In the Matter of

CENTRAL OREGON BUILDING SUPPLY, INC., Respondent.

Case Number 21-98

Final Order of the Commissioner

Jack Roberts

Issued April 7, 1998.

SYNOPSIS

Where respondent's manager, who was complainant's supervisor, verbally harassed complainant because he was a worker who had invoked and used Oregon's workers' compensation procedures, the commissioner held that respondent discriminated against complainant in the terms and conditions of his employment, in violation of ORS 659.410(1). The commissioner awarded complainant $25,000 for mental suffering. ORS 659.410(1).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 6 and 7, 1998, in a conference room at the Bureau of Labor and Industries offices, 1250 NE Third, Suite B-105, Bend, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Ronald E. Bemis (Complainant) was present throughout the hearing. Central Oregon Building Supply, Inc. (Respondent) was represented by Brian Gingerich, Attorney at Law. Dave Paterson, Respondent's president, was present throughout the hearing.

The Agency called the following witnesses: Brenda Bemis, Complainant's wife; Ronald E. Bemis, Complainant; John James (Jim) Blair, Respondent's former employee; Dennis Fitzpatrick, Respondent's former employee; Lorenzo Gonzalez, Respondent's former production manager and swing shift manager; and Peter Martindale, a senior investigator with the Civil Rights Division of the Agency.

Respondent called the following witnesses: James Richard (Rich) Blair, Respondent's former assistant manager of the truss department; William (Bill) Brown, Respondent's plant manager of the truss department; Vincent (Vinni) DiLorenzo, Respondent's former employee; Paul Hamly, Respondent's employee; Chris Paterson, Respondent's employee and son of Dave Paterson; Dave Paterson, Respondent's owner and president; Todd Schouviller, Respondent's employee; and Steve Sjostrand, Respondent's sales manager and human relations director.

Administrative exhibits X-1 to X-9, Agency exhibits A-1 to A-11, and Respondent Exhibits R-1, R-2, R-5 to R-8, R-9 pp. 1-2, and R-10 were offered and received into evidence. Respondent withdrew exhibits R-3 and R-4. The record closed on January 7, 1997.

Having fully considered the entire record in this matter, I, Jack 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 8, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondent discriminated against him because he had an on-the-job injury and utilized the workers' compensation system in that, following his on-the-job injury and his return to work on light duty, Respondent's manager, Bill Brown, required Complainant to work beyond his work limitations, repeatedly verbally abused him, and terminated him.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices by Respondent in violation of ORS 659.410 and 659.425.

3) On November 10, 1997, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent's supervisory employee, Bill Brown, harassed Complainant because he had invoked and used Oregon's workers' compensation procedures. The Specific Charges alleged that Respondent's action violated ORS 659.410(1). The Agency claimed damages for Complainant's mental suffering.

4) 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.

5) On November 25, 1997, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges.

6) On November 19, 1997, Respondent's attorney requested a postponement of the hearing because of a conflict between the date set for hearing and a settlement conference in another matter. The ALJ denied Respon- dent's request, pursuant to OAR 839-050-0150(5)(a) and 839-050-0020 (10), because the notice of hearing in this case was issued and received by Respondent's counsel before the settlement conference was scheduled, and therefore Respondent had not shown good cause for a postponement.

7) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondent each filed a Summary of the Case.

8) At the start of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

9) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) Following the presentation of all the evidence, the Agency moved to amend the Specific Charges to conform them to the evidence and allege violations of ORS

659.410 (termination based on utilizing the workers' compensation system) and 659.425(1) (a-c) (harassment and termination based on physical disability). Respondent opposed the motion and the ALJ denied it. The ruling was based on ORS 183.415(10) (the ALJ's duty to insure that the record developed at hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before him) and OAR 839-050-0140(2). Respondent had objected to evidence on such issues. The ALJ found that presentation of the merits and defense would not be served by the amendments.

11) On March 6, 1998, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At times material, Respondent was an Oregon corporation operating as a building materials dealer. Respondent employed six or more persons in Oregon. Dave Paterson was Respondent's owner and president.

2) Bill Brown was Respondent's truss plant manager and one of Complainant's immediate supervisors. Rich Blair was an assistant manager (under Brown) and directly supervised Complainant. Brown was a hands-on manager in charge of the department and the drivers.

3) Respondent employed Complainant as a delivery driver and crane operator from on or about June 16, 1993, until on or about June 12, 1996.

4) Complainant was initially hired to assemble trusses in Respondent's truss department. After around two weeks, Rich Blair offered Complainant a job as a truck driver and crane operator. Blair normally scheduled the delivery drivers. Complainant accepted. Blair and another driver trained Complainant for around two months. Complainant attended OSHA classes for crane operators and got the required commercial driver's license. After he was trained and licensed, Complainant worked five days per week and made deliveries all over central Oregon. Occasionally he volunteered to work weekends. When Complainant was regularly driving the truck and making deliveries, he was away from Respondent's business around 80 percent of the time.

5) Complainant's starting pay on June 18, 1993, was $5.75 per hour. He received raises to the following amounts on the dates indicated: $6.00 on July 19, 1993; $6.50 on August 26, 1993; $7.00 on November 10, 1993; $7.75 on July 11, 1994; $8.25 on July 11, 1995; $8.50 on January 26, 1996; and $9.50 on May 11, 1996.

6) Todd Schouviller was hired to be a delivery driver and crane operator. He had a commercial driver's license and prior experience as a truck driver and crane operator. His starting pay on February 2, 1994, was $6.00 per hour. He received raises to the following amounts on the dates indicated: $6.75 on March 25, 1994; $7.00 on May 10, 1994; $7.50 on May 26, 1994; $8.00 on July 11, 1994; $8.50 on January 26, 1995; $9.00 on

August 26, 1995; and $9.50 on May 11, 1996.

7) At first, Complainant got along well with Brown. Complainant tried to be sociable with Brown and other workers. Before Complainant's ankle surgery (described below), Brown visited Complainant at home two or three times and they drank beer together. Complainant thought Brown treated the employees unprofessionally and abusively. Complainant thought Brown did not care about the employees, and Brown was only concerned with production.

8) Brown regularly called workers names and insulted them. He used derogatory and racial names. If a worker was hurt (on or off the job), Brown called the worker a "wuss," "gimp," "idiot," "clumsy," and names like that.

9) Complainant thought Rich Blair was an offensive person who acted like a drill sergeant. Blair did not regularly call Complainant names related to his injuries (described below), but once, during a meeting of several people, Blair called Complainant a "pill-popper" because he was taking anti-inflammatory pills. Other workers also thought Blair was loud and obnoxious.

10) During his first year of employment, Complainant slipped on spilled oil and fell off the bed of his truck. He hit his elbow and shoulder. He reported the injuries to Brown and Blair. Blair encouraged him not to file a workers' compensation insurance claim. He said that Respondent would pay the doctor's bill to avoid using its workers' compensation insurance. Complainant did not file a claim or go to a doctor. He got some physical therapy for stiffness due to the injury. Respondent paid around $2,000 for the therapy. Complainant believed that Respondent fired employees who filed workers' compensation claims.

11) Respondent's managers discouraged employees from filing workers' compensation insurance claims if their injuries weren't serious. Respondent preferred to pay the employees' medical expenses, rather than have them file workers' compensation insurance claims. Respondent sometimes found light duty jobs for injured workers until they were ready to resume their regular duties.

12) Some workers who were injured on the job filed workers' compensation insurance claims and perceived no different treatment by Respondent as a result.

13) On April 29, 1994, Complainant sustained an on-the-job, compensable, disabling left ankle injury. At Brown's request, Complainant was helping Brown and two others push a cart loaded with trusses to a truck for loading. Complainant was in the front, pulling on the cart's steering handle. After they had moved the cart about half way into the yard, Brown said to Complainant, "I forgot, Ron, you're a gimp. You better stand back so you don't get hurt." Brown called him a "gimp" because of his earlier shoulder injury. About that time the cart ran over Complainant's ankle. Brown called him a "stupid fool" when he was injured. Respondent sent Complainant home and discouraged him from seeing a doctor and filing a workers' compensation insurance claim. At first, Complainant did not file a claim because he thought his ankle was only sprained and because of his perception of how Respondent treated employees who filed claims.

He took time off work and iced the ankle. The next day Complainant was seen by a doctor and had the ankle x-rayed.

14) Although it was Rich Blair's job to write a report about any employee who acted unsafely, neither he nor Brown wrote a report about Complainant's ankle injury. Complainant received no written reprimand about the ankle injury.

15) Bill Brown and Steve Sjostrand signed a memorandum, handwritten by Sjostrand and dated May 26, 1994, concerning Complainant's accidents. In the memo, they referred to the accident when Complainant slipped off the trailer and hurt his shoulder and the accident when he injured his ankle. They characterized both accidents as preventable, and wrote that Complainant's "failure to work in a safe manner will place his job in jeopardy." Complainant never saw or signed the memorandum.

16) On Complainant's one-year written evaluation, Bill Brown and Steve Sjostrand acknowledged that Complainant had once been nominated employee of the month. They found his performance "real good," except for making sure his truck was loaded and ready to go for the next day. Under "Area of Concern," they wrote, "Ron needs to be more safety concious [*sic*] and to take more responsibility for his own safety and the safety of others working with him." Under "Expectations," they wrote, "I would like to see Ron go the remainder of the year with Ø acidents [*sic*]. I also would like to see Ron have his truck loaded + ready to go for the next day." Complainant signed the evaluation, which was written on a form entitled "90 Day Evaluation." During the rest of his employment with Respondent, Complainant did not receive another written evaluation.

17) Complainant's ankle continued to bother him, and a surgeon advised him he needed surgery. At that point, Brown told him to fill out a workers' compensation claim form. Complainant filed a workers' compensation injury report on August 23, 1994, concerning his left ankle injury.

18) Surgery was performed on Complainant's ankle on October 31, 1994. He was off work until November 15, 1994. When he returned to work, Respondent put him on light duty in the office. He was receiving physical therapy. He did some deliveries with an assistant to help strap and unstrap the load. During this time he wore a removable cast and used crutches. He wore plastic bags on his cast to protect it from the snow. Because of the deliveries, Complainant missed around 10 physical therapy appointments.

19) After Complainant had surgery on his ankle, Brown regularly referred to him as "gimp," "wuss," "hoppy," "crip," "cripple," "puss," and "stupid," and criticized Complainant for being slow. Blair also called Complainant a "crip" and other names after the ankle injury. Brown criticized Complainant's job performance, although Complainant was doing a good job. Other workers considered Complainant a safe worker. Complainant felt that Brown was harassing him and treating him differently than he had before the ankle injury. Jim Blair, who was Rich Blair's brother and who worked in the yard loading and unloading trucks, believed Brown had a different attitude toward Complainant after the ankle injury. He

thought Brown was meaner to Complainant because Complainant was slower, and Brown was never satisfied with him.

20) Complainant had a second surgery on February 8, 1995. He was taken off work until March 18, 1995. When he returned to work, Respondent again put him on light duty. He worked first in the truss department office. There was not enough work for him there, so Respondent put him in the "front" office, where the roofing and sales departments were. Soon he was sent back to the truss department. He answered phones, made copies, filed, and ran errands.

21) At that time, Brown's treatment of Complainant worsened. Rich Blair was making deliveries, so Brown was Complainant's direct supervisor. Brown was unhappy that Complainant was working in the office. Complainant was supposed to keep his foot elevated to relieve his pain. Brown complained to Complainant about this and called him a "gimp."

22) At some point, Complainant talked to Brown about the verbal abuse. Brown did nothing and the problem was not resolved.

23) While Complainant was on light duty and while he was still in a cast and using crutches, he volunteered to deliver a load because Rich Blair was on a one-week vacation. Brown directed Complainant to make additional deliveries that week. Brown pushed Complainant to work beyond his light-duty work limitations. Complainant complained to Brown about the deliveries because he was on light duty and was taking pain medications. Brown told him not to be a "wuss" and said if Complainant couldn't do to job, Brown would find someone who could without whining. Complainant contacted the workers' compensation insurance company and his doctor, who gave him a note that prohibited him from driving.

24) When Complainant's wife went to Respondent to deliver the doctor's note, Brown asked her why gimpy couldn't limp down on his own.

25) Without his knowledge, Complainant's wife talked to Dave Paterson about the offensive treatment Complainant was getting from Rich Blair and Brown. Her primary complaint was about Blair and his "pill popping" comment about Complainant. Paterson talked to Blair about his treatment of Complainant. Blair later talked to Complainant and his wife about his treatment of Complainant, and he apologized for his conduct. He stopped teasing Complainant after that. Blair, Brown, and a dispatcher in the building department later attended a managerial course on managing people.

26) After Brown had worked Complainant beyond his light duty work restrictions, Complainant complained to Respondent's president, Dave Paterson. Complainant complained about Brown sending him out on deliveries and, along with the other driver, complained about not getting pay raises. Paterson told Complainant that he (Paterson) needed him in the truck, and that Complainant was no good to Respondent in the office. He said once Complainant got well and returned to driving, they would discuss a raise. Paterson and Steve Sjostrand, Respondent's human resources mana- ger, later talked to Complainant about his work restrictions. Respondent stopped working Complainant beyond his light duty re-

strictions. Brown later warned Complainant that if he ever went over Brown's head again, Brown would make sure Complainant got fired. He told Complainant that he wouldn't get a raise until he was driving again.

27) On July 14, 1995, the Workers' Compensation Division, Respondent, and Complainant entered into a workplace modification agreement. Complainant qualified for the Division's Preferred Worker Program. Under the agreement, Respondent received $25,000 to help it purchase a particular truck and crane for $115,000. The truck and crane had features, such as an automatic transmission and a remote control for the crane, that would assist Complainant to meet the physical requirements of his job. Respondent purchased the truck and crane to accommodate Complainant's work restrictions. Respondent would not otherwise have bought this truck and crane. After Respondent got the truck and Complainant was released to return to work, Complainant went back to his old job.

28) On August 9, 1995, Complainant was declared medically stationary.

29) Due to his ankle injury, Complainant was permanently restricted "regarding the duration of walking and was left with a permanent limp when he walk[ed]." Because of nerve damage, Complainant's foot constantly hurt or stung. His leg went numb. The limp caused hip and back problems. The Workers' Compensation Division awarded Complainant permanent partial disability for a 35 percent loss in his left foot (ankle).

30) After Complainant began using the new truck, Brown still considered Complainant slow and incompetent. He called Complainant "gimp" every day, and said he was a "wuss" and a "whiner." He treated Complainant in an angry, aggressive way. At times, Complainant had to operate his old truck-crane that did not have an automatic transmission because another driver was using the newer, modified truck. Complainant complained to Blair about this, and it was eventually resolved. Complainant began constantly arguing with Brown about pay raises that had been promised.

31) On June 4, 1996, Complainant had an accident with Respondent's crane truck that damaged a contractor's pickup truck. Respondent paid $2,800 for those damages. On June 6, 1996, Complainant was using a crane to unload trusses at a worksite. A front stabilizer on the crane truck gave way and the truck flipped onto its side. When Brown arrived at the scene, he screamed and cursed at Complainant and fired him. Respondent later put Complainant on probation while Respondent and OR-OSHA investigated the accident. Damage to the truck cost Respondent $68,000. Respondent terminated Complainant on June 12, 1996, in part because of the recent truck accidents. Complainant blamed Brown for his termination.

32) Complainant felt embarrassed, degraded, and belittled by Brown's offensive comments. His self confidence and self esteem were diminished. He did not feel able bodied or like a man because of Brown's comments. He went home each day upset because of Brown's treatment.

He was angry, depressed, and frustrated. At times he wanted to quit, but he had a mortgage to pay and a family to support. The emotional effects on Complainant upset and worried his whole family. He began smoking and drinking more than before. Complainant received no counseling for these emotional effects. Sometime after he was terminated by Respondent, he talked to Rich Blair about getting another job with Respondent.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent employed six or more persons within the state of Oregon.

2) Respondent employed Complainant.

3) Complainant sustained an on-the-job, compensable injury. He applied for and received workers' compensation insurance benefits.

4) Thereafter, Respondent's supervisory employee, Bill Brown, repeatedly and continuously called Complainant names such as "gimp," "wuss," "hoppy," "crip," "cripple," "puss," and "stupid," and criticized Complainant for being slow. Brown pushed Complainant to work beyond the limitations of his work release. Brown's conduct was unwelcome and offensive to Complainant. Brown directed this conduct at Complainant because he was a worker who had applied for benefits or invoked or utilized the workers' compensation procedures.

5) A reasonable person in Complainant's circumstances would find that Brown's conduct had the effect of creating a hostile and offensive working environment.

6) Respondent knew or should have known of Brown's conduct.

7) Complainant suffered mental distress because of Brown's conduct.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.460. ORS 659.400 (3) and 659.010(12) and (13); OAR 839-006-0115(1).

2) Complainant was Respondent's "worker," as that term is used in ORS 659.410(1). OAR 839-006-0105(4), 839-006-0120.

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 659.435.

4) The actions, inactions, and knowledge of Dave Paterson and Bill Brown, employees or agents of Respondent, are properly imputed to Respondent.

5) 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."

Respondent violated ORS 659.410(1).

6) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), 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 and 659.400 to 659.545, 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 the Complainant and other persons similarly situated.

OPINION

The Agency alleges that Respondent's supervisor, Bill Brown, harassed Complainant because of his status as an injured worker who had applied for benefits or invoked or utilized Oregon's workers' compensation procedures. It contends that Brown's conduct was unwelcome to Complainant and created an intimidating, hostile, and offensive work environment, which caused Complainant mental suffering. This harassment, the Agency charges, constituted discrimination with respect to the terms and conditions of employment, in violation of ORS 659.410(1). Respondent denies the allegations of harassment and damages.

This is a case of first impression for this forum. The Commissioner has expressly recognized harassment as a form of discrimination based on race, religion, sex, age, and national origin. Harassment on the basis of disability is prohibited by ORS 659.425. *Leggett v. First Interstate Bank of Oregon*, 86 Or App 523, 530-31, 739 P2d 1083, 1087-88 (1987) (arachnophobic complainant, harassed by her coworkers who put rubber spiders on her desk, could show disability discrimination if she could show she "was terminated for resisting harassment relating to her spider phobia"). This, however, is the first contested case to address harassment based on applying for benefits or invoking or utilizing the state's workers' compensation procedures. Nevertheless, there can be little doubt that the prohibition of discrimination by ORS 659.410(1) includes a prohibition of harassment based on applying for benefits or invoking or utilizing the state's workers' compensation procedures. *In the Matter of James Meltebeke*, 10 BOLI 102, 129 (1992) ("Oregon has a compelling interest in enforcing its laws that prohibit harassment and discrimination based upon the protected classes listed in ORS chapter 659"). Respondent did not contend otherwise.

Prima Facie Case

To establish a prima facie case of harassment in this matter (that is, in a case of hostile environment harassment by a supervisor of a worker who has applied for benefits or invoked or utilized the workers' compensation procedures), the Agency must present evidence to show that: (1) respondent is an employer of six or more persons; (2) respondent employed complainant; (3) complainant is a member of a protected class (that is, a worker who applied for benefits or invoked or utilized the workers' compensation procedures); (4) respondent's supervisory employee engaged in unwelcome verbal or physical conduct directed at complainant because of his protected class; (5) the conduct had the purpose or effect of creating an objectively intimidating, hostile, or of-

fensive working environment; (6) respondent knew or should have known of the conduct; and (7) complainant was harmed by the conduct. OAR 839-005-0010; 839- 007-0550; *In the Matter of Kenneth Williams*, 14 BOLI 16, 24 (1995).

The Evidence of Harassment in Violation of ORS 659.410(1)

The evidence was undisputed on the first three elements of the prima facie case. Conflicting evidence was presented on the remaining elements.

The Agency presented credible evidence that Bill Brown frequently called Complainant a variety of demeaning names related to his ankle injury and resulting limp. Credible evidence also showed that Brown required Complainant to work for a week beyond his light duty restrictions. Complainant gave credible testimony that he found Brown's conduct unwelcome and offensive. Credible evidence showed that Respondent's managers discouraged workers from filing workers' compensation insurance claims, and that Brown's harsh treatment of Complainant increased after he filed a claim. Thus, one could infer that Brown's unwelcome conduct was because of Complainant's membership in the protected class.

There was credible evidence that others found Brown's name calling and harsh treatment of Complainant abusive and offensive. Thus, a reasonable person in Complainant's shoes would have found that Brown's conduct created a hostile and offensive work environment.

Unrebutted evidence showed that Brown was Complainant's supervisor. He was the person who evaluated Complainant and recommended pay raises. Complainant testified credibly that, after he complained to Dave Paterson about his pay and being worked beyond his light duty restrictions, Brown threatened to get him fired if Complainant ever went over his head again. Complainant's wife testified credibly that she complained to Paterson about Brown's and Rich Blair's treatment of her husband. In addition, other employees and at least one other manager knew of Brown's hostile treatment of Complainant. This evidence shows that Respondent had actual knowledge of Brown's conduct. Even if it did not have actual knowledge, it certainly had constructive knowledge. While credible evidence shows that Paterson immediately took care of Complainant's complaint about working beyond his restrictions, there is no evidence of timely or appropriate corrective action related to Brown's other conduct toward Complainant.[1] Complainant and his wife testified credibly about mental suffering he experienced due to Brown's conduct.

With the credible evidence described above, the Agency established a prima facie case. Respondent presented evidence to refute the prima facie case. For the reasons given below, the forum finds

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[1]After Complainant's wife complained to Dave Paterson about Brown and Blair, Brown (along with Blair and another employee) attended training on how to manage people. However, no evidence suggests that this training did anything to correct Brown's offensive conduct. No evidence suggests that Respondent did anything to follow up or evaluate whether the training had any substantive corrective effect.

that the preponderance of credible evidence on the whole record supports the Agency's allegations.

Respondent presented witnesses who testified they did not hear Brown call Complainant demeaning names. However, some of those witnesses, such as Sjostrand, Chris Paterson, and Hamly, did not work around Brown and Complainant much of the time. They simply were not able to witness much of Brown's alleged conduct. Thus, testimony that they did not see Brown abuse Complainant or call him names was given less weight than the testimony of other witnesses who worked around Brown and Complainant more often. Other testimony, such as that of Brown (who admitted calling Complainant "gimpy" on one occasion) and Rich Blair (who said he couldn't remember Brown ever calling Complainant a "gimp," "crip," or "cripple"), was not credible because it was so greatly outweighed by opposing credible evidence. The preponderance of credible evidence shows that Brown verbally harassed Complainant with demeaning names and criticism related to his injury.

Just as harassment of a woman does not necessarily amount to sexual harassment, harassment of an injured worker does not necessarily amount to harassment prohibited by ORS 659.410; the Agency must show that the harassment was directed at the worker because he or she applied for benefits or invoked or utilized Oregon's workers' compensation procedures. Respondent presented credible evidence that some workers, including Brown, suffered on-the-job injuries, filed workers' compensation claims, and did not experience negative consequences from Respondent. There was also evidence that Brown used names like "gimp" for any injured worker, whether or not the injury occurred on-the-job or the worker had filed a workers' compensation claim. Nevertheless, the preponderance of credible evidence showed that employees were discouraged from filing workers' compensation insurance claims, and Respondent was willing to pay doctors' and therapist bills directly to avoid such claims. For example, Respondent paid around $2,000 in Complainant's therapist bills so that he would not file a workers' compensation insurance claim.[2] This type of discouragement, however subtle, along with the increased hostile treatment that Complainant experienced soon after he filed his claim permit the reasonable inference that Brown's hostile conduct was directed at Complainant because he had filed a claim.

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[2]Compare Respondent's actions with the requirements in the workers' compensation law, at ORS 656.262(3) ("Employers shall, immediately and not later than five days after notice or knowledge of any claims or accidents which may result in a compensable injury claim, report the same to their insurer. * * *"), and ORS 656.262(5) ("Payment of compensation under subsection (4) of this section or payment, in amounts not to exceed $500 per claim, may be made by the subject employer if the employer so chooses. The making of such payments does not constitute a waiver or transfer of the insurer's duty to determine entitlement to benefits. If the employer chooses to make such payment, the employer shall report the injury to the insurer in the same manner that other injuries are reported. * * *").

Respondent also presented evidence to show that the conditions were not as pervasive as alleged or, in other words, that the conditions did not create a hostile or offensive work environment. For example, credible evidence showed that after Complainant was discharged, he asked Rich Blair about getting reemployed by Respondent. Respondent argued that a person who had experienced the harassment and mental suffering alleged by Complainant would not seek reemployment with the same employer, under the same supervisor. Respondent also presented credible evidence that vulgarity and name-calling was not uncommon in the work place, and other employees including Complainant engaged in it.

With that evidence in mind, the forum still finds that the preponderance of evidence in the whole record shows that Brown's treatment of Complainant was unusual in its severity, frequency, and duration. The evidence is persuasive that Complainant found Brown's conduct unwelcome and offensive. He and his wife both complained to Respondent's management about it. Assistant manager Rich Blair recognized that his comments to Complainant were hurtful and he apologized. Evidence was also persuasive that Complainant had enjoyed his job as a driver and crane operator. He thought it was an important job and he was good at it. After he was medically stationary and had returned to his former job, he was away from Respondent's business (and Brown) making deliveries about 80 percent of the time. Just as before his termination, Complainant had a mortgage to pay and a family to support. He could not find an equivalent job as a driver and crane operator because other employers did not have the modified equipment he needed. Viewing the record as a whole, it is not inconsistent to conclude that Respondent's work environment had been hostile and offensive to Complainant, but also to find that he wanted another job with Respondent.

Regarding the issue of whether Respondent knew or should have known of Brown's conduct, Dave Paterson testified that Complainant complained to him about two things: (1) that Brown assigned him to work beyond his restrictions, and (2) that Brown was not being responsive to Complainant's requests for a pay raise. (Complainant did not get a raise in pay between July 11, 1994, and July 11, 1995. The other driver, Todd Schouviller, had gotten a raise of 50 cents per hour on January 26, 1995.) Paterson denied that Complainant complained about Brown picking on him. He also denied that Complainant's wife complained about Brown. Brown, of course, denied that he engaged in the alleged conduct, and Blair said he never heard Brown call Complainant the demeaning names alleged. For the reasons already given, the forum found Brown's and Blair's testimony on this issue not credible.

The forum has weighed Respondent's evidence on this issue against conflicting evidence in the record. The conflicting evidence shows that Brown (Respondent's manager and Complainant's supervisor) regularly

engaged in a course of verbal conduct that Complainant found unwelcome and offensive. Evidence shows that this conduct was notorious among many truss department employees, including at least one other manager, Gonzalez. Complainant complained to Gonzalez and others about Brown's conduct. Complainant's wife testified credibly that she complained to Dave Paterson about Brown's conduct. Respondent subsequently sent Brown to training. Under these circumstances, the forum concludes that Respondent's management level employees either knew or should have known of Brown's conduct. As noted above, no evidence shows that Respondent took appropriate corrective action.

Finally, Respondent presented evidence to dispute Complainant's alleged mental suffering. The forum discussed above some of that evidence, which also related to the pervasiveness of Brown's conduct and Complainant's post-termination inquiry about another job with Respondent.

Respondent also presented evidence to attack Complainant's credibility. The ALJ carefully observed the demeanor of each witness and evaluated the credibility of the testimony based upon its inherent probability, its internal consistency, whether it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrated it was logically incredible. *See Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256, 602 P2d 1161 (1979) (Richardson, J., concurring in part and dissenting in part). In Complainant's case, the forum found his testimony credible based upon his demeanor at hearing. His demeanor was calm and forthright, even where his memory was deficient and unsupportive of his claim. He responded to questions without hesitation and made no effort to avoid any issue. His statements were supported by testimony from other witnesses whom the ALJ found to be credible. As with other witnesses, Complainant and his wife were sometimes vague or imprecise about when some events occurred. However, the forum believes this reflects some difficulty remembering the timing of events as opposed to an attempt to deceive the forum. In addition, the forum's opinion of Complainant's credibility was not diminished by his conviction of a crime that did not involve dishonesty or false statement. Complainant and his wife testified credibly, and the forum finds, that he suffered mental distress -- as described in Finding of Fact, The Merits, number 32 -- as a result of Brown's harassment.

Accordingly, the preponderance of credible evidence on the whole record supports the prima facie case of harassment, in violation of ORS 659.410(1), for which Respondent is liable.

Damages

Awards for mental suffering damages depend on the facts presented by each complainant. Respondent pointed out that Complainant did not seek counseling as a result of his distress. However, a failure to seek counseling goes to the severity of mental suffering, not necessarily to its existence. *In the Matter of Portland General Electric Company*, 7 BOLI 253 (1988), *aff'd*, *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d

1143 (1993). A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Jerome Dusenberry*, 9 BOLI 173 (1991).

Here, credible evidence showed that, as a result of the discrimination Complainant experienced, he suffered embarrassment, degradation, anger, depression, frustration, and diminished self confidence and self esteem, as described in the Findings of Fact. Brown's harassment started after Complainant filed his workers' compensation insurance claim in August 1994 and continued on a daily basis (when Complainant was present) until he was terminated nearly two years later. Even after August 1995, when Complainant returned to his regular duties, Brown continued to call him demeaning names and criticize him for slowness on a daily basis. By Complainant's own testimony, however, he was probably away from Brown about 80 percent of the time, once he was back to making deliveries. Nonetheless, while the frequency of the Brown's treatment may have decreased, the severity continued.

The effects of Complainant's mental distress appear in his anger and depression, low self esteem, increases in smoking and drinking, and changes in his behavior at home. His mental distress has had a long duration. It covered not only the two years he was harassed, but to some extent it continued to the time of hearing. Respondent is directly liable for these damages.

The amount awarded to Complainant in the order below is compensation for his mental suffering and is a proper exercise of the Commissioner's authority to eliminate the effects of the unlawful practices found.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010 (2) and to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondent, CENTRAL OREGON BUILDING SUPPLY, INC., is hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street # 32, Suite 1010, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for Ronald E. Bemis, in the amount of:

a) Twenty Five Thousand Dollars ($25,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; plus,

b) 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 the employee has applied for benefits or invoked or utilized Oregon's workers' compensation procedures.

In the Matter of

SCOTT A. ANDERSSON

and Sally Andersson, dba Ace Computer Consulting Co., Respondents.

Case Number 48-98

Final Order of the Commissioner

Jack Roberts

Issued May 14, 1998.

SYNOPSIS

Respondents, who operated a computer consulting business as partners, employed wage claimant as a computer service and sales technician. Claimant's wage rate, determined in an agreement with the Workers' Compensation Division Preferred Worker Program, was $12.00 per hour. Respondents failed to pay claimant all wages when due, in violation of ORS 652.140 (2), after claimant quit employment. Respondents' failure to pay the wages was willful, and the commissioner ordered respondents to pay civil penalty wages, pursuant to ORS 652.150. Because respondent Sally Andersson was in default for failing to appear at hearing, an amendment of the charging document to increase the alleged civil penalty wages did not apply to her. ORS 652.140(2), 652.150.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 24, 1998, in the offices of the Bureau of Labor and Industries, Portland, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Tommy Harold Patterson (Claimant) was present throughout the hearing. Scott Andersson (Respondent) was present throughout the hearing. Sally Andersson (Responsible dent Sally Andersson) did not appear at hearing.

The Agency called the following witnesses: Vicki King, a former compliance specialist with the Wage and Hour Division of the Agency; and Tommy Patterson, Claimant. Respondent called himself as a witness.

Administrative exhibits X-1 to X-11, Agency exhibits A-1 to A-9, and Respondents' exhibits R-1 to R-10 were offered and received into evidence. The record closed on March 24, 1998.

Having fully considered the entire record in this matter, I, Jack 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 June 2, 1997, 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 Respon- dent.

3) On November 4, 1997, the Agency served on Respondent an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed Claimant a total of $3,474 in wages and $2,160 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 November 13, 1997, the Agency received an answer and request for a contested case hearing, dated November 7, 1997, from Respondent Sally Andersson. In her answer, she disputed the number of work hours claimed and the alleged rate of pay. Mrs. Andersson described herself as "Owner" of Ace Computer Consulting Co. On February 27, 1998, the Agency notified Respondent that he was named in the Order of Determination and personal service had been made on him; therefore, the Agency advised him that he was required to personally answer the order. On March 9, 1998, the Agency received Respondent's request of a hearing and answer, in which he disputed the wages claimed and the period of employment.

5) On March 11, 1998, the Agency requested a hearing from the Hearings Unit of the Bureau of Labor and Industries. With its request, the Agency moved to add Sally Andersson as a respondent, pursuant to OAR 839-050- 0170(4). The ALJ granted the motion because Sally Andersson had filed an answer and identified herself as an owner of the business.

6) On March 11, 1998, 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 839-050-0000 to 839-050-0440.

7) On March 11, 1998, the Administrative Law Judge 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 839-050-0200 and 839-050- 0210. The Agency and Respondent each submitted a summary.

8) At the beginning of the hearing on March 24, 1998, the Agency requested that the ALJ find Respondent Sally Andersson in default for failing to appear at hearing. The ALJ granted that request and found Respondent Sally Andersson in default, pursuant to OAR 839-050-0330.

9) 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.

10) Pursuant to ORS 183.415(7), the ALJ explained the issues involved in the hearing, the

matters to be proved or disproved, and the procedures governing the conduct of the hearing.

11) During the hearing, the Agency moved to amend the charging document to increase the civil penalties claimed. The increase resulted from an arithmetic error by the Agency's compliance specialist. Respondent objected because he disputed the underlying rate of pay upon which the penalty wages were calculated. Finding that evidence had been presented without objection about Claimant's alleged wage rate and about the correct calculation, the ALJ granted the motion.[1] As amended, the charging document alleged that Claimant's rate per day was $96.00 (eight hours times $12.00 per hour) and that there was due and owing the sum of $2,880 as penalty wages ($96.00 times 30 days).

12) On March 31, 1998, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions to the Proposed Order. On April 10, 1998, the Hearings Unit received Respondent's timely exceptions. He said he had "discovered more information very relevant to these issues that was not available at the time of the hearing." On April 13, 1998, the ALJ wrote to the participants and described the requirements for reopen- ing the contested case record. The ALJ required Mr. Andersson to file an affidavit and any new exhibits by April 20, 1998, in order for the ALJ to determine whether to reopen the record. The Hearings Unit never received the required affidavit with exhibits. Accordingly, the record remained closed. The forum has addressed Respondent's exceptions in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, the Respondents, husband and wife, did business as Ace Computer Consulting Company. As partners, they had the right to share in the profits, the liability to share in the losses, and the right to exert some control over the business.

2) From January 13 to May 23, 1997, Respondents employed Claimant as a computer service and sales technician. Claimant's duties included phone sales, computer hardware assembly, and technical assistance to customers.

3) Before his employment with Respondents, Claimant had a disabling on-the-job injury to his right knee. Respondent applied to the Workers' Compensation Division's Preferred Worker Program for a wage subsidy for Claimant. As part of a wage subsidy agreement with the Division, Respondent agreed to and did pay Claimant at the rate of $12.00 per hour. The Division agreed to reim-

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[1]The amendment to the charging document applies only to Respondent Scott Andersson. Because Respondent Sally Andersson defaulted, she had no notice of the increased civil penalty. In a default situation, the charging document sets the limit on the issues and relief that the forum can consider. *In the Matter of Jack Mongeon*, 6 BOLI 194, 201-02 (1987). Accordingly, the amount of civil penalty wages alleged in the original charging document, $2,160, is the limit of the civil penalty wage liability the forum can consider against Respondent Sally Andersson.

burse Respondent for Claimant's work at $6.00 per hour. A representative from the Preferred Worker Program advised Respondent that reimbursement would not be possible if Claimant were paid on a commission basis.

4) According to Respondent's instructions, Claimant completed time sheets on a weekly basis. He signed and delivered them to Respondent. Respondent kept no other record of Claimant's work. Claimant was supposed to be paid every two weeks. There is no record of Respondent paying Claimant for his work between January 13 and January 26, 1997.[2] Respondent gave Claimant his first pay check around March 1, 1997, for the periods January 27 to February 9 and February 10 to March 1, 1997. Between January 27 and February 9, 1997, Claimant worked 71 hours, which is reflected on his time sheets and on the itemized deduction statement that accompanied his paycheck. Respondent paid him $12.00 per hour. Between February 10 and March 1, 1997, Claimant worked 77 hours, which is reflected on his time sheets and on the itemized deduction statement that accompanied his paycheck. Respondent again paid him $12.00 per hour. There is no record of Respon- dent paying Claimant for the period March 3 to 16, 1997.[3] Between March 17 and March 30, 1997, Claimant worked 79.5 hours, which is reflected on his time sheets and on his paycheck for that period, dated May 2, 1997. [4]

5) Between March 31 and May 23, 1997, Claimant worked 289.5 hours. He recorded his hours on time sheets for the period March 31 to May 18, 1997, and gave these to Respondent. There is no time sheet in the record for Claimant's final week, May 19 to 23, 1997. Respondent paid Claimant nothing for these 289.5 work hours.

6) Claimant asked Respondent for his wages many times. Respondent never disputed the work time Claimant recorded on his time sheets or that wages were due. Respondent said he could not afford to pay Claimant until he received money from customers or Safeway, the grocery chain, where Respondent had been employed as a truck driver. Nevertheless, Respondent was paying other bills. Because Respondent was not paying Claimant and his savings had run out, Claimant quit his employment with Respondent on May 23, 1997.

7) On July 25, 1997, the Agency sent Respondent a Notice of Wage Claim. The notice said that Claimant had filed a wage claim for unpaid wages of $3,474 at the rate of $12.00

[2]Claimant's wage claim did not include this period of his employment.

[3]Again, Claimant did not include this period of his employment in his wage claim.

[4]Respondent wrote on the check that it was for "Payroll 3-16 to 3-30-97 79.50 hrs." Since the hours on Claimant's time sheets for the March 17 to March 30 period match exactly with the hours noted on the check, the forum attaches no significance to the one-day difference in the recorded pay period, that is, the difference between March 16 and March 17 as the beginning day of the period. The forum concludes that the May 2 check compensated Claimant for his work recorded on the time sheets.

per hour earned from March 31 to May 23, 1997. The Agency required Respondent to either pay this claim, if it was correct, or complete a response form and return it with documentation supporting his position, if he disputed the claim. Respondent did not respond to the notice. He never submitted any documentation to the Agency until the day before the hearing in this matter. When a compliance specialist contacted Respondent about the claim, Respondent agreed that he owed Claimant around $3,000. He did not dispute the claim or the rate of pay, and he said on several occasions he would pay Claimant.

8) The forum computed civil penalty wages, in accordance with ORS 652.150 and OAR 839-001-0470, as follows: $12.00 (Claimant's hourly rate) multiplied by 8 (hours per day) equals $96.00. This figure of $96.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of $2,880. The Agency set forth this figure in the Amended Order of Determination.

9) The forum carefully observed Claimant's demeanor and found his testimony to be credible. He had the facts readily at his command. There is no reason to determine Claimant's testimony to be anything except reliable and credible.

10) Respondent's testimony was not reliable or credible. His testimony was inconsistent on important points, often contradicted by Claimant's and King's testimony, and sometimes contradicted by Respondent's own records. For example, he testified that he never had a wage rate agreement with Claimant. He claimed that the $12.00 rate of pay was merely a goal, a figure insisted upon by a representative from the Preferred Worker Program. He said it was a rate Claimant could earn after his training was complete. However, his own records (the itemized statements that accompanied Claimant's paychecks) showed that he paid Claimant at a rate of $12.00 per hour for precisely the number of hours Claimant recorded on his time sheets. In addition, Respondent claimed that he disputed the number of hours Claimant put on his time sheets. He pointed to a March 23, 1997, e-mail message to Claimant complaining about the recorded hours. However, Respondent paid Claimant on May 2, 1997, for exactly the number of hours Claimant recorded on his time sheets for the period March 16 to 30, 1997. Likewise, Respondent never disputed Claimant's alleged rate of pay or hours worked when he spoke with an Agency compliance specialist on several occasions. Accordingly, the forum has disbelieved all of Respondent's testimony except that which was corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondents were persons who, as partners, engaged the personal services of one or more employees in the state of Oregon.

2) Respondents employed Claimant from January to May 23, 1997.

3) Claimant quit without notice on May 23, 1997.

4) During the wage claim period, that is, from March 31 to May 23, 1997, Respondents and Claimant had

an agreement whereby Claimant's rate of pay was $12.00.

5) During the wage claim period, Claimant worked 289.5 hours for Respondents. At the wage rate of $12.00 per hour, Claimant earned $3,474 in wages. Respondents have paid Claimant nothing and owe him $3,474 in earned and unpaid compensation.

6) Respondents 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.

7) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal $2,880.

8) Respondents did not allege in their answers an affirmative defense of financial inability to pay the wages due at the time they accrued. Respondents made no showing that they were financially unable to pay Claimant's wages at the time they accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Respondents were employers and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414.

3) Before the start of the contested case hearing, the forum informed Respondent of his rights as required by ORS 183.413(2). The Administrative Law Judge complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

4) The actions or inactions of Respondent Scott Andersson, a partner of Respondent Sally Andersson, are properly imputed to Respondent Sally Andersson. ORS 68.210, 68.250, 68.270.

5) 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."

Respondents 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.

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

hourly rate for eight hours per day 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."

Respondents are jointly and severally liable for a civil penalty under ORS 652.150 for willfully failing to pay Claimant all wages or compensation when due as provided in ORS 652.140.

7) 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 Respondents 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

Default

Respondent Sally Andersson 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 whether the Agency has made a prima facie case supporting the Order of Determination. *See In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); *see also* OAR 839-050-0330(2).

In a default situation where a respondent's total contribution to the record is a request for a hearing and an answer that contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *In the Matter of Jack Mongeon*, 6 BOLI 194 (1987).

Respondents Were Partners

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)).

In this matter, the evidence is persuasive that Respondents' former corporation, Ace Computer Consulting, Inc., was involuntarily dissolved on November 2, 1995. Respondent Scott Andersson admitted that Sally Andersson, his wife, had the right to share in the profits, the liability to share losses, and the right to exert some control over the business. She characterized herself as an "owner" of the business in her answer. Respondent said she had been the president

of the corporation. No evidence suggested that Respondents operated the business in some form other than a partnership during times material. Accord- ingly, the forum concludes that Respondents were partners.

Claimant's Rate of Pay

Claimant testified credibly that his agreed rate of pay was $12.00 per hour. Respondent contended that he and Claimant never had an agreement, and the $12.00 rate was only used to satisfy the representative of the Preferred Worker Program.

The preponderance of credible evidence establishes that Claimant worked for $12.00 per hour. As noted in Finding of Fact -- The Merits, number 10, the forum found Respondent's testimony not credible. Despite Respondent's protestations to the contrary, credible evidence, including the itemized deductions statements Respondent gave Claimant, shows Respondent paid Claimant $12.00 per hour. He claimed that around April 1, 1997, he changed whatever agreement he previously had with Claimant, and he put Claimant on a commission-only basis. No other evidence supports Respondent's testimony. Claimant testified that he never saw the e-mail message purporting to change his rate of pay, and his wage rate was never changed. The forum disbelieved Respondent and, accordingly, found no credible evidence establishing a change in the $12.00 per hour wage rate.

Work Time

"Employ" includes to suffer or permit to work. ORS 653.010(1). Training time is considered a cost of doing business for an employer and is compensable work time. *See* OAR 839-020- 0044; *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989).

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 US 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 this burden of proof, the court analyzed the situation as follows:

> "An employee who brings suit under 16(b) of the [Fair Labor Standards] 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 permitted Claimant to keep track of his work time. Claimant prepared detailed time sheets and presented these to Respondent each week. Respondents kept no other time records of Claimant's work.

Pursuant to the analysis, 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*, 8 BOLI 96, 106 (1989).

As part of his claim for wages, Claimant filled out a calendar form for the Agency to show the number of hours he worked. On the basis of this calendar, Claimant's time sheets, and his credible testimony, the forum has concluded that Respondents employed and improperly compensated Claimant. The forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimant.

Where the forum concludes that an employee was employed and improperly compensated, it becomes the burden of 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." *Anderson v. Mt. Clemens Pottery Co.*, 328 US at 687-88; *In the Matter of Dan's Ukiah Service*, 8 BOLI at 106. Respondents did not maintain any record of hours or dates worked by Claimant beyond what Claimant provided them.

Respondent produced no credible evidence to contradict Claimant's evidence. While Respondent testified that Claimant did not work the number of hours claimed, Respondent's testimony was exceedingly vague, inconsistent, and unreliable. Therefore, the forum gave his testimony little or no weight. The forum concludes that Respondent's evidence did not sufficiently undermine the credible evidence produced by the Agency.

Wages Due

Claimant's credible testimony, time sheets, itemized pay stubs, and calendar form established both his hourly rate of pay and the number of hours he worked. From the credible evidence and the applicable law, the forum concludes that Claimant worked 289.5 hours at $12.00 per hour, and that Respondents owe Claimant $3,474 in unpaid wages.

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). Respondents, as employers, had a duty to know the amount of wages due to their 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 Respondents knew they had not paid Claimant's wages and intentionally failed to pay those wages. Evidence showed that Respondents acted voluntarily and were free agents. Under this test, the forum finds that Respondents acted willfully and thus they are liable for penalty wages under ORS 652.150.

As noted above, Respondent Sally Andersson was in default. Therefore, she is liable for the amount of civil penalty wages alleged in the original charging document: $2,160. Respondent Scott Andersson, however, is liable for the amount of civil penalty wages alleged in the amended charging document: $2,880.

Respondent's Exceptions

Respondent Scott Andersson filed timely exceptions to the Proposed Order. He contended that "[w]e have since [the hearing] discovered more information very relevant to these issues that was not available at the time of the hearing." Although the ALJ gave him the opportunity to reopen the record, Mr. Andersson did not submit the affidavit or exhibits requested by the ALJ. Accordingly, the ALJ did not reopen the record.

OAR 839-050-0380 provides in part:

> "(1) Any participant may file specific written exceptions to the proposed order. No oral argument is allowed on exceptions unless requested by the administrative law judge. Any new facts presented or issues raised in such exceptions shall not be considered by the commissioner in preparation of the final order.

Since the record was not reopened, this order is based exclusively on the record made at hearing. Aside from claiming that he had discovered more evidence, Respondent's exceptions do not challenge the facts found, the conclusions of law reached, or the reasoning explained in the opinion of the proposed order. Accordingly, the forum denies Respondent's exceptions.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders SCOTT A. ANDERSSON and SALLY ANDERS- SON to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

> A certified check payable to the Bureau of Labor and Industries IN TRUST FOR TOMMY HAROLD PATTERSON in the amount of FIVE THOUSAND SIX HUNDRED AND THIRTY FOUR DOLLARS ($5,634), less appropriate lawful deductions, representing $3,474 in gross earned, unpaid, due, and payable wages; and $2,160 in penalty wages; plus interest at the rate of nine percent per year on the sum of $3,474 from June 1, 1997, until paid and nine percent interest per year on the sum of $2,160 from July 1, 1997, until paid.

FURTHERMORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders SCOTT A. ANDERSSON to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

> A certified check payable to the Bureau of Labor and Industries IN TRUST FOR TOMMY HAROLD PATTERSON in the amount of SEVEN HUNDRED AND TWENTY DOLLARS ($720), less appropriate lawful deductions, representing additional civil penalty wages, plus interest at the rate of nine percent per year on that sum from July 1, 1997, until paid.

In the Matter of
TYREE OIL, INC.,
Respondent.

Case Number 10-98
Final Order of the Commissioner
Jack Roberts
Issued June 10, 1998.

SYNOPSIS

Complainant, an injured worker, was on temporary disability when his employer sold its assets to respondent. When complainant was released to return to work, he demanded to be reinstated by respondent to his former position. Respondent rejected his demand. Applying the successorship doctrine, the commissioner held that respondent was a successor employer and failed to reinstate complainant to his former position, in violation of ORS 659.415(1). The commissioner ordered respondent to reinstate complainant and pay him back wages and damages for mental suffering. ORS 659.415(1), (3)(b)(D); OAR 839-006- 0115(2), 839-006-0130(1).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 7, 1998, 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. Blair Fountain (Complainant) was present throughout the hearing. Tyree Oil, Inc. (Respondent) was represented by Dennis Percell, Attorney at Law. Ron Tyree, Respondent's president, was present throughout the hearing.

The Agency called the following witnesses: Jesse Aday, Respondent's former employee; Blair Fountain, Complainant; Darlene Fountain, Complainant's wife; and Ron Tyree, Respondent's president.

Respondent called the following witnesses: Lisa Allender, Respondent's office manager; Dan Cumberland, owner of Cumberland Distributing, Inc. (Cumberland); Sherry Stemmerman, of Stalcup Trucking; and Ron Tyree, Respondent's president.

Administrative exhibits X-1 to X-39, Agency exhibits A-1 to A-6 and A-8 to A-14, and Respondent exhibits R-1 to R-6 and R-8 to R-11 were offered and received into evidence. The Agency withdrew exhibit A-7. Exhibit R-7 did not exist. Exhibits X-37, X-38, and X-39 are Respondent's addition to its case summary, its hearing memorandum, and the Agency's response to the memorandum, respectively, which are hereby received. The record closed on April 10, 1998.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby 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

During its closing argument, the Agency moved to amend the Specific Charges to request the additional remedy of reinstatement. Respondent opposed the amendment because it was untimely and prejudicial, and there was insufficient evidence on the record concerning the participant's positions on the issue. The ALJ reserved ruling on the motion until the Proposed Order.

The Agency's motion is granted, pursuant to OAR 839-050-0140. Complainant's right and eligibility for reinstatement were central issues in this case. The ALJ received evidence on these issues. While the Agency's motion was made very late in the process and after the evidentiary record was closed, Respondent's argument that additional evidence was necessary was not persuasive. Nor can I find that Respondent is substantially prejudiced by allowing the motion, since the remedy requested is exactly what the law had required it to provide.

FINDINGS OF FACT -- PROCEDURAL

1) On September 23, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that he suffered an on-the-job compensable injury while working for Respondent's predecessor, Cumberland Distributing, Inc.; before he got a full release to return to work, Respondent became the new owner; and Respondent failed to reinstate him to his former job after he was fully released to return to work.

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 659.415.

3) On October 2, 1997, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent failed to reinstate Complainant to his former position of employment. The Specific Charges alleged that Respondent's action violated ORS 659.415.

4) 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.

5) On October 16, 1997, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges, and stated affirmative defenses.

6) On October 16, 1997, Respondent's attorney, Dennis Percell, requested a postponement of the hearing because he intended to file a motion for summary judgment. He asserted that there was insufficient time to prepare the motion, for the Agency to respond, to obtain a ruling, and to complete discovery in the event the motion was denied. The Agency did not object to the motion and the ALJ granted it, pursuant to OAR 839-050-0150(5). The ALJ reset the hearing for April 7, 1998.

7) On December 11, 1997, Respondent filed a motion for summary judgment with exhibits. Respondent argued that (1) it was not Complainant's employer, for purposes of ORS 659.415; (2) it was not responsible for Cumberland's obligation to Complainant; and (3) it was not a successor in interest of Cumberland. After extensions of time, an Assistant Attorney General responded to the motion on behalf of the Agency. Respondent and the Agency filed supplemental responses. On February 17, 1998, the ALJ denied the motion, concluding that genuine issues of material fact existed, which precluded summary judgment. OAR 839-050-0150(4)(a)(B)

8) On February 26, 1998, Respondent requested an order authorizing the deposition of Complainant. The Agency did not object and the ALJ granted the request.

9) On March 11, 1998, Respondent filed a second motion for summary judgment, with stipulated facts. Respondent argued that Complainant was not eligible for reinstatement, pursuant to ORS 659.415(3)(b)(D). Through the Attorney General's office, the Agency responded. On March 20, 1998, the ALJ denied the motion because Complainant was not ineligible under the statute. See the opinion below.

10) On March 11, 1998, the Agency requested an order authorizing the deposition of Ron Tyree. Respondent did not object and the ALJ granted the request.

11) On March 23, 1998, the Agency requested a discovery order concerning documents it had earlier requested from Respondent. In a telephone conference with the ALJ, counsel for Respondent did not object to the motion, and the ALJ granted it.

12) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondent each filed a Summary of the Case and later filed supplements

13) A pre-hearing conference was held on April 7, 1998, at which time the Agency and Respondent stipulated to certain facts. Those facts were read into the record by the ALJ at the beginning of the hearing.

14) At the start of the hearing on April 7, 1998, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

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

16) During the hearing and pursuant to OAR 839-050-0140(2)(b), the Agency moved to amend the Specific Charges to request that Respondent reinstate Complainant to his former position of employment. The ALJ reserved ruling on the motion until the proposed order. See the "Ruling on Motion" section of this order, above.

17) On May 26, 1998, the ALJ issued a Proposed Order in this matter. On June 4, 1998, 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) At all times material herein, Respondent was a domestic corporation with its principal place of business in Eugene, Oregon, and it employed six or more persons in Oregon.

2) Respondent was in the business of selling and distributing petroleum products, primarily from Eugene and Roseburg. Respondent's president was Ron Tyree. Before June 1996, Respondent had customers in Washington, Idaho, northern California, and Oregon, including some customers in Florence, Reedsport, and Coos Bay. Among its business activities, Respondent serviced trucking, mining, railroad, and construction customers, and some retail gasoline stations. It sold heating oil and acted as a common carrier for hire. It performed chemical analyses for customers. It distributed industrial products such as diesel additives and environmental cleanup products.

3) Cumberland Distributing, Inc. (Cumberland) operated a business primarily engaged in the sale and distribution of fuel and petroleum products. It serviced customers along the coast from south of Bandon to north of Florence, and east to Coquille and Elkton. It serviced the trucking, logging, and fishing industries along the coast. It sold heating oil. Before June 1996, Cumberland had no financial interest in Respondent, and Respondent had no financial interest in Cumberland. Cumberland was owned by Dan and Colleen Cumberland. Dan Cumberland was the president. Cumberland's principal office was in Reedsport, and it had another office in Coos Bay. During the second quarter of 1996, Cumberland employed fewer than 20 employees.

4) Complainant was hired by Cumberland on or about January 3, 1996, as a driver of Cumberland's tanker truck.

5) At all times material, Complainant lived in Florence.

6) Before May 1996, Dan Cumberland told Complainant and the other employees that he planned to sell Cumberland's assets to Respondent. In April 1996, Ron Tyree met with Cumberland's employees, including Complainant. He told them that things would not really change after the sale, and the employees did not need to worry about their jobs.

7) On Thursday, May 30, 1996, Complainant suffered an on-the-job injury to his lower back. He first saw a doctor on June 3, 1996. He called Dan Cumberland, who told him to stay home until he recovered. He filed a workers' compensation insurance claim form on June 6, 1996. The claim was accepted by SAIF Corporation (Cumberland's workers' compensation insurance company) on July 16, 1996. The insurer paid Complainant for temporary total disability from June 7 to July 7, 1996, and closed the claim on August 1, 1996.

8) Soon after Complainant was injured on May 30, 1996, Cumberland re-employed Jesse Aday to drive the tanker truck Complainant had been driving. Until February 1996, Aday had worked for Cumberland driving the same truck, and he had trained Complainant. When Aday was re-employed, he had an agreement with Dan Cumberland to work for around two weeks, until Complainant returned from his injury.

9) Respondent purchased some assets of Cumberland in June 1996.

10) Before it purchased Cumberland's assets, Respondent employed around 30 employees, 23 in Eugene and 7 in Roseburg.

11) On June 16, 1996, Cumberland assigned a franchise agreement for a Pacific Pride fueling system territory to Respondent. Further, Cumberland signed a covenant not to compete for two years with Respondent in any capacity in any automated commercial fueling business located within five miles of the boundaries of the franchise agreement territory.

12) Before June 17, 1996, Ron Tyree did not know that Complainant had been injured on May 30, 1996.

13) On June 17, 1996, Cumberland sold to Respondent substantially all of the assets used or useful in the operation of Cumberland's business. The assets included equipment, rolling stock (including about a dozen trucks, tankers, and trailers), tools, office equipment and furniture, and fixtures; inventories of supplies and merchandise; equipment leases, real property leases, distributorship agreements, and other contracts; certain leasehold improvements; Cumberland's rights under sales orders and purchase orders and contracts; and Cumberland's goodwill. One of the assets Respondent purchased was the 96,000 pound tanker truck that Complainant drove. Respondent knew before June 17, 1996, that Complainant was the driver of that truck. Respondent did not assume Cumberland's accounts receivable or accounts payable. Respondent did not specifically assume any liability regarding Cumberland's employees. Section six of the sale agreement, entitled "Adjustments," states in part:

> "Expenses, including but not limited to utilities, personal property taxes, rents, real property taxes, <u>wages, vacation pay, payroll taxes, and fringe benefits of the employees</u> of [Cumberland], shall be prorated between [Cumberland] and [Respondent] as of the close of business on the closing date, the proration to be made and paid, insofar as reasonably possible, on the closing date * * *." (Emphasis added.)

In section 10.3 of the agreement, entitled "Employee Matters," Cumberland promised to give to Respondent a list of all employees, along with amounts paid each employee during the previous and current fiscal years, and a schedule of other material compensation or personnel benefits or policies in effect. Cumberland also promised that, before the closing date, it would not enter into any "material agreement" with its employees, increase their pay or bonuses, or make any changes in personnel policies or employee benefits without Respondent's prior written consent. Cumberland promised to "terminate all of its employees not having employment agreements transferable to [Respondent] and will pay each employee all wages, commissions, and accrued vacation pay earned up to the time of termination, including overtime pay" as of the closing date. Cumberland and Dan and Colleen Cumberland also agreed not to compete with Respondent in the distribution of fuel or petroleum products for five years in Lane, Douglas, and Coos Counties. Respondent agreed to pay Cumberland for the assets in monthly

installments from July 1996 to June 2003.

14) When Respondent purchased Cumberland's assets in June 1996, it added about 1,000 customers. However, many of these were inactive. Around 350 were active customers. Respondent continued to operate out of Cumberland's former locations in Reedsport and Coos Bay. Respondent serviced the same areas that Cumberland had. There was no interruption in service to Cumberland's former customers. Respondent offered some new services and did not provide some services that Cumberland had. For example, Respondent discontinued the sale of oil filters, the recycling of additives and antifreeze, and the repair of customers' equipment. Sales related to the acquisition of Cumberland amounted to around 15 percent of Respondent's gross sales.

15) After Respondent bought Cumberland's assets, Respondent moved most of Cumberland's office and bookkeeping functions to Respondent's Eugene office. Respondent's financial operations were different from those that Cumberland had used, and Respondent did not use most of Cumberland's office and bookkeeping methods.

16) In March 1998, Respondent had around 3,000 customers. Of those, around 1,000 customers were serviced from Respondent's facilities in Reedsport and Coos Bay and around 2,000 were serviced from Respondent's facilities in Eugene and Roseburg. Respondent had around 50 trucks, trailers, tankers, and tank trucks. Eleven of those assets were operated out of Respondent's Reedsport-Coos Bay facilities; 10 of them were assets acquired from Cumberland in June 1996.

17) Just before the sale of its assets, Cumberland had 11 employees (including Dan and Colleen Cumberland). Around June 17, 1996, Dan Cumberland terminated the employment of all Cumberland employees, including Complainant. However, Dan Cumberland never told Complainant he was terminated or that he would have to apply with Respondent to be hired. Beginning June 17, 1996, Respondent employed 8 of the 11 Cumberland employees. Respondent did not employ Complainant, Dan Cumberland, or Colleen Cumberland. At first, the eight employees earned the same rate of pay as they had with Cumberland. Over time, Respondent slowly changed their pay rates to match Respondent's pay scales. Respondent treated these employees as new hires with respect to health and other benefits. Respondent provided employment policies and benefits that Cumberland had not provided. For a while after June 17, these eight employees continued to perform their same jobs; that is, the drivers continued to drive and the office workers continued to perform office work. In time, the duties of some of the eight employees changed. For example, Respondent gave the mechanic more driving duties, and the maintenance and repair work was phased out. Likewise, over time, Respondent changed the use and location of some of the rolling stock and other assets. Jesse Aday was one of the workers Respondent employed. Aday agreed to work for Respondent for $10.50 per hour. Aday told Ron Tyree

that he didn't want to take Complainant's job. Tyree said that Aday was not taking Complainant's job, because there was a place for Complainant with Respondent. Tyree expected to hire Complainant full time once he was released for work. Aday worked continuously for Respondent for one and a half years. During the first five weeks, Aday worked from 40 to 50 hours per week.

18) In 1996, Respondent paid Jesse Aday gross wages of $12,409. In 1997, Respondent paid him gross wages of $24,845.

19) On June 17, 1996, Complainant's doctor released him to return to light duty work with a 25 pound lifting restriction and limitations on the number of hours he could sit, walk, and stand per day. Complainant called Dan Cumberland, who told him to talk to Ron Tyree. Complainant called Tyree, who said to come in. Complainant met Tyree at the Reedsport office. Tyree changed his mind about putting Complainant to work when he learned that Complainant had been injured and had a 25 pound lifting restriction. Tyree told Complainant he needed to wait until he had a full (unrestricted) release to return to work from his doctor.

20) On July 1, 1996, Tyree told Complainant that he (Tyree) had hired Aday. Complainant had other conversations with Tyree and showed he was very interested in returning to work. Tyree told Complainant he needed a full work release before he could come to work.

21) On July 8, 1996, Complainant's doctor, Dr. Pearson, released him to return to regular work without restriction. In a letter to SAIF Corporation, Dr. Pearson wrote, "[Complainant] tells me that he is completely recovered now and is released to go back to work full capacity."

22) On July 11, 1996, Complainant got a copy of Dr. Pearson's July 8 letter and faxed a copy to Ron Tyree. Tyree faxed the letter to Phil Swinford with SAIF Corporation. Tyree was unsure whether Dr. Pearson's letter constituted a sufficient work release because it was based only on what Complainant said. Complainant talked to Tyree three more times, and Tyree said he was still talking to SAIF, but not to worry. Tyree also told Complainant's wife that Complainant should not worry. Complainant also called SAIF, to try to get the matter resolved. On July 17, 1996, Swinford sent Tyree a fax with another letter from Dr. Pearson, dated July 12, 1996. Swinford thought this second letter was an adequate work release.

23) On July 17, 1996, Tyree was in the Reedsport office. He called and left a message for Complainant to come in and talk about the job. An office worker, Karen, told Tyree that Complainant had gotten the message and had stopped in when Respondent was not there. Respondent called and left another message for Complainant. Respondent told Karen to contact him if Complainant came to the office, so they could meet. Between July 17 and 23, 1996, Respondent did not hear from Complainant

24) Complainant became suspicious that he would not get his job back. He talked to an attorney, and on July 23, 1996, attorney C. Randall Tosh sent Respondent a letter demanding that Respondent reinstate

Complainant to his former position and demanding back wages.

25) On July 31, 1996, Respondent's attorney wrote to Mr. Tosh that Complainant's former employer was Cumberland, not Respondent, and that Complainant had no right of reinstatement with Respondent.

26) Complainant did not apply for other job openings with Respondent after July 1, 1996. Respondent had job opportunities with wages around what Respondent paid Jesse Aday. Respondent had Complainant's home address. Respondent did not mail Complainant a letter about any job openings.

27) Between early August 1996 and late March 1997, Complainant actively looked for driving jobs and other work in the southern coastal area of Oregon. He found no suitable work. He did not want to move to Eugene for work.

28) Complainant is not seeking and is not entitled to damages after he became self-employed, which was on or about April 1, 1997.

29) From July 10, 1996, to April 1, 1997, Stalcup Trucking, Inc. needed drivers off and on. It hired 11 drivers in the Coos Bay and Reedsport areas during that time. Stalcup's business was located on Highway 101 in Coos Bay, and it had a reader-board along the highway on which it advertised when it was hiring drivers. Complainant did not remember seeing the reader board. He saw Stalcup's help-wanted advertisements in a newspaper and called their office twice. Both times he learned that the available jobs were located in Roseburg. Complainant did not submit a written application. Stalcup paid its drivers 26.2 cents per mile, plus $6.24 per hour for down time, and $9.88 per hour for other work. Stalcup provided insurance and vacation benefits.

30) Complainant suffered financial hardship after he was released to return to work and his temporary disability benefits stopped. He supported his wife and two children. He couldn't pay his bills and had to borrow money from his mother. His wife took house cleaning jobs to help out financially. Complainant felt shocked and confused when he wasn't put back to work by Respondent. He was upset because he was "left hanging." He had never been fired from a job. The stress of waiting to return to work made him "grumpy." He lost confidence in his ability to find work because he was over 40 years old and had suffered a back injury on his last job with Cumberland. He became depressed and felt hopeless when he could not find work. He experienced sleeplessness.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent employed 21 or more persons within the state of Oregon.

2) On May 30, 1996, Complainant was injured on the job. On June 3, 1996, Complainant notified Cumberland Distributing, Inc., his employer, of the injury and sought medical treatment. He applied for and received benefits in accordance with the Oregon workers' compensation procedures.

3) On June 16 and 17, 1996, Cumberland sold substantially all of its assets to Respondent. Thereafter,

Cumberland was unable to reinstate Complainant to his former job.

4) Beginning June 17, 1996, Respondent substantially continued Cumberland's business operations. Respondent used the same facilities in Reedsport and Coos Bay and substantially the same work force that Cumberland had used. Initially, the same jobs existed under substantially the same working conditions. Respondent provided different benefits and later changed some of the jobs' duties. Respondent used substantially the same equipment and assets that Cumberland had used, and provided substantially the same services to Cumberland's former customers. Respondent used different supervisory personnel.

5) Effective July 8, 1998, Complainant was fully released by his treating physician to return to his former job.

6) Complainant was physically able to perform the duties of his former position.

7) On July 11, 1996, Complainant made a demand to Respondent for reinstatement to his former position.

8) At the time of Complainant's demand to return to work, his former position existed and was available.

9) Respondent never reinstated Complainant to his former job or offered him another existing position that was vacant and suitable.

10) Complainant made a reasonable effort to obtain employment for which he was qualified and which he was able to perform until April 1, 1997.

11) Between July 17, 1996, and March 31, 1997, Complainant lost wages of $16,772.

12) Complainant suffered mental and financial distress and prolonged unemployment due to Respondent's failure to reinstate him to his former position.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435. *See* ORS 659.400(3), 659.415(3)(b)(D), and 659.010(12) and (13).

2) Complainant was Respondent's "worker," as that term is used in ORS 659.415.

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 659.435.

4) The actions, inactions, and knowledge of Ron Tyree, an employee or agent of Respondent, are properly imputed to Respondent.

5) ORS 659.415 provides in 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 worker's former position is 'available' even if that position has been filled by a replacement while the injured worker was absent. If the former position is not available, the worker shall be reinstated in any other existing

position which is vacant and suitable. 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:

" * * * * *

"(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.

"(4) Any violation of this section is an unlawful employment practice."

Respondent violated ORS 659.415.

6) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), 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 and 659.400 to 659.545, 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 the Complainant and other persons similarly situated.

OPINION

Duty to Reinstate an Injured Worker

ORS 659.415(1) says that an injured worker "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."

"It is a *per se* violation of ORS 659.415 not to reinstate an employee when reinstatement is required. A discriminatory motive need not be proved to establish a violation of the statute * * *." *Palmer v. Central Oregon Irrigation District*, 91 Or App 132, 136, 754 P2d 601, 603 (1988).

To present a prima facie case of a violation of ORS 659.415 (failure to reinstate an injured worker) the Agency must present evidence that (1) the worker suffered a compensable on-the-job injury; (2) the worker demanded reinstatement to the worker's former position, which existed and was available; (3) the worker was not disabled from performing the duties of such position; and (4) the employer denied the worker reinstatement. *See In the Matter of Pacific Convalescent Foundation, Inc.*, 4 BOLI 174, 184 (1984).

In this case, there is no dispute that Complainant suffered an on-the-job compensable injury, he demanded reinstatement to his former position, he was not disabled from performing the duties of such position on July 8, 1996, and Respondent denied him reinstatement. Evidence shows that Complainant's job had been filled with a replacement worker

(Aday) by Cumberland. Thus, Complainant's position still existed and was available. ("A worker's former position is 'available' even if that position has been filled by a replacement while the injured worker was absent." ORS 659.415(1).) Respondent then hired Aday to continue driving the tanker truck that Complainant had driven, with the assurance that Aday would not take away Complainant's job. There is no evidence that the duties of this position changed or that the position did not exist after Respondent acquired Cumberland's assets. Accordingly, the forum concludes that the position still existed and was available after June 17, 1996, with Respondent.

The issues here are whether Respondent was a successor employer of Cumberland Distributing, Inc. (Complainant's employer at the time of injury) and, if so, whether Respondent had an obligation under ORS 659.415 to reinstate him to his former position. The Agency contends that Respondent is the successor employer and had a duty to reinstate Complainant. Respondent denies that it was and asserts that Complainant was never it's employee.

Successor Employer

Ruling on a Respondent motion for summary judgment, the ALJ set out the law of the forum concerning successor employers in civil rights matters, quoting *In the Matter of Palamino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989).

> "The general rule in discrimination cases under federal law regarding successor liability holds the successor entity liable for the acts of the predecessor unless such a holding would be manifestly unjust to the succeeding entity[.] * * * *EEOC v. MacMillan Boedel Containers, Inc.,* 8 FEP 897, 901, 503 F2d 1086 (6th Cir 1974).
>
> " * * * * *
>
> "The *MacMillan* case outlines relevant factors, taken from National Labor Relations Act cases, as being equally applicable to successorship considerations in discrimination cases:
>
> > '1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production, and 9) whether he produces the same product.' *Ibid.,* at 902-03.
>
> This nine-point formula was *adopted* by the Ninth Circuit in *Slack v. Havens,* 522 F2d 1091, 11 FEP 27 (9th Cir 1975). [*See also Bates v. Pacific Maritime Assn.*, 744 F2d 705, 709-10, 35 FEP 1806, 1807-08 (9th Cir 1984).]

"This Forum has *previously* considered the successor problem in instances where an owner of a corporation has continued as a proprietorship in place of an insolvent or defunct corporate entity. In *In the Matter of Anita's Flowers & Boutique,* 6 BOLI 258 (1987), the Commissioner determined that in deciding whether an employer is a 'successor,' the test is whether it conducts essentially the same business as the predecessor. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision. *See, e.g., NLRB v. Jefferies Lithograph Co.,* 752 F2d 459 (9th Cir 1985). * * * " *Palomino*, 8 BOLI at 43-44.

Since *Palomino* was issued in 1989, the Commissioner has revisited the issue of successor liability in three other civil rights cases and has cited *Palomino* with approval each time. *In the Matter of G & T Flagging Service, Inc.*, 9 BOLI 67, 77 (1990); *In the Matter of Pzazz Hair Designs*, 9 BOLI 240, 250 (1991); and *In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 254-55 (1995).[1]

Respondent criticized the Agency's position because of its reliance on the *NLRB v. Jefferies Lithograph* case. As the ALJ found, however, that criticism is not well founded. "Successorship first developed in the context of obligations under the National Labor Relations Act. 29 USC § 151, *et seq*. (1982). * * * Different policy considerations and enforcement mechanisms are incorporated in Title VII; nonetheless, we have held the successorship doctrine to apply to Title VII obligations." *Bates v. Pacific Maritime Assn.*, 744 F2d 705, 35 FEP at 1808 (citing *Slack v. Havens* and *EEOC v. MacMillan Boedel Containers, Inc.*). *See also Musikiwamba v. ESSI, Inc.*, 37 FEP 821, 825 (7th Cir 1985) (analysis set forth by US Supreme Court to justify successor liability in cases arising under NLRA also justifies successor liability in employment discrimination cases, since overriding federal policy

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[1]Other BOLI final orders addressing this issue are wage claim cases. *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258 (1987); *In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68 (1988); *In the Matter of Tire Liquidators*, 10 BOLI 84 (1991); *In the Matter of Gerald Brown*, 14 BOLI 154 (1995); and *In the Matter of Susan Palmer*, 15 BOLI 226 (1997). Those cases were decided in part under ORS 652.310(1), which defines an "employer" as "any person who * * * engages personal services of one or more employees and includes any producer-promoter, and any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full * * *." To avoid any confusion those cases might attract here, the forum has not relied on them in reaching a decision.

against unfair and arbitrary employment practices is implicated in both types of cases).

The ALJ properly concluded that *Palomino* sets out the factors this forum must consider to decide the successorship issue.

Respondent also asserted that it was not responsible for Cumberland's obligation to Complainant, citing from *Schmoll v. Acands, Inc.*, 703 F Supp 868, 872 (D Or 1988), that "when a corporation purchases all or most of the assets of another corporation, the purchasing corporation does not assume the debts and liabilities of the selling corporation." The ALJ ruled that *Schmoll* was not relevant to the successor employer issue in this case. Likewise, the forum has reviewed Respondent's hearing memorandum and concludes that *Schmoll* and the related cases cited by Respondent are not on point here. The ALJ's ruling is affirmed.

Respondent argued that it had only purchased Cumberland's assets, that Cumberland continued to exist after the acquisition, and that Respondent just "folded the purchased assets into its own larger business." Transferring assets from one company to another does not preclude a finding that the purchasing company is a successor. In *Slack*, the court noted that where one corporation (International) dissolved and its assets were transferred to another corporation (Calgon), "Calgon may well have been liable as International's successor corporation * * *." *Slack v. Havens*, 522 F2d 1091, 11 FEP at 30-31.

Before returning to the nine-point formula adopted in *Palomino*, the forum notes its agreement with the *MacMillan* court that successorship turns on the facts in the case. "Each case * * * must be determined on its own facts. * * * We emphasize that the liability of a successor is not automatic, but must be determined on a case by case basis." *MacMillan Boedel Containers*, 503 F2d at 1090-91, 8 FEP at 900; accord *Bates*, 744 F2d 705, 35 FEP at 1808.

The first inquiry is whether Respondent had notice of the charge. In the *MacMillan* case, the "charges" referred to were EEOC charges alleging race and sex discrimination brought against the predecessor. In the *Slack* case, the "charges" referred to were again EEOC charges alleging race discrimination brought against the predecessor. In the *Bates* case, the court refers to "the notice to the successor employer of its predecessor's legal obligation." *Bates*, 744 F2d 705, 35 FEP at 1809. The legal obligation referred to was a consent decree entered into by an association of companies; one of those companies was defendant's predecessor.

Here, there was no charge against Cumberland. No one has alleged that Cumberland committed an unlawful practice. However, Cumberland had a legal obligation to reinstate Complainant to his former position in accordance with ORS 659.415. On June 17, 1996, Ron Tyree learned from Complainant that he was released to light duty work following a compensable injury. This was also the date that Cumberland transferred its assets to Respondent. The record is silent about whether Tyree learned that Complainant was an injured worker before or after he signed the sale agreements. In any event, notice to Respondent of its predecessor's legal obligation was slim at best.

Nevertheless, the record shows that Respondent intended to put Complainant to work, and only delayed the start date until after Complainant got a full work release. As late as July 17, 1996, Tyree was trying to contact Complainant to put him to work. The forum is convinced from the preponderance of the credible evidence in the whole record that Respondent would have reinstated Complainant to his former position if Complainant's attorney had not sent Respondent the letter demanding reinstatement and back pay. Under these circumstances, the late notice to Respondent of Cumberland's legal obligation to Complainant was inconsequential.

The second factor to consider is the ability of the predecessor, Cumberland, to provide relief. Cumberland exists primarily to receive the proceeds from the sale of its assets to Respondent. Cumberland no longer has employees. At the time of hearing, Mr. Cumberland was employed by the Coquille School District. Cumberland could not reinstate Complainant to his former job. Any failure to reinstate the Complainant was Respondent's, not Cumberland's. This factor weighs in favor of finding successorship.

The third factor is whether there has been a substantial continuity of business operations. The forum views this factor from the perspective of Cumberland's business operation, and finds that, for the reasons given below regarding the other factors, there has been substantial continuity. This factor weighs in favor of finding successorship.

The next factor is whether the new employer, Respondent, uses the same plant. The forum finds that it does. Cumberland had facilities in Reedsport and Coos Bay. Respondent continues to use those facilities. Although it has made changes over time (such as leasing out the repair shop), it still uses Cumberland's former locations for substantially the same purposes. This factor weighs in favor of finding successorship.

The fifth factor is whether Respondent uses the same or substantially the same work force. Cumberland employed 11 employees, including Mr. and Mrs. Cumberland, at the time Respondent bought its assets. Respondent immediately hired eight of those employees. The only ones not employed were Mr. and Mrs. Cumberland and Complainant. The forum finds that this constitutes substantially the same work force. The forum is also mindful that Respondent employed 30 other workers in Eugene and Roseburg. Thus, the former Cumberland employees did not make up a majority of Respondent's total workforce after the purchase of Cumberland. This last fact, by itself, weighs against finding successorship. Nevertheless, this fact must be looked at with all the other facts to make a decision.

The sixth factor is whether Respondent uses the same or substantially the same supervisory personnel. Respondent used different supervisory personnel. This fact weighs against finding successorship.

The seventh factor is whether the same jobs exist under substantially the same working conditions. Immediately after the purchase, the same

jobs existed under substantially the same working conditions. Some job duties were later changed, and over time the mechanic's job became a driver's job. The wage rates immediately after the purchase were the same. Respondent offered different benefits than Cumberland had, and Respondent had different employment policies. On the whole, however, I find that the working conditions were substantially the same for the former Cumberland employees. This factor weighs in favor of finding successorship.

The eighth factor is whether Respondent uses the same machinery, equipment, and methods of production. The forum again views this factor from the perspective of Cumberland's business operation. It is undisputed that Respondent bought substantially all of the assets used or useful in the operation of Cumberland's business. Respondent used these assets and continued to service the same customers after the acquisition. There are some exceptions to this. For example, Respondent did not buy Cumberland's antifreeze recycling machine. And after a time, Respondent changed a fueling station to an unattended cardlock operation. Nevertheless, the forum finds that to a very high degree Respondent used the same machinery and equipment and it provided most of the same services as Cumberland had. Respondent presented credible evidence describing the other machinery, equipment, and services it used with a broader range of customers. However, the forum believes the proper focus should be on machinery, equipment, and services that were used and provided by Cumberland. This factor weighs in favor of finding successorship.

The final factor is whether Respondent produces the same product. Here, the inquiry should be whether Respondent provides the same products and services. Cumberland was engaged primarily in the sale and distribution of fuel and petroleum products, such as heating oil. Likewise, Respondent was in the business of selling and distributing petroleum products, including fuel and heating oil. Respondent discontinued some of Cumberland's products and services, but continued most of them. In addition, Respondent provided products and services that Cumberland had not. I find that Respondent provided substantially the same products and services. This factor weighs in favor of finding successorship.

Viewing all the facts together, they weigh in favor of imposing liability on Respondent as a successor employer.

ORS 659.415 Right to Reinstatement Applies to Complainant

In a motion for summary judgment, Respondent argued that Complainant did not meet the requirements of ORS 659.415 and thus was ineligible for reinstatement. In the following ruling, the ALJ denied the motion.

> "ORS 659.415(3) provides in pertinent part:
>
> > 'Notwithstanding subsection (1) of this section:
> >
> > ' * * * * *
> >
> > '(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.'

"Respondent argues that 'in order to be eligible for reinstatement, Complainant must meet two separate requirements. First, his employer at the time of his injury must have employed at least 21 employees. Second, Complainant's employer must employ at least 21 employees at the time he requested reinstatement.' Respondent misreads the statute.

"The Agency argues that, '[i]n order to be ineligible for reinstatement, the complainant must meet two tests: his employer at the time of the injury must have twenty or fewer employees and his employer at the time of demand for reinstatement must have twenty or fewer employees. * * * Both tests must be met to deny a complainant the right to reinstatement.'

"The Agency's interpretation is correct. The Agency properly points out that the first level of analysis of the statute is to examine the text and context of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143, 1146 (1993). Words of common usage typically should be given their plain, natural, and ordinary meaning. *PGE*, 317 Or at 611, 859 P2d at 1146.

"The difference in the participants' interpretations of the statute is that Respondent incorrectly reads it to define a worker's eligibility for reinstatement, while the Agency correctly reads it to define a worker's ineligibility.

"The statute speaks about when a worker's right to reinstatement does not apply, *i.e.*, when the worker is ineligible for reinstatement. The worker's right to reinstatement does not apply when the employer employs 20 or fewer workers at the time of the worker's injury <u>and</u> at the time of the worker's demand for reinstatement. Thus, the employer must employ 20 or fewer workers at both times before the worker will lose the right to reinstatement.

"In its brief, the Agency also correctly points out that the context of the statute supports this conclusion.

'Subsection (1) of the same statute sets out the general rule that an injured worker is entitled to reinstatement to his former position if it exists, is available and the worker can perform the duties of the position. Subsection (3) is an exception to the general rule. ORS 659.405(2) states in relevant part that:

"'The right to otherwise lawful employment without discrimination because of disability where the reasonable demands of the position do not require such distinction * * * are hereby recognized and declared to be the rights of all people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights and ORS 659.400 to 659.460 shall be

> construed to effectuate such policy.'"
>
> 'ORS 659.415 is a remedial statute. BOLI's interpretation of subsection (3)(b)(D) supports the remedial nature of the statute by excluding from the right to reinstatement only those employers who had fewer than twenty employees both at the time of the worker's injury and at the time of his request for reinstatement.' (Agency's brief, at 2-3.)

"This interpretation is further supported by the Agency's rules. OAR 839-006-0115(2) provides:

> 'Employers covered by ORS 659.415 are those employing 21 or more workers at the time of the worker's injury or at the time of the worker's demand for reinstatement.'

"Likewise, OAR 839-006-0130(1) provides in part:

> 'An employer with 21 or more employees at the time of injury or at the time of demand is required to reinstate an injured worker to the injured worker's former position[.]'

"These rules are consistent with the Agency's interpretation that a worker becomes ineligible for reinstatement (that is, the right to reinstatement does not apply) only when the employer had 20 or fewer employees both at the time of injury and at the time of the request for reinstatement.

"In this case, Complainant's employer at the time of injury (May 30, 1996) had fewer than 20 employees. However, Respondent, the alleged successor employer at the time of the request for reinstatement (July 1996), had more than 20 employees. Therefore, the two conditions of ORS 659.415(3)(b)(D) have not been met, and the right to reinstatement under ORS 659.415 applies to Complainant.

"In reaching this conclusion, I have noted that the rules referred to above were amended to their current form effective December 4, 1996 (BL 10-1996). These rules and others were earlier amended effective March 12, 1996 (BL 4-1996). At that time, OAR 839-006-0115(2) provided:

> 'Employers covered by ORS 659.415 are those employing 21 or more workers at the time of the worker's injury and at the time of the worker's demand for reinstatement.'

"OAR 839-006-0130(1) provided in part:

> 'An employer with 21 or more employee both at the time of injury and at the time of demand is required to reinstate an injured worker to the injured worker's former position[.]'

"As written in March 1996, these two rules agree with Respondent's interpretation of ORS 659.415(3)(b)(D). However, for the reasons given above regarding the interpretation of the statute, I find that these two rules conflicted with the language of ORS 659.415(3)(b)(D). Therefore, they were invalid. *Miller v. Employment*

Division, 290 Or 285, 620 P2d 1377, 1379 (1980) (rule invalid that conflicts with express language of statute and legislative policy).

"For these reasons, I conclude that Respondent is not entitled to a judgment as a matter of law, and its motion for summary judgment must be denied."

The forum adopts that ruling.

Remedies

Back Wages

At the latest, Respondent should have reinstated Complainant to his former position on July 17, 1996. Complainant became self employed on April 1, 1997. That date cuts off the period for measuring back wages.

Respondent had the burden of proving that Complainant failed to mitigate his damages. OAR 839-050-0260(5). The forum found that Complainant actively looked for driving jobs and other work in the southern coastal area of Oregon. His testimony was credible that he called Stalcup Trucking a couple of times about job openings, but the available positions were in Roseburg. The forum also notices that Complainant lived in Florence, while Stalcup's highway reader board (advertising job openings) was in Coos Bay, some 47 miles away. Given that, Respondent's argument that Complainant failed to mitigate his damages was unpersuasive.

In order to compute back wages, the Agency proposed that the forum modify Jesse Aday's earnings to approximate what Complainant would have earned between July 17, 1996, and March 31, 1997. Respondent objected to that and argued that the forum could not impose damages based on guesswork. Respondent argued that the Agency did not meet its burden of proof concerning an amount of back wages. The Agency replied that Respondent failed to produce payroll records that would have allowed the Agency to more accurately estimate Complainant's back wages.

The forum agrees with the Agency that Complainant's back wages can be computed based on Aday's wages, since Aday was employed in Complainant's former position and no evidence suggests that Complainant would not have performed the same work in that position if Respondent had reinstated him. Beginning June 17, 1996, Aday worked for Respondent for one and a half years. The Agency stipulated that, for the purposes of computing back wages, Aday worked 40 hours per week between June 17 and July 16, 1996. That period included four weeks and two days, which the forum calculates to be 176 hours. Aday's hourly rate of pay was $10.50. Thus, Aday earned $1,848 in gross wages during that period (176 times $10.50). During 1996, he earned gross wages of $12,409. Accordingly, between July 17 and December 31, 1996, Aday earned $10,561 ($12,409 minus $1,848). Aday worked the entire year in 1997, earning gross wages of $24,845. It is reasonable to infer that he earned one-quarter of that amount in the first quarter of the year, that is, between January 1 and March 31, 1997. One quarter of $24,845 equals $6,211. Therefore, the forum concludes, based on these calculations, that Complainant lost wages of $16,772

($10,561 plus $6,211) during the period July 17, 1996, to March 31, 1997.

Mental Suffering

It is well settled that the Commissioner may award compensatory damages for mental suffering as an administrative remedy under the Oregon civil rights law. *Williams v. Joyce,* 4 Or App 482, 504, 479 P2d 513, 523, 524, *rev den* (1971); *School District No. 1 v. Nilsen*, 271 Or 461, 484-86, 534 P2d 1135, 1146 (1975); *Fred Meyer, Inc. v. Bureau of Labo*r, 39 Or App 253, 592 P2d 564, 569-70, *rev den* 287 Or 129 (1979); *Gaudry v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668, 670-71 (1980); *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475, 484 (1984); *Schipporeit v. Roberts*, 93 Or App 12, 760 P2d 1339, 1342-43 (1988); *aff'd*, 308 Or 199, 778 P2d 953 (1989). *See also* OAR 839-003-0090(1)(a).

In determining mental distress awards, the Commissioner considers the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused. Also considered is a complainant's vulnerability due to such factors as age and work experience. *See Fred Meyer Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, 571-72 (1979), *rev den* 287 Or 129 (1979); *In the Matter of Pzazz Hair Designs*, 9 BOLI 240, 256-57 (1991).

In this case, the unlawful conduct was Respondent's failure to reinstate an injured worker to his former position as required by ORS 659.415. The duration of that conduct was comparatively brief. At most, it lasted from July 11, 1996, when Complainant demanded reinstatement, to July 31, 1996, when Respondent's attorney wrote that Complainant had no right to reinstatement with Respondent. An unlawful failure to reinstate an injured worker is like an unlawful discharge, which the forum considers a severe form of discriminatory conduct. This type of conduct, unlike harassment, is not measured in terms of frequency and pervasiveness.

The mental suffering Complainant experienced is described in Finding of Fact -- The Merits number 30. Most of his distress came from the financial hardship caused by his unemployment, the difficulty finding other work, and his impaired self esteem. The Commissioner has held many times that the anxiety and uncertainty connected with loss of employment income is compensable when attributable to an unlawful practice. *In the Matter of WS, Inc.*, 13 BOLI 64, 91 (1994). Complainant's mental distress (attributable to Respondent) lasted until he became self employed.

The forum is therefore awarding the Complainant $10,000 to help compensate him for the mental distress he suffered as a result of Respondent's unlawful employment practice.

Reinstatement

Respondent had a duty under ORS 659.415 to reinstate Complainant to his former position. The Agency has requested as a remedy that Respondent reinstate him. The forum finds that this is an appropriate remedy in this case.

Accordingly, the forum will order Respondent to reinstate Complainant to his former position of employment

upon demand if the position exists and is available, as defined in ORS 659.415. If the former position is not available, Respondent shall reinstate Complainant in any other existing position which is vacant and suitable. Complainant must make his demand within seven days of the date he receives the Final Order in this case. His right to reinstatement under this order will terminate seven days from the date he receives the Final Order unless he demands reinstatement within that time.

Respondent's Exceptions

In its exceptions to the proposed order, Respondent alleges the same facts and makes the same legal arguments as it did in its prehearing legal memorandum. The forum has reviewed the record in this matter and the applicable law. To the extent that Respondent's exceptions are contrary to the facts found and law applied in this order, the forum overrules the exceptions.

Respondent argued that Complainant failed to mitigate his damages because he did not submit an application to Stalcup Trucking, Inc. This does not constitute a failure to mitigate, under the facts of this case. Complainant testified credibly that he contacted Stalcup twice when he learned of job openings. On both occasions, the openings were in Roseburg, which is nearly 100 miles away from Complainant's home town. Under those circumstances, Complainant's failure to submit a job application does not constitute a failure to mitigate his damages.

Respondent argues that if it is considered a successor-in-interest to Cumberland, then every time a company purchases some assets of another company the purchaser will be liable for the seller's obligations to its employees. Respondent claims this will have a chilling effect on business transactions, and that it's bad law and bad business. These are obvious overstatements of the effects of this order. The forum determines whether an employer is a successor on a case-by-case basis, applying the factors adopted in the *Palamino Cafe* case. Applying those factors here, it is the forum's considered opinion that Respondent was a successor employer to Cumberland.

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 in violation of ORS 659.415, as well as to protect the lawful interest of others similarly situated, the Respondent, Tyree Oil, Inc., is hereby ORDERED to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street # 32, Suite 1010, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for Blair Fountain, in the amount of:

a) SIXTEEN THOUSAND SEVEN HUNDRED AND SEVENTY TWO DOLLARS ($16,772), less appropriate lawful deductions, representing wages Complainant lost as a result of Respondent's unlawful practice found herein; plus,

b) Interest on the foregoing, at the legal rate, accrued between April 1, 1997, and the date Respondent complies herewith, to be computed annually; plus,

c) 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,

d) 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 annually.

2) Reinstate Complainant to his former position of employment upon demand if the position exists and is available, as defined in ORS 659.415. If the former position is not available, Respondent shall reinstate Complainant in any other existing position which is vacant and suitable. The requirements of this paragraph are conditioned on Complainant making his demand within seven days of the date he receives the Final Order in this case. His right to reinstatement under this order will terminate seven days from the date he receives the Final Order unless he demands reinstatement within that time.

3) Take all appropriate steps to ensure that any worker who has sustained a compensable injury will be reinstated to his or her former job or the first existing job that is vacant and suitable after the employee's demand for such reinstatement, providing that the employee is not disabled from performing the duties of such job.

In the Matter of
THE WESTWIND GROUP OF OREGON, INC., dba Burger King,
Respondent.

Case Number 47-98
Final Order of the Commissioner
Jack Roberts
Issued June 30, 1998.

SYNOPSIS

Where respondent, a public accommodation, operated a fast food restaurant, and where respondent's assistant manager, who was white, ignored and failed to serve complainant, who was black, but then promptly and courteously served a white customer who came to the counter behind complainant, the commissioner found that the assistant manager discriminated against complainant because of her race, in violation of ORS 30.670. The commissioner awarded complainant $15,000 for her mental suffering caused by respondent's actions. ORS 30.670, 30.675, 30.685.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 30, 1998, 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. Veta Shamsud-Din (Complainant) was present throughout the hearing. The Westwind Group of Oregon, Inc. (Respondent) was represented by Emi Anne Murphy, Attorney at Law. Stephen LaBreche was present throughout the hearing as Respondent's representative.

The Agency called the following witnesses: Chet Nakada, Senior Investigator with the Civil Rights Division of the Agency; Jeff Nelson, Portland Police Officer; and Veta Shamsud-Din, Complainant.

Respondent called the following witnesses: Dinshaw Kermani, Respondent's restaurant manager; and Denise Ribbeck, Respondent's district team leader.

Administrative exhibits X-1 to X-6, Agency exhibits A-1 to A-3, and Respondent exhibits R-1 to R-6 were offered and received into evidence. The record closed on April 30, 1998.

Having fully considered the entire record in this matter, I, Jack 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 March 26, 1997, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent discriminated against her because of her race/color in that, on January 22, 1997, Respondent's employee, Jim Brusseau, ignored Complainant, who is black, and made no effort to serve her when she entered Respondent's restaurant and then served a white man.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful public accommodation practice (denying service because of race) by Respondent in violation of ORS 659.045.

3) On March 18, 1998, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent denied Complainant the full and equal enjoyment of Respondent's services because of her race. The Specific Charges alleged that Respondent's action violated ORS 30.670.

4) 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.

5) On April 9, 1998, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges, and stated affirmative defenses.

6) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondent each filed a Summary of the Case.

7) A pre-hearing conference was held on April 30, 1998, at which time the Agency and Respondent stipulated to facts that were admitted in the pleadings. Those facts were ad-

mitted into the record by the ALJ during the hearing.

8) At the start of the hearing, the attorney for Respondent stated that she had read the Notice of Contested Case Rights and Procedures and had no questions about it.

9) Pursuant to ORS 183.415(7), the ALJ orally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) On June 10, 1998, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At times material herein, Respondent was an Oregon corporation and a franchisee of Burger King Corporation operating under the assumed business name, Burger King, and was engaged in the business of selling food and drink to the public, subject to the provisions of ORS 659.010 to 659.435 and 30.670 to 30.685.

2) At times material herein, Respondent was a fast food restaurant offering food and beverages for sale to the public under the assumed business name Burger King located at 1525 SE Grand Avenue, Portland, Oregon.

3) At times material herein, James Brusseau was employed by Respondent as an assistant manager at Respondent's 1525 SE Grand Avenue, Portland, Oregon location.

4) Respondent maintained a "Crew Member Handbook" outlining its major policies and procedures, dated January 1995. The handbook contained guidelines for appropriate customer service. Unacceptable conduct that would result in disciplinary action included, among other things, "Failure to offer the highest degree of service, courtesy and respect to any customer." Brusseau received training about appropriate customer service. His managers thought he followed the customer service policy.

5) On January 19, 1997, Respondent adopted a national personnel policy prohibiting harassment of or discrimination against its employees. It replaced a 1992 policy memorandum prohibiting harassment of employees.

6) Brusseau, who is white, worked at the Grand Avenue restaurant for less than two years. He worked with several black employees. He helped a black employee get a promotion to assistant manager. He hired several black employees. Brusseau's manager got no complaints of discrimination or racism by Brusseau from customers or employees. The restaurant served around 10,000 customers per week. Around 20 to 30 percent of the customers were black.

7) On January 22, 1997, Jeff Nelson, a white Portland Police Officer, was a customer in Respondent's restaurant between 7:00 and 8:00 p.m. He was in plain clothes. Brusseau was busy with some activity when Nelson came in. Brusseau immediately greeted Nelson and took his order. He was courteous to Nelson and served him quickly. Nelson sat at a table near the service counter. He observed Complainant when she en-

tered Respondent's restaurant and the whole time she was there.

8) On or about January 22, 1997, Complainant was present at Respondent's fast food restaurant.

9) Complainant is a black female.

10) Before Complainant entered the restaurant, she knew she wanted a milkshake. She entered alone. Her daughter, the daughter's boyfriend, and her granddaughter were waiting in her car. The restaurant was not busy. No customer was waiting to be served. When Complainant entered, she walked up to the counter near the cash register. She looked at Brusseau. He was the only employee present behind the counter. He looked at her and looked away. He was moving around behind the counter, wiping down the counter and other things. Complainant was tracking Brusseau and they made eye contact several times. He occasionally glanced at her and looked down or turned his back on her. Complainant was not looking at the menu because she already knew what she wanted. She was waiting for Brusseau to ask to help her.[1] Brusseau didn't say a word to Complainant. She stood there for around a minute. Brusseau was behind the counter the entire time. Complainant felt embarrassed because she was not being helped and Brusseau was ignoring her. Brusseau never took Complainant's order.

11) A white male customer came into the restaurant and stood behind Complainant. The customer did not appear to be in a hurry. Brusseau tilted his head, looked around Complainant, and asked, "May I help you, sir?" to the white customer. The man looked at Complainant, then stepped up beside her. The customer was angry and complained that his last order had been filled incorrectly. Brusseau apologized to the man. Complainant then said to Brusseau that she had been there first and this wasn't fair. Brusseau had an aggressive tone of voice and posture and said, "Oh well," and something that Complainant did not remember because she was upset. Brusseau was not apologizing. Nelson heard Brusseau say to Complainant something to the effect of, "If you don't like it, you can take your business elsewhere." Complainant stepped back, shocked. Complainant said she would spend her money elsewhere and left. She thought Brusseau was a racist.

12) Complainant left the restaurant without purchasing any food or drink items.

13) Jeff Nelson contacted Complainant at her car. She had never seen him before and did not know he was a police officer. She was upset and had tears in her eyes. Nelson told her he had seen what happened in the restaurant. He said it was wrong and that she had been discriminated against. He wrote down his name and phone number for her, in case she wanted him to be a witness. Before Nelson came up to her car, Complainant did not plan to do anything about the incident.

14) While Complainant was talking with Nelson, the white customer came out of the restaurant. His car was parked next to the passenger

[1]Complainant had once worked at a McDonald's restaurant, and she was trained to ask the customers if she could help them.

side of Complainant's car. As the customer was getting in his car, he yelled something to the effect that he thought Nelson was making a mistake or Nelson was blowing it out of proportion. Nelson told the man he was not part of their conversation. The man said an obscenity and left.

15) Complainant then drove up to Respondent's drive-through window and ordered a milkshake. She was served by a Hispanic male. He said the milkshake machine was broken. Complainant asked him the name of the manager and told him the manager had been rude to her. He agreed that the manager was rude.

16) Complainant felt surprised, upset, humiliated, and embarrassed when Brusseau did not help her. The incident hurt her self esteem. She spoke to her pastor about the incident later because she felt depressed and hurt. Up to the time of hearing, she still thought about the incident and was upset by it. She never went to another Burger King restaurant.

17) Complainant's testimony was credible. The ALJ carefully observed her demeanor at hearing, and on that basis found her testimony reliable. Further, her testimony was corroborated by Nelson's testimony, which the forum also found to be credible.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent's restaurant at 1525 SE Grand Avenue, Portland, Oregon, was a place offering to the public accommodations, advantages, facilities or privileges in the nature of goods and services.

2) Complainant is a member of a protected class (race).

3) Respondent's assistant manager denied Complainant the full and equal accommodations, advantages, facilities, and privileges of Respondent's restaurant on account of Complainant's race.

4) Complainant suffered mental distress because of Respondent's action.

CONCLUSIONS OF LAW

1) ORS 30.675(1) provides:

> "A place of public accommodation * * * means any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise."

At all times material, Respondent was a place of public accommodation subject to the provisions of ORS 30.670 to 30.685 and 659.010 to 659.110. ORS 659.010(8), (13), (15).

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 practice found. ORS 659.045, 659.050, 659.060.

3) ORS 30.670 provides:

> "All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race * * *."

ORS 30.685 provides:

> "It is unlawful for any person to aid or abet any place of public accommodation, as defined in ORS 30.675 or any person acting on behalf of such place to make any distinction, discrimination or restriction on account of race * * *."

Respondent violated ORS 30.670.

4) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), 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 30.670 to 30.685, 659.010 to 659.110 and 659.400 to 659.545, 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 the Complainant and other persons similarly situated.

OPINION

Prima Facie Case

The Agency has the burden of proving that Complainant's protected class membership was the reason for Respondent's alleged unlawful action. OAR 839-005-0010(5). To present a prima facie case in this matter, the Agency must present evidence to establish the following four 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 protected class.

OAR 839-005-0010(1). The Agency has established a prima facie case. The credible testimony of Agency witnesses was accepted and relied upon herein. Regarding the first three elements:

> (1) Respondent stipulated that it was engaged in the business of selling food and drink to the public, subject to the provisions of ORS 659.010 to 659.435 and 30.670 to 30.685
>
> (2) Respondent stipulated that Complainant is a black female. Thus, she is a member of a class protected by ORS 30.670.
>
> (3) Complainant's credible testimony established that she suffered mental distress because of Respondent's treatment of her.

Regarding the fourth element, that is, the causal connection between Respondent's action and Complainant's membership in the protected class, comparative evidence established this element. Credible evidence on the record showed that Brusseau treated Nelson, a white person, and the customer who came in after Complainant, another white person, differently than he treated her. Brusseau served both the white customers quickly and courteously. He stopped his other work to serve them immediately. In comparison, he did not serve Complainant quickly or at all. He did not stop his other clean-up activities to help her. All the credible evidence in the record shows that he ignored her, despite her apparent readiness for service.

Furthermore, his demeanor towards Complainant was completely different than it was toward the white customers. He was prompt and courteous to them. He was apologetic to the white customer with a complaint. However, he was rude and unhelpful to Complainant, and he responded to her complaint with a comment to the effect of "If you don't like it, take your business somewhere else."

These facts permit a reasonable inference that Respondent's assistant manager treated Complainant differently than other customers (who were not members of Complainant's protected class) because of her protected class.

Respondent's Defenses

In its answer, Respondent claimed it maintained a strict policy prohibiting any discrimination or unequal treatment of its customers because of race. Respondent presented two versions of its crew or team member handbook. It also provided two versions of its employment harassment and discrimination policies. The forum reviewed the two handbooks and failed to find such a specific policy. The handbook dated January 1995 contained many statements requiring the highest standards of customer service, but no specific policy prohibiting discriminatory treatment of customers because of race. The second handbook was dated July 1997. Therefore, it was not in existence at times material and the forum gave it no weight. The two discrimination policies prohibit employment discrimination, not discrimination against Respondent's customers. Respondent's two witnesses testified credibly that Respondent had a policy prohibiting discrimination against customers because of race and requiring equal treatment of all customers. Thus, while Respondent's written policies in the record don't evidence its alleged antidiscrimination policy concerning customers, the forum believes that Respondent did train its employees to treat all customers equally, without regard to race.

Respondent then contended that Jim Brusseau complied with this policy during his encounter with Complainant. Respondent's evidence included Brusseau's unsworn statement and character evidence about Brusseau from his managers. Brusseau's statement says that Complainant arrived at the counter, mid-way down (that is, not in front of the cash register), and that she "was still deciding as she was intently reading the menu board." He claimed he went to the register and waited. Then the other customer approached and was in a hurry. Brusseau claimed that since Complainant was still looking at the menu, "I decided to help this gentleman." He also described his brief conversation with Complainant. Brusseau's description of the event and the conversation was contradicted by the sworn testimony of Complainant and Nelson. Nelson was a trained observer and an unbiased witness. His testimony was clear and reliable, and it corroborated Complainant's testimony about the incident. The Agency's evidence was more persuasive and reliable than Respondent's, and the forum found Brusseau's statement unreliable and not credible. Respondent's character evidence about Brusseau was insufficient to overcome the Agency's credible evidence about the actual incident.

Respondent also suggested a non-discriminatory reason for Brusseau's treatment of Complainant. It alleged that Brusseau was unable to serve Complainant while she was reading the menu board and deciding what to order. It claimed that Complainant left the establishment before Brusseau could take her order. Respondent again relied on Brusseau's statement. For the reasons given above, this evidence is not credible.

Respondent's evidence failed to rebut the Agency's prima facie case. The forum concludes that a preponderance of the evidence on the whole record proves that Respondent's treatment of Complainant was due to her race.

Damages

The Agency requested $15,000 to compensate Complainant for her mental suffering resulting from Respondent's unlawful practice. Such an award in authorized by ORS 659.060 (3) and OAR 839-003-0090(1)(b).

In previous cases where a complainant has been denied equal treatment by a place of public accommodation because of race, the commissioner focused on three points when determining a monetary award.

First, the battle against race discrimination has been at the front line of civil rights. Discrimination in public accommodation impairs a "person's basic right to move about freely in society and to be recognized thereby as a part of his or her community." It is particularly "insidious and devastating."

Second, suffering in such cases is usually mental, rather than physical or financial, making it difficult to measure. However, to follow the mandate of the statute to "eliminate the effects" of discrimination, a compensatory award must be measured in terms of mental suffering.

Third, because such discrimination is particularly devastating, it is important to emphasize that the duration of the discrimination does not determine either the degree or duration of the effects of discrimination, "and it is these effects which damages awarded are meant to compensate." *In the Matter of Joseph Gaudry*, 1 BOLI 235, 241-43 (1980), *affirmed in part, reversed and remanded as to posting in other establishments operated by respondent*, *Gaudry v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668 (1980). *See also In the Matter of Joseph Gaudry*, 3 BOLI 32, 37-38 (1982); *In the Matter of The Pub*, 6 BOLI 270, 284-86 (1987).

Here, the discriminatory episode lasted only a couple of minutes. Complainant's upset lasted during the episode, the remaining evening, and for a long time thereafter. She consulted her pastor and attorneys as a result. Indeed, she testified credibly that the long term negative effects lasted to the date of hearing. In cases of race discrimination, the courts and the Commissioner have inferred that the complainant suffered impaired human dignity, and that inference is justified here. *See, for example, Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979).

The forum is therefore awarding the sum of $15,000 to compensate Complainant for her mental distress.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and to eliminate the effects of the unlawful practice found in violation of ORS 30.670, as well as to protect the lawful interest of others similarly situated, The Westwind Group of Oregon, Inc. is hereby ORDERED to:

1) And has delivered to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street # 32, Suite 1010, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for Veta Shamsud-Din, in the amount of Fifteen Thousand Dollars ($15,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice in violation of ORS 30.670 found herein;

2) Cease and Desist from engaging in practices that discourage or deny persons the full and equal accommodations, advantages, facilities, and privileges of your public accommodation by discriminating or imposing distinctions and restrictions based upon race.

In the Matter of

LARSON CONSTRUCTION CO., INC., and David M. Larson, Respondents.

Case Number 36-98

Final Order of the Commissioner

Jack Roberts

Issued July 22, 1998.

SYNOPSIS

Where respondents, a corporation and its president, performed a subcontract on a public works project and intentionally failed to pay 29 workers the prevailing wage rate, in violation of ORS 279.350(1), intentionally failed to post the prevailing wage rates at the project, in violation of ORS 279.350(4), filed inaccurate and incomplete certified statements, in violation of ORS 279.354, and took action to circumvent payment of the prevailing wage rate by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship program, in violation of ORS 279.350(7), respondents became ineligible for a period of three years to receive any contract or subcontract for public works, pursuant to ORS 279.361, and the commissioner assessed respondents civil penalties of $59,993.72 for those violations, pursuant to ORS 279.370. ORS 279.350(1), (4), (7); 279.354; 279.361; 279.370; OAR 839-016-0085, 839-016-0095, and 839-016-0520 to 839-016-0540.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by

Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 21 and 22, 1998, in the Council Chambers of the City of Cannon Beach, 163 East Gower Street, Cannon Beach, Oregon, and on April 23, 1998, in room 1005 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. Larson Construction Co., Inc. (Respondent LCCI) and David M. Larson (Respondent Larson) were represented by Margaret Hoffmann and Darien Loiselle, Attorneys at Law. David M. Larson was present throughout the hearing on his own behalf and as Respondent LCCI's representative.

The Agency called the following witnesses: Jason Bergeson, former employee of Respondent LCCI; Dan Bott, Project Superintendent, Wildish Construction Company; Stacy Clark, former employee of Respondent LCCI; Lora Lee Grabe, Compliance Specialist with the Wage and Hour Division (WHD) of the Agency; and Vicki King, former Compliance Specialist with WHD.

Respondent called the following witnesses: Mike Caccavano, City Engineer of Astoria; Julie Fritz, Respondents' office manager; Gil Gramson, City Manager of Warranton; David Larson, Respondent and president of Respondent LCCI; and Darien Loiselle, Respondents' attorney.

Administrative exhibits X-1 to X-16; Agency exhibits A-1 to A-13, A-15, A-17, A-19 to A-31, A-33, and A-34; and Respondents' exhibits R-1 to R-5 and R-7 to R-11 were offered and received into evidence. The Agency withdrew exhibits A-16, A-32, and A-35. Respondents withdrew exhibit R-6. The record closed on May 7, 1998.

Having fully considered the entire record in this matter, I, Jack 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 October 24, 1997, the Agency issued a "Notice of Intent to Make Placement on List of Ineligibles and to Assess Civil Penalties" (Notice of Intent) to Respondents. The Notice of Intent alleged that (1) Respondents intentionally failed to pay the prevailing rate of wage to workers on a City of Seaside water treatment plant public works project in violation of ORS 279.350(1); (2) Respondents intentionally failed to post the applicable prevailing wage rates on that project in violation of ORS 279.350(4); (3) Respondents filed inaccurate and incomplete certified statements on that project in violation of ORS 279.354; and (4) Respondents took action to circumvent the payment of the applicable prevailing wage on that project in violation of ORS 279.350(7). The Agency alleged aggravating circumstances. The Agency proposed to place Respondents' names on the list of contractors ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on the ineligible list, pursuant to ORS 279.361, and to assess civil penalties against Respondents in the amount of

$58,522, pursuant to ORS 279.370 and applicable rules. The Agency attached an appendix listing 25 workers who were not paid prevailing wages on the project and listing related civil penalties. At hearing, the Agency moved to amend the notice to correct the appendix to list 29 workers and related civil penalties of $45,993.72. Respondents stipulated to the amendments and the ALJ granted the motion.

2) On November 12, 1997, Respondents filed an answer. They denied the violations alleged above in the Notice of Intent and stated five affirmative defenses. Respondents requested a contested case hearing. At hearing, Respondents moved to amend their answer to allege an additional affirmative defense challenging the constitutionality of ORS 279.361. Over the Agency's objection, the ALJ granted the motion and set a briefing schedule. After hearing, Respondents withdrew this affirmative defense.

3) On December 17, 1997, the Hearings Unit issued to Respondents and the Agency a Notice of Hearing, which set forth the time and place of the requested hearing. 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 administrative rules regarding the contested case process -- OAR 839-050-0000 through 839-050-0440. On February 13, 1998, the Hearings Unit issued to Respondents and the Agency a notice that OAR 839-050-0220 had been amended, along with a copy of the new rule and a complete copy of OAR 839-050-0000 through 839-050-0440.

4) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondents each filed a Summary of the Case.

5) On March 11, 1998, Respondents requested a discovery order permitting the deposition of Lora Lee Grabe, the Agency's compliance specialist. The Agency had no objection and the ALJ granted the request.

6) At the start of the hearing on April 21, 1998, Respondents' attorney said that she had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

7) The participants waived the requirement that the ALJ advise them of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. ORS 183.415(7).

8) Respondents' attorneys filed a hearing memorandum.

9) Early in the hearing, the participants agreed to several stipulations, which Respondents later reduced to writing and submitted for the record.

10) The proposed order, containing an exceptions notice, was issued June 9, 1998. Exceptions were due June 19, 1998. Respondents timely filed exceptions which are dealt with in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) At all times material, Respondent LCCI was an Oregon corporation. Respondent Larson was Respondent LCCI's president.

2) Respondent LCCI was the prime contractor on a Cannon Beach Rural Fire Protection District public works project. Beginning in December 1995, Agency Compliance Specialist (CS) Vicki King investigated Respondents' alleged failure to pay the prevailing wage rate (PWR) (including zone pay, driving time, and overtime over eight hours per day) and failure to post PWR information at the job site of the Cannon Beach project. As a result of the investigation, Respondents paid 10 workers PWR wages due totaling $2,846.14. CS King found 10 violations of failing to pay PWR and one violation of failing to post PWR information at the job site. She recommended that the Agency send Respondents a warning letter and place Respondents on its warning letter list. The Agency sent Respondents a warning letter on May 31, 1996, informing them that their practices did not comply with the PWR law. The letter warned them that the Agency would consider placing their names on a list of persons ineligible to receive public works contracts for a period of up to three years should they be found to have failed or refused to pay PWR in the future.

3) Wildish Building Company (Wildish) was the prime contractor on a Seaside Water Treatment Plant public works project. The City of Seaside was the contracting agency. Respondent LCCI was a subcontractor. Respondents performed excavation and earthwork on the project.

4) Respondents intentionally failed to pay the prevailing wage rate between on or about September 12, 1995, to on or about January 6, 1997, to 29 of its workers, the names of said workers set out below, on the City of Seaside's Seaside Waste Treatment Plant public works contract, upon which Respondents were a subcontractor, by not paying said workers for all hours worked, by not paying the prevailing hourly wage rates specified by the Commissioner for workers employed as truck drivers and heavy duty mechanics, and by not paying zone pay to power equipment operators. The names of the workers, as listed in "Corrected Appendix A" to the Notice of Intent, are: Kurt Anderson, Jason Bergeson, Stacy Clark, Joseph Cox, Bryan Edwards, Andy Finn, Gary Fritz, Jennifer Fritz, Joe Gilmore, Randy Gilmore, Chris Gipson, Mike Goodwin, Joel Grothe, Bill Gunderson, Les Hannah, Rod Herndon, Chad Mason, Travis Owsley, Joseph Painter, Paul Parker, Paul Phillips, Michael Rider, Jeff Rosa, John (Rick) Schertenleib, Clyde Stanley, Mark Stough, Leo Susbauer, Joe Talbot, and Glen Wadley.

5) Between on or about September 12, 1995, to on or about January 6, 1997, Respondents intentionally failed to post in a conspicuous and accessible place in or about its public works project the applicable prevailing wage rates on the City of Seaside's Seaside Waste Treatment Plant public works contract, upon which Respondents were a subcontractor.

6) Between on or about September 12, 1995, to on or about January 6, 1997, Respondents filed inaccurate and incomplete certified statements by failing to report workers, hours and dates of work on the City of Seaside's Seaside Waste Treatment Plant public works contract, upon which Respondents were a subcontractor.

7) Between on or about September 12, 1995, to on or about January 6, 1997, Respondents took action to circumvent the payment of the applicable prevailing wage by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship agreement on the City of Seaside's Seaside Waste Treatment Plant public works contract, upon which Respondents were a subcontractor.

8) The following provides further explanation for Findings of Fact -- The Merits number 4, 6, and 7:

(a) In some instances, Respondents reported on certified statements and paid employees for only a certain percentage of the hours reported by those employees;

(b) In some instances, hours worked by employees on weekends were reported by Respondents on certified statements and paid as [though] they had been worked on weekdays;

(c) In some instances, hours in excess of eight worked in a day were banked or reported on certified statements and paid as though they had been worked on another day.

9) Respondents' intentional failure to pay the prevailing wage rate, as described in Findings of Fact -- The Merits numbers 4 and 8; their failure to file accurate and complete certified statements, as described in Findings of Fact -- The Merits numbers 6 and 8; and their actions to circumvent the payment of the applicable prevailing wage, as described in Findings of Fact -- The Merits numbers 7 and 8, were done knowingly and deliberately. These actions and failures (acts) affected 29 workers and occurred over a long time. Some of the acts were the same as those that Respondents committed on the Cannon Beach project. The acts occurred at the same time that the Agency was warning Respondents about such acts and collecting back wages on the Cannon Beach project. Respondent Larson knew such acts violated the law. He chastised workers who complained about such acts.

10) Early in the Seaside project, Wildish was the only contractor with a job shack on site. Wildish had a BOLI PWR poster posted in the shack. No subcontractor posted the prevailing wage rates. Respondent Larson thought it was difficult to post the prevailing wage rates before he had a trailer on site. Around late May or early June 1996, Respondents put a trailer on the Seaside site. He never called the Agency about how to post the rates when he did not have a trailer on site.

11) On September 20, 1996, Respondent Larson hired Stacy Clark as an equipment operator of bulldozers and scrapers. Clark did not know what his wage rate was or that the Seaside job was a public works project. When Clark asked about his wages, Respondent Larson told him that he would be paid 70 percent of the regular wage because Clark, like all new employees, was part of an apprenticeship program. When Clark worked 10 hours one day, he saw the foreman write down seven hours. The foreman said this was how Respondents figured Clark's 70 percent wage rate. Clark learned from a Wildish superintendent that the Seaside job was a public works project and that he should be getting PWR. Clark started

keeping track of his hours. He checked with other employees and they were not being paid PWR. Clark was not in any apprenticeship program. Respondent Larson heard that Clark was angry about his wages. He jumped up on Clark's machine, called him dirty names, and challenged Clark to turn him in to BOLI. Respondent Larson later told Clark that he wanted him to stay with Respondent LCCI, but Respondent Larson was going to send him to a non-public works job and pay him only $10 per hour. After Clark got his second paycheck, he went to Wildish's office and got a paper showing what he should have earned based on his hours and the PWR. He then went to Respondents' office and gave a secretary a copy of his hours to get his pay straightened out. Later a job bidder for Respondents called Clark. Clark went to the office, where the bidder gave him a document entitled "Labor Dispute Settlement Agreement." Clark read and signed the document, and then he got a paycheck for additional wages. The secretary then called Wildish and had Clark tell Wildish that he had settled his wage claim with Respondents. The employment relationship between Clark and Respondents was terminated.

12) On October 30, 1996, Respondents' former employee Chad Mason filed a complaint with the Agency about Respondent LCCI. He complained that Respondents were improperly paying him and others for all hours worked on the Seaside project. Mason worked for Respondents from November 1, 1995, to October 19, 1996. On December 2, 1996, he filed a wage claim with the Agency against Respondent LCCI for regular and overtime wages at the prevailing wage rate.

13) The Agency has a procedure in its Field Operations Manual called "Prevailing Rate Investigations for wage claims and complaints." Section III.E. of the procedure, entitled "Final Determination," provides in part:

> "2) If investigation reveals wages are owed, make final demand, in writing, advising contractor of possible debarment. Do not advise contractor he/she will <u>not</u> be debarred if he/she pay [*sic*] wages.
>
> "a) If contractor pays wages due, remit wages to claimant/worker and write WH-60 [Case Summary Report]. Get written promise from contractor of future compliance with PWR Law. Detail in WH-60 the contractor's reasons for initial failure to pay PWR.
>
> "b) If contractor refuses payment of wages, prepare a legal WH-60 report, detailing contractor's reasons for initial failure to pay PWR, and recommend legal action, pursuing unpaid wage from the surety.
>
> "3) Debarment should be recommended in the following situations:
>
> "a) Contractors have previously been found in violation of the PWR law; have been warned that placement on the Ineligible List would be considered in the future and have committed subsequent violations.
>
> "b) Contractors have been found in violation of the PWR law

where the violation includes falsification of records or clear evidence of subterfuge designed specifically to avoid paying PWR.

"c) Contractors have been found in violation of the PWR law and there is clear evidence they knew the PWR must be paid and failed to do so.

"d) There is evidence of kickbacks.

"e) First time offenders when the violations are extremely serious, such as preceding examples b, c, d.

"f) Refusal and/or failure to post prevailing wage rates (this is not routinely treated as a debarment offense when found alone)." (Emphasis original.)

During November 1996, the Agency assigned Compliance Specialist (CS) Lora Lee Grabe to investigate the complaint against Respondents. Beginning in January 1997, Grabe was the lead worker in the Agency's PWR program and investigated only PWR claims and complaints. She was familiar with the PWR statutes, rules, and investigation procedure. She was aware that the Agency had sent Respondents a warning letter concerning the Cannon Beach public works contract. She drafted a Notice of Claim to file against the prime contractor's bond for back wages. To estimate the back wages and liquidated damages potentially due, Grabe relied on interviews with two of Respondents' employees (Chad Mason and Jason Bergeson), some records (including some of Respondents' certified statements), and allegations that Respondents had not properly paid PWR to other employees. At the time, Grabe was not evaluating the case for whether there was sufficient evidence to debar Respondents.

14) During December 1996, the Agency filed a Notice of Claim against Wildish's bond, creating a lien on the bond for about $2.5 million, in connection with the PWR claims against Respondents. Wildish withheld around $250,000 in progress payments to Respondents. This put Respondents in extreme financial difficulty.

15) On December 9, 1996, CS Grabe sent a letter to Respondent Larson advising him of the prevailing wage rate claim filed against Respondent LCCI. She advised Respondent Larson that she would investigate the claim and needed him to provide various time and payroll records, including certified statements, related to the Seaside project. She also requested that he make himself and workers available to be interviewed regarding the project.

16) On January 6, 1997, CS Grabe and CS King interviewed a number of workers at Respondents' offices. CS Grabe conducted an initial conference with Respondent Larson and Respondents' attorney, Darien Loiselle. She asked Respondent Larson questions about how time records were kept, whether prevailing wage rates were paid on the project, and whether he had posted the prevailing wage rates on the project. Respondent Larson explained his time keeping methods, said he thought he was paying the correct amount of PWR, and said he had posted a PWR poster on the project. Respondent Larson said he had a financial interest in no other company. He was troubled

by the dollar amount in the Notice of Claim. Later, at Mr. Loiselle's request, CS Grabe explained the Agency's debarment policy. Grabe said that Respondents were on the warning letter list for violations found during the investigation of the Cannon Beach public works project in the summer of 1995. That investigation resulted in the collection of PWR wages. She explained to Respondent Larson that she had some discretion in making a debarment recommendation. As was her practice, she explained that a debarment recommendation is not contingent on whether an employer pays the PWR back wages. She never told them that payment of back wages would prevent a debarment recommendation. As she described the Agency's debarment policy, Loiselle was nodding and Grabe believed he understood the policy and the seriousness of the situation. She told them it was the Agency's policy not to pursue liquidated damages unless the Agency had to seek payment of the back wages from the surety company. She also said that the Agency had civil penalty authority and that she used agreements for future compliance as enforcement tools. During this meeting, Loiselle and Respondent Larson did not understand the distinction between civil penalties and liquidated damages. CS Grabe then collected available records. Respondent Larson said his office was still gathering reports and information for her. He said he had limited office staff to collect records. Respondent Larson asked when the investigation would be completed, because Wildish was withholding almost $250,000 in payments to Respondent LCCI. He said he'd have to shut down the business soon if he didn't get that money. CS Grabe explained that she couldn't complete the investigation without the additional records and that she had to interview other employees. Grabe told Loiselle that if he had any question or needed information, he should put this in writing and send it to her.

17) After the meeting, Respondent Larson talked with Loiselle. They felt relieved because they thought that if Respondents cooperated with the Agency and paid the back wages, there would be no other sanction. Respondent Larson showed willingness to cooperate with the Agency. The next day, Respondent Larson telephoned Loiselle to say that he felt comfortable getting his records together for the Agency and did not need Loiselle's help any longer. Respondent Larson felt that debarment was not an issue. Loiselle was not involved in the Agency's investigation after that.

18) Early in the investigation, Respondent Larson conceded to CS Grabe that Respondents had problems with paying prevailing wages, and he said the back wages would be paid.

19) During the investigation, CS Grabe asked for and received documents from an engineering firm, a construction management company that helped administer the Seaside project, and the prime contractor (Wildish). These records included daily progress reports, field reports, and work force records. Grabe used these records along with Respondents' records to try to calculate prevailing wages due Respondents' workers.

20) In a telephone call with him on January 27, 1997, CS Grabe told Respondent Larson that the Agency would waive any liquidated damages on the wages due if Respondents paid them. Respondent Larson wrote to Wildish demanding payment of the withheld progress payments. At some point in the investigation, Grabe told Respondents' office manager, Julie Fritz, that the Agency would not pursue liquidated damages if the workers were paid their back PWR wages.

21) On January 30, 1997, CS Grabe wrote to Respondent Larson, to follow up on a telephone conversation she had with him on January 29, 1997, and again requested time and payroll records for work on the Seaside project. On February 3, 1997, Julie Fritz wrote to Grabe that Respondents would try by the end of the week to supply timecard records for every employee on the Seaside job from September 1995 to November 1996.

22) On February 18, 1997, CS Grabe wrote Respondent Larson about the progress of the investigation and included a list of employees for whom she had calculated revised amounts due. She was reviewing additional time records that Respondents had submitted and she requested additional records.

23) On February 19, 1997, Respondent Larson wrote to Wildish again requesting payment of the withheld funds, claiming that the withholding was causing Respondents damages. Respondent Larson wrote that he felt the Agency's revised wage claim amounts were high.

24) On March 7, 1997, CS Grabe wrote to Respondent Larson recapping the wages found due to 29 employees based on additional time records reviewed. She also described her belief that reports and records were still missing for many employees and for specific periods of time. She requested these missing records and said that all back wage estimates may need revision due to the missing records. During the entire course of her investigation, CS Grabe asked Respondents for records many times in writing and by telephone. She talked with Julie Fritz several times. Grabe believed she never got all the requested documents and there were obvious records of hours missing. Each time she got additional records from Respondents, she recalculated the unpaid PWR wages.

25) On March 12, 1997, Fritz sent Grabe daily timecards for the period April 23 to May 12, 1996. Fritz wrote that she believed Grabe should have all daily reports for the Seaside project and all timecards for the applicable employees for September 1995 to November 1996. Fritz wrote that a reference to "Larson Excavation" on a daily report was incorrect and that there was no such business or any others that Respondent LCCI had an interest in.

26) On March 14, 1997, the Commissioner e-mailed the administrator of the Wage and Hour Division, Christine Hammond. The Commissioner had been contacted by Steve Wildish about reducing the lien amount to more accurately reflect the amount of wages Respondents owed. Hammond responded that there was no reason not to amend the Notice of Claim to reflect the amount CS Grabe had determined appeared due, with liquidated damages. They agreed to wait until Respondents responded to

a request for records. Grabe got a copy of these e-mails.

27) On March 17, 1997, Respondent Larson wrote to CS Grabe that "we may not agree with several employee calculations" contained in a revised wage estimate, and he asked to meet with her to discuss the revised amounts. He also asked her to file a revised notice of claim in the amount of the back wages claimed. On March 20, 1997, CS Grabe sent Respondent Larson wage transcription and computation sheets reflecting the prevailing wage calculations. She asked him to call her to schedule a meeting after he had reviewed the sheets.

28) On March 22, 1997, the Agency notified Respondents, Wildish, and the City of Seaside that it had reduced the Notice of Claim against Wildish's bond to $142,959.10. This amount was based on unpaid wages of $71,479.55 and liquidated damages of $71,479.55. After this time, Respondents gave CS Grabe additional records. She gave them credit for benefits and wages already paid. Respondent Larson told Grabe he would not dispute small differences he had with the amounts Grabe found due, but he did not concede those amounts were due. He thought specific employees were not due additional wages. In the context of Wildish continuing to withhold around $250,000 from Respondents even after the Notice of Claim was amended, Respondent Larson said paying the back wages was tantamount to blackmail. At one point in the investigation, Respondent Larson told Grabe he was not going to pay snot-nosed kids PWR.

29) On April 25, 1997, CS Grabe wrote to Wildish that the Agency had completed its investigation of Respondent LCCI and listed the 29 workers who had prevailing wages due them. The total unpaid prevailing wages due was $55,456.38. She advised that the Agency would release its notice of claim on Wildish's bond after receiving payment of the wages to the workers. The workers listed and the amount of unpaid prevailing wages due each worker were: Kurt Anderson, $462.78; Jason Bergeson, $6,725.23; Stacy Clark, $465.15; Joseph Cox, $12.00; Bryan Edwards, $821.15; Andy Finn, $10,420.44; Gary Fritz, $873.30; Jennifer Fritz, $85.19; Joe Gilmore, $4,621.93; Randy Gilmore, $9,059.81; Chris Gipson, $1,701.75; Mike Goodwin, $493.50; Joel Grothe, $1,799.41; Bill Gunderson, $116.32; Les Hannah, $823.12; Rod Herndon, $4,442.25; Chad Mason, $2,689.99; Travis Owsley, $783.85; Joseph Painter, $155.62; Paul Parker, $455.36; Paul Phillips, $76.50; Michael Rider, $157.50; Jeff Rosa, $31.50; John (Rick) Schertenleib, $354.49; Clyde Stanley, $670.64; Mark Stough, $2,745.22; Leo Susbauer, $773.04; Joe Talbot, $385.85; and Glen Wadley, $3,253.49. Grabe sent a copy of the letter to Respondents.

30) CS Grabe never sent to Respondents a written "final demand" for wages owed -- as described in section III.E.2. of the investigation procedure (see Finding of Fact -- The Merits number 13) -- because Respondent Larson said he would pay the back wages that were owed according to the investigation. Grabe did not advise Respondents in writing that they could be debarred because

she had already articulated the Agency's policy to Respondent Larson and his attorney on January 6, 1997, and the Agency had already sent Respondents a warning letter in May 1996.

31) On May 7, 1997, Respondents' office manager sent CS Grabe cashier's checks for the prevailing wages owed on the Seaside project. Respondents paid the amounts found due by the Agency as listed in Finding of Fact -- The Merits number 29, above. The Agency then sent these checks to the workers. Thereafter, the bond was released and Respondents received their money from Wildish.

32) Along the north Oregon coast, it is difficult to get contractors to bid on public works projects. For contracts over $100,000, there are only two contractors available in the area to perform the kind of work Respondents perform, and Respondent LCCI is one of those. Construction work provides high-wage jobs in the area. In the five years before hearing, Respondents performed several contracts for the City of Warranton. Their job performance was satisfactory and on schedule. Additional public works projects were coming up in the next two years. If Respondents were not available to bid on those contracts, the city's options would be limited and it would be harder to get bids. With reduced competition, bids would not be as competitive and the price would be higher. The City of Astoria used Respondents on several public works projects. On one project, Respondent LCCI was the only bidder. The city engineer would be concerned if prevailing wage rates were not being paid, and he relied on the Agency to watch that.

33) After the investigation in this matter was finished, Respondent Larson checked into setting up a registered apprenticeship program, but did not do so because of the cost.

34) Julie Fritz attended a seminar about PWR. Respondent Larson consulted with CS Grabe about other public works projects.

35) Respondent Larson's testimony was not wholly credible. Some of his testimony was corroborated by other credible evidence. However, on important questions related to the conversation on January 6, 1997, Respondent Larson's testimony was not reliable. For example, he testified that Grabe said, "Mr. Larson, we are not seeking liquidated damages or disbarment * * * if you cooperate." This testimony was contradicted by the testimony of Grabe and Loiselle, the other two participants at the meeting. Such a statement by Grabe would contradict Agency policy, and the forum finds it highly unlikely that she would make such a statement. Likewise, Respondent Larson testified that Grabe reassured him in a later conversation that the Agency would not debar him. He repeatedly called liquidated damages "penalties" and used these terms interchangeably. The forum finds his testimony regarding conversations about sanctions unreliable and incredible. Other testimony by Respondent Larson was also inconsistent with and contradicted by credible evidence. For example, he testified that he had worked hard to comply with the PWR law. Given the stipulated facts and other credible evidence related to Respondent Larson's actions and inactions concerning this law, how

ever, the forum finds such testimony incredible. Some of his testimony was not believed because experience demonstrates that it was logically incredible. For example, Respondent Larson testified that, when he set up his bogus apprenticeship program, he thought one of the requirements was having a collective bargaining agreement with his employees. He testified he thought he had a collective bargaining agreement with them, when in fact he did not. The forum found this testimony incredible, coming from a man who had worked in the construction trades and run a construction business for much of his life. Accordingly, the forum gave little weight to Respondent Larson's testimony whenever it was contradicted by other credible evidence, and at times the forum did not believe his testimony even when it was not contradicted by other evidence.

ULTIMATE FINDINGS OF FACT

1) Respondent LCCI is an Oregon corporation. Respondent Larson is its president.

2) Respondent LCCI received a subcontract on the City of Seaside's Seaside Waste Treatment Plant public works.

3) Respondent LCCI intentionally failed to pay the prevailing rate of wage to 29 workers employed upon the City of Seaside's Seaside Waste Treatment Plant public works project.

4) Respondent LCCI intentionally failed to post in a conspicuous and accessible place in or about the City of Seaside's Seaside Waste Treatment Plant public works project the prevailing wage rates as required by ORS 279.350(4).

5) Respondent Larson, a corporate officer of Respondent LCCI, was responsible for Respondent LCCI's failure to pay and failure to post the prevailing rate of wage. He knew or should have known the amount of the applicable prevailing wages and that such wage rates must be posted.

6) Respondents filed inaccurate and incomplete certified statements by failing to report workers, hours, and dates of work on the City of Seaside's public works contract.

7) Respondents took actions that circumvented the payment of prevailing wages to workers employed upon the City of Seaside's public works contract by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship agreement.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over Respondents and the subject matter herein. ORS 279.348 to 279.380.

2) ORS 279.350(1) provides in part:

> "The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed."

OAR 839-016-0035(1) provides:

> "Every contractor or subcontractor employing workers on a public works project shall pay to such

workers no less than the prevailing rate of wage for each trade or occupation, as determined by the Commissioner, in which the workers are employed."

Respondent LCCI violated ORS 279.350(1) by failing to pay the prevailing rate of wage to workers employed upon a public works project.

3) ORS 279.350(4) provides in part:

"Every contractor or subcontractor engaged on a project for which there is a contract for a public work shall keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project."

OAR 839-016-0033(1) provides:

"Contractors shall post the prevailing wage rates applicable to the project in a conspicuous place at the site of work. The posting shall be easily accessible to employees working on the project."

Respondent LCCI violated ORS 279.350(4) by failing to post the prevailing wage rates for the Seaside project in a conspicuous and accessible place in or about the project.

4) ORS 279.350(7) provides:

"No person shall take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project not subject to ORS 279.348 to 279.380 in a manner that has the effect of offsetting the prevailing wage on a public works project."

Respondents violated ORS 279.350(7) by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship agreement.

5) ORS 279.354(1) provides in part:

"* * * [E]very subcontractor * * * shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries certifying the hours rate of wage paid each worker which the * * * subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the * * * subcontractor * * * that the * * * subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the * * * subcontractor's knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid."

Respondent LCCI violated ORS 279.354 by failing to file certified statements that set out accurately and completely the payroll records for the prior week.

6) ORS 279.361 provides in part:

"(1) When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS 183.310 to 183.550, determines that a * * * subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works, * * * or * * * a subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the * * * subcontractor or any firm, corporation, partnership or association in which the * * * subcontractor has a financial interest shall be ineligible for a period not to exceed three years from the date of publication of the name of the * * * subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. The Commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies.

"(2) When the contractor or subcontractor is a corporation, the provisions of subsection (1) of this section shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing rate of wage * * *."

OAR 839-016-0085 provides in part:

"(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that for a period not to exceed three years, a * * * subcontractor * * * is ineligible to receive any contract or subcontract for a public work:

"(a) The * * * subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on public works as required by ORS 279.350;

" * * * * *

"(c) The * * * subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4) and these rules.

"(2) When the * * * subcontractor is a corporation, the provisions of section (1) of this rule shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing wage rates.

"(3) As used in section (2) of this rule, any corporate officer or corporate agent responsible for the failure to pay or post the prevailing wage rates * * * includes, but is not limited to the following individuals when the individuals knew or should have known the amount of the applicable prevailing wages or that such wages must be posted:

"(a) The corporate president[.]

" * * * * *

"(4) * * * Except as provided in OAR 839-016-0095 [Removal of Names from List], such names will remain on the list for a period of three (3) years from the date such names were first published on the list."

OAR 839-016-0095(1) provides:

"The names of the * * * subcontractor or other persons * * * shall remain on the list for a period of three (3) years from the date of publication of such name on the list."

Pursuant to ORS 279.361 and based on the facts set forth herein, the Commissioner has the authority to place the name of Respondents LCCI and Larson on the list of persons who are ineligible to receive any contract or subcontract for public works for a period not to exceed three years from the date of publication of their names on that list.

Because Respondent LCCI intentionally failed to pay the prevailing rate of wage to workers employed upon a public works and intentionally failed to post the prevailing wage rates as required by ORS 279.350(4), it shall be ineligible for a period of three years from the date of publication of its name on the ineligible list to receive any contract or subcontract for public works.

Because Respondent Larson was a corporate officer responsible for the failure to pay and post the prevailing wage rates, he shall be ineligible for a period of three years from the date of publication of his name on the ineligible list to receive any contract or subcontract for public works.

7) ORS 279.370 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 $5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto.

"(2) Civil penalties under this section shall be imposed as provided in ORS 183.090."

OAR 839-016-0530 provides in part:

"(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"(2) Civil penalties may be assessed against any contractor, subcontractor or contracting agency regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

"(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

"(a) Failure to pay the prevailing rate of wage in violation of ORS 279.350;

"(b) Failure to post the applicable prevailing wage rates in violation of ORS 279.350(4);

" * * * * *

"(e) Filing inaccurate or incomplete certified statements in violation of ORS 279.354;

" * * * * *

"(h) Taking action to circumvent the payment of the prevailing wage, other than subsections (e) and (f) of this section, in violation of ORS 279.350(7)[.]"

OAR 839-016-0520 provides in part:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules;

"(b) Prior violations, if any, of statutes and rules;

"(c) The opportunity and degree of difficulty to comply;

"(d) The magnitude and seriousness of the violation;

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in section (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

OAR 839-016-0540 provides in part:

"(1) The civil penalty for any one violation shall not exceed $5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) For purposes of this rule 'repeated violations' means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.

"(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty shall be calculated as follows:

"(a) An equal amount of the unpaid wages or $1,000, whichever is less, for the first violation;

"(b) Two times the amount of the unpaid wages or $3,000, whichever is less, for the first repeated violation;

"(c) Three times the amount of the unpaid wages or $5,000, whichever is less, for second and subsequent repeated violations.

" * * * * *

"(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to OAR 839-016-0530.

"(6) The civil penalties set out in this rule shall be in addition to any other penalty assessed or imposed by law or rule."

Under the facts and circumstances of this record, and according to ORS 279.370 and OAR 839-016-0500 to 839-016-0540, 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 penalties specified in the Order below is an appropriate exercise of that authority.

OPINION

Respondents stipulated to facts that established the violations alleged by the Agency. At hearing the participants focused on the sanctions proposed by the Agency and on Respondents' affirmative defenses. The Agency proposed to place Respondents' names on the list of contractors ineligible to receive any public works contracts and to assess civil penalties. Regarding civil penalties, the participants offered evidence of aggravating and mitigating circumstances. The forum will address Respondents' affirmative defenses first and then the sanctions.

1. Respondents' Affirmative Defenses

In their amended answer, Respondents raised six affirmative defenses. They withdrew the sixth one after the hearing.

Their first defense was that the Commissioner failed to state claims for which relief should be granted. They presented no evidence or argument supporting this defense. The Notice of Intent to Make Placement on List of Ineligibles and to Assess Civil Penalties met the requirements for a notice under the Administrative Procedures Act (ORS 183.415(2)), under the forum's contested case hearing rules (OAR 839-050-0060), and under the Agency's rule regarding placing a name on the ineligible list (OAR 839-016-0085). Accordingly, Respondents did not prove this defense.

Respondents' second affirmative defense claimed that the Commissioner waived or was estopped from assessing civil penalties and placing Respondents' names on the ineligible list because the Agency induced them to pay $55,456.38 in back wages by representing that this payment would be the only assessment against them in this matter. The Agency denied that it made any such representation.

Related to Respondents' second affirmative defense was their fourth affirmative defense, which claimed that the Agency "is not entitled to any additional assessments, penalties, and/or place [Respondents] on the List of Ineligibles because [Respondents have] settled this dispute with the Bureau of Labor and Industries." The Agency denied that a settlement existed. The forum will return to the second and fourth affirmative defenses in a moment.

In their third affirmative defense, Respondents alleged they did not intentionally perform any act or omission alleged in the Notice of Intent. In the notice, the Agency alleged that Respondents intentionally failed to pay and post the prevailing wage rates on the Seaside public works project. At hearing, Respondents' stipulated that they intentionally failed to pay and post the prevailing wage rates on the project. There was no

evidence to the contrary. Accordingly, Respondents failed to prove this defense.

In their fifth affirmative defense, Respondents alleged that they were entitled to an offset and/or reduction in any penalty or assessment and a waiver of being placed on the ineligible list. This was allegedly because they cooperated completely and expeditiously with the Agency, they paid the underlying wage claims, which amounts they agreed were owed, and they corrected any practice that could result in a future violation. The forum has addressed these matters below in the discussion of placing Respondents' names on the ineligible list and assessing civil penalties.

a. The Settlement Defense

As mentioned above, Respondents raised a purported settlement agreement and the doctrine of equitable estoppel as separate defenses in their answer. However, in their arguments and in their hearing memorandum, they appear to combine the settlement agreement within their equitable estoppel defense. For clarity, the forum will address the settlement defense separately and then address it in the context of the equitable estoppel defense.

In their memorandum Respondents argued that the Agency, through Compliance Specialist Grabe, agreed to waive all sanctions if Respondent Larson agreed to pay the back wages owed. They relied on Loiselle and Larson's testimony about the meeting with Grabe on January 6, 1997, and also Fritz's testimony that Grabe told her that all damages would be resolved via the agreement on back wages, and that Grabe never disclosed that civil penalties and debarment (placing Respondents' names on the ineligible list) were being considered.

In Finding of Fact -- The Merits number 16, the forum has set out its findings concerning the meeting among Grabe, Larson, and Loiselle on January 6, 1997. During that meeting, Loiselle and Respondent Larson did not understand the distinction between civil penalties and liquidated damages. Larson thought that liquidated damages, penalties, and sanctions were all the same thing. This lack of familiarity with the different sanctions caused Larson and Loiselle to misunderstand Grabe's explanation of them.[1]

Grabe gave Respondents and Loiselle accurate information about debarment, civil penalties, and liquidated damages, but they misunderstood this information and incorrectly assumed that all sanctions would be waived if Respondents just paid the back wages. Likewise, Fritz did not appreciate the different sanctions provided in the law. The forum believes Grabe told Fritz that the Agency would waive liquidated damages if the back wages were paid, which is the same thing she had told Respondent Larson and his attorney. The preponderance of credible evi-

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[1]It is notable that, even at hearing, Loiselle and Respondent Larson referred to "penalties" and "sanctions" when the matter under discussion was liquidated damages. This continuing failure to appreciate the difference between liquidated damages, civil penalties, and debarment says much about their misunderstanding of Grabe's statements to them on January 6, 1997.

dence on the whole record shows that Grabe did not say the Agency would waive all possible sanctions if Respondents paid the back wages owed.

Much of Respondent Larson's testimony concerning the January meeting was not credible. Loiselle testified that he asked Grabe whether she was considering debarring Respondents and she said she was not considering it at that time. In her testimony, Grabe flatly denied that she said that. She testified credibly that she remembered this because she was expecting him to ask such a question, and he did not. Furthermore, she made contemporaneous notes of what was discussed in this meeting, and her notes do not reflect that Loiselle asked her such a question or that she made such a statement. No one else offered notes of this meeting. Grabe's testimony and notes reflect that her advice to Larson and Loiselle was accurate and consistent with Agency policy. Accordingly, the forum concludes that Grabe's testimony and notes of her conversation with Larson and Loiselle were more reliable than Loiselle's memory of the conversation. The forum concludes further that Grabe did not say she was not considering debarment at that time.

Even if Grabe had made such a statement, the forum would find that Loiselle misunderstood it. The statement would have been accurate because, at the time she allegedly made it, Grabe was in the initial stage of her investigation -- long before she would make a final determination on whether wages were due or violations had occurred. Appropriately so, she was then not prepared to make a recommendation about debarring Respondents. Loiselle felt that Grabe's statement meant that if Respondents paid the back wages and cooperated, the Agency would not debar them. This feeling amounts to nothing more than an inaccurate assumption. Grabe's purported statement did not create a settlement agreement, nor was it a false representation by the Agency. I find nothing misleading or ambiguous about it, given the circumstances under which she allegedly made it. Her alleged statement must be taken in context, including her advice that debarment recommendations were not based on whether back wages were paid. Loiselle's and Respondent Larson's opinion at the end of the meeting that there was an agreement between the Agency and Respondents (the agreement being that if Respondents paid the back wages and cooperated, the Agency would not impose any other sanction) was not based in fact and was unfounded. Accordingly, the forum finds that no agreement existed between the Agency and Respondents as claimed. Respondents' fourth affirmative defense fails for lack of proof.

b. The Equitable Estoppel Defense

Respondents contended that the Agency was equitably estopped from debarring them and assessing civil penalties because CS Grabe falsely represented the Agency's objectives regarding these sanctions in January 1997. In the alternative, they alleged that Grabe made inaccurate and misleading representations regarding the status of the sanctions. They claim she did so with knowledge of the facts. They say they were ignorant of the truth and relied to their detriment on Grabe's misrepresentations. The Agency denies that it made any false

representation to Respondents. It claims that Respondents had knowledge of the truth, because of the advice Grabe gave them, the statutes and rules that disclose the different sanctions, and the warning letter Respondents received before the investigation in this case.

The Commissioner has previously held that the doctrine of equitable estoppel does not apply to the agency when it is enforcing a mandatory requirement of the law. *In the Matter of Albertson's, Inc.*, 10 BOLI 199, 299 (1992) (citing *Bankus v. City of Brookings,* 252 Or 257, 259-60, 449 P2d 646, 648 (1969); *Solberg v. City of Newberg,* 56 Or App 23, 641 P2d 44, 48 (1982)). After reviewing several cases in which the doctrine was invoked against the government, the Commissioner found that

> "the courts have limited the application of the doctrine to tax and government benefit cases, and to cases in which the government was involved in a land transaction or had negotiated a contract. The Oregon Supreme Court, in a recent case, did not reveal any intention to broaden the doctrine as applied against the government when it said:
>
> > 'Estoppel, if ever applicable against the government, certainly does not apply here.' *Committee in Opposition to the Prison in Malheur County v. Oregon Emergency Corrections Facility Siting Authority,* 309 Or 678, 792 P2d 1203, 1207 (1990).
>
> "The Forum finds that the doctrine of equitable estoppel does not apply in a case such as this, where the Agency is enforcing a mandatory requirement of the law. An Agency employee could not have waived the requirements of the law and rules." *Albertson's*, 10 BOLI at 299.

In *Albertson's,* a child labor case, the respondent argued that assessing civil penalties was discretionary, and that even if the Agency could not be estopped from requiring the respondent to comply with a record keeping requirement of the law, the Agency could still be equitably estopped from imposing a discretionary civil penalty. The Commissioner found that argument meritless.

> "What Respondent urges is a distinction without a difference. The Agency's use of all of its enforcement tools is discretionary. If the Agency could be estopped from using its enforcement tools (civil penalties being one), it would be effectively estopped from enforcing the mandatory requirements of the law. Employers, such as Respondent, could refuse to comply with the mandatory requirements of the law, and the Agency would be estopped from using its statutorily provided enforcement tools. The Forum finds that the doctrine of equitable estoppel does not apply to stop the Commissioner from exercising her power to impose civil penalties under ORS 653.370 for violations of child labor statutes and rules." *Albertson's*, 10 BOLI at 299.

The forum believes the Commissioner's holdings in *Albertson's* are still valid and concludes that the doctrine of equitable estoppel does not apply to the Agency in this case.

Nevertheless, if the doctrine does apply here, Respondents must prove it by a preponderance of the evidence. *McKinney v. Hindman,* 86 Or 545, 551, 169 P2d 93 (1917). To constitute equitable estoppel, there must be a false representation, it must be made with knowledge of the facts, the other party (Respondents) must have been ignorant of the truth, the representation must have been made with the intention that it should be acted on by the other party, and the other party must have been induced to act on it. *Coos County v. State*, 303 Or 173, 180-81, 734 P2d 1348, 1354 (1987).

The first element of the doctrine disposes of Respondents' estoppel claim here. The forum has found that CS Grabe did not make a false or misleading statement to Respondents and their attorney. That they misunderstood her explanation concerning liquidated damages does not make her statements misleading. Nor were her statements incomplete. Her credible testimony, which was corroborated by her notes from the meeting, was that she explained that the Agency had the authority to assess civil penalties. She explained the Agency's policy regarding debarment. She did not say that the Agency would waive these sanctions if Respondents paid the back wages. She said the Agency's policy was not to seek liquidated damages if Respondents paid the back PWR wages found owing. Respondents' attorney was present during the conversation, he had reviewed the prevailing wage rate law and rules before the meeting, and he appeared to understand Grabe's explanation of the possible sanctions and enforcement tools. The PWR statutes and rules clearly show differences between liquidated damages, civil penalties, and debarment. Given these facts, the forum will not now hear Respondents' claim that they did not understand the different sanctions and their argument that Grabe had some duty to give them more information about the sanctions.

Respondents and their attorney were free at any time to put their understandings and any purported agreement with the Agency in writing, to ensure that they understood these matters correctly and to confirm an agreement with the Agency. They did not do that.

Furthermore, one element of the purported agreement was that Respondents would cooperate with the investigation. Evidence shows that Respondents were not wholly cooperative with the Agency, in that Grabe had to request repeatedly (and then received piecemeal) additional records from them, and she believed she never got all the relevant records. Thus, a condition upon which Respondents' estoppel argument is based was not satisfied.

In addition, Respondents' argue that they were induced by the Agency's misrepresentations to settle the back wage claims. For several reasons, the forum is not persuaded by this argument. The doctrine of equitable estoppel requires that one is induced to act by a false representation. It presumes that the party taking the action had no other reason or duty to take the action. Here, Respondents already had a legal obligation (or inducement) to pay the back wages. They presented no evidence that the amount of wages found owing (which Respondents paid) was inaccurate. Thus, for pur-

poses of equitable estoppel, the Agency could not have induced Respondents to do what they already had a legal duty to do. Although no credible evidence on the record supported his position, Respondent Larson testified that he disputed the amount of back wages the Agency ultimately found owing. He argued that he settled the disputed amounts because of the Agency's false representations. However, undisputed evidence showed that Respondents worked with the Agency for months to resolve the amount of unpaid wages, offering additional records and discussing the Agency's calculations. Respondent Larson said he felt he was blackmailed into settling because Wildish was withholding Respondents' progress payments. Further, Respondent Larson knew that if he paid the back wages found due, the Agency would not seek liquidated damages. From this undisputed evidence, the forum concludes that these were the reasons Respondents paid the back wages, rather than some alleged inducement from an alleged misrepresentation.

Respondents have failed to prove their second affirmative defense of equitable estoppel.

2. Ineligibility for Public Works Contracts

From the stipulated facts and the uncontroverted evidence, the forum found that Respondent LCCI failed to pay the prevailing wage rate to its workers on the Seaside public works project, in violation of ORS 279.350(1). Likewise, from the stipulated facts and the uncontroverted evidence, the forum found that Respondent LCCI failed to post the prevailing wage rates on the Seaside project, in violation of ORS 279.350(4). Respondents admitted that these failures were intentional. It is no defense that, after the filing of a Notice of Claim and an Agency investigation, Respondent LCCI paid the back wages owed.

> "The fact that the wage differential was ultimately paid to the workers does not negate the violation. Likewise, the fact that the Contractor did eventually begin to pay the appropriate prevailing wage rate does not release the Contractor from liability." *In the Matter of P. Miller and Sons Contractors, Inc.*, 5 BOLI 149, 159 (1986).

Under ORS 279.361(1), if a subcontractor has "intentionally failed" to pay or post the prevailing wage rates as required, then the subcontractor "shall be ineligible" for up to three years to receive any contract or subcontract for public works. Under ORS 279.361(2), any corporate officer who is responsible for the failure or refusal to pay or post the prevailing wage rates shall also be ineligible for up to three years to receive any contract or subcontract for public works. Here, the preponderance of credible evidence shows that Respondent Larson was responsible for Respondent LCCI's intentional failure to pay and post the prevailing wage rates as required. He was the one who did not want to pay young workers the prevailing wage rate and who set up the bogus apprenticeship program. He was responsible for Respondent LCCI's intentional failure to post the prevailing rate of wage, even after he had put a trailer at the Seaside project. Pursuant to ORS 279.361, OAR 839-016-0085, and 839-016-0095(1), and from the facts found in this case, placing Respondents' names on the

list of persons ineligible to receive any contract or subcontract for public works for three years is appropriate.

Respondents presented evidence to show the negative effects on local government agencies, local workers, and the local economy if Respondents were debarred. They also presented evidence that they cooperated with the Agency during the investigation, paid the underlying wage claims, and corrected their practices that could result in a future violation. The forum notes that neither ORS 279.361, OAR 839-016-0085, nor any final order of the Commissioner states that the Commissioner should consider such matters when considering whether to debar a contractor. The forum also notes, however, that when reviewing a petition to remove a name from the ineligible list under OAR 839-016-0095, the Commissioner may consider matters such as a petitioner's history of correcting violations and its likelihood of violating the prevailing wage rate law in the future. The forum infers that such matters are not considerations in the initial determination of whether to debar a subcontractor. If such mitigating matters were to be considered, however, the forum would also consider the aggravating circumstances present in this case. The forum's determination to debar Respondents for three years would not change.

3. Civil Penalties

a. Failure to Pay the Prevailing Wage Rates

The Agency alleged and proved 29 violations of ORS 279.350(1). In its amended Notice of Intent, it proposed to assess $45,993.72 in civil penalties for the 29 "first repeated violation[s]." Civil penalties are authorized by ORS 279.370 and OAR 839-016-0530 (3)(a). A minimum civil penalty for each violation of ORS 279.350(1) is required by OAR 839-016-0540(3). Because the Agency requested only the minimum civil penalty for each of the violations, and because the forum has assessed those minimums, there is no need to address evidence of aggravating and mitigating circumstances here.

The only question for the forum in assessing these civil penalties is whether the violations are "first repeated violation[s]," as alleged, under OAR 839-016-0540(3)(b). "Repeated violations" are "violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation." OAR 839-016-0540(2). Here, Respondents violated a provision of law, namely ORS 279.350(1), by failing to pay 10 workers the prevailing wage rate in 1995 on the Cannon Beach public works project. The Agency found and reported the violations, and Respondents paid the wages found owing. Those violations occurred within two years of the most recent violations of ORS 279.350(1) found on the Seaside project. Accordingly, the minimum civil penalty shall be calculated for each violation at two times the amount of the unpaid wages or $3,000, whichever is less. OAR 839-016-0540(3)(b).

The table below lists each worker, the amount of the unpaid wages found due, and the civil penalty ("C.P.") assessed. Accordingly, the forum assesses Respondents $45,993.72 for 29 "first repeated" violations of ORS 279.350(1).

Table

Name	Wages	C.P.
Kurt Andersen	$ 462.78	$ 925.56
Jason Bergeson	$ 6,725.23	$3,000.00
Stacy Clark	$ 465.15	$ 930.30
Joseph Cox	$ 12.00	$ 24.00
Bryan Edwards	$ 821.15	$1,642.30
Andy Finn	$10,420.44	$3,000.00
Gary Fritz	$ 873.30	$1,746.60
Jennifer Fritz	$ 85.19	$ 170.38
Joe Gilmore	$ 4,621.93	$3,000.00
Randy Gilmor	$ 9,059.81	$3,000.00
Chris Gipson	$ 1,701.75	$3,000.00
Mike Goodwin	$ 493.50	$ 987.00
Joe Grothe	$ 1,799.41	$3,000.00
Bill Gunderson	$ 116.32	$ 232.64
Les Hannah	$ 823.12	$1,646.24
Rod Herndon	$ 4,442.25	$3,000.00
Chad Mason	$ 2,689.99	$3,000.00
Travis Owsley	$ 783.85	$1,567.70
Joseph Painter	$ 155.62	$ 311.24
Paul Parker	$ 455.36	$ 910.72
Paul Phillips	$ 76.50	$ 153.00
Michael Rider	$ 157.50	$ 315.00
Jeff Rosa	$ 31.50	$ 63.00
John Schertenleib	$ 354.49	$ 708.98
Clyde Stanley	$ 670.64	$1,341.28
Mark Stough	$ 2,745.22	$3,000.00
Leo Susbauer	$ 773.04	$1,546.08
Joe Talbot	$ 385.85	$ 771.70
Glen Wadley	$ 3,253.49	$3,000.00
Total Civil Penalties		**$45,993.72**

b. Failure to Post the Prevailing Wage Rates

The Agency sought a $5,000 civil penalty for Respondents' failure to post the prevailing wage rates at the Seaside public works project. A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(b). The penalty shall not exceed $5,000, and the amount will depend on all the facts and on any mitigating and aggravating circumstances. OAR 839-016-0540(1). Those circumstances, pursuant to OAR 839-016-0520(1), include:

> "(a) The actions of the * * * subcontractor * * * in responding to previous violations of statutes and rules;
>
> "(b) Prior violations, if any, of statutes and rules;
>
> "(c) The opportunity and degree of difficulty to comply;
>
> "(d) The magnitude and seriousness of the violation;
>
> "(e) Whether the * * * subcontractor * * * knew or should have known of the violation."

Evidence shows that Respondents failed to post the prevailing wage rates on the Cannon Beach project. While the evidence does not show it expressly, the forum infers that the Agency advised Respondents of the violation and the requirement to post the rates. Respondents' failure to post the rates on the Seaside project was occurring at the same time as the Agency's investigation of the Cannon Beach project. Thus, Respondents' apparent response to the previous violation of the statute was inaction and a repeated violation on the Seaside project. These factors aggravate

the violation. On the other hand, Respondents did show some cooperation with the Agency's investigation in this case and paid the back wages the Agency found owing. There was some evidence that Respondents were taking actions, such as sending the office manager to PWR training, that indicate that they are less likely to violate the PWR laws and rules in the future. These are mitigating circumstances.

Respondents presented evidence to show the difficulty of complying with the posting requirement. They presented evidence that the prime contractor had a PWR poster in its job shack, that no other subcontractors posted the rates, and that Respondents did not have a job shack on site for the first few months of the job. Respondent Larson claimed the rates were in a brief case in his truck at the site. The Agency presented evidence that Respondents never contacted the Agency about how to comply with the posting requirement on this project. Evidence also established that Respondent Larson did not show the rates to the workers who asked about them. The forum recognizes that there would be some difficulty posting the rates on a project such as the one here, compared with one where a building is under construction. However the forum also recognizes that many public works projects are like the one here, such as road building and maintenance projects. It appears to the forum that it was not the difficulty of posting the rates that prevented Respondents from complying with the statute. Rather, it appears that Respondents never attempted or intended to post the rates on this job. That view is bolstered by the fact that Respondents did not post the rates even after they put a trailer on site. For these reasons, the forum gives little weight to Respondents' argument that the difficulty of posting the rates is a mitigating circumstance.

The forum views a failure to post the prevailing wage rates as a serious violation. The legislature considered it serious enough to justify making a violating contractor or subcontractor ineligible to receive any public works contracts for up to three years. ORS 279.361. Here, Respondents did not post the rates for many months of the project, and one worker at least had to go to the prime contractor to find out what his correct prevailing wage rate was. And, as noted above, Respondent Larson did not show the rates to workers who asked about them. These facts aggravate the violation and show why the law requires every contractor and subcontractor to post the rates.

Because of the Cannon Beach investigation, Respondents either knew or should have known of their duty to post the prevailing wage rates. Respondent Larson also testified that he had been performing public works contracts for over 10 years. He, like other employers, has a duty to know the wage and hour laws that apply to Respondent LCCI and their workers. This factor aggravates the violation.

Having considered the applicable aggravating and mitigating circumstances, the forum assesses Respondents a civil penalty of $4,000 for their violation of ORS 279.350(4).

c. Filing Inaccurate and Incomplete Certified Statements

The Agency proposed a $5,000 civil penalty for Respondents failure to file accurate and complete certified statements, in violation of ORS 279.354. A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(e). By stipulation, Respondents presented no evidence or argument to explain the inaccuracies in their certified statements. The Agency presented evidence to show aggravating circumstances.

Above, the forum discussed the evidence on Respondents' prior violations of the PWR statutes and their response to those violations. These aggravating factors apply here as well.

Regarding the magnitude and seriousness of the violation, the forum finds Respondents' acts egregious. The incompleteness and inaccuracies were not isolated or trivial. They were widespread and deliberate. Respondents' apprenticeship program was an obvious sham. He made no effort to become a registered training agent or operate a registered apprenticeship program. He offered no related training to his workers. The only part of Respondents' strategy that imitated a real apprenticeship program was the payment of 70 percent of journeymen's wages. Likewise, Respondents' practice of banking hours and recording overtime and weekend hours as though they were worked on weekdays was plainly carried out to circumvent paying the correct prevailing wage to the workers. Respondents' office manager certified statements that had deliberately falsified hours and rates of pay. These are aggravating circumstances.

Respondents knew or should have known of this violation. All employers are charged with knowledge of wage and hour laws governing their activities as employers. *In the Matter of Country Auction*, 5 BOLI 256, 267 (1985). The law imposes a duty upon employers to know the wages that are due to their employees. *McGinnis v. Keen*, 189 Or 445, 459, 221 P2d 907 (1950). Respondents should have known that their payroll methods, as reflected in their certified statements, were illegal. This too is an aggravating circumstance.

Having considered the applicable aggravating circumstances, the forum assesses Respondents a civil penalty of $5,000 for their violation of ORS 279.354.

d. Taking Action to Circumvent Payment of the Prevailing Wage

The Agency proposed a $5,000 civil penalty for Respondents action to circumvent payment of the prevailing wage by requiring workers to accept less than the prevailing wage rate as part of the bogus apprenticeship program, in violation of ORS 279.350(7). A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(h).

The discussion in part 3.b. of this opinion, above, concerning Respondents' prior violations and their actions in responding to previous violations applies here as well. The forum finds no mitigation in Respondent Larson's recent consideration of becoming a registered apprenticeship program.

The forum considers this violation particularly serious because it was a deliberate effort to avoid complying with the law, and its effect was to cheat the workers out of the minimum wage required by law. Respondent Larson's testimony that he thought the scheme was legitimate was incredible, and suggests that he hasn't yet accepted responsibility for his actions. He knew or should have known this action violated the law, given his years in the construction trades and the plain language of certified statements that apprentices must be in registered programs. These circumstances aggravate the violation.

Having considered the applicable aggravating and mitigating circumstances, the forum assesses Respondents a civil penalty of $5,000 for their violation of ORS 279.350(7).

Respondent's Exceptions

Respondents timely filed exceptions to the Proposed Order. Respondents argued that the forum's position that equitable estoppel does not apply against the Agency, or, if it does, that Respondents failed to show a false or misleading statement upon which Respondents relied to their detriment was contrary to Oregon law. Respondents then cite a number of cases in support of their view. The cases cited deal with tax exemption criteria,[2] personal property authority,[3] real property authority and statute of frauds,[4] assessment of employment tax,[5] prison siting appeals qualification,[6] and worker's compensation coverage.[7]

While none of these cases have facts approaching those in a prevailing wage enforcement action, all are cited in support of the proposition that equitable estoppel can run against BOLI, and that the Proposed Order erred in holding that affirmative misconduct and intent to mislead were required. While the result of the order does not depend on that view, the forum acknowledges that *Western Graphics* and *Swift & McCormick* suggest that affirmative misconduct and intent to mislead are not necessarily elements, at least where government is concerned. But the factual findings in this case are that CS Grabe did not make a false or misleading statement to Respondents and their attorney, intentionally or not. Her statements were found by the forum to be complete and accurate. The differences between liquidated damages, civil penalties, and debarment are the subjects of the PWR statutes and rules. Respondents' claim that they did not understand the

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[2]*Pilgrim Turkey Packers, Inc. v. Dept. of Revenue,* 261 Or 305, 493 P2d 1372 (1972)

[3]*Belleville v. Davis,* 262 Or 387, 498 P2d 744 (1972)

[4]*Wiggens v. Barrett & Associates, Inc.,* 295 Or 679, 669 P2d 1132 (1983)

[5]*Employment Division v. Western Graphics Corp.,* 76 Or App 608, 710 P2d 788 (1985); *Employment Department v. Funseth,* 140 Or App 464, 916 P2d 1043 (1996)

[6]*Committee in Opposition to the Prison in Malhuer County v. Oregon Emergency Corrections Facility Siting Authority,* 309 Or 678, 792 P2d 1203 (1990)

[7]*Swift & McCormick Metal Processors v. Burbin,* 117 Or App 605, 845 P2d 931 (1993)

different sanctions is suspect in that they did not attempt in writing to ensure and confirm an agreement with the Agency.

Respondent's exceptions are denied.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents Larson Construction Company, Inc. and David M. Larson or any firm, corporation, partnership, or association in which they have a financial interest shall be ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

FURTHERMORE, as authorized by ORS 279.370, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents Larson Construction Company, Inc. and David M. Larson 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 Fifty Nine Thousand, Nine Hundred Ninety Three Dollars and Seventy Two Cents ($59,993.72), plus any interest that accrues at the annual rate of nine percent between a date ten days after the issuance of the final order and the date Respondents comply with the final order. This assessment is the sum of the following civil penalties against Respondents: $45,993.72 for 29 violations of ORS 279.350(1); $4,000 for one violation of ORS 279.350(4); $5,000 for one violation of ORS 279.354; and $5,000 for one violation of ORS 279.350(7).

In the Matter of
EXECUTIVE TRANSPORT, INC.
and Louis Viveiros,
Respondents.

Case Number 01-97
Final Order of the Commissioner
Jack Roberts
Issued July 24, 1998.

SYNOPSIS

Where female complainant was subjected to unwanted and offensive sexual touching and comment by respondent corporation's owner and president, the Commissioner found that she suffered mental distress from the intolerable working conditions and her resulting resignation. The Commissioner found the owner-president aided and abetted the corporation in the unlawful sexual harassment and awarded $3,000 for wage loss and $20,000 to compensate complainant for mental suffering.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was

held on May 20, 1997, in a conference room of the State of Oregon Employment Department, 2075 Sheridan Avenue, North Bend, Oregon. The Civil Rights Division (CRD) of the Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Executive Transport, Inc. (Respondent ETI), a corporation, was not represented by counsel and under the rules of this forum was declared in default. Louis Viveiros (Respondent), owner and officer of Respondent ETI, was present throughout the hearing and not represented by counsel. Marjorie Pursley, formerly known as Marjorie Gover (Complainant), was present throughout the hearing and not represented by counsel.

The Agency called as witnesses, in addition to Complainant, Respondent ETI's former employees Marcia Lynn Davis and Samantha Smith, and Agency Senior Investigator Jane MacNeill (by telephone).

Respondent called as witnesses himself and business consultant Archie Mahon.

Having fully considered the entire record in this matter, I, Jack 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 July 21, 1995, Complainant, a female, filed a verified complaint with CRD alleging that she was the victim of the unlawful employment practices of Respondent dba Executive Transport. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) Thereafter, the Agency prepared for service on Respondent Viveiros dba Executive Transport Specific Charges alleging that Respondent employed Complainant in 1995; he discriminated against her based on her sex by creating an intimidating, hostile, and offensive working environment altering the terms and conditions of her employment; he discharged Complainant because of her failure to submit to her supervisor's sexual advances and because of her opposition to her supervisor's unlawful behavior; and that Complainant lost income and suffered emotional damage as a result, all in violation of ORS 659.030(1)(a), (b), and (f).

3) On July 12, 1996, with the Specific Charges, the Agency served on Respondent the following: a) Notice of Hearing setting forth the time and place of hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of OAR 839-50-000, *et seq*., regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On July 30, 1996, counsel for Respondents timely filed an answer admitting that Complainant had been employed by Respondent ETI with Respondent as her supervisor, and controverting the other allegations of the Specific Charges, denying that

Respondent committed any unlawful practice or that Complainant was damaged by any such practice. The answer further alleged Respondent ETI's corporate status and Respondent's connection therewith, and alleged that Complainant lacked the skills necessary for her position, made numerous errors, gave herself an unauthorized raise, and quit voluntarily when questioned about her performance. Respondent alleged a prior small claim action by Complainant over wages. The answer moved for dismissal for failure to join an indispensable party and for failure to state a claim, and recited several affirmative defenses including allegations that Complainant's claim was fabricated, that she was unreasonably sensitive, that she failed to mitigate damages, and that Respondent was entitled to attorney's fees.

5) Accompanying the answer were motions for postponement, change of hearing location, and for discovery. On July 31, 1996, the ALJ issued an order for case summaries and directed the Agency to respond to the motions.

6) Also on July 31, the Agency filed a motion to amend its Specific Charges to allege that Respondent ETI was the employer and that Respondent was president of the corporation who aided and abetted the unlawful practices of the employer, thus stating violations of ORS 659.030(1)(a), (b), (f), and (g). The damages alleged remained unchanged. The Agency did not oppose Respondents' motion for postponement but did oppose moving the hearing from Coos Bay to Eugene, based on the location of the witnesses.

7) On August 6, 1996, the ALJ postponed hearing to September 25, 1996, located the hearing in Coos Bay, granted Respondents' motion to depose Complainant, and, until Respondents complied with the forum's discovery rule, denied Respondents' request to depose other unnamed workers, to compel the Agency to provide documents, or to obtain documents and testimony from a subsequent potential employer.

8) On August 13, 1996, the ALJ granted the Agency's motion to amend, changed the caption of the proceeding to reflect the amendment, denied Respondents' motion to dismiss, ruled that Respondent ETI was served through its agent, Respondent Viveiros, and gave Respondent ETI until August 26, 1996, to answer.

9) On August 28, 1996, in response to the Agency's request for assistance with discovery, the ALJ issued a discovery order to Respondents for the personnel records of Complainant to be provided to the Agency by September 9. On September 6, 1996, the presiding officer was changed from ALJ Douglas A. McKean to ALJ Warner W. Gregg, who ordered Respondents to comply with the previous discovery order or submit justification for refusing discovery by September 11, 1996.

10) On September 10, 1996, the Agency and Respondents jointly moved for postponement based on the unavailability of a witness and uncompleted discovery. Also on September 10, Respondent ETI filed its separate answer to the amended Specific Charges, incorporating by reference the previous answer of Respondent. On September 11, the ALJ postponed and reset the hearing for

February 18, 1997, and on September 16, the ALJ revised that order to February 19, 1997, at the North Bend office of the State of Oregon Employment Department.

11) On January 21, 1997, the ALJ ordered that Respondent be made available for his deposition by the Agency on the same date as a deposition of Complainant was scheduled. On January 29, counsel for Respondents moved for an order allowing him to withdraw as attorney for both Respondents, citing difficulties working with Respondents and their failure to meet their financial obligations. On January 31, the ALJ permitted Respondents' counsel to withdraw from representing Respondents. In that order, the ALJ advised Respondents that the hearing remained scheduled as before and that Respondent Viveiros could represent himself therein but that Respondent ETI, a corporation, would be in default at the hearing if not represented by an attorney.

12) On or about February 1, 1997, the Agency suggested that the scheduled depositions be canceled. On February 7, 1997, Respondent requested further postponement for the purpose of obtaining new legal counsel. Also on February 7, the ALJ vacated and canceled the previous order for depositions and postponed the hearing until May 20, 1997, in the same location as before.

13) On May 8, 1997, the Agency timely filed its case summary. Neither Respondent filed a case summary.

14) At the commencement of the hearing, Respondent was present and not represented by counsel. Respondent ETI, a corporation, was not represented by counsel and was found to be in default under the forum's rules. At the commencement of the hearing, the ALJ found that Respondent ETI had received a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413. Respondent received a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413 and had no questions about it.

15) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) The proposed order, containing an exceptions notice, was issued March 19, 1998. Exceptions, if any, were due March 29, 1998. Both the Agency and Respondent timely filed exceptions received postmarked March 27 and March 30, 1998, respectively (March 29, 1998, was a Sunday). Both sets of exceptions are dealt with in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) Complainant is a female who worked at Respondent ETI June 5 to June 28, 1995. She was hired as office manager and did bookkeeping and correspondence.

2) At times material herein, Respondent ETI was an Oregon corporation engaged in routing and dispatching freight shipments by truck throughout the United States and utilized the personal services of one or more individuals reserving the right to control the means by which such ser-

vice was performed. Respondent was the president and sole owner of Respondent ETI and was Complainant's direct supervisor.

3) When Respondent ETI was formed, Ed Goetz was to have invested some funds and was to have had an interest in the corporation. When the corporate papers were drawn, Goetz failed to sign them. He had no record interest, but Respondent periodically referred to Goetz as his "partner." Goetz drank heavily and was infrequently in the office.

4) In order to broker the truck cargoes between states, Respondent, or his corporation, was required to be licensed by the federal Interstate Commerce Commission. That license required that Respondent and/or the corporation qualify for and carry a bond. Respondent ETI was paid a commission for moving the loads. In turn, certain of the employees, called dispatchers, were paid an hourly rate plus part of the commission for each load moved.

5) The office of Respondent ETI was in Respondent's home in Eastside, a suburb of Coos Bay. The front room of the house contained three desks, two facing each other. The third, off to one side, had a computer. There were no barriers or walls between the desks. Respondent's bedroom opened off of the office. There either was no door or it was never closed.

6) Complainant's job resume submitted to Respondent ETI listed a certificate of completion at Southwestern Oregon Community College in word processing and spreadsheet operations. The certificate dated from 1990. She had not worked in an office since that time. She acknowledged that her computer skills were "rusty," causing some problems with proper spacing on billing documents. Respondent told her to consult with Smith regarding the computer.

7) At times material, Archie Mahon was a business consultant who assisted Respondent with organizing Respondent ETI. He trained ETI office staff in the kind of business information needed for tax purposes in the brokerage business. He had no knowledge of Complainant's hourly wage. He witnessed a discussion between Respondent and Complainant regarding the possibility of her becoming a dispatcher. Mahon was present for about two hours once a week while Complainant was employed. Respondent told Mahon that Respondent started work at 5 a.m. on weekdays in order to talk to east coast truckers. Mahon had no first hand observation of Respondent's morning routine.

8) On her second or third day on the job, Complainant was at her desk showing Respondent errors in the books. Respondent had his hand on Complainant's back as he leaned forward to see the work. Mahon cautioned Respondent that was inappropriate in an office with a female employee, that it might be misconstrued.

9) At the time of hearing, Samantha Smith was serving in the Oregon Air National Guard at Kingsley Air Force Base near Klamath Falls, Oregon. Her duty assignment called for computer expertise. She worked at Respondent ETI as a dispatcher in late June 1995. She occupied the

desk across from Respondent's and observed the interaction between Respondent and Complainant.

10) During her first week on the job, Complainant exchanged back rubs, outside the clothing, with Respondent at his request. When he removed his shirt, Complainant became uncomfortable and refused any further back rubs.

11) Complainant returned from lunch one day to find Respondent in his bathrobe. He told her he didn't know she was coming back and that he was about to shower. She said she was leaving unless he got dressed. He showered and dressed.

12) Complainant had a hot tub at her house and suggested a company barbecue at her house for all employees. She never invited Respondent alone to use the tub. When her house was for sale, she showed the house to Respondent one work day during the lunch hour. He was there about fifteen minutes.

13) Smith saw Respondent talk to Complainant. As Complainant worked at the computer, Respondent leaned close over her with his hand on her back. If Complainant were standing when Respondent engaged her in conversation, Respondent would move very close, less than twelve inches from her. In each instance, Complainant moved away from the touching and crowding.

14) Respondent frequently discussed activities outside work with Complainant, suggesting fishing and camping trips alone together. He spoke to her of his sexual encounters with other women and stated that sex relaxed him. He talked of a vacation in the Bahamas and going nude on the beach in such a way that she believed he meant for her to do that. He asked her to go dancing. He frequently asked Complainant to stay and barbecue at his house after work. Complainant consistently refused. Her refusals became more insistent as time passed. She finally told Respondent that she wasn't interested and to please not ask her again.

15) Respondent continued to touch Complainant and make suggestive remarks. She continued to move away. Once he put his hands under her shirt and she told him to get his hands off. She became increasingly stressed by his touching and comments. She considered quitting, but jobs were scarce in the Coos Bay area.. She was self-supporting, having recently separated from her husband, and needed the employment. She was very shaky emotionally. She was upset and angry that Respondent would not stop. She tried to talk to him, but it did not work. Each time she protested his actions, Respondent said either that she had mistaken his motives or that she was naive and had been hurt by other men. He stated he was not like other men. He told Complainant of his sexual experiences with a live-in girl friend. Complainant was not interested in a personal relationship with Respondent. She found his behavior and the atmosphere it created offensive and unwelcome. Each day she felt uneasy because of the sexual advances.

16) Complainant asked Smith how to stop Respondent's unwanted behavior because she didn't like the

attention. Complainant was concerned, upset, and angry. Smith suggested that Complainant tell Respondent of her concerns and that she wanted a professional environment free of sexual harassment.

17) Complainant periodically asked Respondent what had happened to Rebecca, who had started as a dispatcher when Complainant was hired. A day or so before Complainant's employment with ETI terminated, Respondent told her that Rebecca had spent two nights with him after starting work and then left.

18) On June 27, 1995, Respondent asked Complainant to stay and work overtime. He stated he thought his employees should give "200 percent" effort. She refused. She had already worked a full day and she also didn't think it was appropriate to work over into the evening where the office was in Respondent's home.

19) On June 28, 1995, Respondent showed Smith a knife he had acquired. After she commented on it, he approached Complainant to show it to her. He approached her at her desk from behind and leaned over with his arms on either side of her, holding the knife in front of her. Complainant was startled, jumped, and said to leave her alone. She felt trapped and told him to back away. She questioned his attentions and said she didn't like the harassment. He told her if she couldn't do the job to leave, "you're out of here."

20) Complainant thought she was fired and began computing her final check. Respondent asked why she was doing that and Complainant said "you fired me." Respondent said he had just given her the day off. Respondent then asked Smith if he had fired Complainant. Smith confirmed that he had. He asked Smith if she thought he was sexually harassing Complainant. Smith said that he was and that Complainant had asked that he stop. Respondent told Smith she was out, too.

21) Marcia Davis worked at ETI as a secretary from January 27 to about mid-February, 1995. Respondent was her boss. When Davis worked for Respondent ETI, she arrived at work at 8 a.m. Respondent was usually sleeping when she arrived. After entering through the kitchen to the office, she would stand in the open doorway to Respondent's bedroom and awaken him. This made her uncomfortable as she thought it inappropriate and awkward. She never entered the bedroom. At least once it appeared that Respondent was sleeping nude.

22) Two or three times while Davis worked with Respondent, he put his hands on her for an unsolicited back rub while she worked at the computer. Respondent sat very close with his leg touching hers whenever she showed him the computer screen. He spoke of his sexual relationship with a female with whom he was breaking up. His conversations often had sexual overtones. Once, when she was agitated over the computer, he told her "Don't get your panties in a bunch." Davis felt that Respondent's behavior was an invasion of her personal space. It made her very uncomfortable. Davis did not protest to Respondent, but she did draw away from his touching. Following a dispute over pay for Saturday work in early February, Davis quit because of the overall environment.

23) Complainant had understood her pay to be $6.25 an hour. She drew her first paycheck based on that amount. When Respondent confronted her about the amount, claiming he had hired her at minimum wage, Complainant stated she needed that much. After Complainant left Respondent ETI, she filed in small claims court for the wages she believed she had coming. The court found that her pay rate had been $6.25 an hour and awarded over $400 in unpaid wages.

24) Respondent did not use Mahon's consulting services, except for occasional telephone questions, after June 1995. Mahon did not visit Respondent's business after June 1995.

25) At times material, Jane MacNeill was Senior Investigator with the Agency. As part of her duties, she interviewed Archie Mahon by telephone December 21, 1995. He told her that Complainant had complained to him about Respondent's rough language and that she came into the office one day and Respondent was without trousers.

26) Respondent Viveiros was not a credible witness. He appeared to believe himself to be a victim. He testified that Complainant's allegations were untrue. He stated that she and Smith had conspired to fabricate the sexual harassment allegations, but the testimony of the witness Davis, which was not rebutted, suggested that such allegations described an ongoing practice. He stated that he had previously been victimized by a bank which had failed to file a bond it had promised for his business, and by a previous attorney who declined to represent him because Complainant had done housework for the attorney. He acknowledged most of the events complained about by Complainant, but had his own version of them. He acknowledged showing the knife, but insisted it was in the afternoon, although he later testified that Smith and Complainant left on the last day between 9:30 and 9:45 a.m. He acknowledged being in his robe one day when Complainant arrived at work, but insisted that it was in the morning and that he had overslept. He repeated his claim of beginning work at 5 a.m., despite testimony that Davis awakened him each day that she worked there. He attempted to establish that Complainant had misrepresented her computer skills, even though her resume showed that her training was four years old. He insisted that Complainant had quit, but admitted that he fired Smith for supporting Complainant. He testified that after Complainant and Smith left, he took to his bed for two or three days. After that, he said he hired no more employees and did no more business. When confronted by the Agency on cross-examination, he admitted having several other employees after Smith and Complainant left and acknowledged investing an additional sum of money in the business before ceasing operations in September. This forum did not credit Respondent's testimony unless it was verified by other more credible evidence.

27) Archie Mahon's testimony was not entirely credible. He attempted to protect Respondent, whom he described as a truck driver with a volatile temper. Mahon stated that Respondent was not profane and

that Complainant never mentioned Respondent's language or Respondent not being fully dressed at the office. He testified that Respondent had his hand on the back of Complainant's chair, rather than on Complainant, when he cautioned Respondent about getting too close physically to female employees. This forum has credited only those portions of Mahon's testimony that were corroborated by other credible sources.

28) Complainant consistently searched for replacement employment after June 1995, but was unsuccessful. This made her feel she had lost control of her employment potential. The loss of income had a significant negative effect on her life. In January 1996 she began her own housecleaning business.

29) Kay Casey replaced Complainant, working from early July to August 25, 1995. Respondent ETI had one or two short term employees after that, and ceased doing business sometime in September 1995. Respondent ETI was not in business at the time of the hearing.

ULTIMATE FINDINGS OF FACT

1) Complainant is a female who worked at Respondent ETI from June 5 to June 28, 1995, at a wage of $6.25 an hour.

2) Respondent was the president and sole owner of Respondent ETI, a corporation, and was Complainant's direct supervisor.

3) While Complainant worked at ETI, Respondent intentionally subjected Complainant to the following behavior: placing his hand on her back, leaning close over her, rubbing her back, removing his shirt, appearing in the office in his bathrobe, standing close to her, suggesting fishing and camping trips alone together, speaking of his sexual encounters with his live in girlfriend and other women, stating that sex relaxed him, talking of going nude on the beach, asking her to go dancing, asking her to stay and barbecue at his house after work, making suggestive remarks, putting his hands under her shirt, telling complainant she was naive and had been hurt by other men and he was not like other men, approaching her with a knife from behind and leaning over with his arms on either side of her.

(4) Respondent's behavior was unwelcome to Complainant. Complainant responded to Respondent's behavior by moving away when he touched or crowded her; asking him to take his hands off her and leave her alone; refusing invitations for social activities and telling him not to invite her again; indicating her discomfort when he removed his shirt and when he wore his bathrobe in the office; attempting to talk to him about his behavior; and stating she did not like the harassment.

(5) Other female employees found Respondent's behavior offensive: one left employment after experiencing unwelcome physical and verbal conduct; another told Respondent she believed he was sexually harassing Complainant.

6) Respondent's behavior toward Complainant created and maintained working conditions which were so intolerable that a reasonable person in Complainant's position would have resigned because of them.

7) Respondent knew that Complainant was substantially certain to leave employment as a result of those working conditions.

8) Complainant resigned her employment with Respondent ETI as a result of those working conditions.

9) Following Complainant's resignation, Respondent ETI remained in business through mid-September 1995.

10) As a result of her resignation, Complainant lost wages from June 28 to mid-September 1995, a period of 12 weeks at $6.25 an hour for a total of $3,000.

11) Respondent's behavior toward Complainant, the resulting intolerable working conditions, and the involuntary discharge with its sudden loss of income caused Complainant serious and lasting mental distress.

CONCLUSIONS OF LAW

1) At times material herein, ORS 659.010 provided, in part:

> "As used in ORS 659.010 to 659.110 * * * unless the context requires otherwise:
>
> " * * *
>
> "(6) 'Employer' means any person * * * who in this state * * * engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.

Respondent ETI was an employer subject to ORS 659.010 to 659.110 at all times material herein.

2) At times material herein, ORS 659.040(1) provided, in part:

> "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 * * * no later than one year after the alleged unlawful employment practice."

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.

3) At times material herein, the actions, inactions, statements and motivations of Respondent Louis Viveiros are properly imputed to Respondent ETI herein.

4) At times material herein, ORS 659.030(1) provided, 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 * * * sex * * * to refuse to hire or employ or to bar or discharge from employment such individual.* * *
>
> "(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 * * * or to attempt to do so."

At times material herein, OAR 839-07-550 provided:

"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."

Complainant's responses to Respondent's behavior made it clear that the conduct was unwelcome. By subjecting Complainant to unwelcome sexual touching, comments and other behavior directed toward Complainant, Respondent ETI, aided by its owner Respondent Viveiros, discriminated against Complainant by creating intolerable working conditions because of her sex, unreasonably interfering with her work performance and creating an intimidating, hostile or offensive working environment, whereby Respondent corporation violated ORS 659.030(1)(b) and Respondent Viveiros violated ORS 659.030(1)(g).

5) By subjecting Complainant to unwelcome sexual touching and comment, Respondent corporation, aided by its owner Respondent Viveiros, created objectively intolerable working conditions because of her sex and Complainant's resignation was a constructive discharge whereby Respondent corporation violated ORS 659.030(1)(a) and Respondent Viveiros violated ORS 659.030(1)(g).

6) At the time of the hearing, OAR 839-050-0110 provided in part:

"(1) Any party may be represented by counsel. All government agencies, corporations and unincorporated associations must be represented by counsel * * * "

At the time of the hearing, OAR 839-050-0020 provided in part:

"(8) 'Counsel' means an attorney who is a member in good standing with the Oregon State Bar * * * "

At the time of hearing, OAR 839-050-0330 provided in part:

"(2) When a party * * * fails to appear at the specified time and place for the contested case hearing, the administrative law judge shall take evidence to establish a prima facie case in support of the charging document and then issue a proposed order to the commissioner and all participants pursuant to OAR 839-050-0370. * * * "

Respondent ETI, a corporation, was not represented by counsel at the hearing and was therefore in default.

7) 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 an Order requiring Respondents to perform any act or series of acts reasonably calculated to carry out the purposes of ORS 659.010 to 659.110, 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

Default

Respondent ETI, a corporation, was found in default, pursuant to OAR 839-050-0330(2), for failing to appear by counsel at 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 839-050-0330(2). In default cases, the defaulting respondent is not allowed to present any evidence, examine witnesses, or otherwise participate in the hearing. *In the Matter of Metco Manufacturing, Inc.,* 7 BOLI 55 (1987), *aff'd Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988). In this case, the corporation did not present evidence, examine witnesses, or otherwise participate in the hearing. Respondent Viveiros, the corporate president, was named personally and presented evidence, examined witnesses, and otherwise participated fully in the hearing.

Prima Facie Case

To establish a prima facie case of sexual harassment, the Agency must present evidence to show that (1) At times material, Respondent ETI was an employer subject to ORS 659.010 to 659.110; (2) Respondent ETI employed Complainant; (3) Complainant is a member of a protected class, sex; (4) Respondent ETI through Respondent Viveiros engaged in unwelcome verbal or physical conduct directed at Complainant because of her protected class; (5) the conduct had the purpose or effect of creating an intimidating, hostile or offensive working environment; (6) Respondent knew or should have known of the conduct; and (7) Complainant was harmed by the conduct. OAR 005-0010; 839-007-0550; *In the Matter of Kenneth Williams*, 14 BOLI 16, 24 (1995).

The evidence was undisputed on the first three elements of the prima facie case. As to element (4), the Complainant credibly testified to numerous instances of verbal, physical and other conduct of a sexual nature directed at Complainant by Respondent. Although Respondent testified that Complainant's allegations were untrue, his testimony was not credible. In addition, other credible witnesses testified as to some of the instances Complainant described. Even Archie Mahon, whose testimony the forum generally found protective of Respondent, testified consistently with Complainant that Mahon cautioned Respondent that leaning over Complainant while checking her work was inappropriate and might be misconstrued. The evidence establishes that Respondent engaged in verbal,

physical and other conduct of a sexual nature directed at Complainant.

That the Respondent's conduct was unwelcome is apparent from credible testimony of Complainant's repeated and clear attempts to communicate this, through verbal objections and by physically moving away from Respondent, refusing social invitations from him and attempting to discuss his harassing behavior.

Respondent's conduct was directed at Complainant because of her sex.[1] He attempted to date her. He spoke to her of his sexual encounters with other women and stated that sex relaxed him. He stated that Complainant was naive and had been hurt by other men and that he was not like other men. The evidence demonstrates that Respondent engaged in unwelcome conduct directed at Complainant because of her protected class.

The fifth element of the prima facie case is that the unwelcome conduct must create an intimidating, hostile, or offensive working environment. What constitutes such an environment is measured by the totality of the circumstances.[2] Some factors to be considered are (a) the nature of the conduct (verbal or physical), (b) the context in which the alleged incidents occurred, (c) the frequency of the conduct, its severity and pervasiveness, and (d) whether it was physically threatening or humiliating.[3] Those factors as they relate to this case:

(a) Nature of the Conduct: In this case there was not only abundant unwelcome verbal and physical conduct of a sexual nature such as touching directed at Complainant, but there were instances where Respondent removed his shirt, appeared in his bathrobe in the office, and on one occasion approached the Complainant with a knife.

(b) Context in which Incidents Occurred: Respondent's office, including Complainant's workspace, was located in his home, within close proximity of his bedroom which had an open door. Although some of the conduct occurred with witnesses, Complainant was also alone with Respondent in this setting during some of the instances.

(c) Frequency and Pervasiveness: All the incidents of unwelcome conduct took place in a span of a few weeks. Thus frequency and pervasiveness are established.

(d) Humiliating or Threatening Conduct: Respondent put his hands under Complainant's shirt, on more than one occasion stood or leaned near her, touched her, and rubbed her back. On one occasion Respondent approached Complainant from behind with a knife and put his arms

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[1]"In proving a claim for a hostile work environment due to sexual harassment . . . the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment.." *Holien v. Sears, Roebuck and Co.,* 298 Or App 76, 689 P2d 1292 at 1299.

[2]*See Fred Meyer v. Bureau of Labor & Industries*, 152 Or App 302, 954 P2d 804 (1998).

[3]*U.S. Equal Employment Opportunity Commission, Notice Number 915.002* (Enforcement Guidance on *Harris v. Forklift Sys. Inc.*), March 8, 1994.

on either side of her to show her the knife, startling her.

Under the totality of the circumstances test, then, Respondent's harassing conduct toward Complainant was sufficiently severe and pervasive to create an intimidating, hostile, and offensive working environment.

Whether particular conduct directed towards a person constitutes sexual harassment is viewed from the perspective of a reasonable person in the circumstances of the person alleging harassment (an objective standard).[4] Evidence established that Complainant, herself perceived the environment to be hostile and offensive and indicated in numerous ways the conduct was unwelcome. There was credible evidence that other women who worked for Respondent found Respondent's conduct offensive. The forum believes that any reasonable person in Complainant's circumstances would have found that Respondent's conduct created a hostile, intimidating, offensive working environment.

The sixth element which must be proven is that Respondent knew or should have known of the unwelcome conduct. In this case, Respondent Viveiros, whose conduct is at issue, is the president of Respondent ETI. See "Liability," below.

The seventh and final element of the prima facie case is that Complainant must be harmed by the conduct. See "Damages," below.

ORS 659.030(1)(g) Liability

A corporate president and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided and abetted the corporation's unlawful employment practice under ORS 659.030(1)(g). The statute declares it to be an unlawful employment practice "For any person * * * to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110."

> "The Commissioner has long held that corporate presidents are liable for aiding and abetting their Respondent corporations where the presidents were found to have personally sanctioned or engaged in the alleged discriminatory acts. *In the Matter of Salem Construction Company, Inc.,* 12 BOLI 78, 87-88, 90 (1993); *In the Matter of Allied Computerized Credit & Collections, Inc.,* 9 BOLI 206, 214, 218 (1991); *In the Matter of Sapp's Realty, Inc.,* 4 BOLI 232, 270-72 (1985); *In the Matter of N.H. Kneisel, Inc.,* 1 BOLI 28, 30, 38 (1976)." *In the Matter of Gardner's Cleaners, Inc.,* 14 BOLI 240, 254 (1995).[5]

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[4]OAR 839-007-0550(4); *In the Matter of James Meltebeke*, 10 BOLI 102, 115 (1992), *reversed and remanded on other grounds, Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 903 P2d 351 (1995).

[5]*See also In the Matter of Wild Plum Restaurant, Inc.,* 10 BOLI 19 (1991) (holding corporate owner and president subject to ORS 659.030(1)(g) as an aider and abettor); *In the Matter of Loyal Order of Moose,* 13 BOLI 1 (1994) and *In the Matter of Oregon Rural Opportunities,* 2 BOLI 8 (1980) (both holding employer's manager liable under ORS 659.030(1)(g)); and *Sterling v. Klamath Forest Protective*

The Agency did not allege that Respondent Viveiros was an employer. Respondent Viveiros was a person as defined in ORS 659.010(12) who was charged with having "aided and abetted" the doing of acts forbidden by ORS 659.030, in violation of ORS 659.030(1)(g). He was thus a "respondent" under ORS 659.010(13).

Constructive Discharge

This forum has consistently adhered to an objective standard regarding constructive discharge that if the employer imposes objectively intolerable working conditions,[6] the employee's resignation due to those conditions is constructively a discharge. *In the Matter of West Coast Truck Lines, Inc.,* 2 BOLI 192 (1981), *aff'd without opinion,* 63 Or App 383, 665 P2d 882 (1983).[7]

> "' * * * [T]o establish a constructive discharge, [the employee] must allege and prove that (1) the employer intentionally created or intentionally maintained specified working condition(s); (2) those working conditions were so intolerable that a reasonable person in the employee's position would have resigned because of them; (3) the employer * * * knew that the employee was certain, or substantially certain, to leave employment as a result of those working conditions; and (4) the employee did leave the employment as a result of those working conditions.' *McGanty v. Staudenraus,* 321 Or 532, 557, 901 P2d 841, 856 (1995) * * * ." *In the Matter of Body Imaging, Inc*., 16 BOLI 163, 185 (1997).

In this case, this forum has found (1) that Respondents created and maintained specified working conditions (2) that were objectively intolerable, (3) that Respondents were aware that Complainant was substantially certain to leave over those conditions and (4) that Complainant did leave the employment as a result of those conditions. Her departure was a constructive discharge.

Association, 19 Or App 383, 528 P2d 574 (1974), (holding employer's manager liable under former ORS 659.030(5)).

[6]In context, "objectively intolerable working conditions" means conditions that a reasonable person would find intolerable and over which a reasonable person would resign.

[7]*See also In the Matter of Sapp's Realty*, 4 BOLI 232 (1985); *In the Matter of Richard Niquette*, 5 BOLI 53 (1986); *In the Matter of Deanna Miller*, 6 BOLI 12 (1986); *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989);, 9 BOLI 91 (1990), *aff'd without opinion, City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991); *In the Matter of Allied Computerized Credit & Collections, Inc.,* 9 BOLI 206 (1991), *In the Matter of William Kirby*, 9 BOLI 258 (1991); *In the Matter of Lee Schamp*, 10 BOLI 1 (1991); *In the Matter of Wild Plum Restaurant, Inc*., 10 BOLI 19 (1991); *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183 (1992), *aff'd without opinion, JLG4, Inc., v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993); *In the Matter of Sunnyside Inn*, 11 BOLI 151 (1993); *In the Matter of RJ's All American Restaurant*, 12 BOLI 24 (1993); *In the Matter of Loyal Order of Moose*, 13 BOLI 1 (1994).

Damages

Initially, Respondent's rough language and behavior toward Complainant appeared inappropriate to her and made her uncomfortable. As his behavior became more sexually oriented, Complainant became increasingly stressed and very shaky emotionally. The touching and comment were offensive and unwelcome. She became upset, angry, and felt extremely vulnerable, visualizing financial stress if she quit the job. His continued behavior had the effect of making her uneasy each day at work. She was constantly fending off his advances. The knife incident startled her and made her feel trapped. Her emotional distress caused the work situation to be less and less tolerable. When Respondent suggested on June 28 that she leave, if only temporarily, she decided to leave for good. Her unplanned departure caused the financial distress she had feared and resulted in an unanticipated and fruitless job search of several months. Throughout that period, and to a lesser extent up to the time of the hearing, her emotional distress continued. The award in the order below is intended to compensate her for the mental suffering caused by Respondents' sexual harassment, an unlawful employment practice.

Under ORS 659.010(2), the Commissioner has authority to fashion a remedy adequate to eliminate the effects of an unlawful practice found and to protect the rights of other persons similarly situated to the person harmed. The wage loss through loss of employment, as well as mental suffering, is an effect of discrimination attributable to the Respondents. The order below awards back pay and mental suffering damages against Respondent corporation for violation of ORS 659.030(1)(a) and (b), and against Respondent Viveiros for violation of ORS 659.030(1)(g).

Respondent's Exceptions

Respondent Viveiros filed a letter with the Forum in response to the proposed order in which he questioned Complainant's abilities to fill the job for which she was hired, alleged that she misrepresented her skills and lied on other job applications, and alleged that she took the job with knowledge that "Mr. Viveiros's language was more common to truck drivers than to a professional office." Respondent further alleged that the proposed order (characterized as "the complaint") "fails to allow for the fact that during the period of employment, my girlfriend Opal Solvey was in the next room." None of those allegations were relevant to the facts as found, and were unsupported by the evidence and testimony on the whole record. Respondent apparently does not appreciate what the case was about. The forum has revised and expanded upon the Ultimate Findings of Fact, the Conclusions of Law, and the Opinion in order to further clarify the grounds and legal reasoning for the decision and award. Respondent's exceptions are without merit and are denied.

Agency Exceptions

The Agency excepted to the amount of compensatory damages for mental and emotional distress in the proposed order ($15,000) as failing to adequately compensate Complainant based on the record and the forum's awards in similar cases. The Agency's exceptions are well taken.

In re-examining the record as a result of both sets of exceptions, the forum has revised Findings of Fact 15 and 28 and Ultimate Finding of Fact 11 in order to more accurately reflect the evidence on the record. Those revisions more fully recognize the duration and seriousness of the distress suffered and support an increase in the mental suffering award to $20,000.

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, specifically violations of ORS 659.030(1)(a), (b) and (g), Respondents EXECUTIVE TRANSPORT, INC., and LOUIS VIVEIROS are hereby ordered to:

1) Deliver to the Fiscal Office of the Bureau of Labor and Industries, State Office Building, Ste. 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for MARJORIE GOVER PURSLEY, in the amount of:

a) THREE THOUSAND DOLLARS ($3,000), less lawful deductions, representing wages lost by Complainant between June 28 and September 15, 1995, plus

b) TWENTY THOUSAND DOLLARS ($20,000), representing compensatory damages for the mental and emotional distress suffered by MARJORIE GOVER PURSLEY as a result of Respondents' unlawful practices found herein, plus

c) Interest at the legal rate from September 15, 1995, on the sum of $3,000 until paid, plus

d) Interest at the legal rate on the sum of $20,000 from the date of the Final Order herein until Respondents comply therewith, and

2) Cease and desist from discriminating against any employee based upon the employee's sex.

In the Matter of
ADVANTAGE AVIATION ASSOC., INC., and ESU, Inc., Respondents.

Case Number 04-98
Final Order of the Commissioner Jack Roberts
Issued July 28, 1998.

SYNOPSIS

Where the participants placed a settlement on the record by telephone conference call with the Administrative Law Judge on the date set for hearing and Respondents, who were represented by counsel, failed to submit closing documents encompassing the agreement and failed to pay the amounts agreed upon, the Commissioner awarded wages and penalty wages in the amounts designated in the settlement.

The above-entitled contested case was scheduled for hearing before

Warner W. Gregg, designated as Administrative Law Judge (ALJ) by

Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon, on May 5, 1998, in conference room 1004 of the State of Oregon 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. Advantage Aviation Association, Inc., and ESU, Inc., (Respondents), both corporations, were represented by Stephen T. Boyke, Attorney at Law, Portland, in a conference telephone call at approximately 9:00 a.m., Tuesday, May 5, 1998, the date set for hearing. The conference was for the purpose of placing a settlement on the record pursuant to OAR 839-50-220 and was tape recorded.

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

FINDINGS OF FACT - THE MERITS

1) On June 1, 1997, the Agency issued its Order of Determination number 97-075 (Determination) based on the wage claims of Jeffrey R. Linscott, Alden A. Andre`, James O. Jackson, and James R. Morris alleging that said wage claimants were employed in Oregon by Advantage Aviation Association, Inc., an Oregon corporation, and ESU., Inc., an Oregon corporation (Respondents). The Determination found that wage claimants performed work, labor and services for Respondents during the time periods and at the rates listed below and were paid sums due and owing to them except the sums determined to be due and owing with interest totaling $2,722.80 as follows:

Jeffrey Linscott, August 14 to August 18, 1996, 40 hours at $16.82 per hour, earned $672.80, paid 0.00, due $672.80 plus interest at the legal rate from September 1, 1996;

Alden A. Andre`, August 14 to 18, 1996, 40 hours at $15.00 per hour, earned $600, paid 0.00, due $600 plus interest at the legal rate from September 1, 1996;

James O. Jackson, March 15 to August 18, 1996, 42 hours at $25.00 per hour, earned $1,050, paid 0.00, due $1,050 plus interest at the legal rate from September 1, 1996;

James R. Morris, August 13 to August 19, 1996, 40 hours at $10.00 per hour, earned $400, paid 0.00, due $400 plus interest at the legal rate from September 1, 1996;

2) The Determination also found that Respondents' failure to pay was willful, that over 30 days had passed since the respective wages became due and owing, in violation of ORS 652.140 and that Respondents owed the respective wage claimants as penalty wages (pursuant to ORS 652.150) a total of $16,036.80 with appropriate interest as follows:

Jeffrey Linscott, terminated August 18, 1996, average daily wage $134.56, for 30 days as penalty wages, $4,036.80 plus interest at the legal rate from October 1, 1996;

Alden A. Andre`, terminated August 18, 1996, average daily wage $120, for 30 days as penalty wages, $3,600 plus interest at the legal rate from October 1, 1996;

James O. Jackson, terminated August 18, 1996, average daily wage $200, for 30 days as penalty wages, $6,000 plus interest at the legal rate from October 1, 1996;

James R. Morris, terminated August 19, 1996, average daily wage $80, for 30 days as penalty wages, $2,400 plus interest at the legal rate from October 1, 1996.

3) The Determination was served on Respondents by the Multnomah County Sheriff on June 24, 1997. It provided that Respondents either pay the amounts claimed or file an answer and request a hearing within 20 days from receipt. On July 3, 1997 the Agency extended time for Respondents' answer to July 14 and on July 14 Respondents through counsel timely filed answers and requests for contested case hearing.

4) On September 17, 1997 the Agency requested a hearing date and the forum issued a Notice of Hearing. On November 7 the ALJ issued a Discovery Order requiring the filing of case summaries by November 19. On November 13 Respondents' original counsel withdrew.

5) On November 19, 1997 Respondents' new counsel, Mr. Boyke, filed a partial summary of the case together with a motion for postponement of hearing and case summaries and a request for further discovery. In its response on November 24, the Agency did oppose postponement and assured cooperation in further discovery.

6) On November 24, 1997, the ALJ ordered the participants to cooperate in discovery and reset the hearing for February. On February 3, 1998 the Agency moved for postponement because of the temporary military service of a witness. Respondents did not oppose postponement and on February 5, 1998, the ALJ reset the hearing for May 5, 1998.

7) On April 17, 1998, the Agency notified the ALJ that the Agency and Respondents had "agreed to resolve all issues in this matter by consent order." The Agency further advised that if documents were not completed by the date of hearing, the participants would "be prepared to put the terms and conditions of the agreement on the record May 5, 1998."

8) At approximately 9:00 a.m., May 5, 1998, the ALJ, the Agency Case Presenter and Respondents' counsel participated in a conference telephone call, which was tape recorded, for the purpose of placing the settlement on the record pursuant to OAR 839-50-220.

9) On May 5, 1998, Respondents through counsel agreed to enter into a consent order with the Agency providing for the payment to the Agency by Respondents of the $2,722.80 earned and unpaid wages to be distributed to the wage claimants as specified in the Determination. Respondents further agreed that the consent order provide for the payment to the Agency by Respondents

the further sum of $8,018.40, representing one half the claimed penalty wages, to be distributed proportionately to the wage claimants as specified in the Determination. The consent order provided further that such payments were in settlement of a disputed claim and Respondents expressly waived their rights to hearing, administrative appeals and judicial review and assured future compliance with statutes and rules governing payment of wages. The Commissioner through the Agency accepted the terms of the consent order as settlement and compromise of the allegations of the Determination, agreed to forego further action on the wage claims therein, and found that Respondents' promises and immediate payment of $10,741.20 was consistent with ORS Chapter 652. The ALJ approved the settlement, ordered that the signed consent order and Respondents' payment be submitted by May 15, 1998, and canceled the hearing.

10) On May 21, 1998, the Agency notified the ALJ that Respondents had not executed the consent order and had not tendered payment as agreed and moved for a final order based on the terms of settlement placed on the record, pursuant to OAR 839-050-0220(6). On May 22, 1998, the ALJ issued an order reciting that no final documents or payment had been received and that no extension of time had been requested. The order further recited that a final order based on the settlement terms placed on the record would be issued pursuant to OAR 839-050-0220 if the documents were not received by the Hearings Unit by May 29, 1998. No signed consent order or payment have been received up to the date of this order.

11) The administrative exhibits, X-1 to X-18, consisting of the pleadings and correspondence among the participants and the forum up to the time of the Proposed Order, were admitted into the record by the ALJ.

12) On June 23, 1998, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein pursuant to ORS 652.140, 652.150, and 652.332.

2) OAR 839-050-0220 provides, in part:

> "(4) Where a case is settled within ten days before or on the date set for hearing, the terms of the settlement shall be placed on the record, unless fully executed settlement documents are submitted on or before the date set for hearing.
>
> "(5) Where settlement terms are placed on the record because settlement documents are incomplete, * * * fully executed settlement documents must be submitted to the hearings unit within ten days after the date set for hearing. Where a party fails to submit the settlement documentation within ten days after the date set for hearing, the terms of the settlement set forth on the record

shall constitute the basis for a final order."

OAR 839-50-240 provides, in part:

"The commissioner designates as administrative law judges those employees who are employed by the agency as hearings officers, * * *. The commissioner delegates to such designee the authority to:

" * * *

"(9) Decide procedural matters, but not grant motions for summary judgment or other motions by a party which involve final determination of the proceeding, but to issue a proposed order as provided for in these rules."

Respondent's failure to submit settlement documents or cooperate in the preparation and execution of settlement documents within 10 days after the hearing date, or by such date as modified by the written order of the ALJ, allows the terms of settlement as placed on the record to form the basis for a final order as proposed herein.

3) Under the facts and circumstances of this record, and in accordance with ORS 652.140, 652.150, and 652.332, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay the wages and penalty wages agreed to, plus interest on both sums until paid.

OPINION

Where the forum cancels a hearing based upon a respondent's agreement on the record to sign settlement documents and to pay wages and penalties and the respondent thereafter fails to execute settlement documents and make payment as agreed within the time allowed by the forum, the Commissioner may enter a final order against the respondent based upon the record of settlement. OAR 839-050-0220(5), (6), (7). *In the Matter of Fidel Hernandez,* 14 BOLI 149, 153-154 (1995); *In the Matter of Dale Bryant,* 14 BOLI 111, 114 (1995); *In the Matter of Portland Custom Interiors, Inc.,* 14 BOLI 82, 85 (1995).

Respondents' agreement of settlement having been placed on the record and the forum having canceled the hearing and the Agency having agreed to forego any further action on the wage claims settled thereby, the entry of a final order by the Commissioner based on the settlement as placed on the record is a proper disposition of this matter.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondents' violation of ORS 652.140 and pursuant to ORS 652.150, the Commissioner of the Bureau of Labor and Industries hereby orders that:

1) ADVANTAGE AVIATION ASSOCIATION, INC., and ESU, INC., corporations, jointly and severally, deliver to the Fiscal Services Office, Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

a) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JEFFREY LINSCOTT in the amount of TWO THOUSAND SIX HUNDRED NINETY ONE DOLLARS AND TWENTY CENTS ($2691.20), less appropriate lawful deductions, representing $672.80 in gross earned, unpaid, due, and payable

wages, and $2,018.40 in penalty wages, plus interest at the legal rate on the sum of 672.80 from September 1, 1996, until paid and interest at the legal rate on the sum of $2,018.40 from October 1, 1996, until paid. These sums are assessed for violation of ORS 652.140 and pursuant to ORS 652.150.

b) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR ALDEN A. ANDRE` in the amount of TWO THOUSAND FOUR HUNDRED DOLLARS ($2,400), less appropriate lawful deductions, representing $600 in gross earned, unpaid, due, and payable wages, and $1,800 in penalty wages, plus interest at the legal rate on the sum of $600 from September 1, 1996, until paid and interest at the legal rate on the sum of $1,800 from October 1, 1996, until paid. These sums are assessed for violation of ORS 652.140 and pursuant to ORS 652.150.

c) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JAMES O. JACKSON in the amount of FOUR THOUSAND FIFTY DOLLARS ($4,050), less appropriate lawful deductions, representing $1,050 in gross earned, unpaid, due, and payable wages, and $3,000 in penalty wages, plus interest at the legal rate on the sum of $1,050 from September 1, 1996, until paid and interest at the legal rate on the sum of $3,000 from October 1, 1996, until paid. These sums are assessed for violation of ORS 652.140 and pursuant to ORS 652.150.

d) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JAMES R. MORRIS in the amount of ONE THOUSAND SIX HUNDRED DOLLARS ($1,600), less appropriate lawful deductions, representing $400 in gross earned, unpaid, due, and payable wages, and $1,200 in penalty wages, plus interest at the legal rate on the sum of $600 from September 1, 1996, until paid and interest at the legal rate on the sum of $1,200 from October 1, 1996, until paid. These sums are assessed for violation of ORS 652.140 and pursuant to ORS 652.150.

In the Matter of
DAVID CREAGER and
Judith Creager, dba
Visual Changes Salon,
Respondents.

Case Number 50-98
Final Order of the Commissioner
Jack Roberts
Issued August 25, 1998.

SYNOPSIS

Respondents, who operated a hair salon, employed Claimant as a stylist. Respondents failed to pay Claimant all wages due upon termination, in violation of ORS 652.140(2) and OAR 839-020-0030 (overtime wages). Respondents' failure to pay the wages was willful, and the Commissioner ordered Respondents to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2), 652.150, 653.261; and OAR 839-020-0030.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as

Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 14, 1998, in Bureau of Labor and Industries offices, Suite 105, 700 E Main Street, Suite 105, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Amy M. Smith (formerly Beyer-Percy) (Claimant) was present throughout the hearing. David Creager (Respondent D. Creager) and Judith Creager (Respondent J. Creager) were present throughout the hearing and were not represented by counsel.

The Agency called as witnesses Lesley Laing, a compliance specialist with the Wage and Hour Division of the Agency; and Amy M. Smith, Claimant. Respondents called themselves as witnesses.

Administrative exhibits X-1 to X-9, Agency exhibits A-1 to A-12 (A-7, page 7 only), and Respondent exhibits R-1 to R-3 were offered and received into evidence. The Agency withdrew all of exhibit A-7 except page 7. The record closed on May 12, 1998.

Having fully considered the entire record in this matter, I, Jack 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 October 10, 1996, Claimant filed a wage claim with the Agency. She alleged that Respondents employed her and 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 Labor, in trust for Claimant, all wages due from Respondent.

3) On September 19, 1997, the Agency served on Respondents an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondents owed a total of $213.75 in wages and $1,200 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 October 9, 1997, Respondents filed an answer to the Order of Determination. Respondents' answer contained a request for a contested case hearing. They denied they owed Claimant any unpaid wages.

5) On April 16, 1998, 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 839-050-0000 to 839-050-0440.

6) On April 20, 1998, the Administrative Law Judge issued a discovery order directing each participant 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 839-050- 0210(1). The summaries were due by May 4, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200 (8), for failure to submit the summary.[1] The Agency submitted a timely summary. Respondents did not submit one.

7) On May 4, 1998, the Hearings Unit received Respondent D. Creager's request for a postponement of the hearing scheduled for May 14, 1998. The reason for the request was that Mr. Creager had court dates set on May 5 and 19 and a brief due at the state Supreme Court on May 13. He claimed that these matters were already scheduled when he received the Notice of Hearing, and that they were "extremely time consuming to prepare for and obviously extremely important." The Agency objected to a postponement because there was no conflict between the hearing date (May 14) and any of Mr. Creager's other commitments. The Agency stressed that Mr. Creager did not claim he had inadequate time or was unable to prepare for the hearing. The ALJ denied Respondent D. Creager's request, pursuant to OAR 839-050-0150(5), because workload was the cause for the requested postponement. This forum has consistently ruled that, in the absence of an actual conflict between a hearing date and a respondent's schedule, workload alone is not sufficient to justify a postponement. Respondent D. Creager did not show good cause for a postponement.

8) During a pre-hearing conference, Respondents and the Agency stipulated to certain facts, which were admitted by Respondents in their answer.

9) At the start of the hearing, Respondents said they had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

10) Pursuant to ORS 183.415(7), the ALJ 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, containing an exceptions notice, was issued June 16, 1998. Exceptions were due June 26, 1998. On June 17, 1998, this proceeding was transferred from ALJ McKean to ALJ Warner W. Gregg.

12) On June 26, 1998, the forum received by fax a request from Respondent David Creager for an extension of time in which to file exceptions to the Proposed Order herein, reciting that delivery of the Proposed Order to Respondent was delayed because of a changed address and the time consumed in forwarding mail to a mailing address of 2047 Amy St., Medford, Oregon,

[1]This discovery order was inadvertently not listed with the administrative exhibits that were received at hearing. The order, marked exhibit X-5A, is hereby received.

97504. Finding that Respondents had failed to timely notify the forum of a change of address, the ALJ found that Respondent had failed to show good cause for extending time for exceptions. Nonetheless, the ALJ extended time for exceptions to July 24, 1998. Respondent's exceptions were received by the forum on July 24, 1998, and are dealt with in the opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) Respondents operated a beauty and barber shop under the assumed business name of Visual Changes Salon. Respondents were coregistrants of the assumed business name. Respondents are husband and wife. The salon was in Medford, Oregon. Respondents shared the profits from the business and were each liable for any losses. They each participated in the management of the salon.

2) Claimant was employed by Respondents from approximately April 12 to June 15, 1996, and was paid at the straight time rate of $5.00 per hour.

3) Claimant worked for Respondents as a hair dresser and nail technician. She also answered the business phone, helped customers, was a cashier, and cleaned the salon.

4) Respondents paid a total of $1,670 in wages to Claimant for all of the time she worked for Respondents.

5) Respondents always paid Claimant at the straight time rate of $5.00 per hour.

6) Respondents paid each employee for a minimum of four hours each day. They told employees there would be no overtime work, that is, no work time over 40 hours in a week.

7) Respondents' work week ran from Monday through Saturday.

8) Claimant maintained a log book in which she recorded her appointments and hours worked. At Respondent D. Creager's direction, Claimant normally started at 8 a.m. on weekdays, and at 9 a.m. on Saturdays. If she came in later, she marked it in her book. She normally took a one-hour lunch break. Sometimes she did not leave the shop during her lunch hour. On those occasions, she was not always relieved of all duties because she was expected to answer the phone, and sometimes she watched hair-care videos. She usually stayed until 6 p.m., Monday through Friday, unless she had an earlier engagement. Respondents never told her to leave early. If she had time without customers, she cleaned the shop, washed and folded towels, and answered the phone. On Saturdays Claimant usually worked 9 a.m. to 5 p.m.

9) Respondent D. Creager told Claimant that the time she spent performing services for her family members was not work time. Respondents did not charge the family members for these services, but did charge them for any products used. When staff members styled each other's hair or did each other's nails, this was not part of any training. It was for their own benefit. Staff members asked each other for these services. Normally, all training was done after the salon's business hours.

10) Respondent J. Creager was a hair dresser and the salon's bookkeeper. She kept track of when employees came and went from the

salon. From the salon's appointment book, she kept a daily diary of hours employees worked. This daily diary was not accurate.

11) For the period April 12 to 30, 1996, Respondents paid Claimant gross wage of $370, for 74 hours worked. For the period May 1 to 31, 1996, Respondents paid Claimant gross wage of $902.50, for 180.5 hours worked. For the period June 1 to 15, 1996, Respondents paid Claimant gross wage of $397.50, for 79.5 hours worked. Total gross wages equaled $1,670, for 334 hours worked.

12) For reasons explained in the opinion, Respondents' records were not reliable. Accordingly, from the Claimant's appointment book and other credible evidence, the forum finds that she worked the hours shown below. The forum made adjustments for lunch hours, time Claimant provided services to her family members, and times when she was giving or receiving services to or from other salon staff. Claimant's compensable work hours in 1996 were: April 12, 3.75; April 13, 7.0; April 15, 9.0; April 16, 9.0; April 17, 7.0; April 23, 8.5; April 24, 8.0; April 25, 9.0; April 26, 6.0; April 27, 7.0; April 30, 8.0; May 1, 8.0; May 2, 8.5; May 3, 8.5; May 4, 8.0; May 6, 8.0; May 7, 7.0; May 8, 5.0; May 9, 7.0; May 10, 9.0; May 11, 6.0; May 13, 9.0; May 14, 7.0; May 15, 8.0; May 17, 7.0; May 18, 3.0; May 20, 9.0; May 21, 8.0; May 22, 8.0; May 23, 6.0; May 28, 9.0; May 29, 7.0; May 30, 8.0; May 31, 8.0; June 1, 6.0; June 3, 5.0; June 4, 9.0; June 5, 9.0; June 6, 7.0; June 7, 6.0; June 8, 7.0; June 10, 4.0; June 11, 9.0; June 12, 9.0; June 13, 9.0; June 14, 9.0; and June 15, 8.0. Claimant worked a total of 351.25 hours; of the total hours, 14 were hours worked in excess of forty hours per week. Claimant earned $1,791.25 in wages (337.25 hours x $5.00 = $1,686.25; plus 14 OT hours x $7.50 = $105). Respondents paid Claimant $1,670. The balance of earned, unpaid, due and owing wages equals $121.25.

13) In mid June 1996, Claimant's fiancé was injured, and Claimant asked for time off work to care for him. At the end of June 1996, Claimant notified Respondents that she had accepted a new job.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondents were persons who, as partners, engaged the personal services of one or more employees in the state of Oregon.

2) Respondents employed Claimant from April 12 to June 15, 1996.

3) Respondents and Claimant had an oral agreement whereby Claimant's rate of pay was $5.00 per hour.

4) Claimant quit without notice around June 30, 1996.

5) Claimant worked 351.25 hours, 14 of which were hour worked in excess of 40 hours in a work week. Claimant earned $1,791.25 in wages. Respondents paid Claimant $1,670, and owe her $121.25 in earned and unpaid compensation.

6) Respondents willfully failed to pay Claimant all wages within five days, excluding Saturdays, Sundays, and holidays, after she quit without notice, and more than 30 days have elapsed from the date her wages were due.

7) Civil penalty wages, computed in accordance with ORS 652.150 and Agency policy, equal $1,200.

CONCLUSIONS OF LAW

1) During all times material herein, Respondents were employers and Claimant was an employee subject to ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414.

3) 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 839-020-0030(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)."

Oregon law required Respondents to pay Claimant one and one-half times her regular hourly rate for all hours worked in excess of 40 hours in a week. Respondents failed to pay Claimant her overtime rate, in violation of OAR 839-020-0030(1).

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."

Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after she 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 hourly rate for eight hours per day 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 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 Respondents to pay Claimant her earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on those sums until paid. ORS 652.332.

OPINION

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 US 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 this burden of proof, the court analyzed the situation as follows:

> "An employee who brings suit under 16(b) of the [Fair Labor Standards] 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 kept records of Claimant's work. However, those records were inaccurate and 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 [she] 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*, 8 BOLI 96, 106 (1989). From Claimant's log book and credible testimony, as well as other evidence in the record, the forum has concluded that Respondents employed and improperly compensated Claimant. The forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimant.

Where the forum concludes that an employee was employed and improperly compensated, it becomes the burden of 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." *Anderson v. Mt. Clemens Pottery Co.*, 328 US at 687-88; *In the Matter of Dan's Ukiah Service*, 8 BOLI at 106.

Respondents submitted three documents regarding the hours worked by Claimant: their appointment books; a daily diary of hours worked; and a summary of hours, in which they compared the information in their appointment books with that in their daily diary. In addition, they testified about Claimant's hours worked and made allegations about her hours in their answer. For the following reasons, the forum found Respondents' records and testimony about Claimant's hours worked inconsistent and unreliable.

In their answer, Respondents contended that Claimant worked only 269.75 hours. They also asserted this in their summary of hours. In the answer, they also claimed they paid her for 332.5 hours. This number of hours times Claimant's rate of pay ($5.00 per hour) equals $1,662.50. They also asserted this in their summary of

hours. At the same time, however, they admit in the answer that they paid Claimant $1,670, which corresponds to 334 hours at $5.00 per hour. Respondents' pay checks and transaction reports support $1,670 and 334 hours.

Respondents daily diary does not agree with their appointment book. Their summary of hours and their testimony demonstrate the complete unreliability of their daily diary. Likewise, the summary doesn't accurately track with the information in their appointment book. For example, for April 23, their diary shows Claimant worked 8 hours. However, Respondents claim in their summary that she only worked 6 hours. In contrast, they testified from the appointment book that Claimant came in at 8: a.m. and left at 4:30 p.m. (8.5 hours), less one hour for lunch and one hour for styling her mother's hair, which equals 6.5 hours.

Respondent J. Creager testified that Respondents maintained the daily diary for just this kind of situation, that is, a wage claim. Yet she admitted that the diary did not accurately reflect the hours worked. She said it reflected the amounts paid to the employee. Respondents claimed they were trying to be kind, and rounded the hours up. For example, regarding May 8, Respondents contend they paid Claimant for 8 hours (per their daily diary), when she only worked 4 hours (per the summary). In contrast, Respondent J. Creager testified from the appointment book that Claimant worked only 3 hours -- she performed services for her mother until noon, then took a one-hour lunch break, and then worked from 1:00 to 4 p.m.

Respondent J. Creager testified that Respondents filled out the daily diary at end of each day. However, Respondents testified inconsistently about the accuracy of the diary. Respondent D. Creager said he wanted the diary for "tight record keeping." He said it was "very accurate," to avoid problems like this wage claim. But then he testified that the appointment book was more accurate. The diary was not accurate. For example, regarding June 7, Respondents testified that Claimant was out all day, but (per the daily diary) they paid her for 6.5 hours.

Respondent's appointment book was not accurate or reliable as a record of Claimant's hours. It was kept in pencil. Others besides Respondents wrote in it and erased entries from it. It was inconsistent with the diary and Respondents testimony. The forum concludes that Respondents' evidence about Claimant's hours worked did not sufficiently undermine the credible evidence produced by the Agency.

Wages Due

Claimant's credible testimony and log book established the number of hours she worked as a matter of just and reasonable inference. Although Respondents had no agreement with Claimant regarding overtime, Oregon law required them to pay her at time and one-half her regular hourly rate for all hours worked over 40 in a work week. Accordingly, the forum calculated Claimant's overtime wages at the rate of $7.50 per hour (time and one-half her regular hourly rate of $5.00). From the credible evidence

and the applicable law, the forum concluded that Respondents owe Claimant $121.25 in earned and unpaid wages.

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). Respondents, as employers, had a duty to know the amount of wages due to their 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 Respondents knew they were not paying the Claimant overtime wages and intentionally failed to pay those wages. Evidence showed that Respondents acted voluntarily and were free agents. Under this test, the forum finds that Respondents acted willfully and thus they are liable for penalty wages under ORS 652.150.

Respondents' Exceptions

Respondents' exceptions included disagreement with the findings of the Proposed Order as to Claimant's 8:00 a.m. starting time, as to the expectation that Claimant would answer the phone during lunch, and that Claimant's work day extended to 6:00 p.m. weekdays and 5:00 p.m. Saturdays during which she cleaned and washed and folded towels when not with a customer. Respondents' exceptions further disputed that overtime was authorized or worked and stated that Claimant knew none could be expected and that she was free to leave after four hours each day. Respondents denied that Claimant's final pay was late, that their appointment book was inaccurate or that they had any knowledge of unpaid overtime until receiving the wage claim, and argued that they should not be liable for penalty wages when Claimant gave them no notice of or claim of underpayment for nine or more months after employment ended. In support of these exceptions, Respondents pointed to their own testimony and to the documents they submitted at hearing.

The forum previously considered all of the arguments listed in Respondents' exceptions. The facts as found establish that the testimony of Respondents and their documents were inconsistent and unreliable. Claimant's log and testimony were considered credible. Respondents had a duty to know the amount of wages due, knew they were not paying overtime worked, and failed to pay all that was due. That is all ORS 652.150 requires for penalty wages to be assessed.

Respondents' exceptions are without merit and are overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondents' violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders David Creager and Judith Creager to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries IN TRUST FOR Amy M. Smith in the

amount of ONE THOUSAND THREE HUNDRED AND TWENTY ONE DOLLARS AND TWENTY FIVE CENTS ($1,321.25), less appropriate lawful deductions, representing $121.25 in gross earned, unpaid, due, and payable wages; and $1,200 in penalty wages; plus interest at the rate of nine percent per year on the sum of $121.25 from July 15, 1996, until paid and nine percent interest per year on the sum of $1,200 from August 15, 1996, until paid.

In the Matter of
MANUEL GALAN, JR., dba Timber Rock Reforestation and Janette Galan, an undisclosed partner,
Respondents.

Case Number 20-97
Final Order of the Commissioner
Jack Roberts
Issued August 31, 1998

SYNOPSIS

Where Respondent labor contractor performed activities that were defined as forestation activities and required a farm labor license with forestation indorsement, the Commissioner found that Respondent had acted as a forest labor contractor without a license, failed to provide workers' compensation, and failed to disclose his spouse as his business partner. The Commissioner also found that Respondent was not operating as a sham or subterfuge for a previously debarred contractor, did not fail to disclose others with financial interest in his business, and did not employ a debarred contractor. ORS 658.405(1); 658.407 (3); 658.410(1) and (2)(a) and (b); 658.415(1)(a), (b) and (d), (2), (3) and (18); 658.417(1), (2) and (4); 658.420 (1) and (2); 658.453(1)(e); 658.501; OAR 839-015-0004(5)(a) and (8)(c); 839-015-0142(1), (2)(a), (b), (c), (d), (e), (f) and (3); 839-015-0145(6), (8) and (13); 839-015-0520(3)(a) and (h), 839- 050-0140(2).[1]

The above-entitled matter came on for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on February 25, 26, 27, and 28, 1997, in the Project Development Building Conference Room, State of Oregon Department of Transportation, Highway Division, at 63034 O. B. Riley Road, Bend, Oregon. Linda Lohr, Case Presenter with the Bureau of Labor and Industries (BOLI or the Agency) represented the Agency. Manuel Galan, Jr., (Respondent[2]) was present throughout the hearing. Present representing Respondent on February 25 was Anthony Albertazzi, attorney at law, Bend, who did not

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[1]In 1996, the Oregon Secretary of State renumbered all Oregon Administrative Rules (OAR) by adding a digit to the division and rule numbers; thus OAR 839-15-004 became 839-015-0004.

[2]Despite the addition of Janette Galan as a party respondent, the term "Respondent," singly, refers to Respondent Manuel Galan, Jr., herein.

appear thereafter. On February 27 and thereafter, at her request and at that of Respondent, Janette (Jan) Galan, as a partner in Timber Rock Reforestation, assisted Respondent with examination of Agency witnesses, with presentation of Respondent's witnesses, and with argument of the facts.

The ALJ admitted into evidence Administrative Exhibits X-1 through X-28, Agency Exhibits A-1 through A-4, A-7 through A-25, A-27 through A-30, A-33 through A-42, A-45, A-50, A-51, A-56 and A-57, and Respondent's Exhibits R-1, R-2, R-4 through R-9, R-29 through R-70, and R-74 through R-79. The ALJ did not admit Agency Exhibits A-5 and A-6, which are in the record as offers of proof, but not as substantive evidence.

The Agency called the following witnesses: Agency farm/forest labor unit (FFLU) manager Nedra Cunningham, Respondent's father Manual Galan, Sr., Respondent, Barrett Business Services (BBS) manager Dan Hatfield, forestation worker Debbie Martinez, Agency Administrator's assistant Carol Parsons (by telephone), Agency FFLU Compliance Specialist Raul Ramirez, Agency FFLU licensing clerk Julye Robertson (in person and by telephone), Agency FFLU administrative specialist Dorothy Williams, and Contractor's Bonding and Insurance Company (CBIC) agent Jane Thorsen (by telephone).

Respondent called the following witnesses: Respondent's mother Erlinda Galan, Respondent's wife Janette (Jan) Galan, Respondent, Respondent's father Manuel Galan, Sr., Respondent's brother Marcos Galan, and Respondent's acquaintance and guarantor Larry Syring (by telephone).

Having fully considered the entire record in this matter, I, Jack 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 August 9, 1996, the Agency issued a "Notice Of Proposed Denial Of A Farm/Forest Labor Contractor License and Of Intent To Assess Civil Penalties" (Notice of Proposed Denial) to Respondent.[3] The Notice of Proposed Denial informed Respondent that the Commissioner intended to deny a farm/forest license to Respondent effective 60 days from Respondent's receipt of the Notice of Proposed Denial and that the Commissioner intended to assess civil penalties against Respondent in the amount of $4,000 pursuant to ORS 658.453. As the basis for these actions, the Agency alleged substantially as follows:

> 1. Respondent Is A Sham Or Subterfuge For Staff, Inc., Manuel Galan And Erlinda Galan, Debarred Farm/Forest Labor Contractors. OAR 839-15-142(2) & (3). On July 10, 1996, A Final

[3]The Notice of Proposed Denial refers to "Manual Galan, Jr., dba Timber Rock Reforestation" as "Applicant." In keeping with the forum's custom and rules, he is referred to in this proceeding as "Respondent."

Order issued from the Oregon Bureau of Labor and Industries ("Agency") barring Staff, Inc., and Manuel and Erlinda Galan, officers and principles of Staff, Inc., from obtaining a farm/forest labor contractor's license for a period of three years from the date of their breach of a Consent Order entered into March 11, 1994. On August 9, 1996, [Respondent] made application for a farm/forest labor contractor's license while at all times material herein Respondent was a blood relative of Manuel and Erlinda Galan. Less than one year has elapsed between the Agency's denial and Respondent's application for a farm/forest labor contractor license.[4] OAR 839-015-0142(2) & (3).

2. Acting As A Farm/Forest Labor Contractor Without A Valid License Or Indorsement Issued By The Commissioner. (One Violation) From on or about July 8, 1996, and continuing, Respondent, for an agreed upon remuneration, recruited, solicited, supplied, or employed workers to perform labor on Respondent's forestation or reforestation contract on the Umpqua National Forest at Roseburg, Oregon, USFS Contract No. 53-04T1-6-27. At all times material herein, Respondent did not possess a valid farm/forest labor contractor license, in violation of ORS 658.410, 658.415 and 658.417. Respondent's violation of said statutes demonstrates that Respondent's character, competence and reliability make Respondent unfit to act as a farm/forest labor contractor under OAR 839-015-0520(3)(a). Civil Penalty Assessed: $2,000.00.

3. Making A Willful Concealment In The Application For A License. (One Violation) On August 9, 1996, Respondent made application for a farm/forest labor contractor license and willfully concealed the identities of all persons financially interested in the Respondent's proposed operations as a farm/forest labor contractor, and, specifically, the identity of Respondent's co-signer on CBIC Farm Labor Contractor Bond No. PA 2142, in violation of ORS 658.415 and OAR 839-015-0145(13). Respondent's violation of said statute demonstrates that Respondent's character, competence and reliability make Respondent unfit to act as a farm/forest labor contractor under OAR 839-015-0520 (3)(a) & (h). Civil Penalty Assessed: $2,000.00.

As the basis for enhanced penalties, the Agency alleged the magnitude and seriousness of the violations and Respondent's knowledge of the licensing requirement for the activities Respondent is engaged in.

[4]This sentence amended to "Less than one year has elapsed between the issuance of the Agency's Final Order barring Staff, Inc. and Manuel and Linda Galan from obtaining a farm/forest labor contractor's license and Respondent's application for a farm/forest labor contractor license."

The Notice of Proposed Denial was served on Respondent personally on August 9, 1996.

2) On September 17, 1996, Respondent through counsel timely requested a contested case hearing and filed an answer to the Notice of Proposed Denial wherein:

1. Respondent denied being a sham or subterfuge for Staff, Inc., Manuel Galan and Erlinda Galan, denied having knowledge or information regarding the Final Order of July 10, 1996, and its contents and therefore denied that allegation, admitted that he made application for a farm/forest labor contractor's license on August 9, 1996, and that he is a blood relative of Manuel and Erlinda Galan, admitted that less than a year elapsed between his application and the Agency's Notice of Proposed Denial,[5] and denied any remaining allegations of paragraph 1. of the Notice of Proposed Denial.

2. Respondent alleged that prior to July 8, 1996, he contracted with the US Forest Service to perform work on the Umpqua National Forest and substantially completed the work under the contract, admitted that he did not possess a farm/forest contractor license, denied that he violated ORS 658.410, 658.415 and 658.417, denied that his character, competence and reliability make him unfit to act as a farm/forest labor contractor, and denied any remaining allegations of paragraph 2. of the Notice of Proposed Denial.

3. Respondent denied that he made any willful concealment in the application for a license, that he willfully concealed the identities of all persons financially interest in his operations as a farm/forest labor contractor, denied that he willfully concealed the identity of his co-signator on the bond, denied that his character, competence and reliability make him unfit to act as a farm/forest labor contractor, and denied any remaining allegations of paragraph 3. of the Notice of Proposed Denial.

4. Respondent denied any and all remaining allegations in the Notice of Proposed Denial not expressly admitted.

And, as affirmative defenses, Respondent's answer alleged:

5. That the Agency exceeded the scope of its statutory authority in promulgating one or more of the rules upon which its action was based, including OAR 839-015-0142.

6. That the Agency's failure to follow rulemaking procedures, including proper notice, bars the Agency from enforcing one or more rules upon which its action was based.

7. That the decision to deny a farm/forest labor contractor license and to assess civil penalties was based on bias and prejudgment of issues.

8. That the Agency exceeded the scope of its authority in denying a license to Respondent based on grounds not provided for by the relevant statutes and /or regulations.

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[5]See footnote *supra*.

9. That the Agency exceeded the scope of its authority in assessing civil penalties against Respondent based on grounds not provided for by the relevant statutes and/or regulations.

10. That the Agency abused its discretion in denying a farm/forest labor contractor license to Respondent.

11. That the Agency abused its discretion in assessing civil penalties against Respondent.

12. That the Agency's denial of a farm/forest labor contractor license constituted a deprivation of a liberty or property interest in violation of constitutional due process.

13. That the Agency is estopped from denying a farm/forest labor contractor license to Respondent and assessing civil penalties against Respondent.

14. That the Agency lacks jurisdiction over federal contracts concerning federal lands.

15. That federal law preempts the Agency's interference with federal contracts to perform work concerning federal lands.

16. That one or more of the statutes relied upon by the Agency in denying a farm/forest labor contractor license and/or assessing civil penalties is void for vagueness.

17. That one or more of the regulations relied upon by the Agency in denying a farm/forest labor contractor license and/or assessing civil penalties is void for vagueness.

3) The Agency requested a hearing date and on October 18, 1996, the Hearings Unit issued to Respondent and the Agency a Notice of Hearing setting forth the time and place of hearing and the designated ALJ, together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413, and b) a complete copy of the Agency's administrative rules regarding the contested case process — OAR 839-050-0000 through 839-050-0420.

4) On October 18, 1996, the Agency filed a motion to amend the final sentence of paragraph 1 of the Notice of Proposed Denial. On October 30, 1996, the ALJ granted the amendment,[6] and ordered that the participants submit case summaries in accordance with OAR 839-050-0210.

5) On November 7, 1996, Respondent through counsel moved to postpone the hearing date and case summaries for the reasons that Respondent was moving from Estacada, Oregon to Joseph, Oregon, and was without ready access to all of his business records and also because Respondent needed time to seek new counsel. The motion was accompanied by a notice of withdrawal of counsel which included Respondent's Joseph address and the request that further correspondence and communications be sent there for Respondent .

6) Also on November 7, the forum received the formal appearance of a Eugene attorney as Respondent's counsel, also urging a postponement.

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[6]See footnote, *supra*

On November 14, 1996, the ALJ issued an order setting January 28, 1997, as the hearing date and Salem, Oregon, as the location, and changing the due date for case summaries. On December 6, 1996, Respondent's Eugene attorney notified the forum of the withdrawal of counsel and the request that further correspondence and communications be sent directly to Respondent at the Joseph address. On January 9 and 16, 1997, respectively, the Agency requested a change of hearing location to Portland and a change of hearing date to February 6, 1996. Respondent did not object. On January 17, the ALJ acknowledged the withdrawal of Eugene counsel and ordered that the case be heard in Portland on February 6. Copies of that order were served on Respondent at the Joseph address and on the Eugene attorney.

7) On January 23, 1997, the forum received Respondent's discovery information and request for a change of location for the hearing to Bend, Oregon, where he was currently living. The Agency did not object. Respondent supplied a return address on his cover letter of "Timber Rock Reforestation, c/o 61419 S Hwy 97 Suite F1 Bend, OR 97702" and on the envelope of "Timber Rock 815 NW 9th Redmond OR. 97756." On January 23, the ALJ changed the hearing location to Bend and again changed the hearing date to February 25, 1997. That order was sent to Respondent at the Timber Rock addresses supplied as well as to the Estacada address. On February 12, the ALJ reset the due date of the case summaries to February 18, 1997. The Agency timely filed a case summary pursuant to that order.

8) On January 24, 1997, the Forum received a copy of a letter from Respondent's former Eugene attorney to Anthony Albertazzi, Attorney at Law, Bend, reciting that the Eugene attorney had forwarded the entire contents of Respondent's file to Albertazzi on January 8, 1997, at Respondent's request, and was forwarding a copy of the ALJ's January 17 order.

9) Prior to the commencement of the hearing on February 25, 1997, and off the record, Respondent requested permission to videotape the hearing by means of a stationary video camera. The Agency objected. Determining that the proceedings were open to public view, the ALJ allowed the request, provided that the official sound recording of the hearing remain the official record and provided that the taping not become disruptive to the orderly progress of the hearing.

10) At the commencement of the hearing, Mr. Albertazzi was present and confirmed that he represented Respondent. Counsel stated that Respondent had received the Notice of Contested Case Rights and Procedures and had no questions about it. Counsel stated further that the answer filed by Respondent's first attorney would serve as Respondent's answer for purposes of hearing.

11) At the commencement of the hearing, pursuant to ORS 183.415(7), the Hearings Referee orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) On February 26, the Agency on the record renewed its objection to the video taping by Respondent, citing that the viewing of the completed tapes by potential witnesses of Respondent was a circumvention of the forum's ruling excluding witnesses. Respondent offered to deposit completed tapes with the ALJ until the close of the hearing, and offered to supply the Agency with a copy of each tape within a week of the close of the hearing. The ALJ approved that arrangement, assumed custody of each videotape as it was completed, and gave the completed tapes to Respondent at the close of the hearing.

13) During the course of the hearing, the Agency sought to admit Exhibits A-5 and A-6, which were respectively a letter dated September 23, 1996, to Respondent's then counsel, and an attached questionnaire seeking information regarding the form of Respondent's business, the identity of persons interested therein, Respondent's recent residences, capitalization, contracts worked and employees and equipment used, and other related information. The ALJ ruled that the proffered exhibits formed a settlement offer and were inadmissible. They were accepted as an offer of proof and were not used as substantive evidence in regard to the Findings of Fact On the Merits herein.

14) During the hearing, witness Manuel Galan, Sr., requested an interpreter to translate English to Spanish and Spanish to English. The forum had received no prior notice of the alleged need for an interpreter. OAR 839-050-0300 provides that "a person who cannot speak or understand the English language * * * is entitled to a qualified interpreter." The witness, who speaks and understands English, insisted on communicating in Spanish. In the interest of expediency, the ALJ allowed Erlinda Galan, under proper affirmation, to act as translator.

15) During the hearing, on the morning of February 27, Respondent and his wife, Janette (Jan) Galan requested that she be able to assist Respondent with the presentation of the case on the basis that she was and had been a partner in Timber Rock. The ALJ allowed her to participate as requested.

16) The proposed order, containing an exceptions notice, was issued February 27, 1998.[7] Exceptions were due March 9, 1998. Under timely requests for extension of time, both the Agency and Respondents timely filed exceptions received by the forum on April 1, 1998. Both sets of exceptions are dealt with in the Opinion section of this Final Order.

RULINGS ON MOTIONS

At the commencement of the hearing, Respondent's counsel proposed that Respondent's case should be presented first since OAR 839-015-0142 (3) provided that it was "the burden of the applicant to provide evidence to the Bureau clearly indicating that such business form is not sham or subterfuge." The ALJ ruled that, in accordance with the cited rule, Respondent's stated burden would

[7]In the proposed order, following Proposed Finding of Fact 28, Proposed Findings of Fact 29 through 45 were erroneously renumbered 22 through 38. Those Findings are properly numbered in this order.

arise only if the Agency established that one or more of the factors enumerated in OAR 839-015-0142(2) were present. In other words, it was necessary that the Agency establish a prima facie case of sham or subterfuge as described by the rule before Respondent had any obligation to provide evidence clearly indicating to the contrary. That ruling is confirmed.

On February 28, 1997, at the close of testimony, both the Agency and Respondent having rested, the Agency moved to amend its Notice of Proposed Denial to conform to the evidence pursuant to OAR 839-50-140 (2)(a). Respondent timely objected to the proposed amendments. The ALJ found that when evidence was presented on the additional allegations, Respondent either did not object to all of the evidence or did not do so timely, and that the participants addressed the issues involved in the proposed amendments. Accordingly, the ALJ allowed the amendments, pointing out that whether the additional charges would be upheld was a matter for the Proposed Order. At Respondent's request, the ALJ ruled further that Respondent's counsel, who was not present and had not been present since early in the hearing, could argue the propriety of the amendments, but only in the form of exceptions to the Proposed Order in the event that the amendments were upheld in the Proposed Order.

On March 5, 1997, the ALJ issued a written order confirming the amendments allowed at the close of the hearing. That order, after reciting the circumstances outlined above, provided further:

"The Notice [of Proposed Denial] was amended as follows (the term 'Respondent' singly refers to Manuel Galan, Jr.):

> "a) Janette (Jan) Galan was added as a party respondent herein as a partner to Respondent Manuel Galan, Jr., in the business of Timber Rock Reforestation. OAR 839-050-0140 (2), 839-050-0170(2).
>
> "b) As to Count 3, the Agency added that Respondent willfully concealed the existence of a partner, Jan Galan, on his application, in violation of ORS 658.410(2)(c) [*sic*],[8] making two violations reflecting on his character, competence and reliability under OAR 839-015-0520(a) and (h). Additional penalty $2,000.
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> "c) As a new Count 4, the Agency added the charge of Respondent's willful concealment of all addresses, temporary and permanent, on his application in violation of ORS 658.415(1)(a) and OAR 839-015-0145(13), which affects his character, competence and reliability. Civil penalty $2,000.
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> "d) As a new Count 5, the Agency added the charge that in connection with the Umpqua National Forest USFS Contract number 53-04T1-6-27, between July 15, 1996 and July 28, 1996, Respondent failed to provide workers compensation coverage for all workers em-

[8]The proper citation is ORS 658.415(1)(d), as in the original count 3.

ployed on said contract, in violation of ORS 658.417(4) and OAR 839-015-0145(6), which affects his character, competence and reliability. Civil penalty $2,000.

"e) As a new Count 6, the Agency added the charge that in connection with the Stanislaus National Forest in 1995, Respondent employed as an agent a person who had a farm labor contractor license revoked, in violation of OAR 839-015-0145(8), which affects his character, competence and reliability. No civil penalty sought.

"Respondent, without the presence of his counsel, argued the facts of the case in his closing statement. The above amendments are listed as a courtesy to counsel; the ALJ has made no final determination as to whether these allegations, the original allegations, or any defenses have been established. That determination will be addressed in the Proposed Order."

A copy of the order of March 5, 1997, was transmitted to the Agency Case Presenter, to Respondents Manuel Galan, Jr. and Jan Galan, Timber Rock Reforestation, Estacada, and to Anthony Albertazzi, Attorney at Law, Bend. As to the amendment of the original charge 3 and the inclusion of additional charges 4, 5, and 6, the ruling of February 28 as memorialized in the written order of March 5 is hereby confirmed.

Following the hearing, the Agency moved for an order compelling Respondent to provide a copy of the videotapes made during the hearing. On May 2, 1997, the ALJ ordered that Respondent supply a copy of each videotape made of the hearing to the Agency, as promised during the hearing, by May 12, 1997. A copy of that order was served on each Respondent and on Respondents' attorney. The tape copies were not supplied. A discussion of sanction for this noncompliance is contained in the Opinion section below.

FINDINGS OF FACT —THE MERITS

1) Respondent Manuel Galan, Jr., social security number [redacted], born [redacted], 1973, is the son of Manuel Galan, Sr., social security number [redacted], born [redacted], 1949.

2) On July 10, 1996, the Commissioner issued a final order in In the Matter of Manuel Galan, Erlinda Galan, and Staff, Inc., Respondents, Case number 07-96.[9] Included among the provisions of that order was one barring and prohibiting any application for a forest/farm labor contractor license by any of those respondents for a period of three years from April 18, 1994.

3) At times material, Nedra Cunningham was manager of the FFLU of the Agency. She supervised the FFLU investigators, the FFLU licensing unit, and was Agency liaison with federal forestation agencies.

4) At times material, Carol Parsons was administrative assistant to the Agency's Wage and Hour Division Administrator. Among her duties

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[9] 15 BOLI 106 (1996), *aff'd without opinion, Staff, Inc. v. Bureau of Labor and Industries,* 148 Or App 450, 939 P2d 174 (1997), *rev den,* 326 Or 57, 943 P2d __ (1997). The Manuel Galan named as a Respondent therein is Manuel Galan, Sr.

were the recording and preserving of the records of Agency administrative rules promulgation, amendment, and hearings.

5) On January 24, 1995, Respondent met with the Agency's FFLU licensing clerk, Julye Robertson, at the Agency's Portland office to inquire about obtaining a farm/forest labor contractor's license. He was accompanied by his wife Janette Galan, his brother Marcos Galan, and his parents Manuel Galan, Sr. and Erlinda Galan. Marcos Galan was also interested in being licensed. Respondent and Marcos Galan brought in partly completed license applications.

6) Manuel Galan, Sr. told Robertson that Respondent and Marcos Galan were setting up separate companies. Robertson explained the licensing procedure after noting that the application of Marcos Galan did not include the required bond, a certificate of insurance for vehicles to be used, or the required workers' compensation insurance certificate. She explained that when the paperwork including the application, the necessary bond and certificates was complete, a temporary 60-day permit could be issued and an appointment made for the applicant to take the required written examination. Manuel Galan, Sr. stated that he thought they could submit the applications, obtain the 60-day permit, and then obtain the rest of the paperwork. Robertson asked that they take each incomplete application, complete it and send it in with the proper bond and certificate.

7) Manuel Galan, Sr. did most of the talking on January 24, speaking in collective terms such as "we could bring in the applications and get a temporary permit." He stated that they would send in the applications the following week. Respondent and Marcos Galan spoke only when Robertson directed a question to them.

8) On February 8, 1995, Respondent brought a farm/forest labor contractor application to Robertson in Portland. He was accompanied by Marcos Galan, Manuel Galan, Sr. and an unidentified male. Robertson noted that the bond submitted was limited as to time and was for $10,000. She explained that the amount would only cover a work force of up to 20 workers and that his application stated he would employ 21 to 50, which would require a $30,000 bond. Respondent stated that 21 to 50 was a mistake and changed the application to reflect 0 to 20 employees. Robertson questioned the wording of the bond and explained to Respondent that he would need to have the bonding company file a rider rewording the effective date of the bond. She noted that Respondent had supplied evidence of auto and workers' compensation insurance coverage, and accepted a check for the license fee conditioned on receiving a third photograph (Respondent had supplied only two) and the rider for the bond. Manuel Galan, Sr. repeated back to Robertson what she had told Respondent.

9) When Robertson asked Marcos Galan on February 8 if he also had an application, he stated that he

was still trying to get a bond. She asked both Respondent and Marcos Galan if their respective companies were registered with the corporation section. Both answered that they had not done so because each was an individual proprietorship.

10) On February 10, 1995, after further examining Respondent's February 8 application, Robertson wrote to Respondent to advise him that the February 8 application was incomplete and that it could not be processed. The application was returned with a list of items needed for completion. These included a Farm Labor Contractor Surety Bond (the one submitted had been a Construction Contractors Board Surety Bond), vehicle insurance certificate in accordance with Agency rules, workers' compensation insurance certificate providing coverage for each worker employed (the Barrett Business Service coverage notice submitted covered only "temporary" workers), a federal tax ID number, list of all vehicles to be used to transport workers, with serial numbers, proof of assumed business name registration, and an additional photograph.

11) On February 15, 1995, the Oregon Secretary of State, Corporation Division recorded an assumed business name of Timber Rock Construction for Manuel Galan, Jr. at 62162 Hamby Road, Bend, Oregon, listing Respondent as authorized representative.

12) On February 27, 1995, the Oregon Secretary of State, Corporation Division recorded an assumed business name of Timber Rock Reforestation for Manuel Galan, Jr. at 62162 Hamby Road, Bend, Oregon, listing Respondent as authorized representative.

13) On March 13, 1995, the Agency, after consultation with the Oregon Workers' Compensation Division and Barrett Business Services, confirmed its position that an agreement by a worker leasing company to supply and insure temporary workers to a farm/forest labor contractor would not comply with ORS 658.417(4), which requires that every worker be covered, unless the contractor had workers' compensation coverage for workers not obtained from the leasing company.

14) On March 20, 1995, Robertson received a telephone call from Respondent's wife, Jan Galan, stating that they were having trouble obtaining the required bond, partly because they didn't own real property. Jan Galan stated that Respondent would probably apply again later in 1995 or early in 1996. She asked that the fee be refunded.

15) On April 17, 1995, Respondent established a checking account as "Timber Rock Reforestation" with the First Interstate Bank, Bend. Authorized signatures on the account were Manuel Galan Jr. and Janette R. Galan. Thereafter, deposits were made periodically to that account by Offord Finance, Medford, which factored payments for Respondent's work on various US Forest Service contracts for application of big game repellent, pesticide and herbicide and eradication of rodents in the forest. Checks were drawn against the account by both signators for business expenses of Timber Rock and for personal expenses of Respondent and Jan Galan.

16) In May of 1995 Respondent submitted information to the US Department of Agriculture, Forest Service (USFS) in connection with bid solicitation number IFB R5-16-95-38, USFS Stanislaus National Forest, Sonora, California. He represented that he owned Timber Rock Reforestation as a sole proprietor, and that he planned to use Manuel Galan, Sr. as his foreman. He gave his business address as 62162 Hamby Rd., Bend, and acknowledged his firm's experience as 1/2 year and that of his foreman as 5 years in pesticide/herbicide application.

17) In a letter verifying his bid on IFB R5-16-95-38, which called for the application of herbicide to approximately 426 acres in the Stanislaus National Forest, Respondent stated that he had worked as a foremen in reforestation for Staff, Inc., for four years and in 1993 gained specific herbicide experience in the Groveland Ranger District and the Sierra National Forest. He acknowledged that he did not have a California applicators license, but was obtaining one and had meanwhile assigned Manuel Galan, Sr., a certified applicator, to perform the contract.

18) On June 26, 1995, USFS Stanislaus awarded contract 53-9A55-5-1s035 (Stanislaus 1s035) to Respondent based on his bid on solicitation IFB R5-16-95-38. Work was to begin July 1, 1995, and was to be completed in 16 calendar days. In a prework meeting on June 30, Respondent designated Manuel Galan, Sr. as Respondent's contractor representative, with authority to attend prework meeting, sign prework forms, do on ground administration and sign work orders, suspend and resume work orders, change orders, partial payment invoices, final payment invoice and contract release.

19) At the time Stanislaus 1s035 was awarded, Respondent did not have a California pesticide applicator license or a California agricultural business license. Manuel Galan, Sr. had an applicator license and Respondent proposed to operate on that.

20) Respondent's work on Stanislaus 1s035 began on July 12, 1995, when Respondent had obtained required California licenses and permits and all of Respondent's equipment had been brought up to standard and inspected. USFS had initially insisted that Respondent obtain California workers' compensation insurance; Respondent's workers were from Oregon and were already covered through interstate agreement. Seventy-five per cent of the allowable contract time had expired, and one item was deleted from the contract because the plants involved had matured during the delay.

21) Both Respondent and Manuel Galan, Sr. were involved in obtaining the necessary California documents; at times, Manuel Galan, Sr. took the lead role. USFS Contracting Officer (CO) Borge-Dorffi and Contracting Officer Representatives (CORs) were of the opinion that Respondent should have dealt with the documentation issues, crew training, and vehicle and equipment maintenance between the award date and the prework conference. The CO and the CORs noted that much of the spray work was unsatisfactory and that Respondent's crew was inexperienced, careless, and operated unsafely.

22) The USFS CO determined on or about July 17 or 18, 1995, that Respondent was considered in default on Stanislaus 1s035 and allowed no further work toward completion of the contract after Respondent failed to establish his ability to do so timely.

23) On or about July 18, 1995, Manuel Galan, Sr. addressed a Freedom of Information act request to USFS COR Lynn Webb asking for documentation concerning a 1993 contractor whom Webb had mentioned and requesting the name of the contractor who was mentioned in the prework meeting as ready to perform contract 1s035 in the event of Respondent's default.

24) On July 28, 1995, Respondent submitted contract costs to date on Stanislaus 1s035 to the USFS CO, requesting payment. On August 17, 1995, Manuel Galan, Sr. wrote to the US Department of Labor (USDOL) regarding its request that USFS withhold payment to Respondent to assure payment of workers. In that letter, Manuel Galan, Sr. questioned USDOL's position on worker travel and explained Respondent's difficulties with contract 1s035 as being due to animus toward Manuel Galan, Sr. (and, thus, toward Respondent) of CO Borge-Dorffi and of BOLI's FFLU manager.

25) In July 28, 1995, Manuel Galan, Sr. wrote to CO Borge-Dorffi reviewing his prior experience with the Stanislaus National Forest as a principle of Staff, Inc., and accusing the CO of retaliation against Respondent as Manuel Galan, Sr.'s son. The letter outlined the problems with Respondent's Stanislaus 1s035 contract in Manuel Galan, Sr.'s view and stated that the CO intended from the beginning that Respondent default. Manuel Galan, Sr.'s letter was endorsed by Respondent as well as his two foremen and herbicide mixer, and copies were directed to two congressmen, the Small Business Administration, the agricultural commissioners of two California counties, California pesticide licensing, and the USDOL.

26) In September 1995, CO Borge-Dorffi responded to congressional inquiry with her view of the facts surrounding Respondent's Stanislaus 1s035 contract, and sometime in October, the Secretary of Agriculture responded to Congressman Radanovich of California to the effect that the CO had acted properly based on the short season and Respondent's "difficulties in meeting material and equipment safety requirements, and the unsatisfactory work accomplishment."

27) Pursuant to Oregon statute, the Commissioner of the Bureau of Labor and Industries has adopted Oregon Administrative Rules (OAR) 839- 15-000 to 839-15-610 (now renumbered 839-015-0000 to 839-015-0610) regulating farm and forest labor contractors. Prior to July 1, 1996, the activities of forest fire suppression by contract crew, application of big game repellent by contract crew, herbicide or pesticide application in the forest by contract crew, gopher baiting, and gopher trapping were among activities that were exempted from the definition of forestation and reforestation activities requiring a farm/forest labor contractor license.

28) At times material, OAR 839-15-004(8)(c) (now renumbered to 839-015-0004 (8)(c)) defined in part

the activities constituting the "Forestation or Reforestation of Lands." Pursuant to statute, the Agency gave notice of rules hearings to be held in March 1996 regarding a proposed rule change intended to add activities related to the forestation or reforestation of lands with the result that persons engaged in such activities would became subject to the requirements of the Oregon farm/forest labor contracting law. In a summary of proposed changes published in March 1996 and distributed at each rules hearing, the Agency gave notice that the change to the rules was a major substantive change which, if adopted, might result in licensing requirements for persons not currently licensed. This notice included gopher baiting as a proposed licensable activity. It did not include gopher trapping.

29) The summary of proposed rule changes was available at rules hearings held in Bend on March 26, 1996, and in Salem on March 28, 1996. Respondent attended both hearings. Persons attending rules hearings were notified of the final Agency action regarding the rules involved. On or about May 30, 1996, the Agency transmitted a memorandum notice to "Interested Parties" regarding the adoption of rules relating to farm and forest labor contractors which contained the following, in pertinent part:

> "Effective July 1, 1996, administrative rules relating to farm and forest labor contractors will be amended as follows:
>
> " * * * * *
>
> "The following activities by a contractor have been added to the definition of activities relating to the forestation and reforestation of lands. <u>Contractors performing these activities will be required to obtain a farm/forest labor contractor's license as of July 1, 1996:</u>
>
> > Forest fire `suppression by contract crew
> >
> > Application of big game repellent by contract crew
> >
> > Herbicide and pesticide application by contract crew
> >
> > Gopher baiting and gopher trapping
>
> " * * * * *
>
> "Copies of the amended rules <u>may</u> be obtained by calling (503) 731-4742." (Emphasis in original.)

Respondent was among those persons to whom this memorandum notice was mailed.

30) Cunningham met with individuals from other regulatory agencies, including the USFS, during the time the new rules were being considered and adopted. Since it was the activity that was to be regulated, rather than the contracts, BOLI considered the described forest activity subject to the rules as of the effective date. At no time did Cunningham say that previously exempt forestation activity would remain exempt under any contract awarded or started prior to July 1, 1996, the effective date of the rules.

31) On April 10, 1996, USFS Umpqua National Forest, Roseburg, Oregon, awarded contract 53-04T1-6-27 (Umpqua 6-27) to Respondent based on his bid dated March 5, 1996. Umpqua 6-27 called for gopher trapping in the Diamond Lake Ranger District. The Umpqua CO issued a

notice to proceed on Umpqua 6-27 on July 8, 1996. Respondent and his crew engaged in gopher trapping on Umpqua 6-27 on July 9, 10, 11, 20, 26, and 28, 1996.

32) Manuel Galan, Sr. was listed as a foreman on Respondent's experience questionnaire submitted in March 1996 in connection with Respondent's bid on Umpqua 6-27. His name did not appear on Respondent's available pay records for Umpqua 6-27. The Umpqua COR's daily diaries for July 9 to August 16, 1996 did not mention Manual Galan, Sr.

33) A 1989 Ford F-35 pickup, Oregon license PQK 645, vin[10] 03265, was one of the vehicles used by Respondent on Stanislaus 1s035 in July 1995. This vehicle was formerly registered to Staff, Inc., 815 NW 9th, Redmond. It was financed by Western Bank, Beaverton, for Dolores and Genaro Loredo, Metolius, Oregon, in March 1995. Dolores Loredo is Respondent's sister, from whom Respondent borrowed the vehicle. This vehicle was used by Manuel Galan, Sr. (as Campesino #95[11]) on USFS contract 53-9A55-6-1s030 (Stanislaus 6-1s030) in the Groveland Ranger District, Sonora, California, July 3 through 5, 1996. This vehicle was inspected for Timber Rock Reforestation, PO Box 7065, Bend, by Midas Muffler, Bend, on July 8, 1995, for purposes of compliance with USDOL regulations.

34) A 1988 Ford van, Oregon license SYV 552, vin 73495, was one of the vehicles used by Respondent on Stanislaus 1s035 in July 1995. This vehicle was registered to Staff, Inc., Madras, until September 15, 1995, when Marcos Galan, 915 NW 9th, Redmond applied for title. Marcos Galan is Respondent's brother, from whom Respondent borrowed the vehicle. This vehicle was inspected for Timber Rock Reforestation, PO Box 7065, Bend, by Midas Muffler, Bend, on July 3, 1995, for purposes of compliance with USDOL regulations.

35) A 1989 Ford pickup, Oregon license PUY 359, vin 09304, was one of the vehicles used by Respondent on Stanislaus 1s035 in July 1995. This vehicle was registered to Staff, Inc., Redmond, until July 17, 1995 when it was transferred to Marcos A. Galan, Hard Rock Reforestation, 815 NW 9th, Redmond. In April 1996, title and registration were changed to Campesino 95, 815 NW 9th, Redmond, and in July 1996, it was again titled to Hard Rock Reforestation. New Oregon plates, 382 AKQ, were issued at that time. This vehicle was used by Manuel Galan, Sr. on Stanislaus 6-1s030 in the Groveland Ranger District, Sonora, California, July 3 through 5, 1996. This vehicle was inspected for Timber Rock Reforestation, PO Box 7065, Bend, by Midas Muffler, Bend, on July 8, 1995, for purposes of compliance with USDOL regulations. In November 1996, this vehicle was sold by Marcos Galan to Hector Galan, 23 NW Depot, Madras.

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[10]Vehicle identification number. This is currently a 17 digit number, assigned by the manufacturer under industry standards; for convenience, only the last five digits are used herein.

[11]The forum officially notes that "Campesino 95" was an assumed business name registered to Manuel Galan, Sr. *In the Matter of Manuel Galan,* 16 BOLI 51 (1997).

36) Respondent's farm/forest labor contractor application submitted August 9, 1996, listed a 1984 Ford Crew cab pickup, Oregon temporary license, vin 07792. This vehicle was specifically covered on the certificate of auto insurance accompanying the application. There was no evidence regarding prior ownership.

37) Five Oregon workers employed by Manuel Galan, Sr. on Stanislaus 6-1s030 from July 3 to July 5, 1996, were employed by Respondent on Umpqua 6-27 between July 15 and July 28, 1996: Javier Cruz, Mario Cruz, Antonio Lopez, Rafael Quintana, and Mario Zamora.

38) In July 1996, Respondent submitted to USFS a notice of Oregon workers' compensation coverage from BBS under a temporary worker agreement, effective April 25, 1995. Under such an agreement, workers supplied by BBS were covered, but workers hired by Respondent had to be covered by Respondent's own workers' compensation insurance policy; he had none. With the application received by the Agency on August 9, 1996, Respondent submitted a joint employer lease coverage notice from BBS, effective August 6, 1996. Under such an agreement, workers hired by Respondent as well as any supplied by BBS were covered.

39) Respondent obtained a $10,000 farm labor contractor bond from Contractors Bonding and Insurance Company as corporate surety effective July 26, 1996, in connection with his August 9, 1996, license application. His bond application to Contractors Bonding was accompanied by a completed co-indemnitor (co-signer) application. The bond was issued based on the co-signer. Contractors Bonding received inquiry from the Agency regarding the identity of the co-signer, but would not disclose that without "a court order."

40) At times material, Larry Syring was owner of Mountain View Sanitary Service, Inc., Gresham. He was acquainted with Respondent and Jan Galan from his church, where Jan Galan's father was pastor. Syring had a bond for his own business with CBIC. He knew that Respondent did forestation work and when Respondent needed a bond for a contract, he co-signed for Respondent, who stated he would get his own bond after successful completion of the contract. Syring had no interest in Respondent's business and derived no income from Respondent's contract. He did not know Manuel Galan, Sr., or Erlinda Galan, other than possibly meeting them when Jan and Manuel, Jr., were married. He recalled that Manuel Galan, Sr. had once been in the restaurant business.

41) At the time of his 1995 application, Respondent gave his address as 62162 Hamby Road, Bend, Oregon, 97701. Documents in this record indicate he used that address throughout 1995, occasionally using PO Box 7065, Bend, Oregon, 97708, as a mailing address. In 1996, in his correspondence and later application, he gave his address as 38197 SE Coupland Rd., Estacada, Oregon, 97023, and used PO Box 1368, Estacada, Oregon, 97023, as a mailing address. From time to time, he stayed at 915 NW 9th, Redmond, his parent's address. In late 1996,

while pursuing a restaurant venture, he received mail in Joseph, Oregon. At the time of hearing, his residence was in Estacada.

42) Respondent had been awarded USFS Malheur National Forest gopher baiting contract number 43-04KK-6- 2031 (Malheur 2031) on June 17, 1996. On August 22, 1996, he wrote to USFS Malheur giving his version of his licensing situation and withdrawing his bid.

43) On October 30, 1996, in connection with Stanislaus 1s035, the Board of Contract Appeals of the United States Department of Agriculture, finding that contract time dating from the notice to proceed should have allowed five additional days for performance and that the CO caused Respondent to unnecessarily spend seven days seeking local workers' compensation insurance coverage, ultimately found that the government had breached its duty of cooperation and breached its duty not to hinder or delay a contractor's performance, and ruled "that the default is not justified and that the default termination shall be changed to termination for convenience."[12]

44) Respondent testified that Janette Galan was his business partner as well as his domestic partner. Jan Galan acknowledged her interest in Timber Rock Reforestation and subjected herself to the forum's jurisdiction as a party; she examined and cross-examined witnesses and argued the merits of the Notice of Proposed Denial.

45) Respondent testified that he was told by Paul Tiffany of BOLI that contracts involving the newly regulated activities which predated the effective date of the new rules could be completed without farm/forest labor licensing, but that any new contracts for those activities after the effective date would require a farm/forest labor license. The Umpqua CO received information through another USFS employee that Cunningham had said that contracts awarded and started prior to the effective date of the rule change would not require a farm/forest labor license. Respondent stated that he did not see the Agency's May 30 memorandum notice of the effective date of the rules change until some time after it was issued. He did not deny that it was received. The suggestion in his testimony that he was unaware that gopher trapping was included in the list of regulated activities, or that he was told the rule applied only to contracts let after July 1, 1996, was self-serving, largely unsupported, and not relevant.

ULTIMATE FINDINGS OF FACT

1) Respondent Manuel Galan, Jr. is the son of Manual Galan, Sr. and Erlinda Galan. Janette Galan is the wife of Respondent Manuel Galan, Jr. and is a partner in his forestation and pesticide business registered in his name as Timber Rock Reforestation.

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[12]"Termination for convenience" is short for "termination for the convenience of the government." Such a termination has no lasting negative connotation. The contractor is eligible thereafter to seek other USFS contracts. A record of default subjects a contractor-bidder to additional qualifying sanctions or possibly outright disqualification on future bids. (Official Notice)

2) The Commissioner of the Bureau of Labor and Industries (BOLI) is charged with the regulation and licensing of farm/forest labor contractors (FFLC) in Oregon.

3) Manual Galan, Sr. and Erlinda Galan, together with their corporation Staff, Inc., were former FFLC licensees who were debarred by order of the Commissioner for a period of three years from April 1994.

4) Respondent submitted an incomplete application for a FFLC license in early 1995. The application did not have an acceptable bond, auto liability coverage or workers' compensation insurance coverage.

5) Respondent did not pursue the 1995 application because of difficulty in obtaining a bond and because the work he was doing, herbicide, pesticide and gopher baiting and trapping, did not require a FFLC license.

6) In February 1995, Respondent registered the assumed business name of Timber Rock Reforestation as a sole proprietorship.

7) In May 1995, Respondent bid on a herbicide contract in USFS Stanislaus National Forest in Northern California. As part of his documentation, he listed Manuel Galan, Sr. as the licensed applicator required by the bid solicitation. Respondent himself did not have an applicator license at the time.

8) Respondent was awarded the contract (Stanislaus 1s035) in late June 1995, with work to begin on July 1, 1995, and to be completed in 16 calendar days. He designated Galan, Sr. as his contract representative with full authority to deal with all aspects of Stanislaus 1s035.

9) Work on Stanislaus 1s035 was delayed by USFS insistence that Respondent have an applicator license, have equipment meeting USFS inspection, and have California workers' compensation insurance coverage. Galan, Sr. took a lead role in obtaining the necessary documentation and permits for Stanislaus 1s035 as well as in directing the work when USFS allowed Respondent to proceed.

10) USFS declared Respondent in default on Stanislaus 1s035 in mid-July, 1995. Thereafter, Galan, Sr. took a lead role in obtaining information, in protesting the withholding of payment, in complaining to the USDOL and in complaining to Congress. On October 30, 1996, the US Department of Agriculture Board of Contract Appeals ruled that the default was not justified.

11) Effective July 1, 1996, by administrative rule, the Commissioner redefined forestation and reforestation activities subject to FFLC licensing to include the previously exempt activities of application of big game repellent, herbicide or pesticide by contract crew, gopher baiting and gopher trapping. Respondent attended rules hearings regarding the amendments and was among the persons receiving notice that the rule redefining forestation and reforestation activities requiring a FFLC license would be effective for all such activities beginning July 1, 1996.

12) Respondent was awarded a gopher trapping contract by USFS Umpqua National Forest (Umpqua 6-27) on April 10, 1996. Respondent and his crew engaged in gopher trapping on Umpqua 6-27 throughout the month of July 1996. Respondent did not have a FFLC license in July 1996.

13) Manuel Galan, Sr. did not participate as Respondent's employee or representative on Umpqua 6-27 in July 1996.

14) Respondent used some of the same vehicles in working on Umpqua 6-27 in July 1996 that Galan, Sr. had used on a USFS contract in California earlier in July 1996. Respondent used some of the same workers in working on Umpqua 6-27 in July 1996 that Galan, Sr. had used on a USFS contract in California earlier in July 1996.

15) Respondent did not have workers' compensation insurance coverage for all workers employed on Umpqua 6-27 in July 1996.

16) On July 29, 1996, Respondent submitted an application for a FFLC license, together with a licensing fee. The application was incomplete and on August 9, 1996, Respondent submitted documents completing the application. On August 9, 1996, the Agency served Respondent with a "Notice Of Proposed Denial Of A Farm/Forest Labor Contractor License and Of Intent To Assess Civil Penalties."

17) On his applications of 1995 and 1996, Respondent reported his correct address at the time.

18) On his applications of 1995 and 1996, Respondent failed to include the name of Janette Galan as having a partnership interest in his business.

19) On his applications of 1995 and 1996, Respondent did not include the name of Larry Syring, co-signer on Respondent's FFLC bond which accompanied his August 9, 1996, application as having an interest in his business. Syring had no financial interest in Respondent's business and derived no income from Respondent's contracts.

20) On his applications of 1995 and 1996, Respondent did not include the name of Galan, Sr. as having an interest in his business. There was no evidence that Galan, Sr. had a financial interest in Respondent's business in 1996.

21) On August 22, 1996 Respondent withdrew his successful bid on a gopher baiting contract with USFS Malheur because of his licensing situation.

CONCLUSIONS OF LAW

1) At times material herein, ORS 658.407 provided, in part:

> "The Commissioner of the Bureau of Labor and Industries shall administer and enforce ORS 658.405 to 658.503 and 658.830, and in so doing shall:
>
> " * * *
>
> "(3) Adopt appropriate rules to administer ORS 658.405 to 658.503 and 658.830."

At times material herein, ORS 658.501 provided:

> "ORS 658.405 to 658.503 and 658.830 apply to all transactions, acts and omissions of farm labor contractors and users of farm labor contractors that are within the constitutional power of the state to regulate, and not preempted by federal law, including but not limited to the recruitment of workers in this state to perform work outside this state, the recruitment of workers outside of this state to perform work in whole or in part within this state, the housing of

workers in this state for work in another state, the housing of workers from another state in connection with work to be performed in this state, the transportation of workers through this state and the payment, terms and conditions, disclosure and record keeping required with respect to work performed outside this state by workers recruited in this state."

At times material herein, ORS 658.405 provided 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, * * * or who enters into a subcontract with another for any of those activities."

At times material herein, OAR 839-015-0004 provided:

"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[.]"

At times material herein, ORS 658.410 provided, in pertinent part:

"(1) * * * No person shall act as a farm labor contractor with regard to the 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). * * *

"(2) Farm labor contractor licenses may be issued by the commissioner only as follows:

"(a) To a natural person operating as a sole proprietor under the person's own name or under an assumed business name registered with the Office of Secretary of State.

"(b) To two or more natural persons operating as a partnership under their own names or under an assumed business name registered with the Office of Secretary of State."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein, including provisions of Oregon law regarding licensing of farm and forest labor contractors and pertaining to payment, terms, conditions, disclosure and record keeping and related matters.

2) As persons acting as farm labor contractors in the State of Oregon with regard to the forestation or reforestation of lands, Respondents M. Galan, Jr. and Janette Galan were subject to the provisions of ORS 658.405 to 658.503 and 658.830 on and after July 1, 1996.

3) At times material herein, ORS 658.415 provided, in pertinent part:

"(1) No person shall act as a farm labor contractor unless the person has first been licensed by the Commissioner of the Bureau of Labor and Industries pursuant to ORS 658.405 to 658.503 and 658.830. Any person may file an application for a license to act as a farm labor contractor at any office of the Bureau of Labor and Industries. The application shall be sworn to by the applicant and shall be written on a form prescribed by the commissioner. The form shall include, but not be limited to, questions asking:

"(a) The applicant's name, Oregon address and all other temporary and permanent addresses the applicant uses or knows will be used in the future.

"(b) Information on all motor vehicles to be used by the applicant in operations as a farm labor contractor including license number and state of licensure, vehicle number and the name and address of the vehicle owner for all vehicles used.

"(c) * * *

"(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.

"(2) Each applicant shall furnish satisfactory proof with the application of the existence of a policy of insurance in an amount adequate under rules issued by the Bureau of Labor and Industries for vehicles to be used to transport workers. * * *

"(3) Each applicant shall submit with the application and shall continually maintain thereafter, until excused, proof of financial ability to promptly pay wages of employees and other obligations specified in this section. The proof required in this subsection shall be in the form of a corporate surety bond of a company licensed to do such business in Oregon * * *. The amount of the bond and the security behind the bond * * * shall be based on the maximum number of employees the contractor employs at any time during the year. * * *

" * * * * *

"(18) A person who cosigns with a farm labor contractor for a bond required by subsection (3) of this section is not personally or jointly and severally liable for unpaid wages above the amount of the bond solely because the person cosigned for the bond."

At times material herein, ORS 658.417 provided, in pertinent part:

"In addition to the regulation 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.

"(2) Pay a license fee of $100, * * *

" * * * * *

"(4) Provide workers' compensation insurance for each individual who performs manual labor in forestation or reforestation activities regardless of the business form of the contractor and regardless of any contractual relationship which may be alleged to exist between the contractor and the workers notwithstanding any provision of ORS chapter 656, unless workers' compensation insurance is otherwise provided."

At times material herein, OAR 839-015-0142 provided in pertinent part:

"(1) The Bureau may refuse to license * * * any person who proposes to use any individual, partnership, association, corporation or other entity as such person's agent for the performance of any activity specified in ORS 658.405(1), when the proposed agent has, within the preceding three years, violated any section of ORS 658.405 to 658.485.

"(2) The Bureau will regard as prima facie evidence of sham or subterfuge mere changes in business form subsequent to denial, suspension, revocation or refusal to renew a license, where a relative by blood or marriage, or a person presently employed in an occupation, other than an occupation with a licensed farm or forest contractor, makes application, including a renewal application, for a license and one or more of the following factors are present:

"(a) A lack of adequate consideration or value given for the former business or its property;

"(b) The use of the same real property, fixtures or equipment or use of a similar business name of the former business;

"(c) The time period elapsed between the Bureau's denial, suspension, revocation or refusal to renew a license and application by the new business for a license is less than one year;

"(d) A person financially interested in any capacity in the former business has a financial interest in any capacity in the new business;

"(e) The amount of capitalization is inadequate to meet current obligations of the new business; or

"(f) The formalities of a partnership or a corporation are disregarded by the new business when such business is a partnership or corporation.

"(3) When the factors outlined in section (2) of this rule are present, it shall be the burden of the applicant to provide evidence to the Bureau clearly indicating that such business form is not sham or subterfuge.

Respondent, doing business as Timber Rock Reforestation in 1996 was not a sham or subterfuge for Staff, Inc., Manuel Galan, Sr., and Erlinda Galan, debarred farm/forest labor contractors. (Count 1)

4) Prior to July 1, 1996, OAR 839-15-004(8) provided in pertinent part:

> "'Forestation or reforestation of lands' includes, but is not limited to:
>
> " * * * * *
>
> "(c) Other activities related to the forestation or reforestation of lands including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land."

Effective July 1, 1996, and thereafter, OAR 839-15-004(8) (now 839-015-0004(8)) provided in pertinent part:

> "'Forestation or reforestation of lands' includes, but is not limited to:
>
> " * * * * *
>
> "(c) Other activities related to the forestation or reforestation of lands including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; *forest fire suppression by contract crew; application of big game repellent by contract crew; herbicide or pesticide application in the forest by contract crew; gopher baiting; gopher trapping* and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land." (Emphasis supplied.)

After July 1, 1996, Respondent engaged in contract gopher trapping in the Umpqua National Forest, was thus engaged in forestation or reforestation activities and acted as a forest labor contractor without a valid license in violation of ORS 658.417(1). (Count 2)

5) At times material herein, OAR 839-015-0520(3) provided, in pertinent part:

> "(3) The following actions of a farm or forest labor contractor license applicant or licensee or an agent of the license applicant or licensee demonstrate that the applicant's or 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;
>
> " * * * * *
>
> "(h) Willful misrepresentation, false statement or concealment in the application for a license[.]"

As a person applying for a license as a farm labor contractor in the State of Oregon with indorsement for the forestation or reforestation of lands, Respondent failed to disclose the interest of Respondent Janette Galan in the business known as Timber Rock Reforestation, violating ORS 658.415 (1)(d) and OAR 839-015-0145(13). (Count 3)

6) In 1996, as a person applying for a license as a farm labor contractor in the State of Oregon with indorsement for the forestation or re-

forestation of lands, Respondent did not unlawfully fail to disclose the interest of Manuel Galan, Sr., in the business known as Timber Rock Reforestation. (Count 3)

7) In 1996, as a person applying for a license as a farm labor contractor in the State of Oregon with indorsement for the forestation or reforestation of lands, Respondent did not unlawfully fail to disclose the interest of Larry Syring in the business known as Timber Rock Reforestation. (Count 3)

8) At times material, ORS 658.420 provided in pertinent 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 in the commissioner is satisfied as to the applicant's character, competence and reliability."

At times material herein, OAR 839-015-0145 provided in pertinent 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:
>
> " * * *
>
> "(6) Whether a person has provided workers' compensation coverage for each worker or paid workers' compensation insurance premium payments when due.
>
> " * * * * *
>
> "(8) Whether a person has employed as agent who has had a farm or forest labor contractor license denied, suspended, revoked or nor renewed or who has otherwise violated any provisions of ORS 658.405 to 658.503 or these rules.
>
> " * * * * *
>
> "(13) Whether a person has made a willful misrepresentation, false statement or concealment in the application for a license."

Respondent did not willfully conceal his addresses and did not violate ORS 658.415(1)(a). (Count 4)

9) Respondent failed to provide workers' compensation insurance for each worker employed on Umpqua 6-27 in July 1996, violating ORS 658.417(4) and OAR 839-015-0145(6). (Count 5)

10) When Respondent employed Galan, Sr. as his agent in 1995, he did not violate OAR 839-15-145(8). Respondent did not employ Galan, Sr. as his agent after July 1, 1996, and did not violate OAR 839-015-0145(8). (Count 6)

11) At times material herein, ORS 658.453 provided, in pertinent 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:

"(e) A farm labor contractor who fails to comply with ORS 658.417(1), (3) or (4)."

12) At the time of the hearing, OAR 839-050-0140(2) provided for amendment of the pleadings to conform to the evidence presented and OAR 839-050-0170 provided that upon proper application, a party may be added at any stage of the contested case proceeding. Janette Galan was a business partner of Respondent Manuel Galan, Jr. and requested status as a party. Janette Galan was properly included as a party respondent herein.

OPINION

The Agency proposed to deny the application of Manuel Galan, Jr. for a farm labor contractor license with forestation indorsement. As bases for its action, the Agency alleged that Respondent was a sham or subterfuge for Staff, Inc., Manuel Galan, Sr. and Erlinda Galan, debarred farm/forest labor contractors, that Respondent had acted as a farm/forest labor contractor without a valid license, and that Respondent had made a willful concealment in his application for a license. After the presentation of evidence at hearing, the Agency sought to include additional charges of failing to disclose on his application that Janette (Jan) Galan was a partner in the business of Timber Rock Reforestation, thus violating ORS 658.410(2)(c), making two violations in Count 3 reflecting on his character, competence and reliability under OAR 839-015-0520(a) and (h) and sought an additional penalty of $2,000; as a new Count 4, the Agency alleged Respondent's willful concealment of all addresses, temporary and permanent, on his application in violation of ORS 658.415(1)(a), also affecting his character, competence and reliability and sought an additional penalty of $2,000; as a new Count 5, the Agency added the charge that Respondent failed to provide workers' compensation insurance coverage for all workers employed on Umpqua National Forest USFS Contract number 53-04T1-6-27, between July 15 and July 28, 1996, in violation of ORS 658.417(4) and OAR 839-015-0145 (6), also affecting his character, competence and reliability, and sought an additional penalty of $2,000; and as a new Count 6, the Agency added the charge that Respondent employed as an agent in connection with the Stanislaus National Forest in 1995, a person who had a farm labor contractor license revoked, in violation of OAR 839-015-0145(8), also affecting Respondent's character, competence and reliability.

Violations Charged

1. Sham or Subterfuge.

The rule regarding sham or subterfuge, OAR 839-015-0142, quoted in part in Conclusion of Law 3 above, reads:

"(2) The Bureau will regard as prima facie evidence of sham or subterfuge mere changes in business form subsequent to denial, suspension, revocation or refusal to renew a license, where a relative by blood or marriage, or a person presently employed in an occupation, other than an occupation with a licensed farm or forest contractor, makes application, including a renewal application, for a license and one or more of the following factors are present:***"

Webster's Seventh New Collegiate Dictionary defines sham as "to act intentionally so as to give a false impression." Subterfuge is defined as "deception by artifice or stratagem in order to conceal, escape, or evade." Both are premised on deception. The purpose of the inquiry as set out in the rule is to uncover "mere changes in business form..." that would indicate that the entity now making application is really the same entity that had a previously denied, suspended, revoked or refused license, in a different form (hereinafter referred to as "the former business"). The rule further states:

> "(3) When the factors outlined in section (2) of this rule are present, it shall be the burden of the applicant to provide evidence to the Bureau clearly indicating that such business form is not sham or subterfuge."

The forum finds that the Agency established two of the six factors of the sham or subterfuge rule and discusses those first:

> "(b) The use of the same real property, fixtures or equipment or use of a similar business name of the former business;"

The only property or equipment appearing in evidence were motor vehicles formerly registered to Staff, Inc., and/or to Campesino 95 (Manuel Galan, Sr.) or to Respondent's relatives. Respondent acknowledged they were borrowed, which is not unlawful so long as there is adequate liability insurance. However this established one factor under the rule, even though Respondent did not use the same real property or a similar business name.

> "(c) The time period elapsed between the Bureau's denial, suspension, revocation or refusal to renew a license and application by the new business for a license is less than one year;"

The senior Galans and their corporation, Staff, Inc., were prohibited from applying for a FFLC license initially in 1994; that prohibition was extended by order on July 10, 1996. Respondent's application was within one year. This established another factor under the rule. The Agency having presented a prima facie case by establishing one or more factors of the rule, the Respondents must provide evidence clearly indicating their business form is not a sham or subterfuge. Since the rule itself provides the relevant factors in the inquiry as to whether a business is or is not a sham or subterfuge, following is a discussion of the remaining four factors as applied to the established facts:

> "(2)(a) A lack of adequate consideration or value given for the former business or its property;"

The problem in establishing this factor is that there was no evidence that a business actually changed hands. Although the Agency's evidence was designed to infer that Respondent took over his father's business without buying it for value, there is no evidence in the record to suggest that Respondent assumed any of Galan, Sr.'s contracts, debts or obligations. In short, this factor simply could not be established.

> "(d) A person financially interested in any capacity in the former business has a financial interest in any capacity in the new business;"

This factor was not established. Several pages of Respondent's check stubs on what he described as his business account were admitted into evidence. The stubs showed mixed business and personal expenditures. Several were to individuals, and noted "paid in full." Respondent stated these were usually loans to the person and the notation meant that Respondent expected the payee to repay him in full. There were occasional payments to Respondent's relatives, including a check to Erlinda Galan. There were checks to Manuel Galan and to Manuel Galan, Jr. Respondent did not recall what every check covered, suggesting usually that they were loans to the recipients of the checks or, in the case of his father-in-law, repayment. Respondent explained that all of the checks payable to Manuel Galan and Manuel Galan, Jr., were wage draws to himself. None of the payments to relatives suggested any ongoing business interest on the part of the various payees. Respondent's checkstubs and explanations of them established a rather incredible bookkeeping operation, but there was insufficient evidence to establish that either of the senior Galans, or their corporation, had any financial interest in Timber Rock Reforestation. This factor was not established.

> "(e) The amount of capitalization is inadequate to meet current obligations of the new business;"

The apparent purpose of this element is to show some dependence or reliance on the former business for capitalization. The Agency suggested that Respondent's business was inadequately capitalized, as evidenced by the need for a co-signer. The need for a surety does not necessarily establish that a business is undercapitalized; it is also possible that the applicant for bonding or credit has no credit history. At any rate, the backup capitalization (co-signer) was unconnected to Manuel Galan, Sr. or his former business. This factor was not established.

> "[or] (f) The formalities of a partnership or a corporation are disregarded by the new business when such business is a partnership or corporation."

The apparent purpose of this element is to establish that although the business seeking the license is a partnership or corporation, the partners or corporate officers do not act or are not treated as such and the defacto leadership emanates from the former business. The record indicates that Timber Rock Reforestation is registered with the Oregon Secretary of State Corporation Division not as a partnership or corporation but as the assumed business name of Manual Galan, Jr. However both Respondent and Jan Galan testified that she was his business partner. That issue is addressed later in this opinion. But the forum believes as to this factor the more important question is whether Manuel Galan, Sr. or anyone else acting on behalf of the former business was acting as a defacto business partner or corporate officer in Timber Rock. The Agency did not establish this factor as to Manuel Galan, Sr., Erlinda Galan or anyone else associated with the former business.

Conclusion: Sham or Subterfuge

When Respondent submitted an application in 1996, the Agency was aware that Respondent had em-

ployed Manuel Galan, Sr. in the past, that Respondent was a blood relative of Manuel Galan, Sr. and that the application was made within one year of the Bureau's July 1996 order extending the prohibition of Galan, Sr.'s right to apply for a license. This established one of the six factors of sham or subterfuge. Respondent used some of the same equipment as Manuel Galan, Sr. in 1996, establishing a second factor. It also appeared that Galan, Sr. had played a major active role in Respondent's dealings with Stanislaus 1s035 as well as in Respondent's early 1995 attempt to apply. This gave the Agency reason to suspect that Galan, Sr. might be the true proprietor or co-proprietor of Timber Rock. However there was no showing that Galan, Sr. had a financial interest at the time of the application, was a defacto business partner, or that any business or property, other than the borrowed cars, changed hands with or without adequate consideration. The rule requires that if the agency establishes one or more factors of sham or subterfuge, the burden shifts to respondent to refute this inference. Here the agency established two of the factors but the evidence on the whole record did not establish that Timber Rock was a sham or subterfuge.

2. Acting as a farm/forest labor contractor without a valid license.

The Agency was also aware at the time of Respondent's 1996 application that Respondent had worked at least one contract after July 1, 1996, without the required license. Although to an extent mitigated by the fact that licensing for the particular activity was a new requirement, that failure to obtain a license impacted on the Commissioner's view of Respondent's character, competence, and reliability.

3. Making a Willful Concealment in an Application for a License.

The agency alleges Respondent willfully concealed the identities of all persons financially interested in Respondent's proposed operations. There was evidence that Manuel Galan, Sr. acted as if he were the principal in Timber Rock in 1995, but there was no evidence that he shared in the profits or loss of the business at the time of the 1996 application. Respondent had no duty to list Galan, Sr. as a person "financially interested * * * in the applicant's proposed operations as a farm labor contractor."

A bond was provided as a voluntary accommodation by Respondents' friend Larry Syring who, the evidence showed, had no financial interest in Respondents' business. Under such circumstances, Respondent had no duty to list the co-signer of his bond as a person "financially interested * * * in the applicant's proposed operations as a farm labor contractor."

Although her name does not appear in the listing with the Corporations Division, both Respondent and Jan Galan testified that she was his business partner and upon Respondent's request, at hearing both Manual Jr. and Jan Galan examined witnesses and argued the facts. Under the circumstances, she should have been listed on the application, and the forum finds that failure to list her was a willful concealment. The forum does not consider that omission to be as serious as the intentional concealment of a partner ineligible for a license or a person

with a financial interest who also provided financial resources, neither of which was proven, and therefore assesses a nominal penalty.

4. Willful concealment of all addresses on an Application for a License.

Respondent's testimony regarding his address at particular times was equivocal; he sometimes used the Redmond address of his parents. However, in written communication with the Agency and on the applications, he used his true address at the time. Taken as a whole, the evidence does not reveal any willful concealment of his true address.

5. Failure to provide workers compensation coverage for all workers employed.

Evidence at hearing established that Respondent did not have proper workers' compensation insurance coverage on Umpqua 6-27 in July 1996. This means that for a period of time Respondent's workers, whose job it was to perform physical labor, were completely without coverage for any job-related injuries that may have occurred. Although the period of time was brief, around a month, that does not lessen the seriousness with which the Commissioner views this violation. This seriously affected the Commissioner's view of Respondent's character, competence, and reliability.

6. Employing as an agent a person who had a farm labor contractor license revoked.

Manuel Galan, Sr. was barred from obtaining a FFLC license beginning in early 1994. Respondent employed Manuel Galan, Sr. in 1995 as his agent for the performance of what became in 1996 forestation or reforestation activities. At that time, the subject matter of Stanislaus 1s035 was not within the Agency's jurisdiction as a licensable activity. Respondent could not violate Oregon law by employing Manuel Galan, Sr. in a non-forestation activity in 1995.

Respondent's Defenses

In finding that the Commissioner has jurisdiction over the parties and subject matter, the forum has necessarily found contrary to those stated "affirmative defenses" which involve exceeding the scope of the Agency's authority. There was no showing that the Agency exceeded the scope of its statutory authority in promulgating one or more of the rules, in failing to follow rulemaking procedures, in denying a license to Respondent based on grounds not provided for by the relevant statutes and /or regulations, or in assessing civil penalties against Respondent based on grounds not provided for by the relevant statutes and/or regulations. Similarly, no evidence was adduced suggesting that the decision to deny a farm/forest labor contractor license and to assess civil penalties was based on bias and prejudgment of issues, or that the Agency abused its discretion in denying a farm/forest labor contractor license to Respondent or in assessing civil penalties against Respondent, or that the Agency lacked jurisdiction over federal contracts concerning federal lands, or that federal law preempted the Agency's interference with federal contracts to perform work concerning federal lands. There was no showing that one or more of the statutes or regulations relied upon by

the Agency in denying a farm/forest labor contractor license and/or in assessing civil penalties was void for vagueness. In short, more than mere allegations of the lack of substantive or procedural due process or of constitutional inadequacy are necessary in order to test the sufficiency of these proceedings.

License Denial and Civil Penalties

The agency sought both to assess civil penalties for the violations found, and to deny Respondent's license application. The civil penalties listed below are a proper disposition of the violations found herein. Having found at least two violations that demonstrate that Respondent's character, competence and reliability make him unfit to act as a forest labor contractor, the forum is also denying Respondent's license application for three years effective from the date of denial, which was August 9, 1996. The applicable rule, OAR 839-015-0520 (4), would allow the Commissioner to begin the three year period from the date of this Final Order, and the Commissioner has exercised this authority in the past. However there are mitigating circumstances in this narrow instance to justify beginning the denial period at the earlier date. Respondent's application was denied largely because the agency suspected the Respondent's business was a sham or subterfuge, which was not established. During the pendency of these proceedings Respondent has already been unable to operate as a licensed contractor for over two years.

Agency Exceptions

The Agency's exceptions to the proposed order focused on the ALJ's "incorrect" application of "both the letter and the spirit OAR 839-015-0142(2) to the facts in the record" by finding that Respondent was not a sham or subterfuge for debarred farm/forest labor contractor Manuel Galan, Sr. As a result, the opinion section has been largely re-written to make the reasoning more clear. The Agency is correct that it should not be required to prove all the factors of OAR 839-015-0142 (2); however there does not exist a preponderance of evidence on the whole record that Respondent was a sham or subterfuge for the former business. The Agency argues competently and eloquently, but its case is built largely on inference and supposition. For instance, Respondent's book of check stubs indicated checks were issued to Manuel Galan, Sr. and Erlinda Galan; however these do not prove these persons had a financial interest. The Agency also argues that the use of the same workers by the two entities also should suggest that Respondent and Galan Sr. are operating as one. The forum rejects that inference, given the transient nature of farm/forest employment.

Respondents' Exceptions

Respondent excepted to the conclusions of the proposed order that Jan Galan was an undisclosed partner in Timber Rock Reforestation, that Respondent violated the law when he performed the gopher trapping contract without a license, and that Respondent violated the law by not having proper worker's compensation coverage on the gopher trapping contract.

As noted earlier, the subject of Jan Galan as a partner came up first in the context of allowing her to participate in the hearing as a party.

Respondent himself asked that she be allowed to assist him, as his attorney was not in attendance.

The colloquy on the record in this regard was as follows:

> "ALJ: We're back on the record on Thursday morning, February 27th. It is now 9:10 a.m. Mr. Albertazzi is not with us at the present time, is that correct?
>
> MR. GALAN: That's correct.
>
> ALJ: And he's expected when?
>
> MR. GALAN: 10:00, 10:30.
>
> ALJ: Thank you. And Mrs. Galan, Jan Galan is now seated beside you, *and I understand that she is and has been a partner in Timber Rock, is that correct?*
>
> MR. GALAN: *Yes, she is.*
>
> ALJ: Therefore, she may sit with you as a representative of the respondent."

(Emphasis supplied)

At the time the ALJ ruled that Jan Galan could assist Respondent, the latter was represented by counsel who, so far as the ALJ knew, would be returning or at least consulting with Respondent. If Respondent did not understand that "partner" meant business partner, he could have clarified that at the time.

ORS 68.110(1) defines partnership as "an association of two or more persons to carry on as coowners a business for profit." Partnerships are not assumed. Whether a partnerships exists, in the absence of a contract, may be inferred from the conduct of the parties, whether they intended to establish a partnership, and whether each has a right to share in the profits, the liability to share losses, and the right to exert some control over the enterprise. *In the Matter of Diran Barber,* 16 BOLI 190 (1997), citing Stone-Fox, Inc. v. Vandehey Development Co., 290 Or 779, 626 P2d 1365 (1981). That exception is overruled.

Respondent's exceptions suggest that enforcement of the Agency's rule requiring a license, effective as it was on July 1, 1996, after he had been awarded a gopher trapping contract in April, violated Article I, Section 21 of the Oregon Constitution when it was applied to a pre-existing contract. In relevant part, Article I section 21 provides, "No * * * law impairing the obligation of contracts shall ever be passed * * * ." A law violates this provision with respect to preexisting contracts if that law "modif[ies] those obligations"[13], or changes or eliminates the remedy available for a breach of contract.[14]

Application of the July 1, 1996 rule amendments to Respondent's activities on and after July 1, 1996 regarding a federal contract awarded before that date did not impair the obligation of that contract, its terms, or its enforceability. That exception is overruled.

Respondent also excepts to the finding that he failed to provide proper workers compensation coverage. An explanation of that finding is con-

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[13] *Eckles v. State of Oregon,* 306 Or 380, 760 P3d 846 (1988)

[14] *Towerhill Condo. Assoc v. American Condo Homes*, 66 Or App 342, 675 P2d 1051 (1984)

tained in Finding of Fact 38. That exception is overruled.

Videotapes

The forum allowed Respondent to videotape the hearings portion of these proceedings. The forum finds that taping was disruptive and troublesome, and detracted from the orderly progress of the hearing. The forum finds further that it became necessary for the forum to be actively involved in the preservation of the tapes in order to assure the exclusion of witnesses. Finally, it is clear that videotaping by a party is of no value to the forum since the tapes are not and will not be the official record. This was a case of first impression and does not represent a precedent for future hearings. Because the taping was allowed as an accommodation, and will not become a matter of right for future hearings, the forum imposes no specific sanction for Respondent's deliberate and intentional refusal to comply with his own assurances and the forum's order.

ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, the Commissioner of the Bureau of Labor and Industries hereby denies MANUEL GALAN, JR., dba Timber Rock Reforestation, a license to act as a farm labor contractor, effective from August 9, 1996, and MANUEL GALAN, JR., is prevented from applying for a license for three years from that date in accordance with ORS 658.415(1)(c) and OAR 839-015-0140(3) and 839-015-0520(4);

IT IS FURTHER ORDERED that Respondents MANUEL GALAN, JR. and JANETTE GALAN are hereby ordered to deliver to the:

Bureau of Labor and Industries

Fiscal Services Office Suite 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 FOUR THOUSAND TWO HUNDRED DOLLARS ($4,200), plus any interest thereon which accrues at the annual rate of nine percent, between a date ten days after the issuance of the Final Order herein and the date Respondents comply therewith. This assessment is made as civil penalty against Respondents as follows:

for violation of ORS 658.417(1) $2,000;

for violation of ORS 658.415(1)(d), $200;

for violation of ORS 658.417(4)(g), $2,000;

(total $4,200).

In the Matter of
THOMAS J. HEYWOOD, dba
PETER PAN ENTERPRISES,
Respondent.

Case Number 57-98
Final Order of the Commissioner
Jack Roberts
Issued October 14, 1998.

SYNOPSIS

Respondent, who was engaged in metal roof construction, failed to pay two wage claimants all wages due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful, and the Commissioner ordered Respondent to pay 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 Alan McCullough, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries (BOLI) for the State of Oregon. The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Thomas Heywood (Respondent) represented himself.

Having fully considered the entire record in this matter, I, Jack 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 11, 1997, Claimant Adrian S. Mancillas 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) On March 11, 1997, Claimant Jorge Villa 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.

3) At the same time that they filed the wage claims, Claimants Mancillas and Villa assigned to the Commissioner of Labor, in trust for Claimants, all wages due from Respondent.

4) On December 16, 1997, the Agency served on Respondent an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of $760.00 in wages and $2,880.00 in civil penalty wages based on work Claimants had performed for Respondent from February 14-25, 1997. 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.

5) On January 7, 1998, Respondent filed an answer to the Order of Determination and requested a contested case hearing.

6) In his answer and request for hearing, Respondent admitted he employed both wage claimants at $6.00/hr., stated he had paid some wages to both Claimants, and admitted owing Claimant Mancillas $37.00

in unpaid wages and Claimant Villa $98.00 in unpaid wages. Respondent also stated that at the end of their employment, both claimants failed to show up for work. Respondent did not contest the dates of Claimants' employment as represented in the order of Determination.

7) On January 7, 1998, 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 839-050-0000 to 839- 050-0440.

8) On June 17, 1998, the Administrative Law Judge issued a discovery order directing each participant 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 11, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary.

9) On July 8, 1998, 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 the amount of $37.00 in unpaid wages for Claimant Mancillas and $98.00 in unpaid wages for Claimant Villa, based on the admissions in Respondent's answer. The Agency also contended that Respondent was liable for $1,440.00 in civil penalty wages for each Claimant pursuant to ORS 652.150, in that Respondent knew wages were owed Claimants at the time of Claimants' termination and willfully failed to pay Claimants' wages within the time limits set out in ORS 652.140.

10) On August 7, 1998, the ALJ denied the Agency's motion for summary judgment for two reasons. First, because the motion was unaccompanied by documentary evidence showing that the Claimants had filed wage claims and assigned them to BOLI. Second, because the motion sought an amount of unpaid wages less than the amounts sought in the Order of Determination and the Agency did not move to amend the Order of Determination to reflect the lesser amounts.

11) On August 10, 1998, the Agency filed a second motion for summary judgment, seeking $37.00 in unpaid wages for Claimant Mancillas, $98.00 in unpaid wages for Claimant Villa, and $1,440.00 in civil penalty wages for each Claimant. The Agency included several new exhibits, including wage claims, wage assignments, and calendars of hours worked by both Claimants. It also included a motion to amend the Order of Determination.

12) On August 10, 1998, the ALJ denied the Agency's second motion on the basis that the Agency's motion to amend asked for the same amount of unpaid wages as the original Order of Determination.

13) On August 11, 1998, the Agency repeated its motion for summary judgment, accompanying it with an amended Order of Determination seeking $37.00 in unpaid wages for Claimant Mancillas, $98.00 in unpaid wages for Claimant Villa, and $1,440.00 in civil penalty wages for each Claimant.

14) On August 11, the ALJ issued an Interim Order giving Respondent until 5 p.m., August 17, 1998, to respond to the Agency's motion for summary judgment and motion to amend the Order of Determination. The ALJ ordered the Agency to use appropriate means to ensure that Respondent actually received a copy of all documents associated with the Agency's motions prior to August 17 and to provide the forum with documentation of Respondent's receipt of these documents.

15) On August 17, 1998, the Agency provided documentation showing that service pursuant to the ALJ's order dated August 11, 1998 had been attempted by certified mail and by a process server. The certified mail had been signed for by someone other than Respondent at the private mail service where Respondent receives his mail. The process server had not been able to personally serve Respondent because Respondent refused to cooperate and make himself available for service when called on the phone by the process server. The process server reached Respondent at 541-385-8856, a number that Respondent identified to the ALJ as a business number located in his home.

16) Respondent did not file a response to any of the Agency's motions for summary judgment or motions to amend.

17) On August 18, 1998, the ALJ issued an Interim Order finding that Respondent had been constructively served by the Agency with all documents associated with the Agency's motions. The ALJ granted the Agency's motion to amend the Order of Determination on the bases that no objection was filed and justice required that the amendment be granted. The ALJ also granted the Agency's motion for summary judgment, ruling in pertinent part as follows:

> "4. Motion for Summary Judgment.
>
> "OAR 839-050-0150(4) governs summary judgment proceedings in this forum. It provides, in relevant part::
>
> "'(a) A motion for summary judgment may be made by a participant * * * as to all or part of the issues raised in the pleadings. The motion may be based on any of the following conditions:
>
> "' * * *
>
> "'(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[.]'
>
> "When considering a motion for summary judgment, this forum will draw all inferences of fact from the record against the participant filing the motion and in favor of the participant opposing the motion. *In the Matter of Efrain Corona*, 11 BOLI 44 (1992), *aff'd without opinion*, *Corona v. Bureau of Labor*

and Industries, 124 Or App 211, 861 P2d 1046 (1993).

"In order to prevail, the Agency must establish that 1) Claimants were employed by Respondent; 2) Claimants have not been paid all wages due and owing; 3) More than 30 days has elapsed since the wages became due and owing; and 4) Respondent's failure to pay Claimants' wages was willful.

"In his answer and request for hearing, Respondent admits having employed claimants Villa and Mancillas at the wage rate of $6.00/hr. Respondent further admits owing Villa $98.00 and claimant Mancillas $37.00 in back wages. The Order of Determination alleges that claimants' last day of employment was February 25, 1997. This date is not disputed by Respondent. For purposes of this summary judgment motion, the forum will assume that claimants quit and apply the most lenient timeline for determining when their wages became due and owing. Under ORS 652.140(2), Respondent was obligated to pay claimants their wages no later than March 4, 1997. Respondent's answer is dated December 20, 1997, at which time Respondent admitted still owing $98.00 and $37.00 in back wages to claimants Villa and Mancillas, respectively.

"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 * * *, then, as a penalty for such nonpayment, the wages * * * shall continue from the due date thereof at the same hourly rate for eight hours per day 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 did not allege a financial inability to pay claimants' wages at the time they accrued in his answer. Therefore, both claimants are entitled to civil penalty wages in the amount of $1,440 ($6.00/hr. x 8 hrs./day x 30 days) if Respondent "willfully" failed to pay claimants' wages. 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's answer shows that he acted voluntarily and as a free agent in employing claimants and deciding when and how much to pay them, and that he had (sic) knew he owed claimants back wages. The forum concludes that claimants are entitled to civil penalty wages in the amount sought by the Agency.

"The Agency's motion for summary judgment is GRANTED in its entirety."

17) In the same Interim Order, the ALJ canceled the hearing and the discovery order requiring the submission of case summaries.

18) The proposed order, containing an exceptions notice, was issued September 9, 1998. Exceptions, if any, were due September 21, 1998. The hearings unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, the Respondent, a person, did business as a sole proprietorship under the assumed business name of Peter Pan Enterprises and engaged the personal services of one or more persons in the State of Oregon. Respondent operated his business out of Bend, Oregon.

2) Claimant Mancillas was employed by Respondent between February 14, 1997, and February 25, 1997. Claimant Villa was employed by Respondent between February 14, 1997, and February 25, 1997.

3) Respondent and Claimants entered into an agreement that Claimants would work for $6.00 per hour.

4) Claimants' last day of employment with Respondent was February 25, 1997, after which Claimants quit work without giving notice.

5) During Claimants' employment, Respondent paid Claimant Mancillas $275.00 and Claimant Villa $100.00 in wages. Respondent paid these amounts knowingly and intentionally. Respondent was a free agent.

6) At the time Claimants quit, Respondent owed Mancillas $37.00 in unpaid wages and Villa $98.00 in unpaid wages.

7) The Forum computed civil penalty wages, in accordance with ORS 652.150, as follows: $6.00 (Claimants' hourly rate) multiplied by 8 (hours per day) equals $48.00. This figure of $48.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of $1,440.00 for each Claimant.

8) Respondent 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.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent employed Claimant Mancillas in Oregon from February 14, 1997, and February 25, 1997. Respondent employed Claimant Villa in Oregon from February 14, 1997, and February 25, 1997.

3) Respondent agreed to pay each Claimant $6.00 per hour.

4) Each Claimant quit Respondent's employment without notice on February 25, 1997.

5) When Claimants quit, Respondent owed Claimant Mancillas $37.00 in unpaid wages and Claimant Villa $98.00 in unpaid wages.

6) Respondent willfully failed to pay Claimant Mancillas $37.00 and

Claimant Villa $98.00 in earned, due, and payable wages within five days, excluding Saturdays, Sundays, and holidays, after they quit, and more than 30 days have elapsed from the date their wages were due.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent 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 Respondent herein. ORS 652.310 to 652.405.

3) 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 Claimant quit employment without notice.

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 hourly rate for eight hours per day 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. 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 Claimants their 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, due to admissions made by Respondent in his answer and request for hearing. Respondent admitted that he employed both wage claimants at the rate of $6.00 per hour, that he had paid part of the wages due Claimants, and that he still owed the unpaid wages sought by the Agency in their amended Order of Determination. Respondent did not

dispute Claimants' dates of employment or raise the affirmative defense of financial inability to pay Claimants' wages when they became due. Based on these facts, the ALJ granted the Agency's motion for summary judgment, finding as a matter of law that Respondent had violated ORS 652.140(2) by not paying Claimants a total of $135.00 in unpaid wages when due and that each Claimant was entitled to civil penalty wages under ORS 652.150. That ruling is confirmed.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as a result of Respondent's violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders THOMAS J. HEYWOOD to deliver to the Fiscal Services 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 Adrian S. Mancillas in the amount of ONE THOUSAND FOUR HUNDRED SEVENTY-SEVEN DOLLARS ($1,477.00), less appropriate lawful deductions, representing $37.00 in gross earned, unpaid, due, and payable wages; and $1,440.00 in penalty wages; PLUS

a) Interest at the rate of nine percent per year on the sum of $37.00 from March 4, 1997, until paid and nine percent interest per year on the sum of $1,440.00 from April 3, 1997, until paid;

(2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Jorge Villa in the amount of ONE THOUSAND FIVE HUNDRED THIRTY EIGHT DOLLARS ($1,538.00), less appropriate lawful deductions, representing $98.00 in gross earned, unpaid, due, and payable wages; and $1,440.00 in penalty wages; PLUS

a) Interest at the rate of nine percent per year on the sum of $98.00 from March 4, 1997, until paid and nine percent interest per year on the sum of $1,440.00 from April 3, 1997, until paid.

HAROLD ZANE BLOCK and
Susan Rebecca Schaan, partners,
aka Sage & Sand Equine Center
and
aka Sage & Sand Trucking,
Respondents.

Case Number 58-98
Final Order of the Commissioner
Jack Roberts
Issued October 14, 1998

SYNOPSIS

Respondent Block operated a potato waste hauling business, employing Claimant as a truck driver, and failed to pay Claimant all wages due upon termination, in violation of ORS 653.025(1) (minimum wages), OAR 839-020-0030 (overtime wages), and ORS 652.140(1). Respondent Block's failure to pay the wages was willful, and the Commis-

sioner ordered Respondent Block to pay civil penalty wages. ORS 652.140(1), 652.150, 653.025(1), 653.045, 653.055(1) and (2), 653.261(1), and OAR 839-20-030(1).

The Commissioner dismissed the Order of Determination as to Respondent Schaan.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 25, 1998, in the conference room of the Oregon Department of Transportation, Department of Motor Vehicles, at 1732 S.W. Court Street, Pendleton, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Rosetta Marie Gilbert (Claimant) was present throughout the hearing. Harold Zane Block (Respondent Block or Block) was present at the hearing and represented himself. Susan Rebecca Schaan (Respondent Schaan or Schaan), 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: Rosetta Marie Gilbert, Claimant; and Margaret Trotman, a compliance specialist with the Wage and Hour Division of the Agency.

Respondent Block called himself as his only witness.

Administrative exhibits X-1 to X-9, Agency exhibits A-1 to A-9, and Respondent exhibits R-1 to R-12 were offered and received into evidence. The record closed on June 25, 1998.

Having fully considered the entire record in this matter, I, Jack 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 March 10, 1997, Claimant filed a wage claim with the Agency. She alleged that Respondents employed her and 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 Labor, in trust for Claimant, all wages due from Respondents.

3) Claimant brought her wage claim within the statute of limitations.

4) On September 9, 1997, the Agency served on Respondent Schaan an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. On November 20, 1997, the Agency served the same Order of Determination on Respondent Block. The Order of Determination alleged that Respondents owed a total of $581.32 in wages and $1320.00 in civil penalty wages, plus interest, and required that, within 20 days, Respondents either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On December 16, 1997, the Agency sent to Respondent Block a Notice of Intent to Issue Final Order by Default. In that Notice, the Agency informed Respondent Block that, if the Agency did not receive an Answer and Request for Hearing or Court Trial by December 26, 1997, the Agency would issue a Final Order by Default.

6) On December 23, 1997, Respondent Block filed an answer to the Order of Determination and requested a contested case hearing. Block's answer denied that Respondent owed Claimant any amount of unpaid wages.

7) On May 1, 1998, the Agency requested a hearing in the matter. On May 22, 1998, the Hearings Unit issued a Notice of Hearing to Respondent Block, Respondent Schaan, 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 "Summary 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- 050-0000 to 839-050-0440.

8) On June 4, 1998, this forum sent an Amended Notice of Hearing to Respondents, the Agency and Claimant indicating a change in hearing location.

9) At the time and place set forth in the Amended Notice of Hearing for this matter, Respondent Schaan did not appear or contact the Agency or the Hearings Unit.

10) At the start of the hearing, Respondent Block 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 Administrative Law Judge explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

12) On September 9, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. By the terms of the proposed order and in accordance with OAR 839-050-0380, exceptions were due by September 21, 1998 (the next business day after 10 days from date of issuance of the proposed order), unless a request for extension of time was submitted no later than September 21, 1998. OAR 839- 050-0050(2).

13) On September 28, 1998, the Forum received a letter bearing a signature "H. Zane Block" and postmarked September 24, 1998. Block stated that he wanted to file exceptions to the proposed order and requested additional time for filing them. The ALJ denied the request as untimely and ordered that any untimely exceptions that might later be filed would be disregarded.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, Respondent Block, a person, did business as Sage & Sand Equine Center and/or Sage & Sand Trucking, a sole proprietorship located in Hermiston, Oregon. Respondent Block employed one or more persons in the State of Oregon as truck drivers.

2) From January 29, 1997, to February 20, 1997, Respondent Block employed Claimant as a truck driver. Claimant's employment duties including driving truckloads of liquid potato waste from potato plants to farms and ranches that used the waste as animal feed. Respondents' trucks, which Claimant was responsible for driving, were "18-wheelers," had a maximum rated weight of 80,000 lbs, and were the type of truck commonly referred to as "semis." The potato waste was carried in farm bed trailers that could be raised at one end so the waste would drain out the other.

3) Claimant delivered loads of potato waste from the potato plants in Boardman to other locations within the State of Oregon. Claimant never made deliveries within Boardman itself; nor did she deliver potato waste to locations outside of Oregon.

4) During the week preceding January 29, 1997, Respondent Block and Claimant entered into an oral agreement that Claimant would work for a couple of days at minimum wage, while she was training. After that, Claimant would receive 20% of the amount Respondent Block received in payment for each truckload of potato waste that Claimant delivered to Respondent's customers.

5) Respondent Block expected Claimant to work from 6:00 a.m. to 6:00 p.m. each working day. Sometimes, however, Claimant worked later than 6:00 p.m. because a load of waste became available for delivery late in the day.

6) On an average day, Claimant delivered three or four loads of potato waste. When she was not occupied driving, Respondent Block required Claimant to be near the trucks and ready to haul the next available load. Respondent Block did not tell Claimant that she could go home or do what she pleased when no load was available to be delivered. Claimant had no scheduled lunch breaks and never was told that she could take a break and go to lunch.

7) Respondent Block told Claimant that another employee, John Krebs, would tell Claimant what to do, and instructed her to do as Krebs said. During times when no load was ready for delivery, Krebs sometimes told Claimant to help with general truck maintenance, and Claimant did that. Krebs never told Claimant that she could go home or do what she pleased when no load was ready for delivery.

8) Although Claimant was not always busy during the times between loads, she did not believe she could leave the site where the trucks were located.

9) On or about February 8, 1997, while backing up a truckload of potato waste for delivery, Claimant tipped over the trailer of waste and almost rolled the truck itself. Respondent Block decided to dump the load of potato waste because he did not believe he could safely salvage the trailer otherwise. Block was angry at Claimant because of her mistake in backing up the truck and trailer.

10) Respondent Block discharged Claimant on February 20, 1997.

11) Respondent Block kept no record of the hours Claimant worked.

12) Claimant's records and testimony reveal the following information, which the forum has accepted as fact: she worked 210 total hours; of the total hours, 51 were hours worked in excess of forty hours per week. Claimant and Respondent Block had no agreement about overtime hours.

13) At times material, the minimum wage in Oregon was $5.50 per hour, pursuant to ORS 653.025(1).

14) Pursuant to ORS Chapter 653 (Minimum Wages), OAR 839- 020-0030 (Payment of Overtime Wages) and Agency policy, the Agency calculated Claimant's total earnings to be $1295.25. The total reflects the sum of the following:

159 hours at $5.50 per hour	
(minimum wage [MW])	$ 874.50
51 hours at $8.25 per hour	
(overtime rate: 1.5 times MW)	$ 420.75
TOTAL EARNED	$1295.25

15) Respondent Block calculated Claimant's total earnings at $828.58 by multiplying 0.20 by the amount he asserted he had been paid for loads delivered by Claimant. Respondent Block paid Claimant only $713.93, however, because he withheld $114.65 as the value of the load of potato waste that he dumped as a result of Claimant's mistake in backing up a truck. The $713.93 paid to Claimant was comprised of checks for $200.00, $35.00 (paid to an apartment management company on Claimant's behalf), and $268.72, plus legal deductions totaling $210.21. Respondent Block knowingly and intentionally paid Claimant only $713.93 in wages.

16) The forum computed civil penalty wages, in accordance with ORS 652.150 and Agency policy, as follows: $5.50 (minimum wage) multiplied by 8 (hours per day) equals $44.00. This figure of $44.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continue to accrue) for a total of $1320.00. The Agency set forth this figure in the Order of Determination.

17) Respondent Block 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.

18) The forum carefully observed Claimant's demeanor and found her testimony to be credible. She had most pertinent facts readily at her command. In addition, Claimant did not attempt to deny that she had agreed to be paid at the rate of 20% of the amount Respondent Block received for each load of potato waste that Claimant delivered. Nor did Claimant deny that it was her mistake in driving that ultimately resulted in Respondent Block's decision to dump one load of potato waste.

19) Respondent Block's testimony was not reliable or credible where it conflicted with other credible evidence. Evidence Block submitted was internally inconsistent in some respects. For example, Block's May 4, 1997, response to the Agency's wage claim investigation stated that Claimant's last day of work had been February 18, 1997. Block later submitted documentation stating that Claimant had worked on February 19. In addition, Respondent Block's testimony conflicted with the documentary evidence; he claimed

that he had enclosed the documents comprising Exhibit R-12 with his May 4, 1997, letter to the Agency, but Agency records indicate this is not the case. Moreover, the main disputed factual issue in this case -- the hours and days Claimant worked for Respondent Block -- involves matters about which the law requires Block to keep records. *See* ORS 653.045; OAR 839-020-0080(1). Despite the Agency's requests, Respondent Block did not produce any records of the hours or days Claimant worked for him, other than a *post-hoc* attempt to calculate the number of hours Claimant would have been occupied in driving loads of waste. Accordingly, the forum gave little weight to Respondent's testimony, except that which other credible evidence corroborated or which was against his pecuniary interest.

20) Respondent Schaan and Respondent Block had a personal relationship. Schaan had signing authority for the Sage & Sand bank account and Block permitted her to withdraw funds from that account for her personal use. Block had Schaan's name printed on the Sage & Sand bank checks so Schaan would not have difficulty using them. The account, however, was his alone.

21) Respondent Schaan wrote Claimant a check for wages drawn from Schaan's personal checking account. Respondent Block believes that Schaan would have reimbursed herself for that amount from the Sage & Sand bank account.

22) Respondent Block did not intend to form a business partnership with Respondent Schaan. Schaan did not have an ownership interest in any assets of Sage & Sand, and would not share in any losses the business suffered. Respondent Schaan did not have authority to hire or fire Sage & Sand employees. The forum has accepted Respondent Block's testimony regarding the nature of his personal and professional relationship with Schaan because the testimony is against his pecuniary interest in this matter.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent Block was a person doing business as Sage & Sand Equine Center and/or Sage & Sand Trucking in the state of Oregon, and who engaged the personal services of one or more employees in the operation of that business.

2) Respondent Block employed Claimant as a truck driver from January 29 to February 20, 1997. During that time, Respondent Block suffered or permitted Claimant to render personal services to him.

3) The state minimum wage during 1997 was $5.50 per hour.

4) Claimant's last day of work was February 20, 1997, the same day Respondent Block terminated Claimant's employment.

5) Claimant worked 210 hours for Respondent Block, 51 of which were hours worked in excess of 40 per week. At the minimum wage of $5.50 per hour, and the overtime rate of $8.25 per hour, Claimant earned $1295.25 in wages. Respondent Block has paid Claimant only $713.93 and owes her $581.32 in earned and unpaid compensation.

6) Respondent Block willfully failed to pay Claimant $581.32 in earned, due, and payable wages. Respondent Block 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 in accordance with ORS 652.150 and Agency policy, equal $1320.00.

8) Respondent Block did not allege in his answer an affirmative defense of financial inability to pay the wages due at the time they accrued. Respondent Block did not provide any such evidence for the record at the hearing.

9) Respondent Schaan did not share in the losses of Respondent Block's business or own any assets of that business.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

> "(3) 'Employ' includes to suffer or permit to work; * * *."
>
> "(4) 'Employer' means any person who employs another person * *
>
> *."

ORS 652.310 provides, in pertinent 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."

During all times material herein, Respondent Block was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, 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 652.414.

3) Before the start of the contested case hearing, the forum informed Respondent Block of his rights as required by ORS 183.413(2). The Administrative Law Judge complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

4) The actions or inactions of John Krebs, an agent or employee of Respondent Block, are properly imputed to Respondent.

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:
>
> "(1) For calendar year 1997, $5.50."

Oregon law required Respondent Block to pay Claimant at a fixed rate of at least $5.50 per hour. Respon-

dent Block failed to pay Claimant the minimum wage rate of $5.50 for each hour of work time.

6) ORS 653.261(1) provides:

"The Commissioner of the Bureau of Labor and Industries 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 839-020-0030(1) provides, in pertinent part:

"[A]ll work performed in excess of forty (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)."

Oregon law obligated Respondent Block to pay Claimant one and one-half times her regular hourly rate, in this case the minimum wage of $5.50, for all hours worked in excess of 40 hours in a week. Respondent failed to pay Claimant at the overtime rate, in violation of 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 or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

Respondent Block violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after discharging her from employment on February 20, 1997.

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 hourly rate for eight hours per day 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 Block 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 Block to pay Claimant her earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

10) The Agency did not prove by a preponderance of the evidence that Respondent Schaan was the business partner of Respondent Block. Respondent Schaan was not Claimant's employer for the purposes of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261. 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 dismiss the Order of Determination as to Respondent Schaan upon finding no violation that was charged. ORS 652.332.

OPINION

Minimum Wage and Overtime

Respondent Block contends that he owes no wages to Claimant because she agreed to compensation of 20% of the amount Block received in payment for each load of potato waste that Claimant delivered, and Block paid Claimant that amount. ORS 653.055(2) states, however, that "[a]ny agreement between an employee and an employer to work at less than the wage rate required by [the minimum wage law] is no defense to an action under subsection (1) of this section." Similarly, ORS 652.360 states that "[n]o 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 652.414 or by any statute relating to the payment of wages * * *." In other words, an employer may not make an agreement with an employee whereby the employer is not required to comply with the minimum wage law or the wage collection law. The agreement between Respondent and Claimant is no defense to a failure to pay the minimum wage or a failure to pay final wages when due. Respondent Block did not assert, and the Administrative Law Judge did not find, any other 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 Block or Claimant.

ORS 653.025(1) prohibited employers, during 1997, from paying their employees at a rate less than $5.50 for each hour of work time. OAR 839-020-0030 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 Block was obliged by law to pay Claimant at least $5.50 per hour worked plus one and one-half times that wage for all hours worked in excess of 40 hours in a week.

Work Time

This forum has ruled repeatedly that, pursuant to ORS 653.045, it is the employer's duty to maintain an accurate record of an employee's time worked. *See, e.g., In the Matter of Diran Barber*, 16 BOLI 190, 196-97 (1997) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946));

In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997). Where the forum concludes that an employee was employed and was improperly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise amounts involved. *In the Matter of Diran Barber,* 16 BOLI at 196. Where the employer produces no records, the Commissioner may rely on the evidence produced by the Agency "`to show the amount and extent of [the employee'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.'" *Id.* (quoting *Mt. Clemens Pottery Co.*, 328 US at 687-688).

Here, Respondent Block kept no records of the days or hours that Claimant worked. Rather, Block relied solely on scale tickets and billing invoices showing how many loads of waste each truck driver delivered. Those records do not reflect hours or days spent on tasks other than driving; nor do they reflect compensable waiting time. In addition, nothing about the documents Respondent Block submitted establishes that they are true copies of the invoices actually sent to customers for billing. The documents all are dated February 1, 1997, even though they purport to be complete records of activities that took place during February. Nor were the documents accompanied by records of payment corresponding to the amounts purportedly billed to the customers. Because Respondent Block has not produced legally required records of Claimant's hours worked, the forum relies on the evidence produced by the Agency on that subject.

Claimant relied on her recollection and a personal calendar in determining the days on which she had worked for Respondent Block. Claimant's reconstruction of her work schedule, as reflected on the calendar admitted as Exhibit A-4, does conflict with Respondent Block's billing records in a few details. For example, Claimant reported that she worked from January 29 through February 20, with February 6, 11, 14, 15, and 16 as her days off. Respondent Block's billing records indicate, to the contrary, that Claimant did work on February 6, 11, and 15. Nonetheless, the forum has accepted Claimant's calendar and testimony as establishing, by a preponderance of the evidence, the *number* of days that she worked.

Claimant calculated that she worked a total of 15 days or fractions of days in February 1997. Respondent Block asserted that Claimant had worked only 13 days in that month. As noted above, however, Block did not produce any records of the days Claimant had worked, as required by law, and the forum finds his testimony on this point not credible. Similarly, the forum gives no weight to Respondent Block's denial of Claimant's credible testimony that she also worked on January 29, 30, and 31, 1997. Evidence in the record shows that Sage & Sand gave Claimant a $35.00 advance on her earnings on January 23, 1997, which was a Thursday. Claimant testified credibly that she started work the week after she received that advance; it follows that Claimant's first work day must have occurred during the last week in

January. For these reasons, the forum has accepted as fact Claimant's testimony regarding the number of days she worked for Respondent Block.

The forum also has accepted as fact Claimant's testimony regarding the number of hours she worked each day, which the forum finds to be credible. Claimant testified that she was required to be on duty, either driving, waiting to drive, or performing other tasks, from 6 a.m. to at least 6 p.m. each work day. 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 839-020-0041; *In the Matter of Mary Stewart-Davis*, 13 BOLI 188, 197 (1994), *aff'd sub nom Stewart-Davis v. Bureau of Labor & Industries*, 136 Or App 212 (1995). Here, Claimant testified that neither Respondent Block nor Krebs relieved her from duty during the time she spent waiting for loads to come available for delivery. Respondent Block provided no credible evidence to the contrary. Any time Claimant spent waiting for work between driving loads of potato waste was, therefore, compensable work time.

ORS 653.055(1) provides, in part, that "[a]ny employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 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 * * *." Respondent Block paid Claimant only $713.93. Therefore, Respondent Block owes Claimant unpaid wages in the amount of $581.32 ($1295.25 - $713.93).

Deductions

ORS 652.610(3) establishes when an employer may withhold, deduct, or divert any portion of an employee's wages. Except as required by law or authorized by a collective bargaining agreement, nothing in that statute would allow for a deduction from wages where the employee has not authorized that deduction in writing, particularly where the ultimate recipient of the money withheld is the employer. *See In the Matter of Mary Stewart-Davis*, 13 BOLI at 195-96; *see also Garvin v. Timber Cutters, Inc.,* 61 Or App 497, 658 P2d 1164, 1166 (1983) (construing previous version of ORS 652.610(3)). Respondent Block violated ORS 652.610(3) by deducting $114.65 from Claimant's wages to cover the value of the load of dumped potato waste.

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if the respondent acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent Block, 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, Respondent Block admitted that he paid Claimant only a

percentage of the amount he received in payment for each truckload of potato waste that Claimant delivered to Block's customers. He also admitted that he deducted from Claimant's wages the value of the dumped load of potato waste. Evidence showed that Respondent Block committed these acts voluntarily, intentionally, and as a free agent. Thus, Respondent Block acted willfully and is liable for penalty wages of $1320.00 under ORS 652.150.

Respondent Block did not plead or show that he was financially unable to pay Claimants' wages at the time they accrued. Therefore, he cannot escape penalty wage liability.

Default by Respondent Schaan; Dismissal of Order of Determination as to Respondent Schaan.

Respondent Schaan failed to respond to the Order of Determination and never filed an answer, a request for a contested case hearing, or a demand for a court trial. Thus, she 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 whether the Agency has made on the record a prima facie case supporting the Order of Determination. *See In the Matter of Tina Davidson*, 16 BOLI at 148; *see also* OAR 839-050- 0330(2).

The Agency has not established a prima facie case that Respondent Schaan was Claimant's employer. The Agency's theory was that Respondent Block and Respondent Schaan were business partners. The Agency did establish, through the testimony of Respondent Block, that Respondent Schaan was given access to the bank account of Respondent Block's business, Sage & Sand. The Agency did not, however, prove that Respondents intended to form a partnership. Nor did it prove that Respondent Schaan owned any assets of the business, shared in any of the business's losses, or controlled the business's operations. Although Schaan did write a wage check to Claimant out of her own bank account, Respondent Block testified that Schaan would have reimbursed herself for that amount out of the Sage & Sand account. Nor is the fact that Block gave Schaan signing authority for the Sage & Sand account, and had her name printed on the business's checks, sufficient to establish that Block and Schaan were partners. Block testified that he had Schaan's name printed on Sage & Sand's checks only so she would not have difficulty using them. In the absence of persuasive evidence that Respondents intended to form a partnership, the forum concludes that Schaan was not Block's partner. *See Widmer Brewing Co. v. Rolph*, 128 Or App 666, 671, 877 P2d 112, *rev den* 320 Or 110 (1994) ("The essential test in determining the existence of a partnership is whether the parties intended to establish such a relationship. * * *. Intent to form a relationship may be established by an express agreement or inferred from the conduct of the parties, including whether the parties shared profits, losses and control of the business."). The Order of Determination as to Respondent Schaan is dismissed.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondent Block's violation of ORS 652.140(1), ORS 653.025(1), and OAR 839-020-0030(1), the Commissioner of the Bureau of Labor and Industries hereby orders HAROLD ZANE BLOCK to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

> A certified check payable to the Bureau of Labor and Industries IN TRUST FOR ROSETTA MARIE GILBERT in the amount of $1901.32, less appropriate lawful deductions, representing $581.32 in gross earned, unpaid, due, and payable wages, and $1320.00 in penalty wages; plus interest at the rate of nine percent per year on the sum of $581.32 from February 21, 1997, until paid and nine percent interest per year on the sum of $1320.00 from March 24, 1997, until paid.

The Commissioner further orders that the Order of Determination is dismissed as to Respondent Schaan.

In the Matter of
BODY IMAGING, P.C.,
and Paul Meunier, M.D.,
Respondents.

Case Number 08-95
Final Order On Reconsideration
of the Commissioner
Jack Roberts
Issued October 16, 1998.

SYNOPSIS

Where Respondent employer regarded and treated Complainant as if she had a disability, modified the terms and conditions of her employment and deliberately created intolerable conditions compelling Complainant to resign, the Commissioner found that the employer discriminated against Complainant based on disability. The Commissioner found that the employer's president aided and abetted the employer and found both liable for Complainant's lost wages and benefits and for mental suffering damages. ORS 659.400; 659.425 (1)(c); 659.030(1)(g).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 22, 23, 24, and 25, 1996, in the hearings conference room of the Bureau of Labor and Industries, 1004 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. Body Imaging, P.C., a professional corporation (Respondent), and Paul Meunier, M.D. (Respondent Meunier), were represented by William N. Mehlhaf, Attorney at Law, Portland. Respondent Meunier was present throughout the hearing on his own behalf and as the representative of Respondent. Therese Zeigler (Complainant) was present throughout the hearing. Her counsel, Gordon S. Gannicott, Attorney at Law, Portland, was also present.[1]

The Agency called the following witnesses (in alphabetical order): Respondent's former business office manager Margaret Bridges; former Agency Senior Investigator James D. Kreiss; International Business Machines (IBM) customer engineer Jeffrey W. Lehman (by telephone); Respondent's former prospective co-owner and employee Michael E. Stoll, M.D.; Complainant's neurologist Reed C. Wilson, M.D.; and Complainant.

Respondents called as their witness Respondent Meunier.

On September 16, 1997, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, having fully considered the entire record in this matter, issued the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order in this case. Thereafter, Respondents sought judicial review in the Oregon Court of Appeals. On August 24, 1998, through counsel, the Agency filed its Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals.

On October 16, 1998, having reconsidered the record and the legal issues presented in this case, I make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order on Reconsideration.

FINDINGS OF FACT -- PROCEDURAL

1) On August 13, 1993, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondent. After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On August 24, 1994, the Agency prepared for service on Respondent Specific Charges, alleging that Respondent discriminated against Complainant in her employment with Respondent, both on the job and at termination, based on her perceived disability in violation of ORS 659.425. 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; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

3) On September 12, 1994, Respondent through counsel timely filed

[1]In this forum, the function of Complainant's private counsel is advisory. OAR 839-50-120.

an answer wherein Respondent admitted employing Complainant in Oregon and that Respondent Meunier was her immediate supervisor. Respondent denied any unlawful employment practices or damages to Complainant based on disability.

4) On November 4, 1994, the Hearings Referee assigned was changed from Linda Lohr to Alan McCullough. On March 14, 1995, the Hearings Referee assigned was changed from Alan McCullough to Douglas A. McKean. In October 1995, the Administrative Law Judge[2] assigned was changed from Douglas A. McKean to Warner W. Gregg.

5) Between September 12, 1994, and June 6, 1995, the hearing in this matter was repeatedly delayed by order of the forum upon application of the participants. On June 6, 1995, the forum held a pre-hearing conference on the record. The meeting resolved discovery disagreements and resulted in the scheduling of responses for outstanding motions. There was discussion of the necessity for further postponement of the hearing, scheduled for June 19, based on Respondent Meunier's health.

6) On June 9, 1995, the forum postponed the hearing based on Respondent Meunier's health and directed that the participants explore available dates for hearing after October 1, 1995. There was pending at that time the Agency's motion to strike certain of Respondent's affirmative defenses and Respondent's motion for summary judgment.

7) On June 14, 1995, the Agency filed its motion to amend the Second Amended Specific Charges. The forum extended time for Respondent to object thereto until the previously pending motions were resolved.

8) On June 17, 1995, the forum struck certain of Respondent's affirmative defenses, denied Respondent's motion for summary judgment, and set the hearing for January 22, 1996. On July 31, 1995, the forum formally extended the time for Respondent to respond to the pending motion to amend until September 29, 1995.

9) Respondent's objections to amendment of the Agency's Second Amended Specific Charges were timely filed. On December 28, 1995, the forum allowed the requested amendment, which served to join Respondent Meunier personally as a respondent to the charges, and directed that the Agency, by January 2, 1996, file its third amended charges incorporating all amendments previously approved by the forum. Respondents were allowed until January 9 to answer the new charges, with the option of allowing the existing answer of the corporate respondent to stand. 10) On January 2, 1996, the Agency filed its Third Amended Specific Charges and thereafter counsel timely filed the answer thereto of Respondent Meunier and advised the forum that the corporate respondent would rely on its previous answer.

11) On January 16, 1996, the Agency and Respondents timely filed their respective summaries of the case in accordance with the orders of

[2] In July 1995, the Commissioner authorized BOLI employees functioning as hearings officers to utilize the working title of Administrative Law Judge in subsequent hearings and proceedings.

the Forum. On January 19, Respondents filed a document denominated "Respondents' Hearing Memorandum."

12) At the commencement of the hearing, counsel for Respondents stated that he had reviewed the Notice of Contested Case Rights and Procedures and had no questions about it.

13) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

14) At the close of testimony the participants mutually agreed to submit written argument in accordance with a schedule set by the ALJ. Submissions under that schedule as modified with the approval of the ALJ were timely made and the record herein closed with receipt of the final submission on April 17, 1996.

15) The proposed order, containing an exceptions notice, was issued February 19, 1997. Exceptions were due, under extension of time, on March 26, 1997. Respondents timely filed exceptions which are dealt with in the Opinion section of this order.

16) After the proposed order was issued, the forum asked the Agency for a statement of Agency policy regarding aider and abettor liability under ORS 659.030(1)(g) in view of *Schram v. Albertson's, Inc.,* 146 Or App 415, 934 P2d 483 (1997), decided in February 1997. The Agency filed a policy statement, serving it on Respondent's counsel, and thereafter filed a revised statement of Agency policy, which was also served on counsel. The aider and abettor issue is discussed in the Opinion section of this order.

FINDINGS OF FACT -- THE MERITS

1) At times material herein, Respondent Body Imaging, P.C., was an Oregon professional corporation operating an outpatient clinic engaged in diagnostic radiology and associated medical procedures performed at the request of referring medical practitioners. Originally, Body Imaging was an assumed business name for Richard Arkless, M.D, P.C. The professional corporation later became Body Imaging, P.C., of which Respondent Meunier was the president and sole stockholder. Both as a proprietorship and as a corporation, Body Imaging utilized the personal services of six or more employees in Oregon.

2) Respondent Paul Meunier, M.D., graduated from the U.S. Military Academy in 1973 and thereafter served four years as an infantry officer. He graduated from medical school at the University of Vermont in 1981 and did his internship and residency in U.S. Army hospitals. His specialty was diagnostic radiology and he became certified by the American Board of Radiologists. He left the Army in June 1989 and began working as an employee of Richard Arkless, M.D, P.C. in November 1989, with the expectation of buying into the practice after one year.

3) Diagnostic radiology outpatient clinics are generally found only in urban areas because of the financial outlay involved and the need for a numerically large referral base. At the time of hearing there were three diagnostic radiology outpatient clinics

in the Portland Metropolitan area, including Respondent. Most radiologists are employed in hospitals providing inpatient as well as outpatient radiological services. Respondent's practice was totally dependent upon referrals from primary care or treating physicians. Respondent's physicians are never the treating physician. It is a competitive field.

4) Complainant began working as a receptionist for Dr. Arkless in April 1985. She remained employed, first by the proprietorship and then by the professional corporation. She was initially supervised by Susan Arkless, wife of the proprietor.

5) In December 1990 Respondent Meunier bought a 51% share of the practice. In early 1991, Susan Arkless left the office. Margaret Bridges was then supervising Complainant.

6) Margaret Bridges began working for Body Imaging in September 1988. Her initial duties were billing and collections, where she was supervised by Susan Arkless. In late 1989, Bridges began supervising the "front office" help, including Complainant. Bridges became business manager in 1991 after Respondent Meunier obtained control of the practice. Respondent Meunier was then Bridges's immediate supervisor.

7) Complainant worked in reception. Her duties as receptionist involved scheduling patients for the various procedures offered by Respondent. She set up computer records from information supplied by the referring physician's office or the patient, verified personal and insurance data, and assured that the patient had information regarding preparation for the procedure and was scheduled with the right technician and/or radiologist. The receptionist also copied and mailed reports and schedule sheets, filed reports, films and schedules, received and transmitted films, recorded patients seen and fee information, metered the outgoing mail, and turned office machines on or off as appropriate. As a receptionist, Complainant was to make every effort to schedule patients the same day when requested by referring physicians to do so, either because of medical urgency or because the patient was from outside the area.

8) Complainant was originally the only receptionist. As the office grew, other receptionists were hired. Complainant's duties expanded to include insurance input and in 1990 she became lead receptionist, which made her responsible for assuring that the other receptionists were trained and that the front office was staffed.

9) Complainant's performance of her receptionist duties was inconsistent. She was very good with patients, both in person and by telephone. She was very good with referring physicians' offices. She was repeatedly counseled about time spent on personal phone calls, about tardiness and long lunch breaks, and on one occasion was placed on probation by Bridges for returning late from vacation. Her written evaluations, first by Susan Arkless and later by Bridges, reflected these inconsistencies, but also reflected positive overall performance. Bridges felt that Complainant's strengths outweighed her weaknesses. Generally, written evaluation forms were completed annually. Memos of counseling or

discipline were also part of each employee's personnel record.

10) Arkless and Respondent Meunier had disagreed about the operation of the practice and about their respective duties and responsibilities, with the result that when he could not re-purchase control, Arkless resigned as an employee of the corporation effective in December 1991. Respondent Meunier bought the remaining interest of Arkless and became sole owner.

11) Around December of 1990, Complainant noted numbness in the right side of her face. Her dentist referred her to a neurologist, Dr. Wilson, who examined her in January 1991.

12) Reed C. Wilson, M.D., has practiced neurology in Portland since 1975 and has been on the neurology faculty of Oregon Health Sciences University since 1977. He is an expert in the field.

13) Multiple sclerosis (MS) is an incompletely understood disease of the nervous system characterized by a genetic or inherited susceptibility combined with an acquired factor, probably a non-specific viral infection, which lays dormant and over time alters the structure of portions of the nervous system to the extent that the body mounts an antibody response to it. It is an auto-immune disease of the central nervous system, specifically of the mylum or insulation of the nerve fibers. The resulting alteration causes a lesion, or scarred area, leading to a malfunction. Evidence obtained by history and by examination which reveals malfunctions in different areas of the nervous system occurring at different times (malfunctions separated by space and time), when other causes have been ruled out, suggests more than one scarred area, or multiple lesions. Hence, multiple sclerosis. It is a progressively debilitating disease which can substantially limit one or more major life activities.

14) Detection and diagnosis of MS involves a history of and examination for physical symptoms of neurologic malfunction plus laboratory tests such as MRI[3] and CSF,[4] among others.

15) Dr. Wilson's examination of Complainant in January 1991 verified numbness, but not its exact cause. An MRI was normal. At that time he did not think MS was indicated, but counseled further observation because he could not rule it out. Complainant was relieved and shared the information in Respondent's office.

16) Bridges noted during the time she supervised Complainant that Complainant was "sometimes 'on,' sometimes not." Bridges learned of the facial numbness and thought she

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[3]MRI (Magnetic Resonance Imaging) involves the measurement of the magnetic charge in the protons of the cellular structure of body fluids which creates an image of the body's structures. It is very sensitive in detecting abnormalities; it does not necessarily identify the exact nature of the abnormalities it detects. (Testimony of Stoll)

[4]CSF: A laboratory test which screens spinal fluid for multiple sclerosis; highly accurate when other sources of malfunction or infection have been eliminated by other tests. (Testimony of Wilson)

observed fatigue in Complainant. Bridges was concerned. She had a cousin who had exhibited similar symptoms and had been diagnosed with MS. When Wilson's January 1991 finding was essentially normal, Bridges suggested to Complainant that she get a second opinion. Complainant did not do so at the time.

17) Although his agreement with Dr. Arkless contained a "non-compete" clause, Respondent Meunier sensed that Arkless might attempt to dissuade referring physician offices from continuing with Respondent and might open a competing practice. In late 1991, Complainant began visiting referring physician offices and in January 1992, she was assigned the title of "Service Coordinator." Her duties were to deliver films and reports and provide pads and forms, referral kits, and information regarding preparation of patients to the staffs of the referring physicians. She dropped off items such as coffee cake and donuts for the staffs and processed and delivered the office newsletter, "Inside Image." She explained the changes at Body Imaging, the available services and future plans, and learned what Arkless had represented about Body Imaging. The purpose of her efforts was the retention of the existing referral base.

18) When she became service coordinator Complainant had several years experience as a receptionist and was familiar with procedures offered by Body Imaging. She had no technical knowledge of the equipment or its operation. She was well acquainted with the office staff of each of the referring physicians' offices and had established a positive rapport with each office. The position was not full time, and Complainant performed her regular receptionist duties when she was not acting as service coordinator. Respondent paid for a three month course, "Fundamentals of Marketing," which Complainant took at Portland Community College.

19) Complainant used her own automobile in her work as service coordinator. She kept a log of her marketing or public relations activities, which required her to drive, in order to claim reimbursement for mileage. Short, "spur of the moment" trips requested by Bridges were not all recorded in the log or in Complainant's personal appointment calendar.

20) In February 1992, Michael Stoll, M.D., Ph.D., a radiologist, began employment with Respondent. At that time, it was his intent and that of Respondent Meunier that he eventually become a shareholder in Respondent.

21) In 1991 and early 1992, Respondent Meunier planned to add MRI capability to the existing services of ultrasound, CT scanning, mammography, arthrography, fluoroscopy, and nuclear medicine. For this, he perceived a need for a marketing component beyond the services provided by Complainant.

22) Stoll recommended the hire of Stephen Weeks, who had done marketing for a competing radiology clinic with MRI capabilities where Stoll had practiced. Respondent hired Weeks in February 1992 with the title of "Provider Relations Representative." Weeks was a college graduate and had some technical knowledge of MRI equipment and of the imaging equipment used by Respondent.

23) Complainant was told by Bridges that Weeks was to concentrate on marketing the anticipated MRI services and other new business. Complainant would continue servicing the existing referral base. At times they worked together, with Complainant using her wide acquaintance to introduce Weeks to particular providers.

24) From December 16, 1991, through July 14, 1992, Complainant spent all or a portion of 21 work days in marketing and public relations activities, including film and report deliveries, providing bakery treats, referral forms and insurance information, and explaining changes and future plans in the office. She spent nine days on these activities in April 1992, when she also delivered the office newsletter and promoted an open house scheduled for early May. There was no activity noted for February, March, or June 1992.

25) Following Complainant's January 1991 examination, Bridges continued to observe Complainant, who had headaches from time to time and still appeared distracted and fatigued. In February 1992, Bridges memorialized a conversation with Complainant about entry errors in insurance, misquotes of costs, and personal phone calls. The memo to Complainant's personnel file concluded:

> "I ask[ed] Terri to be checked again for the problem last year with the numbness & she said . . . maybe."

26) On April 16, 1992, Bridges noted that Complainant appeared preoccupied and disinterested and was "making a lot of errors." She wrote:

> "I ask[ed] Terri about her health and she insists she is fine --- She has not been rechecked as she was suposed (*sic*) to have been. I ask[ed] her to be rechecked."

In the same memo, Bridges stated:

> "She thinks maybe she has 'reception Burnout' -- I explain[ed] she's needed there --- MRI didn't materialize & she is not needed out as we had planned for --- "

27) Complainant's right facial numbness persisted after January 1991. She subsequently developed headaches and fatigue, and the numbness shifted to include the left side and seemed to increase in severity. She made a second appointment with Dr. Wilson.

28) In mid-July 1992, suspecting that the persistence and expanded location of the numbness might indicate a second base location of neurologic involvement, Dr. Wilson performed a spinal tap for a CSF test and then ordered another MRI. While the CSF results were "strongly suggestive of multiple sclerosis," the MRI was essentially normal. He thought a diagnosis of MS probable, but not confirmed, and recommended that she be followed with "serial neurological examinations" (*i.e.*, further tests over time). He shared his findings with Complainant, who told Diana, a co-worker who had accompanied Complainant at the direction of Bridges. Bridges had instructed Diana to call Bridges with the result, which she did in Complainant's presence.

29) The following day, Complainant's co-workers knew of the

diagnosis. Bridges called Complainant into her office and attempted to give her a vacation. Bridges was concerned about the psychological and emotional effect of the "probable" diagnosis. Complainant told Bridges that she didn't want special treatment and didn't need time off.

30) Upon learning of Dr. Wilson's findings, Bridges was concerned about whether Complainant should drive on office business. She asked Respondent Meunier if she should check with the corporation's attorney and insurance carrier regarding corporate liability if Complainant had a vehicle accident in her condition. He thanked Bridges for the suggestion and told her to call. Bridges learned from the attorney and the insurance agent that Complainant's driving her own car on company business was not a problem. She reported that to Respondent Meunier, who was still concerned and directed Bridges to prohibit Complainant's driving on company business. (Testimony of Bridges) Respondent Meunier did not ask at this time about Complainant's symptoms or whether there had been a diagnosis.

31) Complainant was scheduled to do marketing on August 3, 1992, including lunch with Weeks at the Metro Clinic. It was on that day that Bridges informed her that she was not to drive on company business. Complainant and Weeks had worked together to arrange that meeting several weeks in advance. Weeks drove. Complainant was the primary person arranging luncheon meetings with providers on September 18 and October 15 for herself and Weeks, who drove. She did not drive on behalf of Respondent's office after July 14, 1992.

32) Respondent Meunier twice asked to see Complainant's MRI result, which she supplied. He also saw a portion of the CSF test result.

33) Together, Stoll and Respondent Meunier looked at the MRI result and the partial CSF data. Stoll saw the MRI as normal, but was not familiar with the CSF. Respondent Meunier said there could be MS and told Bridges that Complainant should not drive for the office. The medical information available to Respondents Body Imaging and Meunier did not justify a restriction on Complainant's driving on company business.

34) Complainant returned to Dr. Wilson on August 19, 1992. She had noticed some twitching around her left eye. She also reported a left hand tremor, intermittent myoclonic jerks, fatigue, and that her job duties had been changed due to her condition.

35) Because Complainant had no "neurological handicaps," Wilson thought the shift in her job duties to be unjustified. He referred Complainant to Dr. Herndon for a second opinion and at her request wrote a letter to her stating "There is no medical reason why you are not fully capable of employment."

36) Herndon examined Complainant on September 3, 1992. His impression was possible MS. At Complainant's request, he wrote a letter regarding Complainant stating: "there is no contraindication to her continuing to work and specifically no contraindication to her continued driving."

37) The letters from Drs. Wilson and Herndon were given to Bridges by Complainant as they were received. Bridges discussed them with

Respondent Meunier, who still did not want Complainant to drive for the office. Complainant never resumed the portion of her service coordinator duties that involved driving. The delivery of kits and referral pads, films and reports were handled by others or done by mail. From a projected two days per week on public relations, Complainant was reduced to a few hours a month accompanying Weeks.

38) When Bridges first informed her that she was not to drive on company business, Complainant was upset. Bridges suggested patience, then later told her that Respondent Meunier did not want her driving for the office. Complainant felt useless, embarrassed, humiliated and hurt, and as if she had been labeled an invalid. She felt totally stripped of every bit of personal dignity.

39) There was a change in Respondent Meunier's attitude toward Complainant after July 14, 1992. He had always been sharp, direct, and authoritative, but after that date things like morning acknowledgments and politeness no longer seemed to include her. He never explained or discussed the decision regarding driving. He was more critical of her in front of patients and other workers and the severity of his manner, words and tone increased. He focused on Complainant as being responsible for any deficiency among the three receptionists.

40) From July 1992 on, Complainant was intimidated by Respondent Meunier. She was sometimes in tears from verbal confrontations with him. Bridges described Respondent Meunier as "military." Bridges spoke weekly with Complainant and saw that the situation was negatively affecting Complainant's confidence, self-esteem, and ability. Specifically, Respondent Meunier's verbal confrontations with Complainant interfered with and adversely affected Complainant's work performance. Complainant appeared nervous, anxious, and inhibited, and dreaded coming to work. Bridges discussed the ongoing conflict with Stoll in the hope of facilitating a solution with Respondent Meunier.

41) When Stoll was hired, Respondent began offering disability insurance to employees, including Complainant. Respondent Meunier remarked to Bridges that if anyone needed to get focused or straightened out, it was Complainant because she might need the disability insurance.

42) Stoll observed that Respondent Meunier was hard on employees, yelled at them, and had unreasonable expectations of them. It was reported to him by Complainant, Weeks, and Bridges that Respondent Meunier focused on Complainant more than others beginning about six months after Stoll began working. Stoll spoke with Respondent Meunier in about February 1993 suggesting a kinder approach to employees, and thought his remarks were taken positively at the time.

43) Weeks related well to the existing client base and was able to bring in additional referrals. By late 1992, Respondent Meunier did not see the need for more than one person in marketing and when another receptionist resigned in the fall, Complainant was reassigned full time to reception.

44) Had there been no restriction on Complainant's driving on company business, Complainant's public relations activities would have continued.

45) In November 1992, Bridges placed Complainant, then working as a receptionist, on 90 days probation for failing to return from vacation on time.

46) When she could no longer work as service coordinator, Complainant felt demoted, and about January 1993 she sought to return to the position of lead receptionist. She was supported by Bridges and Stoll. Respondent Meunier opposed her appointment to the position but allowed it to occur, holding Bridges ultimately responsible for Complainant's performance.

47) On or about April 20, 1993, Respondent Meunier had instructed that he be scheduled for no more than two procedures an hour. Because she also had standing instructions from him that referring physicians were not to be refused when requesting an immediate scheduling, Complainant inserted two extra appointments. At closing, Respondent Meunier profanely questioned her scheduling, accusing her of not paying attention or listening to instructions. He stated she was incompetent and that he had told Bridges that Complainant was not responsible enough to be lead receptionist. Complainant said nothing pleased him since he learned of her MS and he acknowledged that nothing she did pleased him, stating that she was lucky to have a job and that no one would hire her with her condition. The exchange was loud and lasted over 10 minutes. Respondent Meunier did not allow her to explain that she was following his instructions. Respondent's anger was such that she felt physically threatened.

48) Complainant went home extremely upset and called Bridges, saying she was not coming back. She felt that Respondent Meunier wanted to get rid of her. She felt stripped of dignity and respect and couldn't handle the stress. Bridges attempted to calm her by promising to talk with her the next day. Bridges told her that Respondent Meunier didn't feel that Complainant could handle lead receptionist.

49) In the spring of 1993, Respondent Meunier assigned Bridges to determine costs in regard to an office expansion. Jeffrey Lehman was a customer engineer with the International Business Machines (IBM). As a service technician, Lehman talked with Bridges about reconnecting the computer system to a nearby location. Around 5:30 p.m. on or about April 20, he was present at Respondent's office for a meeting with Stoll and Respondent Meunier to make an informal presentation of ideas for accomplishing the move.

50) While awaiting the meeting, Lehman witnessed a conversation between Respondent Meunier and an office worker whom he later identified as Complainant. Respondent Meunier was agitated, upset, and yelling. He stood very close to Complainant and loudly admonished her for between ten and fifteen minutes. Lehman could not distinguish the exact words and did not know whether Complainant's health or medical condition were mentioned. Complainant did not raise her voice. Right after the

exchange between Respondent Meunier and Complainant, Lehman spoke briefly with Complainant. He was worried about her and wanted to make sure she was all right, because she appeared quite upset.

51) In April and May of 1993, Respondent Meunier became increasingly concerned over the planned move and over expenditures made or authorized by Bridges. He learned from Stoll that Bridges and Stoll were discussing office business by telephone after hours.

52) In early May 1993, Stoll again attempted to speak with Respondent Meunier about his manner with employees. At the time, Respondent Meunier was upset with Bridges, and Stoll's remarks had no positive effect. It was suggested that Stoll leave if he was dissatisfied. Shortly thereafter, Stoll was present when Respondent Meunier placed Bridges on probation in a loud and profane manner which made Stoll uncomfortable.

53) On May 13, 1993, Respondent Meunier authored an unscheduled employee evaluation of Bridges. The spaces on the form intended for numerical rating of performance were left blank. The "Comments" section of the form stated the following in Respondent Meunier's handwriting:

> "1. Probation beginning today 5/13/93 for a period of 30 days (immediate termination for any disruptive activities)
>
> "2. Effective immediately you no longer have authority to sign checks for any reason. (Bring me new signature cards today)
>
> "3. You have no authority to commit the corporation to contracts of any sort. Expenditures will be approved by Dr Meunier.
>
> "4. I expect a proposed plan to accomplish all necessary billing tasks and to most effectively utilize personnel and space available by close of business Fri 5/14/93.
>
> "5. Work hours 8 AM - 4:20 PM Mon - Fri."

Bridges called in sick on May 13 and first saw the evaluation on May 14. Respondent changed "today" in paragraph 2 to "Mon 5/17" and changed "5/14/93' in paragraph 4 to "5/17/93."

54) Bridges quit on or about May 17, 1993, and Respondent Meunier became Complainant's direct supervisor.

55) On May 24, 1993, Complainant worked according to her schedule until 6 p.m. and left. On the following morning, Respondent Meunier could not locate the arthrogram films of a patient he had seen the previous evening. When Complainant also could not locate them, Respondent Meunier became angry and again accused her of being unable to handle responsibility and of always making mistakes. Complainant learned from the patient that Respondent Meunier had given the films to the patient.

56) During a conversation about his expectations of Complainant, Respondent Meunier told her that he wanted perfection, and that if he was not going to get perfection from her, he would hire someone else who would give him perfection.

57) On May 25, 1993, Respondent Meunier authored an

unscheduled employee evaluation of Complainant. Her performance ratings were mostly "Needs Improvement," "Unsatisfactory," or "Not Applicable." The "Comments" section of the form stated the following in Respondent Meunier's handwriting:

> "Your personnel file has been reviewed. You have been repeatedly counseled regarding violations of office policy. You are again placed on probation. Any violation of office policy, lack of attention to detail or negativism will result in your immediate termination.
>
> "You will 1) Maintain a schedule (30 days in advance) for all receptionists. One receptionist will be sched. 7:00 - 4:00 The second 9:00 - 5:30.
>
> "2) When Joyce is not sched. as receptionist her time will be sched. for the billing office.
>
> "3) A no-fail mechanism for signing out films will be immediately instituted. You are responsible for implementation.
>
> "4) You are again spending too much time in personal phone calls This must stop.
>
> "5) You need to improve in the areas noted above. You must reach a new level of professionalism or you will be replaced."

Respondent Meunier handed the evaluation to Complainant at about 4:15 p.m. on May 25 and spent 10 to 20 minutes going over it with her in detail, particularly the expectations.

58) Complainant considered the probation conditions, particularly the film signout requirement, impossible to meet. Specifically, Complainant felt that it would be impossible to design a "no-fail" system for keeping track of films, because films inevitably get misplaced from time to time. She believed the probation was imposed as justification for eventual termination and was based on her medical condition. She was previously reluctant to resign because she thought she would lose health coverage with a new employer due to her preexisting neurological condition. She considered that her working conditions had become intolerable, and felt compelled to leave.

59) On May 26, 1993, Complainant opened the office and left when the other receptionists arrived. On May 27, 1993, Complainant telephoned Dr. Wilson and reported work as being "very stressful." She stated she "kind of" quit that date. She reported stomach upset and feeling anxious and unable to "unwind." Dr. Wilson prescribed valium for acute anxiety reaction.

60) On May 28, 1993, Complainant returned to leave Stoll and Respondent Meunier a copy of the following:

> "Dear Drs. Meunier and Dr. Stoll,
>
> "Due to the unprofessional attitude and unrealistic demands placed on me personally by Dr. Paul Meunier, I regredt [sic] to do so but must terminate my employment at Body Imaging P.C. effective immediatley [sic].
>
> "I can no longer allow myself to be employed with and work with a company that is extremley [sic] unprofessional and places very high and unrealistic demands on their employees. There has been

no compassion or understanding given to me by Dr. Paul Meunier in regards to my medical condition. Since my diagnosis of Multiple Sclerosis in July 1992, it has become quite apparent that Dr. Meunier has changed his attitude and opinion of me both professionally and personally and has not allowed me to obtaine [*sic*] the level of employment and work that I was doing prior to that time. This has cause me great fear and stress. The particular incident of April 20, 1993 gave me reason to believe that his anger was out of control and could result in personal and physical harm towards me.

"Because of these incidents and others and the unrealistic demands and verbal abusiveness and harassment I enclose my keys and vacate the premise [*sic*] today.

"/s/ Therese M. Zeigler"

61) Stoll never realized an ownership interest in Respondent. He left employment with Respondent in early 1994, under circumstances described as "less than amicable." At the time of the hearing there was ongoing litigation between Stoll and Respondent Meunier. Stoll admitted a personal dislike of Respondent Meunier. Respondent Meunier disputed the accuracy of some of Stoll's testimony.

62) Complainant had sought counseling on earlier occasions involving, respectively, treatment of her by her family and a personal relationship. The subject matter of those sessions was not work connected. She did not seek counseling for the stress she felt from her job or for the upset resulting from having to resign.

63) On July 12, 1993, Complainant began working for Medical Marketing and Service Group (MMSG) which was owned by an acquaintance, Mike Hawkins, who had previously suggested that Complainant consider working there. She was paid $1,500 per month July 12 to October 12, 1993, $1,600 per month October 12, 1993, to February 1, 1995, and $1,800 per month to the date of hearing (January 22, 1996).

64) Complainant was earning $10.50 an hour, or $1,825 per month, when employment with Respondent ceased. For the period July to October 1993, she earned $975 less than if she had continued with Respondent; for the period October 1993 to February 1995, she earned $3,487.50 less; for the period February 1995 to January 22, 1996, she earned $293.75 less.

65) Complainant had worked as a volunteer with the YWCA prior to 1994. In January 1994 she began being paid at an hourly rate of approximately $5.25 for about 15 hours a week. She worked Monday evenings from 5 to 10:30 p.m. and Saturdays from 6:45 a.m. to around 4 p.m., while working full time at MMSG. In addition to her earnings, she received the equivalent of monthly dues. Prior to the hearing, her hourly rate at the YWCA had increased slightly.

66) While working at Respondent, Complainant received medical insurance, dental insurance, profit-sharing, pension, life insurance, and disability insurance. At MMSG, the employer paid for medical insurance only. Had Complainant remained employed by Respondent, she would have been credited with five per cent

pension contributions each month from July 1993 through December 1996 of $91.25 per month (five per cent of $1,825) or $2,737.50. She was also out of pocket $135 for one month's unreimbursed medical insurance premium and $140 for dental expenses incurred after May 1993.

67) On some key factual issues, Respondent Meunier's testimony differed from that of other witnesses. For instance, Respondent Meunier denied having suggested that Complainant was incompetent because of her medical condition; Complainant testified that Respondent made that statement. Additionally, Respondent Meunier testified that, regardless of Complainant's driving restriction, he would have removed her from her public relations duties; Bridges testified that had there been no restriction on Complainant's driving on company business, Complainant's public relations activities would have continued. Respondent Meunier denied having raised his voice to Complainant during his confrontation with her on April 20, 1993; an independent witness, Lehman, testified that Respondent Meunier yelled at Complainant for between 10 and 15 minutes.

Significantly, this forum views the change in Respondent Meunier's attitude toward and treatment of Complainant after July 14, 1992 - - the time when Respondent Meunier learned about the concern that Complainant may have MS - - as not merely coincidental. Rather, this forum infers that the change was based on Respondent Meunier's perception that Complainant was disabled. Respondent Meunier's denial is not credible. That lack of credibility on a critical point has led this forum to resolve factual disputes against Respondent Meunier.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent was an Oregon professional corporation which engaged and utilized the personal services of six or more employees in Oregon in operating a diagnostic radiology outpatient clinic. Respondent Meunier was sole owner of Respondent from late 1991 to the time of the hearing and had sole and ultimate authority in all personnel and financial matters.

2) Complainant worked for Respondent from April 1985 until May 28, 1993. Her immediate supervisor after late 1989 was Margaret Bridges, who was supervised by Respondent Meunier. Evaluations of Complainant's job performance were positive overall.

3) Multiple sclerosis (MS) is a disease of the nervous system which over time alters the structure of portions of the nervous system. The resulting alterations cause lesions, or scarred areas, leading to malfunctions. Malfunctions separated by space and time suggest multiple scarred areas, or multiple sclerosis. MS is a progressively debilitating physical impairment which can substantially limit one or more major life activity.

4) At times material herein, Complainant exhibited facial numbness (which was sometimes severe), headaches, fatigue, twitching around her left eye, a left hand tremor, and intermittent myoclonic jerks. Complainant was physically impaired by her condition but was not diagnosed as having MS and did not have a

physical impairment that substantially limited a major life activity.

5) Bridges believed that Complainant might have MS. In January 1991, when Complainant's neurologist, Dr. Wilson, could not rule out MS, Bridges suggested that Complainant get a second opinion.

6) In December 1991, Complainant was assigned a part time position in which she used her own automobile.

7) In July 1992, when Bridges learned that Dr. Wilson thought MS was probable, Respondent Meunier told her to prohibit Complainant's driving on company business. At his direction, Bridges checked regarding corporate liability and was told that Complainant's driving on office business was not considered a problem.

8) During times material, Dr. Wilson did not make a definite diagnosis of MS. He found no medical basis for restricting Complainant's job duties. Nevertheless, Respondent Meunier continued to prohibit Complainant's driving on company business.

9) After July 1992, Respondent Meunier made remarks to or about Complainant suggesting that she was not employable elsewhere, was not insurable, and was not capable of satisfactory job performance due to her medical condition. In April 1993, he angrily told her that she was incompetent, that she was not responsible enough to be lead receptionist, that nothing she did pleased him, that she was lucky to have a job and that no one would hire her with her condition.

10) In late May 1993, Respondent Meunier accused Complainant of being unable to handle responsibility and of always making mistakes, and gave her a written evaluation placing her on probation. She felt physically threatened by his anger.

11) On May 28, 1993, feeling unable to cope with an intolerable work environment, Complainant resigned, citing Respondent Meunier's change in attitude toward her due to her medical condition dating from July 1992 and resulting in unrealistic demands, verbal abusiveness, and her fear of physical harm.

12) Respondent Meunier knew that Complainant was substantially certain to leave employment as the result of the working conditions imposed on her.

13) From July 1993 to January 22, 1996, if Complainant had continued employment with Respondent, she would have earned $4,756.25 more, been credited with $2,737.50 in pension contributions, and had $275 in medical and dental expenses paid.

14) Complainant suffered severe mental distress as a result of Respondents' conduct.

CONCLUSIONS OF LAW

1) At times material herein, ORS 659.425 provided, in part:

> "(1) For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:
>
> " * * * * *

"(c) An individual is regarded as having a physical or mental impairment."

At times material herein, ORS 659.400 provided, in part:

"As used in ORS 659.400 to 659.460, unless the context requires otherwise:

"(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

"(2) As used in subsection (1) of this section:

"(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

" * * * * *

"(c) 'Is regarded as having an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment.

"(3) 'Employer' means any person who employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard."

At times material herein, OAR 839-06-205 provided, in part:

(7) “Physical or Mental Impairment” means an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or mental activity.

At times material herein, OAR 839-06-215 provided, in part:

"(1) As it pertains to employment, ORS 659.425 protects a [disabled] person, as defined in ORS 659.400, from discrimination by an employer because of a perceived or actual physical or mental impairment which, with reasonable accommodation, does not prevent the performance of the work involved."

At times material herein, ORS 659.435 provided, in part:

"Any person claiming to be aggrieved by an unlawful employment practice may file a complaint under ORS 659.040 * * * . The Commissioner of the Bureau of Labor and Industries may then proceed and shall have the same enforcement powers, and if the complaint is found to be justified the complainant shall be entitled to the same remedies, under ORS 659.050 to 659.085 as in the case of any other complaint filed under ORS 659.040 * * * "

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

2) At times material herein, Respondent was an employer in this state subject to ORS 659.010 to 659.110 and 659.400 to 659.460.

3) The actions, inactions, statements, and motivations of Margaret Bridges and Respondent Meunier are properly imputed to Respondent herein.

4) At times material herein, Margaret Bridges, Respondent's supervisory employee, regarded Complainant as having multiple sclerosis (MS), a physical impairment, and treated her as if she were substantially limited in the major life activities of employment and transportation. Bridges did this when she suggested to Respondent Meunier that Complainant might have an accident in her condition while driving on Respondent's behalf that would create liability for Respondent. This substantially limited Complainant's ability to be employed in her public relations, marketing and delivery driving duties and in the additional broad class or range of jobs requiring driving. Complainant had not been diagnosed as having MS and had no impairment that substantially limited her in any major life activity. Respondent violated ORS 659.425(1)(c) in changing the terms and conditions of her employment.

5) At times material herein, ORS 659.030 provided, in part:

> "(1) For the purposes of ORS * * * 659.400 to 659.460 * * * . it is an unlawful employment practice:
>
> " * * * * *
>
> "(g) For any person, whether an employer or employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS * * * 659.400 to 659.460 * * * or to attempt to do so."

At times material herein, Respondent Meunier aided Respondent by regarding Complainant as having MS, a physical impairment, and treated her as if she were substantially limited in the major life activities of employment and transportation when he sanctioned the removal of Complainant's driving duties and later continued to prohibit her from driving on Respondent's behalf. Complainant had not been diagnosed as having MS and had no impairment that substantially limited her in any major life activity. Respondent Meunier violated ORS 659.030(1)(g).

6) At times material herein, Respondent Meunier perceived, regarded and treated Complainant as having MS, a physical impairment, and limited in her major life activity of employment when, based on her perceived medical condition, he made negative remarks about her employability, insurability, performance, competence and responsibility, and placed her on probation with conditions that she felt she could not meet and that could not rationally have been met. All of these actions were unwelcome and offensive to Complainant and made her feel physically threatened. Based on his perception that Complainant was disabled, Respondent Meunier intentionally and deliberately created hostile and intimidating terms and conditions of employment so intolerable that a reasonable person in Complainant's position would have resigned be-

cause of them. Respondent Meunier intended to cause Complainant to resign as a result of those working conditions or knew that she was substantially certain to resign. She did resign as a result of those working conditions. Complainant had not been diagnosed as having MS and had no impairment that substantially limited her in any major life activity. By constructively discharging Complainant, Respondent violated ORS 659.425(1)(c) and Respondent Meunier violated ORS 659.030(1)(g).

7) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority to issue a cease and desist order requiring Respondents to perform an act or series of acts in order to eliminate the effects of an unlawful practice. The amounts awarded in the Order below are a proper exercise of that authority.

OPINION

1. ORS 659.425(1)(c) Liability

The record herein established that Complainant was treated adversely in her employment with Respondent following an examination in July 1992, from which her neurologist concluded that a diagnosis of multiple sclerosis (MS) was "probable." MS is a progressive physical impairment which can substantially limit major life activities. At the time, Complainant was engaged part-time in public relations work for Respondent, which involved driving her own car.

Complainant's immediate supervisor from late 1989 to mid-May 1993, Margaret Bridges, dealt periodically with Complainant's performance and felt that her strengths outweighed her weaknesses. Bridges learned immediately of the July 1992 diagnosis, which strengthened her belief that Complainant had MS and which she discussed with Respondent Meunier. He prohibited Complainant from driving on behalf of the office. He continued the prohibition after Bridges reported that Respondent's attorney and Respondent's insurer had advised that Complainant's driving for the office was not a problem, and again after both of Complainant's neurological consultants had written letters to verify that Complainant's ability to drive was not affected. From a projected two days per week on public relations, Complainant was reduced to a few hours a month.

Respondent Meunier's attitude toward Complainant changed after July 14, 1992, and his dissatisfaction with her performance escalated. His increasingly severe criticisms of her performance were coupled with negative remarks about the effects of her perceived medical condition. Respondent Meunier testified that there was insufficient data in the MRI and CSF information that he saw for him to diagnose MS. His counsel argued that for that reason, Respondent Meunier could not have regarded Complainant as disabled. But it is not necessary under ORS 659.425(1)(c) that the "disabled person" have the actual impairment they are perceived to have. The statute is violated when the individual is regarded as having a disability. An individual is regarded as having a disabling impairment when she is seen as unemployable, or uninsurable, or incapable or incompetent because of either a known or a suspected medical condition.

Respondents also argued that because Complainant was promoted to lead receptionist during the period that Respondent Meunier was allegedly treating her as disabled, Respondents could not have been guilty of discrimination. The facts, however, suggest that Respondent Meunier did not favor the reassignment to lead receptionist and permitted it only because Bridges would have to deal with any shortcomings. The facts are also clear that Respondent Meunier sanctioned the removal of Complainant's driving duties, leading to the loss of her marketing duties, and that he made negative remarks about her employability and performance and placed her on probation. Thus, his alleged acquiescence in one positive decision does not overshadow his role in the discriminatory decisions.

Respondents questioned the credibility of Complainant's claims, pointing to the lack of such allegations in Complainant's unemployment application or in any of the responses to criticisms in her personnel file and alleging that she did not suggest discrimination until well after she quit. But her letter of resignation stated her belief that it was her medical condition that accounted for Respondent Meunier's described attitude toward her after July of 1992.

2. Application of Former OAR 839-06-235

The termination of Complainant's driving duties in mid-July 1992, to await the receipt of medical evaluations, was not authorized by *former* OAR 839-06-235 (in effect at relevant times), which provided, in relevant part:

> "(1) An employer may inquire whether an individual has the ability to perform the duties of the position sought or occupied.
>
> "(2) An employer may not use this type of inquiry with the intent or result that a handicapped person is barred from a position without regard to:
>
> "(a) The individual's ability or capacity to safely and efficiently perform the duties of the position, and
>
> "(b) The effect of a reasonable accommodation on the individual's ability to so perform.
>
> "(3) An employer may require a medical evaluation of an individual's physical or mental ability to perform the work involved in a position.
>
> "(a) The individual seeking or occupying a position must cooperate in any medical inquiry or evaluation, including production of medical records and history relating to the individual's ability to perform the work involved."

It is not the request for the results of Complainant's medical evaluations, in order to determine whether Complainant could safely drive, that forms the basis for this forum's conclusion that Respondent and Respondent Meunier violated Complainant's rights. Rather, as relevant here it is Respondent Meunier's decision to end Complainant's driving duties when Complainant had no disability impairing her driving ability.

Former OAR 839-06-235 did not allow an employer to change an employee's job duties pending the results of a medical evaluation. That

rule merely permitted the employer to request a medical evaluation in certain defined circumstances.

That reading of the rule is compelled not only by the terms of the rule itself (which said nothing about changing job duties) but also by interpretations of *former* ORS 659.425 (in effect at relevant times) that are binding on this forum. In *Montgomery Ward v. Bureau of Labor*, 280 Or 163, 570 P2d 76 (1977), the Labor Commissioner had concluded that the employer violated *former* ORS 659.425 for refusing to hire a person because of a physical disability. The Court of Appeals reversed. The evidence showed that in refusing to hire the person, the employer relied in good faith on the opinion of its doctor after a pre-employment physical. The Court of Appeals held that, because the employer reasonably and in good faith relied on the opinion of its doctor, the employer did not violate the statute. The Oregon Supreme Court disagreed. That court stated, in relevant part:

> " The question whether the employer acted in good faith or on reasonable grounds goes to the propriety of a sanction, but it does not control the employee's employment rights under the statute. * * * As we read the Act, there is nothing therein to indicate that it was the intention of the legislature to exclude from the purview of the Act employers who acted in good faith and upon reasonable appearances. The emphasis is entirely upon whether the applicant is capable of fulfilling the job requirements."

280 Or at 169. The court referred to an "applicant" because *Montgomery Ward* involved a job applicant. The statute, however, applied equally to changes "in work activities, terms or conditions.

Pac. Motor Trucking Co. v. Bur. of Labor, 64 Or App 361, 668 P2d 446, *rev den* 295 Or 733 (1983), is to the same effect. In that case, the Court of Appeals construed *former* ORS 659.425 to prohibit discharging an employee who has "the present ability to work" (64 Or App at 368) merely because there is some risk that the employee would become incapacitated in the future. Again, although the opinion referred to a discharge, the statute applied equally to a change in "work activities, terms or conditions."

The version of *former* ORS 659.425 in effect at relevant times no longer contained the phrase "work activities." Rather, as relevant here, the statute contained the phrase "terms, conditions or privileges of employment." An employee's job duties are part of the "terms, conditions or privileges of employment," and cannot be changed due to a perceived disability where the employee has the present ability to perform the job. *In the Matter of Parker-Hannifin Corporation*, 15 BOLI 245, 274 *n* * (1997).

Under *Montgomery Ward* and *Pac. Motor Trucking Co.*, even if Respondent Meunier had been reasonable in asking for Complainant's medical results, or in barring Complainant from driving pending his review of those results, that reasonableness would not be relevant to a determination whether Respondent or Respondent Meunier committed unlawful discrimination. The issue is whether, at the time Complainant's

job duties were changed, she was capable of driving safely. As found above, Complainant had no impairment that limited her ability to drive. Therefore, the change in Complainant's job duties violated ORS 659.425.

In any event, this forum concludes that Respondent Meunier did not act reasonably in forbidding Complainant from driving pending his review of her medical records. Respondent Meunier acknowledge*d* that he did not even ask about Complainant's symptoms. Additionally, as found above, the medical information available to Respondents Body Imaging and Meunier at *t*he time of the decision did not justify a restriction on Complainant's driving on company business. Stoll characterized that action as an "extreme response" and unwarranted by medical criteria.

3. ORS 659.030(1)(g) Liability

Respondents argued that Respondent Meunier was not an employer contemplated by ORS 659.030(1), as "employer" is defined in ORS 659.010(6), citing *Ballinger v. Klamath Pacific Corp.,* 135 Or App 438, 898 P2d 232 (1995). That case was brought under ORS 659.121, which provides a right of suit in state court for persons aggrieved by certain statutory unlawful employment practices, including violations of ORS 659.030. In that case, the circuit court complaint named two employees and the corporate president, a majority shareholder, as defendants to charges of violating ORS 659.030(1)(a) and (b). The Court of Appeals held that none of the three met the statutory definition of "employer."

At times material, ORS 659.030 provided, in pertinent part:

> "(1) For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340, 659.400 to 659.460 and 659.505 to 659.545, it is an unlawful employment practice:
>
> " * * * * *
>
> "(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."

This provision, as it refers to ORS 659.400 to 659.435, has been unchanged since 1975, except for renumbering.[5]

Respondent Meunier's liability as an aider or abettor does not hinge on whether he was an "employer" within the meaning of ORS 659.030(1)(g). Under that statute, an aider or abettor also may be an "employee." Respondent Meunier expressly testified that he is "employed by" Respondent Body Imaging, P.C. Consequently, by his own admission he is an "employee" and, therefore, may be charged with liability as an aider or abettor.

A corporate president and owner who commits an act rendering the corporation liable for an unlawful employment practice may also be found to have aided and abetted the corpo-

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[5]ORS 659.030(5) in 1975; 659.030(1)(e) in 1977 and 1979; and 659.030(1)(g), 1981 through 1993.

ration's unlawful employment practice.

> "The Commissioner has long held that corporate presidents are liable for aiding and abetting their Respondent corporations where the presidents were found to have personally sanctioned or engaged in the alleged discriminatory acts. *In the Matter of*

Salem Construction Company, Inc., 12 BOLI 78, 87-88, 90 (1993); *In the Matter of Allied Computerized Credit & Collections, Inc.,* 9 BOLI 206, 214, 218 (1991); *In the Matter of Sapp's Realty, Inc.,* 4 BOLI 232, 270-72 (1985); *In the Matter of N.H. Kneisel, Inc.,* 1 BOLI 28, 30, 38 (1976)." *In the Matter of Gardner's Cleaners, Inc.,* 14 BOLI 240, 254 (1995).[6]

In this case, Respondent Meunier sanctioned the removal of Complainant's driving duties based on an unfounded assumption that her medical condition formed a risk to the corporation. In addition, based on her medical condition, he created an intimidating work atmosphere characterized by criticism of Complainant's supposed performance deficiencies based on her employability, insurability, performance, competence, and responsibility, and placed her on probation with conditions she felt she could not meet, all of which was unwelcome and offensive to her, made her feel physically threatened, and which intentionally and deliberately created hostile and intimidating terms and conditions of employment so intolerable that she felt compelled to resign.

On the day that the proposed order issued, the Oregon Court of Appeals decided *Schram v. Albertson's, Inc.,* 146 Or App 415, 934 P2d 483 (1997), wherein the court confirmed that a supervisor could be individually guilty of aiding and abetting an employer's unlawful employment practice under ORS 659.030(1)(g). However, the court determined that a back pay remedy was not available from such aider and abettor supervisors charged with violation of ORS 659.030(1)(g) in a circuit court proceeding under ORS 659.121. The court reasoned that the ultimate responsibility for wage loss was with the employer.

This proceeding is not based on ORS 659.121. Remedies available under ORS 659.060(3) in the Commissioner's administrative forum have not always run parallel to remedies available in circuit court under ORS 659.121(1). For instance, compensatory damages for mental suffering are recoverable under ORS 659.060(3);[7] compensatory damages for mental

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[6] *See* also: *In the Matter of Wild Plum Restaurant, Inc.,* 10 BOLI 19 (1991) (holding corporate owner and president subject to ORS 659.030(1)(g) as an aider and abettor); *In the Matter of Loyal Order of Moose,* 13 BOLI 1 (1994) and *In the Matter of Oregon Rural Opportunities,* 2 BOLI 8 (1980) (both holding employer's manager liable under ORS 659.030(1)(g)); and *Sterling v. Klamath Forest Protective Association,* 19 Or App 383, 528 P2d 574 (1974), (holding employer's manager liable under *former* ORS 659.030(5)).

[7] *Williams v. Joyce,* 4 Or App 482, 479 P2d 513, *rev den* (1971)*; School District No. 1 v. Nilsen,* 271 Or 461, 534 P2d 1135 (1975); *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564, *rev den* (1979).

suffering, in contrast, are not available under ORS 659.121(1).[8]

Under ORS 659.010(2), the Commissioner has authority to fashion a remedy adequate to eliminate the effects of any unlawful practice found and to protect the rights of other persons similarly situated (*i.e.*, to the person harmed). The loss of wages through loss of employment, as well as mental suffering, can be an effect of discrimination attributable to an employer, although perpetrated by a victim's co-employee or manager, or, indeed by a non-employee customer. Accordingly, the order in this case awards both back pay and mental suffering damages against Respondent corporation for violation of ORS 659.425(1)(c), and against Respondent Meunier for violation of ORS 659.030(1)(g).

4. Constructive Discharge

Respondents argued that in order to prove a claim of constructive discharge, the Agency was required to show that Respondents "deliberately created and maintained working conditions with the purpose of forcing [Complainant] to resign. *Bell v. First Interstate Bank,* 103 Or App 165, 168, 796 P2d 1226 (1990) . . . *See, also, Seitz v. Albina Human Resources Center,* 100 Or App 665, 674-75, 788 P2d 1004 (1990); *and Bratcher v. Sky Chefs, Inc.,* 308 Or 501, 783 P2d 4 (1989)."

Bratcher arose from questions certified from the US District Court to the Oregon Supreme Court regarding the tort of wrongful discharge in at-will employment. Equating constructive discharge to involuntary resignation, the court fashioned a subjective standard: that the deliberately created or maintained unacceptable working conditions must be imposed with the intention that the employee resign and that the employee must have left because of them. *Bratcher*, 783 P2d at 6.

Prior to *Bratcher*, this forum adhered to an objective standard regarding constructive discharge that if the employer imposes objectively intolerable working conditions, the employee's resignation due to those conditions is constructively a discharge. *In the Matter of West Coast Truck Lines, Inc.,* 2 BOLI 192 (1981), *aff'd without opinion,* 63 Or App 383, 665 P2d 882 (1983); *In the Matter of Sapp's Realty,* 4 BOLI 232 (1985); *In the Matter of Richard Niquette,* 5 BOLI 53 (1986); *In the Matter of Deanna Miller,* 6 BOLI 12 (1986); *In the Matter of Lee's Cafe,* 8 BOLI 1 (1989).

In *Bell*, the court cited *Bratcher* in holding that a constructive discharge under ORS 659.030(1)(a) be established by a showing that the employer:

> "deliberately created or maintained working conditions with the purpose of forcing [the employee] to resign." 796 P2d at 1227

In *Seitz*, *Bratcher* was followed with the court requiring that under

> "an allegation of constructive discharge in a claim for violation of ORS 659.030(1)(f), [the employee] must prove that [the employer] (1) deliberately retaliated, because [the employee] filed the discrimination complaints, (2) with the intent of forcing [the employee] to

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[8]Holien v. Sears, 298 Or 76, 689 P2d 1292 (1984). .

leave employment and (3) that [the employee] left employment because of retaliation." 788 P2d at 1010.

Despite those holdings dealing with ORS chapter 659, this forum continued to follow its own earlier precedent. *In the Matter of City of Umatilla,* 9 BOLI 91 (1990), *aff'd without opinion, City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991); *In the Matter of Allied Computerized Credit & Collections, Inc.,* 9 BOLI 206 (1991). The Commissioner explained that the *Bratcher* test for working conditions created by statutorily unlawful discrimination could produce results inconsistent with the Commissioner's remedial authority under Oregon civil rights statutes and held that where objectively intolerable working conditions created by statutorily unlawful discrimination leave no reasonable alternative to resignation, the resignation equates to a discharge regardless of the employer's intent about the employee's tenure. *In the Matter of William Kirby,* 9 BOLI 258 (1991); *In the Matter of Lee Schamp,* 10 BOLI 1 (1991); *In the Matter of Wild Plum Restaurant, Inc.,* 10 BOLI 19 (1991); *In the Matter of Chalet Restaurant and Bakery,* 10 BOLI 183 (1992), *aff'd without opinion, JLG4, Inc., v. Bureau of Labor and Industries,* 125 Or App 588, 865 P2d 1344 (1993); *In the Matter of Sunnyside Inn,* 11 BOLI 151 (1993); *In the Matter of RJ's All American Restaurant,* 12 BOLI 24 (1993); *In the Matter of Loyal Order of Moose,* 13 BOLI 1 (1994).

Recently, the Oregon Supreme Court rejected the subjective standard of *Bratcher*:

> " * * * [I]n view of the *Bratcher* court's blurring of the distinction between purpose and intent, we now hold that the court erred when it held that a plaintiff must show, to establish a constructive discharge, that an employer acted with the purpose of forcing the employee to resign. That one aspect of the *Bratcher* opinion was inadequately considered when it was decided, and we will no longer adhere to it. * * * "
>
> " * * * [T]o establish a constructive discharge, [the employee] must allege and prove that (1) the employer intentionally created or intentionally maintained specified working condition(s); (2) those working conditions were so intolerable that a reasonable person in the employee's position would have resigned because of them; (3) the employer desired to cause the employee to leave employment as a result of those working conditions *or* knew that the employee was certain, or substantially certain, to leave employment as a result of those working conditions; and (4) the employee did leave the employment as a result of those working conditions." *McGanty v. Staudenraus,* 321 Or 532, 557, 901 P2d 841, 856 (1995) (emphasis in original; footnotes omitted).

This forum adopted the *McGanty* standard in *In the Matter of Thomas Myers,* 15 BOLI 1 (1996).

The Forum concludes that all of the elements of constructive discharge have been proven.

The factual findings stated above (both those expressly labeled findings of fact and factual findings stated as

part of a conclusion of law or in the "Opinion" portion of this final order) show that this forum has found that Respondent and Respondent Meunier intentionally created and maintained specified working conditions.

The forum also concludes that those working conditions were so intolerable that a reasonable person in Complainant's position would have resigned because of them. As detailed above, those working conditions included: (1) Respondent Meunier, who, based on his perception that Complainant was disabled, made negative remarks about her employability, insurability, performance, competence and responsibility; (2) being yelled at by Respondent Meunier for ten to fifteen minutes, while Respondent Meunier stood very close to her, in a way that led Complainant to feel physically threatened and caused a witness (Lehman) to be concerned for her well-being; (3) Respondent Meunier's demand for "perfection" from her - - a demand that could not rationally be met - - and his statement that if he was not going to get perfection from her, he would hire someone else who would give him perfection; and (4) Respondent Meunier's imposition of a probation condition requiring that she create and implement a "no-fail" system for keeping track of films: a condition that could not rationally be met.

Further, the forum finds that Respondent desired to cause Complainant to leave employment as a result of those working conditions, or knew that Complainant was substantially certain to leave employment as a result of those working conditions. This finding rests in part, although not exclusively, on the inference from Respondent Meunier's impossible demands for perfection, coupled with a threat to find someone else who could give him perfection, that Respondent Meunier intended that Complainant quit.

Finally, this forum finds that Complainant quit her employment with Respondent as a result of those working conditions.

5. Damages

a. Lost Earnings

Respondents argued that, even if Complainant were unlawfully discharged, she has not suffered any recoverable damages. Respondents argued that even if she were entitled to back pay, she had no economic loss because of her earnings with the YWCA. The evidence was, however, that Complainant's earnings at the YWCA were from part-time employment performed outside her regular working hours. In other words, she would have earned the same amount even if she had remained employed by Respondent. In such circumstances, the part-time earnings do not reduce the wage loss caused by the unlawful practice. *In the Matter of Peggy's Cafe,* 7 BOLI 281 (1989); *In the Matter of Lee's Cafe,* 8 BOLI 1 (1989). In this forum, it is incumbent upon a respondent to establish any failure to mitigate damages. OAR 839-50-260(5) (*former* OAR 839-30-105 to the same effect); *In the Matter of Lucille's Hair Care,* 5 BOLI 13 (1985) on remand from *Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985). Pension contributions lost are also lost earnings. *In the Matter of West Linn School District, 3 JT*, 10 BOLI 45 (1991); *In the Matter of Mini-Mart Food Stores, Inc.*, 3 BOLI 262 (1983); *In the Matter of City of*

Portland, 2 BOLI 21 (1980), 2 BOLI 71 (1981); *aff'd, City of Portland v. Bureau of Labor and Industries*, 298 Or 104 (1984)

b. Mental Suffering

As to the appropriateness of mental suffering damages, Respondents also argued that Oregon law does not allow for recovery of emotional distress or mental suffering damages, only back pay, and cites *Holien v. Sears,* 298 Or 76, 689 P2d 1292 (1984). *Holien* was brought under ORS 659.121, which provided only for equitable relief. The statement quoted is correct, but it does not apply to this proceeding. Again, this proceeding was not brought under ORS 659.121, but rather is brought in the administrative forum under ORS 659.060. This forum has previously ruled adverse to Respondents' argument as follows:

> "It is well settled that the Commissioner may award compensatory damages for mental suffering as an administrative remedy under the Oregon civil rights law. *Williams v. Joyce,* 4 Or App 482, 504, 479 P2d 513, 523, 524, *rev den* (1971); *School District No. 1 v. Nilsen,* 271 Or 461, 484-86, 534 P2d 1135, 1146 (1975); *Fred Meyer, Inc., v. Bureau of Labor,* [39 Or App 2*53,* 592 P2d 564, *rev den* (1979)]; *Gaudry v. Bureau of Labor and Industries,* 48 Or App 589, 617 P2d 668, 670-71 (1980); *City of Portland v. Bureau of Labor and Industries,* 298 Or 104, 690 P2d 475, 484 (1984); *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339, 1342-43, *aff'd,* 308 Or 199, 778 P2d 953 (1989). *See also* OAR 839-03-090.
>
> "As the court stated in *Schipporeit*, the legislative history of ORS 659.121, which provides for civil suits in circuit court, does not show:
>
> > 'any intention to abrogate the previously existing powers of the Commissioner recognized in *Williams v. Joyce, supra*. In *Holien,* the Supreme Court concluded that the 1977 legislation did not eliminate or reduce existing administrative remedies, including damages, in employment discrimination.' 93 Or App 12, 760 P2d at 1341.
>
> "Thus, Respondent's reliance on *Holien* is misplaced. The Supreme Court has specifically recognized the Commissioner's power to award mental suffering damages under the Oregon civil rights law." *In the Matter of Harry Markwell,* 8 BOLI 80, 82 (1989).

In *Holien*, the Oregon Supreme Court reviewed extensively the history of the legislation, (Or Laws 1977, ch. 453) which became ORS 659.121. The Court concluded that the legislature did not intend to foreclose the existing administrative remedies before the Commissioner of the Bureau of Labor and Industries, stating:

> "In essence, the legislature, by its final action, said to aggrieved employees that under state statute:
>
> > "(1) You may continue to obtain such relief, *including general damages,* as is provided under administrative remedies.
> >
> > "(2) You may obtain equitable relief as we provide by this statute.

"(3) You are deprived of a jury trial under the statute.

"(4) You may not recover general or punitive damages under the statute." 689 P2d at 1302[9] (emphasis supplied).

The statute itself dictates the same conclusion. ORS 659.121(4) states, in pertinent part:

"This section shall not be construed to limit or alter in any way the authority or power of the commissioner or to limit or alter in any way any of the rights of an individual complainant until and unless the complainant commences civil suit or action."

The Commissioner of the Bureau of Labor and Industries is authorized to award compensatory damages, including mental suffering damages, in the administrative forum as a means reasonably calculated to eliminate the effects of any unlawful practice found.

When Complainant was deprived of her outside public relations duties due to her medical condition, she felt as though she had been labeled an invalid and demoted. She was embarrassed, hurt, upset, and humiliated. She felt increasingly that Respondent Meunier wanted her to leave and she worried about health coverage. She appeared nervous and anxious, her confidence and self-esteem were shaken, and she dreaded coming to work. She was intimidated by Respondent Meunier, felt physically threatened by his anger, and was sometimes in tears from verbal confrontations with him. When she resigned, she felt stripped of personal dignity and respect and that conditions had become intolerable. She suffered stomach upset and her physician found an acute anxiety reaction due to stress. This evidence established Complainant's entitlement to the mental suffering damages awarded herein.

6. Respondents' Exceptions

Respondents timely filed exceptions to the proposed order. Each is quoted and discussed below.

<u>Exception 1.</u>

"The proposed order fails to find as fact whether or not Complainant had a physical impairment."

This exception addressed Complainant's protected class membership, that is, her status as a disabled person under the definitional section of the statute, ORS 659.400, entitled to the protection afforded by the operational section, ORS 659.425. Respondents correctly pointed out that the proposed order failed to distinguish with precision among the definitions of disabled persons possible under ORS 659.400(2). This defect is corrected in this order. The factual findings have been revised so that the forum has found that Complainant had no impairment that substantially limited her in any major life activity but was treated by the employer as if she had such an impairment and was so limited. This describes a violation of ORS 659.425(1)(c).

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[9]ORS 659.121 has since been amended providing for compensatory and punitive damages for certain unlawful practices; the quoted language regarding the powers of the commissioner remains the same.

Exception 2.

"The proposed order fails to address or resolve key factual issues regarding Respondents' liability.

"a. There is no dispute that Complainant's duties were changed because another, more highly qualified employee took over her outside responsibilities, and because another receptionist left."

While it is true that Weeks had become the marketing point person, Complainant continued to assist in this effort as planned. The curtailment of her driving negatively affected her opportunity to so assist and was clearly triggered by a perception of her physical limitations. It was the initial illustration of a series of adverse occurrences traceable to Respondent Meunier's view of those limitations. As expressly found above, had there been no restriction on Complainant's driving on company business, Complainant's public relations activities would have continued. That finding is supported by the testimony of Bridges, which this forum finds credible on this point. Respondent Meunier's increased criticism and remarks regarding her competence were further illustrations. Because she was already a receptionist, the unpredicted happenstance of the departure of another employee leading to permanent reception duties over three months later was not seen as one of those occurrences. Neither was the probation resulting from her late return from vacation.

"b. There is no dispute that the performance problems for which Complainant was placed on probation long predated her purported diagnosis."

Respondents supported this exception with observations from Complainant's personnel file regarding errors and inattention (February and April 1992), and attitude (May 1992). Respondents argued that to treat the disciplinary action of May 1993 "as evidence of discrimination, or as an act of discrimination itself, creates an unworkable standard for employers" regarding "problem employees." But Respondent Meunier's previous oral criticism and comment to and about Complainant suggested that his view of her as impaired played a role. Thus, the "standard" enunciated by the finding is that discipline may not be motivated, wholly or in part, by discriminatory intent, even if Complainant was not a perfect employee.

"It is not a prerequisite to statutory protection against discrimination that a complainant be a superior, error-free worker." *In the Matter of Snyder Roofing & Sheet Metal, Inc.,* 11 BOLI 61, 82 (1992).

In any event, this forum has expressly found that Respondent Meunier's verbal confrontations with Complainant interfered with and adversely affected Complainant's work performance. As also found, those verbal confrontations resulted from Respondent Meunier's perception that Complainant was disabled, and were part of the working conditions that constituted the constructive discharge. Respondent cannot rely on poor job performance caused by its own discriminatory acts or those of employees for whose conduct Respondent is liable as a justification for its treatment of Complainant. Exception 2 is denied.

Exception 3.

> "Respondents except to the proposed order's conclusion and opinion that Respondents' conduct toward Complainant was motivated by an intent to discriminate, that it brought about a constructive termination, and that it resulted in damage as found to Complainant.
>
> "For all the reasons stated in their submissions at the hearing of this matter, and for the reason that the evidence does not support the conclusions of the order, Respondents except to the proposed order."

The forum has reviewed the argument and evidence including Respondents' submissions and found that the record, taken as a whole, supports the proposed order as revised herein. Exception 3 is denied.

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, specifically the violations of ORS 659.425(1)(c), and ORS 659.030(1)(g), Respondents BODY IMAGING, P.C. and PAUL MEUNIER, M.D. are hereby ordered to:

1) Deliver to the Fiscal Office of the Bureau of Labor and Industries, State Office Building, Ste. 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for THERESE ZEIGLER, in the amount of:

a) FIVE THOUSAND THIRTY-ONE DOLLARS AND TWENTY-FIVE CENTS ($5,031.25), less lawful deductions, representing $4,756.25 in wages lost by Complainant between May 28, 1993, and January 22, 1996, and $275 in unreimbursed medical and dental expenditures between those dates, plus

b) TWO THOUSAND SEVEN HUNDRED THIRTY DOLLARS ($2,730) representing pension contributions for July 1, 1993 to January 1, 1996, said sum to be paid into Respondent's pension plan for the use of THERESE ZEIGLER, plus

c) THIRTY THOUSAND DOLLARS ($30,000), representing compensatory damages for the mental and emotional distress suffered by THERESE ZEIGLER as a result of Respondents' unlawful practices found herein, plus

d) Interest at the legal rate from January 22, 1996, on the sum of $5,031.25 until paid, plus

e) Interest at the legal rate on the sum of $1,092 from June 30, 1994, until paid, interest at the legal rate on the sum of $1,092 from June 30, 1995, until paid, and interest at the legal rate on the sum of $546 from January 1, 1996, until paid, plus

f) Interest at the legal rate on the sum of $30,000 from the date of the Final Order herein until Respondents comply therewith, and

2) Cease and desist from discriminating against any employee based upon the employee's status as a disabled person.

In the Matter of
TOMKINS INDUSTRIES, INC.,
Respondent.

Case Number 71-97
Final Order of the Commissioner
Jack Roberts
Issued October 29, 1998.

SYNOPSIS

Respondent, which operated a manufacturing facility, employed Complainant and required her to work with lacquer thinner in a manner that posed a risk of serious injury. When Complainant refused to continue working with the lacquer thinner, Respondent laid her off. Respondent's discharge of Complainant constituted retaliation and discrimination against Complainant for opposing unsafe working conditions, and was an unlawful employment practice that violated ORS 654.062 (5)(a). The Commissioner awarded Complainant $2,098.11 in lost wages and $10,000.00 for the mental suffering caused by the unlawful employment practice. ORS 654.062(1), (5); OAR 839-006-0020.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on November 5, 1997, in the conference room of the Bureau of Labor and Industries, 3865 Wolverine Street NE, Salem, Oregon. The Civil Rights Division (CRD) of the Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Respondent Tomkins Industries, Inc., a corporation, was represented by Calvin Keith and Jay Nusbaum, Attorneys at Law, Portland. Carol Oeder, of the corporate Respondent, was present throughout the hearing. The Complainant, Mary D. Koon, was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses, in addition to Complainant, OR-OSHA industrial hygienist Penny Wolf-McCormick, Respondent employees Joel Pikl and Carol Oeder, and former Respondent employee Bernice Richards.

Respondent called as witnesses Respondent employees Rondeeda Magby, Angela Cruz, Adam Slusser and Carol Oeder, and former Respondent employee Robert A. Young.

The ALJ admitted into evidence Administrative Exhibits X-1 through X-13, Agency Exhibits A-1, A-3, A-5, A-8 through A-18, and by stipulation A-2, A-4, A-19 and A-20, and Respondent's Exhibits R-1 through R-3, R-6 through R-8, R-13, R-14, and R-19.

Having fully considered the entire record in this matter, I, Jack 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 December 20, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that she suffered serious medical problems from breathing lacquer thinner fumes when she worked in the frame area of Respondent's manufacturing facility. Complainant further alleged that, after she informed her supervisors and Respondent's Human Rights Director about the medical problems and asked to be transferred, Respondent gave her the choice of continuing in the frame area or taking a "voluntary lay off due to work reduction." Complainant asked if she should finish out the day of work and was told "no." Complainant stated her belief that Respondent laid her off because of her opposition to the health hazard presented by exposure to the lacquer thinner fumes.

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 654.062.

3) On June 18, 1997, the Agency requested a hearing.

4) On July 16, 1997, the Agency duly served on Respondent Specific Charges which alleged that Respondent had laid off Complainant from employment for opposing unsafe and/or unhealthy conditions in the workplace, in violation of ORS 654.062(5)(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 Summary 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) The Notice of Hearing stated that Respondent's answer was due 20 days from the receipt of the notice and that, if Respondent did not timely file an answer, it could be held in default.

7) On August 8, 1997, Respondent's corporate attorney informed the Forum and the Agency that Respondent would be filing an answer to the Specific Charges within the next ten days.

8) On August 11, 1997, the Agency filed a Notice of Intent to File a Motion for Default, stating that it would file a motion for default if the Agency did not receive an answer by August 21, 1997.

9) Respondent filed its answer on August 15, 1997. In that answer, it admitted the allegations in Paragraphs I and II of the Specific Charges and denied the allegations in Paragraphs III and IV of the Specific Charges. Respondent also asserted three affirmative defenses.

10) On October 3, 1997, the ALJ issued a discovery order to the Agency and Respondent directing them each to submit a summary of the case, including a list of 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 839-050-0200 and 839-050-0210. The summaries were due by October 22, 1997. The order advised

the participants of the sanctions, pursuant to OAR 839-050-0200 (8), for failure to submit the summary. The Agency and Respondent each submitted a timely summary. On October 22 and 23, 1997, the Agency submitted first, second, and third addenda to its case summary, which the Forum accepted for filing. Those addenda included Exhibits A-19, A-20, and A-21. The Agency identified Exhibits A-19 and A-20 as updated versions of Exhibit A-4.

11) On October 23, 1997, the Agency filed substitutes for Agency Exhibits 7 and 21. At the hearing, the Agency marked those substitutes as Exhibits A-24 and A-25, respectively. The forum did not receive any of these exhibits (A-7, A-21, A-24, or A-25) as evidence.

12) At the start of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

13) Pursuant to ORS 183.415(7), the ALJ then verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

14) In the Specific Charges, the Agency initially requested $2500.00 in back wages. During the hearing, the Agency moved to amend the claim for back wages to $2098.11, the amount Complainant calculated she had lost as a result of being laid off. Respondent did not oppose the motion, which the ALJ granted.

15) On October 1, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. Both the Agency and Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) At all times material herein, Respondent was an employer in Oregon. Several products were manufactured at Respondent's Stayton, Oregon facility, including mobile home doors, house doors, vinyl products, aluminum windows, and screens.

2) Counsel for Respondent explained in his opening statement that Philips Products, a name that appears on several exhibits, is a division of Respondent Tomkins Industries, Inc. No party has claimed otherwise, and Counsel's statement is consistent with the testimony of Robert Young and Rondeeda Magby that they worked for Philips Products. Consequently, the Forum has accepted Counsel's statement that Philips Products is a division of Respondent as an admission by Respondent.

3) In March 1996, Respondent hired Complainant to work at Respondent's manufacturing facility. In April 1996, Complainant was given a permanent assignment to work on door frames in the Mobile Home Doors (MHD) Department. Complainant's duties included cleaning newly manufactured painted door frames with lacquer thinner. She did this by soaking paper towels or discarded cloth gloves with lacquer thinner and using those materials to wipe down the door frames. Complainant used lacquer thinner in this manner throughout the work day. She sometimes also applied spray

paint to door frames to cover scratches and weld marks.

4) Complainant's immediate supervisor in the MHD Department was Adam Slusser; Robert Young was Slusser's supervisor. Joe Pikl was a group leader in the MHD Department; Young was also his supervisor.

5) Nobody at Respondent's facility told Complainant that she should take any precautions while using the lacquer thinner or spray paint. Nobody in management ever said anything to Complainant about whether the chemicals were safe to use. Gloves were available in the facility, but nobody told Complainant to use them. Complainant testified that, if she wore gloves, she could not clean the inside corners of the door frames.

6) Because Complainant used lacquer thinner throughout the day and did not wear gloves, the lacquer thinner frequently came into contact with her hands. Complainant testified credibly that her hands were "soaking" in the lacquer thinner when she worked on painted door frames. Complainant was able to wash the lacquer thinner off her hands at lunch, during breaks, and when she used the restroom.

7) While Complainant worked in the door frame area, she suffered from severe headaches, dizziness, confusion, nausea, and blurry vision. On May 31, 1996, she went to a physician, who did not find a specific cause for her problems.

8) On one day that Claimant worked in a different area (fabrication) where lacquer thinner was not used, she did not feel as bad. Complainant suspected that the lacquer thinner was causing her medical problems and read the label on the 55-gallon drum in which the chemical was stored. The label stated that the lacquer thinner could cause health problems, including damage to the liver, kidneys, and nervous system.

9) Other employees told Complainant that the lacquer thinner also bothered them.

10) After she visited the doctor in May 1996, Complainant started telling her supervisors, including Robert Young, Adam Slusser, and Joe Pikl, that she could not work with the lacquer thinner because it made her feel terrible. Young was cooperative and reassigned Complainant to other work in the MHD Department that did not involve the direct use of lacquer thinner.

11) After Complainant complained about the lacquer thinner fumes, Respondent provided two fans, but they were not sufficient to ventilate the work area. Exhaust fans on the wall of the manufacturing facility did not always work.

12) Even though Complainant no longer was cleaning door frames, she continued to become ill when she was assigned to apply parts to door frames that had just been cleaned, or was assigned to other work that had to be done in close proximity to the wet door frames. When Complainant told Young that she still was having problems, he had Complainant trade jobs with other employees in the MHD Department. Those employees would work in the door frame area when the wet frames came through, and Complainant performed the other employees' jobs. Pikl also arranged for Complainant to switch tasks with other employees, including Angela Cruz.

13) In September 1996, Complainant quit work, but asked to be reinstated two days later. Respondent rehired Complainant. At the time Complainant was rehired, she already had complained that the fans did not provide adequate ventilation.

14) On November 21, 1996, the employees who usually filled in for Complainant when wet door frames came through were absent, and nobody was available to switch tasks with Complainant. Consequently, Slusser assigned Complainant to apply materials to freshly cleaned door frames that were wet with lacquer thinner. Complainant did that, became ill, and told Slusser that she could not perform that job any longer.

15) After her morning break on November 21, Complainant spoke with Rondeeda Magby, an assistant in the Human Resources Department. Complainant was very upset and told Magby that she needed to be transferred to an area where lacquer thinner was not used. Complainant did not tell Magby that she needed to be transferred out of the MHD Department altogether. Complainant also told Magby that she wished to speak with Carol Oeder, the head of Human Resources.

16) After speaking with Magby, Complainant started working in the fabrication area in the MHD Department. At about 11:00 a.m., Complainant met with Robert Young and Carol Oeder in the Human Resources office. Complainant explained that the lacquer thinner made her ill when she worked with painted door frames, and asked to be transferred to another area where lacquer thinner was not used. Complainant did not ask to be transferred out of the MHD Department; nor did she tell anybody that she would not work anywhere in that department. Oeder told Complainant that this was the time of year when Respondent typically had to lay off employees, and said there were no openings for work in other areas. Young also stated that there were no openings. Complainant pointed out that she had just been working in the fabrication area and believed that work was available. Oeder then told Complainant that she could either work with the door frames or take a "voluntary layoff." Oeder told Complainant how to apply for unemployment benefits and said that Respondent probably would hire Complainant back in the spring.

17) Later that day, either Young or Slusser told Pikl that Complainant's layoff was permanent and she would not be returning.

18) An "EMPLOYEE STATUS FORM" with an effective date of November 21, 1996, indicated that the reason for Claimant's termination was a reduction in work force (RIWF). The December 3, 1996, "EMPLOYEE SEPARATION REPORT" that Rondeeda Magby later completed stated that Complainant had been permanently laid off because of a "lack of work."

19) Complainant testified credibly that she felt she had to take the layoff instead of returning to work on door frames because the lacquer thinner had serious adverse effects on her health. Complainant asked Oeder if she should finish out the work day, and was told that she should not.

20) When Complainant was laid off, she was earning $7.50 per hour, was regularly scheduled to work 40 hours per week, and occasionally worked overtime. Complainant calculated that she lost $2098.11 in gross wages she would have earned from November 21, 1996, through January 10, 1997. Claimant acknowledged that she had received unemployment benefits totaling $402.00 during that time.

21) Complainant's calculation of lost wages includes $28.11 for the three and three-quarter hours she did not work on the afternoon of November 21, 1996. Oeder testified that Complainant was paid for the entire day even though she did not work eight hours. Respondent did not, however, provide any documentary evidence to support that claim.

22) Complainant's calculation of lost wages includes $90.00 in regular and overtime pay that Complainant believes she would have earned had she worked on November 23, 1996, a Saturday on which she had been scheduled to work eight hours of overtime. Respondent produced no evidence suggesting that Complainant would not have worked overtime on November 23 had she not been laid off.

23) When Oeder informed Complainant that she would have to either continue working in the door frame area or accept a layoff, Complainant felt helpless and angry because she believed she would jeopardize her health if she continued to work with the lacquer thinner. During the seven weeks she was laid off, Complainant was unhappy, very depressed, and extremely angry. She had to rely on charity to feed her children and provide them with Christmas presents.

24) A few days after she was laid off, Complainant contacted the Agency, which sent her a questionnaire that she completed and returned. Complainant said that Respondent had made her choose between working in the frame area or taking a voluntary layoff. Complainant asserted that Respondent laid her off because of her opposition to a health hazard. Complainant also contacted the Oregon Occupational Safety and Health Division (OR-OSHA).

25) On November 25, 1996, OR-OSHA received a complaint concerning potential safety/health hazards at Respondent's Stayton facility. The complaint related to employees' exposure to a paint thinner.

26) By letter dated November 27, 1996, Penny Wolf-McCormick, an OR-OSHA regional health manager and industrial hygienist, urged Respondent to investigate the situation and make any necessary corrections. Wolf-McCormick also asked Respondent to advise OR-OSHA within 20 days of any responsive action it had taken. Wolf-McCormick further advised Respondent "that Oregon law prohibits discriminatory actions by employers against employees who make such complaints."

27) On December 6, 1996, Respondent sent the Material Safety Data Sheet (MSDS) for the lacquer thinner to an environmental consultant called Med-Tox Northwest, explaining that it wanted Med-Tox to conduct an exposure analysis for this chemical. The MSDS stated that the lacquer thinner contained several

hazardous ingredients, including toluene and methanol. The MSDS listed several health hazards and health effects associated with the lacquer thinner, including the following:

> **"ACUTE HEALTH EFFECTS:**
>
> "EYE CONTACT: Material is a severe eye irritant. Direct contact with the liquid or exposure to vapors or mists may cause stinging, tearing, redness, swelling and eye damage.
>
> "INHALATION: Breathing high concentrations of vapors or mists may cause irritation of the nose or throat and signs of nervous system depression.
>
> "INGESTION: Ingestion of excessive quantities may cause irritation of the digestive tract, and signs of nervous system depression (headache, drowsiness, dizziness, loss of coordination, and fatigue).
>
> "SKIN CONTACT: This material is a skin irritant. Direct contact may cause redness or burning, drying and cracking of the skin.
>
> * * *
>
> **"CHRONIC HEALTH EFFECTS:**
>
> Laboratory studies have shown that petroleum distillates may cause kidney, liver, or lung disease. Reports have associated repeated and prolonged overexposure to solvents with permanent brain and nervous system damage. Not listed as a carcinogen by the NTP, IARC, or OSHA."

The MSDS also stated that respirators should be worn when the airborne concentration of the lacquer thinner exceeded 100 ppm and that neoprene or rubber gloves should be worn if prolonged skin contact was likely. The MSDS stated that lacquer thinner produced vapors heavier than air that could travel long distances.

28) In December 1996, Complainant asked Oeder for a copy of the MSDS for lacquer thinner to take to a doctor's appointment. Oeder told her superiors that Complainant was asking for documentation on the lacquer thinner. The next day, Complainant received a letter from Oeder stating that Respondent would not accept responsibility for any condition Complainant then was experiencing because she had not been in the facility since November 21, 1996. Oeder stated that Respondent "would actively deny any claim for a work related injury." Complainant did not file a Workers' Compensation claim based on exposure to lacquer thinner.

29) Oeder's letter to Complainant stating Respondent would deny a claim for a work-related injury was dated December 19, 1996. According to Oeder, Respondent stopped using lacquer thinner that same day because Med-Tox personnel had reported verbally that the levels of lacquer thinner were too high.

30) By letter dated January 7, 1997, Oeder informed OR-OSHA that Respondent was waiting for written results from air testing conducted on December 18, 1996. In the interim, Oeder stated, Respondent had removed all lacquer thinner from the building and was testing possible substitute metal cleaners. Oeder's letter also stated that "[t]he employee complaining of headaches was temporarily reassigned." At the hearing, Oeder testified that the employee referred to in the letter was

Complainant. She further testified that she had written the letter at the direction of her former manager, Lyle Haas, and had used the wording he specified.

31) On January 9, 1997, Oeder sent Complainant a letter stating that Respondent had an opening in production, and asking Complainant to return to work on January 13. Oeder testified that she sent the letter because Respondent's production had increased and it was adding staff to the MHD line.

32) In a February 3, 1997, letter, Respondent's plant manager informed OR-OSHA that Respondent had removed lacquer thinner from its facility. Wolf-McCormick deemed the letter to be a satisfactory response. She sent Respondent a letter dated February 10, 1997, stating that no on-site inspection was then planned.

33) Wolf-McCormick testified regarding the health hazards posed by exposure to toluene, which is a component of the lacquer thinner used by Respondent. Toluene exposure can occur four ways: absorption through skin; inhalation; ingestion; and contact with the eyes or mucus membranes. Most exposure comes through skin contact, not through inhalation. Symptoms of exposure to toluene include irritation to the eyes and nose, fatigue, weakness, confusion, euphoria, dizziness, headache, dilated pupils, tearing of the eyes, nervousness, muscle fatigue, insomnia, dermatitis, and kidney/liver damage. Most of these symptoms (except eye/nose irritation) can be caused by any of the four types of exposure. One study has indicated that toluene is absorbed more quickly into the skin when it is combined with methanol. Wolf-McCormick also testified that it is the employer's responsibility to determine whether chemicals in the workplace present a hazard, and to supply any necessary protective equipment.

34) The National Institute of Occupational Safety and Health ("NIOSH") has recommended that the short-term exposure limit for toluene in the air be set at 150 ppm over 15 minutes. OSHA has set a permissible exposure limit at 200 ppm, based on an 8-hour time-weighted average; it also has set an instantaneous exposure limit at 300 ppm. According to NIOSH, a toluene level of 500 ppm presents an immediate danger to life or health. Studies indicate that five to ten minutes of skin exposure to toluene is equivalent to eight hours of exposure to air containing 100 ppm of the chemical.

35) In a document dated January 20, 1997, Med-Tox reported the results of its December 18, 1996, analysis of the air in the frame assembly and cleaning areas of Respondent's MHD Department. Med-Tox's tests indicated that toluene exposure levels exceeded the permissible exposure limit of 200 ppm. Peak readings for toluene exposure were as high as 2,000 ppm.

36) Wolf-McCormick testified that, if she observed workers getting lacquer thinner on their hands throughout the day, with the opportunity to wash it off only during breaks, she probably would cite the workers' employer for a serious violation of OSHA rules. In Respondent's case, there was no on-site investigation, and Respondent was not cited for exposing its workers to toluene.

37) Complainant returned to work at Respondent's facility on January 13, 1997. Complainant went back to work in the door frame area, where lacquer thinner no longer was being used. Complainant still was bothered by the spray paint used in the door frame department; she eventually was transferred to the screen department and also has worked in the shipping area. Complainant now is on light duty work pursuant to a Workers' Compensation claim.

38) Respondent's business typically slows down during the winter months, resulting in some layoffs. At all material times, Respondent's policy was to base layoffs and recalls on seniority, with two exceptions: 1) employees would not be placed in jobs they were not physically capable of performing; and 2) employees with prior training might be recalled a day or two before others. Respondent's Product Teammember Handbook (dated 1996) stated:

> "If you are displaced as a result of a lay-off, you would normally be allowed to exercise your seniority to replace the least senior employee in the plant, provided you have the skill, ability, and training necessary to perform the essential functions of that position. In no instance may you bump another employee from a job occupation of higher pay rate. In all cases you must be capable of learning the work within a reasonable length of time."

39) Oeder testified that Complainant was given the first permanent, long-term position that had opened in the MHD Department since Complainant's layoff. She also testified that Respondent hired no new employees from November 21, 1996, through January 13, 1996.

40) Respondent's records demonstrate that it transferred two employees (Jesse Smith and Erik Kvistad) with less seniority than Complainant into the MHD Department on January 6, 1997. Respondent's records also indicate that another employee with less seniority than Complainant (Kay Martinez) quit working in MHD in December 1996 and was rehired into MHD starting on January 10, 1997. In addition, three MHD employees with less seniority than Complainant were not laid off during the winter of 1996-1997. After explaining these records, Oeder testified that Complainant's layoff was not based on seniority, it was based on her refusal to work in the MHD line.

41) During the duration of Complainant's layoff, Respondent also shifted several employees from other departments into the MHD Department to work on a day-to-day basis; this occurred almost every day.

42) Complainant's testimony regarding the use of lacquer thinner at Respondent's facility was corroborated by several other witnesses, including Joe Pikl, who, at the time of the hearing, had been employed by Respondent for just under ten years. He worked in the MHD Department as a group leader while Complainant worked there. Pikl, too, used lacquer thinner to clean door frames. The lacquer thinner came into contact with his skin; he did not use gloves because Respondent did not have gloves that would fit his hands. Before Complainant was laid off, nobody in management instructed Pikl to take any precautions while using the lac-

quer thinner. Nor did management personnel inform Pikl that the lacquer thinner could cause health problems.

43) Pikl got headaches and became a little "spaced out" when using lacquer thinner. At times, he complained to Robert Young about this. Pikl also heard many other employees complain to Young, Slusser, and himself about the lacquer thinner. The Forum has accepted Pikl's testimony, and its determination that the testimony is credible is not swayed by Slusser's testimony that Pikl was demoted about two years prior to the hearing. No evidence was presented that Pikl resented Respondent or had a motivation to misrepresent facts during the hearing.

44) Bernice Richards started working for Respondent in May 1995 and worked in the door frame department with Complainant. Richards' duties included using lacquer thinner to wash down door frames; she did not wear gloves while performing that job and got lacquer thinner on her hands every time she used it. Richards testified credibly that nobody in management ever said that employees should take precautions while using lacquer thinner or spray paint. After Complainant was laid off, a safety meeting was held and Oeder told employees that they should wear gloves. Richards testified that, after the safety meeting, employees used gloves "at first."

45) While Richards worked in the door frame department, she suffered from headaches and diarrhea. After Complainant was laid off, Richards was assigned to clean door frames. She told Slusser that she did not want that job because it made her sick. Slusser did not respond. Richards quit working for Respondent in December 1996; at that point, Respondent had stopped using lacquer thinner.

46) The forum found Complainant's testimony to be credible in all material respects. Her testimony regarding the adverse effects of lacquer thinner was confirmed by the testimony of several other witnesses, including Richards, Pikl, and Wolf-McCormick, as well as the MSDS sheets for that compound. In addition, Complainant did not appear to embellish her complaint about Respondent, readily acknowledging that, until November 21, 1996, Respondent's supervisory employees had accommodated her desire not to work with or around the lacquer thinner. Throughout the hearing, Complainant testified in a forthright and straightforward manner.

47) Not all of Carol Oeder's testimony was credible, and she sometimes seemed to be straining to rationalize the actions she had taken. For example, Oeder's testimony regarding Complainant's November 21, 1996, request for a transfer was internally inconsistent and, at times, appeared designed to protect Respondent's interests rather than to provide an accurate description of events. Specifically, Oeder testified that, although Complainant had asked only for a transfer to somewhere that lacquer thinner was not used, she believed Complainant's use of the word "transfer" meant that she wanted to be transferred out of MHD, and would not accept a job anywhere in that department. Oeder also testified both that Complainant was laid off because she did not want to work anywhere in the MHD Department

and, more narrowly, that Complainant would not have been laid off if she had not refused to clean door frames. In addition, Oeder wrote a highly misleading letter to OR-OSHA, stating that Complainant had been "temporarily reassigned" after she complained of headaches when, in fact, Complainant had been laid off. In her testimony regarding that letter, Oeder attempted to rationalize what she had written, claiming the letter was not entirely inaccurate because Complainant *had* been temporarily reassigned, albeit to layoff status. Given the inconsistent, evasive, and defensive nature of much of Oeder's testimony regarding the material facts, the Forum has given it little weight except where it was corroborated by other credible evidence.

48) The testimony of Rondeeda Magby was not wholly credible. She testified that she had no doubt that Complainant had stated that she needed to be transferred out of the MHD Department immediately. However, the notes that Magby wrote during her conversation with Complainant state only that Complainant said she was bothered by fumes when painted doors (the ones that were cleaned with lacquer thinner) came through, and that she wanted a transfer. The notes do not reflect any statement by Complainant that she could not work anywhere in the MHD Department. Magby and Oeder both testified that the Human Resources Department generally became involved with employee work assignments only when an employee wanted to be transferred from one department to another, and not when an employee wanted only to switch job assignments within a particular department. Given the severe health problems Complainant had suffered, however, the Forum finds credible Complainant's testimony that she asked Magby and Oeder for assistance in getting a job assignment that did not involve working with or around lacquer thinner, whether that job was in the MHD Department or elsewhere. The Forum gives no weight to Magby's testimony to the contrary.

49) One of Respondent's current production employees, Angela Cruz, testified for Respondent. Cruz stated that she worked with lacquer thinner and wore gloves all the time. Cruz testified that she never complained to her supervisors about the lacquer thinner and never had heard anybody else complain. On cross-examination, Cruz acknowledged that she had been provided with gloves, but had not been told why she might want to wear them. Cruz was not told that there were health hazards associated with getting lacquer thinner on her skin. The Forum gave little weight to Cruz's testimony that she never had heard anybody complain about lacquer thinner, in light of Complainant's, Richards, and Pikl's credible testimony that several employees complained about the chemical.

50) Robert Young was Respondent's production supervisor for many years. In that position, he was responsible for training employees on safety matters. He was aware that employees could be exposed to lacquer thinner by inhalation and by absorption through the skin; he also was aware of the risks of exposure. At the time that Complainant worked with lacquer thinner, Young was not

aware whether the level of lacquer thinner fumes in the plant was hazardous.

51) Young's testimony regarding safety matters and the events leading up to Complainant's layoff was not wholly credible. Young testified that employees who worked with lacquer thinner were supposed to wear gloves and were reprimanded when they did not. Young could not, however, remember the name of any employee he had reprimanded for not wearing gloves. In addition, no non-supervisory employee confirmed Young's testimony on this point, and even Respondent's own witness, Angela Cruz, testified that she was only told that she could wear gloves if she chose to. Young's testimony about what happened on November 21, 1996, also was not credible. He testified that Complainant had told Slusser that lacquer thinner fumes were bothering her throughout the MHD Department. Complainant testified to the contrary that she had complained to Slusser only when she was assigned to work with or near the door frames because the employees who normally handled that task for her were absent from work. Complainant's testimony on this point is supported by her uncontroverted statement that, after she refused to work on door frames, she started helping out in the MHD fabrication area, and would have kept working there had Oeder not told her that she had to choose between working with door frames or taking a voluntary layoff. Complainant also testified credibly that there were several areas within the MHD Department where the lacquer thinner did not bother her. Finally, the Forum has given no weight to Young's testimony that Complainant stated specifically in the November 21 meeting that she could not work anywhere in the MHD Department; nor has the Forum given any weight to Young's hand-written note containing a similar assertion. Young's testimony and note are not corroborated by any other credible evidence. Even Oeder testified only that she *interpreted* Complainant's statements to mean that she did not want to work in the MHD Department; she admitted that Complainant had not stated directly that she would not work there. For these reasons, the Forum has given no weight to Young's testimony regarding these matters except where it was corroborated by other credible evidence.

52) The testimony of Adam Slusser, who was Complainant's production supervisor in 1996, was not wholly credible. Slusser testified that the company held daily safety meetings in 1996, and that the safety meetings included training on use of lacquer thinner. He also testified that all workers at Respondent's facility were aware of short- and long-term health hazards posed by the lacquer thinner. He, like Young, testified that all workers were supposed to wear gloves at all times. No non-supervisory employee corroborated Slusser's testimony on these matters, and Pikl, Complainant, Richards, and Cruz gave credible testimony to the contrary. Slusser testified that, on November 21, Complainant stated that she no longer could work anywhere in the MHD Department. He included the same assertion in a hand-written note. The Forum has given no weight to Slusser's testimony or note, given the

uncontroverted and credible testimony of Complainant that, after complaining about the lacquer thinner fumes on November 21, she assisted other employees in the fabrication area in the MHD Department. Had Complainant believed she could not safely work anywhere in MHD, she would not have continued working in fabrication.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was a corporation that had one or more employees within the State of Oregon.

2) In early 1996, Respondent employed Complainant to work in the MHD Department of its Stayton, Oregon manufacturing facility.

3) Employees working in the door frame area of Respondent's MHD Department used lacquer thinner on a regular basis. Exposure to lacquer thinner (through skin absorption, inhalation, ingestion, or contact with the eyes or mucus membranes) can cause serious short- and long-term medical problems. Complainant and other employees suffered at least some of those adverse health effects when they worked with the chemical.

4) On November 21, 1996, Complainant informed her supervisor and Respondent's Human Resources Director that she no longer would work in the door frame area because she was made ill by the lacquer thinner. Complainant asked to be transferred to any other area in Respondent's facility where lacquer thinner was not used.

5) Respondent refused Complainant's request to be transferred to an area where lacquer thinner was not used. Respondent ordered Complainant to either work in the door frame area or take a "voluntary layoff."

6) Complainant reasonably believed she would suffer serious adverse health effects if she returned to work in the door frame area, and refused to do so. Respondent laid Complainant off work because of her refusal to work in the hazardous environment present in the door frame area.

7) Respondent rehired Complainant on January 13, 1997.

8) At the time Complainant was laid off, Respondent had employees working both inside and outside the MHD Department who had less seniority than Complainant.

9) During the period of Complainant's layoff, Respondent gave other employees temporary assignments in the MHD Department.

10) Complainant's final rate of pay was $ 7.50 per hour. She was regularly scheduled to work 40 hours per week, Monday through Friday, and occasionally worked overtime. From November 21, 1996 (a day on which Complainant lost 3 3/4 hours of pay), to January 10, 1997, Complainant lost wages of $2098.13, comprised of $2008.13 in regular pay ($7.50 per hour times 8 hours per day equals $60.00 per day; November 22, 1996, to January 10, 1997, was a period that included 33 week days, not including Thanksgiving, Christmas, and New Year's Day; 33 days times $60.00 per day equals $1980.00, plus $7.50 per hour times 3 3/4 hours lost on November 21, 1996, equals $2008.13) and $90.00 for the 8 overtime hours that Complainant had

been scheduled to work on November 23, 1996.

11) Complainant suffered financial distress, prolonged unemployment, depression, and anger because of the lay-off based on her refusal to work in hazardous conditions that posed a serious threat to her health.

CONCLUSIONS OF LAW

1) At all material times, Respondent was an employer and a person subject to the provisions of ORS 654.001 to 654.295, including ORS 654.062. ORS 654.005(5), (7).

2) Complainant was an employee of Respondent entitled to the protections of ORS 654.001 to 654.295. ORS 654.005(4).

3) 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 654.062(5)(b); ORS 659.040 *et seq*.

4) ORS 654.062(5)(a) provides, in pertinent part:

> "It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because such employee has opposed any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780 * * *."

ORS 654.010 provides:

> "Every employer shall furnish employment and a place of employment which are safe and healthful for employees therein, and shall furnish and use such devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably necessary to render such employment and place of employment safe and healthful, and shall do every other thing reasonably necessary to protect the life, safety and health of such employees."

ORS 654.015 provides:

> "No employer or owner shall construct or cause to be constructed or maintained any place of employment that is unsafe or detrimental to health."

OAR 839-006-0020 provides:

> "(1) ORS 654.062(5) prohibits discrimination against an employee because the employee "opposed" health and safety hazards in the workplace. OSEA does not specify to whom or in what manner an employee can oppose health and safety hazards and be protected. Therefore, what constitutes opposition covers a broad range of activities. For example, an employee may oppose health and safety hazards in a discussion with co-workers that is overheard by management, in a letter to a newspaper read by management or by written protest given to the employer. The concern of ORS 654.062(5) is not with how the opposition is made but with the employer's reaction to the opposition.
>
> "(2) Although OSEA does not specify the manner of opposition, the protection of ORS 654.062(5) does not cover an employee who opposes health and safety haz-

> ards by refusing to work or by walking off the job, ***except where an employee may be confronted with a choice of either refusing to do assigned tasks or risking serious injury or death because of a hazardous condition at the workplace, not inherent in the job."***

(*Emphasis added*). By giving Complainant the choice of either continuing to work with lacquer thinner in the door frame area or taking a "voluntary" layoff, Respondent violated ORS 654.062(5). Respondent also violated ORS 654.062(5) by laying off Complainant rather than giving her a different assignment (not involving the use of lacquer thinner) and laying off a less senior employee.

5) The actions, inactions, statements, and motivations of Carol Oeder, Robert Young, Adam Slusser, and Joe Pikl properly are imputed to Respondent.

6) Pursuant to ORS 654.062, 659.010(2), 659.040, and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages resulting from Respondent's unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and 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

Unlawful Employment Practice

ORS 654.062(5) prohibits employers from discharging or otherwise discriminating against employees who oppose or complain about practices forbidden by the Oregon Safe Employment Act. To prove a violation of ORS 654.062(5), the Agency need not establish that the employee opposed conditions that actually violated a statute or an OR-OSHA rule. *Butler v. Dept. of Corrections*, 138 Or App 190, 201, 909 P2d 163 (1995). Rather, the Agency need prove only "retaliation for a reasonable refusal to work due to safety concerns * * *." *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61, 83 (1982); *see Butler*, 138 Or App at 201 ("if plaintiff can establish that he suffered discrimination at his employment because he made a complaint 'related to' safe and healthful working conditions, he has met the elements necessary to establish a claim under ORS 654.062(5)(a)").

In this case, Complainant's fears about working with the lacquer thinner, which contained toluene, were objectively and subjectively reasonable. On December 18, 1996, Med-Tox determined that the concentration of toluene fumes in the door frame area sometimes was as high as 2000 ppm -- four times greater than the level that presents an immediate danger to life or health. No evidence in the record suggests that toluene levels were significantly higher on December 18, 1996, than they had been on November 21, 1996, the day on which Complainant refused to continue working in the door frame area. The protection of ORS 654.062(5) extended to Complainant because she was confronted with a choice of either refusing to work in the door frame area or risking serious injury from exposure to lacquer thinner. *See* OAR 839-006-0020(2); *In the Matter of*

Rare Construction Incorporated, 12 BOLI 1, 10 (1993); *Snyder Roofing*, 11 BOLI at 83.

Respondent argues that it may have violated OR-OSHA rules, but that its discharge of Complainant did not constitute retaliation against her for opposing an unsafe working condition. According to Respondent, it was entitled to lay off Complainant when she refused to work in the MHD Department because there were no job openings in other areas of Respondent's facility.

Respondent's argument fails both on the facts and on the law. First, the Forum has accepted Complainant's testimony that she did not refuse to work in all areas of the MHD Department; she refused only to work in those positions that involved exposure to lacquer thinner. Evidence in the record demonstrates that, during the period of Complainant's layoff, Respondent shifted employees from other areas of its facility to work in the MHD Department. The Forum infers from this evidence that Respondent could have kept Complainant employed within the MHD Department, and could have continued its previous practice of having other employees work in the door frame area when lacquer thinner was used. Respondent presented no evidence to the contrary.

In addition, it is clear that Respondent retained employees with less seniority than Complainant when it discharged her for refusing to work in the door frame area. Respondent's employee handbook states that, when layoffs occur, senior employees are entitled to displace junior employees in other positions. Respondent's failure to offer Complainant a position held by an employee with less seniority confirms that it retaliated against Complainant for opposing unsafe working condition.[1]

Moreover, even if Respondent could not have employed Complainant elsewhere in its facility, it violated ORS 654.062(6) by insisting that she either work with door frames or take a "voluntary layoff." It is well established that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an employee who refuses to work in hazardous conditions, not inherent in the job, that the employee reasonably believes present a risk of serious injury or death. *See* ORS 654.062(5); OAR 839-006-0020 (2); *Rare Construction*, 12 BOLI at 9-10 (1993). The employee's refusal to work in unsafe conditions is "[t]he ultimate form of remonstrance or opposition" to the hazard, *Rare Construction*, 12 BOLI at 9, and the discharge constitutes the ultimate form of discrimination.

Timeliness of Complaint

As its second affirmative defense, Respondent asserted that "Complainant's claim is barred by the applicable statute of limitations." Respondent did not pursue that defense at hearing, and the Forum finds it to be without merit. Respondent laid off Complainant on November 21, 1996. Complainant filed her Complaint on December 20, 1996, within the 30

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[1]The evidence on this point also defeats Respondent's third affirmative defense, that "Complainant was laid off for a legitimate, nondiscriminatory reason." Exhibit X-5.

days specified by ORS 654.062(5)(b). *See* Exhibit A-1.

Damages

Back wages

The Forum has accepted Complainant's evidence regarding the number of hours she would have worked, and the rate at which she would have been paid, had she not been laid off. The Forum's calculation of lost wages is set forth in paragraph 10 of the Ultimate Findings of Fact. The Forum has accepted Complainant's testimony that she had been scheduled to work overtime on November 23, 1996, because no evidence controverted either that testimony or Complainant's testimony that she had worked overtime on previous occasions. Accordingly, the calculation of back wages includes the $90.00 that Complainant would have received had she worked the scheduled overtime. The calculation also includes $28.13 in lost wages for three and three-quarter hours that Complainant would have worked on November 21, 1996, had Respondent not laid her off. The credible evidence submitted by Complainant indicates she was not paid for those hours. Although Oeder testified to the contrary that Complainant was paid for eight hours of work on November 21, Respondent offered no documentation supporting her assertion. The Forum has found Oeder's testimony not to be credible in several respects, and will not rely on it to reduce Complainant's damage award. In sum, the Forum calculates that Complainant lost $2098.13 in wages. It has reduced that amount by two cents to comport with the amount claimed in the Agency's complaint, as amended by motion at the hearing.

As its first affirmative defense, Respondent claimed that Complainant had failed to mitigate her damages. Respondent did not pursue that claim at the hearing, and no evidence in the record suggests that Complainant did not seek other employment during the period she was laid off. Indeed, Complainant received unemployment benefits, and this Forum "has previously observed that continued eligibility for ongoing unemployment benefits requires that the claimant actively seek work." *Snyder Roofing*, 11 BOLI at 83. Respondent did not meet its burden of proving that Complainant failed to mitigate her damages.

Mental suffering

In determining damages for mental suffering, the Commissioner considers "the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused." *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 21, 27 (1997). The Commissioner also considers "a complainant's vulnerability due to such factors as age and work experience." *Id.*

Here, Respondent retaliated against Complainant for her well-founded opposition to severe health hazards. The unlawful practice endured for seven weeks -- the time during which Respondent did not rehire Complainant and continued to utilize the services of less senior employees. Complainant testified credibly and persuasively that she became very angry and depressed as a result of being laid off for her refusal to work in hazardous conditions, and also suffered from feelings of help-

lessness. Before being laid off, Complainant's only reliable source of income had been her wages from Respondent. After the layoff, she had to rely on charity to feed her children and to provide them with Christmas gifts. On these facts, the Forum finds $10,000.00 to be an appropriate amount to compensate Complainant for the mental distress she suffered as a result of Respondent's unlawful employment practice.

Exceptions

The Agency's exceptions

In its first and second exceptions, the Agency suggests that the order should include additional detail regarding the lacquer thinner's adverse health effects. The Forum agrees, and has amended Factual Findings Nos. 27 and 33, although not to the extent proposed by the Agency. In its fourth exception, the Agency suggests that the Ultimate Findings should reflect the fact that lacquer thinner may be harmful whether inhaled, ingested, absorbed through the skin, or brought into contact with the eyes or mucus membranes. The Forum agrees, and has amended Ultimate Finding of Fact No. 3 to include that information.

In its third exception, the Agency states that a quotation of the OR-OSHA administrative rule defining a "serious violation" should be added to the factual findings. The Forum disagrees. It was not necessary for the Agency to prove that Respondent's actions constituted a "serious violation" of OR-OSHA rules, and the administrative rule defining that term need not be included in the order. The Agency's third exception is denied.

The Forum also denies the Agency's fifth exception, in which it asks the Forum to include the word "anxiety" in Ultimate Finding of Fact #11 as a description of one aspect of Complainant's mental suffering caused by Respondent's unlawful employment practice. After reviewing the relevant portions of Complainant's testimony, the Forum has determined that the evidence does not support such a finding.

Finally, the Agency states that Complainant should be awarded $20,000.00 in damages for mental suffering, rather than only $10,000.00. In support of that argument, the Agency relies on both the evidence in the record and descriptions of other recent cases in which the Commissioner awarded damages for mental suffering.

As an initial matter, it is important to note that the Commissioner's previous decisions regarding damages for mental suffering are merely determinations of *fact* -- the degree to which particular complainants experienced mental anguish as the result of particular employment practices. Consequently, those prior awards may not be relied upon as binding "precedent." To imply otherwise suggests, incorrectly, that the Commissioner imposes mental suffering awards to punish employers, not to compensate victims. As the Court of Appeals has explained:

> "Damages for humiliation and mental suffering are damages for actual harm. They are not awarded as a penalty for unlawful discrimination. Whether the Employer acted unreasonably and in bad faith may be relevant in assessing such damages, but the

> evidence must support a finding of humiliation and mental anguish before an award can be made."

Montgomery Ward and Co. v. Bureau of Labor, 42 Or App 159, 600 P2d 452, 454 (1979) (citations omitted), *rev den* 288 Or 81.

It is true that prior cases serve as examples of the types of awards that are within the Commissioner's range of discretion. They also may serve to remind the Commissioner of the amounts of money he previously has determined sufficient to compensate individuals who have experienced particular types of mental or emotional difficulties as the result of unlawful employment practices. Nonetheless, because damages for mental suffering are purely compensatory, the amount to be awarded in any given case is completely dependent upon the facts proved. Two individuals subjected to the same unlawful employment practice might suffer mentally to very different degrees, depending on their ages, prior experiences in the workplace, emotional vulnerability, and other factors.

The Forum has reviewed the evidence regarding Complainant's mental suffering in light of the Agency's sixth exception. As noted above, the Forum has rejected the Agency's argument that Complainant experienced "great anxiety" as the result of Respondent's unlawful employment practice. Complainant did experience depression, financial distress, and anger. The Forum adheres to its determination that $10,000.00 adequately compensates Complainant for that suffering and denies the Agency's exception.

<u>Respondent's exceptions</u>

In its first and second exceptions, Respondent takes issue with the Forum's credibility findings. After considering Respondent's arguments, the Forum declines to change its determinations regarding the various witnesses' credibility, which are explained in the factual findings and opinion, *supra*. The exceptions are denied.

In its third exception, Respondent reasserts its argument that Complainant requested a transfer out of the Mobile Home Door Department. For the reasons set forth in earlier portions of this Opinion and in Findings of Fact Nos. 15, 16, 47, 48, 51, and 52, the Forum denies this exception.

The Forum also denies Respondent's fourth exception, in which it appears to argue that, because the Agency did not present medical evidence supporting the claim of mental suffering, the Forum was not entitled to find that Complainant suffered depression and anger. "[A] lack of medical consultation or a failure to seek counseling goes to the severity of mental suffering, not necessarily to its existence." *In the Matter of Katari, Inc.*, 16 BOLI 149, 161 (1997), *aff'd without opinion* 154 Or App __ (1998). Respondent also suggests that Complainant's seven-week layoff was "short- term" and that Complainant did not suffer financial distress because she received unemployment benefits during that time. The Forum rejects this argument. It is sufficient to note that Complainant was forced to rely on charity to feed her children and provide them with Christmas gifts.

Respondent asserts, in its fifth exception, that "[c]urrent and former

employees of respondent were uniform in their testimony that employees were to wear gloves at all times in handling lacquer thinner." That is not correct. Current employee Joe Pikl and former employee Bernice Richards both testified that they had not worn gloves when they worked with lacquer thinner, and that, before Complainant's layoff, they had *not* been instructed to take any precautions while working with the chemical. The exception is denied.

In its sixth exception, Respondent asserts that the evidence does not support Complainant's claims for lost wages for three and three-quarter hours of work on November 21, 1996, and eight hours of overtime on November 23. The exception is denied. Complainant's testimony regarding Respondent's failure to pay her for an entire day of work on November 21 was credible. Complainant also testified credibly that she had been scheduled to work overtime on November 23. Respondent offered no evidence to the contrary; nor did it provide evidence that overtime work would not have been available to Complainant on that day.

In its seventh exception, Respondent asserts that it had no obligation to provide Complainant with work outside the Mobile Home Door Department and lay off a less senior employee. Respondent further claims that there is no evidence that it discriminated against Complainant in failing to provide her with a position outside that department. The exception is denied. First, the Forum has determined that Complainant did *not* request a transfer outside the Mobile Home Door Department, and that Respondent discriminated against Complainant by laying her off instead of continuing its practice of having her switch jobs with other employees when lacquer thinner was being used in the door frame area. However, even if Complainant had requested a transfer outside the Mobile Home Door Department, Respondent's own policy would have required it to lay off a junior employee so that Complainant could take that transfer. Respondent's witnesses testified that Complainant's request for a transfer was not granted because there were no job openings, due to a seasonal decrease in business. Respondent's employee handbook provided that, in the event of layoffs, senior employees generally would be entitled to replace, or "bump," less senior employees. Respondent's discriminatory animus toward Complainant is evidenced by its failure to give her this opportunity. Finally, as explained in the opinion, *supra*, this Forum consistently has ruled that it is unlawful for an employer to force employees to choose between working in hazardous conditions or being fired. Respondent's seventh exception is denied.

In its eighth exception, Respondent challenges the award of damages for mental suffering. The Forum has reassessed its award in light of exceptions from both Respondent and the Agency, and adheres to its determination that $10,000.00 appropriately compensates Complainant for the depression, anger, and financial distress she suffered. The exception is denied.

Finally, Respondent generally challenges the Proposed Order as not being supported by facts in the record or by applicable law. Based on the

factual findings, legal conclusions, and opinion set forth above, the exception is denied.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3) and to eliminate the effects of Respondent's violation of ORS 654.062(5)(a), as well as to protect the lawful interest of others similarly situated, the Commissioner of the Bureau of Labor and Industries hereby orders TOMKINS INDUSTRIES, INC. to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in trust for Mary D. Koon in the amount of:

a) TWO THOUSAND NINETY-EIGHT DOLLARS AND ELEVEN CENTS ($2,098.11), less appropriate lawful deductions, representing wages Complainant lost from November 21, 1996, through January 10, 1997, as a result of Respondent's unlawful practice found herein; plus

b) Interest at the legal rate on said wages from January 10, 1997, until paid, computed and compounded annually; plus

c) TEN THOUSAND DOLLARS ($10,000.00), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice found herein; plus

d) Interest on said damages for mental suffering 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 employee because that employee has reported or opposed unsafe practices in the work place.

3) Post in a conspicuous place on the premises of Respondent's manufacturing facility in Stayton, Oregon, a copy of ORS 654.062, together with a notice that anybody who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

In the Matter of
PAUL A. WASHBURN,
Diann M. Washburn, and
Washburn Reforestation, Inc.,
Respondents.

Case Number 02-99
Final Order of the Commissioner
Jack Roberts
Issued October 29, 1998.

SYNOPSIS

Respondents, licensed farm/forest labor contractors, violated ORS 658.440(1)(g) by failing to execute written agreements with five workers using either Form WH-153 or an equivalent document. The Commissioner ordered Respondents to pay a

$750.00 civil penalty for each of the five violations, for a total of $3,750.00. ORS 658.440(1)(f) and (g).

The above-entitled contested case came on regularly for hearing before Administrative Law Judge (ALJ) Warner W. Gregg. The hearing was held on September 15, 1998, in the conference room of the State of Oregon Adult and Family Services Division, 3600 East Third Street, Tillamook, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Washburn Reforestation, Inc. (Washburn Reforestation), Paul Washburn, and Diann Washburn (collectively, "Respondents") were represented by Mark Comstock, Attorney at Law. Paul Washburn and Diann Washburn were present throughout the hearing.

The Agency called one witness: Katy Bayless, a Compliance Specialist with the Agency. Respondents called Paul Washburn and Diann Washburn as witnesses.

Administrative exhibits X-1 to X-8 were offered and received into evidence. The participants stipulated to Agency exhibits A-1 to A-6 and Respondent exhibits R-1 to R-17, and the ALJ received each of those exhibits into evidence. The record closed on September 15, 1998.

Having fully considered the entire record in this matter, I, Jack 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 June 29, 1998, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to Respondents. The Notice of Intent cited the following basis for the assessment: "Failure To Execute A Written Agreement Containing The Terms And Conditions Of Employment For Each Worker At The Time Of Hire Or Prior To Work Being Performed. **(Five Violations)** * * * **CIVIL PENALTY of $5000.00 (Five violations @ $1,000 per violation); OAR 839-15-508(1) (h).**" The Notice of Intent stated that Respondents had 20 days from the date they received the Notice to request a contested case hearing.

2) The Notice of Intent was served on all Respondents on July 2, 1998.

3) By letter dated July 21, 1998, attorney Mark B. Comstock notified the Agency that he represented all Respondents in this matter. In that letter, the Respondents each requested a hearing on the Agency's intended action. Respondents enclosed with the letter their Answer and Affirmative Defenses. The Agency received the letter and enclosures on July 22, 1998.

4) On July 31, 1998, the Agency requested a hearing from the Hearings Unit. On August 6, 1998, the ALJ issued to Respondents and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing. With the hearing notice, the Hearings Unit sent to Respondents a "Summary 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 839-050-0000 through 839-050-0440.

5) On August 27, 1998, the ALJ issued a discovery order to the participants directing them each to submit a summary of the case, including: 1) a list of the witnesses to be called; 2) the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence; and 3) a statement of any agreed or stipulated facts. The summaries were due by September 8, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary. The Agency and Respondents submitted timely summaries.

6) At the start of the hearing, Respondents' attorney said he had received and read the Summary of Contested Case Rights and Procedures and had no questions about it.

7) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

8) At the close of the Agency's case, Respondents moved to dismiss on the ground that the Commissioner lacked jurisdiction. Respondents also moved to strike the Agency's request for enhanced penalties. The ALJ denied both motions for reasons explained in the Opinion section of this order.

9) Pursuant to OAR 839-50-360 and the motion of Respondents' attorney, the ALJ requested written closing arguments from Respondents and the Agency, to be filed by September 25, 1998.

10) On or about September 23, 1998, the ALJ orally agreed to extend the due date for written argument until September 28, 1998, pursuant to a stipulation of counsel for Respondents and case presenter Lohr. Respondents and the Agency submitted timely written arguments.

11) On October 6, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. By the terms of the proposed order and in accordance with OAR 839-050-0380, exceptions were due by October 16, 1998, unless a request for extension of time was submitted no later than that day. OAR 839-050-0050(2). The Forum received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At all material times, Respondent Washburn Reforestation, Inc., was a corporation registered in the State of Oregon. Respondent Paul Washburn was president of the corporation and was responsible for management of all its activities. Respondent Diann Washburn was the corporation's secretary and managed its payroll and accounts. Paul and Diann Washburn were the sole shareholders of Washburn Reforestation.

2) At all material times, Respondents were licensed as a farm/forest labor contractor in Oregon. Respondents employed between 40 and 100 persons to perform forestation and re-

forestation activities, including tree planting, precommercial thinning, slash burning, wildfire suppression, and chemical operations. Ninety percent of Respondents' business involved performing forestation/reforestation contracts with private parties. Ten percent of Respondents' business involved performing state and federal contracts, including contracts with the United States Forest Service.

3) Respondents own two or three acres of land that is planted in Christmas trees. Except when they worked with those trees, Respondents' workers performed labor on land that Respondents did not own or operate. Respondents' workers always were supervised by Respondents' foremen; no other party controlled or directed their work.

4) Respondents generally expected their workers to work 40 hours per week throughout the year and did not employ workers on a limited-duration basis. Workers would move from one type of job (*e.g.,* thinning) to another (*e.g.*, planting) based on the time of year and the work available. The workers' hourly pay rates depended on their experience and the type of work they performed. A typical starting wage was $7.00 per hour. Respondents did not provide workers with housing or day care services.

5) Respondents required workers to provide certain personal equipment, including boots. Respondents purchased these items in bulk and permitted (but did not require) workers to purchase them from Respondents, with payment made by payroll deduction. At material times, Respondents did not have workers sign payroll deduction authorization forms before making those deductions. By the time of the hearing, Respondents had changed their practice and required workers to sign a deduction authorization form if they wished to take payroll draws or have the cost of equipment deducted from their paychecks.

6) ORS 658.440(1)(f) requires farm/forest labor contractors to furnish each worker with a written statement that describes certain terms and conditions of employment. ORS 658.440 (1)(g) requires farm/forest labor contractors to execute written agreements with workers containing those terms and conditions.

7) The Agency has developed forms that employers may use to fulfill the requirements of ORS 658.440(1)(f) and (g). Form WH-151 describes, in narrative form, the rights of employees of farm/forest labor contractors. Farm/forest labor contractors may use that form to satisfy the requirements of ORS 658.440(1)(f), or they may use another document that includes all required information.

8) When completed and executed by both parties, Form WH-153 is a contractual agreement between the farm/forest labor contractor and its worker. Farm/forest labor contractors may use that form to satisfy their obligations under ORS 658.440(1)(g), or they may use a different document that incorporates all elements of that form. Form WH-153 specifies, among other things: the worker's rate of pay; whether bonuses may be given; whether personal loans will be made; whether housing, health and day care services are provided; the starting and approximate ending

dates of employment under the agreement; the working days and hours; whether the worker must provide necessary equipment and clothing; whether the worker may purchase any such equipment and clothing from the contractor; whether a labor dispute exists at the worksite; and the owner of the land or operation for the job. By signing Form WH-153, "[t]he parties agree that worker rights and remedies enumerated on Form WH-151 are incorporated in this agreement by reference * * *."

9) On January 13, 1997, Respondent Paul Washburn signed a certification of compliance, certifying that he had read and understood Forms WH-151 and WH-153 and would, "in accordance therewith, provide this information to all subject workers as required by law." On February 3, 1997, Respondent Diann Washburn signed a substantively identical certification. Paul Washburn signed similar certifications each year from 1986 through 1996. Diann Washburn signed similar certifications each year from 1993 through 1996.

10) Respondents required their workers, at the time of hire, to sign form WH-151, a copy of Washburn Reforestation's early return to work policy, and a copy of Washburn Reforestation's personnel policy manual.

11) Respondents did not enter written agreements with their workers using Form WH-153. Either Paul Washburn or one of Respondents' foremen told workers their hourly pay rate when they "came on board." Workers received that information in writing only when they were paid.

12) In 1997, Washburn Reforestation employed Hector Alvarez, Benjamin Garcia, Salvador Garcia, Armando Martinez, and Victor Hernandez. At the time they were hired, each of those five workers signed English or Spanish versions of Form WH-151, Washburn Reforestation's early return to work policy, and its personnel policy manual.

13) On May 15, 1997, the Immigration and Naturalization Service ("INS") inspected Respondents' job site and detained Alvarez, Benjamin Garcia, Salvador Garcia, Martinez, and Hernandez. May 14, 1997, was the five workers' last day of employment by Washburn Reforestation.

14) In July 1997, Katy Bayless, a Compliance Specialist with the Agency, began an investigation of Washburn Reforestation because she had learned that the INS had deported some of Washburn Reforestation's workers. By letter dated July 2, 1997, Bayless asked Respondents to furnish various records, including copies of Forms WH-151 and WH-153 "for each and every employee that appears on your payroll recvords (*sic*) for contracts performed under the definition (ORS 658.440) farm/forest labor activity." Bayless did not ask for documents that might be the equivalent of Form WH-153.

15) By letter dated July 8, 1997, Diann Washburn, in her capacity as corporate secretary of Washburn Reforestation, responded to Bayless's letter and enclosed some of the requested records.

16) On August 27, 1997, Bayless called Diann Washburn and left a message for her to send the WH-151 forms for the five detained

employees, as well as the WH-153 forms or a statement why they were not used. On August 29, Diann Washburn responded to Bayless's request and enclosed the WH-151 forms for each of the five employees in question. Diann Washburn's letter stated that Respondents did not use Form WH-153 because it "would have to be completed with each new job, which could be a daily or weekly project with as many as 100 employees, in as many as 10 different job sites," because Respondents "do not have any seasonal positions," and because "[e]ach individual job may last anywhere from one to thirty days, depending upon the contract." Diann Washburn also asserted that Respondents paid all of their employees "well above minimum wage." During their telephone conversations, Bayless did not ask Diann Washburn to provide any documents that were equivalent to Form WH-153, and Diann Washburn did not assert that Respondents had provided the workers with any such documents. Bayless believed that, because she had asked for Form WH-153, Diann Washburn would understand that she should provide any equivalent document that existed.

17) By letter dated September 9, 1997, Bayless asked Diann Washburn to provide additional records, including payroll deduction authorizations for clothes and boots for Hector Alvarez, Salvador Garcia, and Victor Hernandez, as well as the deduction authorization for an employee loan to Victor Hernandez.

18) With her September 15, 1997, response to Bayless's letter, Diann Washburn enclosed various documents related to the payroll deductions. The documents Diann Washburn provided did not include employee authorizations of those deductions.

19) In their Answer, Respondents asserted as an affirmative defense that each of the five workers had "receive[d], acknowledged and executed a copy of the personnel handbook finding the terms and conditions of employment prior to commencing any services to respondents."

20) The introduction to Respondents' personnel policy manual states that it "<u>is not a contractual agreement</u> as to terms or duration of employment." (*Underscoring in original*). It also states that "Washburn Reforestation, Inc., reserves the right to make additions and deletions to this policy without prior notice to the employee." The manual further provides: "No one is authorized to make any representations concerning terms and conditions of employment with the company, unless set forth in a written document approved and signed by the company president." The Spanish-language version of the personnel policy manual is an accurate translation, although it includes some words not commonly used in migrant worker populations.

21) The personnel policy manual does not include information regarding: the name and address of the owner of all operations where a worker would be working; the workers' hourly pay rate and the method of computing the rate of compensation; the location of the job to be performed; the approximate term of the job; or a statement of the workers' rights and remedies. The manual does: state that worked time over 40 hours per week would be paid at one

and one-half times the regular hourly rate; identify Washburn Reforestation as the employer; state that productivity bonuses might be paid at the employer's discretion; and identify required equipment that workers must supply.

22) At all material times, there was no wage dispute between Respondents and any of their workers. It appeared to Bayless that each of the deported workers had received his wages and had received any boots or other equipment he had purchased. She found no evidence of a loss to the workers.

23) The Agency has not previously determined that Respondents violated wage and hour laws.

24) Respondents Paul and Diann Washburn each testified that they had reviewed Oregon statutes and administrative rules relating to farm/forest labor contractors and believed the personnel policy manual, the early return to work policy, and the WH-151 form provided workers with all information required by statute. Diann Washburn has attended Agency classes on hiring/firing practices and family leave, receives and reviews Agency newsletters, and seeks advice on compliance with wage and hour rules from Associated Oregon Loggers.

25) The $1000.00 penalty the Agency has proposed for each violation charged herein is well under the $2,000.00 that may be assessed for each such violation pursuant to ORS 658.453(1)(c). The Agency determined that the maximum penalty was not appropriate because Bayless believed that Respondents would comply with the requirements of ORS 658.440(1)(g) in the future. Bayless recommended an enhanced penalty only because Respondents had made unauthorized deductions from workers' paychecks, not for reasons related to Respondents' failure to provide all information required by statute. The Agency, however, asserted that the minimum penalty was not appropriate "because of the magnitude and seriousness of the violations, Respondent's knowledge of all of the violations, Respondent's failure to take all necessary measures to prevent or correct violations, and the willful nature of the violations."

ULTIMATE FINDINGS OF FACT

1) During all material times, Respondents were farm/forest labor contractors, as defined by ORS 658.405(1), doing business in the State of Oregon.

2) With regard to each of the five workers, Respondents failed to execute Form WH-153 (Agreement Between Contractor and Workers), or any written agreement incorporating the statutorily required information, at the time of hiring and prior to the worker performing work for Respondents.

3) Respondents knew or should have known that they were legally required to execute written agreements with their workers. Their failure to execute the agreements was willful.

4) Respondents cooperated with the Agency's investigation and intend to comply with the requirements of ORS 658.440(1)(g) and OAR 839-015-360 in the future.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over this matter and Respondents pursuant to ORS 658.407.

2) As licensed farm/forest labor contractors, Respondents were and are subject to the provisions of ORS 658.405 to 658.503 and ORS 658.830.

3) The actions, inactions, and statements of Respondents Paul Washburn and Diann Washburn properly are imputed to Respondent Washburn Reforestation because they were made within the course and scope of the Washburns' roles as Washburn Reforestation's president and secretary.

4) ORS 658.440(1) provides, in relevant part:

"Each person acting as a farm labor contractor shall:

* * *

"(f) Furnish to each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement in the English language and any other language used by the farm labor contractor to communicate with the workers that contains a description of:

"(A) The method of computing the rate of compensation.

"(B) The terms and conditions of any bonus offered, including the manner of determining when the bonus is earned.

"(C) The terms and conditions of any loan made to the worker.

"(D) The conditions of any housing, health and child care services to be provided.

"(E) The terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof.

"(F) The terms and conditions under which the worker is furnished clothing or equipment.

"(G) The name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied or employed by the farm labor contractor.

"(H) The existence of a labor dispute at the worksite.

"(I) The worker's rights and remedies under ORS chapters 654 and 656, ORS 658.405 to 658.503 and 658.830, the Service Contract Act (41 U.S.C. 351-401) and any other such law specified by the Commissioner of the Bureau of Labor and Industries, in plain and simple language in a form specified by the commissioner.

"(g) At the time of hiring and prior to the worker performing any work for the farm labor contractor, execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in paragraph (f)(A) to (I) of this subsection. The written agreement shall be in the English language and any other language used by the farm labor contractor to communicate with the workers."

OAR 839-015-310 provides:

"(1) Every Farm and Forest Labor Contractor must furnish each worker with a written statement of the worker's rights and remedies under the Worker's Compensation Law, the Farm and Forest Labor Contractor Law, and Federal Service Contracts Act, The Federal and Oregon Minimum Wage Laws, Oregon Wage Collection Laws, Unemployment Compensation Laws, and Civil Rights laws. The form must be written in English and in the language used by the contractor to communicate with the workers.

"(2) The form must be given to the workers at the time they are hired, recruited or solicited by the contractor or at the time they are supplied to another by the contractor, whichever occurs first.

"(3) The Commissioner has prepared Form WH-151 for use by contractors in complying with this rule. The form is in English and Spanish and is available at any office of the Bureau of Labor and Industries."

OAR 839-015-360 provides:

"(1) Farm and forest labor contractors are required to file information relating to work agreements between the farm and forest labor contractors and their workers with the bureau.

"(2) The commissioner has developed Form WH-153 which, in conjunction with Form WH-151, Statement of Workers Rights and Remedies, can be used to comply with this rule. Farm and forest labor contractors may use any form for filing the information so long as it contains all the elements of Form WH-153 and Form WH-151.

"(3) Farm and forest labor contractors must file the form or forms used to comply with this rule with the bureau at the same time that the contractors apply for a license renewal.

"(4) Farm and forest labor contractors are required to furnish their workers with a written statement disclosing the terms and conditions of employment, including all the elements contained in Form WH-151 and if they employ workers, to execute a written agreement with their workers prior to the starting of work. The written agreement must provide for all the elements contained in Form WH-153. A copy of the agreement and the disclosure statement must be furnished to the workers in English and in any other language used to communicate with the workers. The disclosing statement must be provided to the workers at the time they are hired, recruited or solicited or at the time they are supplied to another by that contractor, whichever occurs first. Amended disclosure statements must be provided at any time any of the elements listed in the original statement change. A copy of the agreement must be furnished to workers prior to the workers starting work. Nothing in the written agreement relieves the contractor or any person for whom the contractor is acting of compliance with any representation made by the contractor in recruiting the workers."

Respondent violated ORS 658.440 (1)(g) and OAR 839-015-360(4) by

failing to execute written agreements with any of the five workers at the time of hiring and prior to the workers performing work on Respondents' contracts. Respondents' personnel manual does not satisfy the requirements of ORS 658.440(1)(g) both because it is not a written agreement contractually binding on Respondents and because it does not include all the required elements.

5) 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. ORS 658.453(1)(c); OAR 839-015-508(1)(h). With regard to the magnitude of the penalties, OAR 839-015-0510 provides:

> "(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 contractor or other 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 contractor or other person knew or should have known of the violation.
>
> "(2) It shall be the responsibility of the contractor or other 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 contractor or other person in violation of any statute or rule.
>
> "(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor or other person for the purpose of reducing the amount of the civil penalty to be imposed."

The assessment of the civil penalty specified in the Order below is an appropriate exercise of the commissioner's authority.

OPINION

Jurisdiction

ORS 658.407 establishes the scope of the Commissioner's jurisdiction with regard to matters involving farm/forest labor contractors, and provides:

> "The Commissioner of the Bureau of Labor and Industries shall administer and enforce ORS 658.405 to 658.503 and 658.830, and in so doing shall:
>
> "(1) Investigate and attempt to adjust equitably controversies between farm labor contractors and their workers with respect to claims arising under ORS 658.415(3).
>
> "(2) Take appropriate action to establish the liability or lack thereof of the farm labor contractor

for wages of the employees of the farm labor contractor and if appropriate proof exists of liability for wages the commissioner shall pay the same or such part thereof as the commissioner has funds on deposit or cause the surety company to forthwith pay the entire liability or such part thereof as the sums due under the bond will permit.

"(3) Adopt appropriate rules to administer ORS 658.405 to 658.503 and 658.830."

Respondents assert, as an affirmative defense, that the Commissioner lacks jurisdiction over this matter because none of the three subsections of ORS 658.407 specifically authorizes the Commissioner to enforce farm/forest labor contractors' duty to provide their workers with written agreements, pursuant to ORS 658.440(1)(g). According to Respondents, subsections (1) through (3) of ORS 658.407 delineate the entirety of the Commissioner's jurisdiction with regard to farm/forest labor contractors.

Respondents' narrow reading of ORS 658.407 is supported neither by the plain language of the statute nor by its context. *See generally PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) (setting forth method of statutory analysis). ORS 658.407 first states broadly that the Commissioner has authority to "administer and enforce ORS 658.405 to 658.503 and 658.830" -- the Oregon laws that govern farm/forest labor contractors, including ORS 658.440, the provision at issue here. The statute then instructs the Commissioner that, "in so doing," he or she must conduct the specific activities set forth in subsections (1) through (3). Those subsections do not limit the Commissioner's jurisdiction; they merely direct the Commissioner to take certain actions in the course of exercising a broad grant of authority.

The context of ORS 658.407 confirms that the statute gives the Commissioner jurisdiction to enforce *all* of the statutes relating to farm/forest labor contractors. First, the statutes require farm/forest labor contractors to take certain actions (such as providing workers with written agreements -- ORS 658.440(1)(g)) and not to take others (such as making misrepresentations in a license application -- ORS 658.440 (3)(a)). These statutes would have no meaningful effect if the Commissioner lacked jurisdiction to enforce them. Surely the legislature did not intend the statutes to serve as mere recommendations of appropriate behavior for farm/forest labor contractors. Second, ORS 658.453(1)(c) gives the Commissioner explicit authority to assess civil penalties for violations of ORS 658.440(1). It would be odd for the legislature to give the Commissioner authority to assess civil penalties for violations of that statute without also giving the Commissioner jurisdiction to enforce it. Respondents' argument that the Commissioner lacks jurisdiction over this matter has no merit.

Failure to Execute Written Agreements with Workers

Respondents acknowledge that they did not provide the five workers with written agreements prepared using Form WH-153. Nonetheless, Respondents insist they substantially complied with ORS 658.440(1)(g) by

having workers sign Form WH-151 and copies of Respondents' personnel policy manual. Respondents argue vigorously that those documents include all the information required by ORS 658.550(1)(f). That assertion, however, misses the point. Respondents are not charged with violating ORS 658.550(1)***(f)***, which requires that workers be provided with certain information. Rather, Respondents are charged with violating ORS 658.550(1)***(g)***, which requires farm/ forest labor contractors to enter *written agreements* with their workers.

The requirements of subsections (f) and (g) are distinct and serve different purposes. Subsection (f) ensures that workers will learn the terms and conditions of any prospective employment at the time they are recruited, solicited, hired or supplied, whichever happens first. Workers then may evaluate that information to determine whether they wish to accept the proposed employment. The requirements of subsection (g) are triggered only when a worker actually is hired. At that point, the farm/forest labor contractor is required to enter a binding written agreement with the worker that spells out the terms and conditions of employment. That agreement protects the worker by providing concrete evidence of the terms and conditions of employment -- including the hourly wage rate -- to which the farm/forest labor contractor has bound itself. Subsection (g) does more than ensure that workers are provided with information -- it requires the farm/forest labor contractor to enter legally enforceable agreements with them. By executing written agreements with their workers, farm/forest labor contractors also provide themselves with a means of defending against false wage claims. *Cf. In the Matter of Clara Perez*, 11 BOLI 181 (1993) ("One purpose of the WH-153 form is to eliminate any confusion or misunderstandings about the agreed pay rate").

By its own terms, Respondents' personnel manual is not "a written agreement between the worker and the farm labor contractor containing the terms and conditions described in paragraph (f)(A) to (I) of [ORS 658.440]." ORS 658.440(1)(g). The personnel manual states that it "<u>is not a contractual agreement</u> as to terms or duration of employment" and that "Washburn Reforestation, Inc., reserves the right to make additions and deletions to this policy without prior notice to the employee." Moreover, although each worker signed the manual, that document was not executed by Respondents. Because the personnel manual did not constitute a binding contractual agreement between Respondents and their workers, its use could not fulfill the requirements of ORS 658.440(1)(g). The Forum finds that Respondents committed five violations of ORS 658.440(1)(g) by failing to provide each of the five workers with a written agreement regarding the terms and conditions of employment.

It is worth noting that, even if the personnel manual had been a "written agreement," its use would not have fulfilled the requirements of ORS 658.440(1)(g) because it did not include all the information required by ORS 658.440(1)(f)(A) - (I). First, the personnel manual did not describe

"[t]he method of computing the rate of compensation," in that it did not specify the hourly rate a worker would earn by performing any given job. Respondents acknowledge that the personnel manual did not inform workers of their hourly pay rates, but argue that it adequately described "[t]he method of computing the rate of compensation" by stating that workers would be paid one and one-half times their regular hourly rate for hours worked in excess of 40 per week. The Forum rejects Respondents' reading of ORS 658.440(1)(f)(A). One cannot reasonably describe a method for computing the rate of compensation without also specifying the base pay rate. *See also* Form WH-153, which requires farm/forest labor contractors to specify the rate at which workers will be paid; OAR 839-015-360(4), written agreements "must provide for all the elements contained in Form WH-153". The personnel manual did not provide the information required by ORS 658.440(1)(f)(A).

Pursuant to ORS 658.440(1)(f)(E), the written agreement also must describe "the approximate length of season or period of employment and the approximate starting and ending dates thereof." Respondents argue that their personnel manual satisfied this requirement by stating that employment was from the date of hire until terminated, which is a correct description of Respondents' at-will employment of the workers. The statute, however, does not require the agreement to describe the length of time a worker will be employed by a particular farm/forest labor contractor. Rather, the agreement must include information regarding the approximate length of time the worker will be performing a particular job for that contractor -- a job that involves a specific type of work, has a given rate of pay, and occurs at a specific location. Respondents' personnel manual did not provide their workers with that information.

Similarly, Respondents argue that the manual satisfied ORS 658.440 (1)(f)(G) by stating that Washburn Reforestation, Inc. is the owner of the operations where the workers would be working. Respondents' argument appears to be that, where the farm/forest labor contractor employs the workers itself and uses them to perform a contract on another party's land, the contractor is "the owner of all operations." Again, Respondents' argument misses the point. ORS 658.440(1)(f)(G) requires the written agreement to state "[t]he name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied *or employed* by the farm labor contractor." (*Emphasis added*). If the phrase "owner of all operations" meant nothing more than "the farm labor contractor" in cases where the contractor employed the workers, the emphasized portion of the statute would be superfluous. This Forum will not interpret a statute in a way that renders part of it meaningless. The only way to give effect to the entire statute is to give the phrase "owner of all operations" its plain meaning -- the owner of the land on which the forestation or reforestation work is taking place. In short, the statute ensures that workers will be told who owns the land on which they perform their labor. The personnel

manual, even if it was a written agreement, does not include that information and, therefore, could not fulfill the requirements of ORS 658.440(1)(f)(G) and ORS 658.440 (1)(g).

Finally, the personnel manual does not include a statement incorporating the workers' rights and remedies under ORS chapters 654 and 656, ORS 658.405 to 658.603 and 658.830, and the Service Contract Act. The fact that the workers signed and received copies of Form WH-151, which includes a description of those rights and remedies, is not relevant to Respondents' failure to comply with ORS 658.440 (1)(g). As explained above, Form WH-151 merely explains workers' rights and remedies; it does not incorporate them into a binding contract between the farm/forest labor contractor and the worker. That must be accomplished in a written agreement using Form WH-153 or some other form that explicitly incorporates the provisions of Form WH-151.

In sum, Respondents committed five violations of ORS 658.440(1)(g) by failing to provide any of the five workers with a written agreement that included the terms and conditions of employment. For that failure, the Forum has imposed the civil penalty described below. Even if the personnel manual and Form WH-151 did constitute a "written agreement," however, this Forum would impose the same civil penalty because those documents did not include all the information required by statute.

Civil Penalty

In determining the appropriate amount of a civil penalty, this Forum may consider the seriousness and magnitude of the violation. The Forum finds Respondents' violation of ORS 658.440(1)(g) not only serious, but grave. *See* OAR 839-015-0510(1)(c) (seriousness of violation is a factor to be considered in determining penalty). Respondents did not give their workers *any* document constituting a binding written agreement. The violation goes to "the heart of farm labor contractor statutes" because it denies workers the ability to protect themselves in the event of a dispute. *In the Matter of Andres Bermudez*, 16 BOLI 229, 244 (1998). Moreover, the absence of statutorily required information in the personnel manual would render the violation serious even if the manual was a "written agreement." The seriousness of the violations weighs in favor of a heavy civil penalty.

The Forum also has found that Respondents knew or should have known of the violations. *See* OAR 839-015- 0510(1)(d). Paul and Diann Washburn both testified that they had reviewed the statutes, rules, and forms, which state plainly that workers must be provided with written agreements containing the terms and conditions of employment. In addition, Paul and Diann Washburn certified repeatedly that they had reviewed Form WH-153 and would, "in accordance therewith," provide their workers with required information. Diann Washburn, particularly, knew or should have known that Respondents were violating ORS 658.440(1)(g) -- she admitted that Respondents did not provide their workers with agreements using Form WH-153 because they believed the paperwork would be too burdensome.

The fact that Respondents knew or should have known of the violations also weighs in favor of a heavy penalty.[1]

There also are mitigating factors in this case. Respondents cooperated with the Agency's investigation, they have no prior violations on their record, and they intend to comply with the requirements of ORS 658.440 in the future. In addition, the Agency produced no evidence that any worker had suffered a loss of wages as a result of the violations. After considering both the aggravating and the mitigating factors, the Forum has determined that an appropriate penalty is $750.00 for each of the five violations, for a total of $3,750.00.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and as a result of Respondents' five violations of ORS 658.440(1)(g), Respondents WASHBURN REFORESTATION, INC., PAUL A. WASHBURN, AND DIANN M. WASHBURN 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 THREE THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS ($3,750.00), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Respondents comply with the Final Order. This assessment is made as civil penalty against Respondents as follows: $750.00 for each of five violations of ORS 658.440(1)(g).

[1]The existence of these aggravating factors is fatal to Respondents' motion to strike enhanced penalties.

In the Matter of
LTM, INCORPORATED,
Respondent.

Case Number 45-98
Final Order of the Commissioner
Jack Roberts
Issued November 18, 1998.

SYNOPSIS

Respondent, which operated a construction business, employed Complainant as a pipe layer and grade checker. After Complainant was injured on the job, Respondent's risk manager knowingly assigned him to work outside his return-to-work restrictions, belittled him, and discouraged him from filing for "time-loss" through the Worker's Compensation system. These actions created a working environment hostile and offensive to workers, like Complainant, who applied for Workers' Compensation benefits or otherwise invoked or utilized the Workers' Compensation system, in violation of ORS 659.410(1). The Commissioner awarded Complainant $5,000.00 for the mental suffering caused by the unlawful employment practice. ORS 659.100, 659.410(1); OAR 839-005-0010(3), 839-006-0125.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on September 22, 1998, in the conference room of the Bureau of Labor and Industries, 700 East Main Street, Medford, Oregon. The Civil Rights Division ("CRD") of the Bureau of Labor and Industries ("the Agency") was represented by Alan McCullough, an employee of the Agency. Respondent LTM, Incorporated, was represented by Gerald Shean, III, Attorney at Law, Medford. Michael Benke, of the corporate Respondent, was present from the beginning of the hearing through the close of Respondent's evidence; he was not present during the testimony of the Agency's rebuttal witness or during closing arguments. The Complainant, Steven M. Eld, was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses, in addition to Complainant, Joyce Smith (a friend of Complainant), Pamela Jean Pratt (a former employee of Respondent), Jerry Anthous (a current employee of Respondent), and Toni Eld (Complainant's wife). The Agency called Barbara Turner, an Agency investigator, as a rebuttal witness.

Respondent called as witnesses Respondent employees Michael Benke and Curtis Crichton.

The ALJ admitted into evidence Administrative Exhibits X-1 through X-10, Agency Exhibits A-1 through A-9 (by stipulation) and A-10 through A-12, and Respondent's Exhibits R-1 through R-7 (by stipulation). The record closed on September 22, 1998.

Having fully considered the entire record in this matter, I, Jack 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 or about December 16, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. Complainant alleged that Respondent terminated his employment "because [he] suffered an injury and invoked the Worker's Compensation system."

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence that Respondent unlawfully had retaliated against Complainant for filing a Worker's Compensation claim. The Agency did not find substantial evidence that Respondent had terminated Complainant because he filed that claim.

3) On February 26, 1998, the Agency requested a hearing.

4) On March 18, 1998, the Agency served on Respondent Specific Charges alleging that Respondent had harassed Complainant based on his application for benefits, invocation, or utilization of the procedures provided for in ORS Chapter 656, in violation of ORS 659.410.

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 Summary 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) The Notice of Hearing stated that Respondent's answer was due 20 days from receipt of the notice and that, if Respondent did not timely file an answer, it could be held in default.

7) On March 23, 1998, the Agency moved to amend the amount claimed in damages for mental suffering from $10,000.00 to $15,000.00. The ALJ granted that motion by order dated April 8, 1998.

8) On March 26, 1998, Respondent moved to postpone the hearing.

9) Respondent filed its answer on April 6, 1998. In that answer, it admitted the allegations in Paragraphs I, III-2, III-3, III-8, III-12, III-17, III-20, and III-21 of the Specific Charges. Respondent also admitted: that Complainant initially was employed in 1983; the allegations of Paragraph IV except for the allegation that Complainant received a prescription for pain medication; that Jerry Anthous delivered a copy of the "Return to Work" form to Respondent's office; that Complainant suffered increased pain on March 7, 1996; that Complainant had breakfast with Respondent's safety director on March 8, 1996, to discuss a Habitat for Humanity project; and that Jerry Anthous took Complainant from his home to Dr. Naugle's office. Respondent denied the remaining allegations in the Specific Charges. Respondent also asserted two affirmative defenses: (1) that the Specific Charges had not been timely filed; and (2) that the Specific Charges failed to state a claim for discrimination in violation of ORS 659.410. During the hearing, Respondent withdrew its first affirmative defense.

10) By order dated April 8, 1998, the ALJ granted Respondent's motion for postponement. The ALJ also issued a discovery order to the Agency and Respondent directing each to submit a summary of the case, including: a list of witnesses to be called; the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence; a statement of any agreed or stipulated facts; and, from the Agency only, any wage computations. The summaries were due by September 12, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-050- 0200(8), for failure to submit the summary. The Agency and Respondent each submitted a timely summary. On September 18, 1998, Respondent submitted a copy of Exhibit R-5, to be attached to its case summary.

11) At the start of the hearing, counsel for Respondent 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), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) During the hearing, the participants stipulated to three changes to the Specific Charges: (1) the date mentioned in Paragraph 3, Item 10, of the Specific Charges should be amended to March 8, 1996 (not March 7); (2) Paragraph 3, Item 11, of the Specific Charges should be amended to state that Complainant and Benke had breakfast together on March 9, 1996 (not March 8); and (3) the phrase "the next morning" in Paragraph 3, Item 17, should be replaced with "March 15, 1996." The ALJ ordered these amendments to be made by interlineation.

14) At the hearing, the participants submitted a document listing certain stipulated facts.

15) On October 22, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. By the terms of the proposed order and in accordance with OAR 839-050-0380, exceptions were due by November 2, 1998, unless a request for extension of time was submitted no later than that day. OAR 839-050-0050(2). The Forum received no timely exceptions.

FINDINGS OF FACT -- THE MERITS

1) At all material times, Respondent was an Oregon corporation that employed six or more persons in the State of Oregon. Respondent was registered with the Corporation Division to perform highway and street construction.

2) Complainant has worked for Respondent at various times beginning in 1983. In December 1993, Respondent terminated Complainant's employment because he refused to take a random drug/alcohol test. Respondent rehired Complainant in 1995 to work as a grade checker and pipe layer. As a condition of re-employment, Respondent required Complainant to take a drug test and to sign a last-chance agreement.[2]

3) In March 1996, the only work available with Respondent was dismantling Respondent's old asphalt plant. Respondent assigned Complainant to do that work so Complainant would not sign on to work with another contractor. On March 4, 1996, Complainant injured his shoulder while moving steel beams with a large loader.

4) Complainant's injury occurred shortly before the end of the work day, and he went home without seeing a doctor. When Complainant woke up the next morning, he discovered the injury was more serious than he had thought. He went to LTM's office and completed an accident report; he also told Wes Nieto, a construction supervisor, that he needed to see a doctor. Jerry Anthous, a non-supervisory employee of Respondent, drove Complainant to

[2]In the last-chance agreement, Complainant agreed to be evaluated by a drug/alcohol counselor and complete any recommended treatment. Complainant also agreed to submit to a drug/alcohol test "at any time requested by LTM" and agreed that, if he refused to take the test, or if the test results were positive, his employment would be terminated immediately. Complainant further indicated his "understand[ing] that this agreement constitute[d] a final warning," giving rise to the term "last-chance agreement."

Occupational Health to see Dr. Naugle.[3]

5) Dr. Naugle prepared a Form 827 -- entitled "FIRST MEDICAL REPORT FOR WORKERS' COMPENSATION CLAIMS" -- regarding Complainant's March 4, 1996, injury.

6) Dr. Naugle referred Complainant to Dr. Galt, a shoulder specialist. Anthous immediately drove Complainant across town to Dr. Galt's office. Dr. Galt determined that Complainant needed an MRI, which the doctor scheduled for March 12th or 13th. After the examination, Dr. Galt's nurse brought out paperwork, including a "Return to Work Recommendations/ Restrictions" form. Anthous took these papers and later gave them to Nieto.

7) Joyce Smith and her husband, friends of Complainant, went to the LTM plant to see Complainant and were told that Complainant had been injured. The Smiths then went to Dr. Galt's office, where Complainant was being examined. After the Smiths, Anthous, and Complainant left Dr. Galt's office, Anthous handed Complainant a prescription for pain medication. The Smiths and Complainant went to get the prescription filled and the Smiths drove Complainant home.

8) The next day, March 6, Complainant went to work and reported to Nieto, as usual. Nieto said he did not know what to do with Complainant, but eventually told Complainant to go back to the place he had been working when he was injured. Complainant complied, and continued helping tear down the old asphalt plant. His shoulder hurt while he did that work, and he reported the pain to "anybody that would listen," including Respondent's risk manager, Benke (a supervisory employee). When he got home, Complainant told his wife that he had been doing the same work he had been performing when he was injured.

9) On March 7, 1996, Respondent completed an 801 form for Complainant.

10) Complainant reported to work on March 7 with his right arm in a sling. Nieto and/or Doug Wright told Complainant to move iron I-beams that had supported the asphalt plant. The job involved using a piece of heavy equipment called a "loader" that had a large bucket with a heavy chain attached to it. Complainant wrapped the chain around the beam, then climbed up a ladder into the loader to move the beam. Complainant found it difficult to wrap the chain around the beam, get into the loader, and operate the loader using only one arm. Complainant's shoulder bothered him while he was doing this work.

11) While Complainant was performing this work, the chain slipped and Complainant instinctively reached out with his injured right arm to prevent the chain from falling on him. Complainant fell into the bucket of the loader, further injuring his right shoulder and hands. Complainant went to Respondent's office and told Nieto and Benke that he wanted to look at the work restrictions that Dr. Galt had

[3]Throughout the hearing, witnesses referred to Respondent's employee "Wes" only by his first name. The Forum has cited Respondent's case summary *only* for the fact that Wes's last name is Nieto.

recommended. Benke gave Complainant the paperwork, but Complainant was unable to read it without his reading glasses. Complainant told Benke that he had hurt his arm again, and Benke told him to stop acting like a sissy.

12) Benke told Complainant to deliver parts to another asphalt plant. Complainant told Nieto and Benke that he could not drive because he had just taken more pain pills, which had made him ill. Benke laughed and said that Complainant probably had driven drunk before and could handle the drive to the asphalt plant. Complainant felt like he was talking to a wall when he spoke with Benke because Benke did not listen to anything he said. Complainant delivered parts to the asphalt plant for the remainder of the day because he felt he had no choice -- Respondent had no other work for him to do.

13) That night, Complainant and his wife read the Return to Work Recommendations/Restrictions that Dr. Galt had prepared on March 5. That document stated that Complainant was not supposed to drive or lift objects over 10 pounds. Complainant felt that Respondent was taking advantage of him.

14) The next day, March 8, Complainant visited a physical therapist, who cut the therapy session short because Complainant's hand was very swollen. The therapist's office was in the same building as Dr. Galt's office, and Complainant's wife told Dr. Galt how Complainant was being treated at work. Dr. Galt then gave Complainant's wife new paperwork putting Complainant on "no work" status. Complainant and his wife believed the no-work paper meant that Complainant was not supposed to work at all unless Respondent abided by the original work restrictions Dr. Galt had specified. Complainant took that paperwork to Respondent's facility and gave it to Pamela Pratt with instructions to deliver it to Benke. Complainant then went home because he was in too much pain to work. (Testimony of Complainant, Toni Eld; Exhibit A-8)

15) Later on March 8, Complainant had a telephone conversation with Benke, who asked why Complainant had gotten the no-work paper. Complainant explained that he needed it because he had not been treated right and, as a result, had reinjured his arm. Benke told Complainant that Respondent was close to 1000 injury-free days and Complainant would let down Benke and the whole company if he turned in the no-work paper and took "time loss" through the Worker's Compensation system. Benke also said that such things just weren't done, and told Complainant that he would receive more money if he continued light-duty work than if he took time-loss benefits. Benke told Complainant that his modified work duties would involve sitting in a room with three girls, answering the telephone, and drooling all day. Complainant told Benke that he would be willing to do paperwork if it did not hurt his shoulder.

16) Before Complainant was injured, he and Benke had arranged to do some volunteer work on a project for Habitat for Humanity. On March 9, Complainant had breakfast with Benke and then went with him to the Habitat for Humanity project. Complainant was at the job site for about

six hours, instructing Benke how to use laser equipment for aligning pipes.

17) On March 11, 1996, Doug Wright gave Complainant the assignment of figuring out the amounts of different types of rock Respondent had used over the years. Complainant took this work home, and his wife did the calculations because Complainant's injury prevented him from writing or using a calculator.

18) On March 12, 1996, Complainant returned to Respondent's plant and Benke told him that he should not have finished the paperwork assignment so quickly. Wright gave Complainant large three-ring binders full of Material Safety Data Sheets to update. For the rest of the week, Complainant did this work himself at home, using his injured arm at times. On March 12th or 13th, Complainant had the MRI examination.

19) Also on March 12, Complainant was selected for random drug testing, pursuant to his last-chance agreement, and submitted a urine sample at Occupational Health. Complainant tested positive for opiates and marijuana. On March 14, 1996, the Occupational Health facility left a message for Complainant to contact Dr. Naugle. Complainant did not return that call.

20) On March 15, 1996, Complainant had a 10:00 appointment with Dr. Galt to get the results of his MRI. That same morning, Nieto called Complainant, told him that he had to go see Dr. Naugle, and said Anthous would drive Complainant to Occupational Health. Anthous went to Complainant's house, where Complainant and his wife were getting ready to go to Dr. Galt's office. Anthous told Complainant that he was supposed to take Complainant to Dr. Naugle's office, and Complainant asked Anthous to take him to his appointment with Dr. Galt instead. Despite Complainant's request, Anthous drove him to Dr. Naugle's office, with Complainant's wife following in her car. When Anthous reached Occupational Health, Complainant got into his wife's vehicle and they went to see Dr. Galt.

21) On March 16, 1996, Respondent discharged Complainant because he had violated his last-chance agreement and had violated Respondent's policy against drug and alcohol use.

22) Complainant felt bad, depressed, and hurt after he reinjured his shoulder. Those feelings were caused in part by Benke's comments and Complainant's discovery that Respondent's supervisors had ordered him to do work that was beyond his work restrictions. Complainant's shoulder pain and the illness he suffered because of taking pain medication also contributed to those feelings. From the time he first injured his shoulder and the day he was terminated, Complainant was depressed and just sat on the couch and vegetated, which was not normal for him.

23) About eight years before the hearing, Anthous suffered a back injury while he was driving heavy equipment for Respondent. Anthous did not return to work the day after his accident because he was in too much pain. He spoke with Benke, who then was Respondent's risk manager, the day after he was injured. Benke wanted to know how Anthous was feeling and when he would be back to

work. About three days after the accident, Anthous's wife went to LTM to speak with Benke to explain why Anthous was not yet able to return to work. Anthous already had told Benke that he could not come back yet, but Benke wanted him to come back on a part-time basis, which is why it was necessary for Anthous's wife to speak with him. When Anthous returned to work, he had written work restrictions, which he showed to Benke. Neither Benke nor anybody else at LTM asked Anthous to exceed those restrictions.

24) Pamela Pratt, a former employee of Respondent, testified regarding her experience with an on-the-job injury. Pratt injured her knee in September 1995 and filed a Workers' Compensation claim. She was treated by a doctor chosen by Respondent, who believed Pratt had a muscle injury. Pratt kept working for Respondent until about November 1995 and then was laid off because of a seasonal reduction in work force. After the layoff, Pratt went to see her own doctor, who ordered an MRI examination and determined that surgery would be necessary. Pratt made an appointment for the surgery to be performed on a Monday. At some point before that day, Pratt called the doctor's office to determine whether the surgery still was scheduled to be performed. Pratt was informed that Benke had canceled the surgery. Benke then called Pratt and told her that she should schedule the surgery for a Friday so she could get a full paycheck. Pratt did not understand what Benke was telling her because she had been laid off. Benke also stated that LTM would pay Pratt's wages after the surgery so she would not have to accept the lower amount in time-loss payments she otherwise would receive from Worker's Compensation.

25) Pratt scheduled her knee surgery to be performed on Thursday, February 15, 1996, and Benke arranged for her to work the Tuesday and Wednesday before the surgery. On one of those days, Benke and Pratt went to the doctor to discuss how the injury might have been avoided. Benke stated that Pratt should return to full-time, light-duty work the following Monday. The doctor stated, with Benke present, that Pratt should work only four hours on Monday and work back to eight hours over the course of the week.

26) Pratt had her knee surgery on Thursday, as scheduled. The next day, she received a return-to-work authorization that stated she could stand or walk for a total of one to two hours per day, and could sit for a total of four to six hours per day, "progress as tolerated." These work restrictions were presented to Respondent.

27) On the Monday after her surgery, Pratt felt ill because of the pain medication she was taking, but worked a full day. The next day, Pratt worked only part of the day because she still felt ill. On Wednesday that week, Pratt did not work a full day, but Benke asked her to sign an "Offer of Modified Work" memorandum that stated: "Your hours for work will be from 8:00 am to 4:30 pm, Monday through Friday." Pratt refused to sign the document because she was not working eight hours per day. Benke told Pratt that the work restrictions from her doctor did not state clearly that she could not work full-time. Pratt then obtained another letter from her doctor stating specifically:

"Patient to progress from 4 hrs/day to 8 hrs/day week of 2/19 -> 2/23 as tolerated." Pratt gave that letter to Respondent. About that same day, Pratt changed pain medications, returned to work full-time, and signed the "Offer of Modified Work" memorandum. Pratt performed light-duty work until May 1996. Respondent did not ask her to work outside her limitations.

28) Respondent awarded its employees yearly bonuses that depended, in part, on the company's work safety record. Each time an employee filed a Workers' Compensation claim, the amount of money available for bonuses decreased.

29) Complainant's testimony was credible in some respects. For example, Complainant's testimony regarding the manner in which his injuries occurred and the nature of those injuries was straightforward and did not appear exaggerated. The Forum has accepted Complainant's testimony on those points, which was corroborated in part by accident reports and return-to-work recommendations. The Forum also has accepted Complainant's description of Benke's belittling remarks (calling Complainant a "sissy," etc.) because Benke did not deny having made those remarks. For similar reasons, the Forum has credited Complainant's testimony that Benke told him he would be "letting down" the company if he turned in the no-work paper. Although Benke denied having made that specific remark, he acknowledged having discussed with Complainant the fact that Respondent was nearing the mark of 1000 injury-free days. The Forum infers from that remark that Benke wanted to discourage Complainant from taking advantage of the Workers' Compensation system, which is consistent with Complainant's description of his telephone conversation with Benke. The Forum also found credible, and has accepted, Complainant's somewhat restrained testimony regarding the emotional distress he suffered as a result of Benke's remarks and other events.

30) Other aspects of Complainant's testimony, however, were inconsistent or overly self-serving. Complainant testified initially that he did not know what his medical restrictions were until after he suffered the second shoulder injury, and testified that Dr. Galt had not explained the work restrictions to him. Later, Complainant testified that when he was moving I-beams on March 7 -- before the second injury -- he believed that work exceeded his restrictions, but he decided to do it anyway. Because of this inconsistent testimony, and the improbability of Complainant's testimony that Dr. Galt did not explain the work restrictions to him, the Forum has not credited Complainant's testimony that he was unaware of his work restrictions until after his second injury.

31) The testimony of Complainant's wife, Toni Eld, seemed exaggerated and skewed to portray Complainant in a positive light. For example, Toni Eld testified that Complainant did not dislike Benke when, in fact, Complainant already had testified that he did dislike Benke. For this reason, the Forum has not accepted Toni Eld's testimony where it conflicted with other, more credible testimony.

32) Anthous's recall of events was not wholly credible or reliable. He first testified emphatically that Complainant had not told him why he did not want to go to Dr. Naugle's office on March 15. On redirect, however, he remembered that Complainant had mentioned that he had another doctor's appointment at about the same time. Similarly, when interviewed by an Agency investigator, Anthous initially said that he did not recall taking Complainant to the doctor. Later, he remembered that he had taken Complainant to the doctor and had spoken with him about his shoulder. Still later in his conversation with the investigator, Anthous decided that he could not recall taking Complainant to the doctor's office. Because Anthous's recollection of historical events appears imprecise and incomplete, the Forum has given little weight to those portions of his testimony that conflicted with other, more credible evidence.

33) Pratt testified in a straightforward, sincere manner. She readily acknowledged facts favorable to Respondent, as well as those that portrayed Respondent in a negative light. The Forum finds her testimony to be credible in all material respects.

34) In some respects, Benke's testimony was credible, although he put a "spin" on conversations he had with employees. For example, Benke acknowledged that the "Offer of Modified Work" letter was designed to get Pam Pratt to agree to work full-time after her surgery. He later stated that the decision to have her work full-time had been made before the surgery and that, after the operation, he did not pressure her to work eight-hour days. That testimony does not ring true in light of the fact that Benke did not present the "Offer of Modified Work" letter to Pratt until a few days *after* she had returned to work. Similarly, Benke insisted that he was not upset with Complainant for filing a Workers' Compensation claim, and that his statements to Complainant were meant only to inform him that he would get more money by taking light-duty work with Respondent than by filing for "time-loss" benefits. Benke's characterization of those conversations conflicts with his admission that he reminded Complainant of Respondent's long "injury-free" record, and how proud employees were of it. It also conflicts with Complainant's uncontroverted testimony that Benke called him a sissy after he asked to look at the work restrictions ordered by Dr. Galt. The Forum finds Benke's descriptions of his conversations with employees to be disingenuous, and has not relied on them. With regard to other objectively verifiable historical events, however, Benke's testimony generally comports with that of other witnesses, and the Forum has relied on it to some extent.

35) Complainant and his wife testified that Anthous behaved badly on March 15 when he took Complainant to Occupational Health. For example, Complainant testified that Anthous pulled him into his pickup truck and started driving before Complainant had gotten entirely into the vehicle. Complainant's wife also testified that Anthous had acted insistently, but stated that Complainant jumped into the truck, and was not pulled. She also stated that neither she nor Complainant had spoken loudly to Anthous before he drove away. Anthous testified, to the contrary, that Complainant and his wife

had yelled at him when he went to pick up Complainant and had claimed that Respondent was picking on Complainant. Anthous also testified that Complainant got into the truck by himself and was all the way in the truck before Anthous started driving. The Forum found all three witnesses' testimony regarding these events to be self-serving and overblown, and has not credited any of it. The Forum, therefore, makes no finding with regard to the details of Anthous's behavior on March 15.[4]

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was a corporation that had six or more employees within the State of Oregon.

2) At all material times, Complainant furnished services to Respondent for remuneration, and was Respondent's employee.

3) After Complainant was injured on March 4, 1996, he invoked his rights under, or utilized, the Worker's Compensation system.

4) By the time Complainant returned to work after his first shoulder injury, Respondent was aware of the restrictions and limitations Dr. Galt had placed on Complainant's work. Respondent knowingly required Complainant to perform work that exceeded those work restrictions. Respondent did not, however, take that action because Complainant had invoked his rights under the Workers' Compensation system.

5) Respondent's risk manager, Benke, discouraged Complainant and at least one other employee from taking advantage of the Workers' Compensation system. Benke is one of Respondent's supervisory employees.

6) After Complainant asked to review his work restrictions, Benke belittled Complainant, ordered him to drive a truck, even though Dr. Galt had stated that Complainant should not drive at all, and discouraged him from filing for "time-loss" benefits. Benke took these actions because Complainant had invoked his rights under the Workers' Compensation system.

7) A reasonable person in Complainant's circumstances would find that Benke's conduct had the effect of creating a hostile and offensive working environment for workers, like Complainant, who invoked their rights under the Workers' Compensation system.

8) Respondent knew or should have known of Benke's conduct.

9) Complainant suffered mental distress because of Benke's conduct.

CONCLUSIONS OF LAW

1) For purposes of ORS 659.400 to ORS 659.460, "employer" generally is defined as "any person that employs six or more persons * * *." ORS 659.400(4). The term "person" includes corporations. ORS 659.010(11). At all material times, Respondent was an employer subject to the provisions of ORS 659.400 to 659.460, including ORS 659.410.

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[4]In any event, even if Anthous had acted in the manner alleged by Complainant, the Forum would not attribute that off-site behavior, committed by a non-supervisory employee, to Respondent in the absence of any evidence in the record that Respondent instructed or encouraged Anthous to act that way.

2) OAR 839-006-0120 provides:

"To be protected under ORS 659.410, a person must be a worker as defined in OAR 839-006-0105(4)(a)."

OAR 830-006-0105(4)(a) defines "worker" as follows:

"'Worker' means any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *."

Complainant was a worker entitled to the protection of ORS 659.410.

3) 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 659.010(2), 659.060(3), 659.435.

4) The actions, inactions, statements and motivations of Benke, Wright, and Nieto, all employees of Respondent, properly are imputed to Respondent.

5) 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 ORS 659.400 to 659.460 or has given testimony under the provisions of such sections."

OAR 839-005-0010 provides, in pertinent part:

"(3) Harassment on the basis of protected class is an unlawful employment practice if the employer knew or should have known both of the harassment and that it was unwelcome. Unwelcome conduct of a verbal or physical nature relating to an employee's protected class is unlawful when such conduct is directed toward an individual because of the individual's protected class and

"(a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

"(b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

"(c) 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.

"(d) The standard for determining harassment will be what a reasonable person would conclude if placed in the circumstances of the person alleging harassment."

Respondent violated ORS 659.410(1) because it knew or should have known of Benke's conduct, which created a hostile and offensive working environment.

6) Pursuant to ORS 659.010(2), 659.060(3), and 659.435, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue a Cease and Desist Order

requiring Respondent to pay Complainant money damages for emotional distress sustained as the result of Respondent's unlawful employment practice and to perform certain actions reasonably calculated to protect the rights of Complainant and 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

Unlawful Employment Practice

To establish a prima facie case that Respondent, through a supervisory employee, unlawfully engaged in "hostile work environment" harassment of a worker who applied for benefits or invoked or utilized the Workers' Compensation system, the Agency must present evidence to show that:

> "(1) respondent is an employer of six or more persons; (2) respondent employed complainant; (3) complainant is a member of a protected class (that is, a worker who applied for benefits or invoked or utilized the workers' compensation procedures); (4) respondent's supervisory employee engaged in unwelcome verbal or physical conduct directed at complainant because of his protected class; (5) the conduct had the purpose or effect of creating an objectively intimidating, hostile, or offensive working environment; (6) respondent knew or should have known of the conduct; and (7) complainant was harmed by the conduct."

In the Matter of Central Oregon Building Supply, 17 BOLI 1, 9 (1998). In this case, the first three elements are undisputed. In addition, Respondent has not contended that, if its employees engaged in the unwelcome verbal or physical conduct described in the factual findings, *supra*, it had no reason to know of that conduct. The remaining questions, then, are whether Respondent's employees directed unwelcome conduct at Complainant because of his protected class, whether that conduct created an objectively hostile or offensive working environment, and whether (and to what degree) Complainant was harmed by the conduct.

After Complainant suffered his first shoulder injury on March 4, 1996, Respondent's supervisors told him to go back to helping tear down the asphalt plant, which involved activities outside Complainant's work restrictions. There is no doubt that Wright and/or Nieto knowingly assigned Complainant to perform work outside his restrictions, and that assignment led to Complainant suffering the second injury. But no evidence suggests that this improper work assignment was "directed at complainant because of his protected class." In other words, the Agency did not establish that Respondent's decision to order Complainant back to working at the asphalt plant was improperly motivated by Complainant's invocation or utilization of the Workers' Compensation system. It is true, as discussed below, that Benke discouraged employees from filing for Worker's Compensation time-loss benefits. The Forum will not infer from that fact alone, however, that the improper work assignment -- ordered by someone other than Benke -- constituted

an act of discrimination. *Cf. Central Oregon Building Supply*, 17 BOLI at 11 ("Just as harassment of a woman does not necessarily amount to sexual harassment, harassment of an injured worker does not necessarily amount to harassment prohibited by ORS 659.410; the Agency must show that the harassment was directed at the worker because he or she applied for benefits or invoked or utilized Oregon's workers' compensation procedures").

The Forum reaches a different conclusion with regard to the acts that took place after Complainant asked to review his work restrictions. Complainant made that request just after he suffered his second injury. Benke responded by calling Complainant a "sissy," instructing him to drive under the influence of pain medication (another activity outside Complainant's work restrictions), and telling Complainant he could drive in that condition because he probably had driven drunk before. After Complainant obtained a "no-work" order from Dr. Galt, Benke actively discouraged Complainant from taking Workers' Compensation "time-loss" benefits, telling him that he would be letting down the other employees. Benke told Complainant that, instead, he should take a light-duty assignment that would consist of sitting in a room with three girls, answering the telephone, and drooling all day. Thus, Benke's attitude toward Complainant became demeaning immediately following Complainant's request to review his work limitations; it deteriorated further after Complainant indicated he would file for time-loss benefits. The Forum infers from these facts that Benke's poor treatment of Complainant from March 7, 1996, through the date of his termination was prompted by Complainant's invocation of the Workers' Compensation system. Benke's discriminatory motivation is confirmed by the fact that he actively discouraged at least one other employee, Pratt, from invoking the Workers' Compensation system.

Benke's insistence that Complainant not file for time-loss benefits, his requirement that Complainant perform duties outside his work restrictions, and his belittling remarks toward Complainant combined to create an environment that a reasonable person would find hostile and offensive. Because Benke was Respondent's risk manager and a supervisory employee, the Forum finds that Respondent knew or should have known of his harassment of Complainant. Moreover, Respondent's system of linking employee bonuses to the lack of Workers' Compensation claims increased the hostility of the work environment for individuals who invoked their rights under the Workers' Compensation system. The Agency met its burden of proving the existence of an unlawful employment practice.[5]

Damages for Mental Suffering

The Commissioner is authorized to award compensatory damages, including damages for mental suffering, as a means reasonably calculated to eliminate the effects of any unlawful practice found. *See In the Matter of Harry Markwell*, 8 BOLI 80, 82 (1989). In determining the amount of dam-

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[5]For this reason, Respondent's affirmative defense of failure to state a claim is unavailing.

ages, the Commissioner considers "the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused." *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 21, 27 (1997). The Commissioner also considers "a complainant's vulnerability due to such factors as age and work experience." *Id.*

Here, the harassment consisted of: a discussion between Complainant and Benke in which Benke discouraged Complainant from filing for time-loss benefits, three belittling remarks,[6] Benke's instruction that Complainant drive a truck, an activity outside his work limitations, and a general hostility toward workers who filed for time-loss benefits. Complainant experienced that harassment over a period of about ten days, from March 7, 1996, until he was terminated on March 16, 1996. The Forum finds the severity, frequency, pervasiveness and duration of the discrimination to be less onerous than in some other cases it has heard, although still sufficiently severe to constitute unlawful harassment.

After his second injury, Complainant felt bad, hurt, and depressed. Complainant just "vegetated" for the ten days prior to his termination, which was unusual for him. Both Benke's harassment and Complainant's physical pain contributed to this mental suffering. The Forum has determined that an award of $5,000.00 will compensate Complainant for that portion of his mental distress attributable to the hostile work environment created by Benke's harassment.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010, 659.060,, and 659.435, and to eliminate the effects of the unlawful practice found in violation of ORS 659.410(1), as well as to protect the lawful interest of others similarly situated, the Commissioner of the Bureau of Labor and Industries hereby orders **LTM, Incorporated** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries IN TRUST for STEVEN M. ELD in the amount of:

a) FIVE THOUSAND DOLLARS ($5,000.00), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice found herein; plus

b) Interest on said damages for mental suffering 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 employee because that employee has applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656 or of ORS 659.400 to 659.460

[6]Benke calling Complainant a "sissy," telling him he could drive while using pain medication because he previously had driven drunk, and telling him he could sit in a room with three girls and drool all day.

or has given testimony under the provisions of such sections.

3) Post in a conspicuous place on the premises of Respondent's facility in Medford, Oregon, a copy of ORS 659.410(1), together with a notice that anybody who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

In the Matter of

NEHIA, INC.,

dba The Turquoise Room,

William J. Sahli, and Robert L. Hayes,

Respondents.

Case No. 01-75

Final Order of the Commissioner

Bill Stevenson

Issued June 30, 1975.[1]

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[1] This order was originally published at 1 BOLI 24 (1975). The original order referred to the proposed order in the same case as "Exhibit A" and incorporated by reference parts of that proposed order; however, as noted in the Editor's Note at 1 BOLI 28, for reasons not explained, no copy of the proposed order was known to exist. The original proposed order was located in 1998, and for purposed of completeness of agency orders we now republish the order. The order printed above is a composite of the order appearing at 1 BOLI 24 and the proposed order referred to in 1 BOLI 24 as "Exhibit A," edited in accordance with the instructions of the order at 1 BOLI 24. ED: December 1998.

SYNOPSIS

Where Respondent, a public accommodation (night club), and an independent contractor (a security provider) and his employee, checked age identification so as to exclude black persons and racially mixed groups from the club, the Commissioner found that the Respondents violated ORS 659.010(14) by discriminating against persons because of their race and color and because of the mixed racial makeup of the group they were with. ORS 659.010(14), 659.037, 30.675(1).

The above entitled matter having come on regularly for hearing before Russell M. Heath, designated Presiding Officer by the Commissioner of the Oregon Bureau of Labor, on February 24, 1975, pursuant to notice to all of the named parties; Albert L. Menashe, Assistant Attorney General, appeared on behalf of the Agency and each of the individual Complainants; William McGeorge, attorney, appeared on behalf of the Respondent, Nehia, Inc., an Oregon corporation; the Respondent William J. Sahli arrived at the hearing some minutes late and appeared on his own behalf and represented himself; and the Presiding Officer heard the witnesses called on behalf of the parties and on behalf of the Agency and the Complainants, and considered the exhibits duly received and arguments of counsel and the parties, and issued his Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order.

Thereafter, the Presiding Officer's Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order were served on each of the parties herein adversely affected thereby; and the Respondent Nehia, Inc., having filed objections and exceptions to the Presiding Officer's Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Order, and the Respondents Robert L. Hayes and William J. Sahli not having filed any objections or exceptions thereto and;

The Commissioner of Labor having personally considered the whole record and the objections and exceptions filed by Nehia, Inc. and the relevant portions of the record pertaining thereto and being otherwise fully advised in the premises, hereby makes and enters his FF, Conclusions of Law and Order.

FINDINGS OF FACT

Procedural Findings

1. John B. Robinson, a black man, on or about May 30, 1972, signed and filed with the Oregon Bureau of Labor Civil Rights Division, a complaint of discrimination on a form provided by the said Division. His signature was notarized by Notary Public Walter P. Williams. Mr. Robinson alleged in the complaint that on or about April 1972, he had been discriminated against by the Turquoise Room in that he had been denied admittance thereto because of his race and color.

2. Sharon E. Coleman, a black woman, on or about November 1, 1972, signed and filed with the Oregon Bureau of Labor Civil Rights Division, a complaint of discrimination on the form provided by said Division. Her signature was notarized by Notary Public Walter P. Williams. Ms. Coleman alleged in the complaint that on or about May 1972, she had been discriminated against by the Turquoise Room in that she had been harassed before finally being admitted and that such harassment was because of her race and color.

3. Floyd S. Davidson, a black man, on or about June 5, 1972, signed and filed with the Oregon Bureau of Labor Civil Rights Division, a complaint of discrimination on a form provided by the said Division. His signature was notarized by Notary Public Walter P. Williams. Mr. Davidson alleged in the complaint that on or about June 2, 1972, he had been discriminated against by the Turquoise Room and William John Sahli in this his white female companion was denied admittance thereto because of his race and color.

4. The foregoing complaints and allegations contained therein were investigated by the Civil Rights Division and thereafter an administrative determination was made that there existed substantial evidence supportive of the allegations in each of the said complaints; it was further determined that as to each of the three complaints, the named respondents should be and therefore became Nehia, Inc., and Oregon corporation dba the Turquoise Room, William J. Sahli and Robert L. Hayes.

5. Subsequent efforts to resolve the complaints through conference and conciliation having failed, the Commissioner of Labor, by and through Lee Moore, acting Administrator of the Civil Rights Division,

drew specific charges of discrimination against the aforementioned respondents, and each of them. Said charges and notice of hearing were duly served on the respondents, and each of them. The hearing was scheduled to convene at 9:00 A.M. February 24, 1975 in the auditorium of the Water Services Building, 510 SW Montgomery, Portland, Oregon.

6. The public hearing to determine the facts was convened at the scheduled time, date and place and was preside over at all times by Russell N. Heath, designated by the Commissioner of Labor as Presiding Officer. During the hearing, which was concluded at approximately 8:15 P.M., February 25, 1975, the named Presiding Officer ruled on motions by counsel and on the admissibility of evidence.

General Background Findings

1. The corporate respondent, Nehia, Inc., is an Oregon corporation doing business as the Turquoise Room, hereinafter referred to as "Club," a nightclub/restaurant located at 9847 SW Barbur Boulevard, Portland, Oregon. The said corporation is solely and equally owned by Messrs. Albert Maida, Dan Teeny and Ray Lukich, but Mr. Maida has during all times material herein been responsible to the corporation for the ongoing operation and management of the Club. The Club has during all times material herein, offered to the portion of the public over 21 years of age, food, beverage and entertainment. In its operation and management of the Club the corporate respondent Nehia, Inc., during the time material herein, by contract, retained the services of Oregon Statewide Security, Inc., an Oregon corporation since dissolved, for the purpose of checking identification and handling disturbances at the Club.

2. Respondent Robert L. Hayes was during all times herein material, the secretary/manager and sole owner along with his wife, Laura Janet Hayes, of the aforementioned Oregon Statewide Security, Inc. Mr. Hayes testified to the effect and I find that although the corporation was involuntarily dissolved August 17, 1973, at times prior thereto he furnished security personnel and service to many Portland area night clubs similar in nature to the Turquoise Room.

3. Respondent William J. Sahli was during all times herein material, a security guard employed by Oregon Statewide Security, Inc. and assigned to the Club for the purpose of checking patron identification and handling disturbances therein. Mr. Sahli testified and I find that although he is no longer employed by the now dissolved Oregon Statewide Security, Inc., the said Mr. Sahli is presently a security guard employed by Club Security and assigned to the Flower Drum, a Portland area night club owned by R.A.D., Inc., which in turn is owned and operated by the owners of Nehia, Inc., Messrs. Maida, Teeny and Lukich.

Discrimination Findings

1. Complainant Floyd Davidson credibly and firmly testified to the effect and I find that during the evening on or about June 2, 1972, while accompanied by his white date, Ms. Lynn Phelps, his sister Ms. Florence Sassenet and her white date, Mr. Tyler Walthers, the said Ms. Phelps was denied admission to the Club by Mr. William Sahli purportedly because she did not produce an Oregon Liquor

Control Commission (hereinafter OLCC) identification card. There was ample testimony to the effect and I find that at the time herein material, Mrs. Phelps was approximately twenty four years of age and possessed and produced on the evening in question both a certified copy of her Oregon State Board of Health Birth certificate and a valid Oregon Driver's License as evidence of her identification and age. In accord with Mr. Davidson's further testimony, I find that despite his several explicit requests of both Mr. Sahli and Mr. Don Anderson, Ms. Phelps was not permitted the opportunity to fill out and sign an OLCC Statement of Age (S-146) card. I further find that although Mr. Sahli told Mr. Davidson that they (the Club) had no such cards, the Club during the time material herein, regularly made use of such Statement of Age cards and in fact had such cards available on the evening in question. Further undisputed testimony elicited was to the effect and I find that the aforementioned Mr. Don Anderson acquiesced, both b gesture and spoken word, in Mr. Sahli's conduct resulting in Mr. Davidson's departure from the Club premises.

2. Complainant John Robinson credibly testified to the effect and I find that on a Saturday evening in April, 1972, or thereabouts, he, in the company of his white fiancée, Ms. Lois Fraser (now his wife, Mrs. Lois Robinson), and Mr. Ronnell Parker, a black male friend visiting Portland from Washington, D.C., attempted to gain admission to the Club. I further find that Mr. Sahli denied to Mr. Robinson and his companions such admission purportedly because they did not possess or produce OLCC identification cards. Ample undisputed evidence established and I find that each member of Mr. Robinson's party was over the age of twenty-one and possessed identification to that effect but that Mr. Sahli refused to consider such alternate evidence (to OLCC cards of age identification or to permit an member of said party to fill out and sign one of the aforementioned Statement of Age cards. Mr. Robinson's testimony was corroborated in all material respects by his wife Mrs. Lois Robinson.

Complainant Sharon Coleman credibly testified to the effect and I find that on a Saturday evening during the month of June, 1972, she and Ms. Renee Johnson, visited the Club; that upon entering, Ms. Coleman was requested by Mr. Sahli to produce an OLCC identification card which she thereupon did. Ms. Coleman was then asked to produce a second piece of identification and did; she was thereafter asked to produce yet another piece of identification and did; Mr. Sahli then requested a fourth piece of identification which Ms. Coleman produced, but Mr. Sahli demanded still another piece of identification and Ms. Coleman was unable to oblige. Mr. Sahli thereupon instructed Ms. Coleman to fill out and sign the aforementioned Statement of Age card and in an admittedly emotionally upset and shaken condition Ms. Coleman said " * * * Well Goddam, what do you want, blood?" At that moment, Mr. Don Anderson instructed Mr. Sahli to let Ms. Coleman in – that she had produced enough identification. However, Ms. Coleman and her companion Ms. Johnson

turned around and left the Club. Ms. Coleman's testimony was corroborated in all material respects by Ms. Johnson and ample undisputed evidence established and I find that both Ms. Coleman and Ms. Johnson were, on the evening in question, over the age of twenty-one.

4. Respondent William J. Sahli admitted both in testimony and in a prior voluntary statement and I find, that during the time herein material, he denied to may black persons, because of their race and color, equal access to the Club. In so doing the said Mr. Sahli employed several techniques including the following:

a. Requiring that many black persons and/or their white companions produce an OLCC card as an absolute condition of admission to the Club, while granting admission to white persons unable to produce an OLCC card by allowing them to produce other evidence of age and identification and to sign an S146 Statement of Age card furnished by the Oregon Liquor Control Commission.

b. Denying Club admission to man black persons wrongly deemed by the said Mr. Sahli to be possessed of an "improper Attitude."

c. Discouraging many black persons possessing both an OLCC card and a "proper attitude" from entering the Club by subjecting them and/or their white companions to the above and other forms of harassment calculated to effect that end.

5. Respondent William J. Sahli further testified, and I find that he denied to black persons, because of their race and color access to the Club as found and recited hereinabove, pursuant to and in furtherance of explicit instructions of Robert L. Hayes, who was his employer. I so find despite contrary testimony of Mr. Hayes and several of his friends and past employees to the general effect that the said Mr. Hayes never issued such instructions and/or that he personally harbored no "ill-will" toward black persons generally.

I accord weight to Mr. Sahli's testimony in this regard, as opposed to contrary testimony for the following reasons:

a. Mr. Sahli's motive to falsely implicate Mr. Hayes, whom he admittedly dislikes for non-payment of wages, is insufficient to alter my clear impression that Mr. Sahli's demeanor, appearance and manner of testifying indicated he was honestly if reluctantly, and at times angrily, reciting the truth as to both his own conduct and that of Mr. Hayes.

b. Mr. Hayes's motive to falsely deny that he instructed Mr. Sahli to discriminate against black persons is clear and understandable. More importantly however, Mr. Hayes's demeanor coupled with his evasive manner of testifying, created in my judgment, determinative doubt as to his veracity. Finally, I found it disturbingly noteworthy that although Mr. Hayes adamantly voiced his "good-will" toward black persons, he clearly testified to the effect that he found nothing wrong with referring to black persons as "nig-

gers." This testimony, taken in its best light reveals an anachronistic insensitivity to black persons' rights as equal humans; taken in its worst light it conceals a racially prejudiced mentality; regardless, I find this testimony contradictory to Mr. Hayes' avowed "good-will" toward black persons.

c. Deborah Metzintine, a former office employee of Mr. Hayes at Oregon Statewide Security, Inc., convincingly testified that she attended company meetings presided over by Mr. Hayes during which the said Mr. Hayes instructed his security guards assigned to the Club to require black persons to produce an OLCC card and if they did not produce such a card, to require three pieces of descriptive identification "* * * and then attempt to find something wrong with it to refuse admittance." In addition, Ms. Metzintine testified that she heard Mr. Hayes on more than one occasion refer to black persons in a derogatory manner. This testimony corroborates the earlier testimony of Mr. Sahli.

d. Three friends and/or prior employees of Mr. Hayes called to testify on his behalf were unconvincing in their demeanor and manner of testifying and I was unable to accord weight to their voluntary testimony.

6. Respondent Nehia, Inc. through Mr. Albert Maida, its part owner and officer most responsible for the on-going management and operation of the Club during all time herein material, testified to the effect that discriminatory practices, if any, engaged in by Robert L. Hayes and/or William J. Sahli were neither know to, acquiesced in, nor directed by any officer or employee of the corporation. In its aforesaid defense, each of the corporation owner/officers, Mr. Maida, Mr. Teeny and Mr. Lukich credibly testified to their respective friendships with several black persons and to the corporation's charitable donations and business contracting of the Club physical plant, personnel and stock, to black-related groups.

By way of corroborating the foregoing and countering the Agency's and complainant's charges to the contrary, Nehia, Inc. called a number of persons, most of whom were black, to testify as to their past and present relationships with both the corporation owners and the Club personnel. Each testified to the effect that he had never experienced any discriminatory treatment at the Club. Notwithstanding the foregoing, the weight of the evidence compels me to find as fact the following:

a. That during virtually all times the aforementioned Mr. Sahli engaged in his discriminatory practices, as found and recited hereinabove, Mr. Don Anderson, a "trusted" employee of Nehia, Inc., visually and audibly witnessed such practices, and failed to and refused to cause Mr. Sahli to cease and desist from such practices. I so find despite Mr. Anderson's testimony that he was never aware of any of the practices admittedly engaged in by Mr. Sahli. Mr. Anderson displayed a remarkable and disturbing lack of memory as to any past events

about which he was questioned by

counsel for the agency and complainants. This witness' demeanor and clearly evasive manner of answering questions under oath, compelled me to disregard totally the substance of his testimony. Mr. Sahli's undisputed testimony was to the effect that Mr. Anderson, whose job at the Club was to accept admission fees from patrons, was always physically positioned in close proximity to the said Mr. Sahli; that although the music was at times loud, conversation, requiring that the spoken word be heard, was not only possible, but necessary in the carrying out of his (Mr. Sahli's) function – checking identification. In addition, the presiding officer visited the Club and observed the respective positions, as pointed out by Mr. Maida, of both Mr. Sahli and Mr. Anderson and I am compelled to infer therefrom that Mr. Anderson could not reasonably have avoided perceiving Mr. Sahli's actions in discriminating against black persons. Further supportive of this finding is testimony of several witnesses, including the complainants, to the effect that the said Mr. Anderson clearly appeared to observe, and did not on at least one occasion, intervene in, Mr. Sahli's discriminatory conduct.

b. That Mr. Lee Harris, who during all times herein material was employed by Nehia, Inc. as Club manager, once instructed Mr. George MacGillis, a security guard then employed by Oregon Statewide Security, Inc. and temporarily assigned to the Club, to the effect that he (Mr. MacGillis) should not let black persons in unless he had to. I so find based on credible and convincing testimony to that effect given by the said Mr. George MacGillis, and notwithstanding contrary testimony of Mr. Harris. I accord determinative weight to Mr. MacGillis' testimony for the following reasons: First, his demeanor and candid manner of testifying coupled with an absence of any motive on his part to falsify or fabricate. Second, he was not called to testify by any of the parties herein involved, but rather, testified that he had learned through the news media of the case the prior evening and felt he had relevant information which prompted him to contact my office at which time I asked him to testify. Mr. MacGillis subsequently arrived in the hearing room and was thoroughly examined by myself and the parties. Third, the said Mr. MacGillis, while admitting to a somewhat "hazy recollection" of events surrounding the aforenoted instructions, as well as the name of the Club employee who so instructed him, was, when questioned, able to testify that the person who had so instructed him spoke with either a Greek or Lebanese accent. When asked if that person was in the hearing room, Mr. MacGillis, after a brief pause during which I observed him apparently searching the numerous faces in the audience, pointed to an individual in the audience, which individual thereupon identified himself on the record as Mr. Lee Harris. I accord significant weight to Mr. MacGillis' identification of Mr. Harris because he (Mr. MacGillis) had no prior opportunity to hear Mr. Harris speak;

further, Mr. Harris was one of numerous people in the hearing room. Subsequent to Mr. MacGillis' testimony, Mr. Harris testified that he is in fact Lebanese and I perceived that he speaks with a noticeable accent.

CONCLUSORY FINDINGS

1) Respondent Nehia, Inc., dba the Turquoise Room, at all times material herein, was a liquor licensee licensed to dispense alcoholic beverages on the premises with the responsibility of determining that patrons of the Club be at least 21 years of age; and that Nehia, Inc., delegated the age identification function to Respondent Robert L. Hayes and Oregon Statewide Security, Inc. and authorized Hayes to furnish employees to perform this essential function on behalf of Nehia, Inc.

2) Respondent Sahli was assigned to the Turquoise Room by Respondent Robert L. Hayes to perform the function of checking age identification and at all times material herein was acting on behalf of Respondent Nehia, Inc., in performing said function and determining who would be admitted to the Club.

3) Respondent Sahli was instructed by Respondent Hayes to perform, and did perform, the function of check age identification in such a manner that as many black persons as possible were excluded from the Club and discouraged from patronizing the Club and that as many mixed racial groups as possible were excluded from the Club or discouraged from patronizing the Club. In this regard, Respondent Sahli treated black persons and racially mixed groups differently and more stringently than white persons or all white groups were treated with respect to checking age identification in that black persons were required to have an OLCC card as a condition of admission to the Club and were not offered or permitted to show other age identification or sign an S-146 form while white persons were not required to have an OLCC card as a condition for admission to the Club and were permitted to sign an S-146 form and permitted to show other identification.

4) Donald Anderson, at all times material herein, was an employee of Nehia, Inc., and was employed at the Turquoise Room to collect an admission charge from patrons; and in the performance of this function he knew that Respondent Sahli was imposing different and more stringent requirements for admission upon black persons and mixed racial groups than were being imposed upon white persons or all white groups. Further, Anderson knowingly participated in the racially discriminatory manner in which the age identification was being performed at the place of entrance to the premises; and further, Anderson from time to time exercised authority to admit patrons and gave directions to Respondent Sahli as to whom should be admitted. Anderson was aware and knew that during the entire period that he and Respondent Sahli worked together at the entranceway to the premises that Respondent Sahli at no time ever attempted to or did in fact refuse to respond to directions given him by Anderson when instructed to admit patrons.

5) Complainants John B. Robinson and Floyd S. Davidson, because of their race and color and because of the mixed racial makeup of the group they were with, and Sharon E. Coleman, because of her race and color were each subjected to and were the victims of the racially discriminatory practices described herein which took place at the Turquoise Room and as to the effects thereof were caused to and did suffer mental anguish and distress as described herein.

Damages Findings

1. FLOYD S. DAVIDSON

Mr. Davidson's testimony, corroborated by Ms. Phelps and Mr. Walthers, was not only credible but in material respects uncontroverted, and I find, that as a result of having been discriminated against because of his race and color as found Anderson recited hereinabove, the said Mr. Davidson suffered considerable damage in the form of frustration, mental anguish and embarrassment.

In assessing the extent of the damage suffered by Mr. Davidson, I place weight on not only his conduct subsequent to Mr. Sahli's actions in refusing to admit Mr. Davidson's white female companion, Ms. Phelps, but on Mr. Davidson's apparent personal manner of reacting to stress situations such as testifying.

Upon being informed that Ms. Phelps would not be admitted to the Club, Mr. Davidson, with controlled emotion, stated " * * * look this isn't the first time it has happened, not the second, but it is the last * * *." He thereupon demanded to see Mr. Sahli's identification and produced his own identification showing himself to be a Multnomah County Deputy Sheriff.

Mr. Davidson firmly and unbelievably testified as to his emotional condition after some length of time during which he made a note of Mr. Sahli's name and address and requested and received back from Mr. Don Anderson the four dollars admission fee he had paid for himself and his party, as follows: "Well, if I hadn't have been dealing with people, and I hadn't learned to control myself, I would have hit him in the mouth. You know, I run into it, but it gets frustrating. I got angry at him."

I find the foregoing testimony, particularly, to be consistent with my own observation of Mr. Davidson as a witness; his manner is one of outward control. I found him to be not unlike Ms. Phelps' description of him in her testimony: "Well, he didn't show (anger emotion) very much, but you see I had known Mr. Davidson since 1968 and we were close friends and I know he was angry. His voice gets kind of hard and (his) face gets stiff and he holds himself upright and I could see all the signs that he was angry."

Based on the foregoing and considerable additional uncontroverted testimony not herein recited, to the effect that subsequent to his departure from the Club premises, Mr. Davidson remained in an emotionally upset, angry, humiliated and embarrassed condition which, consistent with his character, he did not allow to "surface," I find that two thousand and no/100 dollars ($2,000.00) is a reasonable value in compensation thereof.

2. JOHN B. ROBINSON

Mr. Robinson whose testimony was corroborated by his wife Lois Robinson, credibly testified to the effect and I find that as a result of having been discriminated against because of his race and color as found and recited hereinabove, the said Mr. Robinson suffered considerable damage in the form of mental anguish, embarrassment, frustration, and humiliation.

Implicit throughout Mr. Robinson's testimony as to the issue of damages was that the said Mr. Robinson "chose" to at least outwardly assume that the then stated reason for being denied admission to the Club (OLCC requirement that one possess an OLCC identification card) was the truthful, valid reason; that although "deep down" he at least suspected the stated reason was a fabrication, he was unwilling to cause his then fiancee who was pregnant, or his visiting friend, any unneeded anguish, by dwelling on the subject.

Mr. Robinson is an observably quiet individual whom I found to be reluctantly and quietly candid about his feelings upon being denied Club admission – although he found it painful during the hearing to "appear" to complain about the way he and his companions were treated, and why.

Unlike Mr. Davidson whose predominate reaction was anger and frustration at being wrongfully denied admission Mr. Robinson's principle reaction was more one of surprise and humiliation.

In assessing the amount of damage suffered by Mr. Robinson, I place weight on the above mentioned testimony and my own observation in addition to Mr. Robinson's further testimony to the effect that upon being informed subsequent to the evening in question, that he had been lied to with respect to the reason for not being admitted, he was hurt and stunned by the inescapable conclusion that he had been discriminated against because of his race and color.

Based upon the foregoing along with considerable supportive testimony not herein recited, I find that as with Mr. Davidson, two thousand and no/100 dollars ($2,000.00) is a reasonable monetary amount in compensation of the damage suffered by Mr. Robinson.

3. SHARON E. COLEMAN

Ms. Coleman's emotional and credible testimony corroborate by Ms. Johnson, was convincing to the effect, and I find, that as a result of having been subjected to discrimination because of her race and color, the said Ms. Coleman suffered profound damage in the form of humiliation, frustration, anxiety, nervousness, embarrassment and mental anguish.

Unlike the situation both Mr. Davidson and Mr. Robinson experienced, Ms. Coleman, on the evening in question was required and able to produce not only an OLCC card, but three other additional pieces of identification establishing her age. Yet her four pieces of identification did not satisfy Mr. Sahli who then furnished a Statement of Age card, telling her to fill it out. Ms. Coleman thereupon became understandably incensed at what she correctly perceived was racial discrimination and " * * * went to shaking and said * * * Well Goddam, what do you want, blood?" whereupon Mr. Sahli told her " * * * I'm sorry

you can't be admitted because you have a bad attitude * * *."

Ms. Coleman further testified that although finally Mr. Anderson instructed Mr. Sahli to "let her in, she showed you enough I.D.," both she and Ms. Johnson turned around and left the Club premises; further that Ms. Coleman was in an extremely upset emotional condition and was afraid to drive her own car so requested Ms. Johnson to drive; that although the evening was young yet she lost her desire to have fun and had ruined her clothing by perspiration; that hey drove around for hours and then stopped at a restaurant but that Ms. Coleman was too upset to eat and that she spilled her coffee on her clothing.

In further testimony Ms. Coleman emotionally related her reaction to the harassing tactics of Mr. Sahli as follows: " * * * I felt like I was a criminal on trial for my life just because I came out to have fun for the evening."

Perhaps most important in assessing the extent of damage suffered by Ms. Coleman as a result of her having been harassed because of her race and color was revealed in her believable and convincing testimony to the clear effect that the incident altered her personal relationships with white persons around who she works and with whom she associates. Further, that as a result of her experience, which to many less sensitive or concerned persons might be deemed "trivial," or "one of those things," Ms. Coleman has " * * * gotten so she doesn't trust too many white people now."

Based on the foregoing, further supportive testimony, and my clear impression of Ms. Coleman as not only a credible and convincing witness, but as a deeply hurt and changed person as a result of the racial discrimination she experienced, I find that two thousand five hundred and no/100 dollars ($2,500.00) is an appropriate amount in compensation of her humiliation, frustration, anxiety, nervousness, embarrassment and mental anguish.

CONCLUSIONS OF LAW

1) Respondent Nehia, Inc., an Oregon corporation, is a place of public accommodation as defined in ORS 30.675(1).

2) That Nehia, Inc., dba The Turquoise Room, is liable for any unlawful practices as defined in ORS 659.010(14) engaged in by any person or persons acting on its behalf whether such person or person be employees, independent contractors or employees of independent contractors.

3) Respondent Nehia, Inc., violated the provisions of ORS 659.010(14) in that Respondents William J. Sahli and Robert L. Hayes, while acting on behalf of Nehia, Inc., did discriminate against and place restrictions on black persons or members of racially mixed groups who sought admission to the Turquoise Room because of the race and color of such persons or the mixed racial makeup of the groups which sought admission to the Turquoise Room.

4) That every person, whether acting in a personal capacity or as a corporate agent who commits an unlawful practices as defined in ORS 659.010(14 is personally liable for such unlawful practices.

5) That Robert L. Hayes, doing business as Oregon Statewide Security and later as Oregon Statewide Security, Inc., was during the time material herein, an independent contractor engaged by Nehia, Inc. to provide security services on the Club premises and was thereafter acting on behalf of a place of public accommodation as defined in ORS 30.675.

6) Respondent Robert L. Hayes violated the provisions of ORS 659.037 in instructing and directing his employee, William J. Sahli, to discriminate against black persons seeking admission to The Turquoise Room because of their race and color.

7) William J. Sahli, during the times material herein, was employed as a security guard by Mr. Hayes, doing business as Oregon Statewide Security and later Oregon Statewide Security, Inc., as was assigned by Mr. Hayes, pursuant to this contract with Nehia, Inc., to perform security services at the Club and that while so employed and assigned, William J. Sahli was acting on behalf of a place of public accommodation as defined in ORS 30.675.

8) Respondent William J. Sahli violated the provisions of ORS 659.010(14) in performing the job functions on behalf of Respondent Nehia, Inc., of checking the age identification of individuals seeking admission to the Turquoise Room in performing said function in such a manner as to deny admission to The Turquoise Room to as many black persons as possible including the Complainants and to as many mixed racial groups as possible because of the race and color of their members.

9) Respondent Nehia, Inc., dba The Turquoise Room, a place of public accommodation and Respondents Sahli and Hayes, acting on behalf of such place of public accommodation, are each jointly and severally liable for the damages found herein to have been suffered by Complainants Floyd S. Davidson, John B. Robinson and Sharon Coleman.

10) Complainant Floyd S. Davidson, was the victim of and subjected to the unlawful practices committed by Respondents and each of them, described herein above because of his race and color and because of the mixed racial makeup of the group he was with when he sought admission to The Turquoise Room on or about June 5, 1972.

11) Complainant John Robinson was the victim of and subjected to the unlawful practices committed by Respondents and each of them, as described herein above because of his race and color and because of the mixed racial makeup of the group he was with when he sought admission to The Turquoise Room on or about June 5, 1972.

12) Complainant Sharon E. Coleman, was the victim of and subjected to the unlawful practices committed by Respondents and each of them, as described herein above and was harassed and otherwise discouraged from seeking admission to The Turquoise Room in June of 1972.

ORDER

1. To eliminate the effects upon complainant Floyd S. Davidson of respondents' unlawful practices, said respondents shall deliver to the office of the Oregon Bureau of Labor, room 473 State Office Building, Portland,

Oregon within ten (10) days of the date of a final order, a cashiers check or money order payable to Floyd S. Davidson in the amount of $2,000.00.

2. To eliminate the effects upon complainant John B. Robinson of respondents' unlawful practices, said respondents shall deliver to the office of the Oregon Bureau of Labor, room 473 State Office Building, Portland, Oregon within ten (10) days of the date of a final order, a cashiers check or money order payable to John B. Robinson in the amount of $2,000.00.

3. To eliminate the effects upon complainant Sharon E. Coleman of respondents' unlawful practices, said respondents shall deliver to the office of the Oregon Bureau of Labor, room 473 State Office Building, Portland, Oregon within ten (10) days of the date of a final order, a cashiers check or money order payable to Sharon E. Coleman in the amount of $2,500.00.

4. Respondents Nehia, Inc., dba The Turquoise Room, Robert L. Hayes and William J. Sahli, their agents, officers, employees and successors in interest and all persons in active concert or participation with any of them are enjoined from engaging in any of the unlawful practices found hereinabove, which practices have the purpose and/or effect of discriminating against persons because of their race and color or because of the race and color of any other person with whom they associate.

5. Respondent Nehia, Inc. dba The Turquoise Room by and through Mr. Albert Maida shall within fifteen days of the date of a final order, formalize and deliver to each corporate employee, officer, agent, and person acting on behalf of said corporation, a policy, setting forth in sufficient detail as to render it unambiguous, whereby identification checking, and all other services and functions offered and performed on the Club premises shall henceforth be without regard to and without disparate effect upon persons because of their race and color, a certified copy of such formal policy shall within fifteen days of the date of a final order, be delivered to the Commissioner of Labor or such other person as he shall designate to accept same.

6. Respondent Nehia, Inc. dba The Turquoise Room by and through Mr. Albert Maida shall within 30 days of the date of a final order post in the Club entranceway, such that it can be visually perceived without effort, a poster or placard clearly informing the reader that the Club offers its good and services to persons without regard to their race and color.

7. Whenever a time limit has been specified in any order herein, the time limit shall be tolled during all times that the respondents, or their agents shall be in default on any act required to be performed hereunder. This section shall apply not only to direct defaults in performance, but also to appeals, stays or other forms of indirect defaults. Provided, however, that nothing in this section shall prevent interest from accruing from ten (10) days after the entry of the order on unpaid sums awarded as a part of the remedies in the case.

IT IS FURTHER ORDERED that the Office of the Commissioner of the Oregon Bureau of Labor or its successors shall retain jurisdiction in this matter and if for any reason nor specified herein, new facts should

develop which would affect any of the remedies provided herein, or the discriminatory conduct of any of the respondents should continue, the complainants, any persons similarly situated, the Administrator of the Civil Rights Division, or any of them may petition me for a supplementary Order and relief which would provide an adequate remedy for the complainants or other persons similarly situated to carry out the Civil Rights Laws, and eliminate the effects of such alleged unlawful practices.

In the Matter of
MARK & LINDA McCLASKEY,
both dba McClaskey's Restaurant,
Respondents.

Case No. 43-98
Final Order of the Commissioner
Jack Roberts
Issued December 23, 1998.

SYNOPSIS

Respondents operated a restaurant and employed Complainant as a waitress. After Complainant became pregnant with twins, Respondents discharged her because of her pregnancy. The Commissioner ordered Respondents to pay Complainant $2698.75 in back wages and $17,500.00 damages for the mental suffering caused by Respondents' unlawful employment practice.

The above-entitled contested case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on November 3 and 4, 1998, in the conference room of the State of Oregon Adult and Family Services Division, 3800 East Third Street, Tillamook, Oregon. The Civil Rights Division of the Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Respondents were represented by Dennis V. Gilbert, Attorney at Law, Tillamook. Respondents Mark McClaskey and Linda McClaskey were present throughout the hearing. Complainant Cheryl Winfrey also was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses, in addition to Complainant: Marlene Thompson (Complainant's mother); Carrie Lagers, Karen Caillier, and Carmin Dummer (all former employees of Respondents); Ebon Bergeron (Linda McClaskey's son and a former employee of Respondents); and Job Valverde (an Agency investigator called as a rebuttal witness).

Respondents called as witnesses: Respondents Mark McClaskey and Linda McClaskey; former employees Heather Orin, Kim Travis, Lonnie McFarland, Cheryl Carver, and Neal Zudima; and customers William Howard, Sr., William Howard, Jr., and Justin Howard.

The ALJ admitted into evidence: Administrative Exhibits X-1 through X-15; Agency Exhibits A-1, A-2, A-4,[1] A-

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[1]Exhibit A-4 is a document that Linda McClaskey gave to Complainant. Por-

5, A-6, A-8, and A-9; and Respondents' Exhibits R-1, R-3, R-6, and R-10.

Having fully considered the entire record in this matter, I, Jack 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 or about December 6, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. Complainant alleged that Respondents terminated her employment because of her pregnancy.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence that Respondents unlawfully had discharged Complainant based on her pregnancy.

3) On February 27, 1998, the Agency requested a hearing.

4) On March 18, 1998, the Agency served on Respondents Specific Charges alleging that Respondents had discharged Complainant based on her sex/pregnancy, in violation of ORS 659.029 and ORS 659.030(1)(a). The Agency sought damages of $3,700.00 in back wages and tips plus $25,000.00 for mental suffering.

5) With the Specific Charges, the Forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Summary 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) The Notice of Hearing stated that Respondents' answer was due 20 days from receipt of the notice and that, if Respondents did not timely file an answer, they could be held in default.

7) Respondents filed their answer on April 6, 1998. Respondents denied they discharged Complainant because she was pregnant, denied they unlawfully discriminated against females, and affirmatively alleged that they discharged Complainant primarily because she "refus[ed] to follow the directives of management and to comply with the rules and policies of the restaurant."

8) By motion dated April 14, 1998, Respondents requested "copies of all medical reports, records and writings in the possession, control or within the ability of the Bureau of Labor and Industries or complaintant [*sic*] Cheryl Winfrey to obtain" regarding Complainant's alleged mental suffering, Complainant's alleged ability to work until January 1, 1997, and the physical condition of Complainant between June 1, 1996, and October 15, 1996. The ALJ granted the motion and ordered the Agency and Complainant to produce the requested documents.

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tions of the original document are highlighted in yellow. The Agency offered, and the Forum received into evidence, the original document as well as a photocopy of it.

The Agency produced the documents on May 13, 1998.

9) On April 28, 1998, the ALJ ordered the Agency and Respondents each to submit a summary of the case including: a list of witnesses to be called; the identification and description of any document or physical evidence to be offered, together with a copy of any such document or evidence; a statement of any agreed or stipulated facts; and, from the Agency only, any damage computations. The Agency and Respondents submitted timely case summaries.

10) On June 26, 1998, the Agency requested that Respondents admit certain facts alleged in their Answer. Respondents admitted those facts in a response dated July 10, 1998.

11) By motion dated June 29, 1998, the Agency moved for a postponement of the hearing. On July 10, 1998, Respondents also filed a motion for setover of the hearing, to which the Agency did not object. By order dated August 5, 1998, the ALJ granted Respondents' motion and reset the hearing to commence on November 3, 1998. The ALJ denied the Agency's motion as moot.

12) On July 10, 1998, attorney Dennis V. Gilbert filed a notice that he would appear on behalf of Respondents.

13) By letter dated September 16, 1998, the Agency notified the Forum that it would be represented by case presenter Linda Lohr.

14) On October 21, 1998, the Forum notified the participants that the matter had been reassigned from ALJ Warner W. Gregg to ALJ Erika L. Hadlock.

15) At the start of the hearing, counsel for Respondents stated that his clients had read the Notice of Contested Case Rights and Procedures and had no questions about it.

16) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) Approximately two hours after the start of the hearing, the ALJ discovered that the proceedings had not been properly recorded on audiotape. The ALJ notified the participants of this problem, and stated that the two witnesses who already had testified (Complainant and Heather Orin) would need to testify again, since the Forum would base its decision solely on evidence in the record and not on testimony that had not been recorded. Those witnesses did testify again; that testimony and the remainder of the hearing were recorded on audiotape. The participants waived their right to repeat the opening statements they had made, but which had not been recorded.

18) On December 3, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. Respondents filed timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) At all material times, Respondents Mark McClaskey and Linda McClaskey owned and did business as McClaskey's Restaurant, located in Tillamook, Oregon. Respondents had 15 or more employees at any given time. Mark and Linda McClaskey supervised the restaurant employees; there were no other managers.

2) The restaurant business in Tillamook is seasonal, with business being heaviest during the summer and falling off during October or November. Respondents sometimes laid off employees at the end of the busy season and cut back the hours worked by others. Before 1996, however, Respondents never had discharged a long-term waitperson because of a slowdown in business.

3) Complainant started working for Respondents as a waitress in 1983. In 1987, Linda McClaskey fired Complainant after they had an argument.

4) In May 1988, Respondents developed an employee handbook that explained company policies, including rules about taking direction without resentment, not allowing anybody in the restaurant after hours, not discussing restaurant business so loudly that customers could hear, and keeping conversations with customers to a minimum. Through the years, Respondents occasionally held employee meetings and passed around copies of the employee handbook, which Mark McClaskey read aloud. Not all employees paid attention while the handbook was being read. Many, if not all, of Respondents' employees also received copies of the employee handbook when they were hired.

5) Respondents rehired Complainant in 1989 or 1990. Complainant worked primarily as a waitress but also was given other responsibilities such as counting the till and ordering supplies. When Mark and Linda McClaskey went out of town, Complainant sometimes ran the restaurant. Complainant, in the words of Mark McClaskey, was "a heck of a worker."

6) Sometime in 1992 or 1993, Complainant experienced difficulties with an excavation company that was preparing a home site for her, and had a conversation about those difficulties with some customers. Mark McClaskey thought Complainant's behavior was unprofessional and gave her a "dirty look," but did not speak with her about it. At the hearing, Mark McClaskey identified this incident as an example of the problems that led to Complainant's termination in 1996. When asked to identify other similar incidents, Mark McClaskey could not recall anything specific.

7) In about 1994, Linda McClaskey overheard Complainant and other employees complaining about the nature of the Christmas bonuses they had received. Complainant apologized to Linda McClaskey for that incident.

8) Respondents employed a cook named Laura who had a difficult personality and did not get along well with many other employees. Complainant, as well as other employees, sometimes had loud discussions with Laura that probably could be overheard by customers. Complainant's disagreements with Laura did not

contribute to Respondents' later decision to fire Complainant.

9) Complainant's mother, Marlene Thompson, worked for Respondents for about 14 years and still works at the restaurant, which Respondents recently sold. Thompson got along well with Respondents. Thompson never heard Respondents complain about Complainant's work or her demeanor in the workplace. She was not aware of any complaints from customers about Complainant.

10) Complainant, who already had four children, became pregnant in the spring of 1996. She reported that pregnancy to Linda McClaskey in June or July. Later in July, Complainant learned that she was going to have twins, and gave Linda McClaskey that information. Complainant told Linda McClaskey that, if it was at all possible, she wanted to continue working until January 1, 1997.

11) At some point, Complainant told some customers (William Howard, Jr., and his son, Justin) that she was pregnant with twins and that her husband was not the children's father. Howard testified credibly that he was not bothered by this conversation, which he did mention in passing to Mark McClaskey. The Forum has not credited former waitress Carver's contrary testimony that Howard told her he did not appreciate hearing the details of Complainant's private life.[2]

12) William Howard, Sr., a regular customer, once overheard customers kidding Complainant about being pregnant with twins and felt that neither Complainant nor the customers were acting appropriately. Howard also once left the restaurant without being seated because Complainant and another waitress were engaged in a loud conversation of which several customers were aware. Those two incidents were the only problems Howard had with Complainant in the 12 years he frequented Respondents' restaurant, and he spoke only to his sons about them. Respondents later learned of the second incident.

13) After she learned of Complainant's pregnancy, Linda McClaskey asked some employees to look out for Complainant and make sure she did not do too much. The employees did offer to help Complainant; she sometimes accepted that help and sometimes did not. Complainant had no difficulty performing her job duties, however, and her doctor had said she could perform all aspects of her job during her pregnancy, including lifting ice buckets and dishes, as well as vacuuming and cleaning.

14) Linda McClaskey never asked Complainant to provide a doctor's certification that she was physically able (or unable) to perform her job duties. She never told Com-

[2]The Forum does *not* find that Carver testified dishonestly. It is clear, however, that either she or Howard is mistaken regarding the significance the conversation had to Howard, and the Forum finds that Howard's recollection of the event is more accurate than Carver's. The Forum bases that finding in part on the fact that Howard's testimony comports with the testimony of his son, Justin, who did not state that he or his father were disturbed by the conversation, and in part on the fact that Howard testified credibly that the conversation was "unimportant" and "irrelevant" to him.

plainant that she was worried about Complainant's ability to perform any particular task. Mark and Linda McClaskey decided independent of any medical advice or expertise that it was dangerous for Complainant to perform certain jobs, such as lifting heavy items.

15) Respondents' waitresses regularly carried buckets of ice through the kitchen to the front of the restaurant. Sometime after she became pregnant, Complainant quickly carried a bucket of ice through the kitchen in a manner that concerned Mark McClaskey, who told Linda McClaskey to get Complainant out of the kitchen before she got hurt. Neither Linda nor Mark McClaskey spoke to Complainant about the incident. Complainant never was told that she was using an improper technique for carrying the ice.

16) Sometime in September, Linda McClaskey discovered that Complainant had allowed her boyfriend to remain in the restaurant with her after closing time. Linda McClaskey did not discuss that incident with Complainant.

17) In late September 1996, Complainant fell off a bucket she had been standing on while washing her car. Complainant was bruised and sore, but did not suffer a back injury. Linda McClaskey offered to cover Complainant's next few shifts, but Complainant insisted on working.[3] The bruises and scrapes Complainant had suffered did not prevent her from performing her normal job duties.

18) Soon after Complainant fell off the bucket, an elderly couple remarked to Mark McClaskey that they had been given a good meal at Respondents' restaurant, but that a pregnant waitress was really "humping it" around there. McClaskey interpreted this remark as meaning that the couple believed Complainant was working too hard.

19) By September 1996, Linda McClaskey had decided she was going to terminate Complainant's employment and had spoken with Agency personnel and the Employment Division about the impending discharge. She specifically told the Agency that she had safety concerns related to Complainant's pregnancy.

20) Respondents developed a job description for waitresses years ago, and at least some of their waitresses were familiar with it. After her conversation with Agency personnel, Linda McClaskey directed Ebon Bergeron to weigh various items that waitresses were responsible for moving, such as ice buckets (20 pounds) and racks of glasses (12 pounds). Respondents then added that weight information to the job description. At about the same time, Respondents developed a medical leave policy.

21) In October 1996, somebody -- perhaps Complainant -- told a cook named Lonnie McFarland to cook a frozen prime rib, which was not a proper procedure. Customers may have overheard the resulting dispute between Complainant and McFarland. Mark McClaskey disciplined McFarland and told him not to take cooking instructions from wait-

[3]When Mark McClaskey learned that Complainant had returned to work soon after her fall, despite the fact that Linda McClaskey had offered to cover a few of her shifts, he chastised Linda McClaskey for letting Complainant "tell her what to do."

resses. Neither he nor Linda McClaskey spoke to Complainant about the incident.

22) In early October 1996, Mark McClaskey found that Complainant had allowed her boyfriend to remain in the restaurant after it had closed, while Complainant ate some food. Mark McClaskey gave Complainant a "dirty look" but did not discuss the incident with her.

23) Soon thereafter, Mark McClaskey went on a hunting trip and left Linda McClaskey in charge of the restaurant. At that point, he, too, had decided that Complainant should be fired. McClaskey testified that he felt that Respondents should lay Complainant off for "lack of work" so she could collect unemployment benefits and return to work after her babies were born.

24) While Mark McClaskey was away, Complainant got into a dispute with McFarland about the way he had prepared some orders and commented that Mark McClaskey should have left her in charge while he was gone.

25) On October 15, 1996, Linda McClaskey asked Complainant and Thompson to meet her in her office. Linda McClaskey started the meeting by saying something like, "I think you probably know why you're here." Complainant and Thompson responded that they did not know what the meeting was about, and Linda McClaskey said she was letting Complainant go. Linda McClaskey said that she was afraid Complainant might fall or get hurt at work during her pregnancy, and that she was an insurance risk. She also mentioned a former employee who had filed a fraudulent Workers' Compensation claim against Respondents in 1984, and said they could not afford another lawsuit if Complainant slipped or fell. Complainant got upset and said she wanted to keep working. Linda McClaskey told Complainant that she would lay her off and attribute the layoff to a slowdown in business so Complainant could get unemployment benefits. Complainant did not agree to characterize what had happened as a "layoff." Linda McClaskey told Complainant that she had worked her last shift. As Complainant left the office, Linda McClaskey handed her documents from which she had read during the meeting.

26) The documents Linda McClaskey gave Complainant were the job description for waitresses and Respondents' medical leave policy. During the meeting, Linda McClaskey had discussed certain duties of waitresses, particularly those that involved heavy lifting or other strenuous physical activity, stating that the work was too much for Complainant to handle while she was pregnant. Linda McClaskey also stated that Complainant was being let go in part because she had not stopped performing certain tasks, such as carrying ice, lifting racks, or vacuuming floors. Although Linda McClaskey indicated in writing on the job description that there were "problems with" keeping voices down, keeping conversations with customers brief, and communicating with the kitchen in a professional manner, she did not mention those purported job performance problems during the meeting.

27) The medical leave policy that Linda McClaskey gave Complainant read as follows:

"McCLASKEY'S RESTAURANT

"GENERAL MEDICAL LEAVE POLICY

"If an employee encounters a medical condition which, in the opinion of the employer may interfere with the employees ability to perform the duties required in their job, or may subject the employee to injury of themselves or others, the employer will make a determination as to medical leave. Due to the fact that employer is engaged in a small seasonal business, no guarantee of job availability can be made, but employer will endeavor, as circumstances dictate. Medical leave is unpaid."

28) The entire time Complainant worked for Respondents during her pregnancy with the twins, she felt fine and wanted to keep working until January 1, 1997. As Complainant testified, pregnancy was an "easy thing" for her. Complainant was able to perform all of her job duties, including lifting. On October 28,1996, Complainant obtained a letter from her physician stating that Complainant "has not had any condition at this point which has not allowed her to work." Complainant requested this note because she did not believe Respondents were in a position to decide whether or not she was able to work. Had Respondents not discharged her, Complainant would have been physically able to work, and would have continued working, until January 1, 1997.

29) At the time Respondents discharged her, Complainant was earning $5.25 per hour plus tips. In 1995, Complainant worked 182 hours in October, 160.5 hours in November, and 143.5 hours in December. Until Respondents fired Complainant on October 15, 1996, she had been working about the same numbers of hours as she had worked in 1995. The Forum infers that, if Complainant had continued working, she would have worked the same number of hours for the remainder of 1996 as she had worked during the corresponding months in 1995. Complainant reported an average of about $250.00 per month in tips during slow months, which was approximately 30% of the amount she actually earned. Linda McClaskey was aware that the waitresses reported only a portion of their tips and instructed at least some waitresses to ensure that they reported similar percentages of the actual amounts they received. When Linda McClaskey was a waitress, she reported none of her tips.

30) Although Complainant's husband (the father of her third and fourth children) earned about $26,877.00 during 1996, he and Complainant were separated and he did not share that money with her. Nor did he provide child support during 1996. The father of Complainant's two oldest children did provide $450.00 per month in child support, but, before Complainant was fired, that was the only income her family had in addition to what she earned working for Respondents.

31) Complainant was very upset and surprised by the discharge. Her feelings were hurt because of Respondents' attitude toward her pregnancy. After she was fired, Complainant cried "all the time." She

was not able to pay her family's bills or keep food in the house, and had to rely on assistance from other family members. After about two months, Complainant started receiving unemployment benefits. Christmas of 1996 was very hard because Complainant had no money to buy presents or food for her four children and had to accept charity for the first time in her life. She received assistance not only from family, but also from local churches and customers of Respondents' restaurant. Complainant was humiliated by having to accept this charity.

32) In March 1997, after her twins were born, Complainant started working for another Tillamook restaurant.

33) After Respondents discharged Complainant, other employees' hours increased as they worked Complainant's old shifts. One hostess, Sarah Walker, who had worked for Respondents only for a few weeks, picked up most of Complainant's shifts. A few weeks after Respondents terminated Complainant's employment, Sarah quit, and Respondents advertised for (and hired) a new waitress because they could not afford to pay overtime to their other employees.

34) On cross-examination, Mark McClaskey was asked to list the reasons that Complainant was terminated. He identified several factors that allegedly contributed to the decision: a slowdown in business; Complainant talking too much about her personal problems (Mark McClaskey identified the time William Howard, Sr., left the restaurant without being seated, as well as the time Complainant told William Howard, Jr., that she was pregnant); Complainant not taking direction without resentment (Mark McClaskey did not give a specific example); the frozen prime rib incident; Complainant allowing people to stay in the restaurant after closing; and Complainant's remark about how Mark McClaskey should have left her in charge. McClaskey never spoke to Complainant about any of these alleged problems.

35) At the hearing, Linda McClaskey stated that she chose to lay off Complainant when business slowed down because she had been causing problems since June 1996. Linda McClaskey identified the following problems that allegedly contributed to that decision: Complainant's refusal to comply with Linda McClaskey's directions not to carry ice, to bring racks down, or vacuum floors; Complainant's "ongoing" problem with talking too much about her personal problems; the incident when Complainant said she should have been left in charge of the restaurant; and Complainant allowing her boyfriend to remain in the restaurant after hours. Linda McClaskey, however, never spoke to Complainant about any of these alleged problems.

36) Carrie Lagers worked as a waitress for Respondents from about September 1995 through April 1998, and worked the same shift as Complainant. Lagers never heard customers complain about Complainant, never heard Respondents complain about Complainant's work performance, and was not aware that Complainant had any problems with coworkers. Lagers believed Respondents were great employers who treated her and other employees well.

37) Cheryl Carver worked as a waitress for Respondents from about 1988 or 1989 until 1997 or 1998, and worked with Complainant. Carver got along well with Complainant, who went out of her way to help other people. During her pregnancy, Complainant was somewhat more emotional than usual, and Carver felt she was trying to do more than she should, like lifting trays that Carver thought were too heavy for her. Carver never heard Respondents complain about Complainant. Carver observed that men sometimes came into the restaurant to visit Complainant, but she did not believe Complainant invited them in, and did not believe the visits interfered with Complainant's work. Customers occasionally had complained about Carver, and she acknowledged that restaurant customers do sometimes complain about waitstaff.

38) Karen Caillier worked as a waitress for Respondents from March 1993 to November 1997, and occasionally worked the same shift as Complainant. Caillier never heard complaints about Complainant's conduct in the workplace or her job performance. Complainant worked hard and was dedicated to her job. Caillier never saw Complainant violate restaurant rules. Complainant talked with customers, but not more than other waitresses did. Caillier was treated well by Respondents and did not observe them treating other employees unfairly.

39) Carmin Dummer worked as a cook for Respondents off and on from 1992 to early 1997, and sometimes worked the same shift as Complainant. She heard no complaints about Complainant's job performance, except that she had a personality conflict with the cook named Laura, who did not get along with many people. Dummer was not aware that Complainant ever was criticized or reprimanded for her disagreements with Laura. She did not see Complainant have any difficulties performing her job while she was pregnant.

40) In 1994 or 1995, Dummer became pregnant while she was working for Respondents, who suggested that she not do heavy lifting. Because Dummer had problems with her feet swelling, Respondents allowed her to work the morning shift, when it was cooler. Dummer continued performing her normal job duties, except for heavy lifting, until her doctor said she should not work anymore. After she had her baby, Dummer went back to work for Respondents in July 1996.

41) Heather Orin worked as a part-time waitress for Respondents from approximately 1993 to 1995, and testified credibly that Complainant was a hard worker. In 1994, Orin once became irritated with Complainant for something related to Complainant talking to customers, and spoke with Linda McClaskey about that. However, Orin did not believe that Complainant spoke more loudly or more excessively with customers than did other waitresses. Orin heard no complaints from customers about Complainant. Nor did she hear Linda McClaskey or Mark McClaskey complain about Complainant's demeanor or behavior in the workplace. Orin was not aware that Complainant violated any restaurant rules.

42) Kim Travis worked as a waitress for Respondents from approximately 1987 through 1994. She testified credibly that Complainant was a good worker who was more energetic than most employees and never let anything "slide." Travis never saw Complainant cause disruption in the restaurant, never saw her fight with Respondents, and never heard any complaints about her. She did not ever hear Mark or Linda McClaskey complain about Complainant's work performance or her demeanor in the restaurant. Travis did once see Complainant disagree with a cook named Laura, who was difficult to get along with.

43) In 1994, Travis became pregnant with a single child and continued to work for Respondents into her eighth month of pregnancy. Respondents allowed Travis to rest when she needed to, and allowed her to ask other employees to help her with heavy lifting. Travis believed Respondents were good bosses and treated their employees fairly.

44) The Forum has accepted these other employees' credible testimony that Complainant was a good, hard worker whose behavior was not disruptive to Respondents' business.

45) In the late 1980s, Respondents employed Neal Zudima, who has a severe arthritic condition, as a cook. Respondents accommodated Zudima by arranging for other employees to help him with certain tasks.

46) The Forum observed Complainant carefully throughout the hearing and found her testimony generally to be credible. She gave straightforward answers to questions and did not go out of her way to portray Respondents in a bad light. Complainant also readily admitted to one incident of poor behavior -- complaining in the restaurant about the staff's Christmas bonuses. Complainant appeared to be justifiably proud of her job skills and performance, which nearly every witness commended, and became somewhat defensive when asked if she had committed particular misdeeds. She also appeared reluctant to acknowledge that her memory may have faded with regard to events several years old. This defensiveness, however, was not so marked as to lead the Forum to reject Complainant's testimony, and the Forum has found it credible except as noted below.

47) The testimony of Respondents Mark and Linda McClaskey also was credible with regard to some historic events. They acknowledged that Complainant had been a good, hard worker and they did not appear to have completely fabricated specific instances of misbehavior on her part. Respondents did, however, make unsubstantiated generalizations about the problems they allegedly had with Complainant in the fall of 1996. For example, Mark McClaskey testified that Complainant's behavior was "erratic" and "out of control," yet he was able to describe only a few specific instances of her alleged misconduct, one of which dated back several years.[4] Respondents also minimized the role Complainant's pregnancy played in their decision to terminate

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[4]*See* findings 6 and 34, *supra*.

her employment in a manner that was not credible, and the Forum has given little weight to their testimony about their motivations for firing her. Respondents' insistence that they would have fired Complainant even if she had not been pregnant is unbelievable, especially in light of Mark McClaskey's testimony that Respondents had planned to rehire Complainant after she had her babies. Nor does the Forum believe Respondents' testimony that Complainant was out of control and had ongoing behavior problems, given the uniformity of opinion among waitstaff (other than Bergeron) that Complainant was a hard worker who did not frequently cause problems or break rules. Overall, the Forum found Respondents' testimony to be less credible than Complainant's, and generally has credited Complainant's testimony where it conflicted with Respondents', particularly where Complainant's testimony was corroborated by Thompson's.

48) Linda McClaskey testified that she sometimes wrote contemporaneous notes on her desk calendar when she had problems with employees; on the first day of each month, she would copy those notes onto the employees' monthly time sheets and the employees' yearly payroll sheets. Linda McClaskey wrote no notes on Complainant's time sheets for January through August 1996. On Complainant's September 1996 time sheet, Linda McClaskey wrote a note that she had found Complainant's boyfriend in the restaurant (with Complainant) after closing. Another note on the September time sheet states that Complainant fell and injured herself, but insisted on working. Linda McClaskey testified that she previously had written those notes on her desk calendar, which she had not retained. A third note on the time sheet states, "fight, Bill left." According to Linda McClaskey,[5] there also are handwritten notes on Complainant's October time sheet regarding: Mark McClaskey finding Complainant's boyfriend in the restaurant after closing; the frozen prime rib incident; and Complainant having stated that Mark McClaskey should have left Complainant in charge of the restaurant.

49) Complainant's 1996 yearly payroll sheet includes several notes. The first note states:

> 10-15-96 -- Laid off lack of work (decided on by waitperson/employer). Called CW and MT to office to inform her of my concerns & medical policy & job description & that I had no other job available that is not a safety problem in her medical condition. She decided to take laid off for lack of work & get unemp. until she could find suitable work.

Other handwritten notes written toward the edges and bottom of this document state that Complainant: "pack[ed] ice" even though she had been told not to; had her boyfriend in the restaurant after hours; "jump[ed] all over cooks"; flirted and "[got] pregnant by customer"; and told customers of her personal problems. Linda McClaskey initially testified that she had written these notes before she laid off Complainant. She then admitted that she had not written the

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[5]The monthly time sheets are not in the record.

notes on the payroll sheet until immediately *after* discharging Complainant in mid-October. She later specifically acknowledged that she had not written the notes regarding September 1996 incidents on the first of October, which would have been her normal practice, but had written them only after she had fired Complainant. The Forum finds that Linda McClaskey wrote the notes in a post-hoc attempt to justify the termination of Complainant's employment.[6]

50) The Forum also has not credited Linda McClaskey's testimony that she told Complainant several times not to perform certain of her job duties, like pulling down racks of glasses and carrying ice buckets. According to their own testimony, which largely comports with Complainant's, Respondents rarely spoke to Complainant about any problems they allegedly observed. For example, Linda McClaskey testified that she had spoken to Complainant about her alleged "ongoing" problem with excessive talking only once every few years. She also could not recall having spoken to Complainant after Mark McClaskey complained that she had been walking quickly through the kitchen with an ice bucket. There is no reason to believe that Linda McClaskey told Complainant to restrict her job duties when she rarely spoke to her about other perceived misconduct. In addition, Complainant testified credibly that Respondents had not asked her to stop performing certain tasks.

51) The Forum has attached no significance to the evidence that waitresses routinely reported only 30% of their tips as income. This appears to have been a universal practice among waitresses at Respondent's restaurant, and a practice of which Linda McClaskey was aware. Although the underreporting of tips is dishonest, because nearly everybody involved in this case colluded in the practice to some extent, the Forum has not found that it reflects poorly on the credibility of any particular witness.

52) The Forum has found it unnecessary to resolve certain factual discrepancies between the testimony of Complainant and that of Respondents and McFarland. For example, Complainant denied she told McFarland to cook the frozen prime

[6]There is a handwritten note on Complainant's payroll sheet from 1983 stating: "CW/Off - for Birth of Child." Linda McClaskey testified that she had not seen that note for years, and had not written that note after she laid off Complainant. During closing argument, the Agency suggested that Linda McClaskey must have written that note much later than 1983 because Complainant's initials then were "CB", not "CW." Respondents objected that there was no evidence in the record of Complainant's name in 1983. Respondents are not quite correct -- the name on the 1983 timesheet is Cheryl Bake, not Cheryl Winfrey -- but there is no evidence in the record regarding whether Complainant may casually have used some name other than Bake in 1983. The Forum finds Linda McClaskey's use of the initials "CW" on a note dated 1983 to be highly suspicious, but will not infer from that evidence alone that she actually wrote the note years later and lied about that fact on the stand.

rib, but Mark McClaskey and McFarland testified that Complainant was the person who gave McFarland that instruction. McFarland could not remember in what year the incident occurred. Carver, whom Mark McClaskey testified was the sole person who had informed him that Complainant was the person at fault, testified that she could not recall if Complainant had been involved at all. It is clear from Carver's and McClaskey's vague recollection of the incident that it did not strike them at the time as being particularly serious or unusual. The Forum finds it unnecessary to determine whether Complainant gave the order to cook the frozen meat because it finds that, even if Complainant gave the order, that incident did not contribute significantly to Respondents' decision to terminate her employment.[7] That finding is confirmed by Linda McClaskey's testimony that she already had decided to fire Complainant before the prime rib incident took place.

53) Another instance in which the various witnesses' testimony does not agree relates to Respondents' employee handbook. Complainant testified that she never had seen or read a copy of the handbook, but Respondents testified that the handbooks were passed around at all employee meetings, and Complainant must have seen one. Several employees agreed with Respondents' testimony on this point; two others, like Complainant, did not recall having read the handbook. The Forum finds it unnecessary to resolve these disputes because its ultimate factual findings and legal conclusions would not change even if it found Complainant's versions of events to be less accurate than Respondents'. Given the amount of time that has passed since the incidents at issue, the discrepancies in the testimony are not important, and the Forum does not find the conflicts to reflect adversely on any given witness's credibility. Moreover, Complainant acknowledged that she was familiar with Respondents' rules and policies, even if she did not gain that knowledge from having read the handbook.

54) The Forum found Thompson's testimony to be highly credible, despite the fact that Complainant is her daughter. Thompson testified in a straightforward manner to facts favorable both to Complainant and to Respondents. She readily admitted when she could not recall particular matters. Thompson was upset when Respondents discharged Complainant, but did not appear to harbor any grudge against them that would lead her to give false or misleading testimony. The Forum has relied heavily on Thompson's testimony in making its findings.

55) Several of Respondents' former employees testified about rumors they had heard regarding the reason Respondents discharged Complainant. The witnesses stated

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[7]Nor does the Forum find that the discrepancy in testimony reflects poorly on the credibility of Complainant. McFarland's testimony about the incident was extremely nervous and vague -- one of the few details he purportedly could recall about the incident was that Complainant was the person who instructed him to cook the frozen prime rib. The Forum did not find McFarland's testimony on this point to be convincing.

forthrightly that they had no personal knowledge of the truth or falsity of those rumors, and the Forum has given no weight to the testimony on that subject.

56) The Forum was not favorably impressed by the ever-changing testimony of Ebon Bergeron, Linda McClaskey's son, who worked for Respondents from 1994 to about 1997. Bergeron initially testified that he could not recall any specific complaints about Complainant's work performance, other than "little squabbles" that occur in the restaurant business. He then remembered that Complainant once had demeaned Respondents in front of customers. Similarly, Bergeron initially could not recall whether he had been asked to weigh items in the kitchen, then recalled that he had been asked to perform that task to determine whether lifting those items could cause injury. Bergeron first insisted he never had spoken with any Agency civil rights investigator, including Job Valverde. Later, Bergeron remembered that he had spoken to Valverde by telephone, but could not remember the substance of the conversation. Bergeron's testimony also was slanted dramatically in favor of Respondents. He, alone among employee witnesses, testified that he was "scared" for Complainant because she was "so big" and Respondent's kitchen was slippery. Unlike any other employee, Bergeron also testified that Complainant violated restaurant rules "countless times" by holding hands with her boyfriends in the restaurant. He testified that employee meetings were held every two or three months, far more frequently than any other witness testified they were held. Bergeron stated many times, in a manner completely unresponsive to the questions asked, that Respondents treated their employees like a family, that all employees looked out for each other, and that the employees naturally were concerned about protecting the "children within" Complainant. The Forum found Bergeron's testimony overblown, designed to protect Respondents, and generally unreliable. Consequently, the Forum has given little weight to his testimony and has given it no weight where it conflicted with other more credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondents did business as McClaskey's Restaurant in Tillamook, Oregon, and had one or more employees within the State of Oregon.

2) Complainant worked as a waitress for Respondents for many years. In 1996, she became pregnant with twins. Complainant informed Respondents that she planned to keep working until January 1, 1997.

3) On October 15, 1996, Respondent Linda McClaskey discharged Complainant from employment because of her pregnancy. Respondent Mark McClaskey previously had told Linda McClaskey that he believed Complainant should be discharged, and the termination was a joint decision and action by Respondents.

4) Complainant was a hard worker. Her overall job performance was satisfactory. Complainant did not talk loudly more than did other waitstaff. Complainant did not speak with

customers more than did other waitstaff. Complainant's behavior in the restaurant was professional and did not disrupt the business. Respondents would not have discharged Complainant from employment had she not been pregnant.

5) During her pregnancy, Complainant remained physically able to perform all her job duties. If Respondents had not terminated her employment, she would have kept working, performing all aspects of her job, until January 1, 1997.

6) At the time Respondents terminated her employment, Complainant was earning $5.25 per hour plus tips. If Respondents had not discharged her, Complainant would have worked approximately 395 hours from October 16, 1996, until December 31, 1996, for total wages of $2,073.75. In addition, Complainant would have reported tips of approximately $625.00 during that time. Her total lost earnings, therefore, equal $2698.75.

7) Complainant was very upset and distressed as a result of being discharged because of her pregnancy. She cried "all the time," and her feelings were hurt by Respondents' attitudes and remarks about her pregnancy. In addition, Complainant suffered financial distress and unemployment because of the termination, and was humiliated by having to accept charity for the first time in her life.

CONCLUSIONS OF LAW

1) At all material times, Respondents were "employers" for purposes of ORS 659.030. *See* 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 659.022; ORS 659.040 *et seq*.

3) ORS 659.030 outlines what acts constitute unlawful employment practices. It states, in pertinent part:

> "For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340 and 659.400 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 reasonable necessary to the normal operation of the employer's business."

The phrase "because of sex" is explained in ORS 659.029, which states:

> For purposes of ORS 659.030, the phrase "because of sex" includes, but is not limited to, because of pregnancy, childbirth and related medical conditions or occurrences. Women affected by pregnancy, childbirth or related medical conditions or occurrences shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work by reason of physical condition, and

nothing in this section shall be interpreted to permit otherwise."

Respondents violated ORS 659.030(1) by discharging Complainant from employment because of her sex.

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

OPINION

Unlawful Employment Practice

It is undisputed that Complainant was pregnant at the time Respondents terminated her employment. This case, therefore, hinges on whether Respondents discharged Complainant *because of* her pregnancy. They did. Respondents believed that Complainant's pregnancy put her at risk of injury and terminated her employment because they were unwilling to assume that risk. Those beliefs are evidenced in Linda McClaskey's assertions during the October 1996 meeting that Respondents were discharging Complainant because she was an insurance risk and could not safely perform her job while she was pregnant. By firing Complainant because they believed her pregnancy made her a liability to their business, Respondents fired Complainant "because of" pregnancy or sex.

Respondents deny firing Complainant because of her pregnancy and argue that they had legitimate reasons for terminating her employment. Those purported reasons fall into two categories. First, Respondents argue that Complainant's general behavior was "out of control" -- that she repeatedly violated Respondents' rules against talking too loudly in the restaurant, speaking to customers about her personal problems, airing business issues in public, and having her boyfriend in the restaurant after closing. The Forum has found, however, that Complainant's behavior was professional and not disruptive to Respondents' business. All of Respondents' former employees, except Linda McClaskey's son, testified credibly to that effect. Complainant did occasionally violate Respondents' rules, particularly those against having non- employees in the restaurant after closing. But Respondents did not reprimand Complainant for that behavior or take any other action that would suggest they considered the rule violations to be serious. In addition, several of the incidents now cited by Respondents occurred *after* they already had decided to fire Complainant. The Forum finds that the rule violations did not prompt Respondents to discharge Complainant. To the extent Respondents cite the rule violations as the basis for the termination, they constitute a pretext intended to hide Respondents' discriminatory motivation.

The pretextual nature of Respondents' proffered reasons for terminating Complainant's employment is corroborated by Mark

McClaskey's own testimony. In passing, he stated that Respondents had planned to rehire Complainant after she gave birth to the twins. If Complainant's job performance was as poor as Respondents claim, they surely would not have wanted her to return to work. McClaskey's testimony confirms that Respondents wanted Complainant to stop working for them only while she was pregnant, not permanently. When she insisted that she could continue working during her pregnancy, they fired her.

Respondents also claim the termination was justified for safety reasons. They claim that they warned Complainant not to perform certain tasks, such as heavy lifting, because they were afraid she would injure herself or the twin fetuses. To the contrary, the Forum has found that Respondents did not instruct Complainant not to perform certain tasks. Consequently, her purported disobedience could not have formed the basis of Respondents' termination decision.

Even if Respondents had told Complainant to stop performing some of her job duties, however, Complainant's refusal to comply still could not justify her termination. Respondents had no objective medical reason for requesting that Complainant not lift certain items, vacuum, or wash floors. Their decision that Complainant should not do those things was based on stereotypical assumptions about the capabilities of pregnant women and an overly protective attitude toward them.[8] That is not permissible. As the federal Equal Employment Opportunity Commission has observed in an analogous context, an employer may not require a disabled employee to take "safety precautions" that are based on paternalistic attitudes instead of the employee's actual ability to safely perform the job:

> "An employer may require * * * that an individual not pose a `direct threat' to the health or safety of the individual or others, if this standard is applied to all applicants for a particular job.
>
> * * *
>
> "The determination that an individual applicant or employee with a disability poses a `direct threat' to health or safety must be based on objective, factual evidence related to <u>that individual's</u> present ability to safely perform the essential functions of a job. It cannot be based on unfounded assumptions, fears, or stereotypes about the nature or effect of a disability or of disability generally. Nor can such a determination be based on patronizing assumptions that an individual with a disability may endanger himself or herself by performing a particular job.
>
> * * *
>
> "The determination of a `direct threat' to health or safety must be based on a reasonable medical judgement that relies on the most current medical knowledge and/or

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[8]The Forum dismisses as pretextual Respondents' claim that their safety concerns were based primarily on the fact that Complainant had a "bad back," which she recently had reinjured. Complainant testified credibly that she had no chronic back problems and had not injured her back in the fall off the bucket.

> the best available objective evidence.
>
> * * *
>
> "Employers should be careful to assure that assessments of `direct threat' to health or safety are based on current medical knowledge and other kinds of evidence listed above, rather than relying on generalized and frequently out-of-date assumptions about risks associated with certain disabilities."

EEOC, Disability Discrimination, IV-8, IV-10 to IV-11 (April 1997) (underscoring in original).

The same principles apply under Oregon law. ORS 659.448 provides, in pertinent part:

> (1) Except as provided in this section, an employer may not require that an employee submit to a medical examination, may not make inquiries of an employee as to whether the employee is a disabled person, and may not make inquiries of an employee as to the nature or severity of any disability of the employee, unless the examination or inquiry is shown to be job-related and consistent with business necessity.

The Agency's administrative rules explain further:

> Notwithstanding the other provisions of these rules, an employer may refuse to employ a disabled person who poses a direct threat to the health or safety of the individual or others. Direct threat means significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. *The determination that an individual poses a `direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence*.

OAR 839-006-0244; *see In the Matter of WS, Inc.*, 13 BOLI 64, 87-88 (1994) (employer must make an individualized assessment of the capabilities of a disabled employee and not rely "solely on their fears about safety, presumptions about [disabled persons] and misconceptions about [the employee's] abilities and limitations"). The same is true of pregnancy:

> Regarding the ability or inability to work by reason of physical condition, pregnant women must be treated the same as males, non-pregnant females and other employees with off the job illness or injuries.

OAR 839-007-0510(2).[9]

Here, Respondents made no attempt to determine, based on objective medical evidence, whether Complainant posed a "direct threat" to her own safety or the health of others in the restaurant work environment. If

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[9]When Complainant was fired, subsection (5) of this rule explicitly permitted employers to request medical verification of a pregnant woman's ability to perform her job. That subsection was deleted from the rule by an amendment effective in February 1998. The Forum's decision would be the same under either version of the rule.

they had, they would have discovered that Complainant was perfectly capable of performing her job.

Respondents' counsel argued in closing that it is not discriminatory for employers to ask pregnant employees to refrain from performing certain tasks as long as there is no penalty to the employee. Whatever the merits of that argument,[10] it has no application to this case. Respondents did penalize Complainant because she was pregnant -- they fired her. Even if Respondents had asked Complainant to stop doing certain things -- and she had ignored those requests -- that could not justify the termination. Although Respondents may have believed in good faith that Complainant could not safely lift heavy objects or vacuum, that determination was impermissibly based on stereotypes and assumptions, not on objective medical evidence.[11]

Damages

Back wages and tips

Respondents are liable for Complainant's lost wages and tips from the date they fired her until January 1, 1997, the date on which she would have voluntarily left their employment. In 1995, Complainant worked a total of 304 hours in November and December and worked 182 hours in October. The Forum has determined that, had Complainant not been fired, she would have worked the same number of hours in October, November, and December 1996 as she had worked in the corresponding months in 1995. Complainant did work through October 15, 1996, and already has been paid for that first half of the month. The Forum, has, therefore, calculated Complainant's back wages as follows: 91 (1/2 the hours Complainant worked in October 1995) plus 304 (Complainant's hours for November and December 1995) equals 395 hours times $5.25/hour equals $2073.75. To this amount, the Forum has added two and one-half months worth of reported tips. At $250.00 per month, that adds $625.00, for a total of $2698.75 in back wages and tips.

Respondents suggested in their answer that Complainant's unemployment benefits should be deducted from any award of back wages. That is not correct. *Colson v. Bureau of Labor and Ind.*, 113 Or App 106, 831 P2d 706 (1992); *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61, 84 (1992).

Mental suffering

In determining damages for mental suffering, the Commissioner considers "the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused." *In the Matter of Vision*

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[10]It is possible to conceive of a situation in which an employer's baseless requests that a pregnant employee stop performing many of her job duties could create an offensive or hostile work environment, even if the employee suffered no direct loss of wages or seniority.

[11]The fact that other pregnant employees may have needed or appreciated special accommodation, which Respondents provided, did not relieve Respondents of the responsibility not to make the *assumption* that Complainant was not capable of heavy work.

Graphics and Publishing, Inc., 16 BOLI 21, 27 (1997). The Commissioner also considers "a complainant's vulnerability due to such factors as age and work experience." *Id.*

Here, Respondents fired Complainant because she was pregnant and because her behavior did not conform to their assumptions and stereotypical beliefs regarding appropriate behavior for pregnant women. The effects of that unlawful practice lasted for about eleven weeks -- from the date Respondents fired Complainant until January 1, 1997. Complainant was very upset by the discharge and was hurt by Respondents' attitude toward her pregnancy. Complainant's mother testified credibly that Complainant cried "all the time" after she was let go. Before being fired, Complainant's only reliable source of income had been her wages from Respondents. After the termination, she had to rely on charity to feed her children and to provide them with Christmas gifts. Complainant testified credibly and persuasively that she was humiliated by having to accept charity for the first time in her life. On these facts, the Forum finds $17,500.00 to be an appropriate amount to compensate Complainant for the mental distress she suffered as a result of Respondents' unlawful employment practice.

Exceptions

In its exceptions, Respondent first claims that the evidence does not support a statement that Complainant sometimes accepted other employees' offers to assist her with her work. That is not correct. Complainant testified credibly that she did not *always* accept other employees' offers of help, and Carver suggested that, although she believed Complainant was doing more than she should, Complainant at least sometimes accepted help. The Forum has inferred from this evidence that Complainant sometimes, if not frequently, allowed other employees to assist her. To clarify that Complainant did not always accept help, however, the Forum has reworded Finding of Fact No. 13 to state that Complainant sometimes accepted help and sometimes did not.[12]

In exception 1(b), Respondents assert that "the only evidence in the record of a doctor's opinion regarding complainant's pregnancy is in agency exhibit A-6, which was prepared after the termination of complainant's employment and makes no mention of workplace requirements, conditions or even the nature of her work." Respondents' characterization of the record is flawed. The Forum has accepted as fact Complainant's credible testimony that, *before she was fired*, she informed her doctor of her pregnancy, and he stated that she was capable of performing all aspects of her job. Respondents' exception is denied.

Respondent objects to the finding that "Linda McClaskey was aware that the waitresses reported only a portion of their tips and instructed at least some waitresses to ensure that they reported similar percentages of the actual amounts they received."

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[12] It is worth noting that, even if Complainant *never* allowed other employees to help her with physically demanding tasks, the Forum's ultimate findings of fact, legal conclusions, opinion and order would not change.

The evidence supports this finding. Caillier, in particular, testified credibly that Linda McClaskey instructed her to report only about 30% of her tips, so that the waitresses would be reporting similar amounts. And contrary to Respondent's assertion, Thompson did not state clearly that Linda McClaskey was unaware of the amount of tips waitresses were claiming. In fact, Thompson testified that she believed Linda McClaskey probably *was* aware of the practice of reporting only 30% of tips, although she could not be positive of that. Respondents' exception is denied.[13]

Respondent also insists that the Forum must take into account Complainant's underreporting of tips in assessing her credibility. To more fully explain why it has declined to do so, the Forum has added to Finding of Fact No. 29 the statement: "When Linda McClaskey was a waitress, she reported none of her tips." That finding is a direct reflection of Linda McClaskey's testimony during cross-examination. Just as the Forum did not base its determination of Complainant's credibility on her admission that she underreported tips, it has not based its findings regarding the credibility of Linda McClaskey's testimony on her similar admission. Respondents' exception is denied.

In their third exception, Respondents assert that Complainant's testimony regarding the employee handbook changed between the time she first testified (in the portion of the hearing that was not recorded) and when she testified later in the hearing. Respondents accuse the Forum of being unwilling to acknowledge "the eagerness of the complainant to change her testimony." To the contrary, the Forum carefully considered the testimony of Mark McClaskey regarding the nature of Complainant's testimony in the unrecorded part of the hearing, and compared that to the testimony she delivered later. The Forum has not found any discrepancies in the testimony significant enough to overcome its findings regarding the credibility of Complainant's testimony, as discussed in Findings of Fact Nos. 46 and 53. The exception is denied.

In their fourth exception, Respondents argue that the order should contain more factual findings than it does. There is no legal requirement, however, that the order summarize *all* evidence that was offered. To the extent that Respondents argue that the evidence does not support an inference that they engaged in a *pattern* of discrimination, the Forum agrees. That is not relevant to the question presented by this case, however, which is whether Respondents engaged in an unlawful employment practice with respect to Complainant. Consequently, the order need not include the additional information proposed by Respondents. In any event, the order does already contain

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[13]The Forum does agree with Respondents that "the taxation of tips is not a direct and material fact to the matters under consideration here," and finds that the matter, being so tangential to the charged allegations of sexual discrimination, was not fully litigated for purposes of an issue preclusion analysis. The Forum included this finding only to explain why it was not basing its determination of any witness's credibility on the fact that the witness may have underreported -- or encouraged the underreporting of -- tips.

findings that many employees thought Respondents treated their employees well and accommodated physical difficulties they had in performing their jobs. *See* Findings of Fact Nos. 36, 38, 40, 43, and 45.

Respondents also claim that the order should contain a finding that they generally did not inform employees of problems they were having with other employees, so that there is no significance to the testimony of various employee witnesses that they never heard Respondents complain about Complainant's work performance. The only evidence to that effect came from Respondents themselves, and the Forum has not found their testimony with regard to such matters to be particularly credible. The exception is denied.[14]

Respondents' first exception to the Proposed Ultimate Findings of Fact merely reiterates their arguments regarding whose testimony the Forum should accept. The Forum adheres to its stated findings regarding the various witnesses' credibility.

In their second exception to the Proposed Ultimate Findings, Respondents argue that the Forum cannot award damages for mental distress related to the economic hardship a Complainant suffers as the result of an unlawful discharge. That argument lacks merit. *See In the Matter of WS, Inc.*, 13 BOLI 64, 91 (1994); *In the Matter of Pzazz Hair Designs*, 9 BOLI 240, 257 (1991). The Forum also notes that, contrary to Respondents' assertion, there is credible evidence in the record that Complainant's distress was caused not only by her sudden unemployment, but also by Respondents' attitude toward her pregnancy. The exception is denied.

Respondents also argue generally that the proposed order has the effect of stripping employers of "the right to care about the well being of a pregnant woman and her unborn fetus * * *." To the extent that an employee's pregnancy poses a genuine safety risk in the work environment, Respondents are wrong. The Forum has expanded the opinion section of this order to explain the circumstances under which an employer may inquire whether an employee's pregnancy presents a "direct threat" to her own safety or that of others. The laws cited in that section of the opinion also serve to protect employees from employers -- like Respondents -- who base employment decisions on unfounded assumptions regarding the abilities of persons with actual or perceived disabilities, whether those actual or perceived disabilities result from pregnancy or from some other condition.

Respondents' exceptions to the Proposed Conclusions of Law and portions of the Proposed Order mirror their exceptions to the proposed findings and are denied for the reasons set forth above. In their final exception to the Proposed Order, Respondents point out that they no

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[14]In any event, the Forum did not rely heavily on the employees' testimony that they never heard Respondents complain about Complainant. The Forum found it much more significant that almost all present and former employees stated that Complainant was a good, hard worker who had no particular job performance problems.

longer own McClaskey's Restaurant, and conclude that the proposed cease and desist order is inappropriate. Respondents are correct that there is no evidence in the record that they presently own or operate any business that utilizes the services of employees. Consequently, the Forum has deleted the cease and desist language from the Order.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and to eliminate the effects of Respondents' violation of ORS 659.030(1)(a) and ORS 659.029, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents Mark McClaskey and Linda McClaskey, dba McClaskey's Restaurant, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in trust for Cheryl Winfrey in the amount of:

a) TWO THOUSAND SIX HUNDRED NINETY EIGHT DOLLARS AND SEVENTY-FIVE CENTS (2698.75), less appropriate lawful deductions, representing wages and tips Complainant lost from October 16, 1996, through December 31, 1996, as a result of Respondents' unlawful practice found herein; plus

b) Interest at the legal rate on said wages and tips from January 1, 1997, until paid; plus

c) SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS ($17,500.00), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondents' unlawful employment practice found herein; plus

d) Interest on said damages for mental suffering at the legal rate, accrued between the date of the Final Order and the date paid.

In the Matter of
R. L. CHAPMAN ENT. LTD.
dba Aghast Productions,
Respondent.

Case Number 53-98
Final Order of the Commissioner
Jack Roberts
Issued January 15, 1999.

SYNOPSIS

Where Respondent submitted an answer to the Order of Determination and requested a hearing, but failed to appear at the hearing, the Commissioner found Respondent in default of the charges set forth in the charging document. Where the Agency made a prima facie case supporting the Agency's Order of Determination on the record, the Commissioner found that Respondent willfully failed to pay Claimants all wages due after Claimants quit their employment, in violation of ORS 652.140(2) and OAR 839-20-030 (overtime wages). The Commissioner ordered that Respondent pay civil penalty wages, pursuant to ORS 652.150.

The above-entitled contested case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 1, 1998, in Room 1004 of the Portland State Office Building, 800 N.E. Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Dorie Lyn Bowers (Claimant Bowers) was present throughout the hearing. Debra Eagle Goertler (Claimant Goertler) was not present at the hearing. R. L. Chapman Ent. Ltd., dba Aghast Productions (Respondent), after being duly notified of the time and place of this hearing, failed to appear and no representative appeared for Respondent.

The Agency called as witnesses Dorie Lyn Bowers, Claimant; Iola Simmons, former Respondent employee; and, Lois Banahene, Compliance Specialist, Bureau of Labor and Industries.

Having fully considered the entire record in this matter, I, Jack 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 November 10, 1997, Claimant Dorie Lyn Bowers filed a wage claim with the Agency, alleging 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 she filed the wage claim, Claimant Bowers assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Bowers, all wages due from Respondent.

3) On November 20, 1997, Claimant Debra Eagle Goertner filed a wage claim with the Agency, alleging 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 she filed the wage claim, Claimant Goertler assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Goertler, all wages due from Respondent.

5) On March 25, 1998, the Commissioner of the Bureau of Labor and Industries served on Respondent's registered agent 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 a total of $1,033.50 in wages and $2,640.00 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 April 23, 1998, Respondent's then counsel, having been granted an extension of time by the Agency, filed a written answer to the Order of Determination and requested a contested case hearing. The answer denied that Claimants ever worked for Respondent, denied that Respondent ever hired employees, and alleged by way of affirmative defenses that Respondent engaged independent contractors to perform specific jobs at a specific rate per job, that if Claimants did work for Respondent they worked as independent contractors, and that if Claimants were owed money by Respondent, Respondent was financially unable to pay them.

7) On May 20, 1998, 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 hearing rules, OAR 839-050-0000 to 839-050-0420.

8) On June 1, 1998, Respondent's counsel notified this forum that as of May 18, 1998, she no longer represented Respondent and withdrew as attorney of record.

9) On June 2, 1998, the ALJ issued an interim order providing as follows:

> "OAR 839-050-0110(1) provides that all corporations must be represented by an attorney in accordance with ORS 9.320 and either 9.160 or 9.241. Respondent's failure to appear by counsel in the matter scheduled for hearing on July 1, 1998, will result in a default.
>
> "This order is issued on the ALJ's own motion so that hearing will not be delayed by last minute retention of counsel or complicated by untimely requests for relief from default. For Respondent to avoid default, <u>counsel must appear on Respondent's behalf with notice to the ALJ by June 9, 1998</u>." (emphasis in original)

Respondent did not respond to the order and no attorney appeared for Respondent.

10) On June 18, 1998, the forum received the Agency's request for a discovery order pursuant to OAR 839-050-0200 encompassing items requested by the Agency from Respondent on June 8, 1998, but not received. On June 19, 1998, the ALJ issued by first class mail a discovery order for the requested items and a discovery order requiring both participants to submit a summary of the case pursuant to OAR 839-050-0200 and 839-050-0210. The Agency submitted a timely summary. The discovery orders were directed to Respondent at 1637 SW Alder Street, Portland, Oregon 97209 and PO Box 55607, Portland, Oregon 97238. Respondent did not produce the requested documents nor did it file a summary.

11) 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. At the conclusion of the hearing, Respondent had still not appeared or contacted the Agency or the Hearings Unit. The ALJ then

found Respondent in default as to the Order of Determination, pursuant to OAR 839-050-0330(2), for failure to attend the hearing

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

13) The proposed order, containing an exceptions notice, was issued on August 4, 1998. Exceptions, if any, were due August 14, 1998. The hearings unit received no exceptions.

FINDINGS OF FACT - THE MERITS

1) During times material herein, the Respondent was an Oregon corporation engaged in the retail fish business and, under the assumed business name, Aghast Productions, operated an independent video production company. Richard Leroy Chapman ("Dick") Panek is Respondent's registered agent. Both businesses were located in Portland, Oregon. Respondent employed one or more persons in the State of Oregon.

2) From on or about September 24, 1997, to on or about September 26, 1997, Respondent employed Claimant Bowers to perform clerical tasks during the evening hours between 5:00 p.m. and 10:00 p.m. Although Claimant Bowers believed she was hired as a screenwriter, her actual duties for the three days she worked consisted of filing, typing, and working with document format. Respondent assigned Claimant Bowers' tasks and furnished the equipment and materials she used on the job. Respondent detailed and controlled how Claimant Bowers was to perform her duties. Claimant Bowers worked for Respondent for three days for five hours each day.

3) Claimant Bowers understood that she would receive minimum wage for the hours she worked. Minimum wage during Claimant's wage claim period was $5.50 per hour. Claimant Bowers recorded her hours on weekly time cards that were attached to a clipboard and kept in an office. She did not make copies of her time cards.

4) Claimant Bowers quit her employment without notice on September 26, 1997, after Dick Panek became verbally abusive to her during a discussion about his request that she work additional hours into the night. After Claimant quit, Panek told her that she would receive her paycheck after she returned a pager and key provided to her by Respondent when she was initially employed. Claimant returned the pager and key and requested her paycheck. She did not receive her paycheck and Panek told Claimant that since she was in charge of billing, it was her fault if she didn't get paid. Claimant didn't know she was in charge of the billing. To date, Claimant has not been paid any wages earned since the date of her hire.

5) Claimant Bowers' record and testimony, which are accepted as fact, show that she worked 15 total hours. She earned $82.50 in wages (15 hours x $5.50 = $82.50). Claimant was paid nothing; the balance of earned, unpaid, due and owing wages equals $82.50.

6) The forum computed civil penalty wages, in accordance with ORS 652.150 and OAR 839-001-0470, as

follows: $5.50 (Claimant Bowers' hourly rate) multiplied by 8 (hours per day) equals $44.00. This figure of $44.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continue to accrue) for a total of $1,320.00. The Agency set forth this figure in its Order of Determination.

7) From September 25, 1997, to October 15, 1997, Respondent employed Claimant Goertler to perform receptionist and clerical tasks. Her duties included billing, typing, and "setting up" actors, writers, interviews, and live auditions.

8) Claimant Goertler was hired by Dick Panek. Panek told Claimant Goertler that she would receive $5.00 per hour and that her pay would go up later on in her employment. She was unaware at the time of hire that the minimum wage was $5.50 per hour.

9) Respondent assigned the tasks Claimant Goertler was to perform, furnished the equipment and materials she used, and detailed and controlled the manner in which she performed her duties.

10) Claimant Goertler recorded her work hours on "Weekly Time Cards" provided by Respondent. According to Claimant's time cards, she worked a total of four weeks, 24 hours the first week, 44 hours the second week, 66 hours the third week, and 33 hours the fourth week.

11) Claimant Goertler's last day of work was on October 15, 1997; Goertler quit her employment without notice because she wasn't receiving her wages.

12) Based on the credible testimony in the record and the time cards, which are accepted as fact, Claimant Goertler worked during the period between September 25 and October 15, 1997, 167 total hours in 18 days; of the total hours, 30 were hours worked in excess of 40 hours per week.

13) Pursuant to ORS 653.261 and OAR 839-020-0030 (Payment of Overtime Wages), Claimant Goertler's total earnings for the period between September 25 and October 15, 1997, were $1,001.00. The total reflects the sum of the following:

137 hours @ $5.50 per hour	$753.50
30 hours @ the overtime rate of $8.25 per hour (one and one half times the minimum wage)	$247.50
TOTAL EARNED	$1,001.00

14) Respondent paid Claimant Goertler $50.00 for work performed during the period of the wage claim; the balance of earned, unpaid, due and owing wages equals $951.00.

15) The forum computed civil penalty wages, in accordance with ORS 652.150 and OAR 839-001-0470, as follows: $5.50 (Claimant Goertler's hourly rate) multiplied by 8 (hours per day) equals $44.00. This figure of $44.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continue to accrue) for a total of $1,320.00. The Agency set forth this figure in its Order of Determination.

16) Respondent alleged in its answer an affirmative defense of financial inability to pay the wages due at the time they accrued but did not provide any such evidence for the record.

17) The testimony of Claimant Bowers, in general, was found to be credible. She had the facts readily at her command and her statements were supported by other credible testimony. There is no reason to determine the testimony of the Claimant to be anything except reliable and credible.

18) The testimony of the other witnesses was credible. The ALJ observed the demeanor of each witness and found each to be believable.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an Oregon corporation and utilized and controlled the personal services of one or more persons in the State of Oregon who were not independent contractors. ORS 652.310 (1) and (2); 653.010(3) and (4).

2) Respondent employed the following Claimants as clericals on the dates listed, during which each Claimant had the earnings listed, and were paid the amounts listed. Respondent owes to each Claimant the sums indicated:

CLAIMNT	DATES	EARNED	PAID	OWED
Dori Lyn Bowers	9/24-9/26/97	$82.50	$0	$82.50
Debra R. Goertler	9/25-10/15/97	$1,001	$50	$951

3) Respondent willfully failed to pay the Claimants all wages within five days, excluding Saturdays, Sundays, and holidays, after each Claimant ceased working, and more than 30 days have elapsed from the date each Claimant's wages were due.

4) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470, total $2,640.00 for both Claimants.

5) Respondent made no showing that it was financially unable to pay the Claimants' wages at the time they accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.414, 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 652.414.

3) 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 without notice.

4) 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 Goertler one and one-half times her regular hourly rate of $5.50, in this case, $8.25, for all hours worked in excess of 40 hours in a week. Respondent failed to do so.

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 each Claimant all wages or compensation when due as provided in ORS 651.140.

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 Claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

Default

The Respondent filed an answer and request for hearing through counsel but did not appear at the hearing nor did any representative appear for Respondent. Respondent was found to be in default. OAR 839-050-0330 (1)(d). In a default situation, the forum's task is to determine whether the Agency has made a prima facie case supporting the Order of Determination. ORS 183.415 (5) and (6); OAR 839-050-0330(2); *In the Matter of S.B.I., Inc.,* 12 BOLI 102 (1993); *In the Matter of Mark Vetter,* 11 BOLI 25 (1992).

Where a Respondent's total contribution to the record is a request for a hearing and an answer that contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *In the Matter Tom's TV & VCR Repair,* 12 BOLI 110 (1993)*; In the Matter of Sealing Technology, Inc.,* 11 BOLI 241 (1993); *In the Matter of Jack Mongeon,* 6 BOLI 194 (1987).

Prima Facie Case

In a wage claim case where the evidence on the record is not only uncontroverted, but is complete, credible, and persuasive that the respondent willfully failed to pay earned, unpaid, due and payable wages to a claimant, a prima facie case is clearly established. *In the Matter of Fred Vankeirsbilck,* 5 BOLI 90 (1986). In this case, a preponderance of credible evidence on the whole record showed Respondent employed each Claimant during the wage claim periods claimed and willfully failed to pay Claimants all of their wages, earned and payable, when due. Respondent owes earned, unpaid, due and payable wages to the Claimants, his former employees, in the amounts specified herein. In addition, Respondent is liable for penalty wages for its willful failure to pay Claimants their wages. The evidence is credible and persuasive and the best evidence available, given the Respondent's failure to appear. Respondent's only articulated defense, aside from its contention that it was financially unable to pay the wages, was an unsworn and unsubstantiated assertion in its answer that the Claimants were independent contractors. That assertion does nothing to controvert or overcome the credible evidence in the record that Claimants were hired as hourly workers to perform clerical tasks requiring no specialized training. Respondent furnished the equipment and materials Claimants used to perform their work, and Respondent had complete control over how and when they performed their work. The Claimants were Respondent's employees, not independent contractors. *See In the Matter of Geoffroy Enterprises, Inc.,* 15 BOLI 148 (1996).

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. Johnson et ux,* 233 Or 103, 377 P2d 331 (1962). Respondent, as an employer, has a duty to know the amount of wages due its employees. *In the Matter of Handy Andy Towing, Inc.* 12 BOLI 284 (1994); *In the Matter of Jack Coke,* 3 BOLI 238 (1983); *McGinnis v. Keen,* 189 Or 445, 221 P2d 907 (1950). The evidence established that Respondent knew it had paid Claimant Bowers nothing and Claimant Goertler only $50.00 at the time the Claimants quit their employment with Respondent, and that it acted voluntarily and as a free agent. Accordingly, Respondent must be deemed to have acted willfully.

It is Respondent's burden to show its financial inability to pay the Claimants' wages at the time they were due. Where an employer files an answer alleging inability to pay but produces no evidence in support of its defense, a claimant's right to a civil penalty will not be overcome. *In the Matter of Mega Marketing,* 9 BOLI 133 (1990). Respondent did not present any evidence in support of its affirmative defense of financial inability to pay when the wages came due, and is therefore liable for civil penalty wages under ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondent's violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders R. L. CHAPMAN ENT. LTD. dba Aghast Productions, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 N.E. Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DORI LYN BOWERS in the amount of ONE THOUSAND FOUR HUNDRED AND TWO DOLLARS AND FIFTY CENTS ($1,402.50)**,** less appropriate lawful deductions, representing $82.50 in gross earned, unpaid, due and payable wages; and $1,320.00 in penalty wages; plus interest at the legal rate on the sum of $82.50, from October 1, 1997, until paid and interest at the legal rate on the sum of $1,320.00 from November 1, 1997, until paid; PLUS

(2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DEBRA EAGLE GOERTLER in the amount of TWO THOUSAND TWO HUNDRED AND SEVENTY ONE DOLLARS ($2,271.00)**,** less appropriate lawful deductions, representing $951.00 in gross earned, unpaid, due and payable wages; and $1,320.00 in penalty wages; plus interest at the legal rate on the sum of $951.00, from October 20, 1997, until paid and interest at the legal rate on the sum of $1,320.00 from November 20, 1997, until paid.

In the Matter of
TROY R. JOHNSON,
dba PACIFIC FRAMING,
Respondent.

Case Number 06-99
Final Order of the Commissioner
Jack Roberts
Issued January 20, 1999

SYNOPSIS

Respondent, who operated a house framing business, employed two Claimants as framers and failed to pay Claimants all wages due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful, and Respondent was ordered to pay 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 Alan McCullough, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries (BOLI) for the State of Oregon. The hearing was held on October 20 and 21, 1998, 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 David Gerstenfeld, an employee of the Agency. Timothy Mark Johnson (Claimant Johnson) and Benjamin Glen Suby (Claimant Suby) were present throughout the hearing, except that Claimant Suby was excluded while Claimant Johnson was testifying. Troy Johnson (Respondent) was present throughout the hearing and was represented by Mark Maisel, Attorney At Law.

The Agency called the following witnesses: Timothy Mark Johnson and Ben Suby, Claimants; Troy Johnson, Respondent; Gerhard Teaubel, Wage and Hour Division Compliance Specialist; Paul Kaminski, building contractor (telephonic); and Ricky Wayne Johnson, cousin to Timothy Johnson (telephonic).

Respondent called the following witnesses: Troy Johnson, Respondent; and Jeff Cox, Respondent's foreman.

Administrative exhibits X-1 to X-15 and Agency exhibits A-1 through A-6 were offered and received into evidence. The record closed on October 20, 1998.

Having fully considered the entire record in this matter, I, Jack 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 2, 1998, Claimant Timothy Mark Johnson 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) On February 2, 1998, Claimant Benjamin Suby 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.

3) At the same time that they filed the wage claims, Claimants Johnson and Suby assigned to the Commissioner of Labor, in trust for Claimants, all wages due from Respondent.

4) On July 6, 1998, the Agency served on Respondent an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of $1,111.00 in wages and $5,280.00 in civil penalty wages based on work Claimants had performed for Respondent from December 8 to December 20, 1997. 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.

5) On July 9, 1998, Respondent filed an answer to the Order of Determination.

6) On July 9, 1998, the Agency sent a letter to Respondent advising that his answer was insufficient because it failed to request a hearing. The Agency gave Respondent until August 6, 1998, to request a hearing. On August 14, 1998, the Agency received a request for hearing from Respondent.

7) In his answer and request for hearing, Respondent denied all the allegations in the Order of Determination.

8) On September 14, 1998, 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 839-050-0000 to 839-050-0440.

9) On September 23, 1998, the ALJ issued a discovery order directing each participant 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 12, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary.

10) On October 5, 1998, the Agency filed a motion for a discovery order seeking pay records and timecards for Claimants and a co-worker.

11) On October 6, 1998, the ALJ issued an Interim Order making Respondent's response to the Agency's motion due on October 12.

12) On October 9, 1998, the Agency submitted its Case Summary.

13) On October 13, 1998, the ALJ issued a discovery order in response to the Agency's motion dated October 5, requiring Respondent to provide the Agency with all records related to payment received or hours worked by Claimants and a co-worker by October 19, 1998.

14) Respondent did not provide any documents to the Agency in response to the ALJ's October 13 discovery order.

15) On October 16, 1998, Respondent FAXed a request for postponement to the Hearings Unit from Durango, Colorado. The request asked that the hearing be postponed until November 3 based on his absence on a hunting trip, his failure to receive notice of the hearing until October 14 and consequent inability to prepare adequately for the hearing, and his amazement that the case had actually been set for hearing.

16) On October 19, 1998, the Agency objected to the motion for postponement.

17) On October 19, 1998, the ALJ issued an Interim Order denying Respondent's motion for postponement. The motion was denied because Respondent failed to establish "good cause," in that

Respondent, after filing his answer and request for hearing, had failed to notify the forum or the Agency of a change of address and because the request for postponement was untimely, coming four days before the hearing was scheduled.

18) At the start of the hearing, Mr. Maisel, the attorney for Respondent, indicated he had just been retained by Respondent. The ALJ gave Mr. Maisel time to review the notice of Contested Case Rights and Procedures. After reading them, Mr. Maisel he had no questions about it.

19) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

20) On December 15, 1998, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, the Respondent, a person, did business as a sole proprietorship under the assumed business name of Pacific Framing and engaged the personal services of one or more persons in the State of Oregon.

2) Claimants Johnson and Suby were both employed by Respondent beginning on November 19, 1997. They were hired as a framing crew to frame houses in a five house framing contract Respondent had in Silverton, Oregon. Eric Shoue was the third member of the framing crew when they were hired.

3) Respondent and Claimant Johnson entered into an agreement that Claimant Johnson would work for $12.00 per hour.

4) Respondent and Claimant Suby entered into an agreement that Claimant Suby would work for $10.00 per hour.

5) Respondent has employees complete time cards that show hours and dates worked on one side and type of work performed by day on the other side.

6) On or about December 7, 1997, Shoue quit Respondent's employ and Rick Johnson, Tim Johnson's cousin, was hired to replace him.

7) On November 22, 1997, Respondent issued check #1176, in the amount of $80.00, to Tim Johnson as a pay advance.

8) On December 11, 1997, Respondent issued check #72, in the amount of $902.64, to Tim Johnson. This was a regular paycheck. Claimant Johnson's payroll stub states "pay period 11/06/97 to 12/05/97".

9) On December 11, 1997, Respondent issued check #76, in the amount of $744.64, to Ben Sube (sic). This was a regular paycheck and paid Claimant Suby in full for all hours worked through December 5, 1997.

10) Respondent paid the amounts cited in Findings 7-9 knowingly and intentionally. Respondent was a free agent.

11) Claimants and Rick Johnson worked the same dates and

hours between December 8, 1997, and December 20, 1997.

12) Claimants worked 3 hours on December 8, 8 hours on December 9, and 5 hours on December 12, 1997.

13) Claimants worked during the week of December 15-19, 1997, but the forum is unable to determine the specific dates or hours that Claimants worked in this time period because of the internal inconsistencies within Claimants' testimony, the external inconsistencies between Claimants' testimony, and the inconsistencies between Claimants' testimony and their written records.

14) On December 20 or 21, Claimants met Respondent at a Gresham bank in hopes of getting a pay advance. Respondent did not give them a pay advance. Later that day, Claimant Johnson telephoned Respondent and told him the number of hours they had worked since December 5. Claimant Johnson also told Respondent that he and Suby were quitting Respondent's employ.

15) Claimants quit work on December 21, 1998, without giving prior notice.

16) The last paycheck given to Claimants was issued by Respondent on December 11, 1997.

17) December 29, 1997, was the five days after December 21, 1998, excluding Saturdays, Sundays, and holidays. Claimants' wages were due and owing on December 29, 1997.

18) At the time Claimants quit, Respondent owed Claimant Johnson $192 in unpaid wages and Claimant Suby $160 in unpaid wages.

19) The testimony of Claimants Johnson and Suby regarding their general terms and conditions of employment with Respondent was credible. It was clear, based on the additional testimony of Rick Johnson and Paul Kaminski, an unbiased witness, that they performed some work during the week of December 15-19, 1997. However, due to the inconsistencies and contradictions in their testimony and between their testimony and time records, the forum found it impossible to determine what days and hours they worked that week.

20) The testimony of Jeff Cox was biased in favor of Respondent. He was Respondent's first employee and was Respondent's leadperson up until eight weeks before the hearing. He picked up Respondent at the airport the night before the hearing. He wore a long-sleeve T-shirt at the hearing with a logo that read "Pacific Framing". Neither he nor Respondent provided any time cards for the pay period covering the period December 15-19, 1997, to back up his testimony that he, Justin Savery, and Kevin Blackburn took over the work Claimants had been performing that week. Accordingly, the forum did not believe his testimony except where it was corroborated by other credible evidence.

21) The testimony of Troy Johnson was suspect in several areas. He had a poor memory and relied extensively on documents to refresh his memory. Instead of calling witnesses or offering documents under his control that would have provided objective support to his assertions, he relied exclusively on his own testimony and that of Jeff Cox. Specifically, he did not provide any

time cards to support his testimony regarding where Jeff Cox, Justin Savery, and Kevin Blackburn worked the week of December 15-19, 1997, and there was no evidence that he was unable to do so. Likewise, he failed to call a witness from Paychex, his payroll service, to corroborate his assertion that Claimants and his other employees were paid through December 10 on the December 11, 1997 paycheck when the payroll stub contained a statement that read "pay period 11/06/97 to 12/05/97". The forum found these omissions to be significant and does not believe his testimony except where it was corroborated by other credible evidence.

22) The Forum computed civil penalty wages, in accordance with ORS 652.150, as follows for Claimant Johnson: $12.00 (Claimant Johnson's hourly rate) multiplied by 8 (hours per day) equals $96.00. This figure of $96.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of $2,880.00 for Claimant Johnson.

23) The Forum computed civil penalty wages, in accordance with ORS 652.150, as follows for Claimant Suby: $10.00 (Claimant Suby's hourly rate) multiplied by 8 (hours per day) equals $80.00. This figure of $80.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of $2,400.00 for Claimant Suby.

24) Respondent 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.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent employed Claimants Johnson and Suby in Oregon from mid-November 1997 until on or about December 20, 1997.

3) Each Claimant was paid for all work performed through December 5, 1997.

4) Each Claimant quit Respondent's employment without notice on December 21, 1997.

5) When Claimants quit, Respondent owed Claimant Johnson $192.00 in unpaid wages and Claimant Suby $160.00 in unpaid wages.

6) Respondent willfully failed to pay Claimant Johnson $192.00 and Claimant Suby $160.00 in earned, due, and payable wages within five days, excluding Saturdays, Sundays, and holidays, after they quit, and more than 30 days have elapsed from the date their wages were due.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent 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 Respondent herein. ORS 652.310 to 652.405.

3) 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 without notice.

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 hourly rate for eight hours per day 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.

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 Claimants their earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

There are two primary issues in this case. First, what specific days and hours between December 8 and December 20, 1997, did Claimants work? Second, which of these days and hours did Respondent pay them for in Claimants' December 11, 1997, paycheck?

1. What Dates Between 12/8/97 and 12/20/97 did Claimants Work?

Both wage claimants and Rick Johnson allege they worked exactly the same hours in this time period. It is undisputed that they worked together as a framing team, and the forum finds this allegation to be true. It is also undisputed that they worked three hours on December 8 and five hours on December 9. Claimant Johnson testified that his crew framed a wall and decked a floor on December 15, but the forum concludes that his testimony misstated the date and that this work actually occurred on December 12, the date on which "deck and frame" is recorded in his journal and time card. Accordingly, the forum concludes that the Claim-

ants worked five hours on December 12.

As stated in Finding of Fact #12 (The Merits), the forum also concludes that claimants worked during the week of December 15-19, but the forum is unable to determine the specific dates or hours worked in this time period because of the lack of credible evidence as to specific dates. Without credible data to rely on, the forum cannot compute or award back wages for this period of time.

2. What Hours Between 12/8/97 and 12/20/97 were Claimants Paid For?

This question hinges on the period of time covered by the December 11 paycheck issued to Claimants. Respondent asserts it covers the period through December 10 and explained that the dates on his own payroll printout and on Claimant Johnson's payroll stub should not be relied on because he telephoned in the hours worked through December 10 on that date. In the absence of testimony from Respondent's payroll service to corroborate this explanation, the forum finds it unconvincing and concludes that Claimants were paid on December 11, 1997, for the payroll period extending from November 6, 1997, through December 5, 1997, the dates stated on Claimant Johnson's payroll stub.

Claimants were not paid for the work they performed on December 8, 9, and 12, 1997.

3. Civil Penalty Wages

Respondent did not allege a financial inability to pay claimants' wages at the time they accrued in his answer. Therefore, both claimants are entitled to civil penalty wages if Respondent "willfully" failed to pay claimants' wages. 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).

The evidence showed that Respondent acted voluntarily and as a free agent in employing claimants and deciding when and how much to pay them. The evidence also showed that Claimants were paid through December 5, and that Respondent knew, at a minimum, that Claimants worked on December 8 and 9 and were not paid for the work performed on those dates. Whether or not Respondent actually knew of the exact hours worked by Claimants on those dates is immaterial. It is the employer's duty to maintain an accurate record of an employee's time worked. *OAR 839-020-0080.* Where the employer does not produce records and an employee provides credible testimony and a record of the number of hours worked, the forum may rely on that evidence as a basis for determining the extent of unpaid wages. *In the Matter of Jewel Schmidt*, 15 BOLI 236 (1997); *In the Matter of Samuel Loshbaugh*, 14 BOLI 224, 229 (1995). The forum concludes that claimants are entitled to civil penalty wages in the amount sought by the Agency.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondent's violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders TROY R. JOHNSON to deliver to the Fiscal Services 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 Timothy M. Johnson in the amount of THREE THOUSAND SEVENTY-TWO DOLLARS ($3,072.00), less appropriate lawful deductions, representing $192.00 in gross earned, unpaid, due, and payable wages; and $2,880.00 in penalty wages; plus interest at the rate of nine percent per year on the sum of $192.00 from December 29, 1997, until paid and nine percent interest per year on the sum of $2,880.00 from January 29, 1998, until paid;

(2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Benjamin G. Suby in the amount of TWO THOUSAND FIVE HUNDRED SIXTY DOLLARS ($2,560.00), less appropriate lawful deductions, representing $160.00 in gross earned, unpaid, due, and payable wages; and $2,400.00 in penalty wages; plus interest at the rate of nine percent per year on the sum of $160.00 from December 29, 1997, until paid and nine percent interest per year on the sum of $2,400.00 from January 29, 1998, until paid.

_____