precise amounts involved. *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). Where the employer produces no records, the Commissioner may rely on the evidence produced by the Agency

"to show the amount and extent of [claimant's] work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate." 328 US at 687-88. On the basis of these rulings, the Forum may rely on the evidence produced by the Agency regarding the number of hours worked by Claimants.

This Forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work — where that testimony is credible. See *In the Matter of Sheila Wood*, 5 BOLI 240, 254 (1986); *Dan's Ukiah Service, supra*, at 106. Here, Claimants' testimony and other evidence was credible. The Forum concludes that Claimants were employed and were improperly compensated, and the Forum may rely on the evidence produced by the Agency regarding the number of hours worked by Claimants. Respondent did not produce persuasive "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens Pottery Co.*, 328 US at 687-88.

Work Time

"Employ" includes to suffer or permit to work. ORS 653.010(1). Work time is all time an employee is required to be on the employer's premises, on duty, or at a prescribed work place. There is no requirement on the part of the employee for mental or physical exertion. Work time includes time spent waiting to perform work for the benefit and at the request of the employer. Unless an employee is

specifically relieved from duty and the time period is sufficiently long for the employee to use for his or her own purposes, the employer must compensate the employee for time spent waiting. See OAR 839-20-041; *Dan's Ukiah Service, supra*, at 106. In this case, Respondent suffered or permitted Claimants to remain on the Respondent's premises, where they either waited for work or performed work. The time Claimants spent waiting for work was compensable work time.

Setoff

ORS 652.610(4) provides. in part that:

"Nothing in this section shall * * * diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process."

While Respondent has not asserted a lawful setoff on due legal process for the rent Claimants owed him, Claimants nonetheless agreed to allow a setoff for the rent from their wages due. Accordingly, the Forum reduced the amount of wages due by \$1,200.

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer,

had a duty to know the amount of wages due to his employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent knew he was not paying Claimants minimum wages for their work and intentionally failed to pay such wages. Evidence showed that Respondent acted voluntarily and was a free agent. Respondent must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150.

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Wayton & Willes, Inc.*, 7 BOLI 68, 72 (1988).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders GARY D. MARTIN to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DENNIS D. BARTOW in the amount of THREE THOUSAND SIX HUNDRED SIXTY DOLLARS AND FIFTY-SIX CENTS (\$3,660.56), representing \$3,079.56 in gross earned, unpaid, due, and payable wages, and \$581 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$3,079.56 from September 1, 1992, until paid and nine percent interest per year on the sum of \$581 from October 1, 1992, until paid; plus

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DONNA D. BARTOW in the amount of THREE THOUSAND SEVEN HUNDRED FIFTY-THREE DOLLARS AND THIRTY-SEVEN CENTS (\$3,753.37), representing \$3,173.37 in gross earned, unpaid, due, and payable wages, and \$580 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$3,173.37 from September 1, 1992, until paid, and nine percent interest per year on the sum of \$580 from October 1, 1992, until paid.

In the Matter of
KENNY ANDERSON,
Respondent.

Case Number 49-94
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 25, 1994.

SYNOPSIS

Respondent willfully failed to pay Claimant all wages due upon termination by mutual agreement, in violation of ORS 652.140(1). The Commissioner ordered Respondent to pay the wages owed plus civil penalty wages, pursuant to ORS 652.150. ORS 652.140(1), 652.150.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 16, 1994, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Alan W. Middleton (Claimant) was present throughout the hearing. Kenny Anderson (Respondent) represented himself and, at his request, participated in the hearing by telephone.

The Agency called the following witnesses: Alan W. Middleton, the Claimant, and Rhoda Briggs, a Compliance Specialist with the Wage and Hour Division of the Agency (by telephone). Respondent called himself as his only witnesses.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On April 21, 1993, Claimant filed a wage claim against Respondent with the United States Department of Labor. His claim was transferred to the State of Idaho Department of Labor and Industrial Services and later transferred to the Oregon Bureau of Labor and Industries pursuant to a reciprocal agreement between the states.

Claimant alleged that Respondent employed him and failed to pay wages earned and due to him.

2) On August 2, 1993, Claimant authorized the Agency to process his wage claim by means of the administrative process provided for in ORS 652.310 to 652.405. On February 20, 1994, effective August 2, 1993, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

3) On August 30, 1993, the Commissioner of the Bureau of Labor and Industries served on Respondent an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Respondent owed Claimant a total of \$1,756 in wages and \$2,316 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

4) On September 16, 1993, Respondent filed an answer to the Order of Determination. Respondent's answer contained a request for a contested case hearing. Respondent admitted that he owed Claimant \$400.38. He disputed the number of hours worked claimed by Claimant. He asserted an offset from wages for gas he provided Claimant and alleged he had been unable to contact Claimant to pay him.

5) On January 24, 1994, the Agency sent the Hearings Unit a request for a hearing date. On February 11, 1994, the Hearings Unit issued a Notice of Hearing to the Respondent,

the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-50-000 to 839-50-420.

6) On February 14, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by March 7, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency submitted a timely summary. Respondent sent in a copy of time records for his employees.

7) On February 8, 1994, the Agency moved for a discovery order and attached an affidavit and exhibits showing the Agency's attempts to obtain Respondent's records through an informal exchange of information. The Hearings Referee granted Respondent until February 21 to respond. He did not respond. On February 23, 1994, the Hearings Referee granted the Agency's motion and issued a discovery order directing Respondent to provide by March 2 certain records regarding Claimant's employment. On March 1, Respondent called the Hearings Referee, who ordered

Respondent to comply with the discovery order and to submit his Summary of the Case. At Respondent's request, the Hearings Referee also ordered that the hearing would be held in Portland and Respondent could participate by telephone.

8) At the start of the hearing, Respondent said he had reviewed the Notice of Contested Case Rights and Procedures and had no questions about it.

9) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

10) Respondent and the Agency stipulated to certain facts, which were admitted into the record by the Hearings Referee at the beginning of the hearing.

11) At the start of the hearing, the Agency moved to amend the Order of Determination to reflect revised calculations of Claimant's earned and unpaid wages, and penalty wage calculations. The revisions resulted from a reduction in the number of claimed hours worked. Respondent did not object and, pursuant to OAR 839-50-140, the Hearings Referee granted the motion. At the end of its case, the Agency again moved to amend the Order of Determination to conform to the evidence. Respondent objected because he disputed some of the evidence upon which the amendment was based. The Hearings Referee granted the motion. OAR 839-50-140(2).

12) On March 25, 1994, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the Certificate of Mailing, including the Respondent. Participants had 10 days to file exceptions to the Proposed Order. No exceptions were received by the Hearings Unit.

FINDINGS OF FACT – THE MERITS

1) During all times material, Respondent was in the business of harvesting hay in areas around Salem, Albany, and Corvallis, Oregon. He employed eight persons in the State of Oregon.

2) Claimant was a student at the University of Idaho in Moscow, Idaho. He was a member of Army ROTC and the Army Enlisted Reserve.

3) On around July 8, 1992, Claimant's fraternity friend, Ed Harness, contacted him about working for Respondent in Oregon. Claimant wanted to wait until the next Monday to go to work because he had plans for the weekend. Harness told Claimant that Respondent needed someone to start work right away. Claimant left the next day for the Albany area. He arrived the evening of July 9.

4) On July 10, 1992, Harness introduced Claimant to Respondent. Beginning that day, for about five hours, Claimant rode in a truck with one of Respondent's employees, Cayman, to learn the fields in which they worked.

5) On July 11, Claimant rode for 10 hours with another of Respondent's employees, Mike Kimble, on a tractor pulling a baler.

6) On July 12, Claimant arrived for work. About two hours later,

Respondent told him there was no tractor for him to drive.

7) On July 13, Claimant rode for 10 hours with another of Respondent's employees, Jerry Ramirez, on a tractor pulling a rake.

8) On July 14, Claimant arrived for work. About an hour later, Respondent told him there was no tractor for him to drive.

9) Between July 15 and August 20, 1992, Claimant worked 324 hours for Respondent driving a tractor with a hydraulic rake. He also performed maintenance on equipment such as the tractors and a service truck.

10) Respondent's time records, which were kept by an employee named Chris Tuttle, showed that Claimant worked 13 hours on August 20. Claimant believed he worked an additional two hours that day. Otherwise, Claimant agreed with Respondent's record of hours worked for the period July 15 and August 20, 1992. Claimant did not have his own records of his hours worked. The hours of work he claimed in his wage claim were estimates.

11) The agreed rate of pay was \$6.00 per hour between Respondent and Claimant, who had an employment relationship.

12) At some time during Claimant's employment, Respondent paid him \$100 cash. Respondent kept no receipts of cash payments to the employees.

13) Between July 15 and August 20, Claimant worked every day except Wednesday, July 29, and Thursday through Sunday, August 6 through 9. During this latter period, Claimant

drove to and from Boise for duty with his Army Reserve unit. Claimant had no money for gas for the trip to Boise. Respondent filled up Claimant's Subaru and two gas cans with gas (two to three gallons each). In total, Respondent gave Claimant around 15 gallons of gas. The fair market value of that gas, at \$1.30 per gallon, was \$19.50. At hearing, Claimant agreed to permit this amount to be a setoff against his wages due. When Claimant returned to Oregon, he drove a Dodge pickup.

14) Toward the end of August, Claimant had to return to Boise for another Army Reserve drill and then return to college. Claimant and Respondent agreed that August 20 would be Claimant's last day of work. August 20, 1992, was Claimant's last day of work.

15) Respondent gave Claimant two checks for \$500 each. The checks were drawn on an Idaho bank, so Claimant could not cash them. He had no money for gas to drive home. Respondent filled up Claimant's truck and two cans with around 20 gallons of gas. The fair market value of that gas, at \$1.30 per gallon, was \$26.00. At hearing, Claimant agreed to permit this amount to be a setoff against his wages due.

16) Respondent told Claimant that he (Respondent) could not pay all of his wages due because Respondent had not been paid by the person who was pressing the hay. Respondent was owed around \$90,000.

17) Claimant called Respondent twice after August 20 for his back wages. Once Claimant went to Respondent's farm in Idaho to get his

pay. Respondent did not have the money to pay Claimant.

18) Respondent did not allege in his answer the affirmative defense of financial inability to pay Claimant's wages due at the time they accrued. At hearing, Respondent gave testimony on this issue and the Hearings Referee permitted it to be introduced. OAR 839-50-140(2)(b). Respondent did not produce specific information about his financial resources and his business and personal requirements during the wage claim period. He submitted no records on the issue. He testified that he paid some of the workers their full wages. He was the record owner of farm equipment and (with his brother) a farm in Idaho, although there were loans and a mortgage, respectively, outstanding on these.

19) Respondent had assets available with which Claimant could have been paid.

20) The Agency computed civil penalty wages according to Agency policy as follows: \$2,124 (the total wages earned) divided by 36 (the number of days worked during the claim period) equals \$59.00 (the average daily rate of pay). This figure of \$59.00 was multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$1,770. This figure is set forth in the amended Order of Determination.

21) Claimant's testimony was generally credible. Some of his testimony was unreliable, however, because of his memory. I do not find that he intended to deceive the Forum. Because his claims about the hours he worked were estimates, and because his estimates (which were made at a

time when the hours worked were fresher in his memory) conflicted with his testimony about his hours, the Forum found parts of his testimony unreliable. Where his testimony was controverted by other reliable evidence on the record, the Forum gave less weight to his testimony.

22) Respondent's testimony was not reliable or credible where it conflicted with other credible evidence. His testimony was evaluated, not only by its own intrinsic weight, but also according to the evidence that was in his power to produce. If weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence is within the power of the participant to produce, the evidence offered should be viewed with distrust. See ORS 10.095(7), (8). The main disputed issues in this case involved matters about which Respondent is required by law to keep records. The Agency requested those records several times, and the Hearings Referee ordered Respondent to produce them. He did not produce payroll records, records of wage payments, a W-2 form, cash receipts, or any documentation to support his general claim of financial inability to pay Claimant's wages. Further, Respondent's testimony was often vague and inconsistent on important points. For example, he claimed he paid Claimant more than \$100 in cash, but could not specify when, and the amount varied. He had no receipts. He claimed he sent records to the Agency during the investigation of this wage claim, but could not remember when or where he sent the records. Such matters were within his power to control and prove.

His testimony on these points was directly contradicted by the credible testimony of the other witnesses. At hearing he was unprepared and failed to have available even documents that the Hearings Referee mailed to him two weeks before hearing. He failed to submit a case summary, although twice ordered to do so by the Hearings Referee. A person who fails to produce evidence that he or she is duty-bound to maintain and produce shall not benefit by that failure. Accordingly, the Forum gave little weight to Respondent's testimony, except that which was corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person doing business in the State of Oregon, who employed one or more persons in the operation of that business.

2) Respondent employed Claimant from July 10 to August 20, 1992. Respondent suffered or permitted Claimant to render personal services to Respondent.

3) Respondent and Claimant had an agreement whereby Claimant's rate of pay was \$6.00 per hour.

4) Claimant worked 352 hours in 36 days.

5) Claimant earned \$2,112 in wages. Respondent paid him a total of \$1,100 in wages, and gave him \$45.50 worth of gas. Respondent owes Claimant \$966.50 in earned and unpaid compensation.

6) Claimant's last day worked was August 20, 1992, the same day Respondent and Claimant mutually agreed to terminate the employment.

7) Respondent willfully failed to pay Claimant all wages immediately when employment was terminated by mutual agreement, and more than 30 days have elapsed from the date Claimant's wages were due and payable.

8) Claimant's average daily rate for the wage claim period of employment was \$58.67. (\$2,112 earned divided by 36 days equals \$58.67 average rate per day.) Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$1,760.10 (Claimant's average daily rate, \$58.67, continuing for 30 days).

9) Respondent failed to prove an affirmative defense of financial inability to pay the wages due at the time they accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) Before the commencement of the contested case hearing, the Forum informed the Respondent of his rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

4) ORS 652.140(1) provides:

"Whenever an employer discharges an employee, or where such employment is terminated by

mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid immediately upon the termination by mutual agreement of Claimant's employment.

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due, and payable wages and civil penalty wages, plus

interest on both sums until paid. ORS 652.332.

OPINION

Hours Worked

The primary issue in dispute in this case was the number of hours Claimant worked. Respondent and the Agency stipulated that Respondent was Claimant's employer and that the agreed rate of pay was \$6.00 per hour. Once Claimant saw Respondent's record of hours worked from July 15 to August 20, 1992, Claimant agreed with the record, except for two hours on August 20. For the reasons stated in Finding of Fact 21, the Forum has found Respondent's record of hours worked for August 20 more reliable than Claimant's memory. Accordingly, the Forum credited Claimant with working 13 hours that day. During the period July 15 to August 20, the record shows Claimant worked 324 hours.

Claimant worked the remaining hours in dispute during the period July 10 to July 14. "Employ" includes to suffer or permit to work. ORS 653.010(1). Work time is all time an employee is required to be on the employer's premises, on duty, or at a prescribed work place. See ORS 653.010(12); OAR 839-20-040(2). There is no requirement on the employee for mental or physical exertion. Work time includes time spent waiting to perform work for the benefit and at the request of the employer. Unless an employee is specifically relieved from duty and the time period is sufficiently long for the employee to use for his or her own purposes, the employer must compensate the employee for time spent waiting. See OAR 839-20-041; *In the Matter of Dan's Ukiah*

Service, 8 BOLI 96, 106 (1989). In this case, Respondent suffered or permitted Claimant to remain at a prescribed work place, where he either waited for work or trained with other employees. The time Claimant spent waiting for work was compensable work time.

Similarly, training time is considered a cost of doing business for an employer. See OAR 839-20-044; *Dan's Ukiah Service, supra*. Thus, the time Claimant spent training was compensable work time. Therefore, the 28 hours Claimant spent either waiting or training from July 10 to 14 were compensable work hours.

Setoff

ORS 652.610(4) provides in part that

"Nothing in this section shall * * * diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process."

While Respondent has not asserted a lawful setoff on due legal process for the gas he gave Claimant, Claimant nonetheless agreed to allow a setoff for the gas from his wages due. Accordingly, the Forum reduced the amount of wages due by \$45.50.

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette*

Western Corp., 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent knew he had not paid Claimant all wages due and intentionally failed to pay those wages. Evidence showed that Respondent acted voluntarily and was a free agent. Respondent must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150. Further, he had an ongoing duty under the law to pay the unpaid wages. He admitted at different times that he owed Claimant either \$400.38 or \$521.28. ORS 652.160 provides:

"In case of dispute over wages, the employer must pay, without condition, and within the time set by ORS 652.140, all wages conceded by the employer to be due, leaving the employee all remedies the employee might otherwise have or be entitled to as to any balance the employee might claim."

While Respondent may not have known how to contact Claimant at first, he should have paid to the Agency the wages he conceded were due once the Agency notified him of the wage claim.

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Wayton & Willes, Inc.*, 7 BOLI 68, 72 (1988).

Financial Inability

Respondent testified that he was financially unable to pay Claimant. This Forum has repeatedly held that it is a respondent's burden to show the respondent's financial inability to pay a claimant's wages. See ORS 652.150, 183.450(2); OAR 839-50-260(3); see also *In the Matter of Jorion Belinsky*, 5 BOLI 1, 10 (1985); *In the Matter of Mega Marketing*, 9 BOLI 133, 138 (1990).

"The meaning of ORS 652.150 is obvious: the only way an employer who has willfully failed to pay termination wages when due can avoid paying a penalty for that failure is to show that the employer could not have paid the employee the wages when they were due. There are no exceptions or qualifications to the phrase 'financially unable.' It is a very strict standard designed to impress upon employers the absoluteness of the duty to pay wages which ORS 652.140 imposes upon them. If an employer has chosen to apply his or her resources elsewhere than to an employee's wages, [then] the employer cannot escape penalty wage liability. Herein, the Employer chose to make payments on other debts and to retain all his business assets rather than to pay the Claimant. This choosing, or setting of priorities, fall within the [ambit] of unwillingness, not inability, to pay." *In the Matter of Kenneth Cline*, 4 BOLI 68, 81 (1983).

Here, Respondent failed to show that he was financially unable to pay Claimant's wages at the time they accrued

and cannot escape penalty wage liability.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders KENNY ANDERSON to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR ALAN W. MIDDLETON in the amount of TWO THOUSAND SEVEN HUNDRED TWENTY-SIX DOLLARS AND FIFTY CENTS (\$2,726.50), representing \$966.50 in gross earned, unpaid, due, and payable wages, and \$1,760 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$966.50 from September 1, 1992, until paid and nine percent interest per year on the sum of \$1,760 from October 1, 1992, until paid.

In the Matter of HANDY ANDY TOWING, INC., Respondent.

Case Number 57-94

Final Order of the Commissioner
Mary Wendy Roberts
Issued May 26, 1994.

SYNOPSIS

Where Respondent withheld \$200 from Claimant's pay to reimburse itself for money it paid to a customer for damage allegedly caused by Claimant to the customer's vehicle, the Commissioner held that Respondent failed to pay wages earned when due, and granted summary judgment to the Agency for \$200 in withheld wages. Finding that the failure to pay was willful, the Commissioner ordered Respondent to pay civil penalty wages. ORS 652.140(1), 652.150, 652.310(1), (2); 652.360; 652.610(3), (4).

The above-entitled contested case came on regularly before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Handy Andy Towing, Inc., a corporation (Respondent), was represented by Darrell L. Cornelius, Attorney at Law, Portland.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, make the

following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or about April 13, 1993, Raymond Lee Duke (Claimant) filed a wage claim with the Agency. He alleged that he had been employed by Respondent, which had failed to pay all wages earned and due to him.

2) At the same time he filed the wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On February 1, 1994, through the Multnomah County Sheriff, the Agency served on Respondent Order of Determination No. 93-206 (Determination Order) based upon the wage claim filed by Claimant and the Agency's investigation. The Determination Order found that Respondent owed Claimant a total of \$211.50* in wages and \$1,440 in civil penalty wages. The Determination Order required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charge.

4) On or about February 8, 1994, Respondent through counsel timely submitted its answer and requested a hearing.

5) In its "Answer, Setoff and Counterclaim," Respondent denied owing

any unpaid wages and set forth the following:

"III. [Claimant] was employed by [Respondent, hereafter 'Handy Andy'] as a tow truck driver/operator. [Claimant]'s employment with Handy Andy's required [Claimant] to assist motorists with minor repairs and/or service and tow disabled vehicles. The motorists assisted by [Claimant] during his employment with Handy Andy's were customers of Handy Andy's. In December 1992, while rendering tow truck operator/driver services to a customer named Warren Johnson [hereafter 'Johnson'], [Claimant] negligently caused damage to Johnson's motor vehicle. The amount of damage caused by Duke to Johnson's vehicle was \$200.00. As a result of [Claimant]'s negligence, he was liable to Johnson in the sum of \$200.00 for the property damage which he caused. Handy Andy's paid to Johnson the sum of \$200.00 on [Claimant]'s behalf. [Claimant] signed a written authorization permitting Handy Andy's to deduct from his wages the sum of \$200.00 to repay Handy Andy's the amount that it had paid to Johnson on [Claimant]'s behalf.

"IV. Handy Andy's realleges the allegations set forth in Paragraph III. Handy Andy's is entitled to set-off by way of counterclaim \$200.00 from wages due for the sum it paid to Johnson on [Claimant]'s behalf."

* The amount was incorrect. Respondent agreed in October 1993 that \$11.50 was not authorized and issued a check in that amount to Claimant through the Agency.

6) On March 3, 1994, the Agency requested a hearing date, and on March 8, the Hearings Unit issued a Notice of Hearing to Respondent, to Respondent's counsel, to Respondent's registered agent, to Claimant, and to the Agency setting forth the time and place of the hearing and of the designated Hearings Referee.

7) With the Notice of Hearing, the Hearings Unit sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420, regarding the Forum's contested case process.

8) On March 24, 1994, the Agency filed a motion for summary judgment, reciting therein that no genuine issue of material fact existed and that the Agency was entitled to judgment as a matter of law. In support of its motion, the Agency pointed out that Respondent admitted employing Claimant and that the sole disagreement was the \$200 taken by way of deduction from Claimant's wages for damages to Johnson's vehicle, which deduction Respondent acknowledged. The Agency argued that such deductions were not allowable under ORS 652.610, that Respondent failed to comply with ORS 652.140 by failing to pay Claimant all wages due at termination, that such failure to pay was willful, and that Respondent was liable for penalty wages under ORS 652.150. Submitted with the motion were copies of documents from the Agency's wage claim file for Claimant.

9) Under OAR 839-50-150, Respondent had seven days from March

24 in which to respond to the Agency's motion.

10) On April 5, 1994, the Hearings Referee ruled in pertinent part as follows:

"On March 24, 1994 the Agency filed a motion asking for summary judgment in favor of the Agency herein pursuant to OAR 839-50-150(4)(a)(B) for the reason that no genuine issue of material fact exists. In accordance with OAR 839-50-150, Respondent had seven days within which to respond to the Agency's motion. No response has been received.

"The Agency seeks \$200 in wages which remain unpaid since the time wage claimant's employment was terminated. ORS 652.140. In addition, the Agency seeks penalty wages under ORS 652.150 for Respondent's willful failure to pay the wages when due. (\$6.00 per hour x 8 hours per day = \$48.00 average daily rate; \$48.00 x 30 days = \$1,440.00).

"Respondent's answer admits that wage claimant was employed by Respondent as a tow truck driver/operator and that while so employed damaged a customer vehicle. Respondent alleges further that wage claimant was thereby liable to the customer for the \$200 damage, that Respondent paid that amount to the customer and that wage claimant signed a written authorization permitting respondent to deduct the sum of \$200 from claimant's wages to repay Respondent for 'the amount that it had paid to [customer] on [Claimant]'s behalf.'

Respondent alleges that it 'is entitled to setoff by way of counterclaim \$200.00 from wages due for the sums it paid to [customer] on [Claimant]'s behalf.'

"Respondent apparently relies on ORS 652.610(3) which deals with permissible lawful deductions by an employer. That statute allows an employer to withhold, deduct or divert a portion of an employee's wages:

"(a) when required to do so by law;

"(b) when authorized in writing by the employee *and the deductions are for the employee's benefit*;

"(c) when authorized in writing *if the ultimate recipient of the money is not the employer*, or

"(d) when authorized by a collective bargaining agreement.

"Clearly, exemptions (a) and (d) are not involved.

"The mere fact that claimant authorized the deduction in writing is not controlling. The question comes under (b), whether such a deduction is for the employee's benefit or, in the alternative, (c), whether the ultimate recipient of the money is the employer. The 'benefit' language used in the statute refers to 'fringe benefits' as they are generally understood, such as discounted premiums or rates available only to employees. That does not obtain here. There is definitely a question whether Respondent may make its own employee its insurer. Similarly, it is

quite clear that under the admitted facts the employer ends up with the deducted funds, contrary to the exemption of (3)(c).

"[The statutes] require that an employer pay an employee the wages that are due and seek to resolve any claims the employer may have against the employee by other means. *Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164, 1166 (1983). *In the Matter of Ken Taylor*, 11 BOLI 139, 144 (1992).

"Accordingly, it is the ruling of the Forum that Respondent is not entitled to the claimed setoff and, having admitted withholding \$200 from wage claimant's wages, is liable for the unpaid wages as a matter of law, and the Proposed Order will provide that the Agency have judgment in that amount. Because Respondent's action in withholding the wages was done intentionally and was conduct done of free will, Respondent is also liable as a matter of law for penalty wages under ORS 652.150. However, Respondent has not admitted the rate or hours of pay, so evidence must be presented by the Agency on that aspect of the claim in order to fix the amount of penalty wages."

11) On April 8, 1994, the Forum received Respondent's response to the Agency's motion, dated, and mailed on April 5. The response asserted that there were material facts at issue, questioned the Forum's rule on summary judgment, asserted Respondent's right to examine witnesses and

cross-examine Agency witnesses under ORS chapter 183, and requested oral argument.

12) Also on April 8, the Hearings Referee received a letter from counsel dated and mailed April 7 which acknowledged the Referee's ruling of April 5, confirmed that the response of April 5 was untimely under the Forum's rule, and requested that the late filing be permitted and the ruling be reconsidered. Counsel cited the Agency's knowledge of and failure to advise the Forum about *Fireman's Fund American Insurance Companies v. Turner*, 260 Or 30, 488 P2d 429 (1971).

13) On April 8, 1994, the Hearings Referee ruled as follows:

"On April 8, 1994, the Hearings Referee received Respondent counsel's request for reconsideration of the ruling granting partial summary judgment herein on April 5, 1994. Counsel asserts that a response to the Agency's motion was submitted, although inadvertently untimely.

"Pursuant to OAR 839-50-150, a response to the Agency motion was due within seven days of service, i.e., by March 31, 1994, postmark (see OAR 839-50-040 (2)). A response postmarked April 5 was directed to the Agency. Accordingly, the response was untimely. This Forum strictly construes its own rules regarding timeliness. A complete copy of those rules was served with the hearings notice.

"The case cited by respondent in its reconsideration request involved a judicial determination of

liability and indemnity, factors not present in this case. Respondent's request is denied and the Hearings Referee adheres to his former ruling."

14) On April 13, 1994, Respondent's counsel advised the Hearings Referee by telephone that Respondent would not be opposing the Agency's penalty wage calculation or allegation of wage rate and that, in view of the Hearings Referee's rulings, there was no need to convene on April 14 for the scheduled hearing. Counsel was advised that the Hearings Referee would cancel the hearing and issue a Proposed Order based on the record consisting of the pleadings and correspondence to date. Respondent could then file timely exceptions to the Proposed Order, should it choose to do so. The Hearings Referee then orally advised the Agency of the conversation with counsel and canceled the hearing.

15) The Proposed Order, which contained an Exceptions Notice, was issued May 6, 1994. Exceptions were due by May 16, 1994. Respondent through counsel timely filed exceptions, which are dealt with in the Opinion section herein.

FINDINGS OF FACT -- THE MERITS

1) At times material, Respondent was in the automobile towing and repair business on SW Capitol Highway in Portland, Oregon.

2) About May 22, 1992, Claimant began working for Respondent. His duties were that of a tow truck driver/operator. He worked a minimum of 8 per day and 40 hours per week.

His last day of work was January 4, 1993.

3) When he began working for Respondent, Claimant signed a form providing:

"HANDY ANDY'S EMPLOYEE PURCHASE CONTRACT 5/28/92

"IT IS A BENEFIT OF EMPLOYMENT THAT YOU MAY CHARGE GASOLINE, PARTS, SERVICE LABOR, AND OTHER MISC. SERVICES.

"AS PART OF THIS BENEFIT WE ARE REQUIREING [sic] THAT YOU PAY FOR THESE SERVICES OUT OF YOUR PAY CHECKS.

"BY SIGNING THIS AGREEMENT YOU ARE ACKNOWLEDGING THAT YOU ARE FULLY AWARE THAT ANY GASOLINE, PARTS, SERVICES AND ANY OTHER MISC. CHARGES WILL BE DEDUCTED FROM YOUR PAYROLL CHECK.

"WE FEEL THIS IS ANOTHER OF OUR POSITIVE BENEFITS THAT YOU RECEIVE BY WORKING AT HANDY ANDY'S.

"I FULLY ACCEPT PAYROLL DEDUCTIONS

"/s/ Raymond L. Duke EMPLOYEE"

Claimant's signature was witnessed and the form was accepted on behalf of Respondent's management.

4) When he began working for Respondent, Claimant signed a second form providing:

"The undersigned employee of Handy Andy's acknowledges that he/she may have a claim made against the employee should the employee intentionally or negligently cause damage to the person or property of another while in the course of employment.

"In the event the employee is liable to another for damages to another's person or property due to the intentional act or negligence of the employee, the Employer may advance on behalf of the employee, such sums as are due to pay for such damages. Any such advance paid by the Employer shall be treated as an advance of wages to the employee and such advance shall be repaid to the Employer from the employee's wages upon such terms as the Employer and employee have agreed.

"DATED: 5-28-92

"EMPLOYEE: /s/ Raymond L. Duke"

5) In May 1992, Claimant charged \$11.50 for a part. Respondent's notation on the charge slip was "tow damage," and Respondent deducted \$11.50 from Claimant's pay, which was later repaid.

6) In December 1992, while Claimant was rendering tow truck driver/operator services to Respondent's customer Warren Johnson, the customer's vehicle was damaged.

7) On December 18, 1992, Claimant signed a form providing:

"The undersigned employee acknowledges that he has caused damage to the person or property of Warren Johnson for which the employee is liable in damages to Handy Andy's Towing in the amount of \$200.00.

"Employee authorizes the undersigned Employer to pay to Warren Johnson the sum of \$200.00 in payment of the claim against the employee as an advance against future wages or

compensation due employee. Employee authorizes the Employer to withhold the sum of \$50.00 every pay period to repay Employer for the above advance until such time as the advance is paid in full.

DATED: 12-18-92

EMPLOYEE: /s/ Ray Duke

EMPLOYER: /s/ [manager]

Effective as of 12/25 paycheck"

8) On December 18, 1992, Respondent issued check #5816 in the amount of \$200 payable to Warren Johnson. The check was noted "Ray Duke Damage."

9) Respondent deducted the sum of \$50.00 for "DAMAGES" from Claimant's paycheck for the period December 1 to 14, 1992. Respondent deducted the sum of \$50.00 for "DAMAGE" from Claimant's paycheck for the period December 15 to 31, 1992.

10) Following an injury on or about January 4, 1993, Claimant was unable to return to employment with Respondent. Respondent deducted the sum of \$100 for "DAMAGE" from Claimant's final paycheck for the period January 1 to 14, 1993.

11) Claimant's average daily rate was \$48.00 (\$6.00 x 8 hours). That figure multiplied by 30 (the maximum number of days civil penalty wages could accrue while Claimant remained unpaid) totaled \$1,440.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent employed one or more persons within this state.

2) Between approximately May 22, 1992, and January 4, 1993, Claimant earned \$6.00 an hour working for Respondent a minimum of 8 hours per day, 40 hours per week.

3) Following Claimant's last day of work on January 4, 1993, Respondent willfully failed to pay Claimant \$211.50 of all wages earned and unpaid when employment terminated. More than 30 days have elapsed from the date those wages were due, and Respondent has since paid the sum of \$11.50.

4) Claimant's average daily rate was \$48.00. Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$1,440.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

3) Respondent received a notice of rights as required by ORS 183.413(2).

4) The actions or inactions of the managers of Respondent, as agents or employees of Respondent, are properly imputed to Respondent.

5) ORS 652.310 provides, in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages

personal services of one or more employees * * *.

"(2) 'Employee' means any individual who * * * renders personal services * * * or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services."

6) ORS 652.140(1) provides:

"Whenever an employer discharges an employee, or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid immediately upon termination of his employment.

7) ORS 652.610 provides that an employer must furnish the employee an itemized statement each regular payday showing the amount and purpose of deductions made during the pay period at the time wages are paid. That statute continues as follows:

"(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:

"(a) The employer is required to do so by law:

"(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books;

"(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of

the money withheld is not the employer, and that such deduction is recorded in the employer's books; or

"(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party.

"(4) Nothing in this section shall be construed as prohibiting the withholding of amounts authorized in writing by the employee to be contributed by the employee to charitable organizations, including contributions made pursuant to ORS 243.666 and 663.110; nor shall this section prohibit deductions by check-off dues to labor organizations or service fees, where such is not otherwise prohibited by law; nor shall this section diminish or enlarge the right of any person to assert and enforce a lawful set-off or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process."

ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by

* The unpaid wages were earned in separate pay periods wherein the hours and earnings varied. Thus, the Forum has used the basic hourly rate and minimum hours per day to calculate civil penalty wages.

showing financial inability to pay the wages or compensation at the time they accrued."

ORS 652.360 provides, in part:

"No employer may by special contract or any other means exempt the employer from any provision of or liability or penalty imposed by ORS 652.310 to 652.405 or by any statute relating to the payment of wages, except insofar as the commissioner in writing approves a special contract or other arrangement between an employer and one or more of such employer's employees."

Respondent's withholding of Claimant's wages on its own account without a judicial determination of liability for the customer damage and without a written approval from the Commissioner was a willful failure to pay all wages or compensation to Claimant when due as provided in ORS 652.140, and Respondent is liable for a civil penalty under ORS 652.150.

8) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant's earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

The key facts in this case were not in dispute. As a condition of employment with Respondent, Claimant signed an agreement allowing the employer to deduct from his wages any damage that his intentional or negligent

act might cause to a customer or to a customer's property. Subsequently, when damage occurred to a customer's vehicle in connection with a tow Claimant was handling, Respondent obtained Claimant's specific agreement to reimburse Respondent for the cost of that damage out of his wages. Respondent then proceeded to deduct from his earnings until fully repaid. Based upon these facts, the Hearings Referee granted the Agency's motion for summary judgment, finding as a matter of law that Respondent had violated ORS 652.140.

There was no averment that the legal responsibility for the customer's damage was judicially assessed or even that Claimant's agreement was in settlement of a claim by the employer. No consideration (other than, arguably, continued employment) flowed from the employer. There was no allegation that either the employer or the customer released Claimant from a claim for the alleged damage or from any further claim. Written authorization notwithstanding, it is clear that the deduction which resulted was not for the benefit of Claimant within the context of ORS 652.610(3)(b). It is equally clear that "the ultimate recipient of the money withheld" was the employer, contrary to ORS 652.610(3)(c).

Respondent cited *Fireman's Fund American Insurance Companies v. Turner*, 260 Or 30, 488 P2d 429 (1971), as making lawful "Claimant's written authorization to deduct amounts from his wages by his employer." The Forum cannot agree. The cited case involved an action for indemnity by an employer's insurer

against an employee's insurer. Judgment against both employer and employee for damages to a third party had resulted from a prior proceeding, which found the employee negligent and the employer responsible under the doctrine of respondeat superior, without claim of negligence on the part of the employer. The case simply stands for the proposition that an employer may seek indemnity from a negligent employee for damages paid to a third party. It does not authorize a wage deduction, particularly in view of the current wage statutes.

At the time of the *Fireman's Fund* decision, ORS 652.610 in its entirety read as follows:

"(1) All persons, firms, partnerships, associations, cooperative associations, corporations, municipal corporations, the state and its political subdivisions, except the Federal Government and its agencies, employing, in this state, during any calendar month five or more persons, and withholding for any purpose, any sum of money from the wages, salary or commission earned by an employee, shall provide such employee on regular paydays with a statement sufficiently itemized to show the amount and purpose of such deductions made during the respective period of service which said payment covers.

"(2) The itemized statement shall be furnished to the employee at the time payment of wages, salary or commission is made, and

may be attached to or be a part of the check, draft, voucher or other instrument by which payment is made, or may be delivered separately from such instrument."

At the time of the *Fireman's Fund* decision, ORS 652.410 provided:

"ORS 652.310 to 652.400 do not effect the right of any employer under lawful contract to retain part of the compensation of any employee for the purpose of affording such employee insurance, or hospital, sick or other similar relief. Nor shall those statutes diminish or enlarge the right of any person to assert and enforce a lawful set-off or counter-claim or to attach, take, reach or apply an employee's compensation on due legal process."

In 1977, the Oregon legislature amended the threshold in section 1 from "five or more persons" to "one or more persons" and, repealing ORS 652.410, added the following new sections:

"(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:

"(a) The employer is required to do so by law;

"(b) The deductions are for medical, surgical or hospital care or service, for the employee's benefit, and are recorded in the employer's books;

"(c) The employee has voluntarily signed an authorization for a deduction;

* Pre-1987 opinions and statutes use the spelling "employe." This order uses the modern spelling.

** Section 1, chapter 618, Oregon Laws 1977.

"(d) The deduction is pursuant to an individual employment contract with the employer, or

"(e) The deduction is authorized by a collective bargaining agreement to which the employer is a party.

"(4) Nothing in this section shall be construed as prohibiting the withholding of amounts authorized in writing by the employee to be contributed by the employee to charitable organizations, including contributions made pursuant to ORS 243.666 and 663.110; nor shall this section prohibit deductions by check-off dues to labor organizations or service fees, where such is not otherwise prohibited by law; nor shall this section diminish or enlarge the right of any person to assert and enforce a lawful set-off or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process."

It was the above language under which the Oregon Court of Appeals decided *Garvin v Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164 (1983). In that case, the employer had held the plaintiff's final paycheck as security until plaintiff made good losses he allegedly had caused through damaging the employer's trailer, removing and keeping items from the trailer without permission, taking gasoline from the employer's vehicles, and making unauthorized purchases on the employer's account. The employer alleged that the employee had agreed that the check could be held until he repaired

the trailer. The court held that even if the employer had a "good faith belief" that it was entitled to withhold the check, that was not a defense to a wage claim brought under ORS chapter 652.

Citing ORS 652.360 as further prohibition against an employer's unpenalized failure to pay, the court said:

"Together these statutes require that an employer pay an employee the wages that are due and seek to resolve any claims the employer may have against the employee by other means. Plaintiff was entitled as a matter of law to the penalty provided in ORS 652.150." *Garvin, supra*.

The concurring opinion makes the rationale of the statute, and of Oregon's wage legislation in general, even more clear.

"The wage recovery statutes appear to me to be intended to provide for a relatively summary way for a person in a decidedly unequal bargaining position — an employee — to obtain what is really due him. The duty on the employer to pay is absolute. That is the message of ORS 652.140(2)." *Garvin, supra* (Gillette, P.J., specially concurring).

In 1980 and 1981, ORS 652.610 was amended to its present wording. The changes eliminated the previous subsection (d), and amended subsections (b) and (c) to read:

"(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and

are recorded in the employer's books;

"(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer, and that such deduction is recorded in the employer's books."

The legislature intended two things: (1) that any withholding beyond that required by law or bargaining agreement must be authorized in writing and be for the employee's benefit; and (2) that the employer could not be the ultimate recipient. Those changes in the statutory language did not change the statutory intent enunciated by the Court of Appeals opinion and Judge Gillette's concurrence in *Garvin* that the duty on the employer to pay remains absolute. That is still the message of ORS 652.140.

Civil Penalty

Respondent's failure to pay Claimant all of the wages due was willful. It was done intentionally with knowledge of what was being done and as a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). In that case, the Supreme Court disapproved the employer's deduction of the employee's "IOU" from wages and vacation pay owed, and termed such a deduction "willful" under the penalty statute. A footnote referring to ORS 652.410 (now encompassed in 652.610) suggests approval of the contention that "lawful set-off or counterclaim" refers to a judicial determination. 276 Or 1083, 557 P2d at 1348.

Respondent's Exceptions

Respondent timely filed exceptions to the Proposed Order. Respondent reiterated its arguments from its response to the Agency's summary judgment motion, namely, that the motion was not supported by sworn testimony, that there were material facts in dispute, and that the Forum's summary judgment rule fails to provide for procedural due process. The Agency's motion relied upon those portions of its Determination Order which were admitted by Respondent's answer plus those material affirmative allegations of that answer upon which Respondent relied to justify the deduction. Sworn evidence was not necessary to frame the dispute, which was one of law. There were no material facts disputed, it being immaterial whether Claimant believed he owed Respondent for the damage or even whether the deduction authorization was voluntary.

Finally, OAR 839-50-150(4) provides, in part

"All motions must be submitted in writing to the hearings referee through the hearings unit. The nonmoving participant shall respond to a written motion within seven days after service of the motion, unless the hearings referee orders otherwise. Motions which may be made in any hearing * * * include but are not limited to the following:

* * * *

"(4) Motion for Summary Judgment:

"(a) A motion for summary judgment may be made by a

* Section 2, chapter 1, Oregon Laws 1980 (special session); section 5, chapter 594, Oregon Laws 1981.

* The more modern spelling is "willful." ORS 652.150 (1993 ed).

participant, or by decision of the hearings referee, for an accelerated decision in favor of any participant as to all or part of the issues raised in the pleadings. The motion may be based on any of the following conditions:

"(A) Direct or collateral estoppel;

"(B) No genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings; or

"(C) Such other reasons as are just."

* * * *

"(c) In cases where the referee grants the motion, the decision shall be set forth in the proposed order."

The rule outlines the various bases for the motion and provides for a timely response and a written ruling. The procedure outlined by the rule was followed here and provides due process. Under the Forum's previous summary judgment rule, OAR 839-30-070(6), which was worded almost exactly as is 839-50-150(4), the Commissioner confirmed the granting of summary judgment based on a respondent's admissions. *In the Matter of Efrain Corona*, 11 BOLI 44, 53-57 (1992), *aff'd without opinion*, *Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993). Respondent's due process concerns are misplaced.

Respondent's other exceptions point toward the failure of the Proposed Order to find as fact or ultimate fact the following:

"i. Claimant negligently caused \$200.00 damage to the vehicle owned by Warren Johnson.

"ii. Due to his negligence, claimant was liable damages in the amount of \$200.00 to Warren Johnson.

"iii. Respondent advanced on Claimant's behalf and for Claimant's benefit the sum of \$200.00 to Warren Johnson to pay for the damage done to Warren Johnson's vehicle by Claimant.

"iv. Claimant signed a written authorization permitting Respondent to deduct from Claimant's wages the sum of \$50.00 per pay period to reimburse Respondent for the monies it paid to Warren Johnson on Claimant's behalf."

The point of this proceeding and of disposing of the matter through summary judgment is that it is immaterial that Respondent may have had a claim for indemnity from the wage claimant; the statute precludes an employer from utilizing the kind of self-help demonstrated in this case. Indeed, it was that kind of overreaching that the particular statute was intended to avoid. If the employer has a cause of action against its employee, it must take the same steps as others and not take advantage of the employment relationship to indemnify itself. That is the combined message of ORS 652.140 and 652.610. The latter statute was not intended to:

"diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach or apply an employee's compensation *on due*

legal process." ORS 652.610(4) (emphasis supplied).

A policy which requires an employee to agree, as a condition of employment, that damages the employee may cause in the future may be deducted from the employee's wages is contrary to public policy. Any purported authorization to deduct from the employee's pay damages allegedly incurred by a third party without adjudication of the liability of both the employee and the employer is void. In *Fireman's Fund American Insurance Companies v. Turner*, 260 Or 30, 488 P2d 429 (1971), cited by Respondent, there was an adjudication of negligence on the part of the employee and one of a lack of negligence on the part of the employer. That case simply does not apply here. It was decided before the current version of ORS 652.610, did not involve deductions from wages at all, and certainly cannot be any authority in favor of Respondent's actions in this case. *Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164 (1983), decided under ORS 652.610, controls.

Oregon courts discern the intent of the Legislature in order to interpret a statute. That is done by examining both the text and the context of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). ORS 652.610 (the text) plainly limits wage deductions; the statutory scheme of which it is a part (the context) points toward the absolute duty of the employer to pay its worker all wages due in a timely manner. Absent a judicially determined indebtedness from employee to employer or a special agreement approved in writing by

the Commissioner, an employer cannot legally withhold from the employee's wages any sums other than those enumerated in the statute.

The Forum hereby adopts and confirms the summary judgment ruling and provisions of the Proposed Order.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders HANDY ANDY TOWING, INC. to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR RAYMOND LEE DUKE in the amount of ONE THOUSAND SIX HUNDRED FORTY DOLLARS (\$1,640), representing \$200 in gross earned, unpaid, due, and payable wages, and \$1,440 in penalty wages, PLUS

2) Interest at the rate of nine percent per year on the sum of \$200 from January 14, 1993, until paid, PLUS

3) Interest at the rate of nine percent per year on the sum of \$1,440 from February 13, 1993, until paid.