BOLI ORDERS

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

VOLUME 3

Cited: 3 BOLI

Published by the

OREGON BUREAU OF LABOR AND INDUSTRIES

1995

Copyright 1995
by
Oregon Bureau of Labor and Industries
Portland, Oregon

All rights reserved

EDITORS
DOUGLAS McKEAN
W. W. GREGG

Printed in the United States of America

BOLI ORDERS

TABLE OF CONTENTS

Introductory Note iv
Table of Final Orders v
BOLI Final Orders 1

INTRODUCTORY NOTE

This third volume of BOLI ORDERS contains all of the known Final Orders of the Commissioner of the Oregon Bureau of Labor and Industries that were issued between March 23, 1982, and April 4, 1983.

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

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

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

TABLE OF FINAL ORDERS

In the Matter of

Boost Program (1982) 72
Burlington Northern Railroad Company (1983) 215
C & V, Inc. (1982) 152
Cannon Beach, City of (1982) 115
Carmen, Ray (1982) 15
Clackamas County (1982) 164
Coke, Jack (1983) 238
Coos Bay, City of (1982) 85
Edwards, Lynn (1982) 134
Fred N. Bay News Company (1982) 149
Gaudry, Joseph Lawrence (1982) 32
Horst Mager Specialty Restaurants, Inc. (1982) 39
International Kings Table, Inc. (1982) 29
K-Mart Corporation (1982) 194
Leisureland Mobile Home Brokerage, Inc. (1982) 3
Love's Woodpit Barbeque Restaurant (1982) 18
Lucille's Hair Care (1983) 286
McCoy Oil Company (1982) 9
Medo-Bel Creamery, Inc. (1982) 1
Mini-Mart Foodstores, Inc. (1983) 262
Multnomah, County of (1982) 52
Northwest Tank Repair (1982) 205
Oregon, State of, Dept. of General Services (1982) 46
Oregon, State of, Dept. of Human Resources (1982) 89
Pacific Motor Trucking Company (1982) 100
PAPCO, Inc. (1983) 243
Pioneer Building Specialties Co. (1982) 123
Rich Manufacturing Company (1982) 137
Riverhouse of Bend, The (1982) 171
S.O.S. Towing and Storage, Inc. (1982) 145
Southern Electrical and Pipefitting Corporation (1983) 254
Tyrholm, Inc. (1982) 188
Union Pacific Railroad Company (1982) 180

3bolitoc.sam

In the Matter of

MEDO-BEL CREAMERY, INC.,

a California corporation doing business in Oregon, Respondent.

Case Number 06-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued March 23, 1982.

SYNOPSIS

Respondent refused to reinstate Complainant, a compensably injured worker who had obtained a medical release to return to work. Thereafter, Respondent offered Complainant other positions, which he refused. The Commissioner made no determination on the suitability of those positions and dismissed the failure to reinstate claim for lack of jurisdiction, because Respondent's actions occurred before the statute provided that refusal to reinstate or to reemploy in a suitable position was an unlawful employment practice. ORS 659.415; 659.060(3).

The above entitled matter came on regularly for hearing before Robert L. Chapman, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries. The hearing commenced on June 20, 1980, in the Hearings Room of the Oregon State Employment Division Building, 801 Oak Street, Klamath Falls, Oregon. The Bureau of Labor and Industries was represented by Douglas R. Andres, Assistant Attorney General. Respondent Medo-Bel Creamery, Inc., was represented by Enver Bozgoz, Attorney at Law. Complainant Richard S[illegible] sent and testified.

On November 17, 1980, the Co[illegible] of Appeals of the State of Oregon ruled in effect that the Commissioner of the Bureau of Labor and Industries has no jurisdiction to enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979. On March 17, 1981, the Supreme Court of the State of Oregon denied the petition of the Bureau of Labor and Industries for review of the above-mentioned Court of Appeals decision. *Corvallis Disposal Co. v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980), *rev den* 290 Or 6510 (1981).

Having fully considered the entire record in this matter and the above-mentioned judicial decisions, I, Mary Wendy Roberts, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On November 28, 1978, Richard Shea filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been discriminated against in connection with his employment in that Respondent did not reinstate Complainant to his former job or available and suitable work after Complainant recovered from an on-the-job injury and demanded such reinstatement.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a California corporation doing business in Oregon and employing six or more persons in that business.

2) In August 1977, Respondent hired Complainant as a delivery driver.

3) In November 1977, Complainant sustained an on-the-job injury while working for Respondent.

4) After a period of disability due to surgery necessitated by this injury, Complainant received from his duly-licensed physician an unconditional release to return to work as of May 22, 1978.

5) On or about May 22, 1978, Complainant presented this release to Respondent and asked to be reinstated to his position with Respondent.

6) Respondent informed Complainant that there were no positions available with Respondent at the time, but that Respondent would notify Complainant when any suitable opening occurred.

7) During June and/or July 1978, Respondent offered Complainant two positions, both involving truck driving. Complainant refused both offers.

8) The evidence adduced by the Agency regarding the suitability of the two proffered positions is extremely unclear and the subject of much conflicting testimony.

ULTIMATE FINDING OF FACT

Complainant sustained a compensable injury while working for Respondent in the fall of 1977. After May 22, 1978, when he was no longer disabled by this injury, Complainant demanded that Respondent reinstate him to work. Respondent thereafter offered to reinstate Complainant to two different positions, which Complainant refused. The Agency has failed to show that these positions were not suitable.

CONCLUSIONS OF LAW

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

2) The Complaint and Specific Charges herein allege that Respondent violated ORS 659.415. Because the Commissioner of the Bureau of Labor and Industries was not empowered to enforce ORS 659.415 at times material herein, the Commissioner has no jurisdiction over, and therefore must dismiss, the Complaint and Specific Charges herein.

OPINION

The "act" of not reinstating Complainant which the Specific Charges allege is unlawful under ORS 659.415 occurred, if at all, between the fall of 1977 and July 1978. Oregon appellate courts have recently ruled that, until the Oregon Legislature amended ORS 659.415 in October 1979, the Commissioner of the Bureau of Labor and Industries did not have jurisdiction to enforce ORS 659.415. Since the Commissioner therefore could not enforce ORS 659.415 with regard to acts which allegedly occurred before October 1979, as herein, the Complainant and the Specific Charges herein must be dismissed.

Because this dismissal for lack of jurisdiction renders moot a determination of this matter on its merits, this Order includes only those substantive findings necessary to the conclusion that this matter does involve allegations governed by ORS 659.415 concerning times before October 1979.

ORDER

NOW, THEREFORE, the Commissioner not having jurisdiction over complaints made under ORS 659.415 at times material herein, the Complaint and Specific Charges filed herein against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of
LEISURELAND MOBILE HOME BROKERAGE, INC.,
Respondent.

Case Number 66-80
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 23, 1982.

SYNOPSIS

Where Respondent's help wanted ad specified "guaranteed salary," and Claimant was interviewed for a position as an outside salesman by three of Respondent's employees, each of whom told him he would get $450 for his first month and would be paid on commission thereafter, the Commissioner found that Respondent was liable for Claimant's first month's salary of $450. Rejecting Respondent's defense that the guarantee was intended only for managers, the Commissioner awarded Claimant $450, plus $465.60 penalty wages. ORS 652.140(2); 652.150; 652.160; 652.332; 653.020(6).

The above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on May 20, 1981, in the South Conference Room of Harris Hall, 125 East Eighth, Eugene, Oregon.

The Bureau of Labor and Industries was represented by Peter B. Higgins, Assistant Attorney General. Leisureland Mobile Homes Brokerage, Inc., was represented by John W. Billington, Attorney at Law. Claimant Leif Dahlin was present and testified.

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

FINDINGS OF FACT – PROCEDURAL

1) On November 7, 1979, the Claimant, Leif E. Dahlin, filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries alleging that the Employer, Leisureland Mobile Homes Brokerage, Inc., was

his former employer and that the Employer had failed to pay wages due to him.

2) On November 7, 1979, the Claimant assigned all wages allegedly due to him from the Employer to the Commissioner of the Bureau of Labor and Industries in trust for the Claimant.

3) On March 15, 1980, the Claimant signed a form entitled "Decision as to Implementation of Administrative Process," which authorized the Bureau of Labor and Industries to process his wage claim through the administrative process described in ORS 652.310 to 652.405.

4) On April 4, 1980, the Administrator of the Wage and Hour Division issued an Order of Determination which found that the Employer owed the Claimant $450.00 in unpaid wages, plus interest thereon. In addition, the Order of Determination found that the Employer owed the Claimant $500.00 in penalty wages, plus interest thereon. The Order of Determination was served upon the Claimant on April 10, 1980, and upon the Employer on April 28, 1980.

5) Thereafter, the Employer filed with the Wage and Hour Division a request for hearing in this matter and an answer to the above-mentioned Order of Determination denying the wage claim in its entirety and alleging as an affirmative defense that the Claimant had been paid the total amount due him, and that because of his position in outside sales, Claimant was "excluded from the provisions of ORS 653."

6) The Bureau of Labor and Industries duly served the Employer and the Claimant with Notices of the Time and Places of Hearing.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, the Employer was engaged in the business of mobile home sales. In this business, the Employer employed one or more persons in the State of Oregon.

2) In November of 1978, the Employer expanded its sales activities to the Eugene area. The Employer placed an advertisement in The Eugene Register-Guard, a newspaper of general circulation, on November 24, 1978, which read:

> "Excellent Opportunity
>
> "Expanding Mobile Home Brokerage Firm needs Men and Women for the Sales Department. Must be neat with clean appearance. Guaranteed Salary plus Excellent Commission Program. Please apply in person or phone 9 a.m. to 6 p.m. Ask for Mr. Cassidy, 1000 Jacobs, 889-9671 (behind Gilbert Shopping Center)."

3) On or about November 25, 1978, the Claimant went to the Employer's office in response to the aforementioned advertisement. The Claimant was interviewed by Rick Downing, who was an assistant manager in the Employer's organization. Mr. Downing told the Claimant, at this initial interview, that the Claimant would be paid a guaranteed salary of $450.00 for the first month of his employment and that he would receive commissions only in subsequent months. Mr. Downing did not have authority to hire or fire the Employer's employees or to guarantee salaries.

4) Early in December of 1978, the Claimant was interviewed by Wayne Ziegler, who was employed by the Employer. Mr. Ziegler assured the Claimant that he would receive a guaranteed salary of $450.00 for the first month of his employment. Mr. Ziegler did not have the authority to hire or fire Employer's employees or to guarantee their salaries.

5) Later in December of 1978, Claimant was interviewed by Terry Cassidy, who was in charge of the Employer's Eugene operation. Mr. Cassidy also mentioned a guaranteed salary for the first month of employment. Mr. Cassidy had authority to hire and fire sales employees. Mr. Cassidy placed the aforementioned advertisement in The Eugene Register-Guard.

6) On December 29, 1978, the Claimant began working in the Employer's office. He was hired as an outside sales person without a written employment agreement. Claimant's first full month of employment was January 1979. Payment for his January 1979 wages was due and payable on February 1, 1979. The Claimant continued to work for the Employer until February 28, 1979, when his employment was terminated.

7) On or about February 5, 1979, Claimant sold a mobile home in the course of his employment. On or about February 6, 1979, the Employer paid Claimant a commission for that sale in the amount of $250.00.

8) Approximately two weeks after the termination of his employment, on or about March 15, 1979, Claimant went to the Employer's Eugene office and attempted to obtain payment of the $450.00 which was guaranteed to him for the first month of his employment. Claimant was unsuccessful in his efforts, but through these efforts the Employer received notice of his claim.

CONCLUSIONS OF LAW

1) The Employer is an employer as defined in ORS 652.310(1).

2) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to the Claimant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award .

(3) The employer owed the Claimant four hundred and fifty dollars, and its failure to pay the Claimant immediately following the termination of the Claimant's employment constitutes a violation of ORS 652.140.

(4) The Employer's intentional failure to pay Claimant the abovementioned $450.00 was willful and therefore constitutes a violation of ORS 652.150.

During the month for which Mr. Dahlin did not receive his guaranteed salary wages, he worked a total of 29 days. Penalty wages are calculated at the rate of an average daily wage for each day the regular wages remain unpaid, for a maximum of thirty (30) days. An "average daily wage" in this case will be calculated by dividing Mr. Dahlin's guaranteed salary by the number of days he worked.

$450.00 x 29 days = $15.52/day

$15.52 x 30 days = $465.60 penalty wages

5) ORS 653.070(6) exempts outside salespeople from the application

of certain provisions of ORS chapter 653, but provides no exemption for claims under ORS chapter 652.

OPINION

The Employer asserts that wage guarantees were offered only to management personnel and that management personnel could be hired only with the approval of the Employer's president, not by Mr. Cassidy of his own volition. It is immaterial whether or not this was the Employer's policy. What is important is what was communicated to Claimant as a prospective employee. The advertisement in The Eugene Register-Guard offers a guaranteed salary and does not limit this guarantee to management personnel. Mr. Downing testified that he reaffirmed the guarantee as applicable for the first month of employment to get new employees "on their feet." Mr. Downing testified that he was instructed to offer this guarantee by Mr. Cassidy, who headed the Eugene office. Mr. Downing did not tell Claimant that the guarantee applied to management only.

After Mr. Downing interviewed Claimant, he was interviewed by Mr. Ziegler, and finally by Mr. Cassidy. Neither Mr. Ziegler nor Mr. Cassidy testified at hearing, but this forum has inferred from the newspaper advertisement and the testimony of Mr. Downing that they too told Claimant that he would receive a guaranteed salary for his first month of employment.

The Employer seeks to defend by asserting that the actions of Messrs. Cassidy, Ziegler, and Downing were outside the scope of their authority. The issue, then, for resolution is the scope of their authority as agents of the Employer; did these men have the power to affect the Employer's legal rights and duties.

Agency, in general terms, is a consensual, fiduciary relationship between two persons created by law by which one party, the principal, has the right to control the conduct of the other, the agent, and the agent has a power to affect the legal relations of the principal. An agent is deemed to have only such powers as are expressly given by the principal or are reasonably required to perform in accordance with the authority granted by the principal. Once an agency relationship is established, the powers of the agent are, as a general rule, strictly construed.

The types of powers given to agents falls into various categories. Express powers are those which the principal has expressly given to the agent either orally or in writing. This type of power is also known as real authority. Implied authority is that power which is reasonably necessary to carry out express authority. For example, if an agent has the express authority to sell grain, the agent has the implied authority to receive or collect payment for it. Apparent authority is established when the conduct of the principal holds another out to a third party, thus causing the third party to reasonably believe that the person thus held out has the authority to enter into contracts. Finally, inherent powers are those for which the principal is liable, even though the agent has neither express nor apparent authority, and there are no estoppel elements, because of the necessity to protect third parties with whom the agent may be dealing.

There is no evidence that the Employer gave express authority to Messrs. Cassidy, Ziegler, or Downing to offer salary guarantees to outside sales persons. Neither can the authority be implied from any actions of Employer which are noted in the record, particularly in respect to Messrs. Ziegler and Downing. It is easier to imply such authority for Mr. Cassidy, who was in charge of the Employer's Eugene operation.

Even if such authority cannot be implied for Mr. Cassidy, he and the others had inherent authority to offer the salary guarantee, which thus binds the Employer. The Claimant was not on notice that the principal had allegedly limited the powers of these agents. Therefore, it was reasonable for the Claimant to assume that the offer of a guarantee was valid. The reasonableness of the assumption particularly in regard to Mr. Cassidy was bolstered at hearing when testimony was presented that Mr. Cassidy not only had the authority to hire and fire sales staff, but also was responsible for placing the advertisement to which the Claimant responded, and which guaranteed a salary. Considering these aspects of the case, the Employer cannot rely upon the absence of express authority.

The Employer, in its defense, asserts that outside sales persons are exempt from protection under wage claim statutes. ORS 653.020(6) provides such an exemption from certain minimum wage protections, but this statute has no counterpart in wage claim matters covered under ORS chapter 652.

The Employer asserts that it has paid $250.00 to the Claimant and implies that this amount should be offset against any amounts found due to the Claimant. I cannot agree. The amount already paid was undisputedly a commission earned and paid in February of 1979. The amounts here at issue are for the work performed in January of 1979.

The issue of penalties is a complex one, which turns upon the matter of willfulness. The Employer must be found to have been aware of Claimant's claim as a prerequisite to refusal to pay. Although the claim at issue relates to work in January of 1979, Claimant's testimony established that he did not go to the Employer's office to seek the money until about two weeks following the termination of his employment had occurred on or about February 28, 1979. Claimant first sought payment on or about March 15, 1979. On March 15, 1979, the Employer, through his agent in the Eugene office, became aware of Claimant's claim.

In *Sabin v. Willamette Western Corporation*, 276 Or 1083, 1093-94 (1976), the Oregon Supreme Court interpreted the phrase "willfully fails to pay any wages" as meaning that the employer knew what it was doing, that it intended to do what it did, and that it acted as a free agent. *See also Schulstad v. Hudson Oil Co., Inc.*, 55 Or App 323 (1981).

In *Nordling v. Johnston*, 205 Or 315, 335-337 (1955), the Court defined "willfully" by citing *Davis v. Morris*, 7 Cal App 2d 269, 99 P2d 345 (1948):

> "The term 'willfully' as used in the statute to impose a penalty upon

an employer for willfully failing to pay wages of an employee immediately upon discharge doesn't mean it must necessarily be based upon a deliberate evil purpose to defraud workmen of their wages which the employer knows are due, but means the employer intentionally fails or refused to perform an act which is required to be done."

Having established the Employer's awareness of the claim, the remaining element for proof is intent. There being no assertion of accident or oversight in this case, this forum infers that the Employer intended to withhold the Claimant's wages.

The Employer asserts that the Claimant's signature on a document entitled "Office Procedures" constitutes a waiver of any compensation not outlined therein. The Procedures discuss a commission procedure only and do no purport to exclude other forms of compensation. This defense must fail.

The Employer asserts that the newspaper advertisement in evidence was a general and vague solicitation for applicants and that the guarantee mentioned therein was never intended to apply to sales people. The advertisement solicits applicants for the sales department and mentions a guaranteed wage. No limitation of those guarantees is made. If any vagueness existed in the advertisement, it was dispelled by Messrs. Cassidy, Ziegler, and Downing in their interviews with the Claimant.

ORDER

NOW THEREFORE, as authorized by ORS 652.332, the Employer is hereby ordered to:

Pay to the Hearings Unit of the Portland office of the Bureau of Labor and Industries:

a. FOUR HUNDRED AND FIFTY DOLLARS ($450.00) to be held in trust for Leif E. Dahlin, plus interest at the rate of six per cent per annum for the period February 1, 1979, to July 25, 1979, and at the rate of nine per cent per annum from July 26, 1979, until paid; plus

b. Penalty wages of FOUR HUNDRED SIXTY-FIVE DOLLARS and SIXTY CENTS ($465.60) to be held in trust for Leif E. Dahlin, plus interest at the rate of six per cent per annum for the period March 15, 1979, to July 25, 1979, and at the rate of nine per cent per annum from July 26, 1979, until paid.

In the Matter of
McCOY OIL COMPANY,
an Oregon corporation,
Respondent.

Case Number 78-79
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 25, 1982.

SYNOPSIS

Complainant responded by phone to a newspaper advertisement for a furnace repair person; Respondent told her that, because she was female, it would do no good for her to apply. Although Complainant was barred from the opportunity to apply based on her sex, and the Respondent thus committed an unlawful employment practice, the Commissioner did not award Complainant damages because she was not qualified for the position available. The Commissioner ordered Respondent to cease discriminating on the basis of sex in accepting applications, interviewing, and hiring. ORS 183.450(4); 659.010(6); 659.030(1); 659.040(1); 659.060(3).

The above-entitled matter came on regularly for hearing before Michael J. O'Brien, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries. The hearing commenced on June 4, 1980, in Room 908A of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon, was continued on September 19, 1980, and on October 15, 1980, and concluded on December 15, 1980, in the same location. The Bureau of Labor and Industries was represented by Thomas E. Twist, Assistant Attorney General. Respondent McCoy Oil Company was represented by John R. Sidman, Attorney at Law.

Complainant Megan (Donna) Brown was present and testified. In addition to Complainant, the Agency called Terry Hargrove, former clerk with McCoy Oil, as a witness. Respondent called Judy (Fimmel) McCoy, wife of Respondent's president and office manager, and Judy Mathias, former chief clerk with Respondent, as witnesses.

Having considered the entire record in this matter, I, Mary Wendy Roberts, make the following Rulings Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS UPON MOTIONS

Respondent propounded the following oral motions at the commencement of the hearing in this matter.

1) Motion to Dismiss Due to Misnomer of Parties Respondent.

The complaint filed in this matter on January 7, 1975, was defective in that it erroneously identified Respondent as "McCall Oil Company." Respondent contends that the complaint should be dismissed due to the defective filing.

Respondent's motion is hereby denied. It is uncontested that the defect in the complaint was corrected within approximately one week after the original filing. Respondent received prompt notice of the pendency of the complaint following the correction. Respondent has made no showing of prejudice in the preparation of its

defense as a result of the erroneous filing. The proper remedy under these circumstances is amendment rather than summary dismissal.

2) Motion to Dismiss Due to Failure to Timely File the Complaint.

Respondent contends that Complainant failed to comply with ORS 659.040(1), which requires that all complaints of discrimination "shall be filed no later than one year after the alleged unlawful employment practice."

Respondent's motion to dismiss on the basis of ORS 659.040(1) is hereby denied. The complaint in this case was filed with the Civil Rights Division approximately two weeks after the occurrence of the alleged unlawful employment practice. Moreover, there was no statute of limitations prior to October 4, 1977, the effective date of ORS 659.040(1).

Respondent also suggests that the Bureau is required to issue specific charges within the period prescribed by the statute of limitations in ORS 659.040. This claim is without merit. There is no statute of limitations concerning the filing of specific charges. If a delay in filing of such charges is prejudicial to Respondent's presentation of a defense, the proper remedy is to move for dismissal on the basis of laches.

3) Motion to Re-Open.

In its exceptions, Respondent has requested the re-opening of the case to present "full evidence regarding salaries and qualifications of trainees, and to show that all persons so hired were qualified as furnace repairpersons." Respondent's motion is hereby denied.

The hearing in this matter took place on four separate dates over a period of six months. At the first reconvenement, Ms. McCoy testified about the hiring of one trainee, Roger Stader. It would have been appropriate at that time, or at either of the other reconvenements, to present additional information regarding Mr. Stader's or any other trainee's qualifications and salary; no such offer of evidence, however, was made. Respondent has had ample opportunity to present the information it now seeks to offer, therefore, the hearing will not be re-opened.

FINDINGS OF FACT – PROCEDURAL

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

2) On January 7, 1979, Megan (Donna) Brown filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been discriminated against in connection with her efforts to obtain employment with McCall Oil on account of her sex. As stated in Rulings Upon Motions 1 above, the named Respondent in Complainant's original complaint was incorrect. Within one week of filing the original complaint, this error was corrected and McCoy Oil was named as the proper Respondent.

3) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a corporation duly organized under the laws of the State of Oregon and authorized to engage in the business of selling fuel oil and related activities.

2) Complainant Megan (Donna) Brown is a female.

3) In December 1974, Respondent placed the following classified advertisement in a Portland daily newspaper of general circulation:

"FURNACE REPAIR PERSON Immediate work. Good working conditions. 252-4685 or 252-0265."

4) On or about the afternoon of December 24, 1974, Complainant placed a telephone call to the listed numbers for the purpose of making inquiries concerning the advertised position.

5) Complainant's telephone call was directed to a person with a male voice who was otherwise not identified by name or title. I find that the person to whom Complainant spoke made statements to the following effect in the course of the ensuing conversation:

a) "Are you a man or a woman?"

b) "Are you calling for yourself?"

c) "Is this some kind of trick?"

d) "We just can't hire a woman" for the advertised position.

e) The term "person" was placed in the advertisement because it was "required by law."

f) That Respondent would "train" whomever it hired.

g) Complainant would have to work in the inner-city neighborhood of Albina, where she "might get raped."

h) Complainant would not be allowed to submit an application for the positions because "it wouldn't do any good."

6) Ms. Hargrove testified that during the holiday season of 1974, she was meeting with Mr. McCoy in his office when their conversation was interrupted by a phone call. Ms. Hargrove testified that during the phone conversation, Mr. McCoy made comments to the effect that:

a) "This is no job for a woman."

b) The job was "a man's job, not a woman's."

c) That the company did a lot of business in the Albina district where there was a possibility of being raped and that he (Mr. McCoy) could not assume that responsibility.

d) That it wouldn't do any good for the caller to put in an application.

7) I find, therefore, that the person with whom Complainant spoke was Clarence M. McCoy, Respondent's president.

8) Respondent hired a male furnace repair person, Charles Paulus, early in January 1975.

9) Complainant offered no prior experience as a furnace repair person, and only limited mechanical

experience of any kind. However, I find that Complainant was sufficiently qualified to submit an application or appear for a personal interview with respect to the advertised position.

10) Two types of employees were hired by Respondent in the area of furnace repair: "trainees," who have no prior experience in furnace repair, and "furnace repair-persons" who generally have substantial prior experience in that area. "Trainees" received from 40 to 80 hours of training within the office and on-the-job and were hired in the summer or "Off" season when time for training was available. Experienced persons would accompany another worker for a few days to familiarize themselves with the required paper work.

11) Prior to January 1975, Respondent received no applications from women for the position of furnace repair person.

12) In a letter dated May 28, 1975, Respondent invited Complainant to apply for the position of furnace repair-person. Complainant did not apply for a position with Respondent because she was employed in a position in which she wished to remain. By failing to apply for a position, Complainant became unavailable for work with Respondent.

ULTIMATE FINDINGS OF FACT

1) Respondent is an employer which, in the State of Oregon, engages or utilizes the services of one or more employees reserving the right to control the means by which such service is or will be performed.

2) Complainant, a woman, was denied the opportunity to present an application, appear for a personal interview, or otherwise be considered for hire as a furnace repair person on account of her sex.

CONCLUSIONS OF LAW

1) Respondent is an "employer" as defined by ORS 659.010(6).

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

3) The actions and motivations of Respondent's officers and agents, including C. M. McCoy and Judy (Fimmel) McCoy, described herein are properly imputed to Respondent.

4) Respondent unlawfully discriminated against Complainant on the basis of her sex in violation of ORS 659.030(1) by denying her the opportunity to present an application, appear for a personal interview, or otherwise be considered for the position of furnace repair person.

5) There is no showing in this case that Complainant was properly disqualified from applying for the position of furnace repair person on account of a gender-related bona fide occupational requirement reasonably necessary to the normal operation of Respondent's business.

OPINION

Complainant alleges that she was barred from applying for a position with Respondent as a furnace repair person on or about December 24, 1974. Viewing the evidence as a whole, I find that Complainant's allegations are amply supported by credible, corroborated evidence.

Complainant testified that she responded to a newspaper advertisement for a "furnace repair person" by placing a telephone call to the listed number. She was directed to a man who, in effect, told her that a woman would not be considered for the position. (Refer to Finding of Fact 5)

Complainant's version of the telephone conversation is corroborated by the credible testimony of an employee, Terry Hargrove, who overheard it and identified the "male voice" as Clarence M. McCoy, Respondent's president. This witness's testimony has been given greater weight than the testimony of Respondent's witnesses because of Ms. Hargrove's lack of bias in the case. Ms. Hargrove does not now work for Respondent, does not have a monetary interest in the outcome and does not know Complainant. Further, her testimony supports that of Complainant in many specifics.

Respondent's primary witness, Judy (Fimmel) McCoy, must be considered a biased witness because of her monetary interest in the business and her lack of first-hand knowledge of the events at issue. Ms. Mathias, while not inherently biased, also lacks first-hand knowledge of the phone conversation.

Because Ms. Brown's testimony is corroborated by an unbiased witness, it can be concluded that Respondent specifically intended to discriminate against prospective female applicants by refusing to consider them in any way for the position of furnace repair person.

In denying Complainant's allegations, Respondent contends that its offices were vacated after 1:00 p.m. on the afternoon of December 24, 1974, due to a staff Christmas party which was held at another location.

Respondent argues that no one was in its offices during the afternoon of December 24th to respond to Complainant's alleged telephone call, which was admittedly placed after 1:00 p.m. Any calls to the office would have been directed to Respondent's answering service, according to Ms. McCoy. Therefore, the conversation with Complainant simply could not have occurred on that date.

I cannot accept Respondent's claim that the conversation never occurred. Based on the credible testimony of two witnesses, I can only conclude that Mr. McCoy was present in his offices for a least enough time to converse with Complainant on December 24, 1974.

Additionally at issue, however, is whether the injury resulting from Respondent's unlawful conduct is compensable. *McDonnell Douglas Corp v. Green,* 411 US 792 (1973) provides the model for a prima facie discrimination case:

> 1) the complainant belongs to a protected class;
>
> 2) complainant applied for and was qualified for the position for which the employer was seeking applications;
>
> 3) complainant was rejected despite his/her qualifications; and,
>
> 4) after the rejection of complainant, the position remained open and the employer continued to seek applications from persons with complainant's qualifications.

While the progeny of *McDonnell Douglas* have recognized

permutations of the above model, this model remains basically the same for many discrimination claims.

Analyzing Complainant's case according to the *McDonnell Douglas* format shows that Complainant does belong to a protected class. Upon reading an advertisement in a local paper, Complainant made preliminary inquiries of Respondent regarding the position but did not make formal application for the position. While the *McDonnell Douglas* format requires that application be made, this forum has previously found that application need not be made when such action would merely be a futile gesture. *In the Matter of Westland Investment Company,* 2 BOLI 1 (1980). In this case, Complainant reasonably decided, after having been told that it "wouldn't do any good" to apply, not to apply, thus satisfying half of the second element of *McDonnell Douglas.*

Complainant's claim fails, however, to satisfy the second half of element 2, that she applied for a position for which she was qualified.

According to the uncontroverted testimony of Ms. McCoy, only experienced furnace repair-persons were hired during the busy winter season. In the record are copies of applications from those persons hired between January 1 and May 15, 1975. A review of each application shows that each man hired during that period had furnace repair and related experience, thus supporting Ms. McCoy's testimony.

Complainant, on the other hand, had little mechanical experience. She had tuned her automobile twice, once under the supervision of her mechanic husband and once by herself; and, she had changed the plug on an electrical heater. The Agency failed to show that any person with as little furnace repair or mechanical experience as Complainant was hired between January 1 and May 29, 1975. Without such a comparator, it is impossible to assess damages.

The Agency has urged that Michael Rackley be used as the comparator. Specifically, the Agency, in its exceptions to the Proposed Order stated:

> "The problem of calculating damages in this case is compounded by Respondent's failure to provide information sought by subpoena for that purpose. Consequently . . . Michael J. Rackley is the appropriate comparator to use in calculating Complainant's lost earnings."

This forum cannot accept Mr. Rackley as a comparator for several reasons. First, a review of Mr. Rackley's application shows that he had five years experience as an air conditioner mechanic and one year experience as a maintenance mechanic. This disparity in experience precludes comparing the two individuals.

Second, Mr. Rackley does not become an appropriate comparator simply because Respondent failed to provide information sought by subpoena. The Agency's attorney could have assured the production of the desired documents by taking action to enforce its subpoena.

If an appropriate comparator is to be found among the persons hired by Respondent and for whom this forum has applications, it is Roger Stader.

Mr. Stader was hired as a trainee, according to the testimony of Ms. McCoy, with his previous experience being approximately four years work as a millwright. Mr. Stader cannot, however, be used as a comparator because he was hired after Complainant ceased to be available for employment by Respondent.

Had the Agency been able to completely satisfy the second element of the McDonnell Douglas test by either a) showing that Complainant was qualified for the position for which others were ultimately hired, or b) showing that a male with qualifications equal to Complainant's was hired, this forum would be able to award damages in the amount of wages lost as a result of Respondent's unlawful practice. Further, the Agency presented no evidence of any pain and suffering caused by Respondent's unlawful employment practice.

Since the evidence presented does not support a monetary award, an order instructing Respondent to cease and desist discriminating on the basis of sex in all aspects of its employment practices shall be issued. Should other discrimination cases against Respondent be litigated in this forum in the future, official notice pursuant to ORS 183.450(4) may be taken of this order.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to cease and desist from discriminating on the basis of sex in accepting applications, conducting interviews for employment, and in hiring.

In the Matter of
RAY CARMEN,
Respondent.

Case Number 10-81
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 6, 1982.

SYNOPSIS

Respondent willfully failed to pay Claimant $210 owed as wages when he quit. The Commissioner ordered Respondent to pay Claimant the wages owed, plus penalty wages of $780. Where Respondent failed to attend the hearing, although regularly and properly served and aware of the time and place designated, the Commissioner ruled that Respondent was in default pursuant to the Administrative Procedures Act, and denied Respondent's request 108 days later to reopen the hearing. ORS 183.415(6); 652.140; 652.150; 652.332.

The above-entitled contested case came on regularly for hearing before Dale A. Price, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on November 9,

1981, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Neil H. Running, Compliance Specialist, Wage and Hour Division. Claimant Wayne D. Sovey was present and testified. Employer Ray Carmen did not attend the hearing.

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

RULING ON MOTION

On or about February 25, 1982, the Employer, Ray Carmen, requested a re-hearing in this matter. As a Final Order had not yet been issued, this request was considered to be a motion to re-open the record. Notice of the motion to re-open and an opportunity to oppose the motion was sent to the Claimant on or about March 17, 1982. The Claimant did not respond within the 10 days allotted.

The motion to re-open is hereby denied. Mr. Carmen admitted in his motion that he knew of the time and place of the hearing. He does not deny that he had adequate notice of the time and place set for hearing and yet he made no efforts to contact the Bureau of Labor and Industries until 108 days after the hearing was held and the Proposed Order issued.

FINDINGS OF FACT – PROCEDURAL

1) On November 8, 1980, Claimant filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries alleging that Ray Carmen was his former Employer and that the Employer had failed to pay wages due him.

2) On November 9, 1980, Claimant assigned all wages allegedly due to him from Employer to the Labor Commissioner in trust for Claimant.

3) On March 20, 1981, Claimant signed a form entitled "Decision as to Implementation of Administrative Process," which authorized the Bureau of Labor and Industries to process his wage claim against Employer through the administrative process described in ORS 652.310 through 652.405.

4) On April 23, 1981, the Administrator of the Wage and Hour Division issued an Order of Determination which found that the Employer owed the Claimant $260.00 in unpaid wages, plus interest thereon. In addition, the Order of Determination found that the Employer owed the Claimant $780.00 in penalty wages, plus interest thereon. The Order of Determination was served on the Claimant on June 26, 1981, and on the Employer on June 25, 1981.

5) Thereafter, the Employer filed with the Wage and Hour Division a request for hearing in this matter and an answer to the above-mentioned Order of Determination in its entirety and alleged, as an affirmative defense, that the Claimant had been paid the total amount due him.

6) The Bureau of Labor and Industries duly served the Employer and the Claimant with Notices of the Time and Place of Hearing.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Employer was a sole proprietor engaged in the business of plumbing at locations within the State of Oregon. In that business Employer employed one or more persons in the State of Oregon.

2) The Claimant began work digging ditches for the Employer on October 17, 1980, and worked through October 28, 1980.

3) The Claimant and the Employer agreed that the Claimant was to be paid $4.00 per hour.

4) The Claimant worked a total of 65 hours during 10 days for the Employer.

5) The Claimant earned a total of $260 during the 10 days of his employment with the Employer. The Claimant was paid a total of $50 of the $260 owed to him by the Employer.

6) The Employer was aware of his debt to the Claimant but failed to pay said debt. The Employer also failed to allege his financial inability to do so or other mitigating circumstances.

ULTIMATE FINDING OF FACT

The Employer knowingly failed to pay Claimant $210 in wages which were due to the Claimant immediately upon termination of the Claimant's employment. The Employer provided no evidence of inability to pay.

The Employer's intentional failure to pay the Claimant the above-mentioned $210 was willful, and therefore constitutes a violation of ORS 652.150.

Penalty wages are calculated at the rate of an average daily wage for each day the regular wages remain unpaid, for a maximum of 30 days. An "average days wage" in this case is calculated as follows:

65 Total Hrs /10 days = 6 ½ Hrs/Day

6 ½ Hrs/Day x $4.00/hr = $26/Day

$26 x 30 Days = $780 Penalty Wages

CONCLUSIONS OF LAW

1) The Employer is an employer as defined in ORS 652.310(1).

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

3) The Employer's failure to pay two hundred ten dollars owing to the Claimant immediately following the termination of his employment constitutes a violation of ORS 652.140.

4) The Employer's intentional failure to pay the Claimant the above-mentioned $210 was willful and therefore constitutes a violation of ORS 652.150.

5) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to the Claimant under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

6) The Employer's failure to appear at hearing on this matter, after having received timely notice of the hearing, resulted in a default pursuant to ORS 183.415(6). The Employer did not act promptly to either notify the Bureau of Labor and Industries regarding the cause of the default or to petition for re-opening of the issue immediately following his failure to appear. Therefore, the matter will not be re-opened.

OPINION

In his answer to the Order of Determination, the Employer alleged, among other things, that he had paid the

Claimant one hundred and eighty dollars. Although the Notice of Hearing was received by a family member at the home of the Employer, said Employer did not appear at hearing, nor did he offer evidence in support of his answer to the Order of Determination. The filing of an answer does not constitute presentation of evidence. No finding of fact or order may be based upon uncorroborated assertions contained in the Employer's answer.

The Employer's absence from the hearing has also thwarted his defense to the imposition of civil penalties under ORS 652.150. If the Employer had appeared and proven accident, oversight, or his financial inability to pay the wages at the time they accrued, then he could have avoided the penalty wages which comprise approximately three quarters of the total award to the Claimant.

The hearing at which the Employer failed to appear was held on November 9, 1981. Not until February 25, 1982, nearly 108 days after the hearing, did the Employer communicate with this Agency regarding his failure to appear. It is incumbent upon employers in matters such as this to act promptly and with the attention appropriate to an issue of this import.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Employer is hereby ordered to:

Pay to the Hearings Unit of the Portland office of the Bureau of Labor and Industries:

a. TWO HUNDRED TEN DOLLARS ($210.00) to be held in trust for WAYNE D. SOVEY, plus interest at the rate of 9 per cent per annum from October 29, 1980, until paid, plus;

b. Penalty wages of SEVEN HUNDRED EIGHTY DOLLARS ($780.00) to be held in trust for WAYNE D. SOVEY, plus interest thereon at the rate of 9 per cent per annum from December 1, 1980, until paid.

In the Matter of

Moshen Kouklani, dba

LOVE'S WOODPIT BARBEQUE RESTAURANT, an Oregon corporation, Respondent.

Case Number 69-79

Amended Final Order of the Commissioner

Mary Wendy Roberts

Issued April 19, 1982.

SYNOPSIS

Respondent refused to hire a male Complainant, who worked as a bus person, as a waiter because of his sex, and discharged him because of his sex, in violation of ORS 659.030(1)(a). The Commissioner awarded Complainant the difference in wages for the two month period he was old enough to qualify as a waiter, plus the wages lost while he was unemployed for ten days after his discharge, for a total of $343. Ruling that Respondent did not establish a bona fide occupational requirement that waiters be female, the Commissioner ordered Respondent to cease discriminating against waiter applicants on the basis of sex. ORS 659.010(2); 659.030(1)(a); 659.060(3).

The above-entitled contested case came on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on December 13, 1979, in Room 678 of the State Office Building in Portland, Oregon. The Bureau of Labor and Industries was represented by Douglas R. Andres, Assistant Attorney General. Respondent Moshen Kouklani, dba Love's Woodpit Barbeque Restaurant No. 54, was represented by W. F. Whitely, Attorney at Law. Complainant Carl S. Ross was present and testified.

An Order in this matter was issued on March 1, 1982.

Having fully considered the entire record in this matter, and having corrected certain mathematical and typographical errors in the above-mentioned Order, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Amended Findings of Fact, Amended Ultimate Findings of Fact, Amended Conclusions of Law, Amended Opinion, and Amended Order.

AMENDED FINDINGS OF FACT – PROCEDURAL

1) On May 24, 1978, Carl Ross filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by Respondent because of his sex.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion, but was unsuccessful in these efforts.

AMENDED FINDINGS OF FACT – THE MERITS

1) At all times material to this proceeding, Moshen Kouklani, Respondent, owned and operated Love's Woodpit Barbecue Restaurant No. 54, in Portland, Oregon, a franchise of Love's Enterprises, Inc., a California corporation doing business in the State of Oregon as Love's Woodpit Barbecue Restaurants. This restaurant is hereinafter referred to as the Restaurant.

2) On February 3, 1982, Proposed Official Notice was sent to the parties in this matter. Written responses were received and Findings of Fact 1 above modified to reflect the information provided.

3) At the Restaurant, Respondent utilized the personal service of one or more employees and reserved the right to control the means by which such service was performed.

4) Complainant is a male person.

5) On August 17, 1977, Complainant applied for work at the Restaurant. He indicated on his application and verbally to the Restaurant's manager,

Lana Myers, that he wanted to work as a waiter. (Throughout this Order, the forum uses the word "waiter" to mean both male and female persons working in that capacity.)

6) At the time of his above-mentioned application, Complainant had at least four-and-one-half months of experience as a waiter. He noted this experience on his application and verbally to Ms. Myers when he applied.

7) Complainant was born on February 28, 1957.

8) Waiters at the Restaurant were required, at times material, to serve alcoholic beverages.

9) At times material, it was illegal in the State of Oregon for a person under the age of twenty-one years to serve alcoholic beverages.

10) Ms. Myers responded to Complainant's application by telling him, and I find, that he was not qualified to be a waiter at the Restaurant because he was not yet twenty-one years of age. She told him that he could work as a bus person at the Restaurant until he became twenty-one years old. At this time, there were no waiter openings at the Restaurant.

11) Complainant began working as a bus person at the Restaurant in September 1977.

12) Waiters and bus persons at the Restaurant worked closely together.

13) Complainant's duties as a bus person were to assist waiters as the waiters directed, setting tables, serving beverages, making salads, and clearing tables. Clearing a table usually meant just removing napkins and place settings and wiping the table after a customer left, because most waiters cleared the rest of the table while serving the customer.

14) Usually, two bus persons worked at a time at the Restaurant, each working with more than one waiter.

15) Each Restaurant employee had one assigned break time per work shift, which was usually spent eating a meal. Employees also were allowed to take short informal and impromptu breaks in a back room when there was no work to be done. Most employees spent these impromptu breaks smoking or reading a newspaper.

16) During his employment at the Restaurant before he became twenty-one years old, Complainant told a Mr. Mamound, who had replaced Ms. Myers as manager, and two head waiters of his desire to become a waiter at the Restaurant when he became twenty-one. Neither Mr. Mamound nor the head waiters expressed any reason why this could not happen.

17) On February 28, 1978, his twenty-first birthday, Complainant spoke to Mr. Mamound about becoming a waiter. Mr. Mamound said that he would have to talk with the owners of the Restaurant because all the waiters at the time were women. Mr. Mamound told Complainant that as far as he knew, he could not hire a man as a waiter without obtaining permission from the owner of the Restaurant, because it was his policy to hire women as waiters at the Restaurant.

18) Respondent hired Carol Taylor, a female, on March 26, 1978, to work as a waiter at the Restaurant. At the time she was hired, Ms. Taylor had, at most, four months of experience as a waiter.

19) Respondent hired Katie Mannel, a female, on April 12, 1978, to work as a waiter at the Restaurant. Ms. Mannell's twenty-first birthday was on April 25, 1978.

20) Respondent hired Susie Hadley, a female, on April 17, 1978, to work as a waiter at the Restaurant. At the time she was hired, Ms. Hadley had four-and-one-third months of experience as a waiter.

21) There is no evidence on the record as to which shift(s) the above-named women worked, or could have worked, as waiters at the Restaurant.

22) From February 28, 1978, until approximately May 16, 1978, Complainant asked Mr. Mamound about becoming a waiter every two to three weeks. Each time, Mr. Mamound stated that he had not received a reply from the Restaurant's owner and reiterated that he could take no action until he received a reply. The last time Complainant asked Mr. Mamound, Mr. Mamound told him that he would tell Complainant when he received a reply and that, until such time, Complainant was not to ask about becoming a waiter.

23) Shortly before May 16, 1978, Complainant spoke directly with Mr. Kouklani about becoming a waiter at the Restaurant. (Both Mr. Kouklani and his wife, Doris Kouklani, who participated in the business, visited the Restaurant on a less than regular basis.) Mr. Kouklani said that he had known that complainant wanted to become a waiter, that Complainant had sufficient experience to do so, and that Mr. Kouklani would see what he could do to make Complainant become a waiter.

24) During the lunch shift on May 16, 1978, Complainant was working as a bus person at the Restaurant with waiter Mona Lee Davis. Complainant worked with Ms. Davis often during his employment at the Restaurant.

25) Ms. Davis preferred bus persons to perform minimal work at the tables and, accordingly, encouraged them to remain away from the tables until she asked for assistance. She had voiced this direction to Complainant.

26) Sometimes, when Complainant was waiting for work to do, he stood away from the tables with his arms folded and observed the activity at the tables in order to ascertain when and where he was needed. This accorded with Ms. Davis' above-described direction.

27) On May 16, 1978, during the mid-day rush of business, Ms. Myers, then manager of the Restaurant, saw Complainant standing away from the tables with his arms folded, observing what was occurring at the tables. Complainant was working with Ms. Davis at the time. Later, after the rush was over and the Restaurant was not busy, Ms. Myers saw Complainant holding an impromptu break in the back room of the Restaurant. He was reading a newspaper during this break. Ms. Myers told Ms. Kouklani what she had seen.

28) Together Ms. Myers and Ms. Kouklani decided to terminate Complainant's employment. During Complainant's lunch break on May 16,

1978, Ms. Myers told him that his services were no longer required. Complainant went home, thinking that Ms. Myers had meant that the restaurant was not busy enough for him to continue working. (*See* Amended Finding of Fact 36 below.) Complainant did not believe that he had been discharged.

29) The next day, May 17, 1978, Complainant reported for work and could not find his time card. He was told to go to the Restaurant's office. When he did, Ms. Myers informed him that he was fired because, on the previous day, he had been reading a newspaper and standing watching others doing his job. Complainant left the Restaurant and has not worked there since that day.

30) As a bus person at the Restaurant, Complainant had worked one four hour shift per day for five days per week at the rate of $2.65 per hour. He also earned an average of $4.50 per day in tips. His total weekly compensation as a bus person averaged, therefore, $75.50.

31) At times material herein, waiters working the Restaurant's evening shift worked, on the average, five hours per day for four days per week at the rate of $2.65 per hour. They also earned an average of $22.50 per day in tips. Their total weekly compensation averaged, therefore, $143.00.

At times material herein, waiters working the Restaurant's lunch shift worked, on the average, three hours per day for four days per week at the rate of $2.65 per hour. They also earned an average of $15 per day in tips. Their total weekly compensation averaged, therefore, $91.80.

32) At times material herein, if Complainant had been a waiter at the Restaurant he would have preferred to work during the Restaurant's evening shift.

33) After his discharge from employment on May 17, 1978, Complainant did not work again until May 27, 1978, when he began working for a previous employer, Grace Memorial Child Care Center. He worked forty hours per week and received total compensation of $2.65 per hour. His total weekly compensation was, therefore, $106.00. Complainant continued working at Grace Memorial Child Care Center until sometime between March 1, 1979, and June 30, 1979.

34) During Complainant's employment at the Restaurant, all of the Restaurant's waiters were female and all of its bus persons were male.

35) On one occasion, during the first half of Complainant's employment at the Restaurant, he was told that he was reporting to work late. This was the only time Complainant received any criticism concerning his work at the Restaurant. Mr. Mamound gave him compliments concerning his work performance while Mr. Mamound was manager. He was never told by anyone that his work was unsatisfactory.

36) Several times during this employment at the Restaurant, Complainant was sent home from work early because business was slow and he was not needed. He was never told that he was sent home because of unsatisfactory work performance.

37) Complainant took no more impromptu breaks than other Restaurant employees during his employment there.

38) While working at the Restaurant, Complainant trained another bus person and performed some of his work.

39) At least one waiter who worked with Complainant at the Restaurant, Ms. Davis, regarded Complainant as one of the best bus persons at the Restaurant.

40) Because of Ms. Kouklani's and Ms. Myers' very strong bias in favor of Respondent, evidenced by their demeanor, inconsistency in testimony, and their current relationships to Respondent, and because of the relatively disinterested and well informed point of view of Ms. Davis, whose testimony agreed with that of Complainant, this forum has given greater weight to Ms. Davis' testimony than to conflicting testimony of Ms. Kouklani and Ms. Myers.

AMENDED ULTIMATE FINDINGS OF FACT

1) Complainant worked as a bus person at the Restaurant from September 1977 to May 17, 1978. His work performance was satisfactory.

2) During Complainant's employment at the Restaurant, Respondent maintained two job classifications at the Restaurant which were segregated on the basis of sex: all Restaurant bus persons were male and all Restaurant waiters were female.

3) At all times during Complainant's employment at the Restaurant, Complainant wanted to become a waiter at the Restaurant.

4) Complainant was qualified to become a Restaurant waiter on and after February 28, 1978, his twenty-first birthday.

5) Starting in August 1977, when he applied to work at the Restaurant, and repeatedly from the day of his twenty-first birthday, Complainant voiced his desire to become a waiter to Respondent. The Restaurant's manager told him, on and after his twenty-first birthday, that because of his sex he could not become a waiter without special permission from the Restaurant's owner.

6) Between February 28, 1978, and May 17, 1978, Respondent hired at least three persons as waiters at the Restaurant. All were women. One was hired thirteen days before her twenty-first birthday. The other two had less experience as waiters than Complainant, and neither had worked before at the Restaurant. Complainant was more qualified than any of these three women at the times they were hired. The first of these women to be hired by Respondent was hired on March 26, 1978.

7) Complainant was deprived of fair consideration for promotion to these waiter openings because of his sex.

8) On May 16, 1978, when Ms. Myers observed Complainant watching the Restaurant's tables, Complainant was not neglecting his work but in fact working by watching the tables to ascertain where and when he was needed. Later that day, when Ms. Myers observed Complainant taking an impromptu break, Complainant was not neglecting his duties because business at the Restaurant was slow enough to allow Complainant to take a

brief break, in accordance with Respondent's Informal policy.

9) Complainant earned an average of $75.50 per week tips and salary as a bus person during the 7.5 weeks between March 26, 1978, and May 17, 1978, for a total of $556.25. If he had been a lunch shift waiter at the Restaurant during that time, he would have earned an average of $91.80 per week in tips and salary, or a total of $688.50. The difference between the bus person and waiter earnings is $122.25.

From May 17, 1978, until May 27, 1978, Complainant was unemployed. If he had been a lunch shift waiter at the Restaurant during ten day period, he would have earned an average of $91.80 per week in tips and salary, or a total of $131.14.

10) On May 27, 1978, Complainant began earning $106.00 per week at alternative employment. This was more weekly compensation than Complainant would have received if he had been a lunch shift waiter at the Restaurant.

11) Because of Respondent's above-cited actions, Complainant lost a total of approximately $253.39 in employment compensation between March 26, 1978, and May 27, 1978.

AMENDED CONCLUSIONS OF LAW

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

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

3) The actions, and motivations for those actions, of Doris Kouklani, Lana Myers, and Mr. Mamound described herein are properly imputed to Respondent.

4) Respondent's refusal to hire Complainant as a waiter between March 26, 1978, and May 16, 1978, did not result from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

5) Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(a) by refusing to hire Complainant as a waiter between March 26, 1978, and May 16, 1978, because of his sex.

6) Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(a) by discharging Complainant from employment, on May 17, 1978, because of his sex.

7) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record, and the sum of money awarded as damages in the Order is an appropriate award.

AMENDED OPINION

1. Summary

Complainant was a bus person at the Restaurant from September 1977 to May 17, 1978. He performed his work in a satisfactory manner. After February 28, 1978, Complainant repeatedly applied, and was qualified, to become a waiter at the Restaurant. All of the waiters at the Restaurant were female and all of the bus persons at the Restaurant were male. Respondent's manager told Complainant that he could not be hired as a waiter without special permission from the Restaurant's owners because Complainant was a male and all waiters at the Restaurant were female. After February 28, 1978, and during the pendency of Complainant's application, Respondent hired at least two women to be waiters at the Restaurant who were less qualified than Complainant, given their lesser amount of experience as waiters and lack of exposure to the Restaurant's operation. Also, after February 28, 1978, Respondent hired at least one woman who was not qualified to become a waiter because she was too young to serve alcoholic beverages. Within a short time after Complainant had confronted one of the Restaurant's owners with his desire to become a waiter at the Restaurant, Respondent discharged Complainant. Respondent alleges that it discharged Complainant for poor work performance, but there is no evidence that Respondent criticized Complainant's work before that time (except to reprimand him for being late once early in his employment), and there is substantial evidence that Respondent's criticisms of Complainant's work performance on May 16, 1978, were unfounded and pretextual. These facts taken together compel the conclusion that Complainant was not promoted to the openings for waiter and was discharged because he is a male person.

2. Damages

Respondent argues that Complainant's damages must be proven with reasonable certainty. Respondent faults the Agency and the Presiding Officer with their alleged failure to prove or determine with precision earnings, i.e. tips, which by their nature are not susceptible to accurate or exact proof.

The difficulty of computing the amount of back pay does not constitute a ground for denying such compensation. *Pettway v. American Cast Iron Pipe Co.*, 494 F2d 211, 253, 254 (5th Cir 1974). "Difficulty of ascertainment is no longer confused with the right of recovery." *Mitchell v. Mitchell Truck Line, Inc.*, 286 F2d 721, 725-26 (5th Cir 1961); *Hodgson v. Ricky Fashions, Inc.*, 434 F2d 1261, 1262-63 (5th Cir 1970).

Although "any attempt to reconstruct what would have happened in the absence of discrimination is fraught with considerable difficulty," *Rios v. Enterprise Association Steamfitters Local 638*, 501 F2d 622, 632 (2nd Cir 1974), in that "no remedy is perfect," *Kirkland v. New York State Department of Correctional Services*, 520 F2d 420 (2nd Cir 1975) (Mansfield, J. dissenting) *cert denied*, 429 US 823 (1976), *rehearing denied* 429 US 1124 (1977), this forum applies its best efforts toward fashioning a "fair measure of redress" for those who have been discriminated against "at no undue expense" to the employer. *Chance v. Board of Bar Examiners*, 534 F2d 993, 1003 (2nd Cir 1976) (Oakes, J., dissenting) *cert denied* 431 US 965 (1977), *rehearing denied* 434 US 881 (1977). It is sufficient that this forum determines the amount of back pay "as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680, 687 (1946).

Witness Davis and Complainant gave testimony concerning the number of hours worked per week by the Restaurant's waiters and Complainant (as

a bus person). They also testified as to the respective hourly wages and average tips earned on each shift. Complainant testified that he would have preferred to work the more lucrative evening shift if he had become a waiter at the Restaurant. However, the Agency offered no evidence that Complainant would have been allowed to work according to this preference. For this reason, this forum has used earning figures for the less lucrative lunch shift work in ascertaining what Complainant would have earned had he become a waiter at the Restaurant.

Complainant testified that he was unemployed for ten days after Respondent discharged him and that after this short period of unemployment, he began working a set number of hours per week at a given hourly wage. His weekly compensation was more than what he would have earned as a lunch shift waiter at the Restaurant. For that reason, the beginning of this employment ends Complainant's accrual of back pay damages.

Respondent argues further that no evidence was presented to establish that Complainant properly mitigated his back pay damages. Complainant's speed on obtaining alternative employment establishes that he did properly mitigate his damages. However, even if no evidence of Complainant's mitigation were presented, in civil rights matters, it is the burden of the respondent, not the Agency, to demonstrate that the complainant failed to mitigate his or her damages. *Hegler v. Board of Education,* 447 F2d 1078, 1081 (8th Cir 1971); *Sparks v. Griffith,* 460 F2d 433 (5th Cir 1972); *Kaplan v. IATSE,* 535 F2d 1354 (9th Cir 1975); *Sangster v. United Airlines, Inc.,* 633 F2d 864 (9th Cir 1980), all cited in *In the Matter of Veneer Services, Inc.,* 2 BOLI 179, 186 (1981). Respondent presented no evidence at all of any failure to mitigate damages.

3. Credibility of Witnesses

The testimony of Respondent's witnesses conflicted sharply with that of the Agency's witnesses concerning Complainant's general work performance and whether Complainant was neglecting his work during times material on May 16, 1978. Complainant and Ms. Davis stated that Complainant's general work performance was, certainly, satisfactory and that Complainant did not neglect his work on May 16, 1978. They agreed that when Complainant stood with his arms folded watching the Restaurant activity, as Ms. Myers observed him doing on May 16, 1978, he was, in accordance with Ms. Davis' standard instructions, observing tables from a discreet distance to ascertain when and where he was needed. They also agreed that the Restaurant was not busy on May 16, 1978, when the Complainant took his informal break to read a newspaper. On the other hand, Ms. Kouklani and Ms. Myers testified that Complainant's general work performance was poor and that on May 16, 1978, when he was watching the restaurant activity and later, taking an informal break, the Restaurant was so busy that Ms. Kouklani was helping bus tables, and Complainant was shirking his duties.

Ms. Davis was in the best position to assess both Complainant's general work competence and what Complainant should have been doing at times material on May 16, 1978. Ms. Davis

was the only waiter who testified at hearing and therefore the only person presenting evidence who worked directly with Complainant. She often worked directly with him and was doing so on May 16, 1978. Because Complainant was supposed to assist her, she would have suffered had he failed to do his work. Consequently, this forum would not expect a positive appraisal of Complainant from Ms. Davis unless he had earned it. By itself, the fact that Ms. Davis' employment with Respondent was terminated after times herein material establishes no substantial bias on her part.

Ms. Myers still works for Respondent. Her hostility toward Complainant was evident at hearing. She seemed hesitant to offer any testimony which could be construed as favorable to Complainant and, in fact, seemed determined to do just the opposite. For example, she attempted to imply that Complainant was sent home for misconduct six times during his employment. Only on cross examination did she admit that employees were routinely sent home without implication of misconduct when the restaurant was not busy. She also testified both that Complainant had never talked with her about a job as a waiter, and that he had asked her about a job as a waiter and she had told him that there were no positions available. Her attempts to explain these inconsistencies were not persuasive. The Presiding Officer, who had a unique opportunity to observe Ms. Myers at hearing, commented in his Proposed Order that her demeanor at hearing left no doubt of her loyalty to Respondent. Ms. Myers substantial bias was obvious, and it impeached her testimony to a great degree.

Ms. Kouklani, as wife of the owner of the Restaurant, has a very direct and compelling interest in the outcome of this matter. In addition, she was not regularly on the Restaurant's premises during times material. Furthermore, her testimony was at times inconsistent. For example, she changed her testimony concerning the sequence of pertinent events on May 16, 1978, when it became obvious that her original testimony contradicted that of Ms. Myers. For all of these reasons, her testimony is also impeached.

The testimony of Ms. Kouklani and Ms. Myers that Complainant's work performance was poor is also impeached by the fact that there is no evidence that either one of them, or anyone else, apprised Complainant of this alleged fact before May 16, 1978. Complainant's testimony that he was criticized only once, and that was for reporting late, has not been disputed. If Complainant was such a poor employee that his alleged neglect of his work on May 16, 1978, was the last straw, as Respondent alleges, it seems most likely that Respondent would have mentioned that fact to him at some point before May 16, 1978.

Finally, this forum has ignored Mr. Kouklani's testimony that there was one male waiter employed at the Restaurant before Complainant's discharge, because it was vague, contradictory to Mr. Kouklani's earlier testimony where he stated no males had been employed as waiters, and appeared to relate to a time before Complainant's employment at the Restaurant.

4. Request to Re-Open

In its exceptions to the Proposed Order in this matter, Respondent questions the Presiding Officer's objectivity. Respondent raised no such question before the issuance of a Proposed Order which found that he had committed unlawful employment practices. Respondent asks that, if the complaint in this matter is not dismissed by this Order, the hearing be re-opened to permit Respondent to produce additional evidence on its behalf. No evidence was presented to this forum to cause it to question the Presiding Officer's objectivity or to grant Respondent's request for reopening.

5. Request for Judicial Notice

In its exceptions, Respondent asks this forum to take "judicial notice" that it is common in most restaurants in the Portland area to have sex-segregated waiter/bus person work forces. No evidence was presented to show that this assertion is accurate. Further, if it were, such information would not establish a bona fide occupational requirement based upon sex and therefore is not a valid defense in this matter.

6. Interest

Interest upon Complainant's award will be computed as follows:

a) Six per cent annually, computed and compounded on April 1, 1978, April 29, 1978, and May 16, 1978, on the accrued difference between compensation Complainant earned and the average total earnings of a lunch shift waiter at the Restaurant, according to the Amended Findings of Fact above, during the period from March 26, 1978, through May 16, 1978.

b) Six per cent annually upon the accrued compensation difference and interest computed in sub-paragraph (a) above plus the average total earnings of a lunch shift waiter at the Restaurant, according to the Amended Findings of Fact above, during the period from May 17, 1978, through May 26, 1978.

c) Six per cent annually upon the principal and interest computed in sub-paragraph (b) above, from May 27, 1978, through July 25, 1979.

d) Nine per cent annually upon the principal and interest computed in sub-paragraph (c) above, from July 26, 1979, to the date Respondent complies with paragraph number 1 of the Amended Order below.

AMENDED 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, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries, within sixty days of the execution of the Final Order in this matter, a certified check payable to the Bureau of Labor and Industries in trust for Carl S. Ross in the amount of THREE HUNDRED FORTY-THREE DOLLARS AND TWENTY-THREE CENTS ($343.23), plus nine per cent interest annually upon $343.23 from April 1, 1982, until the date Respondent complies with this paragraph. Two Hundred Fifty-Three Dollars and Thirty-Nine Cents of the $343.23 award represents damages for compensation Complainant lost because of Respondent's unlawful employment practices set out above, and $89.84 represents interest computed as described in the Amended Opinion above for the period through March 31, 1982.

2) Cease and desist from discriminating against applicants for the position of waiter on the basis of sex.

In the Matter of

INTERNATIONAL KINGS TABLE, INC., an Oregon corporation,

Respondent.

Case Number 84-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued April 26, 1982.

SYNOPSIS

Respondent selected female Complainant for termination when business necessity forced a reduction in her job category. Finding that Complainant's selection was based on her low seniority, poor work performance, and a perception that she was temporary (based on her often stated intention to leave when she found other work), the Commissioner ruled that her pregnancy did not play a key role in her selection, even though the termination occurred within five days after she announced her pregnancy. The Commissioner found that Respondent did not discriminate on the basis of sex and dismissed the Specific Charges. ORS 659.010(6); 659.030(1)(a).

The above-entitled contested case came on regularly for hearing before Dale A. Price, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on October 7, 1980, in Room 240 of the State Office Building, 700 S.E. Emigrant Street, Pendleton, Oregon. The Bureau of Labor and Industries was represented by Daryl D. Wilson, Assistant Attorney General. Respondent International King's Table, Inc., was represented by Richard A. Zalewski, its Regional Director. The Agency called Complainant Teresa Browning and Complainant's husband, Eldon Browning, as witnesses. Respondent called Robin Huber, King's Table cook; Wayne Simmons, King's Table Manager; and Cliff Lewis, King's Table Area Supervisor, as witnesses.

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

FINDINGS OF FACT -- PROCEDURAL

1) On February 28, 1980, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her employment by the Respondent because of her sex.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a corporation engaged in the restaurant business. In that business, Respondent utilized the personal service of one or more employees and reserved the right to control the means by which such service was performed.

2) Complainant is a female who was hired by Respondent as a pantry worker at Respondent's restaurant at Melaney Square in Pendleton, Oregon, in August 1979. King's Table pantry staff at that time consisted of three women: Complainant; Kathy Hasslett, hired in July 1979; and Karla Redding, hired in July 1979.

3) Complainant's work was rated as average or slightly below average by King's Table Manager Wayne Simmons, and poor by King's Table Assistant Manager Robin Huber. Simmons and Huber considered Ms. Hasslett an excellent worker, and Ms. Redding an average to good worker.

4) Robin Dougherty Huber, who, in her capacity as Assistant Manager and Relief Manager, at times supervised Complainant, spoke to Complainant on two or three occasions about deficiencies in Complainant's work. Ms. Huber did not consider these comments to be warnings precedent to a discharge for inadequate work performance.

5) During December 1979, Mr. Simmons and King's Table Area Supervisor Cliff Lewis decided that reductions in the restaurant's labor force would be required shortly, due to a declining number of customers. Respondent decreased the pantry staff to two workers at the time by promoting Karla Redding to cook on a trial basis.

6) On February 3, 1980, Complainant told Ms. Huber that she thought she was pregnant and would only be working for another month or two. On or about the same day, Ms. Huber reported Complainant's pregnancy to Mr. Simmons.

7) Ms. Huber testified, and I find, that prior to Complainant's announcement of her pregnancy, Complainant had on several occasions stated that she was looking for other employment and would only be working for Respondent for a short time. Due to Complainant's announcement of her pregnancy, and her prior statements regarding her search for another job, Mr. Simmons assumed her employment would be temporary. He had no discussion with Complainant regarding her expected time off-the-job or her plans to return to work after the birth of her child.

8) On or about February 8, 1980, Mr. Simmons telephoned Complainant at her home and informed her that her employment was terminated effective immediately because the pantry staff was being reduced from three to two. Mr. Simmons further indicated that he assumed she would be leaving because she was pregnant. Mr. Simmons also told Complainant her final check would be available at the restaurant the next day.

9) Mr. Simmons decided to return Ms. Redding, who was not able to perform the more skilled job of cook, to the pantry. By returning Ms. Redding to the position of pantry worker, Respondent was forced to terminate either Complainant or Ms. Hasslett because of the reduction-in-force begun in December 1979.

10) It is hereby officially noted that among human beings, only females become pregnant.

ULTIMATE FINDING OF FACT

Complainant was selected for discharge from Respondent's employ during a period of declining business. Although considered, Complainant's pregnancy did not play a key role in Respondent's selection of Complainant for discharge. Respondent's primary reasons in deciding to terminate Complainant were legitimate, non-discriminatory considerations, including her poor work performance, lesser seniority, and Respondent's business necessity of maintaining a smaller work force.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer as defined by ORS 659.010(6) and, therefore, is subject to the provisions of ORS 659.010 to 659.110.

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

3) The actions and motives of Mr. Simmons, Respondent's employee and agent as described herein, are properly imputed to Respondent.

4) Respondent's selection of Complainant for termination based on lesser seniority, poor work performance, and business necessity does not constitute discrimination in the terms, conditions and privileges of employment based on sex in violation of ORS 659.030(1)(a).

OPINION

The facts in this matter are not substantially in dispute. Respondent needed to reduce the labor force at its Melaney Park restaurant. In its initial reduction-in-force, Respondent promoted one of its workers, Ms. Redding, to the position of cook on a trial basis. When Ms. Redding proved to be an unsatisfactory cook, Respondent demoted her to her previous position as a pantry worker. As a pantry worker Ms. Redding's work has been rated average to good by her supervisor. Complainant's work had been rated as average to below average by Mr. Simmons and rated as poor by Ms. Huber.

Ms. Huber further testified credibly that Complainant had, on several prior occasions, announced her intentions to leave Respondent's employ as soon as she found other employment.

This latter fact, in particular, led Respondent to reasonably consider Complainant a temporary employee. When faced, then, with a decision to terminate one worker, Respondent chose to terminate the employee whose work was poor, who, by her own statements, was considered to be temporary, and who, among the three pantry workers, was the last hired.

Complainant's pregnancy, although an element which reinforced Respondent's opinion as to the temporary nature of her employment, was not the key factor in choosing which employee to terminate.

ORDER

NOW, THEREFORE, because the evidence presented at hearing is inadequate to prove the allegations contained in the Specific Charges filed in this matter, it is hereby ordered that the Specific Charges and the Complaint in this matter are dismissed.

In the Matter of

JOSEPH LAWRENCE GAUDRY

and Marc Gaudry, formerly dba The Keyhole Kitchen and The Keyhole Supper Club, Respondents.

Case Numbers 106-80 and 107-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued May 4, 1982.

SYNOPSIS

Through an agent, Respondent (who operated a restaurant and bar, a place of public accommodation) denied two black female Complainants admittance to the establishment, while allowing white patrons to enter without restriction. The Commissioner ruled that Respondent committed an unlawful practice based on race and color, in violation of ORS 659.010(14) and 30.670. Relying on a prior Final Order involving Respondent and the same establishment, the Commissioner found that emotional distress was the most usual result of discrimination in public accommodations, and that the duration of the discriminatory incident was less indicative of the severity of emotional upset than was the continuing nature of the upset. The Commissioner awarded each Complainant $2,500 in damages for public humiliation, for the disruption of that evening, and for ongoing distress manifested by continued reluctance to patronize restaurants. ORS 30.670; 30.675 659.010(2); 659.010(14); 659.060(3).

The above-entitled matter came on regularly before Andrew H. Josephson, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on February 18, 1981, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Daryl D. Wilson, Assistant Attorney General. Respondents Joseph Lawrence Gaudry and Marc Gaudry were not present at the hearing, nor was their legal representative. Complainants Victoria Henry and Remel Valentine-Moore were present and testified.

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

RULING ON MOTION

Respondent's Request for Rescheduling of Hearing

Respondent's attorney, Howard R. Hedrick, wrote a letter dated February 16, 1981, which was hand delivered to the Hearings Officer on February 18, 1981, after the hearing had commenced. The letter requested that the hearing be rescheduled due to a conflict in Mr. Hedrick's schedule. Mr. Hedrick had a Circuit Court trial scheduled for February 18, 1981.

The hearing in this matter had originally been scheduled for December 9, 1980, but was reset to February 18, 1981, because of the Department of Justice's inability to serve Respondents. On January 6, 1981, Respondent Joseph Lawrence Gaudry was personally served with the Notice of Hearing and Specific Charges. Mr. Hedrick was present when Mr. Gaudry was served, therefore, he had actual knowledge of the scheduled hearing date.

The hearing was scheduled to commence at 9:30 a.m. on February 18, 1981. The hearing was delayed for 15 minutes to allow Respondent or its representative to arrive. After waiting a reasonable time, the hearing began. The letter from Mr. Hedrick was hand delivered after testimony had begun. The letter is dated February 16, 1981, however the date stamp affixed by the Bureau of Labor and Industries is February 18, 1981.

Both Mr. Hedrick and Joseph Gaudry had knowledge since January 6, 1981, that the hearing was scheduled for February 18, 1981. Mr. Hedrick's Circuit Court trial had been prearranged and it was not an emergency situation. Complainants were present at the scheduled time, having made special arrangements to appear. Ms. Valentine-Moore testified that she had to take a day off work to be present. Ms. Henry testified that she also had to make special arrangements with her employer to be present. To reschedule the hearing would have created a hardship for Complainants.

The request for rescheduling of the hearing was untimely filed pursuant to OAR 839-04-025(1), therefore the request for rescheduling is denied.

The Specific Charges name both Joseph Lawrence Gaudry and Marc Gaudry as Respondents. Joseph Lawrence Gaudry was personally served with Specific Charges and Notice of Hearing on January 6, 1981. No such personal service or other proper notice of the pending action was made upon Marc Gaudry. I hereby rule, therefore, that Joseph Lawrence Gaudry, formerly doing business as The Keyhole Kitchen and the Keyhole Supper Club is the proper Respondent.

Because Respondent did not appear for the hearing at the scheduled time, Ms. Wilson requested leave to present a *prima facie* case and that Respondent be charged with a default judgment. Such leave was granted.

In a letter to the Hearings Officer dated February 2, 1982, Mr. Howard Hedrick, Attorney at Law, objects to several aspects of the proposed order. First, Mr. Hedrick asserts personal knowledge of the fact that the letter requesting a postponement of the hearing was delivered on February 16, 1981. As noted above, the Agency's

date stamp on that letter is February 18, 1981. Further, the taped record of the proceedings reflects the fact that the parties had waited for Respondent to appear and that after the hearing commenced it was interrupted by a messenger bearing the letter requesting postponement. Therefore, while Mr. Hedrick's records may reflect the fact that the letter was dictated on February 16, 1981, it was not received by the Agency until after the hearing commenced.

Even if Mr. Hedrick's letter had been received on February 16, 1981, his request for postponement would not have been timely. In his letter of February 2, 1982, Mr. Hedrick states that the trial which conflicted with the case at hand had been scheduled in "December, 1981 (sic)." Since Mr. Joseph Gaudry was served with the Notice of Hearing and Specific Charges on January 6, 1981, and since Mr. Hedrick's conflicting trial was already scheduled at the time of service (at which Mr. Hedrick was present), Mr. Hedrick had ample time to request a postponement and to object to the adequacy of the service upon Mr. Gaudry.

Mr. Hedrick, in his February 2, 1982, letter, states

> "unequivocally that Mr. Joseph Gaudry was not personally served with Specific Charges and Notice of Hearing on January 6, 1981, . .."

This averment is directly contradicted, at least in part, by Mr. Hedrick's admission, later in the same letter, that a copy of the notice of time and place of hearing second reschedule was served upon Joseph Lawrence Gaudry on January 6, 1981, and that Mr. Hedrick was present when service was made. It is further contradicted by the Certificate of Service of Notice of Hearing and Specific Charges.

Considering the facts as a whole, then, this forum concludes that on January 6, 1981, Joseph Lawrence Gaudry was personally served with Notice of Hearing and Specific Charges in this matter; that Mr. Hedrick was present when service was made; and that the Request for Postponement prepared by Mr. Hedrick was received by the Agency on February 18, 1981, and as such was not timely filed.

FINDINGS OF FACT – PROCEDURAL

1) On December 21, 1979, Remel Valentine-Moore and Victoria Henry filed verified complaints with the Civil Rights Division of the Bureau of Labor and Industries alleging that they had been discriminated against by The Keyhole Supper Club, a place of public accommodation, because of their race and color.

2) Following the filing of the aforementioned verified complaints, the Civil Rights Division investigated the allegations in the complaints and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaints through conferences, conciliation and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent engaged in the business of serving food and drink to the public. Respondent engaged the personal

service of more than one employee and reserved the right to control the means by which such service was performed.

2) The Complainants are black females.

3) At approximately 9:00 p.m. on December 4, 1977, Ms. Henry, Ms. Valentine-Moore and two other black women arrived at the Keyhole Supper Club. Ms. Henry parked the car while the other three women stood in line waiting to enter the Keyhole Supper Club.

4) A security guard was standing at the front of the line and was allowing patrons to enter the Keyhole Supper Club as room for them became available. Ms. Valentine-Moore and her two companions were the only black women standing in line who were unescorted by a male.

5) While waiting in line, Ms. Valentine-Moore testified that she observed other people entered the Keyhole Supper Club without voluntarily showing or being requested to show the guard any identification. Ms. Henry testified that when looking into the club she observed that the patrons she could see were white and all younger than she.

6) When Ms. Valentine-Moore and the two women arrived at the front of the line the security guard requested that each of them produce some identification. Ms. Valentine-Moore showed the security guard her Portland State Faculty card and a number of credit cards. The other two women each showed the security guard their driver's licenses. The security guard stated that the identification presented by each woman was unsatisfactory. They would each need to produce three pieces of identification before he would allow them into the Keyhole Supper Club.

7) Ms. Valentine-Moore and the two other women returned to the parked car in order to obtain more identification. Upon returning to the car, they informed Ms. Henry of the security guard's request. At this time, Ms. Valentine-Moore was 28 years old. After finding additional identification, Ms. Henry, who was then 55 years old, felt that the women now had sufficient identification to enter the Keyhole Supper Club.

8) The group of four women then approached the security guard with additional forms of identification and requested admittance. The security guard refused to look at the additional identification even though one individual attempted to present an Oregon Liquor Control Commission card. Other patrons standing in line and within the club observed the security guard's behavior. Two white women, having observed this interaction, left the club and asked Complainants why Complainants were having problems gaining entrance.

9) Ms. Valentine-Moore and Ms. Henry requested that they have an opportunity to speak with the manager. This request was ignored and the security guard again denied their admittance.

10) Both Complainants were dressed appropriately for the Keyhole Supper Club. Ms. Valentine-Moore was wearing a dress and Ms. Henry was wearing a matching dress and coat.

11) Ms. Valentine-Moore, Ms. Henry, and the two other women had planned to spend the rest of the evening together. They each went home after being denied entrance to the Keyhole Supper Club. The Complainants suffered humiliation and anguish as a result of the way they were treated by the Respondent's security guard. Subjected to obvious discrimination that was observed by the others, Complainants felt humiliated, embarrassed, and experienced real and tangible frustration and depression. While the security guard was denying Complainants admittance to the Keyhole Supper Club with identification, he was allowing white persons to enter without identification.

12) The effects of Respondent's discriminatory behavior toward Complainants were more than temporary, transitory consequences. For an extended time after these events, Complainants were reluctant to go to restaurants or other public places in the evening because of the public humiliation and anguish that they had suffered at the Keyhole Supper Club.

13) On February 7, 1980, the Commissioner of the Bureau of Labor and Industries of the State of Oregon issued a Final Order entitled *In the Matter of Joseph Gaudry,* 1 BOLI 235 (1980). In that case, the Commissioner found that Respondent had discriminated against Ms. Vanessa Duncan, a white woman, because of the race of her companion, a black male. The Oregon Court of Appeals, in *Gaudry v. Bureau of Labor and Industries,* 48 Or App 589, 617 P2d 668 (1980) upheld the Commissioner's award of damages for Ms. Duncan's mental suffering due to Respondent's unlawful acts.

14) On January 12, 1981, a judgment was entered against Respondent Joseph L. Gaudry and Marc Gaudry in the case of *McCuller v. Larry Gaudry and Marc Gaudry, dba The Great Gatsby's,* No. A7905-02323L [Multnomah County Circuit Court]. The jury found for plaintiff, a black man, in the amount of $35,000.00 on his causes of action for discrimination in public accommodations, assault and battery.

ULTIMATE FINDINGS OF FACT

1) Complainants are black persons.

2) Complainants received different treatment by the Respondent because of their race.

3) Complainants, as a result of the treatment by Respondent described above, suffered serious and continuing mental anguish.

CONCLUSIONS OF LAW

1) At all times material herein, Joseph Lawrence Gaudry operated a place of public accommodation as defined by ORS 30.675(1).

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

3) The actions and motivations of Respondent's agents as described herein are properly imputed to Respondent.

4) Respondent committed an unlawful practice, as defined in ORS 659.010(14) and contrary to the provisions of ORS 30.670, in that he did engage in practices designed and intended to, and which did, harass, discourage, and deny to Complainants the full and equal enjoyment of accommodations, advantages and facilities of the premises in question by imposing, because of the race and color of Remel Valentine-Moore and Victoria Henry, restrictions and distinctions as conditions for admission to the premises.

5) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainants herein under the facts and circumstances of this record and the sum of money awarded as damages in this Order is an appropriate award.

OPINION

The evidence amply supports the finding that Complainants were not allowed admission into the Keyhole Supper Club due to their race. Complainants observed that white females similarly situated were allowed admission without displaying identification. Complainants were not allowed admission even after they attempted to display identification.

The award of damages is commensurate with those awarded in *In the Matter of Joseph Gaudry,* 1 BOLI 235 (1980). The monetary award in that case as stated in Finding of Fact 13, was upheld by the Oregon Court of Appeals. Monetary awards are limited to that which compensates Complainants for damages they suffered because of a Respondent's discriminatory acts. The following three points are focal to the discussion of such award:

a) The battle against discrimination in public accommodations.

b) The brief duration and discreet nature of the contact between Complainants and Respondent in most public accommodation cases indicate that the suffering resulting therefrom is usually mental rather than financial or physical. The very nature of most public accommodation discrimination necessitates that, in order to follow the laws mandate to "eliminate the effects" of discrimination in places of public accommodation, award may be based solely in terms of Complainants' mental suffering.

c) The actual act of discrimination in public accommodations can be devastating yet fleeting in duration, it is the degree and duration of the effects of discrimination which damage awards are meant to compensate.

The above three points are distillations of language found in *Gaudry, supra.* The exact language bears repeating in relevant part.

"a) The battle against race discrimination in places of public accomodation (sic) has been the front line of the Civil Rights movement in the United States. Matters involving discrimination on buses and in soda fountains were among the first litigated under the Civil Rights Act of 1964. This makes sense, because public accomodation (sic) discrimination law strikes at the very heart of discrimination: an effort to impair a person's basic right to move about freely in society and to be recognized thereby

as a part of his or her community. Denial or abridgment of that right conveys in a particularly persuasive way the fragility of the victim's position as a functioning member of society. Although no setting for race discrimination is anything less that egregious, discrimination in public accomodations (sic) can be particularly insidious and devastating.

"b) . . . The law forbidding discrimination in places of public accomodation (sic) was enacted to prevent the infliction of such suffering and, when it does occur, to compensate the victim therefor. That this suffering is usually entirely mental rather than physical or financial makes it less easily described (much less measured in pecuniary terms), but no less palpable or destructive. . ..

"c) Because discrimination in public accomodations (sic) can be particularly devastating, yet fleeting in duration, it is important to emphasize that the duration of the discrimination itself does not determine either the degree or the duration of the effects of discrimination, and it is these effects which damages awarded are meant to compensate.

". . . In addition to the degree and extent of suffering of which there is persuasive proof, I may infer from the fact of the discrimination itself mental suffering of which there may be little or no specific proof, especially if the discrimination has taken the form of racial harassment. Oregon courts have acknowledged that mental anguish is one of the effects of race discrimination: '. . . Indignity must be the natural, proximate, reasonable, and foreseeable result of race discrimination . . .;' indignity visited from the inference in such discrimination that black people are inferior. *Gray v. Semuro Builders, Inc.*, 110 NJ Super 297, 265 A2d 904 (1970), *cited with approval in Williams v. Joyce*, 4 Or App 482, 497, 479 P2d 513, 40 ALR 3rd 1972, *rev den* (1971); *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

"It is in recognition of the particularly insidious and pervasive offensiveness of discrimination in places of public accomodation (sic) and the inference of mental suffering which can be made from the occurrence of this type of discrimination, as well as the evidence adduced concerning complainant's mental suffering, that I make this award of mental suffering damages." (*Gaudry*, at 11-14)

The events subjected Complainants to public humiliation since there were many other individuals standing in line observing the events which occurred. The duration and severity of the effects of discrimination lasted longer than the few moments of the actual events. Complainants' evening was ruined; each went home seriously disturbed and distressed by the events which had occurred. The seriousness of the distress continued since Complainants did not feel comfortable going out to restaurants in the evenings after the discriminatory actions. While testifying, Complainants were visibly distressed when recalling events which had occurred over three years before.

In light of this analysis the awards figure of $2,500.00 to each Complainant is an appropriate measure of damages.

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 and to protect the rights of others similarly situated, Respondent is ordered to:

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries, a certified cheek payable to the Bureau of Labor and Industries in trust for Victoria Henry, in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00), in order to compensate Victoria Henry for the damages suffered by her as a result of Respondent's unlawful practices.

2) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, a certified check payable to the Bureau of Labor and Industries in trust for Remel Valentine-Moore, in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00), in order to compensate Remel Valentine-Moore for the damages suffered by her as a result of Respondent's unlawful practices.

In the Matter of

HORST MAGER SPECIALTY RESTAURANTS, INC., Respondent.

Case Number 55-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued May 6, 1982.

SYNOPSIS

Race was not a consideration when Respondent employer discharged black Complainant waiter as a disciplinary measure for cursing in front of customers, but did not discipline a white waiter for other unacceptable conduct. Finding that Complainant was uncooperative with fellow employees, while the white comparator was a superior worker, and that Complainant's attempts to establish a racial motive were severely weakened by his hostility and inconsistent testimony, which resulted in questionable credibility, the Commissioner found that Complainant's discharge was based on legitimate non-discriminatory reasons and dismissed the complaint and Specific Charges. ORS 659.010(6); 659.030(1)(a); 659.060(3).

The above entitled matter came on regularly for hearing before Michael J. O'Brien, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries. The hearing was held on July 15, 1980, in Room 641 of the State Office Building, 1400 S.W. 5th Avenue, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Douglas

R. Andres, Assistant Attorney General. Respondent Horst Mager Specialty Restaurants, Inc., was represented by Ronald L. Wade, Attorney at Law.

The Agency called Complainant Robert L. Mickles and Larry Becker, formerly a waiter at the Couch Street Fish House, as witnesses. Respondent called Lynda Mason, formerly a waitress with Respondent; Seppo Antellainen, former manager with Respondent; and Roger Stowers, head waiter with Respondent, as witnesses.

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

FINDINGS OF FACT – PROCEDURAL

1) At all times material herein, Horst Mager Specialty Restaurants, Inc., was an employer within the State of Oregon and as such was subject to the provisions of ORS 659.010 through 659.110.

2) On March 1, 1977, Robert L. Mickles filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been discriminated against in connection with his employment on the basis of race.

3) Following the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) Complainant is a black male.

2) At all times material herein, Respondent was a duly organized corporation authorized to conduct business in the State of Oregon and utilized the services of more than one employee, reserving the right to control the means by which such service was performed.

3) At all times material herein, Respondent owned and operated the Couch Street Fish House, a restaurant located in Portland, Oregon.

4) On October 15, 1976, Complainant was employed by Respondent as a waiter at the Couch Street Fish House.

5) As a waiter, Complainant's remuneration included an hourly wage and tips. Complainant testified that he reported only 10 percent of his tips to the Internal Revenue Service as taxable income. Documentary evidence supplied by Complainant shows that he consistently declared less than 10 percent of tips received.

6) On or about September 1974, Larry Becker, a white male, was hired by Respondent as a waiter at L'Omlette. On or about October 15, 1976, Mr. Becker transferred within Respondent's organization to the Couch Street Fish House. Mr. Becker was a highly respected employee and, prior to the time of his transfer until December 31, 1976, was being considered for a management position with Respondent.

7) On or about December 31, 1976, Mr. Becker testified that he served dinner to a party of two. As these diners were leaving, Mr. Becker

approached one of the diners and asked if the service had been adequate. When the diner asked why Mr. Becker was asking, Mr. Becker stated that he believed that the amount of a tip was indicative of the service and since there had been little or no tip, Mr. Becker wanted to know what he needed to do to improve his service.

The customer left the Restaurant but later returned and lodged a complaint with the maitre d'. The customer was a local radio announcer. Reports of the incident were heard on the radio the following day. A third version of the incident was included in a column in The Oregon Journal, a newspaper of general circulation. At the time of the incident, Mr. Ben Espana was maitre d' hotel of the restaurant.

8) After the incident, Mr. Becker was immediately reprimanded by the maitre d'. After the incident was reported on the radio, Mr. Becker was reprimanded by Chef Bob Williamson, Respondent's food and beverage manager, and told to apologize formally to both the customer and to the restaurant. Although Mr. Stowers testified that he had heard Respondent's president, Horst Mager, direct Mr. Ben Espana, then manager of the restaurant, to fire Mr. Becker, Mr. Becker remained in Respondent's employ until June or July of 1977.

9) The incident of December 31, 1976, caused the negotiations for Mr. Becker's promotion to cease.

10) The incident involving Mr. Becker caused Respondent to reevaluate its disciplinary policies.

11) Due to the organization of the Couch Street Fish House, waiters are required to cooperate frequently in completing "side work" and sharing the few available serving tables (or "garidons"). "Side work" consists of necessary ancillary duties for which waiters are not compensated by gratuities. Additionally, waiters assist other waiters in serving patrons without being asked.

12) On or about February 16, 1977, Complainant was preparing to serve dinners to several patrons in his assigned area of the restaurant. As he left the kitchen with his serving tray, he was unable to locate a free serving table on which to complete his preparations. He removed a tray from one of two serving tables then being used by two other waiters, Lynda Mason and Roger Stowers, who were working at an adjacent table. Both Mason and Stowers testified, and I find, that as Complainant appropriated the table he told Mason that she was "not the only fucking waiter" in the restaurant.

Several customers seated nearby were aware of the altercation which occurred between Complainant and the other two waiters; both of whom are white. None of the customers complained to the management, however one customer asked Mr. Stowers if "that waiter" (Complainant) was going to be around much longer.

13) Immediately following the incident of February 16, Mr. Antellainen, was advised that an altercation had occurred by the two waiters involved. Complainant was allowed to complete his shift without interruption. Mr. Antellainen spoke with Complainant following the incident.

14) Following the incident of February 16th, Mr. Antellainen contacted

Robert Williamson, his immediate supervisor. After some discussion, Mr. Antellainen made the decision to terminate Complainant's employment with Respondent.

15) Upon reporting to work on February 19, 1977, Complainant was informed by Mr. Antellainen that he was suspended from employment for a period of two weeks for the stated reason that he had used profanity in the presence of customers.

16) During the period of his suspension, February 19 to March 4, 1977, Complainant made several covert attempts to determine his employment status. Complainant, on direct examination, described these attempts by saying that he had one friend call to make reservations for 7 people knowing that reservations for large parties would be handled by the manager. This testimony was consistent with the summary of an interview with Complainant conducted by the Bureau of Labor and Industries on October 24, 1977. On cross-examination, however, he stated that he did not ask these friends to make the calls, rather they made the calls on their own initiative.

17) On or about March 4, 1977, Complainant returned to the Couch Street Fish House to speak with Mr. Antellainen. At hearing Complainant testified that he was accompanied by a woman, who he introduced as a friend. Complainant stated he wanted a witness with him. The summary of an interview with Complainant conducted by a Civil Rights investigator, states, "When he went to see Zeppel (sic), he took Ms. Morgan with him, and introduced her as his attorney." At hearing, Complainant denied introducing the woman as such.

18) On or about March 4, 1977, Complainant was advised by Mr. Antellainen that his employment with Respondent was terminated effective immediately, for the stated reason that he was not a "team worker."

19) The two other waiters involved in the incident of February 16, 1977, were not suspended, discharged or otherwise disciplined by Respondent. I find that adverse action was not warranted in each case because the incident was provoked by Complainant.

20) Prior to the incident of February 16, 1977, Respondent received no complaints concerning Complainant's job performance from customers. Mason, Stowers, and Becker testified, and I find, that Complainant was uncooperative, aloof and was not a team worker. At hearing, Complainant was brusque, hostile and at one point described his work station in the Restaurant by using profanity.

21) Prior to Complainant's discharge, Mr. Espana was discharged for using Spanish profanities and abusing employees in the presence of customers. Mr. Espana, a Spaniard, was described as a white male.

22) Respondent did not provide written warnings regarding unacceptable conduct by employees.

23) Following his discharge, Complainant began working at The Hickory Stick on or about August 15, 1977. In November or December of 1977 Complainant took a second job at The Royal Exchange, a restaurant. On or about January 17, 1978, Complainant sustained a compensable on-the-job injury. The Determination Order from the Workers' Compensation Department ordered compensation for a temporary total disability as a result of this injury. Although Complainant quit his job at the The Royal Exchange because of this injury, he continued to work at The Hickory Stick for what Complainant described as a short period of time.

24) Complainant cannot be considered a credible witness because of the significant inconsistencies in his testimony and other patterns of behavior which raise questions as to his veracity.

ULTIMATE FINDINGS OF FACT

1) Complainant, a black male, was suspended from employment and ultimately discharged by Respondent because on February 16, 1977, he caused an incident which created an adverse impression among customers and generated hostility from two of his co-workers.

2) An earlier incident, involving a customer and Mr. Becker, precipitated substantial adverse publicity for Respondent's restaurant. The waiter, a white male, was neither suspended nor discharged from employment. He was ordered to tender written and oral apologies to all concerned.

3) The two white waiters who were present at the February 16, 1977, incident were not suspended, discharged or otherwise disciplined by Respondent. Such adverse action would not have been warranted in view of the fact that the incident was provoked by Complainant.

4) After the incident involving Mr. Becker but before the incident involving Complainant, Mr. Espana, a white male, was discharged for swearing at the staff in Spanish and for abusing the staff in the presence of customers.

5) Mr. Becker is not a valid comparitor against whose behavior Complainant should be judged. Mr. Becker had been employed by Respondent for over two years when the incident involving him occurred. The incident involving Mr. Becker caused Respondent to reevaluate its disciplinary policies. The results of such reevaluation can be seen in the discharge of Mr. Espana.

6) The Agency has failed to prove, by a preponderance of the evidence, that Complainant was discharged by Respondent because of his race.

CONCLUSIONS OF LAW

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

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

3) The actions of Respondent's agents and employees described herein are properly imputed to Respondent.

4) Upon a *prima facie* showing of unlawful discrimination, the burden of production shifts to Respondent to articulate a substantial and legitimate nondiscriminatory basis for its adverse employment decision. In the absence of a showing that such nondiscriminatory basis is pretextual, Respondent must prevail.

5) Where the Agency cannot prove a causal connection between

Complainant's race and an adverse employment decision, a credible showing of alternative explanations for Respondent's conduct must result in dismissal of the Specific Charges under the provisions of ORS 659.060(3).

OPINION

The Bureau has failed to prove that Complainant's race was a factor in Respondent's decision to suspend and terminate his employment following an altercation which occurred on February 16, 1977. Although Respondent's handling of the matter is questionable in certain respects, a decision for the Bureau could only be based on speculation in the absence of any factual basis for a finding of unlawful discrimination.

The Bureau's case is based on a comparison between the incident involving Complainant and an earlier incident in which a white waiter, Larry Becker, challenged the adequacy of a gratuity which had been left by a customer. Although the latter incident generated considerable adverse publicity for Respondent, Mr. Becker was neither suspended nor discharged despite his admittedly "improper" conduct. Prior to the incident, Mr. Becker had been considered for a management position. All negotiations for his promotion ceased after the incident.

Based on the incident involving Mr. Becker, the Bureau alleges that "(w)hite persons employed by Respondent to wait on tables, whose on-the-job conduct constituted a substantially equivalent detriment to Respondent, were not similarly disciplined or discharged." In fact, the Bureau argues that the publicity surrounding the Becker incident caused far greater detriment to Respondent than the Complainant's incident, which raises the inference that race is the decisive factor which distinguishes Respondent's markedly different responses. However, Respondent has successfully rebutted any such inference with a convincing demonstration that Mr. Becker and Complainant were not, in fact, similarly situated. First, it is uncontradicted that Mr. Becker was an excellent and respected waiter who worked harmoniously with other employees. The incident in which he was involved appears to be an aberration, however serious, in an otherwise accomplished career as a waiter. Secondly, he immediately admitted his error in arguing with a customer and formally apologized to all concerned. Finally, although his employment with Respondent was not interrupted, the evidence suggests that Mr. Becker was no longer considered for a management position following this incident.

Complainant, by contrast, was repeatedly described as "uncooperative" in a workplace where waiters were required to share equipment and miscellaneous "side work" for which they were not compensated by gratuities. Although his job performance was adequate in most respects, Complainant was clearly not an asset to Respondent's business to the same degree that Mr. Becker was.

The manner of Complainant's suspension and discharge raises questions which merit consideration. His discharge was poorly planned and executed. Complainant was told that he would be suspended at a time when the decision to discharge him had apparently been made already.

He was not asked to submit apologies, nor did he do so on his own initiative. In contrast with Mr. Becker's contrite attitude, Complainant became hostile towards management and his co-workers following the incident. This hostility may explain why Respondent was indecisive in its handling of Complainant's suspension and discharge.

It is not unlawful, however, for an employer to summarily discharge an employee for conduct which was tolerated in another employee who is viewed as more of an asset to the employer. Such conduct is unlawful only when it is tainted by some impermissible consideration such as race. In this instance, the Bureau has failed to demonstrate the necessary causal relationship between Complainant's race and Respondent's adverse employment decisions.

In determining whether an action is impermissibly tainted by factors such as race, aspects such as witness credibility must be considered.

After reviewing the testimony and documentary evidence it is clear that Complainant is not a credible witness and therefore, the weight given to his testimony has been lessened. Complainant's testimony was contradictory regarding whether he asked friends to call the Restaurant to determine his employment status or whether these friends called independently and then later reported the calls to Complainant. A third version of this incident is to be found in notes of an investigative interview with Complainant.

It is true that one other witness' testimony (Mr. Antellainen's) differed from the interview summary submitted in evidence. However, the conflict was not as significant as were Complainant's. Further, the bulk of Mr. Antellainen's testimony was supported by testimony from other witnesses.

Complainant's credibility was further damaged by his admission that he had not reported his tips to the Internal Revenue Service; by the contradiction between his testimony that he reported 10 percent of his tips to the I.R.S. and the documentary evidence which shows that he consistently reported less than 10 percent; and, by the fact that after having received a temporary total disability determination from Workers Compensation, Complainant continued to work at least for a short time.

In the absence of evidence of specific intent to discriminate on the basis of race, the Bureau attempts to raise the inference that Complainant's race is the only plausible factor which distinguishes Respondent's treatment of Complainant and Mr. Becker. In support of this contention, it offers as authority the following statement from a 1978 decision of the United States Supreme Court:

> "A prima facie case (citation omitted) raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . and we are willing to presume this largely because we know from our experience that people do not act in a totally arbitrary manner, without underlying reasons, especially in a business setting. Thus, when all legitimate reasons (for an adverse employment decision) have been

eliminated as possible reasons for the employer's actions, it is more likely than not that the employer, whom we generally assume acts only with some reason, bases his decision on an impermissible consideration such as race." *Furnco Construction Corp. v. Waters,* 438 US 567, 98 SCt 2943, 2949-50, 57 LEd 2d 957, 17 FEP 1062 (1978).

In its case-in-chief, the Bureau successfully raises the "inference of discrimination" articulated in *Furnco.* However, Respondent's actions in suspending and dismissing Complainant are not, viewing the record as a whole, "otherwise unexplained." Respondent has presented credible, corroborated evidence to show that its discharge of Complainant was based upon legitimate nondiscriminatory reasons. Any conclusion that Complainant's race may have been an additional factor would only be based on speculation, which is unsupported by the record. Accordingly, the Specific Charges and the Complaint in this matter must be dismissed.

ORDER

NOW, THEREFORE, the Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and the Complaint filed against Respondent are hereby dismissed according to the provisions of ORS 659.030(3).

In the Matter of

STATE OF OREGON, DEPARTMENT OF GENERAL SERVICES,

Respondent.

Case Number No. 105-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued May 24, 1982.

SYNOPSIS

Although the Agency presented a prima facie case of age discrimination by establishing that the qualified Complainant, age 61, was rejected for hire as a driver and contact person for Respondent's Federal Surplus Property Program in favor of a younger applicant, the Respondent demonstrated legitimate reasons for its hiring decision by showing that the successful candidate had public relations and sales ability, as well as creativity and a high level of interest in surplus property. The Commissioner held that Respondent had not committed an unlawful employment practice, and dismissed the Specific Charges. ORS 659.030(1)(a); 659.060(3).

The above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries. The hearing was held on June 15, 1981, in Conference Room B of the Executive Department Building, 155 Cottage Street, Salem, Oregon. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Attorney at Law. Respondent State of Oregon

Department of General Services was represented by Josephine Hawthorne, Assistant Attorney General.

The Agency called as witnesses Complainant Ivan Burbank; Jim Turner, Equipment Operator II; and Roger LaBar, truck driver with the Printing Division. Respondent called as witnesses John Peterson, Coordinator, Federal Surplus Property Program; Floyd Roe, warehouse floor manager; Robert Gray, former Equipment Operator II; Carrie Lee Rytel, formerly a clerk with Respondent; Jim Turner; and George Ascherl, Assistant Administrator, Purchasing Division.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about December 28, 1977, Ivan Burbank filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by the Respondent because of his age.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation and persuasion, but was unsuccessful in these efforts.

4) By mutual oral stipulation at hearing the Specific Charges were amended to delete the prayer for general damages.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon state agency engaged in the business of providing goods and services to other state agencies and other governmental entities within the State of Oregon.

2) Complainant was born on January 2, 1920.

3) Complainant was first employed by Respondent in 1975. Since that time he has worked continuously in the Printing Division as an Equipment Operator II, assigned to shipping functions and as backup driver on a delivery truck.

4) In November 1977, Respondent announced an opening for the position of Equipment Operator II in the Federal Surplus Property Program in the warehouse of the Purchasing Division. The opening was first announced to Respondent's then current employees. Three of Respondent's employees applied for the position. These employees were Jim Turner, Kenneth Calkin, and Complainant.

4) Each of the three applicants were evaluated based upon the following criteria:

a. Knowledge of state highway laws.

b. Good physical condition.

c. Skill in operation of motor vehicles.

d. Ability to make ordinary emergency repairs and assist in general to large or small vehicles.

e. Ability to operate a large truck skillfully on mountain roads.

f. Reading and writing ability to perform in and out of warehouse tasks.

g. Necessary judgment, reliability, and responsibility to be assigned a state vehicle (approximate value $42,000) on frequent out-of-state trips.

5) The applicants' skill in operating motor vehicles was tested by Floyd Roe and by Robert Gray, the retiring equipment operator whose position was being filled. Both examiners rated Kenneth Calkin as a marginal driver. Both examiners rated both Jim Turner and Complainant in the "exceeds requirements" category of driving skill. Robert Gray testified that he believed Jim Turner to be a more skilled truck driver than Complainant.

6) In all non-driving categories, the applicants were evaluated by Mr. Roe and by John Peterson, Coordinator of the Federal Surplus Property Program and Manager of warehouse operations. The applicants were rated as follows:

A. Knowledge of state highway laws.

1) Complainant's scores.

a. Floyd Roe rated him at 95.

b. John Peterson rated him at 85.

2) Jim Turner's scores.

a. Floyd Roe rated him at 85.

b. John Peterson rated him at 85.

B. Good physical condition.

1) Complainant's scores.

a. Floyd Roe rated him at 85.

b. John Peterson rated him at 85.

2) Jim Turner's scores.

a. Floyd Roe rated him at 95.

b. John Peterson rated him at 95.

C. Skill in operation of motor vehicles.

1) Complainant's scores.

a. Floyd Roe rated him at 95.

b. John Peterson rated him at 95.

2) Jim Turner's scores.

a. Floyd Roe rated him at 95.

b. John Peterson rated him at 95.

D. Ability to make ordinary emergency repairs and assist in general repairs to large or small vehicles.

1) Complainant's scores.

a. Floyd Roe rated him at 85.

b. John Peterson rated him at 85.

2) Jim Turner's scores.

a. Floyd Roe rated him at 95.

b. John Peterson rated him at 95.

E. Ability to operate truck skillfully on mountain roads.

1) Complainant's scores.

a. Floyd Roe rated him at 95.

b. John Peterson rated him at 95.

2) Jim Turner's scores.

a. Floyd Roe rated him at 85.

b. John Peterson rated him at 85.

F. Reading and writing ability to perform in and out of warehouse tasks.

1) Complainant's scores.

a. Floyd Roe rated him at 85.

b. John Peterson rated him at 85.

2) Jim Turner's scores.

a. Floyd Roe rated him at 85.

b. John Peterson rated him at 95.

G. Necessary judgment, reliability and responsibility to be assigned state vehicle (approximate value $42,000).

1) Complainant's scores.

a. Floyd Roe rated him at 95.

b. John Peterson rated him at 85.

2) Jim Turner's scores.

a. Floyd Roe rated him at 95.

b. John Peterson rated him at 85.

Total scores were very close with Mr. Roe scoring both Mr. Turner and Complainant at 635 and Mr. Peterson scoring Turner at 635 and Complainant at 615. (Mr. Roe's scores were incorrectly added in giving Complainant and Turner scores of 655. The correct score is 635 as stated above.)

7) The job description for the position here at issue listed work to be performed as including "assists in warehouse as directed." The position description also requires "Extensive contact with public, state and federal personnel." The Federal Surplus Property Program was undergoing a major expansion in late 1977. With this expansion, the duties of the person hired would include more assessment of the condition and value of federal property at the federal locations and reconditioning and repair of equipment for sale to authorized recipients. The position required successful interaction with Federal Area Disposal Officers whose discretion would determine which state received prized surplus items and which trucks were loaded most promptly.

8) Because of the necessity to conduct delicate negotiations with Federal Area Disposal Officers and with eventual recipients of surplus property, the person hired for the position in question needed to possess a gregarious personality and be adept at public relations. Prior to Complainant's application for the position in question, Mr. Peterson had met him in Respondent's print shop and had been negatively impressed with Complainant's spirit of cooperation. Mr. Peterson also overheard a comment from a fellow worker that Complainant was "grumpy" and that Respondent would be unhappy if they hired him. Carrie Lee Shelton Rytel was a clerical specialist where Complainant worked at the time of his application. Ms. Rytel testified, and this forum finds, that Complainant did not seem aggressive or interested in his job, that he spent a lot of time away from his job duties and instead spent time talking to his wife, who worked with Ms. Rytel. Mr. Roe and Mr. Peterson agreed that Complainant lacked the gregarious personality which was essential to the job at issue. Both agreed that Mr. Turner's sales experience and out-going personality were more appropriate for the job at issue than was the more reserved demeanor of Complainant.

9) The job of Equipment Operator II, for which Complainant and Jim Turner competed in November of 1977, demanded an aptitude for mechanical repairs to the truck and to the equipment obtained through the

Federal Surplus Property Program. The job included examination of equipment at the Federal Disposal Site to determine whether goods could be repaired for resale to donees. Complainant had considerable experience in on-the-road repairs to large trucks. He was raised on a farm and had owned his own farm and gas station. He was accustomed to repairing equipment himself. Jim Turner was raised on a farm where he developed the ability to repair vehicles and other equipment at an early age.

10) Complainant testified that the position was explained to him as including driving, loading and unloading the truck, getting along with people and working "on the floor" at times. Turner testified that he was told the job involved operating a 40 foot semi over the road, picking up Federal property from California and Washington, working around the warehouse, on the sales floor, doing a little repair work and presenting property attractively to sell it to donees. This forum finds that, while the percentages of time spent in any one activity may have fluctuated, both Complainant and Turner were informed that the job was not simply truck driving.

11) The final decision to hire Jim Turner for the position of Equipment Operator II was made by John Peterson. Mr. Peterson testified, and this forum finds, that the reasons Mr. Turner was hired included his fascination with "junk," his creativity in anticipating alternative uses for equipment, his apparently greater interest in the surplus property program, and his public relations/sales ability.

12) Roger LaBar was employed as an Equipment Operator II in Respondent's print shop in November 1977. Complainant was Mr. LaBar's back up driver at the time he applied for the job here at issue. On May 18, 1978, Mr. LaBar was interviewed by an investigator from the Civil Rights Division of the Bureau of Labor and Industries. In this interview Mr. LaBar stated that he had overheard a remark made by someone in Respondent's Central Stores area that they didn't want someone for the position in question who would be there for only a couple of years. In that interview, Mr. LaBar stated that he could not remember who made the remark. At hearing Mr. LaBar testified that Floyd Roe had made the remark and that he (Mr. LaBar) had not been exactly truthful in his statement at the 1978 interview that he could not remember who had made the remark. Mr. LaBar's testimony is deemed to be unreliable for reasons explained further in the Opinion below.

ULTIMATE FINDINGS OF FACT

Respondent's Equipment Operator II position, which was vacant in November of 1977, was primarily a truck driving job. A significant minority of the driver's time was to be spent in public relations and equipment repair activities. Mr. Turner and Complainant were rated very similarly in all areas of evaluation. Mr. Turner was selected for the position on the basis of his apparently greater enthusiasm for the surplus program, his gregarious personality and his broad range of experience in small equipment repair.

CONCLUSIONS OF LAW

1) At times material herein, the Respondent was a state agency

employing several individuals in a variety of positions within the State of Oregon, and as such is subject to the proscriptions contained in ORS 659.010 through 659.110.

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

3) The actions and motivations for those actions of Respondent's agents, John Peterson, Floyd Roe, and Robert Gray, as described herein, are properly imputed to Respondent.

OPINION

The position description for the job here at issue does not specifically include small equipment repair and public relations work. It does include the general statement "assists in warehouse as directed." The Federal Surplus Property Program was expanding in late 1977. With this expansion came a shifting of the duties of Equipment Operator II to include less driving and more appraisal and repair of equipment and more public relations with Federal Disposal officers and program donees. The fact that these functions were not specifically delineated in the position description does not suggest that they constitute a pretext for selection of a younger man.

The position description for the job here at issue would probably lead any applicant to believe that he was applying for a job which was primarily a truck driving job. This does not preclude a hiring decision based upon perceived proficiency in non-driving areas in a case where driving skills of two applicants were rated evenly. It should be noted that both Complainant and Turner were told that the job would involve some sales work, which, supports Respondent's consideration of qualities other than driving ability.

The issue of longevity of truck driving experience was broached by the Bureau. The implication was drawn that the quality of Complainant's driving must be superior to that of Mr. Turner because of Complainant's greater number of years of driving experience. Analysis of driving skill was accomplished in road tests. Complainant's and Mr. Turner's ratings were equal on the road tests. *See* Finding of Fact 5.

Consideration of personalities of the applicants was reasonable in view of the expanding public relations functions of the position in question. Mr. Peterson considered his personal impression of Complainant formed in one brief encounter in the print shop and also noted negative impressions made by Complainant upon the clerical staff of the print shop. Although his personal interaction with Complainant was brief and the clerical staff offered only personal, non-professional criticism, the impact of Complainant upon others in brief encounters was precisely what Mr. Peterson was attempting to measure. Respondent convincingly showed its need for an employee who was more gregarious than Complainant.

The Bureau suggests that comparative analysis of the physical condition of applicants by simple observation of their movements was ridiculous. Complainant and Mr. Turner were rated within ten points of each other in this category. The minor disparity in their scores had no measurable impact upon which candidate was selected.

The Bureau did establish a prima facie case by showing that Complainant qualified for the job for which he applied; that he applied and was rejected in favor of a younger man. The burden of production next shifted to Respondent to establish valid non-pretextual reasons for hiring the younger comparator. Respondent's reasons have been explored earlier in this document. The Bureau attempts to establish, by a preponderance of the evidence, that the Respondent's reasons were pretextual. The Bureau's case relies heavily upon the testimony of Roger LaBar, who works closely with Complainant. In a 1968 interview, Mr. LaBar quoted someone in Central Stores asking if Complainant was a "goof off." At hearing he could not remember having heard such a remark. In the interview Mr. LaBar stated that he believed Floyd Roe was the person who asked about Complainant, yet Mr. Roe did not work in Central Stores and vehemently denies any conversation with Mr. LaBar or anyone else regarding the hiring here at issue. In the interview Mr. LaBar stated that he overheard someone in Central Stores say that they wanted to hire someone who would be there more than a couple of years and that he could not remember who made the remark. At hearing Mr. LaBar stated that he had not been exactly truthful during his previous interview when he said he could not remember who made the alleged ageist remark. In light of the inconsistencies identified, findings of fact cannot be based solely upon the testimony of Mr. LaBar.

The Bureau has failed to establish that Respondent's reasons were pretextual. Respondent must prevail.

ORDER

NOW, THEREFORE, the Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and the Complaint filed against the Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of

COUNTY OF MULTNOMAH,

a Political Subdivision of the State of Oregon, Respondent.

Case Number 55-79

Final Order of the Commissioner

Mary Wendy Roberts

Issued June 11, 1982.

SYNOPSIS

In evaluating female Complainant for promotion to Corrections Lieutenant, Respondent assessed her and other applicants' experience as a jail commander. Complainant could not acquire this experience because, at the time in question, the jail commander job was available only to males. The Commissioner held that Respondent committed an unlawful employment practice based on sex, in violation of ORS 659.030, because, despite her qualifications, Respondent promoted a male who had been ranked well below Complainant in the first portion of the selection process. The Commissioner ruled that ORS 659.040, providing a one year limit for filing civil rights complaints, operated prospectively and not retroactively, and ruled that Respondent had not shown the actual prejudice needed for the defense of laches. The Commissioner awarded Complainant a pay differential; accorded her the seniority, salary, and benefit level dating from the initial appointment date; and ordered Respondent to cease discriminating against employees in promotion because of their sex. ORS 659.010(2); 659.030; 659.040(1); 659.060(3).

The above-entitled contested case came on regularly for hearing before Dale A. Price, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The Hearing was held on February 20, 1981, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Respondent County of Multnomah was represented by Richard Busse, Chief Deputy County Counsel. Complainant Overa Pool was present and testified.

In addition to the Complainant, the Agency called as witnesses Stanley Kerner, Respondent's Corrections Manager in charge of Security at Rocky Butte Jail at times material; and Berna Plummer, Respondent's Affirmative Action Officer during times material. Respondent called as witnesses Carl V. Mason, Administrator of Respondent's Corrections Division during times material; Connie Mattingly Fessler, Assistant to Mr. Mason during times material; and Robert Hillsmann, Respondent's Personnel Director during times material.

Having fully considered the entire record in the matter, I, Mary Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Ruling on Motion, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On April 14, 1978, Overa Pool filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been discriminated against in connection with her employment by Respondent because of her sex.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support the allegations considered herein.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

4) At the hearing in this matter, the Presiding Officer told the parties that they would have an opportunity to present further evidence concerning damages if the record thereon proved incomplete.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a political subdivision of the State of Oregon which, in the State of Oregon, engaged the personal service of one or more employees, reserving the right to control the means by which such service was performed. Respondent was divided into departments, one of which was the Department of Justice Services. One of the divisions within Respondent's Department of Justice Services was the Corrections Division, the work unit herein relevant.

2) Respondent's Corrections Division carried out corrections activities within Multnomah County, Oregon, which included the operation of several correctional institutions, probation services, and a network of community related programs.

3) Complainant is a female person.

4) In December 1970, Complainant began employment as a Corrections Officer for Respondent's Corrections Division. Her job was to supervise female prisoners within the part of Rocky Butte Jail (hereinafter RB Jail), which was restricted to female prisoners. At this time, both male and female prisoners were housed at RB Jail, but none of Respondent's female Corrections Officers supervised the male prisoners at that facility.

5) In October 1973, Respondent's Corrections Division transferred all female prisoners to Claire Argow Center (hereinafter CAC). During times material thereafter, the Corrections Division operated four institutions: the Courthouse Booking Facility, an intake facility for men and women; RB Jail, for male prisoners; CAC, for female prisoners; and Multnomah County Corrections Institution, a work release facility for men.

6) Complainant continued supervising female prisoners at RB Jail until they were all transferred to CAC in October 1973. At this time, Respondent also transferred Complainant, and all of its female Corrections Officers, to CAC.

7) From October 1973 until at least the end of 1976, CAC was the only Corrections Division facility where Respondent's female prisoners were housed.

8) At no time before the end of 1976 did Respondent's Corrections Division assign or permit any of its female Corrections officers to work with male prisoners at any Corrections Division facility.

9) At least through the end of 1976 it was the policy of Respondent's Corrections Division that its female employees not be allowed to work with male prisoners at RB Jail.

10) Until sometime in 1974, there were no supervisory personnel assigned specifically to CAC. CAC occupied part of Respondent's Juvenile Detention Home facility, and a supervisor from the Juvenile Detention Home was called if a crisis developed at CAC. However, as a CAC Corrections Officer, Complainant made and took responsibility for those decisions which had to be made immediately, for safety reasons. Throughout her employment at CAC, Complainant also worked to resolve inmate-staff problems.

11) Charlie Crawford, Residential Director of CAC, observed Complainant's informal supervisory activities described in Finding of Fact 10 above and her ability to work with people. Because he liked the way Complainant handled prisoners, he promoted Complainant to acting Corrections Supervisor (Sergeant) of CAC as of June 5, 1975. Complainant served in this capacity until November 3, 1975, when she was promoted to permanent Corrections Supervisor (Sergeant) at CAC.

12) There was no difference between Complainant's work activities and pay as an acting Sergeant and her work activities and pay as a permanent Sergeant.

13) Complainant was the first female Sergeant in Respondent's Corrections Division. She remained its only female Sergeant until some time after she filed the instant complaint on April 14, 1978.

14) At no time before the end of 1976 did Respondent's Corrections Division assign or permit Complainant, its only female Sergeant, to work with male prisoners at any Corrections Division facility. Complainant was assigned to work only with female prisoners.

15) In 1976, Respondent's Corrections Division created a new management position to supervise operations and security at RB Jail. It is the selection of the person appointed to this position which is at issue in this matter. The rank of this position was to be lieutenant.

16) On June 17, 1976, in order to recruit applicants for promotion to the above-mentioned position in accordance with applicable civil service rules, Respondent issued a "Notice of Promotional Examination for Corrections Lieutenant (Correctional Facility Supervisor)." The minimum qualifications for taking the examination for this position were three years of experience in adult corrections work, including one year of experience as a Corrections Sergeant with Respondent.

17) Complainant and Jay Yeager were among the applicants for the Corrections Lieutenant opening.

18) After a total of approximately eight years as a deputy sheriff for Respondent, Sergeant Yeager had begun working for Respondent's Corrections Division as a Corrections Officer in 1968. Later that year, he had become an acting Corrections Supervisor (Sergeant) at RB Jail, and in 1970 he became a permanent Corrections Supervisor (Sergeant). Sergeant Yeager had worked at RB Jail throughout his employment by the Corrections Division. Although he still was a Sergeant for the Corrections Division when he applied to become a lieutenant, Sergeant Yeager also had served as acting Commander of RB Jail during a six week period when the permanent Commander was absent.

19) Since both Complainant and Sergeant Yeager met the minimum qualifications for the Corrections Lieutenant position, they each, along with the other qualifying applicants, took an individual oral examination. The applicants' scores on this examination determined, by themselves, their initial ranking. This examination was administered in July 1976. It consisted of an

interview conducted by Mary Ann Wersch, Personnel Analyst for Respondent's Personnel Division, and Captain Norman Reiter of the Portland Police Bureau. Ms. Wersch and Captain Reiter each graded the applicants on a scale of 60 to 100 in categories titled "Overall, Personal Fitness," "Appropriateness of Education and/or Training," "Appropriateness of Experience," and "Overall Fitness for This Position." The grade in the first of these categories was 20 percent of the applicant's total weighted grade on the examination; the grades in the second and third categories were each 25 percent of the total grade; and the grade in the last category was 30 percent of the total grade.

20) Captain Reiter gave Complainant a grade of 95 and Sergeant Yeager a grade of 95 in "Appropriateness of Experience." Ms. Wersch gave Complainant a grade of 86 and Sergeant Yeager a grade of 94 in this category.

Captain Reiter gave Complainant a grade of 97 and Sergeant Yeager a grade of 90 in "Overall Fitness for This Position." Ms. Wersch gave Complainant a grade of 92 and Sergeant Yeager a grade of 91 in this category.

Captain Reiter's total weighted grade for Complainant was 95.95. He commented "Exceptional history in terms of innovative programs. Administrative and social insights. Still able to see need for security and force in some situations." Captain Reiter's total weighted grade for Sergeant Yeager was 88.55. He commented, "Quiet spoken but verbally sophisticated. Exceptional experience. Provides answers that show problem thought out second solution developed. Intuitive administrative answers."

Ms. Wersch's total weighted grade for Complainant was 92.00. Ms. Wersch's total weighted grade for Sergeant Yeager was 91.30. She made no comments concerning either Complainant or Sergeant Yeager.

21) The average of Complainant's two total weighted grades was 93.98. The average of Sergeant Yeager's two total weighted grades was 89.93.

22) On July 16, 1976, Respondent's Personnel Division sent to Respondent's Corrections Division a "Certification of Eligibles" for the Corrections Lieutenant opening. This "Certification" named the applicants who had met the qualifications for the position, i.e., those who were certified as eligible for the position, and ranked them in order of their competence, as determined by the average of the total weighted grades Ms. Wersch and Captain Reiter had given each applicant. Nine people were named on this Certification. Complainant ranked first, and Sergeant Yeager ranked fourth. The people ranking second and third were both male. The highest average total weighted grade was Complainant's 93.98, and the lowest was 86.53.

23) The rules applicable to the selection of the Corrections Lieutenant required that one of the applicants listed on the July 17, 1976, Certification be selected. These rules did not require that the person who had ranked first on the Certification be appointed; they simply required that the hiring authority interview all applicants on the Certification who ranked the same as or higher than the applicant who was selected.

24) Carl Mason was Administrator of Respondent's Corrections Division from sometime in 1976 until some time in 1980. As such, he was responsible for overall administration and management of its Corrections Division.

25) Mr. Mason was the hiring authority for the Corrections Lieutenant position at issue. Accordingly, he made the final decision as to which person on the July 16, 1976, Certification of Eligibles would be appointed to this position.

26) For reasons explained in the Opinion below, this forum found Mr. Mason to be a credible witness.

27) In order to decide who to appoint, Mr. Mason personally interviewed the applicants listed on the Certification and directed Sergeant Stanley Kernel, Corrections manager in charge of security at Respondent's Courthouse Booking Facility and RB Jail, to interview these applicants and make recommendations to Mr. Mason.

28) RB Jail was the most difficult of Respondent's four corrections institutions to manage, because of its frequent security problems. If there was violence or other threat to security at RB Jail, the person in charge at RB Jail (the new Corrections Lieutenant, once he or she assumed that position) would call Sergeant Kerner for aid.

29) At the time he interviewed the candidates for the Corrections Lieutenant position and made his recommendation to Mr. Mason, Sergeant Kerner had some reservations about a female being appointed to this position. He was concerned about a woman being able to physically handle the job and also about the fact that no woman had what he con[illegible] portant exper[illegible] geant at RB [illegible] that if a wom[illegible] her gender wo[illegible] excluded her f[illegible] Corrections Lie[illegible]

30) Sergeant [illegible]er always preferred to appoint the person who ranked first on the Certification of Eligibles list. Nevertheless, he recommended Thomas B. Slyter, Jr., the fifth ranking candidate, to Mr. Mason, because of Sergeant Slyter's work as a sergeant at Rocky Butte Jail.

31) Mr. Mason did not rely solely upon Sergeant Kerner's judgment in determining who to appoint to the Corrections Lieutenant position, because Mr. Mason was concerned about the "latent bias that exists." By the latter phrase, Mr. Mason meant that he believed that others (generally) would perceive it to be a problem if a woman were appointed to this position, because RB Jail was "a male bastion" at that time. Complainant's effectiveness at RB Jail was a consideration in assessing her suitability for this promotion, and such effectiveness "could have been" related at the time to Complainant's sex.

32) Mr. mason considered all the applicants on the Certification qualified and capable. He felt that his role in the selection process was to determine who would perform best in the Corrections Lieutenant position.

33) On October 7, 1976, Mr. Mason appointed Sergeant Yeager to the Corrections Lieutenant position, effective October 11, 1976.

34) Mr. Mason selected Sergeant Yeager because he believed that Sergeant Yeager would be the best person for the job, given his specific supervisory experience at RB Jail and his overall tenure as a Corrections Division employee.

35) Mr. Mason had considered Complainant's sex in the process of reviewing her application, but her sex itself did not directly play a key role in his decision as to who to appoint, given his perception that in any case, Sergeant Yeager had "greater experience" than Complainant by virtue of his specific supervisory experience as a sergeant and as acting commander at RB Jail, and also his overall tenure.

There is little direct evidence on the record as to whether, by "greater experience," Mr. Mason meant duration or quality of experience, or both. This forum infers, however, that, given the general meaning of "tenure" and in the absence of evidence to the contrary, the duration alone of Sergeant Yeager's overall tenure determined Mr. Mason's assessment of it. Given the fact that both Complainant and Sergeant Yeager had substantial overall tenure and that Complainant had only two and one-half years less overall tenure than Sergeant Yeager, and in the absence of evidence to the contrary, this forum concludes that Mr. Mason considered overall tenure much less important, in his assessment of Sergeant Yeager and Complainant, than specific supervisory experience at RB Jail. Specific supervisory experience at RB Jail, therefore, was a key factor in Mr. Mason's assessment. This forum also infers that the mere fact that Sergeant Yeager had such experience and Complainant had none determined Mr. Mason's assessment of that experience. (There is no evidence that Mr. Mason gave much, if any, weight to Complainant's informal supervisory experience or sergeancy experience at CAC.) It is not possible to ascertain from the record whether duration or quality of service would have been determinative, or what would have been the relative importance of each, had Complainant ever been a sergeant or an acting commander at RB Jail.

36) On October 7, 1976, Mr. Mason sent written notice of Sergeant Yeager's appointment to all other persons on the July 16, 1976, Certification of Eligibles.

37) After Sergeant Yeager's appointment, Complainant contacted Lee Brown, Director of Respondent's Department of Justice Services, to ascertain why she had not been promoted. Mr. Brown told her that he assumed that Mr. Mason had made the decision to promote Sergeant Yeager and that he (Mr. Brown) would have Mr. Mason contact Complainant to explain his decision. Approximately two months later, Mr. Mason informed Complainant that Mr. Brown had asked him to discuss this matter with her. Mr. Mason told Complainant that Sergeant Kerner had made the final decision as to who to appoint to the position in question. Thereafter, Complainant contacted Sergeant Kerner, who denied that he had made the promotion decision. Complainant then returned to Mr. Mason and repeated Sergeant Kerner's denial, at which time Mr. Mason said, "If that's what Kerner wants to say, that's fine." Mr. Mason never did tell Complainant that he had in fact made the decision to appoint Sergeant Yeager, much less why. Having received contradictory responses from Mr. Mason and Sergeant Kerner, Complainant decided that there was no point in questioning either of them further.

38) After Sergeant Yeager's promotion, Complainant discussed her dissatisfaction with Bema Plummer, Respondent's Affirmative Action Officer. Ms. Plummet also asked Mr. Mason why Complainant had not been appointed. Mr. Mason told her that he would try to ascertain the answer and contact Ms. Plummer again. Mr. Mason never made any further response to Ms. Plummer's question.

Ms. Plummer also discussed the failure of the Corrections Division to promote Complainant to the position in question with Robert Hillsmann, Respondent's Personnel Director. He told Ms. Plummer that the promotion decision had been made by Corrections Division management.

Neither Mr. Mason nor Mr. Hillsmann alleged to Ms. Plummer that Complainant had not been promoted because her experience was inadequate.

39) Mr. Mason never treated Complainant in a demeaning fashion due to her sex.

40) Between the 1976 examination for Corrections Lieutenant and the next administration of an examination for that position in 1978, Respondent made three assignments to acting Corrections Lieutenant positions. All three appointees were male. At least one appointee was not listed on the July 16, 1976, Certification of Eligibles for Corrections Lieutenant. There is no evidence on the record that these assignments should have been made from persons on that Certification since they were "acting" assignments rather than "permanent" promotions.

Sergeant Kerner decided who to appoint to these assignments. Complainant had no opportunity to apply for these assignments.

41) On January 25, 1978, Respondent issued a "Notice of Promotional Examination for . . . Corrections Program Manager I (Lieutenant)." This was the first examination for a lieutenant position in Respondent's Corrections Division since 1976.

42) Complainant applied to take this examination. On March 16, 1978, Respondent notified her that she was eligible to take it, since she met the minimum qualifications stated on the January 25, 1978, Notice. Respondent also informed Complainant and the twelve other eligible applicants that it was working out scheduling problems for the examination and that Respondent expected to administer it before the middle of April 1976 (sic). Respondent was using a new type of examination involving interaction of the applicants in group setting, so all applicants had to be tested at the same time.

43) On March 27, 1978, Respondent notified Complainant that the examination would be administered on April 17, 1978. This notice also said that since most of the examiners were from out of town, and because of the length of the examination, there would be no opportunity for rescheduling or making up the examination.

Complainant received this notice on March 31, 1978.

44) Complainant was scheduled to begin a vacation on April 15, 1978. She had given Respondent approximately three months' notice of this vacation. She had made arrangements to bowl in a tournament of the Women's International Bowling Congress in Miami, Florida during this vacation and had paid $400.00 to the organizer of a charter flight to Miami.

45) When Complainant received notice of the date of the examination for the lieutenant position and realized that it conflicted with her vacation, she contacted Ms. Wersch, who was in charge of the examination, and asked to take it before or after her vacation. Complainant's request was denied, because coordination of the examiner's schedules and administration of the examination before the effective date of Ms. Wersch's resignation from Respondent's employ required that it be administered on April 17, 1978.

46) In order to recoup any of the $400.00 she had paid for airfare to Miami, Complainant had to give thirty days' notice or find another person to buy her ticket from her. Although the Women's International Bowling Congress has hundreds of Oregon members, Complainant did not know any member who had not already made travel arrangements.

47) The agreement between the Corrections Officers Local 1940 and Respondent, which was in effect at the time and which applied to Complainant, stated that once a vacation had been scheduled, neither Respondent nor the employee could change it without first giving 45 days' notice to the other party. This provision was not applicable in emergency situations. Complainant did not ask Respondent if it would allow her to reschedule her vacation.

48) Because of the conflict between the scheduling of her vacation and the examination, Complainant decided to, and did, go on her vacation and did not take the examination.

49) As a result of the April 17, 1978, examination, Respondent issued a Master Eligibility List for Corrections Program Manager I (Lieutenant) positions on April 18, 1978. Three people from that list were appointed to these positions, all on June 12, 1978.

50) The next examination for a lieutenant position in Respondent's Corrections Division was administered during the summer of 1980. Complainant took it and, as a result, was promoted to the rank of permanent Lieutenant as of August 1, 1980. She was assigned to CAC. She was the first and, at the time of hearing is still, the only female lieutenant in Respondent's Corrections Division.

51) Starting pay for a Corrections Lieutenant appointed before July 1, 1976, ranged between $17,040 and $20,076. These minimum and maximum figures, and any intermediate figures, were adjusted upward after July 1, 1976, but there is no evidence on the record of what the new figures were.

The specific amount of starting pay a Corrections Lieutenant received within the above-cited range was influenced by the pre-appointment pay of the new appointee, which itself related to that person's length of tenure in his or her pre-appointment position. For that reason, if Complainant had been appointed Corrections Lieutenant instead of Sergeant Yeager on October 11, 1976, she would not necessarily have received the same starting salary as Sergeant Yeager did, given her shorter tenure as sergeant. Given the total absence of evidence on the record as to what Complainant's starting pay as Corrections Lieutenant in 1976 would have been, this forum must infer only that she would have received the minimum starting salary for the position. There is no evidence on the record as to what was the minimum starting salary for a Corrections Lieutenant on October 11, 1976.

52) From October 8, 1976, through December 31, 1976, Complainant earned $3,544.46 in gross pay. In 1977, she earned $18,692.90 in gross pay. In 1978, she earned $21,167.27 in gross pay. The record contains no breakdown of these figures which would allow this forum to compute what Complainant earned between October 11, 1976, and April 17, 1978.

53) At the time of hearing, Complainant was Facility Manager at Respondent's Courthouse Booking Facility and still held the rank of lieutenant.

54) At the time of hearing, Complainant was serving on the Male / Female Staff Utilization Committee of Respondent's Corrections Division, which was studying the male and female staff assignments of the Division. Because of her work with this Committee, Complainant is familiar with Respondent's past and present formal and informal policies concerning assignment of male and female Correction Division staff and is competent to testify thereto.

ULTIMATE FINDINGS OF FACT

1) In the summer of 1976, Complainant and Jay Yeager were among the applicants for promotion to a new management position within Respondent's Corrections Division which would supervise operations and security at RB Jail and carry the title of Corrections Lieutenant. They both met the minimum qualifications for the position.

2) At the time, Complainant, a female, had worked for Respondent's Corrections Division for approximately five and one half years, with about one and one half years of informal supervisory experience at CAC and one year of experience as a sergeant at CAC. Because of Respondent's policy and practice of not allowing female corrections officers or sergeants to work with male prisoners, Complainant had worked just with female prisoners throughout her employment for Respondent and had worked since October 1973 at CAC, where all female prisoners and no male prisoners were housed. When Complainant achieved the rank of sergeant, she was the first and until after April 1978 the only female sergeant in Respondent's Corrections Division.

3) At the time he applied for the position at issue, Sergeant Yeager, a male, had worked for Respondent's Corrections Division for approximately eight years and had been a sergeant, always at RB Jail, for about seven and one half of those years. Sergeant Yeager also had spent six weeks as acting commander of RB Jail, in the temporary absence of the actual commander.

4) Complainant ranked first and Sergeant Yeager fourth in the first part of the selection process for the position at issue, an examination formulated and administered by persons outside of Respondent's Corrections Division. In the part of that examination specifically related to the applicant's experience, one of the two examiners had ranked Complainant and Sergeant Yeager equally and the other had ranked Sergeant Yeager 8 points (on a scale of 60 to 100) above Complainant.

5) In the second and final part of the selection process for the position at issue, the Administrator of Respondent's Corrections Division, Carl Mason, decided which of the applicants who had passed the first phase of the examination to appoint to the position. Mr. Mason was not bound by the rankings on the above-mentioned examination, except that he had to interview all applicants who ranked the same as or higher than the person he selected. Mr. Mason relied upon his own impression from personal interviews of all applicants and also sought the recommendation of Sergeant Kerner, who headed security for RB Jail and another corrections facility. Sergeant Kerner did not recommend either Complainant or Sergeant Yeager, but instead recommended another person, because of that person's experience as a sergeant at RB Jail. Although Sergeant Kerner had some bias against recommending a woman for the position in question, he always preferred to appoint the first ranking person on the first phase examination. Accordingly, Sergeant Kerner might have recommended Complainant, had she worked as a sergeant at RB Jail.

6) Mr. Mason believed that both Complainant and Sergeant Yeager were qualified and capable of working in the position in question. Mr. Mason selected Sergeant Yeager for appointment to the position because he believed that Sergeant Yeager would be the best person for the job, given his overall tenure as a Corrections Division employee and his specific supervisory experience at RB Jail. RB Jail had housed only male prisoners since October 1973 and, at the time of Sergeant Yeager's appointment, was the most difficult of Respondent's four corrections facilities to manage. Mr. Mason believed that Sergeant Yeager had "greater" experience than Complainant because of Sergeant Yeager's longer overall tenure and, most importantly, because Sergeant Yeager had specific supervisory experience (and Complainant had none) as sergeant and acting commander at RB Jail. Although Mr. Mason's credibility was somewhat impeached by the fact that, soon after he appointed Sergeant Yeager, Mr. Mason was either unresponsive or inconsistent in his responses to inquiries concerning his decision not to appoint Complainant, there is no substantial evidence that the above-described reason for his selection of Sergeant Yeager rather than Complainant was pretextual, i.e., that it was not real and was fabricated for the purpose of denying Complainant the promotion because of her sex. That Mr. Mason's reason was not pretextual is supported by the fact that Mr. Mason's conclusion that Sergeant Yeager had greater relevant experience than Complainant is plausible.

7) Accordingly, Complainant's sex did not directly play a key role in Mr. Mason's decision not to promote her to the position in question; her relative experience did. However, Respondent's policy and practice of not permitting its female employees to work with male prisoners at times material herein operated to bar Complainant from obtaining any of the very experience at RB Jail which distinguished Sergeant Yeager from her in key respects. Complainant would have been in a position to gain experience with male prisoners which would have been comparable, qualitatively and perhaps even quantitatively, to that of Sergeant Yeager in key respects, had not Respondent totally prevented her from working with male prisoners and from working at RB Jail after October 1973 because of her sex. The above-described criterion which Respondent used, therefore, discriminated against Complainant because of her sex.

8) Respondent's use of the experience criterion described above was not a business necessity, because there is no substantial evidence that the use of this criterion was essential to the safe operation of RB Jail.

9) It was virtually impossible for Respondent to reschedule the April 17, 1978, administration of the lieutenant examination which Complainant had applied to take. Complainant would have sacrificed the opportunity to bowl in a tournament in Florida had she taken that examination. Complainant's failure to take the exam or at least request that her vacation be rescheduled, constitutes a failure to exercise reasonable diligence to mitigate her damages herein.

20) Complainant's back pay damages in this matter consist of a sum equal to:

a) what Complainant would have earned between October 11, 1976, and April 17, 1978, had she, instead of Sergeant Yeager, been appointed Corrections Lieutenant effective October 11, 1976, and had she started at the minimum rate of pay for that position and obtained all non-discretionary raises thereafter; minus,

b) what Complainant actually earned between October 11, 1976, and April 17, 1978.

CONCLUSIONS OF LAW

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

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

3) The actions, and motivations for those actions, of Respondent's employees and agents Wersch, Reiter, Fessler, Plummer, Kerner, Hillsmann, and Mason described herein are properly imputed to Respondent.

4) Respondent failed to promote Complainant to the position of Corrections Lieutenant on October 11, 1976, because Respondent had assessed Complainant in terms of an experience criterion which discriminated against Complainant because of her sex by perpetuating the effects of Respondent's discriminatory policy and practice. Accordingly, Respondent's failure to promote Complainant was an

unlawful employment practice in violation of ORS 659.030 as charged.

5) The Commissioner of the Bureau of Labor and industries of the State of Oregon has the authority to award monetary damages and make other awards to Complainant under the facts and circumstances of this record, and the formula for computation of back pay damages, as well as the directions concerning the award of a new pay level, seniority, and other fringe benefits delineated in the Order below are appropriate.

RULING ON MOTION

During the hearing, Respondent moved to dismiss the Specific Charges and the Complainant on the ground that the complaint was not filed in a timely manner. Ruling upon this motion was reserved.

1. Complaint Filing Time

Complainant filed the Complaint on April 14, 1978. The acts of discrimination alleged therein which this forum has considered occurred in 1976.

Or Laws 1977, Ch 770 § 3 (Act) amended ORS 659.040(1) to require that a complaint alleging acts of discrimination be filed no later than one year after an alleged discriminatory act. Respondent has raised the defense that all complaints filed after October 4, 1977 (the effective date of the Act), are subject to this one year filing limitation.

Respondent has argued that the proviso in question addresses only the filing of a complaint, not the accrual of a cause of action. In its Hearing Memorandum, Respondent stated that since the Complaint in this case was filed after the effective date of the above-named Act, it was subject to this Act. The effect of this interpretation of ORS 659.040 would be to extinguish any rights arising more than one year before the enactment of the filing limitation.

The Agency has argued that the Legislature intended the one year limitation to apply only to those causes of action which accrued on or after the date the 1977 amendment to ORS 659.040 became effective.

Or Laws, 1977, Ch 770 should be read in conjunction with Or Laws, 1977, Ch 453 § 1, which contains exactly the same language as Chapter 770, section 3. In order to prevent the repetitious enactment of identical amendments, the Legislature provided, in Ch 453 § 2a, that should HB 2281 (Ch 770) become law, § 1 of Ch 453 would be repealed. The intent of the Legislature that the one year limitation apply only to causes of action accruing on or after the effective date of enactment is evidenced by section 7 of Chapter 453, which was not repealed by the passage of HB 2281, and by the legislative history of Chapter 453. Chapter 453, section 7 states:

> "The provisions of this Act shall apply only to those alleged acts of discrimination occurring on or after the effective date of this act."

The comments and discussion before the House Labor Committee when that committee considered what became Chapter 453 on April 8, 1977, also support the conclusion that the Legislature intended to apply the one year filing limitation prospectively only. The testimony indicated that the new statute of limitations was not intended to extinguish a pre-existing cause of action, but, rather, to treat existing cases as they had previously been treated. The Legislature intended that a pre-amendment right of action would not he affected by passage of the new specific statute of limitations and could be maintained thereafter. Although this intent was evidenced during legislative proceedings concerning Chapter 453, it applies also to section 3 of Chapter 770, since that section was identical to the pertinent section of Chapter 453.

The Agency's position is further supported by Oregon case law. In *Bower Trucking and Wholesale Co. v. Multnomah County,* 35 Or App 427, 582 P2d 439 (1978), the Court of Appeals was faced with an issue similar to that in this matter. The court stated that a legislative change in a statute of limitations acts prospectively only, unless a contrary legislative intent appears. *Id.* at 432-433.

The *Bower* court also discussed the effect of an amendment to a statute which reduces the time allowed for bringing an action under the statute. The court observed that where there is a reduction or decrease in time, the change will not cut off rights which have accrued under the old law prior to the change. *Id.* at 433. *See also Reynolds Metals v. Tax Commission,* 245 Or 156, 160-162, 421 P2d 379 (1966). Where statutory amendments are silent on their retroactive effect, courts will not construe those amendments to apply retroactively if such construction will impair existing rights, create new obligations or impose additional duties with respect to past transactions. *Thornton v. Hamlin,* 41 Or App 363, 597 P2d 1307, *rev den* 288 Or 1, (1979). *See also Held v. Product Mfg. Co.,* 286 Or 67, 71, 592 P2d 1005 (1979); *Derenco, Inc. v. Benjamin Franklin Federal Savings and Loan Association,* 281 Or 533, 539 n .7, 577 P2d 477, *cert den* 439 US 1051 (1978).

For all the above reasons, Respondent's argument that the one year filing requirement in Or Laws 1977, Ch 770 § 3 applies to this matter fails.

2. The Defense of Laches

In further support of its motion to dismiss, Respondent cited the doctrine of laches.

Laches has been defined in Oregon as "neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, resulting in a disadvantage to the other party." *Hanns v. Hanns,* 246 Or 282, 304, 423 P2d 499 (1967). Laches, therefore, does not result from delay alone but from an unreasonable and unexplained delay in asserting rights which has resulted in disadvantage or prejudice to the party asserting the defense. *Id.* at 305. If the doctrine of laches comes into play, the result is that the claim involved cannot be enforced.

The doctrine of laches only operates if the conditions described in *Clackamas Fire Protection District v. Oregon Bureau of Labor and Industries,* 50 Or App 337, 342, 624 P2d 141, *rev den* 291 Or 9, 631 P2d 340 (1981), exist.

> "As we stated in *Allied Vet. Council v. Klamath Co.,* 23 Or App 653, 661, 544 P2d 190 (1975):

> 'The established rule is, in fact, that the plaintiff against whom the defense (of laches) is asserted must have had full knowledge of all facts during the period of delay, and that the delay must have resulted in prejudicing the defendant to the extent that it would be inequitable to afford the relief sought by the delaying party.'" *Id.* at 342.

More than a prolonged delay in initiating the litigation is required to invoke the doctrine of laches; there must also be a showing of actual prejudice. Such prejudice may in some cases be shown by the unavailability of witnesses or critical documentary evidence as a result of the delay. *Id.* at 342. Respondent has suggested that prejudice resulted from the inability of Carl Mason to fully recall the events and motives relevant to his decision to hire Jay Yeager instead of Complainant. However, at hearing Mr. Mason remembered and testified about the process by which Mr. Yeager was selected and the specific comparative qualities which lead him (Mr. Mason) to make that selection. Furthermore, this forum has taken the lapse of time since that selection into account in determining what impact Mr. Mason's inconsistent statements or failures to respond at that time should have on this forum's assessment of his credibility. Respondent has failed to establish, therefore, that delay has prejudiced it to the extent that it would be inequitable to afford the relief sought by the Agency. Respondent has, accordingly, failed to meet its burden of establishing that the doctrine of laches should apply to this matter. *Albino v. Albino,* 279 Or 537, 566 P2d 1344 (1977).

For all of the above reasons, Respondent's motion to dismiss the complaint and Specific Charges in this matter is denied.

OPINION

1. The Merits

The Agency met its burden of proving a prima facie case of discrimination herein by proving that Complainant is a female; that she applied and was qualified for promotion to a position for which Respondent was seeking applicants; that despite her qualifications, she was not promoted; and that Respondent instead promoted a male who had been ranked well below Complainant in the first portion of the selection process, despite his longer tenure with Respondent. Respondent then sought to meet its rebuttal burden by producing what it alleged was a legitimate non-discriminatory reason for its failure to promote Complainant: the male whom Respondent selected had "more" relevant experience than Complainant. This forum's inquiry is whether this is in fact a non-discriminatory reason.

The Agency has shown that Respondent had a policy and practice of not allowing women to work with male prisoners at any time before the date in 1976 when it decided not to promote Complainant and that, because of this policy and practice, no woman, including Complainant, could work at RB Jail between October 1973 and the end of 1976 due to her sex. The Agency, finally, has shown that Respondent promoted a male to the position in question who also, because of his

experience as a sergeant at RB Jail and his experience as acting commander at RB Jail, had greater experience in terms of his overall tenure with Respondent's Corrections Division. The two factors regarding experience at RB Jail played a key role in Respondent's decision and were determinative in the selection process.

This is a prima facie showing that Respondent's proffered reason for not promoting Complainant was in fact discriminatory, in that it was the result of the operation of a policy practice which discriminated against Respondent's female employees.

This forum must consider the argument that the operation of Respondent's discriminatory policy of not allowing women to work at RB Jail after 1973, or to work at all with male prisoners until the end of 1976, did not cause Complainant to lose the promotion in question, because even in the absence of said policy, she could not have gained experience comparable to that of the man who was promoted.

This argument is rooted in the assumption that "greater experience," the proffered reason for promoting Sergeant Yeager over Complainant, is a quantitative term (meaning greater length of service) rather than a qualitative term (meaning greater quality of service). Respondent alleged that Sergeant Yeager had greater experience than Complainant in the areas of overall tenure with Respondent's Corrections Division, supervisory experience as a sergeant at RB Jail, and experience as acting commander at RB Jail. This forum concludes that "greater," when applied to the first area (overall tenure) must have been used quantitatively, for "tenure" connotes length of service in ordinary usage. Moreover, it would make more sense for Respondent to have used this word quantitatively, for if Respondent had used it qualitatively, it would be redundant with the next two areas of experience Respondent cited, which merely describe the relevant nature of Sergeant Yeager's overall tenure. Regardless of her gender, and Respondent's discriminatory policy relating to it, Complainant would have had less overall tenure than Sergeant Yeager, since she began working for Respondent's Corrections Division two years after Sergeant Yeager.

This forum has found, however, that the latter two factors, supervisory experience as a sergeant at RB Jail and experience as acting commander at RB Jail, were the key factors in Respondent's decision to promote Sergeant Yeager. There is no evidence on the record that Respondent considered the quantitative or qualitative aspects of these factors in determining whose experience was "greater," given the basic fact that Sergeant Yeager had some such experience and Complainant did not. If Complainant had some experience as a sergeant at RB Jail and/or as acting commander of that or another facility, would Respondent have evaluated that experience, in comparison to Sergeant Yeager's, in terms of its duration or its quality, or both? The record contains no answer to this question. This gap in the record cannot be attributed to any problem with Mr. Mason's recollection, for the question was never asked at hearing.

If Respondent had not deprived Complainant of any opportunity to work

with male prisoners at RB Jail or elsewhere, because of her gender, she conceivably could have become a sergeant anytime after she was hired in 1970 and, as a sergeant, she could have been in a position to gain acting facility commander experience just as Sergeant Yeager did. On the other hand, if Sergeant Yeager had to compete with female as well as male applicants for his promotion to permanent sergeant in 1970, it is at least possible that he might not have gained that promotion. All of this is conjecture however, because Respondent's discriminatory policy operated to bar Complainant from obtaining any of the RB Jail experience that both Sergeant Kerner and Carl Mason, the two people involved in the final decision as to who to promote, felt distinguished the men they chose from Complainant. Complainant would have been in a position to gain at least some experience with male prisoners at RB Jail, experience which could have been comparable, qualitatively and perhaps even quantitatively, to that of Sergeant Yeager, had Respondent not prevented her from working with male prisoners until she applied for promotion to the position in question and prevented her from working at RB Jail after October 1973, all because of her sex.

Since the disparate impact upon Complainant of the experience criterion which Respondent applied in making the promotion in question has been shown, the burden has shifted to Respondent to justify the use of this criterion by proving that it was a business necessity.

Respondent has made the uncontroverted assertion, and this forum has therefore found, that RB Jail was the most difficult of Respondent's corrections institutions to manage, because of its frequent security problems. This forum is left to extrapolate from this that having a corrections lieutenant with experience supervising this particular institution would help insure its safe and efficient operation. Even in the absence of proof, this forum recognizes that the safe operation of a corrections facility is a compelling purpose. Respondent, however, has not offered actual evidence that its use of the experience criterion in selecting a corrections lieutenant for RB Jail served to increase security. Even if this forum were to infer that it did, Respondent has not met its burden of proving a business necessity for the imposition of this criterion. Given the absolute exclusion of women from experience supervising RB Jail, the degree of business necessity required to justify this practice and the use of such experience as a criterion for promotion must be high. B. Schlei and P. Grossman, *Employment Discrimination Law,* at 146-147 (1976 & Supp. 1979). A mere showing that it is rational to link such experience to the safe operation of the jail would not be sufficient. Nor would it be sufficient to show that the imposition of this criterion served a legitimate management function. *In The Matter of Bend Millworks Company,* 1 BOLI 214 (1979), and *Williams v. Colorado Springs School District,* 641 F2d 835, 25 FEP 257 (10th Cir 1981). The business purpose of the use of this experience criterion must have been sufficiently compelling to override its discriminatory impact, and Respondent must prove that the use of the criterion was essential to the accomplishment of this purpose. *Robinson v. Lorillard Corporation,* 444 F2d 791, 797-800, (4th Cir), *cert den* 404 US 1006 (1971); *US v. St. Louis-San Francisco Railway Company,* 454 F2d 301, 308, (8th Cir), *cert den* 409 US 1116 (1973). Respondent has not met this burden. At most, this forum may infer from the evidence that the use of this criterion may have been helpful in determining who would best manage the facility; but it may not infer that the use of this criterion was essential to the safe operation of the facility.

Respondent's articulated reason for promoting Sergeant Yeager rather than Complainant was, therefore, itself discriminatory and was not justified by business necessity. Accordingly, Respondent has not produced a legitimate non-discriminatory reason for failing to promote Complainant, but simply offered the continued effects of disparate treatment as opposed to intentional discrimination. Such an offering has not rebutted the Agency's prima facie case that Respondent failed to promote Complainant because of her sex. For this reason, this forum has found that Respondent did in fact unlawfully discriminate against Complainant because of her sex in failing to promote her to the position in question.

2. Mr. Mason's Credibility

Overall, this forum found Mr. Mason to be a credible witness. Although his credibility was somewhat impeached by his evasive responses to inquiries made by Complainant and Ms. Plummer as to why he had not promoted Complainant. This forum acknowledges that the passage of time may well have diminished Mr. Mason's ability to explain why four and one half years before the hearing, he was unresponsive and inconsistent. This forum also found unusually candid Mr. Mason's attempt to distinguish between a characteristic of which he was aware and which he could have considered in evaluating Complainant, given the discriminatory assignment procedures at the time, and the characteristics which he actually did consider in deciding to promote Sergeant Yeager rather than Complainant. His admission that Complainant's sex fell into the first category and his willingness to attempt to make this conceptually difficult explanation in order to be complete, thereby risking being misunderstood and cast in a negative light, enhanced this forum's assessment of his veracity. Also contributing to the conclusion that Mr. Mason was credible was the fact that the answer he offered at hearing to the crucial question herein, why he did not promote Complainant, was plausible in light of the other evidence on the record.

3. Relevance of Respondent's Policy

Respondent objected to the admission of evidence concerning Respondent's policy of not allowing women to work with male prisoners until at least 1976. Respondent based this objection upon its argument that such a policy is irrelevant to a discrimination matter based upon an allegation of different treatment rather than an allegation of disparate impact. However, Respondent's allegation that it did not promote Complainant because of (the lack of) a characteristic in her experience, which was determined by this policy, makes evidence concerning this policy very relevant.

4. Applicable Legal Framework

As mentioned above, Respondent has sought to characterize this matter as a different treatment rather than a disparate impact case. One distinction between the two is that in a different treatment case, there must be proof of the respondent's discriminatory motive. However this matter is characterized, the record does contain proof of such a motive. Because Respondent had a policy and practice which intentionally discriminated against Complainant because of her sex, and because Respondent used a criterion in determining whether to promote Complainant which perpetuated directly the effect of the intentional discrimination of that policy and practice, Respondent did, in fact, intentionally discriminate against Complainant because of her sex.

5. Damages – Mitigation

Complainant had a duty to exercise reasonable diligence to mitigate her back pay damages herein. Whether her failure to take the April 17, 1978, examination for lieutenant constitutes a failure to exercise such diligence is a question of fact.

The Agency asserted that Complainant did not take this examination because its administration date conflicted with her long-scheduled vacation. The Agency attempted to show that if Complainant had taken the examination as scheduled, she would have forfeited not only her plans to bowl in a tournament in Miami, Florida, but also her $400.00 investment in airfare to Miami and her vacation time itself. This forum does not agree with the assertion that Complainant would have lost the $400, and that the vacation time as there is no evidence on the record Complainant made more than a superficial effort to ascertain whether there was another person, among the many Oregonians who were members of the organization hosting the tournament, who would purchase her ticket from her. She made no inquiry as to whether Respondent would allow her to reschedule her vacation, rather than force her to forfeit it, under the particular circumstances. Accordingly, this forum concludes only that had Complainant taken the examination on April 17, 1978, she would have missed the bowling tournament.

On the other hand, Respondent has shown that to reschedule this examination so that it would not conflict with Complainant's vacation would have been extremely burdensome to Respondent, if not impossible. In order to administer the examination before the resignation date of the coordinator of the examination and at a time when all the examiners could be present, Respondent had to administer it on April 17, 1978. All applicants had to be examined at the same time, because the examination involved interactions between the applicants as a group.

Given Respondent's inability to reschedule Complainant's examination and Complainant's failure to attempt to reschedule her vacation, Complainant's failure to take the examination constitutes a failure to exercise reasonable diligence to mitigate her damages. For that reason, Complainant's back pay damages herein stopped accruing on April 17, 1978, the day Complainant did not take the examination.

Damages – Computation of the Award

There is insufficient evidence on the record to compute damages according to the mandates this forum has made in the Order below. The Presiding Officer told the parties that if the record concerning damages were incomplete, they would have an opportunity to present further evidence thereon. However, in an effort to avoid further delay in this matter, and because the damage mandates appear to be clear, this forum is ordering the parties to attempt to compute together the amount of back pay damages and the salary level, seniority, and other fringe benefits awarded. If they fail, this forum will reassert its jurisdiction in order to ascertain these specifics.

Damages – Computation of Interest on Back Pay

Interest upon Complainant's back pay award will be computed as follows:

a) Six per cent annually on the accrued difference between what Complainant would have earned, had she been appointed Corrections Lieutenant on October 11, 1976, at the minimum starting salary for that position and had she received all non-discretionary raises in salary thereafter, and what she actually did earn, during the period from October 11, 1976, through July 25, 1979. Interest shall be computed and compounded annually.

b) Nine per cent annually upon the principal and interest computed in subparagraph (a) above, computed and compounded annually from July 26, 1979, to the date Respondent complies with paragraph number 2 of the Order below.

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, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Meet with Betty Smith, Assistant Attorney General, or her representative, to:

a) compute what Complainant would have earned between October 11, 1976, and April 17, 1978, had she been appointed to the position of Corrections Lieutenant on October 11, 1976, at the minimum starting salary for that position at that time and had she received all non-discretionary raises in salary thereafter; and,

b) compute what amount of the salary figures cited in Finding of Fact 52 above Complainant actually earned between October 11, 1976, and April 17, 1978; and,

c) compute the amount of interest due Complainant, according to the Opinion above and paragraph 2 below; and,

d) ascertain the salary, seniority, and fringe benefits mandated in paragraphs 3, 4, and 5 below.

2) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a check to be held in trust for Overa Pool in an amount equal to the difference between the amount computed pursuant to subparagraph 1(a) above and the amount computed pursuant to sub-paragraph 1(b) above, plus interest on that difference computed pursuant to subparagraph 1(c) above. This differential

sum represents damages for wages Complainant lost because of Respondent's unlawful employment practices set out above.

3) Raise Complainant's salary to the salary she would now be earning had she been appointed Corrections Lieutenant on October 11, 1976, and had she received all non-discretionary raises since that date.

4) Grant Complainant seniority equivalent to what her seniority would now be had she been appointed Corrections Lieutenant on October 11, 1976.

5) Grant Complainant any additional fringe benefits she would be entitled to at this time had she been appointed Corrections Lieutenant on October 11, 1976.

6) Cease and desist from discriminating against employees in promotion because of their sex.

In the Matter of

the BOOST PROGRAM,

Oregon State System of Higher Education, Office of High School Relations, Respondent.

Case Number 114-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued June 11, 1982.

SYNOPSIS

After Complainant filed a complaint of discrimination under ORS chapter 659, Respondent, through its director, demoted Complainant, imposed onerous educational requirements on her, and subjected her to argumentative behavior, personal antagonism, and disparaging remarks to others intended to embarrass her and diminish her professional reputation, all of which resulted in her resignation. The Commissioner ruled that Respondent committed an unlawful employment practice, in violation of ORS 659.030(1)(d). Finding that Complainant's sleeplessness, moodiness, and anxiety was at least partly attributable to her employment situation, and rejecting Respondent's contention that emotional suffering damages were only available in race cases, the Commissioner awarded Complainant $500 for mental suffering and $157.80 for lost wages, and ordered Respondent to cease discriminating on the basis of filing a complaint of discrimination. ORS 659.010(2); 659.030(1)(d); 659.060(3).

The above-entitled matter came on regularly for hearing before Michael J. O'Brien, designated as Presiding officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries. The hearing commenced on April 27, 1981, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon, and concluded on April 28, 1981, in the same location. The Bureau of Labor and Industries was represented by Charles Robinowitz, Attorney at Law. Respondent BOOST Program was represented by Josephine Hawthorne, Assistant Attorney General.

The Agency called as witnesses the following people: Complainant Madeline Jepson; William H. "Sonny" Jepson III, Complainant's husband; Dennis Tominaga, former BOOST Counselor; and Martha Kinney, former BOOST Counselor. Respondent called Lewis Merrick, formerly of the Office of High School Relations and former supervisor of BOOST; and Richard Pizzo, of the Oregon State System of Higher Education, as witnesses.

Having considered the entire record in this matter, I, Mary Roberts, hereby make the following Rulings on Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS ON MOTIONS

Respondent moved to strike that portion of the Specific Charges relating to compensatory damages on the grounds that:

1. thus far all precedents have stated that the only time a Complainant can recover for pain and suffering is when racial harassment is found;

2. the amount requested in the Specific Charges ($10,000) is punitive and ORS chapter 659 is not punitive; and,

3. the amount of pain and suffering felt may be the stress of bringing litigation rather than the direct result of Respondent's alleged actions.

This motion was denied with leave to renew. The motion to strike was renewed at the conclusion of the Agency's case on the grounds that Complainant had presented no testimony regarding expenses caused by her alleged pain and suffering. The motion was again denied.

Respondent, in its preliminary motions, moved to dismiss on the grounds that the Agency had failed to conciliate in good faith. In support of this motion, Respondent argued that it had made two good faith settlement offers which Complainant refused. Respondent speculated that the reason Complainant refused to accept either offer was because she was misled by the Agency as to the value of her claim by the Agency's request in the Specific Charges for $10,000 in pain and suffering.

The Hearings Officer denied the motion provisionally on the grounds that:

1. he would be required to speculate that no facts existed to support an award for pain and suffering;

2. he was not prepared to say that the amount offered by Respondent was a full and adequate remedy; and,

3. that summary disposition of cases is not a favored alternative in the area of administrative law.

Leave was granted to renew the motion later in the hearing.

Respondent then moved to exclude all witnesses including Complainant. The motion was granted with respect to witnesses other than Complainant. Leave was granted to renew the motion as to Complainant.

Complainant moved to amend the Specific Charges to show that Complainant's lost earnings equaled $157.80. Hearing no objection, the motion was accepted.

FINDINGS OF FACT – PROCEDURAL

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

2) On January 24, 1978, Madeline M. Jepson filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been discriminated against in connection with her employment by Respondent on the basis of her sex, race, and marital status.

3) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and the additional allegation that Respondent retaliated against Complainant for exercising her right to file a complaint of discrimination.

4) The Civil Rights Division determined that substantial evidence existed to support only Complainant's allegations of retaliation.

5) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was a public agency of the State of Oregon authorized by law to provide educational services.

2) Respondent BOOST Program (also known as Talent Search) is affiliated with the office of High School Relations of the Oregon State System of Higher Education (hereinafter referred to as OSSHE). "BOOST" is an acronym for Bettering Oregon's Opportunities for Saving Talent.

3) Respondent's program is intended to locate and provide counseling services to disadvantaged high school students and dropouts in order to encourage them to pursue post-secondary education. Respondent is funded by the federal government.

4) Prior to her employment by Respondent, Complainant received a Bachelor's Degree and a Master's Degree in Education from Linfield College in McMinnville, Oregon. She was also employed as assistant director and residential counselor for the Upward Bound Program affiliated with Linfield College. This was a summer position. The purpose of the Upward Bound Program is similar to that of the BOOST Program.

5) Complainant was employed by Respondent as a counselor in August 1973.

6) On or about May 26, 1976, Ken Marshall offered Complainant a promotion to the position of assistant director and head counselor of the BOOST Program. She accepted this offer on or about August 2, 1976. These titles were not reflected in her "Notice of Appointment" until July 1977.

7) Complainant's duties as assistant director and head counselor included:

a. providing educational counseling to high school juniors and seniors;

b. establishing and implementing student recruitment procedures;

c. office management;

d. supervision of two or more counselors; and,

e. approximately 50 hours per week of work time.

8) On or about July 21, 1976, Respondent's program and funding proposal was evaluated by three "field readers" employed by the Education Department of the federal government. The purpose of the evaluation was to determine whether funding for the program should be continued for the 1976-77 fiscal year. The following comments were made:

a. the program was criticized for "relying on school counselors and walk-ins" with "little or no outreach;"

b. the program was also criticized for not providing counseling services to "drop outs or potential drop outs" and the readers suggested that "more could be done in outreach training and drop out intervention;"

c. the "qualification of director and staff seems very adequate," although questions were raised concerning outreach capabilities and lack of in-service training; and,

d. continued funding of the program was recommended by all three readers.

9) An evaluation by field readers was again conducted in 1977 with the following pertinent results and comments:

a. "resumes of current staff appear qualified;"

b. "the qualifications and experience are definitely there, but there are not definite job descriptions mentioned for each employee;"

c. "resources are excellent . . . Personnel has necessary experience and background as evidenced by their resumes and supporting letters of appreciation;"

d. one of the strengths of the program was identified as its staff due to "good backgrounds and experiences in identifying and counseling problem students . . . very knowledgeable in financial aid procedures;

e. the weaknesses of the program were identified as "lack of a bilingual staff," "a poorly thought out proposal," and no mention of a plan for staff selection or in-service training; and,

f. the program was recommended for re-funding during the period of 1977-80 by two of the three readers.

10) In September 1977, Kenneth Marshall resigned as director of the BOOST Program. He recommended

that Complainant be appointed as his replacement.

11) Prior to October 1977, the BOOST Program was under the general supervision of Lewis Merrick, who served as Coordinator of Specific Programs for OSSHE.

12) Prior to October 1977, Complainant and Mr. Merrick had "ups and downs" over the philosophy and operation of the BOOST Program, however Complainant characterized their work relationship as "tolerable."

13) As early as August 1974, Mr. Merrick expressed his difference in philosophy regarding the focus of the BOOST Program to Mr. Marshall. Mr. Merrick testified that this difference in philosophy continued throughout Mr. Marshall's tenure.

14) Following the resignation of the former director, Mr. Merrick offered the position of acting director to Complainant. Mr. Merrick testified that he did not wish to offer the job to Complainant but did so because of Marshall's prompting and to satisfy the Advisory Board.

15) The director's position offered to Complainant was modified by Mr. Merrick to include certain restrictions which did not previously exist, including severe restrictions on the director's control over budgetary matters.

16) Complainant declined to accept the director's position as offered at least in part due to the restrictions which were imposed by Mr. Merrick.

17) On or about October 17, 1977, Mr. Merrick was appointed acting director of the BOOST Program. The position to which Mr. Merrick was appointed did not contain the same restrictions as those that would have been imposed on Complainant had she accepted the position.

18) The director of the BOOST Program had the authority to appoint members of the Advisory Board. In a letter dated November 29, 1977, Mr. Merrick notified Mr. William Jepson III, that his appointment to Respondent's Advisory Board was revoked as part of an overall effort to reorganize that body by "retiring all persons not currently living and/or working within the Portland Community." Mr. Merrick also stated that Mr. Jepson was being retired "because of the potential for conflict of interest with the new director having your wife Madeline, as an employee and you on the Advisory Board." Other members of the Board who did not live or work in the Portland area were removed at the same time.

19) In a responsive letter dated December 7, 1977, Mr. Jepson criticized many of Mr. Merrick's actions as acting director of BOOST. He particularly criticized Mr. Merrick for his refusal to appoint Complainant as director of the program; for the "arbitrary appointment of yourself as director at a salary higher than that of the former director and substantially higher than that discussed with Madeline . . .;" and for his "abrasive personality and your unprofessional habits." Mr. Jepson concluded by requesting that Mr. Merrick "retire" himself from the BOOST Program.

20) In his reply letter to Mr. Jepson, dated December 28, 1977, Mr. Merrick stated as follows:

> "Even the most cursory view of (Complainant's) credentials reveal that she has had neither professional preparation as a counselor nor has she the broad professional experience and/or responsibility in this area. Clearly she is doing a fine job with her schools and her clients but the responsibilities for the new director appear to far outweigh her professional experience . . ."

21) During November and December 1977, a "Position Description" for "Program Director" was publicity circulated by Respondent. The position description stated that the "position requires that applicant to have a bachelor's degree and a master's degree or four years (sic) equivalent experience to counseling or community services work." The position description requested that all resumes be directed to Mr. Merrick. Complainant met the minimum qualifications for the job as stated in the position description.

22) Persons applying for the Program Director position were to be able to:

a. prepare funding proposals;

b. act as liaison with state, federal, and local agencies;

c. supervise program expenditures;

d. train and supervise staff.

23) At all relevant times, Mr. Merrick had actual notice of the pendency of Ms. Jepson's complaint of discrimination.

24) On or about February 27, 1978, Complainant took maternity leave. She did not return to full-time employment until on or about June 1, 1978.

25) On or about April 20, 1978, while she was on maternity leave, Complainant received a memorandum from Mr. Merrick concerning "staff development and training." Mr. Merrick stated that:

a. he intended to implement substantial changes in the orientation and philosophy of the BOOST Program;

b. Complainant's "limited training and education in counseling is . . . a major weakness in the new BOOST Program which emphasizes counseling;"

c. revisions in the program "will require the senior 'counselor' to be better prepared than we have historically required;" and,

d. a contract as senior counselor would be offered to Complainant for the period 1978-79 only on condition that she complete 30 credit hours of "upper division and graduate courses" relating to counseling "over the next 12 to 15 months."

26) Mr. Merrick's memorandum of April 20, 1978, was not sent to any other counselor or employee, nor did Mr. Merrick, at that time, discuss the need for additional training with any other counselor or employee.

27) For Complainant to complete 30 hours in counseling over a 12-15 month period would have required that Complainant take the equivalent of a full-time graduate class load. Since no evening classes were offered in the summer of 1978, Complainant would have been forced to take classes during the day.

28) At all relevant times, Complainant was fully qualified for employment as a counselor, senior counselor, or

assistant director in the BOOST Program as it existed prior to Mr. Merrick's assumption of supervisory duties and by virtue of her prior education and four and one-half years experience with the program. The evidence indicates, and this forum finds, that Complainant was capable of performing the duties of her position without completing extensive additional counseling course work or training in such a relatively short period of time. This finding is supported by the fact that Mr. Merrick removed Complainant's access to high school students and changed the focus of Complainant's job to include more Agency liaison when Complainant returned from maternity leave. (*See* Finding of Fact 30.)

29) During the spring of 1978, after filing her complaint, Complainant was demoted from the position of assistant director and head counselor to the position of counselor. The reason given by Mr. Merrick was that the program did not require an assistant director. Although Complainant's supervisory duties were eliminated by such demotion, her rate of pay was unaffected. No replacement for Complainant was hired as either assistant director or head counselor.

30) Following the filing of the aforementioned complaint, this forum finds that Complainant was subjected to intermittent harassment by Mr. Merrick, including but not limited to the following:

a. argumentative behavior, including accusations of incompetence and insubordination, and personal antagonism intended to intimidate Complainant and to disrupt the performance of her duties;

b. removal of Complainant's access to high school students yet demanding that she complete extensive course work in counseling in a short period; and,

c. making statements to third persons including statements to her former clients which were intended to embarrass Complainant and diminish her professional reputation.

31) The record indicates that Mr. Merrick's course of conduct was intended to provoke frustration, discouragement, and eventually cause Complainant's resignation.

32) During June 1978, Mr. Merrick requested that another counselor, Martha McMahon Kinney, enroll in additional counseling courses. She requested part-time employment so that she could pursue a Master's degree in Business Administration. When that request was denied by Mr. Merrick, Ms. Kinney resigned. Mr. Merrick denied her request because "the program didn't need part-time counselors."

33) In June 1978, Joyce Marshall was appointed as director of the BOOST Program. Ms. Marshall's resume indicates that her educational background consisted of a "B.S. Elementary Education" and "M.Ed. Student Personnel Administration."

34) Complainant resigned from her position as counselor on or about July 14, 1978.

35) Following her resignation, Complainant obtained employment as director of the Upward Bound Program affiliated with Linfield College. She was unemployed for a period of four days, during which time she sustained lost wages in the amount of $157.80.

36) Mr. Merrick neither discussed Ms. Jepson's Civil Rights complaint with other BOOST staff members nor posted the complaint in a public place within the office.

37) Complainant's co-workers testified they noticed an increase in tension in the office between Complainant and Mr. Merrick after her filing a Civil Rights complaint. The evidence indicates, and this forum finds, that Complainant experienced certain tension, pressure, embarrassment, humiliation, and anxiety as a proximate result of Respondent's retaliatory conduct as found herein.

ULTIMATE FINDINGS OF FACT

1) Respondent is an employer which engages or utilizes the services of one or more employees in the State of Oregon and reserves the right to control the means by which such service is or will be performed.

2) Following the filing of a complaint of discrimination by Complainant, Respondent engaged in a retaliatory course of conduct designed to provoke frustration, resentment, discouragement, and eventual resignation. Such conduct included: "redefinition" of Complainant's duties; imposition of an excessively burdensome educational requirement to be completed in a short time frame, while removing her access to clients who would need counseling; and various forms of personal harassment and intimidation.

3) Following her resignation as counselor for Respondent on or about July 14, 1978, Complainant was unemployed for a period of four days, sustaining lost wages in the amount of $157.80.

4) As a result of Respondent's unlawful conduct, Complainant experienced certain tension and pressure, embarrassment, humiliation, anxiety, and loss of human dignity.

CONCLUSIONS OF LAW

1) Respondent is an "employer" as defined by ORS 659.010(6).

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

3) The actions and motivations of Respondent's employees and agents as described herein are properly imputed to Respondent.

4) Following the filing of a complaint of discrimination by Complainant on January 24, 1978, Respondent discriminated against Complainant because she opposed practices forbidden by ORS 659.030 and because she filed a complaint. Such retaliatory conduct is expressly prohibited by ORS 659.030(1)(d).

5) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the order below is an appropriate award.

OPINION

Complainant alleges a violation of ORS 659.030(1)(d), which provides that it shall be an unlawful employment practice for an employer

"to discharge, expel or otherwise discriminate against any person

because . . . he has filed a complaint, under ORS 659.010 to 659.110 . . . or has attempted to do so."

The retaliation provisions of ORS 659.030 embody a strong public interest in providing protection for individuals who exercise their rights to file charges of discrimination against an employer. Such protection is extended regardless of the merits or outcome of the underlying claim of discrimination. Nevertheless, it is clear that the mere filing of a complaint does not in itself insulate an employee from an adverse employment decision. The critical question in each case is to determine whether the filing of a complaint was a substantial factor in a subsequent adverse decision.

The Bureau has set forth a prima facie showing of retaliation. Specifically, the evidence adduced at hearing indicates that:

a. Madeline Jepson filed a complaint of discrimination with the Civil Rights Division on January 24, 1978;

b. The acting director of the BOOST Program, Mr. Merrick, was aware at all relevant times that the complaint was pending with that agency;

c. Following the filing of the complaint, Complainant was demoted from the position of assistant director and head counselor to counselor;

d. On April 20, 1978, Complainant was directed by Mr. Merrick to enroll for 30 hours of upper-level or graduate credit within a 12 to 15 month period, even though she was qualified for her work without completing extensive additional training or education in such a short time, particularly since her access to those clients who would benefit from this training had been ended;

e. No other counselor was required to enroll in such courses until June 1978;

f. Complainant was subjected to various forms of harassment, intimidation, and verbal abuse; and,

g. Complainant resigned on July 14, 1978, because she was unable to continue working under the circumstances which existed at that time.

In response to these allegations, Respondent contends that its adverse employment decisions were based solely upon legitimate non-discriminatory reasons. These contentions will be separately considered below.

1) Complainant and Mr. Merrick were in serious conflict over fundamental philosophical questions affecting the future of the BOOST Program.

There is abundant evidence that Mr. Merrick was dissatisfied with the overall direction of the BOOST Program even before his appointment as acting director in October 1977. It is likewise clear that Mr. Merrick's concerns were partly inspired by substantial criticisms of the program in two reports completed by federal Field Readers in 1976 and 1977. These reports raised serious questions as to whether the program would continue to obtain funding without significant modifications.

For purposes of this case, it would clearly be inappropriate to question either the desirability of the changes proposed by Mr. Merrick or his sincerity in implementing them. For example, Mr. Merrick testified convincingly that the program was "working with the wrong kids." In his view, the BOOST Program was providing services (mostly financial aid counseling) to students who were already motivated to attend college: i.e., those who were referred by high school counselors. Similarly, the Field Readers had repeatedly criticized the program for its lack of "outreach" capability.

Mr. Merrick's desired changes also reflected a substantial change in the programmatic needs of the client group. Prior to 1978, many students needed the assistance BOOST counselors had been able to give regarding the preparation of financial aid forms. However at a point prior to Mr. Merrick's assumption of the directorship of BOOST, the colleges refused to accept hand computed financial aid forms such as those the BOOST counselors helped prepare. As part of his plan for restructuring the BOOST Program to more adequately meet the needs of the clients, Mr. Merrick testified that he intended to upgrade the existing staff by improving its counseling capabilities and by minimizing their involvement in financial aid form preparation. It is in this context that his memorandum to Complainant dated April 20, 1978, must be considered.

It is not unlawful for an employer to impose educational requirements on an employee as a condition of continued employment, even if such requirements prove to be burdensome or excessive. In this case, however, such requirements were imposed only on Complainant at that time, and make little sense in light of the fact that when Complainant returned from maternity leave Mr. Merrick informed Complainant that she was better suited to work with agencies. Since Complainant was not to be working with those who would use her counseling skills, the reasonableness of Mr. Merrick's demand that she complete 30 hours of upper division counseling courses is highly suspect.

Another counselor, Ms. Kinney, was asked to take advanced courses in counseling, however this request was not made until June 1978. Following this request, Ms. Kinney asked but was denied permission to work part-time to pursue graduate work.

Mr. Merrick testified that at least one reason he would not approve Ms. Kinney's request for part-time employment was because the program did not need part-time Counselors. Mr. Merrick, however, required that Complainant immediately (summer term, 1978) begin class work to satisfy the 30 hour requirement. Since no night classes were offered in summer term, Ms. Jepson would have been taking classes during the day, thus interfering with her full-time job. Mr. Merrick had already told one counselor that the program did not need part-time counselors, therefore it is reasonable to presume that Mr. Merrick would not have accepted Ms. Jepson's less than full-time work while she was taking classes.

This forum has found that the time frame within which the educational requirements were to be completed was excessive. Complainant already earned a Master's Degree in Education and had performed competently as a counselor in the program for over four and one-half years. The position description which was issued by Respondent in November 1977 indicates that Complainant was qualified for the job of Counselor/Assistant Director of the program as the program existed at that time. The federal Field Readers did not note any major deficiencies in the qualifications to staff in spite of their many criticisms of the program as a whole. Respondent has failed to provide credible evidence in support of its claim that Complainant required substantial additional education in such a short period in order to perform the duties of her position.

Respondent's reorganization of BOOST included demotion of Complainant from the position of assistant director and head counselor to counselor. This decision was not adequately explained. Mr. Merrick concluded that Complainant's former position was "not necessary." Indeed, no one was subsequently appointed to replace her. However, Complainant's demotion and the removal of her supervisory responsibilities were part of a course of conduct designed to retaliate against her for filing a complaint with the Civil Rights Division, as described above.

Respondent, in its exceptions, has argued that the demotion was "merely the elimination of artificial distinctions between counselors." Respondent, in so saying, fails to recognize that in addition to losing a title, Complainant also lost her supervisory responsibilities and access to students.

2) Complainant and Mr. Merrick were engaged in a serious personality conflict, which generated considerable personal animosity prior to filing a complaint with the Civil Rights Division.

There is ample evidence in the record indicating that Mr. Merrick was repeatedly in conflict with both Complainant and her spouse, who was a member of Respondent's Advisory Board prior to November 1977. Such conflicts intensified when Complainant refused to accept the director's position with the restrictions imposed by Mr. Merrick. In fact, Respondent contends that Complainant may have filed a complaint of discrimination solely to retaliate against Mr. Merrick for his decisions concerning the director's position. No evidence was presented to support this contention.

The record clearly indicates that Mr. Merrick had a low regard for Complainant's professional abilities long before her complaint was filed with the Civil Rights Division. (Refer to Findings of Fact 14 and 20) The filing of the complaint, however, increased the level of tension between Complainant and Mr. Merrick in that it engendered the retaliatory actions described above.

Oregon law does not protect employees from adverse action or discharge by an employer solely on the basis of personal incompatibility. In this case, however, the level of personal hostility on the part of Mr. Merrick increased markedly after Ms. Jepson filed a complaint at the end of January 1978. Mr. Merrick's increased hostility

to Complainant resulted in a course of conduct intended to cause Complainant to resign, which in fact occurred on July 14, 1978. This course of conduct included various forms of harassment and verbal abuse, culminating in Complainant's demotion and the imposition of educational requirements as described above.

Complainant testified that the effects of Mr. Merrick's treatment of her included difficulty sleeping, moodiness both at home and in the office, and anxiety. To attribute all of Complainant's problems during the time period January to mid-July 1978 to Mr. Merrick and his retaliatory conduct is not reasonable.

The evidence shows that other factors may have contributed to the distress Complainant suffered during the period January to July 14, 1978. One factor, certainly, may have been the dispute between Mr. Merrick and Ms. Jepson. It is reasonable to presume that some of Mr. Merrick's hostility toward Complainant was a result of what Mr. Merrick considered a "declaration of war" by Mr. Jepson's November 17th letter. Another factor may have been the introduction of a new family member to Complainant's home.

Although the evidence presented shows factors other than employment which could have caused Complainant some anxiety, the evidence does establish that the filing of a discrimination complaint by Complainant was a substantial factor in Respondent's adverse employment decisions, a violation of ORS 659.030(1)(d). The evidence also shows that, despite the fact that Complainant did not do those things associated with larger pain and suffering awards (i.e., seek psychiatric or other medical aid), Complainant's anxiety was nonetheless real and primarily the result of Respondent's conduct.

Respondent contends that an award of damages for humiliation and loss of human dignity is inappropriate in cases arising under the retaliation provisions of ORS 659.030. In support of its position, Respondent has cited Oregon cases in which pain and suffering awards have been supported where the underlying facts include incidents of race discrimination, *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979). [*Also see Montgomery Ward v. Bureau of Labor,* 280 Or 163, 570 P2d 76 (1977), 42 Or App 159, 600 P2d 452 (1979).] It has further referred to *School District No. 1 v. Nilsen,* 271 Or 461, 534 P2d 1135 (1975), in which an award for pain, humiliation, and suffering was removed from the award. The case involved a pregnant school teacher, Sally Flurry, a probationary employee who was forced to resign because of her pregnancy. The Commissioner of the Bureau of Labor and Industries awarded Ms. Flurry $700 for the humiliation she suffered because of the Respondent's sexually discriminatory employment practices. In deleting the award for pain and suffering, the court found no evidence of humiliation, saying:

> "The best that can be said of complainant's proof is that she found the situation emotionally trying because . . . she became insecure and upset about what the future would bring." *Id.*, at 484.

Further in the opinion, the court found that the pressures about which

Ms. Flurry complained were those principally attendant to initiating litigation. *Id.*, at 485.

School District No. 1 is distinguishable from the present case. In *School District No. 1,* Ms. Flurry neither alleged nor proved retaliation as Complainant did here. Further, the court found that the School District's wrongful acts did not cause an inference of inferiority such as those described in *Williams v. Joyce* , 4 Or App 482, 479 P2d 513, *rev den* (1971), a race case. As found in this matter, Respondent acted in a manner intended to embarrass Complainant and to diminish her professional reputation. (*See* Finding of Fact 30, above) Finally, Ms. Flurry challenged a School District policy which affected all female teachers who became pregnant during their probationary period, rather than an act which only affected her. Here, Respondent's acts were directed solely at Complainant.

In view of the public interest in discouraging retaliatory conduct and considering the retaliatory conduct itself and the degree of mental suffering in evidence in this case, I conclude that such an award is appropriate and necessary.

Respondent correctly cited an error in the computation of interest as stated in the Proposed Order. This error has been corrected.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, a certified check payable to the Bureau of Labor and Industries in trust for Madeline M. Jepson in the gross amount of SIX HUNDRED FIFTY-SEVEN DOLLARS and EIGHTY CENTS ($657.80) representing:

a) Back Wage $157.80

b) Mental Suffering..... $500.00

Interest shall accrue on the back wages only ($157.80) at the rate of six per cent per annum compounded annually for the time period July 14, 1978, until July 25, 1979, and at the rate of nine per cent per annum for July 26, 1979, until June 1, 1982. Interest computed as described amounts to $56.70. Interest will continue to accrue at the legal rate until paid.

2) Cease and desist from discriminating on the basis of the filing of a prior complaint of discrimination.

In the Matter of
the CITY OF COOS BAY,
Respondent.

Case Number 134-80
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 30, 1982.

SYNOPSIS

Respondent did not commit an unlawful employment practice based on Complainant's previous utilization of the workers' compensation system when it failed to interview him for an entry level position he had previously held, where Complainant was the least skilled and least educated of the applicants, and Respondent was seeking a candidate with supervisory experience and potential. The Commissioner refused to amend the Specific Charges to include physical handicap, based on lack of proof, and dismissed the Specific Charges and the complaint. ORS 659.060(3); 659.410; 658.425.

The above-entitled matter came on regularly for hearing before Robert L. Chapman, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on June 16, 1981, in the State Forestry Building, Blue Room, 300 Fifth Street, Bay Park, Coos Bay, Oregon. The Bureau of Labor and Industries was represented by Daryl D. Wilson, Assistant Attorney General. Respondent City of Coos Bay was represented by Paula Bechtold, Attorney at Law. The Agency called Complainant Charles R. Chapin and Lee Martindale as witnesses. Respondent called Bryan Hudson, Construction Maintenance II; Joe Schwarm, Director of Public Works; and Tommy Crawford, Park Superintendent, as witnesses.

Having fully considered the entire record in this matter, I, Mary Roberts, make the following Ruling Upon Motion, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULING ON MOTION TO AMEND SPECIFIC CHARGES

At the close of the evidence in the above hearing, the Agency moved to amend the Specific Charges by written motion, which is on file herein. The motion sought to expand the theories of unlawful employment practice from those enumerated in ORS 659.410 or 659.415 to include discrimination based on impairment as contemplated by ORS 659.425. The Agency argues that the evidence had demonstrated that Respondent considered Complainant to be "accident prone" and that this perception or designation constituted a mental or physical impairment.

The Agency's motion is hereby denied.

While the Oregon Rules of Civil Procedure and the Bureau of Labor and Industries' administrative rules are very liberal in allowing pleadings to be amended to conform to the proof presented, no proof was offered that would require this amendment.

FINDINGS OF FACT – PROCEDURAL

1) At all times material herein, Respondent was an employer subject to

the provisions of ORS 659.010 and 659.110 and ORS 659.400 to 659.435.

2) On June 12, 1980, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by Respondent because he had applied for benefits or invoked or utilized the procedures provided for in Oregon law dealing with workers' compensation benefits.

3) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT -- THE MERITS

1) Complainant worked for Respondent through Neighborhood Youth Corporation (NYC) in Respondent's Parks Department from February 4, 1975, through June 16, 1975.

2) Complainant was employed by Respondent under the Comprehensive Employment and Training Act (CETA), Title VI, as a Construction-Maintenance I worker in the Parks Department from May 19, 1975, through June 30, 1976.

3) Complainant was employed by Respondent as a permanent employee, Construction-Maintenance I, in the Parks Department from June 9, 1977, through June 30, 1978.

4) Complainant was laid off on June 30, 1978, due to budgetary reasons.

5) On March 27, 1980 Respondent posted a job opening for Construction-Maintenance I, Parks Department. The position was to be temporary, with a maximum length of four months.

6) On March 28, 1980 the Oregon State Employment Division referred Complainant for the Construction-Maintenance I position in Respondent's Parks Department.

7) As a Construction-Maintenance I worker from June 1977 through June 1978, Complainant performed the same duties as were described in the Construction-Maintenance I position posted March 27, 1980.

8) Complainant applied for the position of Construction-Maintenance I, which was announced on March 27, 1980.

9) During the period May 1975 through May 1978, while working for Respondent, Complainant had twenty-seven on-the-job accidents and four on-the-job injuries compensated through the State Accident Insurance Fund (SAIF).

10) Complainant was not hired for the position of Construction-Maintenance I.

11) Respondent filled the position of Construction-Maintenance I, Parks Department, on April 8, 1980, by hiring Bryan Hudson.

12) In hiring for the position of Construction-Maintenance I, Respondent sought an applicant who would be capable of promotion to a position

designated as Construction - Maintenance II.

13) Respondent's Parks Department is small and employees characteristically advance to higher positions from entry level positions.

14) Complainant's job performance when he initially worked for the Parks Department was rated by his first supervisor, Lee Martindale, as excellent. Tommy Crawford, Complainant's supervisor from July 1, 1977, to June 30, 1978, rated Complainants work as average. Crawford testified, and this forum finds, that he spoke with Complainant about work that was not adequately completed.

15) Joe Schwarm, Director of Public Works, was the person responsible for the initial screening of applicants for the Construction-Maintenance I position posted at issue. It was Mr. Schwarm's decision not to interview Complainant. Complainant was excluded from the interview pool because he did not have a high school diploma or GED, did not have experience supervising adults, and limited experience operating and repairing machinery, and thus would not be eligible for promotion to the position of Construction-Maintenance II. All persons selected for an interview after screening all applications, were better qualified on paper than Complainant. There is no evidence that even without his prior workers' compensation claims or prior accidents Complainant would have been selected for an interview. Even if Complainant had been interviewed, it is extremely doubtful that he would have successfully competed against the other applicants, who had at least graduated from high school and had as much or more supervisory experience than Complainant. Merely because Complainant had previously worked for Respondent did not require that Respondent interview him when others more qualified had applied. Mr. Hudson, the person chosen for the position, had outstanding qualifications with seven times more supervisory experience than Complainant and extensive knowledge of small machine repair, and would have been hired even if Complainant had been interviewed.

16) Although, Mr. Crawford testified that he considered Complainant to be "accident prone," this was not a factor in Mr. Schwarm's decision not to interview Complainant. Mr. Crawford testified that Complainant would have been satisfactory in the position of Construction -Maintenance I, but because of his lack of education, failure to pass a test for a license to use spray chemicals, and lack of supervisory experience would not be eligible for promotion to Construction-Maintenance II.

ULTIMATE FINDINGS OF FACT

1) Complainant applied for the position of Construction-Maintenance I that was posted on March 27, 1980, by Respondent. The position was entry level, but it was anticipated that the person would be promoted to a supervisory position.

2) Complainant was not interviewed for this position.

3) Respondent's hiring decision was based on the opinion that Complainant would not be a satisfactory supervisor. Respondent's decision was not based on Complainant's prior

utilization of workers' compensation benefits.

CONCLUSIONS OF LAW

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

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

3) The actions, and motivations for these actions, of Respondent's employees described herein are properly imputed to Respondent.

4) Respondent did not commit an unlawful employment practice in violation of ORS 659.410.

OPINION

The evidence adduced at hearing indicated that although one of Respondent's supervisory employees considered Complainant to be "accident prone," the only factors considered in the decision not to interview Complainant were Complainant's lack of promotion potential, his difficulty in operating sophisticated equipment, and his lack of experience supervising adults.

The Agency has failed to demonstrate by a preponderance of the evidence that Respondent's decision not to hire Complainant was in anyway linked to his utilization of the workers' compensation program.

At the close of the hearing, the Agency moved to amend the Specific Charges to allege that Complainant had been discriminated against on the basis of physical or mental impairment. Evidently this motion to amend was predicated on a comment by a supervisor that Complainant was "accident prone." The Agency provided no definition of "accident prone" nor in any way connected the statement of being "accident prone" to any physical or mental impairment within the ambit of ORS 659.425.

Since the Agency failed to demonstrate that Complainant was not hired because he availed himself of the benefits of the workers' compensation system or because of a mental or physical handicap, the allegations that Respondent engaged in any unlawful practices must fail.

ORDER

NOW, THEREFORE, Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and the Complaint filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of

STATE OF OREGON, DEPARTMENT OF HUMAN RESOURCES,

Vocational Rehabilitation Division, Respondent.

Case Number 13-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued July 9, 1982.

SYNOPSIS

Respondent did not fail to reclassify Complainant or treat Complainant differently due to his age of 58, or due to his having filed a prior discrimination complaint against Respondent. Since there was no age discrimination and no retaliation, and since a delay in Complainant's upward reclassification did not justify resignation, the Commissioner found no constructive discharge, and no violation of ORS 659.030(1)(a) or (d). In denying Respondent's motion to dismiss Complainant's age discrimination complaint, in which Respondent asserted that ORS 659.026 deprived the Commissioner of jurisdiction, the Commissioner ruled that Complainant was not reduced, dismissed, suspended, or demoted as contemplated by that statute. The Commissioner dismissed the Specific Charges. ORS 240.555; 240.556; 659.026; 659.030(1)(a) and (d); 659.060(3).

The above-entitled matter came on regularly for hearing before Andrew H. Josephson, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries. The hearing commenced on March 24, 1981, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon, and continued through March 25, 1981, at the same location. Prior to hearing, a prehearing conference was held on July 3, 1980, to hear argument on Respondent's Motion to Dismiss. The Presiding Officer's Ruling Upon Motion To Dismiss is incorporated in this Final Order.

The Bureau of Labor and Industries was represented by Mary L. Stasack, Attorney at Law. Respondent, State of Oregon, Department of Human Resources, Vocational Rehabilitation Division, was represented by Josephine Hawthorne, Assistant Attorney General. The Agency called as witnesses Complainant Robert V. Guthrie; Anita Farrar, who, at times relevant herein, was employed in the Personnel Section of the Vocational Rehabilitation Division (hereinafter referred to as VRD); Susan Druffel, at times relevant, Personnel Director of VRD; Lester Norman, supervisor of the Workers' Compensation Division (hereinafter referred to as WCD) of VRD until sometime shortly after Complainant's hire, then Vocational Rehabilitation Counselor III; Lee Bercot, at times relevant, investigator with the Civil Rights Division of the Bureau of Labor and Industries; and Thomas Garbarino, at times relevant, a Vocational Rehabilitation Counselor. Respondent called as witnesses Susan Matthews, Complainant's supervisor at VRD at times relevant; Leslie Swope, Fiscal and Personnel Manager with the Oregon Commission of the Blind during the time

period 1970 through 1972; and Susan Druffel.

Having fully considered the entire record in this matter, I, Mary Roberts, hereby make the following Ruling on Motion, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULING UPON MOTION TO DISMISS

The above-entitled matter came on regularly for prehearing conference before Andrew H. Josephson, designated as Presiding Officer with the authority to rule on all preliminary motions by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries.

The prehearing conference commenced on July 3, 1980, in Room 908 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon, and continued through the same morning. The Bureau of Labor and Industries was represented by Charles Robinowitz, Attorney at Law, and Respondent was represented by Josephine Hawthorne, Assistant Attorney General. Complainant Robert V. Guthrie was also present.

Respondent made a motion to dismiss the Amended Specific Charges in this matter. This motion is based upon Respondent's contention that the Bureau of Labor and Industries lacks jurisdiction over the subject matter of the complaint upon which the Amended Specific Charges are based.

ORS 659.026 was in effect at the time the instant complaint was filed. This statute made it an unlawful practice for a public employer to discriminate because of age. Subsection two of ORS 659.026 states that:

> "The complaint and appeal procedure provided under this Chapter shall not apply to an employee, against whom an unlawful employment practice described in subsection (1) of this section has allegedly been practiced, to whom there applies a procedure for administrative review of the practice as provided under any other statute governing employment by a public employer."

Because Respondent is a public employer and this case involves allegations of discrimination because of age, ORS 659.026 is applicable.

Respondent argues that ORS chapter 240 establishes a procedure for administrative review of the unlawful employment practices herein alleged and that, under ORS 659.026(2), the existence of this procedure renders the complaint and appeal procedure of ORS chapter 659 inapplicable to Complainant. Respondent therefore concludes that the Bureau of Labor and Industries lacks jurisdiction over Complainant's complaint and that the Amended Specific Charges herein should be dismissed.

In order to rule upon this motion, I must examine ORS 240.555 and 240.560, the relevant statutes of ORS chapter 240.

ORS 240.555 requires the Personnel Division of the Oregon Executive Department to establish procedural rules to "suspend, reduce, demote or dismiss an employee." ORS 240.560 (1) states in pertinent part that:

> "A regular employee who is reduced, dismissed, suspended or demoted, shall have the right to appeal to the (Employment Relations) Board not later than 10 days after the effective date of such reduction, dismissal, suspension or demotion . . ."

The Amended Specific Charges in this matter allege that Respondent failed to promote Complainant and failed to inform him about the possibility of a lateral transfer. These allegations are not covered by ORS 240.555 and 240.560, which are limited to areas of suspension, reduction, demotion or dismissal. ORS 240.555 and 240.560 therefore do not offer Complainant a procedure for administrative review of the unlawful employment practices alleged in the Amended Specific Charges herein. Accordingly, ORS 659.026(2) does not apply to this matter.

Argument of the parties focused upon the question of whether or not Complainant was a "regular" employee on the date of his resignation. My above conclusions renders this question moot. I hereby rule therefore that the Bureau of Labor and Industries has jurisdiction under ORS chapter 659 over the allegations of unlawful employment practices made in the Amended Specific Charges herein. Respondent's Motion to Dismiss is denied.

FINDINGS OF FACT – PROCEDURAL

1) On April 7, 1977, Robert Guthrie filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by Respondent because of his age.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the Complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter the Civil Rights Division attempted to reach an informal resolution of the Complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

4) The allegation of retaliation for filing a Civil Rights complaint was first raised in the Specific Charges.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a division of the State of Oregon, Department of Human Resources, engaged in the administration of the vocational rehabilitation programs for the State of Oregon. Respondent engaged the personal service of one or more employees and reserved the right to control the means by which such service was performed.

2) Complainant was born on July 17, 1918.

3) On April 7, 1975, Complainant filed a complaint with the Bureau of Labor and Industries alleging that Respondent had not hired him for the position of Vocational Rehabilitation Counselor (hereinafter referred to as VRC) because of his age.

4) Prior to his employment with Respondent, Complainant had been a VRC II with the Oregon Commission for the Blind for approximately one and one-half years, and had several years experience as a Vocational Rehabilitation Counselor in California.

5) On July 6, 1976, Complainant was hired by Respondent as a VRC I. Complainant was hired by Respondent's supervisor, Lester Norman. Mr. Norman was encouraged by his supervisor, whose name he does not recall, to hire Complainant because of Complainant's age.

6) Complainant's job duties consisted of developing rehabilitation plans for injured individuals who were referred to the agency.

7) Mr. Norman was relieved of his supervisory duties soon after Complainant was hired. Respondent's new supervisor was Sandra Matthews.

8) Complainant first met Ms. Matthews approximately one month before he was hired, at an interview for a position at the North Portland office. Complainant testified that at that time he informed Ms. Matthews that he had filed a Civil Rights Complaint against VRD. Ms. Matthews testified that, at the time she became Complainant's supervisor, she knew he had filed a "complaint" of some sort. This forum, therefore, finds that at all times relevant herein, Ms. Matthews had knowledge of Complainant's filing of a Civil Rights complaint.

9) Though his job title was VRC I, Complainant was "under filling" a position which was budgeted as a VRC II. The duties of the VRC II are substantially the same as those of a VRC I. A VRC II, however, has more experience, works under less supervision and receives a higher salary than a VRC I. Ms. Matthews testified that she didn't know Complainant was underfilling a VRC II position.

10) Complainant assumed the case load of a former VRC I. Complainant rewrote a number of the original plans drafted by his predecessor which, according to his first performance appraisal, resulted in more realistic goals. The time Complainant spent re-writing plans limited the time he had to draft new rehabilitation plans. It is Respondent's goal to have each Counselor write an average of five new plans per month. Complainant wrote no new plans during the first two months of employment, but averaged five plans per month after that period.

11) Ms. Matthews wrote Complainant's first performance appraisal which covered the period from July 6, 1976, to September 6, 1976. The appraisal stated in part:

> "The quality of Bob's work is very good. He lacked referrals and original plans for the months of July and August, but has received 15 referrals and has written six plans for the month of September . . . Bob has done an excellent job of rewriting his case load and putting it in shape. He will now need to concentrate his efforts toward intake and original plan writing."

12) Complainant lived in Salem and commuted to Portland each day. He informed his supervisor that after he had been on the job for six months to one year, he would be interested in transferring to Salem. Transfer memoranda were distributed to Respondent's offices. At the WCB office, the lead secretary posted the memoranda on a bulletin board accessible to all employees. In approximately December 1976, a VRC I position became available in Salem. Complainant did not learn of the Salem position until after it had been filled. The evidence presented does not disclose whether or not the opening was posted.

13) Lee Bercot, a Field Investigator for CRD, investigated the complaint filed by Complainant. During the course of his investigation, he interviewed Thomas Garbarino, a former co-worker of Complainant. Mr. Garbarino is no longer employed by Respondent. He is now self-employed and a majority of his business (80 to 90 percent) is obtained through referrals from Respondent. Mr. Bercot testified as to his recollection of a statement made by Mr. Garbarino during the investigative interview. Mr. Garbarino had stated that he recalled a conversation he had with Ms. Matthews concerning Complainant in which Ms. Matthews stated that she felt that Complainant was forcing his way into the agency rather than attempting to gain entry to the agency through his merits as a professional. Complainant also testified that Mr. Garbarino related to him the substance of Ms. Matthews' comment while Complainant was still employed by Respondent.

Mr. Garbarino testified at the hearing that Mr. Bercot had misunderstood and misquoted him. Mr. Garbarino testified that Ms. Matthews had stated that Complainant felt that he was forcing his way into the agency. Mr. Bercot's testimony as supported by Complainant is deemed to be more credible than Mr. Garbarino's because of his lack of interest in the outcome of the case.

14) Sometime early in his trial service, Complainant verbally informed Ms. Matthews that he wanted to be reclassified to the position of VRC II. Ms. Matthews informed him that they would discuss his potential reclassification at the end of his trial service. (Trial service is a six month probationary period. Satisfactory completion of trial service results, among other things, in an employee's becoming a permanent employee.)

15) Complainant's second performance appraisal covered the period September 6, 1976, to December 1976, and was completed by Ms. Matthews. The appraisal report stated in part:

> "In four month's (sic) time, Mr. Guthrie has assumed and reviewed a full caseload and built the number of applicants in that case load to a productive level. Bob's work continues to be of good quality. His case load showed no production for the first two months but has since averaged five plans per month . . . Bob has thoroughly evaluated his case load and reviewed and rewritten plans as necessary. In addition he has begun to demonstrate an ability to maintain an even production flow in the last two months."

Additionally, Complainant was noted for having positive relationships with clients, vendors, and others.

In response to the appraisal form question, "To what extent and how well was the day to day work done?" Ms. Matthews wrote,

> "It was completed in a thorough and timely manner and showed the use of good judgment."

Complainant again received a B rating. Ms. Matthews stated during the

testimony that Complainant was not using enough variety of resources and had not yet developed an even flow of production. These remarks were not found on Complainant's performance appraisal. She also stated a "B" rating was average.

16)After receiving his second performance appraisal (in mid to late December 1976), Complainant again verbally requested that Ms. Matthews recommend his reclassification to a VRC II. Ms. Matthews stated that she would not recommend reclassification until Complainant had been employed with Respondent for a total of 12 to 18 months. Ms. Matthews statements to Complainant were consistent with statements she had made to other employees who desired reclassification.

Complainant informed Ms. Matthews that he was frustrated with the length of time it would take to be reclassified and told her that he was contemplating resigning from Respondent's employment because of this frustration.

17)During the majority of Complainant's trial service, Respondent's policy regarding reclassification was that when a person hired as a VRC I felt he met the qualifications for VRC II, he would notify the supervisor of his desire to be reclassified. If the supervisor agreed, the request for reclassification would be sent to Respondent Vocational Rehabilitation, personnel section for evaluation of qualifications. If the person was underfilling a VRC II position and met the minimum qualifications of a VRC II, he would be reclassified.

18)When Respondent considered a request to reclassify an employee, factors such as the number and quality of plans written, ability to participate in community activities, how long the person had worked for Respondent, the type of caseload carried, and availability of a position, among other factors were appraised. Respondent could not reclassify trial service employees and generally did not reclassify employees at the end of their trial service.

19)Respondent Vocational Rehabilitation's personnel section issued a document dated December 8, 1976. It stated:

> "When an employee who is underfilling a position, that is, filling a position at a lower level than that for which the position was budgeted and established, is able to meet the minimum qualifications established by the personnel division for the established level of the position, he/she shall be reclassified to the higher position unless dismissal action is pending.
>
> "The Personnel Office shall maintain a tickler file of persons underfilling, and shall process the appropriate documents to advance the employee automatically as soon as the employee is eligible for reclassification."

The effective date of this document was the date it was mailed, which was on or about December 8, 1976.

A document entitled - "710. RECLASSIFICATION FROM UNDERFILL," dated January 1977 and issued by Respondent's personnel section states that supervisory and line management approval is not required to implement the reclassification. It is Respondent's normal procedure to send

all such documents to its supervisors via interagency mail. Ms. Matthews was supervising two offices at this time. Copies of the memos would have been sent to both offices. Ms. Matthews does not remember receiving the memos at either office.

20)At an Unemployment Compensation hearing in approximately June 1977, Ms. Matthews testified that the documents referred to in Finding of Fact 19 (above) had been date stamped as received in the WCB office on January 5, 1977.

21)Complainant became a permanent status employee on January 6, 1977, six months after his effective date of employment. Complainant knew that his trial service would be completed on or about that date. Complainant testified, though, that when he had been hired he was told that he would receive three performance appraisals during his trail service and would be notified when his trial service was completed.

22)On January 11, 1977, Complainant dictated a memo of resignation addressed to Ms. Matthews which stated in part:

> "It is with regret that this resignation gives you no notice, but it is not expected that any notice would significantly change conditions or the situation.
>
> "Without becoming accusatory I am certain that you are well aware of the reasons this is (sic) being offered. My alternatives have been to either accept your invalid 'policy' for movement for Counselor II, my resignation, or a drawn out battle with OSEA in a grievance procedure. I am unable to accept the first choice and do not wish to rock the boat in choosing the latter. Therefore, my only course is resignation, and if this must come then it must come immediately."

Under cross examination, Complainant stated that even though he "knew" Ms. Matthews to be wrong in her interpretation of the reclassification policy, it would have been possible for him to remain in the job while trying to correct what he considered to be her erroneous interpretation of policy. This forum finds, therefore, that the work atmosphere to which Complainant was subject was not so outrageous as to compel a reasonable person in similar circumstances to resign.

23)Between January 6, 1977, and January 11, 1977, Respondents' Personnel Office began to process the appropriate documents to reclassify Complainant to VRC II. Complainant was unaware of this personnel action.

24)Respondent could not accept Complainant's written resignation because it was not signed. Since Respondent could not accept Complainant's resignation, he was considered to be absent without leave. According to Personnel Policy Rules issued by the State of Oregon, Executive Department, an employee who is absent for five days without leave is considered to have resigned. The applicable personnel policy # 71-200 states:

> "An unauthorized absence of an employee from duty shall be deemed to be an absence without pay and may be made grounds for disciplinary action by the

appointing authority. In the absence of such disciplinary action, any employee who absents himself for five consecutive work days without authorized leave shall be deemed to have resigned."

Complainant's Personnel Action form indicated:

"Employee deemed to have resigned five days unapproved leave."

Respondent's personnel section canceled Complainant's reclassification due to "Guthrie resigned (five days unapproved leave.)"

25) On February 2, 1977, Complainant wrote to Respondent's personnel manager, Donald L. Wahl. In the letter Complainant requested that certain corrections be made on Complainant's personnel action form. The personnel action form indicated that Complainant's class title was VRC I and his class position, meaning the class position he was filling, was VRC II. Complainant did not question these designations, since he was aware he was underfilling the position. Complainant indicated to Mr. Wahl that the reason for his resignation was not the five days unapproved leave but was based on his written resignation. In that letter Complainant also stated that he had no desire or intent to ever work for Respondent or make application for work any time in the future.

26) On February 8, 1977, Mr. Wahl responded. In his letter, Mr. Wahl stated that if Complainant had remained on the job he would have been reclassified to VRC II.

27) On March 9, 1977, Complainant wrote Larry Martin, Assistant Administrator of the Vocational Rehabilitation Division. The letter stated in part:

"I have previously advised Mr. Wahl that I would not reapply for VRD employment, and I will not. Under the circumstances as described and as they exist under such people at Mrs. Matthews, meaningful rehabilitation can only exist in spite of her rather than because of her."

At hearing, Complainant testified that if he could have been reinstated with a guarantee that "sanctions which had been used against me would not be levied against me, I would have been happy to work for them." Neither Complainant's February 2 nor his March 9, 1977, letters reflected this attitude. This forum therefore finds that it was reasonable for Respondent to rely upon Complainant's written statements.

28) Two VRC I's, both younger than Complainant, submitted written requests to Ms. Matthews requesting promotions to VRC II. She required between one year and eighteen months of experience as VRC I before she recommended their reclassification to VRC II. Complainant never submitted written request for reclassification.

29) Complainant was the oldest counselor in Respondent's office under Ms. Matthews' supervision. Mr. Norman, also under Ms. Matthews' supervision, was closest in age to Complainant. Mr. Norman was born on May 31, 1921, and testified, and this forum finds, that he (Mr. Norman) was not treated differently than other employees because of his age.

30) Complainant did not receive nor did he request a memo from Ms. Matthews informing him that he had successfully completed his trial service on January 6, 1977. Jack Gerringer, Complainant's co-worker, requested written confirmation of his satisfactory completion of trial service. Ms. Matthews did notify him, as he requested, and also recommended that he receive a one step salary increase.

ULTIMATE FINDINGS OF FACT

1) Complainant was born on July 27, 1918. Complainant had filed a previous Civil Rights complaint with CRD against Respondent on April 7, 1975, alleging that Respondent had not hired him for the position of Vocational Rehabilitation Counselor because of his age.

2) Complainant had the ability and qualification to perform the duties of VRC II and had approximately 1½ years experience as a VRC II prior to his employment with Respondent.

3) Respondent's supervisor, Ms. Matthews, required two employees who were younger than Complainant to have between one year and 18 months of experience before reclassifying them to VRC II positions.

4) Ms. Matthews failed to inform Complainant that he had successfully completed his probationary period and had permanent status. This failure has in no way aggrieved Complainant since he satisfactorily completed the probation and since, independent of Ms. Matthews, he knew when his probationary period would end.

5) Ms. Matthews did not know Complainant was underfilling a VRC II position. Ms. Matthews also did not know of the change in policy regarding reclassification from underfill.

6) Respondent did not treat Complainant differently from other employees because of his age.

7) Complainant, by his own admission, could have remained on the job and attempted to change Ms. Matthews interpretation of the reclassification policy (had the policy not already been changed) rather than resign.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent State of Oregon, Department of Human Resources, Vocational Rehabilitation Division, was an employer subject to the provisions of ORS 659.010 to 659.110.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and the subject matter herein. The actions and the motivation of Respondents' agents and Complainant's supervisors, described herein, are properly imputed to Respondent.

3) Respondent did not discriminate against Complainant because of his age, and hence did not violate ORS 659.030(1)(a).

4) Respondent did not retaliate against Complainant because he had previously filed a Civil Rights complaint against Respondent by failing to notify Complainant that he had successfully completed the probationary period of his employment and hence did not violate ORS 659.030(1)(d).

5) Respondent did not retaliate against Complainant because he had previously filed a Civil Rights complaint against Respondent by failing to notify Complainant that he was to be

automatically reclassified to the position of VRC II and hence did not violate ORS 659.030(1)(d).

6) Respondent did not constructively discharge Complainant because of his age nor in retaliation for having previously filed a Civil Rights complaint, and as such did not violate ORS 659.030(1)(d).

OPINION

The specific charges alleged that Complainant received different treatment by Respondent and was constructively discharged from Respondent's employment because of his age, or in the alternative, because of retaliation for filing a Civil Rights complaint against Respondent on April 17, 1975.

Complainant has alleged specific incidents which he felt were either in retaliation for filing a prior Civil Rights complaint or because of his age. These incidents were:

1. failure to notify him of a transfer position in Salem;
2. failure to notify him of his satisfactory completion of trial service; and
3. failure to reclassify him from VRC I to VRC I, or at least failure to notify him of the change in policy regarding automatic reclassification of those underfilling positions.

The combination of these, Complainant states, resulted in his resignation, which he feels should be viewed as a constructive discharge.

1. Failure to Notify Regarding Transfer Position

Both Complainant and Ms. Matthews agreed that Complainant had indicated that he wished to transfer from Portland to Salem after he had six months to one year experience in the Portland office. During his trial service (the first 6 months of his employment), two positions became available in Salem. Notices for these positions would, in the normal course of Respondent's business, have been posted on a bulletin board available to all employees. It was the responsibility of each employee to check this bulletin board for job notices and not the employer's obligation to notify each employee of vacancies.

Complainant stated, though, that Ms. Matthews destroyed one of the transfer notices rather than posting it on the board. Complainant painted the scene as follows: Upon learning of the opening in Salem, Complainant confronted Ms. Matthews about it. Ms. Matthews asked the secretary what Complainant's production had been during the previous months. Upon learning that his production was high, Ms. Matthews responded by saying "It's a good thing I ash-canned that memo (the Transfer Notice)." Complainant understood this to mean that Ms. Matthews had, because of some unlawful motive, prevented him from applying for the transfer.

Under cross-examination, Complainant admitted that the comment could be taken as a compliment – that Ms. Matthews wanted to keep any employee whose production was as high as his. Ms. Matthews testified that she had no recollection of making such a comment. Even if she had, there is no evidence to link such a comment to any unlawful conduct on Respondent's part.

2. Failure To Notify of Change in Policy Regarding Reclassification

Ms. Matthews testified that she was not aware that Complainant was underfilling a VRC II position. Ms. Druffel testified that the policy at the time of hearing was to notify managers of the number and classification of positions under their supervision. Ms. Druffel, however, was not employed in Respondent's personnel unit at times material, and therefore had no knowledge of Respondent's policy during Complainant's tenure.

Ms. Matthews also testified that she never read the memo at issue. It is arguable that as a supervisor, Ms. Matthews should have read the memo, but even if she had, she would not have automatically informed Complainant of the change in policy since she did not know he was underfilling a VRC II position. In the absence of evidence to the contrary, therefore, Ms. Matthews' failure to inform Complainant of the change in policy cannot be considered retaliatory.

3. Failure to Notify of Completion of Trial Service

Complainant testified that when he was hired he was told that he would be notified of the completion of his trial service. Complainant had been an employee of the State of Oregon before and knew that his trial service would end on January 6, 1977. In the absence of negative performance appraisals or disciplinary actions, Complainant had no reasonable basis to assume that he would not complete the trial service successfully. While it may have been an administrative nicety to notify him, the failure to do so does not rise to the level of retaliatory conduct, particularly since Complainant successfully completed the trial service.

4. Constructive Discharge

Since it has been found that Respondent did not retaliate against Complainant for having previously filed a Civil Rights complaint and since there is no link between Respondent and Complainant's age, the issue of constructive discharge is moot.

Respondent has raised the issue regarding the applicability of ORS 659.030 to a state employee since at times material ORS 659.026 was in effect. The Hearings Officer's Ruling Upon Motion has been incorporated into this Final Order to explain the original findings. It should be noted that even if the Hearings Officer was incorrect in his Ruling, ORS 659.026 dealt only with age discrimination. ORS 659.030 would, then, still be the applicable statute which to bring the charge of retaliation for the filing of the 1975 Civil Rights complaint which Complainant filed.

ORDER

NOW, THEREFORE, the Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and the complaint filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of

PACIFIC MOTOR TRUCKING COMPANY, a California corporation, Respondent.

Case Number 16-78

Final Order of the Commissioner

Mary Wendy Roberts

Issued July 16, 1982.

SYNOPSIS

Respondent rejected three Complainants for permanent hire as long-haul drivers, after each had worked satisfactorily as a casual driver, because of back conditions that did not prevent them from performing the duties of the position. The Commissioner found that "spina bifida occulta" put one Complainant at no greater risk of incapacity than the general population, that the presence of osteoarthritic spurs on his spine put another Complainant at the same risk of injury or incapacity as the general population, and that the spondylolisthesis of the third Complainant affected the possibility of future injury, rather than his present ability to do the job. Finding that none of the various conditions prevented the respective applicants from performing satisfactorily, and without present risk of incapacitation, the Commissioner held that Respondent committed unlawful employment practices in violation of ORS 659.425(1), and ordered Respondent to pay back-wages to the Complainants. ORS 659.010(2); 659.060(3); 659.095; 659.405(1); 659.425(1).

The above-entitled matter came on regularly for hearing before Michael J. O'Brien, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries. The hearing commenced on December 10, 1980, in Room 308 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon, and concluded on December 11, 1980, in the same location. The Bureau of Labor and Industries was represented by Thomas E. Twist, Assistant Attorney General. Respondent Pacific Motor Trucking Company was represented by Lawrence F. Janssen and Richard C. Hunt, Attorneys at Law. Complainants Michael E. McCartney, Herbert Fisher, and John D. McKay were present and testified.

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

FINDINGS OF FACT – PROCEDURAL

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

2) On August 25, 1976, Michael E. McCartney filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been discriminated against by Respondent in his efforts to obtain employment on account of a physical handicap.

3) On December 23, 1977, Herbert Fisher filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been discriminated against by Respondent in his efforts to obtain employment on account of a physical handicap.

4) On May 3, 1977, John D. McKay filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been discriminated against by Respondent in his efforts to obtain employment on account of a physical handicap.

5) Following the filing of the aforementioned verified complaints, the Civil Rights Division investigated the allegations of each complaint and determined that substantial evidence existed to support these allegations.

6) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaints through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

7) On January 12, 1979, a prehearing conference was held to receive arguments on Respondent's preliminary motions. A copy of the Hearing Officer's Rulings on Respondent's Preliminary Motions is attached hereto.

8) On February 21, 1980, a prehearing conference was held to receive arguments on Respondent's Preliminary Motions. A copy of the Hearing Officer's Rulings on Preliminary Motions of Respondent is part of the record herein.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a corporation duly organized under the laws of the State of California and authorized to do business in the State of Oregon.

2) Respondent is a wholly-owned subsidiary of Southern Pacific Transportation Company.

Complainant Michael E. McCartney:

3) Michael E. McCartney was employed on a part-time basis by Respondent in February 1976 as a casual heavy-duty truck driver.

4) In May 1976, Mr. McCartney submitted an application to Respondent for a full-time position as a heavy-duty truck driver.

5) In May 1976, Mr. McCartney was required to submit to a physical examination, including radiographic examination, in conjunction with his application for full-time employment.

6) Mr. McCartney failed to pass the physical examination, which was given in May 1976, due to the presence of a hernia.

7) In August 1976, Mr. McCartney presented a medical release from his personal physician to Respondent in connection with his prior application for employment.

8) On or about August 16, 1976, Mr. McCartney was advised by Respondent that he would not be hired as a heavy-duty truck driver because evaluation of the X-ray negatives taken in May 1976 revealed the presence of a congenital back abnormality diagnosed as spina bifida occult.

9) While employed as a casual heavy-duty truck driver by Respondent during the period February to May 1976, Mr. McCartney's duties included:

a) Pick-up and delivery of various shipments as a "hoopie" driver,

requiring 20 to 30 separate stops per day;

b) Loading and unloading of heavy cargoes on a daily basis; and,

c) Placing up to 1,000 cartons of groceries per day on pallets for mechanical loading or unloading.

10) On or about August 19, 1976, Mr. McCartney was employed as a heavy-duty truck driver by Farney Truck Service. Mr. McCartney's duties as a heavy-duty truck driver included:

a) Driving tractor-trailer trucks; and

b) Loading and unloading cabinets, steel, paper, 55-gallon drums, and a variety of other objects weighing up to 120 pounds on a regular basis.

11) Mr. McCartney routinely engages in strenuous physical activities, including skiing and football.

12) Mr. McCartney's work history includes a variety of positions which required strenuous physical activity and heavy lifting.

13) On or about September 9, 1980, Mr. McCartney submitted to a one-hour physical examination by Charles B. Bird, M.D., a professor of orthopedic surgery. The following results were obtained:

a) Physical findings were normal in all respects for Mr. McCartney's age;

b) Radiographic (X-ray) examination revealed the presence of spina bifida occulta, which was described as a failure of a vertebra to completely fuse or "close;"

c) The spina bifida occulta revealed in Mr. McCartney's spine was described as a "variant of normal" with no neurological involvement which, if present, may cause paralysis or other damage to the nervous system.

d) Radiographic examination also revealed the presence of limbus vertebra in the fifth lumbar vertebra (L-5). Limbus vertebra is a calcification that failed to fuse to the body in adjoining vertebra; it is considered to be a remnant of normal growth process;

e) Both conditions observed in Mr. McCartney's spine were asymptomatic.

14) Based on his examination of Mr. McCartney, Dr. Bird concluded that he was at no greater risk of incapacity than the general population.

15) Dr. Bird further testified, and I find, that Mr. McCartney was fully capable of performing the duties of a heavy-duty truck driver at all times.

16) Mr. McCartney is licensed as a truck driver by the Interstate Commerce Commission. Licensure with the agency requires a physical examination every two years. Mr. McCartney was last examined for that purpose in 1979.

17) According to medical schedules currently maintained by Respondent, the presence of spina bifida occulta does not automatically disqualify an applicant from employment.

18) On or about August 19, 1976, Mr. McCartney was employed as a truck driver by Farney Truck Services and he has remained in that position until the date of hearing.

19) As a result of Respondent's unlawful employment practices, as found herein, Mr. McCartney sustained lost wages in the amount of $296.97. Such amount represents the differential between Mr. McCartney's actual earnings through July 23, 1978, and the amount he would have earned but for Respondent's unlawful practices.

Complainant Herbert Fisher:

20) Herbert Fisher was employed by Respondent as a casual, heavy-duty truck driver for approximately two and one-half years prior to December 9, 1977.

21) On or about December 9, 1977 Mr. Fisher was advised by Respondent that he was ineligible for employment as a full-time, heavy-duty truck driver due to the presence of osteoarthritic spurs on his spine.

22) Following the rejection of his application for employment by Respondent, Mr. Fisher was employed as a heavy-duty truck driver by Oregon-Washington Transport Company for a period of approximately two and one-half years. His duties in that position included:

a) Loading and unloading freight such as automotive parts and groceries from trucks;

b) Frequent heavy lifting of weights up to 150 pounds; and

c) Driving.

23) For a description of duties of a heavy-duty truck driver in Respondent's employ, refer to Finding of Fact 9.

24) Mr. Fisher's work history includes a number of positions which required heavy lifting in such areas as construction, agriculture, and truck driving.

25) Mr. Fisher's activities routinely include bowling, hunting, and fishing; he was also active in high school athletics.

26) On or about September 17, 1980, Mr. Fisher submitted to a one-hour physical examination by Charles Bird, M.D. The following results were obtained:

a) Physical findings were normal in all respects for Mr. Fisher's age;

b) Radiographic examination revealed the presence of osteoarthritic spicules, also known as traction spurs, on the third, fourth, and fifth lumbar vertebrae (L-3 to L-5);

c) Osteoarthritic spicules are believed to result from the growth of new bone material due to inflammation of adjacent ligaments; such inflammation may be caused by a strain or injury of some kind;

d) The osteoarthritic spicules observed in the lumbar vertebrae are not advanced or severe for Mr. Fisher's age;

e) There was no other indication or abnormalities; and,

f) Mr. Fisher's condition is asymptomatic.

27) Dr. Bird testified, and I find, that Mr. Fisher was fully capable of performing the duties of a heavy-duty truck driver at all relevant times.

28) The risk of injury or incapacity due to Mr. Fisher's back condition is the same as that of the general population regardless of occupation.

29) The presence of osteoarthritic spicules was disqualifying under a medical schedule maintained by Respondent in 1977. Those standards have since been modified so that a prospective employee is no longer barred solely on the basis of such condition.

30) Mr. Fisher was duly licensed as a truck driver by the Interstate Commerce Commission at all relevant times. (*See* Finding of Fact 16)

31) As a result of Respondent's unlawful employment practices, as found herein, Mr. Fisher lost wages in an amount to be determined based on the difference between his actual earnings since December 9, 1977, and the amount he would have earned but for Respondent's unlawful practices.

Complainant John D. McKay:

32) John D. McKay was employed by Respondent as a casual, heavy-duty truck driver for a total of approximately 10 months prior to April 16, 1977.

33) In his capacity as a heavy-duty truck driver, Mr. McKay's duties included loading and unloading of small boxes and 55-gallon drums from trucks. (For additional detail regarding the duties of a heavy-duty truck driver, refer to Finding of Fact 9.)

34) On or about April 15, 1977, Respondent rejected Mr. McKay's application for full-time employment as a heavy-duty truck driver on the basis of a back condition which was revealed by radiographic evaluation. The information concerning Mr. McKay's condition was provided by a registered nurse employed by his physician in a telephone conversation with Respondent's Manager, Mr. Carl Wallner. Respondent's company physician did not examine Mr. McKay's x-rays and no physical examination was administered by Respondent in conjunction with Mr. McKay's application for employment.

35) Mr. McKay's employment history includes a number of positions which required heavy lifting of a variety of freight, including: unloading barrels and large containers of soap; loading and unloading beer trucks; lifting 100-pound sacks and 40-pound tins; building, stacking, and binding trusses; and similar tasks related to the duties of a heavy-duty truck driver.

36) Mr. McKay was employed by Union Pacific Railroad as a heavy-duty truck driver on or about May 4, 1979, and has continued in that capacity to the date of hearing. Mr. McKay successfully completed a physical examination prior to acceptance of his application by that employer.

37) At the time of hearing, Mr. McKay was 43 years of age.

38) On or about September 11, 1980, Mr. McKay was examined for approximately one hour by Charles B. Bird, M.D. The following results were obtained:

a) There was no evidence of physical problems in Mr. McKay's back, although Dr. Bird noted the presence of a slight scoliosis or curvature of the spine;

b) Radiographic examination revealed the presence of three abnormalities of the spine: scoliosis, spina bifida occulta, and spondylolisthesis.

c) Spina bifida occulta results from the failure of a vertebra to completely fuse or "close;" (Refer to Finding of Fact 13.)

d) Spondylolisthesis is the forward dislocation of one or more vertebra on the one below; in Mr. McKay's case, x-rays revealed the forward slippage of the fifth lumbar vertebra (L-5) over the first sacra vertebra (S-1);

e) Spondylolisthesis may be classified according to the degree of the forward dislocation; a grade one spondylolisthesis exists when the forward slippage of the vertebra is 25% or less; a grade two spondylolisthesis represents forward slippage of 25-50%; and so forth through grades three or four.

f) Mr. McKay's condition is classified as grade one under either a three or four-point scale;

g) The etiology or cause of spondylolisthesis is unknown; it may be either congenital or traumatic in origin;

h) A grade one spondylolisthesis will not necessarily cause any notable disability; and,

i) Mr. McKay's spondylolisthesis is asymptomatic as of the date of hearing.

39) Dr. Bird testified, and this forum finds, that:

a) Mr. McKay was at all relevant times, physically capable of performing the duties of a heavy-duty truck driver;

b) A grade one spondylolisthesis may cause back pain of varying degrees, although many persons with the condition never develop incapacitating back problems;

c) In itself, driving a truck would not present any risk of incapacity to Mr. McKay or risk of injury to others;

d) Lifting or unloading of heavy objects may present a significant danger or injury or incapacity to Mr. McKay as well as some danger of injury to others;

e) Although there is a medical probability in excess of 50 percent that Mr. McKay could perform the duties of a heavy-duty truck driver without experiencing back problems, Dr. Bird would encourage him to pursue another vocation which presents less risk of injury or incapacity.

40) Prior to hearing, Mr. McKay's x-rays were examined by Edward A. Grossenbacher, M.D., an orthopedic surgeon. Dr. Grossenbacher testified for Respondent, and I find, that:

a) Lack of current symptoms associated with spondylolisthesis is not predictive that the condition will not become painful or incapacitating in the future; and,

b) Where there is any history of injury to the affected area of the spine, the risk of recurrence or aggravation of such injury is enhanced due to the progressive nature of spondylolisthesis. No evidence was presented to show that Mr. McKay had ever injured the L-5, S-1 section of his back.

41) Prior to hearing, Mr. McKay's x-rays were also examined by John E. Myers, M.D., Respondent's chief medical officer and a specialist in preventive and occupational medicine. Dr. Myers testified that::

a) Spondylolisthesis affects approximately two percent of the general population;

b) Spondylolisthesis is a progressive, degenerative condition which tends to become more serious with advancing age. Because of the elasticity of muscles, tendons and ligaments naturally diminishes with age, and there is increasingly less support for a skeletal structure which is already weakened by the dislocation of the vertebra affected by spondylolisthesis. The degenerative processes of aging

consequently places increasing stresses on areas of the spine which are already susceptible to injury;

c) Spondylolisthesis is most prevalent at the lumbar level of the spine because that area bears substantial weight and stresses due to movement;

d) Spondylolisthesis may be treated by a spinal fusion of the affected vertebrae; however, more conservative treatment is favored because fusion places substantial additional stresses on unfused vertebrae;

e) The presence of mild scoliosis and the partial sacralization of the first sacral vertebra (S-1) enhance the risk of injury due to spondylolisthesis at the L-5, S-1 level;

f) There is substantial probability or risk that a person with a grade one spondylolisthesis will eventually develop chronic back pain and chronic disability;

g) The risk of injury or incapacity is greatly increased for persons with spondylolisthesis who perform the duties of a heavy-duty ("pickup and delivery") driver;

h) Asymptomatic and undetected spondylolisthesis is frequently associated with disabling back injuries, which occur among workers between the ages of 40 and 50; and

i) Respondent maintains a consistent practice of requiring radiographic examination of all prospective employees in order to detect potentially painful or disabling conditions.

42) This forum adopts those statements by Dr. Myers which are consistent with those of Drs. Bird and Grossenbacher (above). As regarding the potential for injury, greater weight is given to the testimony of Drs. Bird and Grossenbacher, both orthopedists.

43) At the time of his application, Mr. McKay had the ability to perform the duties of heavy-duty truck driver. The presence of spondylolisthesis goes to the possibility of future injury, rather than to current or present ability to do the job. Mr. McKay's "Present ability to do the job" is supported by the fact that he had performed the duties of the job satisfactorily as a casual driver for ten months prior to his rejection for full-time employment.

ULTIMATE FINDINGS OF FACT

1) Respondent is an employer, which, in the State of Oregon, engages or utilizes the services of one or more employees reserving the right to control the means by which such service is performed.

2) On or about August 16, 1976, Mr. McCartney was denied employment by Respondent due to a medical diagnosis of spina bifida occulta, a physical handicap.

3) Spina bifida occulta is a physical handicap which, to the degree it affected Mr. McCartney, is unrelated to his ability to perform the duties of a heavy-duty truck driver, a position for which Mr. McCartney was otherwise eligible or qualified at all relevant times.

4) Respondent has failed to show that Mr. McCartney's degree of spina bifida occulta prevents the performance of the work involved in the position of a heavy-duty truck driver or that such a defect creates a probability that he could perform such duties only at the risk of incapacitating himself.

5) As a result of Respondent's unlawful employment practices, as found herein, Mr. McCartney sustained lost wages in the amount of $296.97.

6) On or about December 9, 1977, Respondent denied full-time employment to Herbert Fisher due to a medical diagnosis of osteoarthritic spicules on the third, fourth, and fifth lumbar vertebrae.

7) Osteoarthritic spicules are a physical handicap which, to the degree it affected Mr. Fisher, is unrelated to his ability to perform the duties of a heavy-duty truck driver, a position for which Mr. Fisher was otherwise eligible or qualified at all times.

8) Respondent has failed to show that Mr. Fisher's degree of osteoarthritic spicules prevent the performance of the work involved in the position of heavy-duty truck driver or that such a defect creates a probability that he could perform such duties only at the risk of incapacitating himself.

9) As a result of Respondent's unlawful employment practices, as found herein, Mr. Fisher sustained lost wages in an amount to be determined based on the difference between his actual earnings since December 9, 1977, and the amount he would have earned, but for Respondent's unlawful practices.

10) On or about April 15, 1977, Respondent denied full-time employment to John D. McKay due to a medical diagnosis of spondylolisthesis, a physical handicap.

11) At all relevant times, Mr. McKay was capable of performing the duties of heavy-duty truck driver notwithstanding his physical handicap. Mr. McKay had been efficiently performing these duties for Respondent for ten months prior to his rejection for full time employment and successfully performed similar duties subsequent to his rejection by Respondent.

12) Mr. McKay's radiographic examination reveals a grade one spondylolisthesis representing a forward displacement of the fifth lumbar vertebra over the first sacral vertebra of 25 percent or less.

13) Spondylolisthesis is a physical handicap which, depending on its severity, may be related to a prospective employee's ability to perform the duties of a heavy-duty truck driver. The presence of this condition, however, does not guarantee inability to successfully perform such duties.

14) At the time of his rejection, Mr. McKay had the ability to perform the duty of heavy-duty truck driver at no higher risk of injury or incapacitation than others.

15) As a result of Respondent's unlawful employment practices, as found herein, Mr. McKay sustained lost wages in an amount to be determined based on the difference between his actual earnings since April 15, 1977, and the amount he would have earned but for Respondent's unlawful practice.

CONCLUSIONS OF LAW

1) Respondent is an "employer" as defined by ORS 659.010(6).

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

3) The actions of Respondent's employees and agents as described

herein are properly imputed to Respondent.

4) The Bureau has alleged facts sufficient to establish a violation of ORS 659.425(1) with respect to each Complainant. Respondent's claim that the Bureau has failed to state a claim upon such relief can be granted is without merit.

5) Application of ORS 659.010 to 659.100 and 659.400 to 659.435 to Respondent does not place an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution. There has been no showing that state regulation in this area discriminates against interstate commerce or undermines its required uniformity. *Huron Portland Cement Co. v. City of Detroit,* 362 US 440 (1960).

6) Federal legislation in the area of interstate transportation, particularly the requirements set forth in 49 CFR Part 391, does not preempt state regulation as embodied in ORS 659.010 *et seq.* Respondent has made no showing that it is being held to a state standard which is higher than, or conflicts with, the federal standard.

7) The matters raised by Respondent's Fifth and Sixth Defenses, as set fourth in its Answer, were addressed at a Prehearing Conference which was conducted on February 21, 1980. Absent a compelling legal or factual basis, the rulings of the Presiding Officer will not be disturbed as to those matters.

8) Respondent's right to due process has not been violated by the failure of the Bureau to separate its adjudicative function from its investigative and prosecutorial functions. *Withrow v. Larkin*, 421 US 35 (1975).

9) The generalized views of counsel for the Bureau on matters of law and public policy do not, without more evidence, establish that the Commissioner has prejudged the factual or legal issues presented by a particular case before her.

10) The administrative remedies provided by the Federal Highway Administration, as set forth in 49 CFR Parts 390 and 391, are cumulative rather than exclusive. The failure of Complainants to exhaust such remedies does not preclude pursuit of state remedies under ORS 659.010 *et seq.*

11) The Amended Specific Charges were timely brought with respect to each Complainant. The time limitations established in ORS 659.095 are not applicable to complaints filed with the Civil Rights Division prior to October 3, 1979. Oregon Laws 1979 ch. 843, sec. 2.

12) Respondent's rejection of Mr. McCartney's application for full-time employment on the basis of a diagnosis of spina bifida occulta constitutes unlawful discrimination on account of a physical handicap which does not prevent performance of the work involved, and is a violation of ORS 659.425.

13) Respondent's rejection of Mr. Fisher's application for full-time employment on the basis of a diagnosis of osteoarthritis of the spine constitutes unlawful discrimination on account of a physical handicap which does not prevent performance of the work involved, and is a violation of ORS 659.425.

14) The presence of grade one spondylolisthesis may not, in itself, bar a prospective employee from obtaining employment which requires heavy lifting or strenuous physical activity.

15) Since Mr. McKay had the current or present ability to perform the duties of heavy-duty truck driving, Respondent's rejection of his application for full-time employment constitutes a violation of ORS 659.425.

16) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Messrs. McCartney, Fisher, and McKay under the facts and circumstances of this record, and the sums of money awarded as damages in the Order below are an appropriate award.

17) Under the facts and circumstances of this record, the Commissioner of the Bureau of Labor and Industries has the authority to order the reinstatement of Mr. Fisher as a truck driver with an award of seniority retroactive to December 9, 1977.

OPINION

The Amended Specific Charges allege violations of the Handicapped Workers Civil Rights Act (ORS 659.400 *et seq.*) with respect to Respondent's refusal to employ complainants McCartney, Fisher, and McKay as heavy-duty truck drivers. The pertinent section of the Act, ORS 659.425, provides as follows:

> "(1) It is an unlawful employment practice for any employer to refuse to hire, employ or promote or to bar, or discharge, dismiss, reduce in compensation, suspend, demote or discriminate in work activities, terms, conditions or privileges of employment because an individual has a physical or mental handicap, unless it can be shown that the particular handicap prevents the performance of the work involved."

The broad policy objectives of the Act are to guarantee to handicapped persons the "fullest possible participation in the social and economic life of the state (and the right) to engage in remunerative employment." ORS 659.405(1).

Complainants McCartney, Fisher, and McKay exhibit a variety of congenital and traumatic back conditions which disqualified them from full-time employment with Respondent under medical standards which were applied during 1976 and 1977. Each Complainant was indisputably capable of performing the duties of a heavy-duty truck driver when he sought such employment. Indeed, all three complainants worked as casual drivers for Respondent for extended periods of time without mishap or injury. Finally, all three complainants have worked in positions with other employers which required heavy lifting and other strenuous labor virtually identical to the duties of a heavy-duty truck driver in Respondent's employ.

Of the three complainants, only Mr. McKay has experienced back pain, but this was not shown to be caused by his condition. Uncontroverted medical testimony in this case establishes that all three complainants were essentially asymptomatic as of the date of the hearing.

In order to justify rejection of an applicant with a physical handicap, ORS 659.425(1) requires an employer to show "that a particular handicap prevents the performance of the work

involved." This standard places a heavy burden on an employer.

In this case, it is clear that none of the handicaps "prevents the performance of the work involved." All three complainants have in fact been successfully performing the duties of a heavy-duty truck driver without injury for significant periods of time. In construing ORS 659.425(1), however, the Oregon Supreme Court concluded that:

> "* * * (T)he legislature intended by the statutory language to impose upon an employer the obligation not to reject a prospective employee because of a mental or physical handicap unless there is, because of the defect, a probability either that the employee cannot do the job in a satisfactory manner or that he can do so only at the risk of incapacitating himself."

Montgomery Ward v. Bureau of Labor, 280 Or 163, 168-69, 570 P2d 76 (1977). (Emphasis supplied.)

Respondent does not contend that there was a probability that any of the complainants could not "do the job in a satisfactory manner." Therefore, each case must be examined to determine whether the complainant's handicap created a risk of incapacity in performing the duties of the position sought.

Complainant McCartney

The medical evidence establishes that Mr. McCartney exhibits two benign conditions of the lower back diagnosed as spina bifida occulta and limbus vertebra. Of the two conditions, the former is considered somewhat more significant because severe cases can be associated with paralysis. However, both conditions are asymptomatic, and neither is likely to cause any debilitating complications with advancing age. Mr. McCartney was fully capable of performing the duties of a heavy-duty truck driver in Respondent's employ without any risk of incapacitating himself due to his back conditions.

Since 1977, Respondent has revised its medical schedules so that a diagnosis of spina bifida occults is no longer an automatic bar to full-time employment as a heavy-duty truck driver. It was improper to disqualify Mr. McCartney in 1976 on the basis of the more restrictive schedule which was applied at that time. Accordingly, Respondent violated ORS 659.425 by refusing to employ Mr. McCartney on the basis of a physical handicap which would not prevent the performance of the work involved or expose him to a risk of incapacitating himself.

Complainant Fisher

Radiographic examination of Mr. Fisher resulted in a diagnosis of osteoarthritic spicules or "traction spurs" in the lumbar spine. This condition does not present any risk of injury or incapacity beyond that faced by the general population regardless of occupation. Mr. Fisher was at all times fully capable of performing the duties of a heavy-duty truck driver without any enhanced risk of injury due to osteoarthritis.

As in Mr. McCartney's case, Mr. Fisher was disqualified from employment on the basis of a classification scheme which was applied by Respondent in 1977. Mr. Fisher would not be disqualified under the scheme which now exists.

Respondent's refusal to hire Mr. Fisher on the basis of a diagnosis of osteoarthritis constitutes a violation of ORS 659.425(1).

Complainant McKay

As in the cases of Messrs. McCartney and Fisher, there is no significant factual dispute concerning Mr. McKay's physical condition. X-rays reveal the presence of a congenital or traumatic condition diagnosed as spondylolisthesis, a forward displacement of one vertebra over another. This condition is compounded to some extent by a mild scoliosis, or curvature of the spine.

Mr. McKay's condition is described as a grade one spondylolisthesis, meaning that a forward dislocation of less than 25 percent has occurred. With increasing age or aggravation by injury, this condition could progress to grade two or three, however it is also possible for the condition to remain unchanged and asymptomatic. Although treatment of spondylolisthesis by spinal fusion is possible, more conservative measures, including mild exercise, are preferred. In an advanced case, neurological involvement is possible.

Mr. McKay's condition was asymptomatic at the time of hearing. He has successfully performed in a variety of jobs requiring heavy lifting without experiencing any difficulties at all. He was employed by Respondent as a casual truck driver for approximately 10 months before his application for full-time employment was rejected. Subsequent to his rejection by Respondent, Mr. McKay successfully passed a pre-employment physical examination for the position of heavy-duty truck driver, and was employed in this capacity, by Union Pacific Railroad.

The Bureau's expert witness, Dr. Charles B. Bird, testified that many patients with spondylolisthesis never experience debilitating pain or disability. In fact, he further stated that it was medically probable, "over 50 percent probable, that (Mr. McKay). will never have any trouble . . ." However, he also testified that he would encourage Mr. McKay to pursue another occupation if he were his patient, since "those are bad odds if you are a human being." Respondent's expert witness, Dr. John E. Myers, testified that Mr. McKay faces an "exceedingly high" possibility of experiencing back problems if he continues to perform strenuous work. It should be noted, though, that Dr. Myers is not an orthopedist and that it is his decision to disqualify Mr. McKay which is here at issue.

The record in Mr. McKay's case establishes:

1) that he was at all times capable of performing the duties of a full-time, heavy-duty truck driver despite his back condition; and

2) that he might be exposed to a risk of incapacity if he is employed in a position requiring heavy lifting or strenuous activity.

The question to be resolved is whether the risk of such incapacity is sufficient to justify rejection of his application for employment in view of the broad remedial purposes of ORS 659.400 *et seq.*

The difficulty of resolving this issue is compounded by the parties inability to agree on the meaning of the standard set in *Montgomery Ward v.*

Bureau of Labor, 280 Or 163, 570 P2d 76 (1977). In that case, the court stated:

> "It is our conclusion that the legislature intended by statutory language to impose upon an employer the obligation not to reject a prospective employee because of a physical or mental handicap unless there is, because of the defect, a probability either that the employee cannot do the job in a satisfactory manner or that he can do so only at the risk of incapacitating himself." *Id.* at 167-169.

Specifically at issue is the meaning of the phrase ". . . a probability . . . that he can do so only at the risk of incapacitating himself." In setting the standard the Oregon Supreme Court rejected the Commissioner's Order which required a showing of "high" probability of incapacitation as well as the Court of Appeals standard of "reasonable possibility" of incapacitation. *Id* at 168. At least in this regard, then, the determination of probability appears to be left to the testimony of experts. In the instant case, Dr. Bird testified that in his opinion the medical probability was in excess of 50 percent that Mr. McKay could perform the duties of a heavy-duty truck driver without experiencing back problems.

Of concern, though, is that both Dr. Bird and Dr. Myers testified that since spondylolisthesis is a degenerative condition the possibility of injury may become greater as Mr. McKay ages. This, then, raises a question as to the time frame within which a person is at risk of injury. Does *Montgomery Ward,* then, mean immediate or present risk of injury or risk of injury at some time in the future however distant?

As stated in ORS 659.405, public policy regarding handicapped employees guarantees "the fullest possible participation in the . . . economic life of the state, to engage in remunerative employment . . ." To effectuate this policy it is this forum's opinion that risk of injury or incapacitation should mean current or present risk of injury. To foster a standard which would permit an employer to disqualify a handicapped worker because he or she might be at risk of injury at some unknown time in the future would eviscerate public policy.

Other jurisdictions have adopted this "present risk" standard. In *Bucyrus-Erie Co. v. D.I.L.H.R.,* 22 FEP 563 (1977), the Wisconsin Supreme Court considered whether Bucyrus-Erie properly rejected an applicant for a welder's position who had, as Complainant herein, spondylolisthesis of the fifth lumbar vertebra. The welder's job involved moderately heavy work including the ability to carry and pull weights up to 60 pounds. In supporting the D.I.L.H.R. ruling which found that Bucyrus-Erie had discriminated against the applicant on the basis of a physical handicap, the court said:

> "If the evidence shows that the applicant has a present ability to physically accomplish the tasks which make up the job duties, the employer must establish to a reasonable probability that because of the complainant's physical condition, employment in the position sought would be hazardous to the health or safety of the complainant and other employees or frequenters to the place of employment." *Id.*, at 568.

Western Weighing v. D.I.L.H.R., 21 FEP 1733 (1977), considered an employee, a railroad inspector, with spondylolisthesis. The employee had previously been employed with Western Weighing in a more strenuous job than the inspector's position. Upon being hired as an inspector, the employee was subjected to a physical examination and, upon the discovery of spondylolisthesis, the employee was terminated. The court stated Western Weighing had not shown that the employee's back condition precluded him from "presently efficiently performing his duties as an inspector. Rather, the medical testimony related to what might occur in the future." *Id.,* at 1735. (Emphasis supplied.)

While the inspector's job is less strenuous than that at issue here, the relevance of *Western Weighing* is its emphasis on the present ability to perform the tasks.

The California Court of Appeals considered the issue of present risk of injury in *Sterling Transit Co. v. FEPC,* 28 FEP 1351, 175 Cal Rptr 548 (1981). In this case, Jose Bustamante was denied a permanent truck driving position after having held the identical job in a temporary capacity for 19 months and after having performed similar duties for other employers for ten years. Bustamante was rejected because a pre-employment physical revealed scoliosis.

Sterling first attempted to defend its actions on the basis of a bona fide occupational qualification (BFOQ). The California Court rejected this saying:

> "The BFOQ defense relates to whether handicapped persons are unable to presently safely and efficiently perform the job duties. If the employer carries his burden of proof all persons within an otherwise protected class may be excluded from employment without inquiry as to whether certain members of the class may, in fact, be capable of safe and efficient job performance." *Id.,* at 1353. (Emphasis in original.)

Sterling also attempted to defend on the basis of safety. The evidence presented showed that Bustamante has a low back condition that makes him more susceptible to back injury than persons not so affected; that the job involved constant lifting, bending and stooping; and that he had regularly performed similar (or identical) duties for a total of nearly 12 years. The court, in considering these factors and the medical evidence presented, concluded that:

> "Sterling's evidence, at best, shows a possibility Bustamante might endanger his health sometime in the future. In light of the strong policy for providing equal employment opportunity, such conjecture will not justify a refusal to employ a handicapped person." *Id.,* at 1354. (Emphasis in original.)

Sterling's last argument was that its actions were reasonable in light of the employer's liability for possible medical treatment, workers' compensation, employee replacement costs and the like. While the court recognized these concerns, it concluded that there was no ambiguity in the language of the statute and that the court was not

empowered to create a financial impact exception.

Respondent, Pacific Motor Trucking, raised similar arguments regarding the cost to its business, and then to the consumer, of the handicapped worker who is injured on the job. As in *Sterling Transit,* the language of the Oregon statute is unambiguous. In drafting this statute the legislature did so very narrowly to effectuate its policy as set forth in ORS 659.405. It would, then, be up to the legislature to determine whether a financial impact exception would eviscerate that policy.

In all of the cases cited above, the courts emphasized that employment evaluations should be conducted on an individual basis considering, among other things, factors such as the nature of the physical handicap and the nature of the job, and the applicant's previous success in performing the duties of the job. Such a review here should have considered the fact that Mr. McKay had been performing the job successfully for ten months prior to Respondent's rejection of his application.

With respect to damages, the Hearings Officer found sufficient evidence to sustain the award of damages to Mr. McCartney set forth in the Order below. The parties, however, will have to supply additional information regarding damages for Messrs. Fisher and McKay.

Respondent, in its Post-Hearing Memorandum, contends that the Bureau has failed to provide sufficient evidence of damages, and that the "evidence fails to establish that claimants accepted all available work." These claims are without merit. The burden of proof is on Respondent to show lack of mitigation by Complainants. *In the Matter of Veneer Services, Inc.,* 2 BOLI 179 (1981). Respondent has not satisfied this burden.

It is the policy of the Bureau of Labor and Industries to award interest on back pay awards. The general formula is as follows and will be applied to the back pay awards of each Complainant:

a) six percent annually on the back pay award during the period which commences with the unlawful employment practice found and ends on July 25, 1979. A back pay award is calculated by determining the difference between what Complainant would have earned in Respondent's employ, but for Respondent's unlawful employment practice, and what Complainant actually earned;

b) nine percent annually on the back pay award starting July 26, 1979, to the date Respondent complies with the Order below.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for MICHAEL E. McCARTNEY in the gross amount of Two Hundred Ninety-six Dollars and Ninety-seven Cents ($296.97), which represents back pay plus interest calculated according to the formula above.

2) Meet with Tom Twist, Assistant Attorney General, or his representative to:

a) compute what Complainant Fisher would have earned between December 9, 1977, and the time when he either obtained employment which paid the same or more than did Respondent, or until he was not available for work;

b) compute the amount of interest due to Fisher, according to the opinion above;

c) compute what Complainant McKay would have earned between April 15, 1977, and the time when he either obtained employment which paid the same or more than did Respondent, or until he was not available for work;

d) compute the amount of interest due McKay according to the opinion above.

3) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for HERBERT FISHER in the amount calculated pursuant to 2(a) and 2(b). above.

4) Reinstate Complainant Fisher as a truck driver with seniority retroactive to December 9, 1977.

5) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for JOHN McKAY in the amount calculated pursuant to 2(c) and 2(d) above.

6) Cease and desist from discriminating against employees or prospective employees on the basis of a physical handicap which is unrelated to the duties or present ability to perform the position sought.

7) Cease and desist from discriminating on the basis of a physical handicap which is unrelated to the duties or performance of the position sought.

[Editor's Note: No copy of the Hearing Officer's Rulings on Respondent's Preliminary Motions referred to in the case is known to exist.]

In the Matter of
the CITY OF CANNON BEACH,
an Oregon municipal corporation,
Respondent.

Case Number 53-80
Final Order of the Commissioner
Mary Wendy Roberts
Issued July 21, 1982.

SYNOPSIS

Respondent paid female Complainant less as City Recorder and Treasurer than it paid other city department heads who were all male. Finding that the skill, effort, and responsibility exercised by Complainant was substantially equal to that expended by the Chief of Police, by the Sewer and Street Superintendent, and by the Water Superintendent, the Commissioner held that Respondent violated ORS 659.030(1) by discriminating against Complainant in compensation because

of her sex, awarded Complainant a stipulated wage differential of $5,472, plus $1,080 in accrued interest, and ordered Respondent to cease discriminating in compensation on the basis of sex. ORS 652.220(2)(a); 659.010(2); 659.030(1)(a); 659.060(3).

The above-entitled matter came on regularly for hearing before Michael J. O'Brien, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries. The hearing was held on July 17, 1980, in the Clatsop County Courthouse, Astoria, Oregon. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. Respondent City of Cannon Beach was represented by Dan Van Thiel, Attorney at Law. Complainant Rosalie Dimmick was present and testified.

In addition to Complainant, the Agency called as witnesses Don Howell, Water Superintendent; Gary Middaugh, Sewer and Street Superintendent; and Robert Kaufman, former Chief of Police. Respondent called former mayor Bruce Haskell and Mayor John Williams.

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

FINDINGS OF FACT – PROCEDURAL

1) On April 24, 1979, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her employment by Respondent because of her sex.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a chartered municipal corporation and a political subdivision of the State of Oregon, existing and duly organized under the laws of the state and utilizing the personal services of more than one employee, reserving the right to control the means by which such service was performed.

2) On or about June 15, 1977, Complainant began her employment with Respondent as City Recorder and Treasurer.

3) On or about December 15, 1977, Complainant successfully completed a six-month probationary and training period.

4) Respondent has adopted, pursuant to its charter, a city government based upon an elected mayor and a city council, whose individual members are assigned to oversee the activities of the four departments maintained by the city. The department heads are appointed by the mayor, with the consent of the council, and their salaries

are fixed by the council. The four city departments are:

a) City Recorder and Treasurer;

b) Water Department;

c) Public Works Department (Sewer and Streets); and,

d) Police Department.

5) In her capacity as City Recorder and Treasurer, Complainant's duties and responsibilities include:

a) As provided in Section 23 of the Charter of the City of Cannon Beach, the Recorder

> "shall serve ex officio as clerk of the council, attend all its meetings unless excused therefrom by the council, keep an accurate record of its proceedings in a book provided for that purpose, and sign all orders on the treasury."

Regular meetings of the Council are conducted once monthly, while special meetings may be conducted upon compliance with certain provisions of the charter concerning notice.

b) The Recorder is also responsible for providing notice of municipal elections and preparing the necessary forms for such elections.

c) As provided in Section 24 of the Charter, the City Treasurer

> "shall be custodian of all funds of the city and shall keep an accurate account of same and pay same out under the direction of the council."

d) As Treasurer, Complainant's duties also include preparation of the municipal budget, collection and investment of city revenues, supervision of payrolls, signing bank drafts in the city's name, overseeing public hearings and fiscal liaison, and planning with the heads of other departments.

e) Respondent's organizational structure provides that the City Recorder and Treasurer shall report directly to the mayor, while two other department heads report to the member of the council who oversees that department via a board. The Water Superintendent reports to the Water Board, the Street and Sewer Superintendent reports to the Public Works Board. The Police Chief reports to a Police Commissioner.

f) The Recorder and Treasurer serves as the immediate supervisor of two to three clerks, and has the authority to hire or fire such employees with the consent of the council. Both the Water Superintendent and Street and Sewer Superintendent have authority to hire and fire with the consent of the council.

6) Complainant works 44 to 50 hours per week, primarily within City Hall; approximately 80 percent of her time is devoted to her various responsibilities as Respondent's finance officer.

7) Prior to obtaining employment with Respondent, Complainant's relevant work experience consisted of three years' employment as an administrative assistant, business manager, and bookkeeper in a nursing home. Her educational background includes approximately one and one-half years of college, including a number of business-related courses. She does not have a college degree.

8) All persons employed as City Recorders and Treasurers have been women.

9) At all relevant times, Complainant received less compensation than the male heads of the other three departments maintained by Respondent, as set forth below:

Dept.	1978	1979	1980
Water	$1383*	$1466	$19,950
	1466	1657	
Sewer	1383	1466	19,950
& St.	1466	1657	
Police	1383	1466	19,950
	1466	1657	
Rec./	999	1310	18,900
Treas.	1310	1500	

* Lower amounts represents previous fiscal year. 1978 and 1979 Columns are monthly figures; 1980 is annual.

10) Respondent's former Police Chief was hired in January 1975. After completion of his probationary period, he was immediately raised to parity with the heads of other departments (excepting the Recorder and Treasurer).

11) The duties of the Superintendent of the Water Department include:

a) Obtaining routine daily readings to check water quality, installation of meters and water lines, replacement of pipelines and broken lines;

b) Supervision of one employee;

c) Attendance at monthly meetings with five members of the Water Board;

d) Periodic meetings with the Water Commissioner, a member of the council assigned to supervise the department; and,

e) Administration of the Water Department, including fiscal management in cooperation with the Treasurer.

12) The current Water Superintendent, Don Howell, is a high school graduate and holds a Class 2 Certificate from the Oregon State Health Division. Such certificate surpasses the requirements for a town the size of Cannon Beach. Prior to obtaining employment with Respondent, Mr. Howell had two years of job-related work experience.

13) The Water Superintendent works approximately 40 to 50 hours per week, of which 90 percent consists of outdoor or "field" work. The Water Superintendent is "on call" at all times, and is required to carry an electronic pager. Although there is some physical risk presented by excavations and other job hazards, the Water Superintendent has not been injured on the job. Approximately 10 percent of the Water Superintendents time is devoted to administrative duties.

14) The duties of the Sewer and Street Superintendent, Department of Public Works, include:

a) Inspection and maintenance of the sewer system, including routine testing, and checking of pump stations and the sewer lagoon;

b) Paving of city streets, repair of potholes, and maintenance of public rest rooms and tennis courts.

c) Supervision of two employees;

d) Preparation of budgets and purchasing orders in collaboration with the Treasurer; and,

e) Frequent meetings with board and council members responsible for overseeing the department's activities.

15) The current Sewer and Street Superintendent, Gary Middaugh, also serves as Building Inspector (a position for which he is separately compensated), police reservist and as a volunteer with the city's Fire Department. Prior to obtaining employment with Respondent in 1974, Mr. Middaugh had approximately 12 years of experience in various types of construction and excavation work. He has a high school degree, and has attended numerous "short schools" on relevant subjects at various colleges.

16) The Sewer and Street Superintendent works approximately 50 hours per week in his various capacities, but the majority of his time is devoted to his responsibilities as Street and Sewer Superintendent. Approximately one-half of his time is spent outdoors. He is on call at all times and carries an electronic pager to respond to emergencies. He has suffered pulled muscles in connection with his work, but injuries are infrequent.

17) The Police Chief is responsible for law enforcement within Cannon Beach, and supervises a staff consisting of 8 to 12 employees (of whom approximately 4 are full-time). The Police Chief answers directly to the Police Commissioner, who is a member of the council. The Police Chief also consults with the Treasurer on budget matters affecting the department.

18) The former Police Chief, Robert D. Kaufman, was employed in that capacity by Respondent from January 1975 to February 1980. His prior experience included 12 years in the U.S. Army and six years as a police officer. He had no prior experience as a police chief. He was on call at all times. Although there was some inherent danger in his position, the Police Chief spent approximately 80 to 95 percent of his time performing various administrative duties. The balance of his time is spent in routine police work.

19) Complainant's job performance was characterized as consistently "excellent" by all those familiar with her work and as "vital" by former Mayor Haskell.

20) The parties stipulated to an award of damages in the amount of $5,742 if liability should be found.

ULTIMATE FINDINGS OF FACT

1) Complainant, a female, is one of four department heads employed by Respondent. All City Recorders and Treasurers employed by Respondent have been female. At all relevant times the heads of all three other departments were male. The City Recorder and Treasurer has been, and is, compensated at a rate less than that of other department heads.

2) The classification system which determined the compensation of Complainant and other department heads was not a merit system within the meaning of ORS 652.220(2)(a).

3) The work performed by Complainant was substantially equal in skill, effort, and responsibility to that performed by the heads of other departments. Accordingly, Complainant was subjected to unlawful discrimination in compensation on the basis of her sex and suffered damage in the amount of $5,472 as a result of the unlawful practice.

CONCLUSIONS OF LAW

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

2) The Specific Charges were properly brought under ORS 659.030(1) rather than ORS 652.210 *et seq. In the Matter of City of Portland,* 2 BOLI 110 (1981).

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

4) The actions of Respondent's employees and agents as described herein are properly imputed to Respondent.

5) Respondent committed an unlawful employment practice in violation of ORS 659.030(1) by discriminating against Complainant in compensation because of her sex in the following particulars:

> At all relevant times, Respondent compensated Complainant at a rate lower than that paid to the male heads of other departments even though Complainant performed substantially equal work, requiring substantially equal skill, effort, and responsibility compared to the work of the other department heads.

6) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant in the amount stipulated to by the parties based on the facts and circumstances of this case.

OPINION

There is no substantial disagreement as to the facts of this case. The evidence establishes that women have traditionally held the position of City Recorder and Treasurer, and that Complainant has been compensated in that position at a rate substantially lower than that of the men who supervise the other three departments in the municipal government. Respondent contends that the salary differential is nondiscriminatory because Complainant's position is not substantially equal to the positions held by men in the skill, effort, and responsibility which it requires. Moreover, Respondent contends that Complainant's alleged inexperience compared to other department heads provides a legitimate nondiscriminatory basis for her lower salary.

In the absence of strict congruence between the positions being compared, it is necessary to resort to a detailed application of the accepted criteria for determining whether unlawful sex discrimination in compensation has occurred: namely, whether the positions are substantially equal in skill, effort, and responsibilities involved. The parties do not dispute the applicability of these criteria.

The difficulty of comparisons in this case is compounded by the fact that there is considerable dissimilarity among all four positions being considered. For example, both the Police Chief and Complainant devote virtually all of their time to a variety of administrative duties. The Water Superintendent, on the other hand, is involved in administrative details only 10 percent of the time; the vast majority of his work is performed outdoors and requires a number of manual skills. Yet despite the great contrast between

their duties, the Police Chief and the Water Superintendent are compensated at the same rate. The City Council has clearly made a judgment that certain administrative positions, at least, are directly comparable to the "field" positions in the departments. Therefore, a comparison of Complainant's position to that of the other department heads is not without precedent. Similarly, the federal courts have repeatedly held that

> "an employer cannot make jobs unequal by arbitrarily according greater weight to the physical effort required by a job than the weight or value accorded to skill, job responsibility and working conditions."

Hodgson v. Daisy Mfg. Co., 317 F Supp 538 (WD Ark 1970), *aff'd per curiam,* 445 F2d 823 (8th Cir 1971).

1. Skill

The educational backgrounds of the four department heads are quite similar. All are high school graduates, but none has a college degree. It appears that Complainant has accumulated more college credits than the other department heads, which would be appropriate to the more theoretical duties of an administrative position.

Respondent contends that Complainant offered less relevant job experience at the time she was hired than other department heads. This argument is not convincing. For example, it appears that Complainant's relevant job experience is comparable to that of the Water Superintendent. Complainant had approximately three years relevant experience while the Water Superintendent had only two years relevant experience. In any event, Complainant was not so seriously deficient in her experience to justify a salary differential which did not diminish as she gained on-the-job experience.

In this regard, it should be noted that the Police Chief had no prior experience in that capacity, although he offered six years of experience as a police officer. In view of the emphasis on the administrative duties of the Police Chief, the relevance of his prior experience as a police officer is not so strong as it might appear to be. Nonetheless, the Police Chief was raised to parity with the other department heads shortly after completing his period of probation. Mr. Middaugh had 12 years construction and excavation experience prior to becoming Sewer and Street Superintendent, while Mr. Howell had only two years job related experience before being hired as Water Superintendent. Each man was paid the same salary, while Complainant, who had more experience than Mr. Howell and less than Mr. Middaugh was paid less. After more than three years of employment, Complainant was still not at parity with her colleagues even though her job performance was considered to be excellent in all respects. While previous experience is certainly a relevant criterion in establishing the salary of a particular employee, it cannot be decisive under these circumstances.

The evidence in this case establishes that Complainant's position requires skills at least equal to that of other department heads. The City Recorder and Treasurer is at the hub of the day-to-day operations of city government. Her duties as finance officer,

in particular, are complex and intricate. She must be attuned to recent developments in the highly regulated area of municipal finance. Mismanagement of the city budget could have wide repercussions on the functioning of all the departments. Complainant works closely with the mayor or the city council at all times. The skills required in the performance of these various duties are substantially equal to those required for the heads of other departments.

The Bureau argues convincingly that the tasks performed by other department heads, though physically demanding, tend to be repetitive compared to Complainant's duties. Complainant is more likely to be confronted by novel situations which require prompt decisions. She must work closely with many persons in city government, including each of the department heads in budget planning and fiscal management. These duties require negotiating skills which do not appear to have a direct equivalent in the other departments.

2. Effort

Comparison of the effort required for each position is difficult because two of the positions are essentially administrative, while the other two require substantial field work including manual labor and related tasks at times. All four department heads, however, worked between 40 and 50 hours per week. The Police Chief, Water Superintendent, and Sewer and Street Superintendent are on call at all times. Complainant does not carry an electronic pager and is not on call at all times. Moreover, Complainant works indoors and is therefore not exposed to the same physical dangers as the heads of the other departments. Generally, however, the risk of injury has been more theoretical than actual.

While there is less risk and physical exertion in Complainant's position, it appears that there is a high level of mental exertion and stress inherent in her work. In this regard, Complainant's job may be directly comparable to that of the Police Chief, whose duties, to reiterate, are also primarily administrative.

In terms of the total hours worked and various job stresses imposed, all four positions appear to be substantially equivalent.

3. Responsibility

In the sheer breadth of her job responsibilities, the City Recorder and Treasurer readily equals the heads of the other departments. It is significant that the City Charter describes the duties of the City Recorder and Treasurer in greater detail than any other city official, with the possible exception of the mayor. Complainant's position is indispensable to the normal functioning of city government. Although policy issues are resolved by the mayor and the council, Complainant is directly responsible for the daily fiscal management of the city. She also prepares a permanent record of the official activities of the council and supervises public hearings.

Each of the department heads is responsible for the supervision of two or more employees. The Police Department is the largest of the four, with approximately 8 to 12 full- and part-time employees. All department heads have the authority to fire and hire with the consent of the council.

Complainant is required to attend council meetings, and she is directly responsible to the mayor at all times. Other department heads are responsible to the council member assigned to their department.

In sum, Complainant's job responsibilities are at least equal to those of the other department heads.

Although there are some dissimilarities between the four positions, there are numerous common factors which make comparisons meaningful. These factors reveal that each position is essential to the routine operation of the municipal government, and that the skill, effort, and responsibility involved is substantially similar in each case. Where work performed is substantially equal, Respondent is under a legal duty to conform to ORS 659.030(1) by providing equal pay without regard to sex.

Because the parties stipulated to the amount of damages should liability be found, this forum is foreclosed from considering any damages which may have accrued since the date of the hearing. It is the policy of this forum, though, to award interest on back pay awards. Interest is to be calculated at the rate of 9 percent per annum from the date of the hearing until the amount is paid. Interest in this manner equals $1080.07 for the time period July 17, 1980, to July 17, 1982. Interest will continue to accrue on the total until paid.

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, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Rosalie Dimmick in the amount of which represents Five Thousand Seven Hundred and Forty-two Dollars ($5,742.00) in lost wages and $1080.07 in interest; and,

2) Cease and desist from discriminating in compensation against any employee on the basis of sex.

In the Matter of

PIONEER BUILDING SPECIALTIES CO., Respondent.

Case Number 125-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 5, 1982.

SYNOPSIS

Black Complainant's immediate supervisor subjected her to racial harassment. The Commissioner held Respondent strictly liable for the supervisor's actions. Respondent failed to take corrective action when Complainant left the job on account of the harassment, and the unlawful employment practice continued when Respondent failed to allow her to

return. Since almost half of the negative evaluations of Complainant's work were authored by the harassing supervisor, the Commissioner rejected Respondent's contention that Complainant was not returned to the job due to her performance. The Commissioner awarded Complainant $8,742, including lost wages of $5,954 plus interest and $1,000 for mental anguish, and ordered Respondent to cease discriminating against employees on the basis of race and color. ORS 659.010(6); 659.030(1)(a); 659.060(3); OAR 839-04-030(3).

The above-entitled contested case came on regularly for hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on June 10, 1981, in Room 311, State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Respondent Pioneer Building Specialties Co. was represented by Edward Murphy, Jr. and Robert Scherzer, Attorneys at Law. Complainant Gerry Coulson was present and testified.

Having fully considered the entire record in this matter, I, Mary Roberts, make the following Rulings Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS UPON MOTIONS

At the beginning of the hearing, Ms. Smith moved, on behalf of the Bureau of Labor and Industries, to amend the Specific Charges in the following particulars:

1) To amend the caption of the matter to include the words "or color" after "race." There was no objection to this amendment and it was allowed.

2) To amend the Specific Charges to include the words "or color" after "race." There was no objection to this amendment and it was allowed.

3) To amend the Charges to delete "October 16, 1979" and insert "November 20, 1980" and amend to delete "October 17, 1979" and insert "November 21, 1980." The ruling was reserved pending the presentation of evidence on how long Complainant remained working at a rate of pay lower than she received while working for Respondent. There was no objection. These amendments are allowed under Hearing Rules for Civil Rights Division Contested Cases, OAR 839-04- 030(3), on the grounds that they are necessary to conform the pleadings to the evidence presented at the hearing.

4) To amend the Charges to delete the words "or unemployment compensation" in reference to what should be deducted from any back pay awarded to Complainant. Respondent objected to this amendment, and the ruling was reserved to allow Respondent to submit a brief in response to the Bureau's hearing memorandum on this issue. After reviewing the briefs and reading the pertinent case law, this amendment is allowed.

5) To amend the Charges to include, as remedy sought, "(3) a favorable reference." There was no objection to this amendment and it was allowed.

Ms. Smith also moved to strike Respondent's request for attorney fees in Respondent's answer. This motion is granted because no provision in Oregon law allows an award of attorney fees to Respondent where the Commissioner of the Bureau of Labor and Industries has filed Specific Charges against a respondent.

FINDINGS OF FACT – PROCEDURAL

1) On August 22, 1979, Gerry R. Coulson filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been discriminated against in connection with her employment by Respondent because of her race.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Divisions investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation engaged in the wholesale distribution business. In that business, Respondent engaged the personal services of about 30 persons, reserving the right to control the means by which such service was performed.

2) Complainant was employed by Respondent on October 24, 1978, as a line checker and packer. Her job involved checking and packing boxes for shipping on the packing line and preparing parcels for United Parcel Service at the UPS desk at Respondent's warehouse. She left her employment with Respondent on March 21, 1979.

3) Complainant is a black woman. During her employment with Respondent she was the only black person employed by Respondent. She was also one of only two women working in Respondent's warehouse.

4) Complainant worked without any significant personal conflicts with any of her supervisors or fellow employees from October 24, 1978, until March 12, 1979.

5) Complainant received some criticism of her job performance, and eleven written entries of these job deficiencies were made on her personnel records from January 10, 1979, to March 20, 1979, with the largest number of entries, six, made after March 9, 1979. Five of the entries were made after March 12, 1979, when Respondent hired David Harris.

6) Complainant's supervisor for most of her employment with Respondent was David Edwards. Mr. Edwards was the person responsible in March 1979 for hiring or firing persons such as Complainant working on Respondent's packing line. There were no apparent problems between Mr. Edwards and Complainant and Mr. Edwards had no intention of firing Complainant at the time her employment with Respondent ended.

7) On or before March 12, 1979, Respondent hired Mr. Harris to supervise the packing lines. At that time Mr. Harris became Complainant's immediate supervisor. He did not have the

ultimate responsibility for hiring or firing the employees under his supervision.

8) Conflicts between Mr. Harris and Complainant developed immediately and became more heated and apparent to the other employees working in the area.

9) Shortly after he came to work for Respondent, Mr. Harris touched Complainant and Respondent's other female warehouse worker, Kathy L. Lowery, who is white, in a physically offensive manner. Both Ms. Lowery and Complainant told Mr. Edwards that they objected to the touching. Mr. Edwards told Mr. Harris that Complainant and Ms. Lowery did not like the touching, but it continued. Both Complainant and Ms. Lowery again complained to Mr. Edwards. Mr. Harris stopped touching Ms. Lowery after Mr. Edwards talked to him a second time. He continued touching Complainant. Complainant told Mr. Harris directly not to touch her.

10) Mr. Harris did not use Complainant's name when addressing her but instead called her "girl." This was done within the hearing of some of the other employees. Mr. Harris did not use the term "girl" when addressing the other female employee, Ms. Lowery. He called her "Kathy." Complainant told Mr. Harris that her name was "Gerry" and not to call her "girl."

11) Mr. Harris supervised Complainant's work more closely than he did the work of the other employees. Mr. Harris appeared to be trying to provoke Complainant. Complainant, along with other employees, would turn the radio up. Mr. Harris engaged in loud arguments with her concerning the volume of the radio in the work area. The other employees were also reprimanded for this by Mr. Harris.

12) Mr. Harris used the words "darkie" and "nigger" either to Complainant directly or within her hearing. He called Complainant "darkie" at least once and referred in conversation to another black person as "nigger." Complainant became upset with Mr. Harris's derogatory racial comments and cried on occasion. Steve Hanson, a fellow worker, heard Mr. Harris call Complainant "darkie."

13) On March 21, 1979, a loud argument occurred between Complainant and Mr. Harris, apparently precipitated by Complainant turning up the radio. During the course of the argument Mr. Harris made a remark to Complainant to the effect that "your kind of people stink - they don't know how to use soap." Complainant became very upset and started crying. She telephoned a boyfriend to pick her up, and when he arrived she went with him to see Ken Monson, the Operations Manager for Respondent. Complainant told Mr. Monson about the "soap" remark and said she felt it was a racial slur. She said she needed some time off, and Mr. Monson agreed. Complainant did not tell Mr. Monson she was quitting. There was no discussion of the amount of time Complainant was going to take off.

14) Mr. Monson conducted an informal inquiry into the situation between Mr. Harris and Complainant. He called Ms. Lowery, Mr. Hanson, and Bob Kamrau, another worker, one by one into his office and asked them only in very general terms whether there were any problems in the warehouse. Although he may have used Complainant's name while inquiring about trouble in the warehouse, he did not ask them whether Mr. Harris had made any racial remarks about or to Complainant or whether his treatment or supervision of her was based on her race. He did not ask them whether Mr. Harris was still engaging in offensive touching. Mr. Monson called Mr. Harris and confronted him with what Complainant had told him Mr. Harris had said to her on March 21. Mr. Harris denied that he had made such a remark.

15) Mr. Monson also talked to Mr. Edwards about what had happened between Mr. Harris and Complainant. He also inquired about Complainant's work record and informed Mr. Edwards that Complainant had left for the day. Mr. Monson told Jack McGowan, Respondent's president, that Complainant had told him that Mr. Harris had made racial remarks to her.

16) Mr. Monson did not attempt to make any contact with Complainant after she left to follow up on Complainant's allegations of racial harassment.

17) Complainant telephoned Mr. Monson about a week to ten days after the March 21 incident. She also returned to the warehouse site and asked Respondent about her job. She was told that she would not get her job back. Mr. Edwards made the final decision not to allow Complainant to resume her job. Mr. Harris retained his position with Respondent.

18) At the time her employment with Respondent ended on March 21, 1979, Complainant was earning $4.00 per hour. She worked 40 hours per week. All of Respondent's warehouse employees received a raise to $5.00 per hour on June 20, 1979.

19) Complainant was unemployed from March 22, 1979, to September 18, 1979, at which time she obtained employment at Good Samaritan Hospital earning $4.31 per hour. She remained at that job full-time until February 25, 1980. She started working full-time at St. Vincent's hospital on February 27, 1980, earning $4.30 per hour until August 15, 1980, when she left her job because of an injury.

20) Complainant received eight weeks' unemployment compensation between March 21, 1979, and September 17, 1979, at $44.00 per week.

ULTIMATE FINDINGS OF FACT

1) Complainant, a black female, was employed by Respondent as a line checker and packer in its warehouse from October 24, 1978, to March 21, 1979.

2) Although Complainant received criticism of her job performance and written entries of these criticisms, and others which were not released to her verbally, were made on her personnel record. Complainant was not fired by Respondent for incompetence nor was Respondent considering firing her on March 21, 1979, the last day on which Complainant worked for Respondent. However, Complainant needed more supervision than other employees and her work was not up to par.

3) Complainant received almost one-half of the entries on her personnel record criticizing her job performance between March 12 and March 20, 1979. There were five entries in those 11 days, compared with six entries in the preceding employment

period with Respondent. March 12 to March 20, 1979, corresponds with the time Mr. Harris was Complainant's supervisor.

4) Complainant's job performance deteriorated under Mr. Harris's supervision; partly as a result of the basic personality conflict between Complainant and Mr. Harris, but primarily as a direct result of Mr. Harris's below-detailed racial harassment of Complainant and his offensive touching of Complainant.

5) Mr. Harris harassed Complainant because of her race and color in the following instances:

a) He called her "girl" while calling the other female employee, a white person, by her name. This was done within the hearing of other employees.

b) He called her "darkie" on at least one occasion and referred to another person of her race as "nigger." These remarks were made within the hearing of Complainant and other employees.

c) On the last day of her employment with Respondent, Mr. Harris remarked to Complainant to the effect "your kind of people stink - they don't know how to use soap."

6) As a direct result of Mr. Harris's racial harassment, Complainant became very upset and left her job. When she attempted to return and resume her job a week or ten days later, she was informed by Respondent that her job was no longer available to her and that a decision to fire her had been made during her absence.

7) Complainant was sufficiently qualified for her job.

8) Respondent made only a limited and inadequate attempt to ascertain whether Mr. Harris's conflict with Complainant was racially motivated, even though Complainant had told Respondent's Operations Manager that Mr. Harris's racially derogatory remarks were the cause of her leaving on March 21, 1979. Respondent never contacted Complainant after March 21, 1979, to inquire further into the allegation that Mr. Harris had racially harassed Complainant.

9) Respondent chose to retain Mr. Harris and fire Complainant as a solution to the racially motivated conflict between Mr. Harris and Complainant.

10) Mr. Harris was authorized to discipline Complainant by correcting her for errors made on the packing line and UPS desk.

11) As Complainant's immediate supervisor, Mr. Harris would have been consulted if Complainant had stayed long enough to apply for a promotion or a raise.

12) As a direct result of Respondent's refusal to allow Complainant to resume her job after she left because of racial harassment, Complainant was damaged in the amount of $5,954.96 This figure represents the difference between the wages which Complainant would have earned if she had remained in Respondent's employ and what she earned in other employment between March 22, 1978, and November 20, 1980. She was unable to work after November 20, 1980, due to an injury.

13) Complainant suffered humiliation and mental stress and cried at work on more than one occasion because of Mr. Harris's racial harassment. There was no testimony on how this suffering affected Complainant's life away from her job or whether she continued to suffer crying spells after she left Respondent's employ. Complainant was generally damaged in the amount of $1,000.00.

14) Because Complainant was criticized by Respondent for poor job performance which was not caused by racial harassment, as well as for some which was, it would not be appropriate to require Respondent to give Complainant a favorable job reference. Since Complainant's work was sufficiently satisfactory that Respondent was not contemplating firing Complainant for incompetence, Respondent will be required to provide a reference indicating only that Complainant worked for Respondent.

CONCLUSIONS OF LAW

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

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

3) The racial harassment of Complainant by Mr. Harris, Respondent's supervisory employee, constitutes discrimination against Complainant in the terms and conditions of her employment because of her race or color.

4) Mr. Harris's discrimination against Complainant is properly imputed to Respondent.

5) Respondent, through its supervisory or management employees, Messrs. Edwards and Monson, and its president, Mr. McGowan, was independently aware of the racial harassment suffered by Complainant and made no adequate attempt to end that harassment. This constitutes racial discrimination.

6) Respondent's discrimination against Complainant in the terms and conditions of her employment because of her race and color constitutes an unlawful employment practice in violation of ORS 659.030(1)(a).

7) Respondent's refusal to allow Complainant to resume her job after she temporarily left work because of racial discrimination constitutes discharging Complainant from employment because of her race and color. This constitutes an unlawful employment practice in violation of ORS 659.030(1)(a).

8) Complainant's injury and inability to work after November 20, 1980, ends the time period during which damages accrue because there is no evidence that Complainant could have continued her employment with Respondent after that date.

9) Oregon law does not require the Commissioner of the Bureau of Labor and Industries to deduct the unemployment compensation received by Complainant from a damage award of back wages. Unemployment compensation was created only to provide a substitute income from public funds and is not intended to be a source for paying damages to a worker who has been wronged by an employer's racial discrimination. Unemployment benefits are collateral benefits to the employee only and are not designed to be used to reduce the employer's liability for the consequences of unlawful employment practices.

10) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to the Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

OPINION

Respondent contends that it is not responsible for Mr. Harris's racially discriminatory conduct toward Complainant because Respondent took action to correct the situation and because Mr. Harris was not a supervisor who was authorized to hire, fire, discipline, or promote Complainant or participate in or recommend such actions.

Respondent's argument that it unsuccessfully attempted to correct the racially discriminatory situation is not by itself a defense to the Specific Charges. In *In the Matter of Roderick Enterprises, Inc.,* 2 BOLI 14 (1980), the Commissioner of the Bureau of Labor and Industries adopted federal law and held that an employer/respondent:

> "is responsible for the acts of its supervisory employees, with respect to racial harassment on the job, regardless of whether the acts complained of were forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." *Id* at 13.

Thus, Respondent here is strictly liable for Mr. Harris's racial harassment of Complainant if Mr. Harris is a supervisory employee. Respondent had the duty to take whatever action necessary, up to and including firing Mr. Harris, to ensure Complainant a work atmosphere free of racial discrimination.

Although Mr. Harris was not authorized to hire or fire Complainant, it appears from the testimony given that Mr. Harris was authorized to discipline Complainant by correcting her for errors made on the packing line and UPS desk and by reprimanding her for playing the radio too loud. It also appears from the testimony that had Complainant remained in Respondent's employ long enough to be considered for a raise, Mr. Harris, as her immediate supervisor, would have been consulted on her job performance and asked for a recommendation as to a promotion.

The discriminatory actions of a supervisor can be imputed to the employer under Oregon law, ORS 659.010(6), which defines "employer" as "any person . . . who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees . . ." (Emphasis added.) The case of *Miller v. Bank of America,* 600 F2d 211 (9th Cir 1979), while not binding on the Bureau of Labor and Industries, illustrates how an employer has been held liable for the racially discriminatory actions of a supervisory employee. In the *Miller* case, a black woman employee had been fired for refusing her supervisor's demand for sexual favors from a "black chick." The 9th Circuit Court of Appeals held that the actions of the supervisor are properly imputed to the employer "even though what the supervisor is said to have done violates company policy" because the supervisor was "authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions," i.e., the person was in fact a supervisor. *Id* at 213. (Emphasis added.)

Mr. Harris was not a fellow employee of Complainant: he was her supervisor, and while his remarks and actions toward Complainant were eschewed by Respondent, they must nonetheless be imputed to Respondent. Even if Mr. Harris was a fellow employee, the Court of Appeals in *Fred Meyer v. Bureau of Labor,* 39 Or App 253, 592 P2d 564 (1979) ruled that "The harassment and the failure of the assistant manager to rectify it constitutes a violation of ORS 659.030(1)(a)." 39 Or App 253 at 264. (Emphasis added.) Thus, Mr. Harris's harassment of Complainant and the failure of Messrs. Edwards, Monson, and McGowan to rectify it after they had knowledge of the problem constitute a violation of ORS 659.030(1)(a).

The testimony more than adequately supports the conclusion that Complainant left her job on March 21, 1979, because she had been subjected to racially discriminatory behavior by Mr. Harris, not only on the day she left but on prior occasions. No reason has been offered by Respondent for why Complainant left her job in tears that day other than because she was upset at Mr. Harris's racial slurs. She did not leave her job to accept a better job offer, nor did she leave because she disliked her work or the people she worked with (other than Mr. Harris) nor did she leave as result of being fired.

The testimony of Mr. Harris was not credible. He denied having been told by Mr. Edwards on two separate occasions that his touching of Complainant was inappropriate. He denied that Mr. Edwards had ever talked to him about this problem with regard to Ms. Lowery. Mr. Edwards, Respondent's own witness, had previously testified, out of Mr. Harris's hearing, that he had twice corrected Mr. Harris for this. Mr. Harris denied that he had called Complainant "darkie" although another employee, Steven Hanson, testified that he heard Mr. Harris do so. Mr. Hanson is not an interested party in this case, and his testimony was more credible than Mr. Harris's.

Mr. Harris also denied regularly using the term "girl" when addressing Complainant. He stated that he had probably said it once, but no more than that. Kathy Lowery and Steve Hanson, however, both testified to the contrary. Ms. Lowery stated that she had heard him use the term to Complainant several times and that he never called her (Ms. Lowery), "girl."

The term "girl" or "boy" applied to a black employee implies an inherent inferiority because of her/his race. The Equal Employment Opportunity Commission (EEOC), in its Decision 172-0679, December 27, 1971, found at EEOC Decisions ¶ 6,324, stated:

> "To be addressed as 'girl' is inherently more offensive to Negroes than to Caucasians because of the repellent historical images the term understandably evokes. Thus, even though Negro and Caucasian employees are called 'girls' with equal frequency and no discriminatory intent, there will nonetheless be a foreseeable disparate effect."

This reasoning is supported in *Murray, et al v. American Standard, Inc., et al,* 5 EPD 8,523 (ED La 1973). In that case plaintiff, a black male, was repeatedly addressed as "boy" by his supervisor who did not use that form of address toward any white male employees. The court found that the consistent use of the term "boy," in addition to other forms of harassment directed towards the black employee, constituted racial harassment.

In this case, Mr. Harris's use of the term "girl," particularly in conjunction with his use of other racially derogatory terms such as "darkie" and "nigger," constitutes racial harassment of Complainant.

Mr. Harris stated that Complainant used "very foul" language when arguing with him. Mr. Edwards and Ms. Lowery both testified that Complainant did not use language stronger than "damn." Mr. Harris's testimony was not credible on this issue.

Ken Monson testified that he specifically asked Mr. Harris about the "soap" remark and that Mr. Harris denied making it. Mr. Harris was asked on cross, re-direct, and on re-cross examination whether Mr. Monson had asked him about the soap remark. Each time he stated that Mr. Monson had not. The only conclusion that can be drawn from the conflicting testimony of Mr. Monson and Mr. Harris, both witnesses for Respondent, is that either Mr. Harris is prevaricating or Mr. Monson never really inquired into whether Mr. Harris had, in fact, made racial slurs to Complainant.

Under the ruling in *McDonnell Douglas Corp. v. Green,* 411 U S 792 (1973), the complainant in a race discrimination case must present a prima facie case of discrimination by showing:

1) that he or she is qualified for the job and he or she belongs to a racial minority and

2) that the employer would hire similarly qualified employees.

If the complainant makes this threshold showing, the burden shifts to the respondent to "articulate some legitimate, non-discriminatory reason for the employee's rejection." *Id.* at 802. The complainant then has the opportunity to show that the ostensible reason for rejection was pretextual. The *McDonnell* holding can be applied to the analogous situation here, where Complainant was not refused initial employment but was denied the opportunity to resume her job.

Here Complainant has shown that she is a member of the black race and, through the testimony of Mr. Edwards, that, although her work needed definite improvement, she was sufficiently qualified for her job that Respondent was not even considering firing her at the time she left.

Respondent has articulated non-discriminatory reasons for refusing to allow Complainant to resume her job: that Complainant had a serious personality conflict with her immediate supervisor, Mr. Harris, which disrupted the workplace, and her work was poor.

However, Complainant has shown by a preponderance of the evidence that the problems which Respondent cites for not re-hiring her were in fact caused by Mr. Harris's racial harassment of her. Almost one-half of the entries about her poor work were made after Mr. Harris became her supervisor, and during the period of the racial harassment. The personality conflict largely stemmed from Mr. Harris calling Complainant "girl" and "darkie" and engaging in offensive touching and racial slurs.

Thus while part of Respondent's reasons for not allowing Complainant to come back to work were not pretextual as such, because her work record did indicate job performance problems before Mr. Harris became her supervisor, Respondent cannot rely on the work record where the underlying racial harassment by Respondent gave rise to almost one-half of the job criticisms, and Respondent would not have fired Complainant for the earlier criticisms.

On the question of whether the unemployment compensation received by Complainant should be deducted from the award for back wages, I am relying on *McPherson v. Employment Division,* 285 Or 541, 556 P2d 381 (1979), in finding that it should not. The reasoning of the *McPherson* case is delineated in Conclusion of Law Number 8 above.

Interest upon Complainant's back pay award will be computed as follows:

a) Six percent compounded annually on $3,088.00, which is the accrued differential between what Complainant actually earned and what Complainant would have earned if she had remained in Respondent's employ during the period March 21, 1979, to July 25, 1979. Interest on this amount calculated to August 1, 1982, equals $936.11

b) Nine percent compounded annually on $2,265.60, which is the accrued difference between what Complainant actually earned and what she would have earned during the period July 26, 1979, to July 25, 1980. Interest on this amount calculated to August 1, 1980, equals $672.75

c) Nine percent compounded annually on $601.36, which is the accrued difference between what Complainant actually earned and what she would have earned in Respondent's employ during the period July 26, 1980, to November 20, 1980. Interest on this amount calculated to August 1, 1982, equals $114.18

d) Interest on the entire amount due will continue to accrue at the legal rate of nine percent until Respondent complies with the Order.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, a certified check payable to the Bureau of Labor and Industries in trust for Gerry Coulson in the amount of EIGHT THOUSAND SEVEN HUNDRED FORTY-TWO DOLLARS and FORTY SEVEN CENTS ($8,742.47). Of this amount, $5,954.96 represents damages for wages lost by Complainant because of Respondent's unlawful employment practices set out above, and $1,000.00 of this amount represents damages for

the mental anguish, pain, and humiliation suffered by Complainant because of Respondent's unlawful employment practice set out above. Interest will continue to accrue at the rate of 9 per cent, to be compounded annually on the amount of $5,954.96 until Respondent complies with this order.

2) Provide an employment reference indicating that Complainant worked for Respondent.

3) Cease and desist from discriminating on the basis of race or color against employees.

In the Matter of

LYNN EDWARDS, dba The Burger Shoppe, Respondent.

Case Number 71-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 5, 1982.

SYNOPSIS

Respondent discharged female Complainant for falsifying time records, and was not motivated by an earlier conversation with her involving her inappropriate dress and a rumor that he was having an affair with her. Since Complainant was discharged for a legitimate, nondiscriminatory reason, the Commissioner ruled that Respondent did not commit an unlawful employment practice based on sex, and dismissed the Specific Charges. ORS 659.060(3).

The above-entitled contested case came on regularly for hearing before Robert L. Chapman, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced on November 12, 1980, at 9:30 a.m. in the auditorium of the Oregon State University Extension Building, 3322 Vandenberg Road, Klamath Falls, Oregon. The hearing was recessed until January 28, 1981, and was reconvened at that time in the conference room of the State of Oregon Employment Division, 801 Oak Street, Klamath Falls, Oregon, and concluded on that date. The Bureau of Labor and Industries was represented at the first hearing by Michael J. Tedesco, and at the second hearing by Daryl D. Wilson, Assistant Attorneys General at the respective times above stated. Respondent Lynn Edwards was not represented by counsel when the hearing originally convened but was represented by James Spindor, Attorney at Law, at the reconvened hearing. The Agency called as witnesses Complainant Debora Hartley and Debby Ganon. Respondent called Lynn Edwards and Nancy Edwards.

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

FINDINGS OF FACT – PROCEDURAL

1) On October 12, 1979, Debora Hartley filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been discriminated against in connection with her employment by Respondent because of her sex.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon business engaged in fast food service. In that business, Respondent utilized the personal service of one or more employees and reserved the right to control the means by which such service was performed.

2) On or about June 7, 1979, Complainant was terminated from her employment with Respondent's business, the Burger Shoppe. Her employment with Burger Shoppe lasted approximately three weeks, during which time she worked as a cook and food server. Complainant earned $2.65 per hour in this employment; normally only one other co-employee was present during her working hours.

3) The owners of the Burger Shoppe during Complainant's employment were Lynn and Nancy Edwards, husband and wife. The Burger Shoppe at that time was a small fast food, "stop-and-go" type of food service facility. The Edwards also owned two other retail food service outlets. All three of these shops were located in the area of Klamath Falls, Oregon. Respondent assumed primary operational and managerial responsibility for the two other shops; Ms. Edwards maintained primary supervisory control over the Burger Shoppe.

4) During at least the final two week period of Complainant's employment, Thi Hoa Yerabek was manager of the Burger Shoppe.

5) Complainant was unemployed from June 7, 1979, the date she was terminated until September 15, 1979, when she obtained new employment earning $2.65 per hour.

6) Approximately one week prior to her termination, Respondent Lynn Edwards approached Complainant at the Burger Shoppe and had a conversation with her shortly before or after closing time. It was not unusual for Respondent to appear at the Burger Shoppe at this time of the business day for the purpose of closing tills, picking up receipts and performing the other various minor managerial functions consistent with the daily closure of the business. On this particular occasion, Respondent took Complainant aside and had a specific conversation with her relating to two subjects: rumors that he and she were having an affair and the possibility that her clothing was so suggestive or revealing as to distract or offend some customers. Respondent specifically mentioned

Complainant's smock being unzipped and apparently showing an excess of cleavage. Complainant denied any involvement in spreading any type of rumors, and asserted that her smock was unzipped only after closing time during the customary clean-up period.

7) Complainant mentioned her conversation with Respondent regarding the alleged rumors concerning her and Respondent and his complaint about her smock to a friend, Debby Ganon, and a supervisor of another of Respondent's stores, Carol Harmon.

8) Approximately two week's prior to Complainant's discharge Ms. Yerabek had a conversation with Complainant after talking to Ms. Edwards, in which she warned Complainant about the importance of keeping accurate time cards and records. Complainant was specifically told at that time that any future incidents involving incorrect time records would result in her discharge from employment.

9) During part of Complainant's employment, Mr. Edwards observed Complainant's actual departure times and noted they did not always agree with the times indicated on her time cards.

10) On the date of her discharge, Ms. Edwards notified Complainant that she was being discharged because she had falsified time records. When discharged, Complainant made no denials concerning the time records, but did mention to Ms. Edwards the prior conversation with Respondent referred to in Finding of Fact Number 6 above.

ULTIMATE FINDING OF FACT

The evidence presented in this matter is not sufficient to establish that Complainant was discharged, and thereby discriminated against, on the basis of her sex.

CONCLUSIONS OF LAW

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

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

3) Respondent did not discriminate against Complainant because of her sex and therefore has not engaged in an unlawful employment practice against Complainant as alleged.

OPINION

At the hearing, Complainant testified with regard to her conversation with Respondent. She also testified that she mentioned the incident to her friend, Debby Ganon, who also testified and corroborated Complainant's testimony concerning the incident. Complainant then indicated that the day after her conversation with Respondent, she advised one of Respondent's managers at another delicatessen, Carol Harmon, of this conversation. Ms. Harmon told Complainant she had spoken to Respondent about the exchange. Ms. Harmon did not testify, and the record is silent as to her whereabouts.

Complainant did not rebut or deny in any way Ms. Edwards' testimony regarding their conversation concerning the reasons for her discharge. Mr. Edwards testified that during the period of time in question, without Complainant's knowledge, he had observed activities and checked her actual departure times from the Burger Shoppe against the time cards she filled out, and that his conclusions, apart from Ms. Edwards' independent information, were that she was indeed falsifying her time records.

Ms. Edwards, who learned about the reconvened hearing only the day prior, testified for Respondent although she is now divorced from Respondent and appears to have a certain degree of animosity towards him. She has no monetary interest in the outcome of this litigation and, because of this, her testimony was given considerable weight. She indicated that she had first been made aware of the problem of time records approximately two weeks prior to Complainant's termination by the manager of the Burger Shoppe, Ms. Yerabek, and that the first indication she heard of the rumor regarding alleged sexual activity between Respondent and Complainant was after she had informed Complainant of her termination. The attorney for Respondent submitted a sworn statement of Complainant's supervisor, Ms. Yerabek, after the hearing, as an addendum to his written argument. Although Ms. Yerabek was in Korea at the time of the hearing, this document was not properly introduced and this forum has not considered it in any way regarding the decision in this matter. It was not admitted into evidence. The arguments of the Assistant Attorney General in this matter are thought provoking, however many of the facts recited in counsel's argument were not established by a preponderance of the evidence.

The burden of proof in this type of case is upon Complainant to show that Respondent discriminated against her unlawfully in discharging her. Complainant was unable to rebut the showing by Respondent that she was discharged for a legitimate, nondiscriminatory reason, that is, falsifying her time records.

While I find that the conversation as related by Complainant did occur, given the rest of the unrebutted evidence this forum cannot conclude that this conversation, or the situation involved, was a motivating force in the termination of Complainant.

ORDER

NOW, THEREFORE, Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and the complaint filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of

RICH MANUFACTURING COMPANY of Oregon, an Oregon corporation, Respondent.

Case Number 94-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 5, 1982.

SYNOPSIS

Respondent subjected Complainant, its first female production area employee, to a sexually discriminatory atmosphere and failed to adequately

train and supervise her, causing her to become frustrated with her job duties. Finding that the sexually prejudicial attitude was the cause of Complainant's discharge, for which Respondent failed to show a legitimate, nondiscriminatory reason, the Commissioner held that Respondent violated ORS 659.030 (1)(a). The Commissioner awarded Complainant $12,114, including $9,975 in lost wages plus interest, and ordered Respondent to cease discriminating against employees on the basis of sex. The Commissioner held that unemployment compensation and nontaxable CETA program funds, which Complainant received after her discharge, would not be deducted from her back wage award because such funds were collateral benefits not intended to reduce Respondent's liability for unlawful employment practices. ORS 659.010(2); 659.030(1)(a); 659.060(3).

The above-entitled contested case came on regularly for hearing before Andrew H. Josephson, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 19, 1981, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Daryl Wilson, Assistant Attorney General. Respondent Rich Manufacturing Company of Oregon was represented by Carol Hewitt, Attorney at Law. Complainant Sharon McClure was present and testified. Complainant also called as a witness Marion Robertson, Respondent's Shop Steward. Respondent called as witnesses Gary Smith, Respondent's Melting Foreman; David R. Sutter, Respondent's Superintendent; Jeffrey L. Smith, Respondent's employee; Victor L. Bjorkman, Respondent's Shipping Foreman; Richard L. Wenger, Respondent's Shipping Department Forklift Operator; and Donald W. Dillman, Respondent's Mill and Mobile Operator.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about September 25, 1979, Sharon McClure filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her employment by Respondent because of her sex.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation engaged in the business of foundry production work. Respondent engaged the personal service of one or more employees and reserved the right to control the means by which such service was performed in this business.

2) Complainant is a female.

3) On July 16, 1979, Complainant was hired by Respondent as a Class B Helper. She was assigned to the shipping department to work a standard 40 hour week. Complainant's duties as a Class B Helper included counting castings to fill orders, painting castings, moving castings, and loading castings with a fork lift. Complainant was the first female to work in the Respondent's production area.

4) Complainant was hired as a "Probationary Employee" pursuant to Respondent's collective bargaining agreement, which provides that new hires are on probationary status for 60 days during which time they may be terminated without cause.

5) Respondent's shipping department foreman and Complainant's immediate supervisor was Victor Bjorkman. He assumed that position a few months before Complainant was hired.

6) Complainant's co-worker, Rich Wenger, had worked in the shipping department for several years. He was very knowledgeable about the duties of the shipping department and knew some procedures better than Respondent's foreman.

7) On several occasions when Complainant would ask Mr. Bjorkman questions about her job duties, he would respond by instructing her to ask her co-worker, Rich Wenger. Mr. Wenger was reluctant to answer the questions since he was not the foreman and felt it was not within the scope of his job to answer her questions. He would instruct Complainant to again ask Mr. Bjorkman. This placed Complainant in a difficult and frustrating position.

8) The Complainant was inadequately supervised because of the conflict in instructions given by Respondent's foreman and Complainant's co-worker, Mr. Wenger. Complainant complained about this situation to Respondent's foreman but he failed to alleviate the situation.

9) Complainant informed Respondent's superintendent, David Sutter, that she was receiving inadequate supervision and the Respondent's foreman was doing nothing to correct the situation. Male employees in other departments were not inadequately supervised. Complainant's frustration caused her to cry while talking to Mr. Sutter.

10) Respondent's foreman instructed Complainant's co-workers not to talk to the Complainant during work. Complainant's co-workers were not given similar instructions not to talk to other male employees. During conversations with Complainant and co-workers, Respondent's foreman Mr. Bjorkman stated that he would not have his wife or daughter working in Respondent's production area.

11) During one conversation Respondent's superintendent told Complainant that Respondent was spending thousands of dollars for new showers and bathrooms in order to accommodate women working for the Respondent. This was said to the Complainant in order to make her feel guilty about working for Respondent.

During another conversation Respondent's supervisor told Complainant that the movement of her breasts while driving a forklift was distracting to her co-workers and possibly dangerous to Complainant. He told Complainant that she could not drive the forklift until she bought a support bra. He also stated that she may want to consider a bust reduction operation. Respondent's supervisor told Complainant that his daughter had a similar operation and gave Complainant the name of his daughter's treating physician.

12) Complainant was experienced in driving an electric forklift, however she had not driven a propane forklift, which was the type of forklift the Respondent used. On one occasion a co-worker observed Complainant driving a forklift forward down a hill. The forklift should have been driven backwards down the hill and the method Complainant used was unsafe. The co-worker reported his observations to Respondent's foreman. The foreman verbally warned Complainant about driving the forklift forward down the hill. Complainant corrected her driving on subsequent occasions.

13) Complainant did not receive written reprimands during her employment with Respondent. Written reprimands for probationary employees are not required by the collective bargaining agreement or by company policy.

14) On one occasion Respondent's foreman yelled at Complainant while she was assisting Mr. Wenger. Complainant was doing what she had been instructed to do and there was no explanation why Respondent's foreman was yelling at her.

15) Mr. Wenger stated that Complainant adequately performed her various job assignments. Since Mr. Wenger had worked in the shipping department longer than the foreman and Complainant's work directly affected his workload and he observed Complainant more than other co-workers, his opinion is more credible than the opinion of other witnesses.

16) A few days before Complainant was terminated, she was instructed by the foreman to place a two inch bander around a pallet without the assistance of a co-worker. A bander is a metal wire used to hold contents in place on a pallet. Using a two inch bander is always a two person job and the foreman was aware that it was a two person task. Complainant became frustrated while attempting to perform this task. Complainant had to ask Mr. Wenger to assist her in banding the pallet. Mr. Wenger was aware that this was a two person task. He assisted Complainant though he had not been instructed to do so by the foreman.

17) Respondent's foreman told Respondent's superintendent that he could not get along with Complainant and requested permission to terminate Complainant. Complainant was terminated on August 23, 1979, less than 60 days after she was hired. Complainant's poor work attitude was stated as the reason for her termination.

18) After Complainant's termination, her Shop Steward for the Molders and Allied Workers Union, Marion Robertson, requested that Respondent's superintendent transfer Complainant to another department. Respondent's superintendent denied the transfer citing Complainant's poor work attitude as the reason. The Shop Steward investigated Complainant's termination and determined that she was performing her job duties adequately and did not have a poor work attitude.

19) Complainant's salary at the time of her termination was $6.25 per hour as a Class B Helper and $7.26 per hour as a forklift driver. On October 16, 1979, Complainant would have received a 24 cent per hour increase in her Class B Helper wage rate. She would have again received a 24 cent per hour increase on January 16, 1980. Complainant would have received at 57 cent per hour increase as a forklift driver on March 13, 1980. Due to Respondent's reduction in work force, Complainant would have been laid off on May 2, 1980.

20) During Complainant's employment she worked 121.25 hours or 53 percent of her time, as a Class B Helper, and 107 hours, or 47 percent of her time, as a forklift driver. Fifty three percent of a 40 hour work week is 21.2 hours and 47 percent of a 40 hour work week is 18.8 hours. If Complainant had been employed by Respondent between August 23, 1979, and May 2, 1980, her wages would have been the following, as presented and agreed to by the parties:

8/23/79 to 10/15/79:

Helper : $6.25 x 21.2 hrs. = $132.50/wk
Forklift Driver: $7.26 x 18.8 hrs. = $136.48/wk
TOTAL: $268.98/wk x 8 wks = $2151.00 (sic)

10/16/79 to 1/15/80:

Helper $6.49 x 21.2 hrs. = $137.58/wk
Forklift Driver: $7.26 x 18.8 hrs. = $136.48/wk
TOTAL: $274.06/wk x 13 wks = $3562.00 (sic)

1/16/80 to 3/12/80:

Helper $6.73 x 21.2 hrs. = $142.67/wk
Forklift Driver: $7.26 x 18.8 hrs. = $136.48/wk
TOTAL: $279.15/wk x 8 wks = $2233.00 (sic)

3/13/80 to 5/2/80:

Helper $6.73 x 21.2 hrs. = $142.67/wk
Forklift Driver: $7.83 x 18.8 hrs. = $147.60/wk
TOTAL: $289.87/wk x 7 wks = $2029.00 (sic)

TOTAL of all wages to 5/2/80: $9975.00 (sic).

21) Despite Complainant's reasonable efforts, including seeking training with CETA, she earned no wages from the date of discharge, August 23, 1979, to May 2, 1980, the date she would have been laid off. Complainant did receive a CETA allowance of $419.00 and, although it was not taxable wages, it was income, and five weeks of unemployment compensation totaling $175.00.

22) Complainant was upset about her termination but there was insufficient evidence presented to demonstrate that Complainant suffered pain, humiliation, or mental anguish as a result of her termination, therefore an award of general damages cannot be supported.

23) Between August 23, 1979, and May 2, 1980, Complainant experienced a death in the family. Had she been working for Respondent at this time she would have missed three working days. Respondent presented no evidence regarding its personal leave policy and absent any evidence to the contrary, it cannot be assumed that Complainant would not have been paid for these days.

ULTIMATE FINDINGS OF FACT

1) Complainant was a female person.

2) Complainant was qualified to perform and did perform adequately her duties as a Class B Helper and forklift driver in Respondent's shipping department.

3) Complainant was the first female to work in Respondent's production area.

4) Complainant did not receive adequate supervision in her job.

5) Respondent permitted a sexually discriminatory atmosphere to exist in Respondent's production area.

6) The sexually prejudicial attitude and statements of Respondent's employees who were Complainant's supervisors caused Complainant to become frustrated with her job duties.

7) Respondent's sexually prejudicial attitude toward Complainant was the cause of her termination. Respondent did not show the existence of a non-pretextual, legitimate, non-discriminatory reason for discharging the Complainant.

8) Based on the calculations of Findings of Fact Nos. 19, 20, 21, and 22, the Complainant is entitled to damages in the amount of $9,975.00 (*sic*), which represents the amount Complainant would have earned but for Respondent's unlawful actions.

CONCLUSIONS OF LAW

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

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

3) The actions and motivations for those actions of Respondent's employees, who were Complainant's supervisors, described herein are properly imputed to the Respondent.

4) Respondent's treatment of Complainant while she was on the job created a sexually discriminatory work atmosphere and is in violation of ORS 659.030(1)(a), because it constitutes discrimination in the terms, conditions, and privileges of employment based upon Complainant's sex.

5) Complainant was discharged from Respondent's employ because of Respondent's sexually discriminatory attitude towards Complainant. Her discharge violates ORS 659.030(1)(a) in that it constitutes discrimination in the terms, conditions, and privileges of employment based upon Complainant's sex.

6) Oregon law does not require the Commissioner of the Bureau of Labor and Industries to deduct the unemployment compensation received by Complainant from a damage award of back wages. Unemployment compensation and non-taxable CETA funds were created only to provide a substitute income from public funds and are not intended to be a source for paying damages to a worker who has been wronged by an employer's sex discrimination. Unemployment and benefits from comparable social programs are collateral benefits to the employee only and are not designed to be used to reduce the employer's liability for the consequences of unlawful employment practices.

7) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

OPINION

The Specific Charges allege that the Complainant was sexually harassed on the job and "was terminated because of her sex." Respondent denies the Specific Charges by stating that Complainant did not perform her job duties adequately and had a poor work attitude.

Complainant was hired on a 60 day probationary status. This allowed Respondent an opportunity to observe Complainant before placing her on permanent status. While Complainant was serving the 60 day probationary period, Respondent could terminate her employment without cause. However, this does not mean that Respondent could terminate Complainant for an unlawful, discriminatory reason.

Respondent's evidence showed that a co-worker once observed Complainant driving a forklift in an unsafe manner and reported this to Respondent's foreman. However, Complainant's co-worker, Rich Wenger, stated that day to day, Complainant was performing her job duties adequately. Since he worked with Complainant on a steady basis, his opinion carries more weight than that of a casual observer. Further, Complainant's job performance directly affected his ability to get his own work done. Had Complainant's work been unsatisfactory Mr. Wenger would have suffered directly and thus he would not have an interest in misstating her capabilities. The evidence also showed that Mr. Wenger had worked in the shipping department longer than Respondent's foreman and was more knowledgeable about the particulars of the job duties than Respondent's foreman. Since he has greater knowledge about the department, his opinion carries more weight than that of Respondent's foreman.

At the time Complainant was hired, a conflict had arisen between the foreman of the shipping department and Mr. Wenger. The foreman of the department was new and was unfamiliar with the job duties of the department. Respondent's foreman told Complainant to ask Mr. Wenger what job duties needed to be performed. Mr. Wenger felt that it was not his job to instruct Complainant and informed Complainant that she should go back and ask Respondent's foreman. Complainant was the only employee affected by this situation. This put Complainant in a difficult and frustrating position.

Complainant's frustration was additionally increased by the behavior of Respondent's supervisors. Evidence indicates that Respondent's foreman told co-workers not to talk to Complainant. Respondent's supervisor told Complainant that her breasts were distracting to the men and a possible safety hazard and that she may want to consider a breast reduction operation. He also told Complainant that Respondent was spending thousands of dollars in order to accommodate women employees. This comment was made for the purpose of creating additional frustration and guilt for Complainant as the first-hired female employee. The foreman told Complainant and co-workers that he would not want his wife or daughter working in

Respondent's production area. The foreman also yelled at the Complainant without cause. As one witness stated, "It was like she was under a microscope," because of her sex. Complainant was discriminated against in her employment because of her sex.

The above stated events caused complainant to cry when she brought her problems to the attention of Respondent's superintendent. Respondent's superintendent criticized Complainant by stating that male employees did not react to problems this way. In our culture, women generally are socialized to react differently to stressful situations than men. The statement by Respondent's superintendent indicates his discomfort with Complainant's crying and his expectation that she behave as he perceived the men on his crew would. The fact that a stressful and frustrating work situation caused Complainant to cry does not impact on her job performance and may not be one of the bases of an employment decision. Similar problems did not arise for male employees because males were not subject to the discrimination based on sex which Complainant experienced. Complainant was terminated as a direct result of her sex.

Despite reasonable efforts to obtain employment, Complainant was unable to earn any wages to mitigate her damages during the period from August 23, 1979, to May 2, 1980. The unemployment compensation and CETA benefits she received during this time are collateral sources of income intended by public policy to benefit an employee who has lost her job and not reduce the employer's liability for the consequences of unlawful employment practices. *In the Matter of Spear Beverage Company*, 2 BOLI 240 (1982).

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, and to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Sharon McClure, in the amount of TWELVE THOUSAND ONE HUNDRED FOURTEEN DOLLARS and THIRTY CENTS ($12,114.30), which represents $9,975.00 damages plus interest in the amount of $2,139.30 accrued at the legal rate of nine percent, compounded annually to August 1, 1982. This represents the amount lost by Complainant because of Respondent's unlawful employment practices set out above. Interest will continue to accrue at the legal rate of interest until Respondent complies with this Order.

2) Cease and desist from discriminating against its employees on the basis of sex.

In the Matter of

S.O.S. TOWING AND STORAGE, INC., an Oregon corporation, Respondent.

Case Number 18-81

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 5, 1982.

SYNOPSIS

Respondent willfully failed to pay Claimant's final wages when he quit after 10.8 hours of employment. While an employer has a right to separately assert a lawful counterclaim or setoff against an employee for negligent damage to equipment, the employer cannot use such a claim to avoid payment of wages. The Commissioner found no evidence to support Respondent's assertion that Claimant had agreed to work one full day free in order to learn Respondent's business, and rejected the defense as against public policy. The Commissioner awarded Claimant $45.38 in unpaid wages and $1,361.40 as penalty wages. ORS 652.140; 652.150; 652.310(1); 652.332.

The above-entitled matter came on regularly for hearing before Dale A. Price, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on March 24, 1982, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Victor Levy, Assistant Attorney General. Employer S.O.S. Towing and Storage, Inc. was represented by Robert M. Hagen, Sr., Attorney at Law. Wage Claimant Jerry A. Montanbault was present and testified. Jacquelyn Runyon, President of S.O.S. Towing and Storage, Inc., was present and testified.

Having fully considered the entire record in this matter, I, Mary Roberts, hereby make the following Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On October 3, 1980, Claimant Jerry A. Montanbault filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries alleging that the Employer, S.O.S. Towing and Storage Inc., was his former Employer and that the Employer had failed to pay wages due to him.

2) On October 3, 1980, the Claimant assigned all wages allegedly due to him from the Employer to the Commissioner of the Bureau of Labor and Industries in trust for the Claimant.

3) On December 3, 1980, the Claimant signed a form entitled "Decision as to Implementation of Administrative Process," which authorized the Bureau of Labor and Industries to process his wage claim through the administrative process described in ORS 652.310 to 652.405.

4) On February 6, 1981, the Administrator of the Wage and Hour Division issued an Order of Determination, which found that the Employer owed the Claimant $50.82 in unpaid wages, plus interest thereon. In addition, the Order of Determination found that the

Employer owed the Claimant $1,524.60 in penalty wages, plus interest thereon. The Order of Determination was served upon the Claimant on February 14, 1984, and upon the Employer on February 11, 1981.

5) Thereafter, the Employer filed with the Wage and Hour Division a request for hearing in this matter and an answer to the above-mentioned Order of Determination denying the wage claim in its entirety and alleging as affirmative defenses that the Claimant had agreed to work one full day without pay while learning the Employer's business, and that negligent damage to the tow or to Employer's equipment would be charged to Claimant as driver. The Employer's answer further alleges that Claimant's gross wages totaled $10.40, that Claimant owes Employer $102.00 for negligent damage to equipment and to a towed vehicle, and that no penalty wages should be awarded because no wages are owed to Claimant.

6) The Bureau of Labor and Industries duly served the Employer and the Claimant with Notices of the Time and Place of Hearing.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, the Employer was engaged in the business of towing and storing automobiles. In this business, the Employer employed one or more persons in the State of Oregon.

2) On or about September 19, 1980, Wage Claimant Jerry A. Montanbault was referred by the Oregon State Employment Service Job Bank to the Employer's place of business. On the same day, Claimant went to Employer's place of business where he was interviewed for the position of driver by Larry Runyon, owner of S.O.S. Towing. During this interview Mr. Runyon and the Towing Manager watched Claimant raise and lower an automobile using a tow truck. Mr. Runyon was satisfied with Claimant's qualifications and it was mutually agreed that Claimant would report for work on Sunday, September 21, 1980.

3) On or about September 19, 1980, while Claimant was initially at the Employer's place of business, Bob Hagen and the Employer's Tow Manager met with him to negotiate a rate of pay. The agreed upon rate of pay was two hundred dollars per week for forty-eight hours per week, or $4.16 per hour. It was agreed that during off-duty hours, Claimant would be on call and would be paid additional regular per hour pay from the time when he received a call at home until he finished the task assigned.

4) On or about September 21, 1980, Claimant reported for work at Employer's place of business. Claimant reported to the dispatcher, who assigned him to wash tow trucks. Claimant spent seven hours washing tow trucks on this first day at work for Employer. At the end of his first work day, Claimant took a tow truck and a voice pager home with him to enable him to respond to calls from the dispatcher.

5) The evening of his first day of work for Employer, Claimant received a call at home at around seven in the evening. This call directed Claimant to recover a vehicle at the State scales on the Sunset Highway and deliver it to 2228 N.E. Union Avenue, Portland, Oregon. Claimant spent from 7:30 p.m. to 9:10 p.m. on this job before returning to his home.

6) During the night following his first day at work for Employer, Claimant received a call at home at around 12:30 a.m. He was directed to recover a vehicle from North Sumner Street and Interstate Avenue. When Claimant arrived at the location described, he found an automobile without wheels and tires. He placed the vehicle on a dolly, or cradle, in accordance with the Employer's established procedures. Enroute to Employer's storage lot, the dolly had two flat tires. Claimant set the automobile down and sought repairs for the flat tires. Having replaced the repaired tires on the dolly, Claimant resumed his movement of the automobile to Employer's storage area, where he backed the automobile in between two others in accordance with the Employer's instructions. Claimant set jack stands under the automobile to attempt to remove the dolly, but the jack stands settled in gravel and one jack stand was bent as the automobile began to sway to one side. Claimant and the Dispatcher debated solutions to the problem. Finding no better solution, Claimant let the automobile down on the dolly and left it. He spent from 12:45 a.m. to 2:45 a.m. on this assignment.

7) On or about September 22, 1980, Claimant told the Employer's night dispatcher that he would accept no further assignments and that he would like to have his check mailed to him. Claimant noted his hours on the back of a business card on or about September 22, 1980.

8) On September 22, 1980, Claimant called and talked to the daytime dispatcher three times, told him that he would accept no further assignments as a result of what had happened the day before, and requested that his paycheck be mailed to his residence. Claimant also called Larry Runyon at home, who instructed him to deal with the towing manager.

CONCLUSIONS OF LAW

1) S.O.S. Towing and Storage, Inc. is an Employer as defined in ORS 652.310(1).

2) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to the Claimant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

3) The Employer owed the Claimant forty-five dollars and thirty-eight cents ($45.38), and its failure to pay the Claimant immediately following the termination of the Claimants employment constitutes a violation of ORS 652.140.

4) The Employer's intentional failure to pay Claimant the above-mentioned forty-five dollars and thirty-eight cents was willful and therefore constitutes a violation of ORS 652.150. Claimant worked a daytime shift of seven hours and 3.83 hours additional call time. Claimant's "average daily wage" for the one day plus additional call time he worked was incorrectly computed in the Order of Determination and should be computed by multiplying $4.16, the hourly wage, times 10.83 hours for a total of $45.38.

Penalty wages are computed on the basis of the "average daily wage."

$ 45.38 (average daily wage)
x 30 (days)
$1,361.40 (penalty wages)

OPINION

The Employer asserts that Claimant agreed to work one full day without pay in order to learn the Employer's business. No evidence was offered in support of this assertion. The Claimant denies having made such an agreement. Claimant's first day was spent washing tow trucks, not receiving training. As a matter of public policy, it must be assumed that an employee should be compensated for all work performed. Where there exists a dispute as to whether an employee agreed to work for free, such dispute must be resolved in favor of the employee who has performed services for the employer.

The Employer asserts that there should be certain offsets against any money otherwise owing the Claimant. In *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976), the court held that the employer could not legally withhold money from a departed employee's paycheck where a petty cash account, which had been in the employee's control, had been found to be short of the proper amount of money. In *Schulstad v. Hudson Oil*, 55 Or App 323, 637 P2d 1334 (1981) *rev den* 292 Or 825, 648 P2d 849(1982), the court defined which deductions from wages owing are to be allowed. In summary, the court held that only deductions which inure to the benefit of the employee, such as payments for health insurance, may be deducted by the Employer against wages owing. However, the court recognized that the right to enforce a lawful setoff or counterclaim against wages owing could be pursued by the employer, but not automatically deducted. The Employer in the case at hand has a right to assert a claim of negligent damage to equipment operated by Claimant, but may not perfunctorily use this claim to avoid payment of wages.

The Employer asserts that it did not know the amount owing to Claimant, and that it was therefore unable to pay. In *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950), the court held that an employer has a duty to know the amount of wages due to an employee at the time of termination of said employee's employment, and that such amounts become due and payable immediately upon termination of employment. The Employer's defense in the case at hand must fail.

The awarding of penalty wages turns upon the issue of willfulness. In *State ex rel Nilsen v. Johnston et ux*, 233 Or 103, 108, 377 P2d 331 (1962), the court adopted a test articulated in *Davis v. Morris*, 37 Cal App 2d 269, 99 P2d 345 (1960). This test states that in civil cases willfulness doesn't imply or require blame, malice, wrong, perversion, or moral delinquency, but only that that which is done or omitted was intentionally done with knowledge of what was done and that the actor or omittor was a free agent. The Employer in the case at hand must be deemed to have acted willfully under this test.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Employer is hereby ordered to:

1) Pay to the Hearings Unit of the Portland office of the Bureau of Labor and Industries ONE THOUSAND SIX HUNDRED FORTY EIGHT DOLLARS and EIGHTY ONE CENTS ($1,648.81):

a) FORTY-FIVE DOLLARS and THIRTY EIGHT CENTS ($45.38), to be held in trust for Jerry A. Montanbault, plus interest at the rate of nine per cent per annum compounded annually from September 24, 1980, to August 1, 1982, in the amount of $7.87, which is to continue to accrue until paid; plus,

b) Penalty wages of ONE THOUSAND THREE HUNDRED SIXTY-ONE DOLLARS and FORTY CENTS ($1,361.40) to be held in trust for Jerry A. Montanbault, plus interest at the rate of nine per cent per annum compounded annually from October 24, 1980, to August 1, 1982, in the amount of $234.16, which is to continue to accrue until paid.

In the Matter of
FRED N. BAY NEWS COMPANY,
an Oregon corporation, Respondent.

Case Number 51-80
Final Order of the Commissioner
Mary Wendy Roberts
Issued August 10, 1982.

SYNOPSIS

Respondent discharged black Complainant, who had an excessive absentee record and had tendered her resignation, for absenteeism and tardiness prior to acting upon her request to withdraw her resignation. Finding that Respondent had earlier allowed two white employees to temporarily delay their already-submitted resignations because they were needed on the night shift, but that no such need existed when Complainant resigned, the Commissioner ruled that the Agency had failed to prove a prima facie case of an unlawful employment practice based on race and color, and granted Respondent's motion to dismiss the Specific Charges and the complaint. ORS 659.060(3).

The above-entitled matter came on regularly for hearing before Michael J. O'Brien, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries. The hearing was held on August 5, 1980, in Room 908A of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. Respondent Fred N. Bay

News Company was represented by John C. Stevason, Attorney at Law.

The Agency called as witnesses Complainant Alice R. Yearby, and Robert Bay, part owner of Bay News, Inc. and Assistant General Manager of Fred N. Bay News Company. Respondent called as witnesses Robert Bay and Ray Grulke.

FINDINGS OF FACT – PROCEDURAL

1) At times material herein, Respondent was an employer within the State of Oregon and as such was subject to the provisions of ORS 659.010 through 659.110.

2) On January 18, 1979, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her employment with Respondent on the basis of her race.

3) Following the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) Complainant is a black female.

2) At times material herein, Respondent was an Oregon corporation.

3) Complainant was employed by Respondent as a keypunch operator (hereafter referred to as operator) in June 1978. At the time of her termination, Complainant was the only night shift operator in Respondent's employ.

4) On at least one occasion prior to her termination, Complainant was warned by her immediate supervisor that failure to improve her allegedly deficient attendance record could result in termination of her employment. Complainant's attendance problems included at least one unexcused absence and chronic tardiness, which ranged from five minutes to one hour.

5) Respondent's key punch operations were structured so that one daytime operator would stay until after the night operator arrived. This overlap allowed the day operator to inform the night operator of tasks which needed to be completed. Day operators who stayed beyond their scheduled shift were paid overtime. When the night operator was late, or failed to come to work, Respondent was forced to pay day operators overtime for the time spent waiting for the night operator or for completing the night operator's shift.

6) On or about September 25, 1978, Complainant submitted a verbal resignation to her immediate supervisor, effective October 6, 1978.

7) On or about September 27 or 28, 1978, Complainant requested that her resignation be withdrawn.

8) Prior to any action on her request for reinstatement, Complainant was discharged by Respondent on or about October 4, 1978. Between September 25 and October 4, 1978, Complainant had two unexcused absences. The stated reasons for the discharge were Complainant's excessive absenteeism and tardiness and because Respondent perceived that she exposed Respondent to increased costs for employee medical insurance by entering the hospital for elective surgery immediately prior to the effective date of her resignation. (The parties agreed at hearing that Respondent's discharge of Complainant is not at issue because it was for legitimate, nondiscriminatory reasons.)

9) Earlier in 1978, two white night operators were reinstated by Respondent following submission of their resignations. Both employees had attendance records substantially worse than Complainant's, but were allowed to return because Respondent had no other employees available to work the night shift and would have incurred substantial overtime costs in having the day staff fill in. Within two weeks of their rehire, one of the white employees was fired due to excessive absenteeism and the other allowed to resign because of excessive tardiness and poor attitude.

10) At the time of Complainant's termination, Respondent had operators available to work the night shift without incurring overtime costs.

ULTIMATE FINDINGS OF FACT

1) Complainant, a black female key punch operator, submitted her resignation to Respondent to be effective October 6, 1978.

2) On or about September 27 or 28, 1978, Complainant requested that her resignation be withdrawn. Before the effective date of Complainant's resignation, she was discharged for excessive absenteeism and for exposing Respondent to increased insurance costs.

3) Earlier in the year, two white operators were allowed to withdraw their resignations because, at the time of their resignations, Respondent did not have staff available to fill their positions.

RULING ON MOTION

Twice during the course of the hearing, Respondent moved to dismiss the Specific Charges and complaint in this matter on grounds that the Agency had failed to establish a prima facie case of employment discrimination. Initially, the motion was denied with leave to renew. When the motion was renewed, a ruling was reserved for the Proposed Order. Upon a full review of the record, Respondent's motion is granted.

The Amended Specific Charges allege that Complainant "was subject to disparate treatment by Respondent in its decision not to accept the withdrawal of her resignation on or about October 4, 1978." It should be noted that the Amended Specific Charges do not allege that Respondent's termination of Complainant's employment was in anyway unlawful. In fact, the parties agreed that the discharge was not at issue. Rather, the only issue is whether Complainant was not allowed to withdraw her resignation because of her race.

Complainant's employment was continuous until the October 4, 1978, discharge. She did not leave her position and then request reinstatement. Mr. Bay testified that had Complainant left and asked to return, he would not have allowed her to return. Until Complainant's resignation either went into

effect or Respondent answered her request to withdraw her resignation, she was not denied reinstatement.

Complainant's termination, for what all parties agreed was legitimate reasons, makes moot the issue of allegedly disparate treatment.

CONCLUSIONS OF LAW

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

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

3) The actions of Respondent's agents and employees as described herein are properly imputed to Respondent.

4) The Agency failed to present a prima facie case, as described in the Ruling Upon Motion above.

ORDER

NOW, THEREFORE, the Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and the Complaint filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of

C & V, INC.,

an Oregon corporation, Respondent.

Case Number 15-81

Amended Final Order of

the Commissioner

Mary Wendy Roberts

Issued August 30, 1982.

SYNOPSIS

Respondent paid female Complainant less per hour as a "knot bumper" than it paid male "knot bumpers" who had the same duties before and after she did. Finding that Complainant quit out of frustration when Respondent refused or ignored her repeated demands for pay parity, and that Respondent's president often remarked in Complainant's presence that a woman was not worth as much as a man on the job, the Commissioner held that Respondent committed an unlawful employment practice based on sex, and awarded Complainant back wages of $1,084 in wage differential plus interest, and $1,000 for mental anguish. ORS 659.030(1)(a).

The above-entitled contested case came on regularly for hearing before Diana E. Godwin, designated as Presiding Officer by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 14, 1982, in the Community Service Room of the Cascade Natural Gas Building, 334 N.E. Hawthorne Street, Bend, Oregon. The Bureau of Labor and Industries was represented by Betty

Smith, Assistant Attorney General. Respondent C & V, Inc. was represented by Stanley E. Clark, Attorney at law. The Agency called as witnesses Complainant Mary McDaniel; Lambert McDaniel, Complainant's husband and log skidder with Respondent; Jerry Arnold, claims adjudicator, State of Oregon Employment Division; and Dan Mura, former knot bumper and logging truck driver with Respondent. Respondent called as witnesses Chester Bradley, Respondent's president; Virginia Bradley, Respondent's secretary and bookkeeper and wife of Respondent's president; and Dave Schweizerhof, truck driver with Respondent.

Having fully considered the entire record in this matter, I, Mary Roberts, make the following Findings of Fact, Amended Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On April 7, 1980, Mary M. McDaniel filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her employment by Respondent because of her sex.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) The parties were not able to settle the matter prior to hearing.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation engaged in the business of logging. In that business, Respondent utilized the personal service of one or more employees and reserved the right to control the means by which such service was performed.

2) Complainant is a woman.

3) Respondent initially employed Complainant on August 21, 1978, as a safety person. As safety person, Complainant was required to drive a pickup truck behind a log skidder (which drags logs to a landing at a logging site in the woods), and be available at the site to assist in case of injuries to other workers. Complainant worked as a safety person for Respondent from August 21, 1978, until August 31, 1978.

4) On September 1, 1978, Complainant began work as a knot bumper. The duties of a knot bumper were to knock limbs off of logs at the landing site using a chain saw, cut out bad spots in the logs and cut off rotten or bad ends. A knot bumper's job included keeping the chain saw sharp, driving from the logging site to Respondent's shop to obtain parts to repair logging equipment that had broken down in the woods, and assisting with equipment repairs in the woods. A knot bumper also assisted in unhooking choker chains from the logs on the skidders. The job involved some periods of waiting in the truck at the landing when no logs were to be limbed. Complainant performed all of the tasks required of a knot bumper and, in addition, she marked logs according to whether they were to cull or mill logs. Marking logs, however, was not part of

the knot bumper's job and did not figure into the wage paid to Complainant. While working at the logging site as a knot bumper, Complainant also served as the safety person.

5) From August 21, 1978, through July 31, 1979, Respondent paid Complainant $4.50 per regular work hour. During this time, Respondent paid Complainant time and one-half, or $6.75, per overtime hour. Respondent did not change Complainant's hourly wage after she began bumping knots on September 1, 1978. She worked 1,188.46 regular hours from September 1, 1978, through July 31, 1979, and 36 overtime hours during this same period.

6) From August 1, 1979, to February 29, 1980, Respondent paid Complainant $4.75 per regular work hour. During this time Respondent paid Complainant time and one-half, or $7.12, per overtime hour. She worked 901.57 regular hours and 16 overtime hours during this period.

7) At the time Complainant was hired, Respondent's president Chester Bradley represented to Complainant that she would be paid $5.00 per hour as a starting wage. Lambert "Skip" McDaniel, Complainant's husband, heard Mr. Bradley make this statement. Mr. McDaniel has worked for Respondent for five and one-half years and is currently working for Respondent running a log skidder.

8) Complainant used some of the money she earned working for Respondent for paying household bills, but her earnings did not go into a common household fund for general household use or for use by her husband. Complainant is an independent person who makes her own decisions and controls her own money separate from her husband.

9) Dale Haney, a male, worked as a knot bumper and safety person immediately before Complainant was hired, and performed the same tasks as Complainant. At the time of his termination, he was paid $5.50 per hour for regular work and $8.25 for overtime. Virginia Bradley, Chester Bradley's wife and the secretary and bookkeeper for Respondent, testified that Respondent hired "a kid" to work with a second log skidder as a knot bumper for about a month, in either the summer of 1978 or 1979, and that he was paid $4.50 per hour. However, there were no wage records to show this, nor could Ms. Bradley remember the person's name. Because of this, Ms. Bradley's testimony regarding this issue was not given any weight.

10) Part of Mr. Haney's job during the time he worked for Respondent involved cutting shake bolts from logs. This task required initial selection of logs appropriate for shake bolts, measuring out 24 inch lengths and making a square cross-cut with a chain saw. However, from approximately April or May 1978 until he left Respondent's employ shortly before Complainant was hired, Mr. Haney did not cut shake bolts. During this time he worked only as a knot bumper and safety person with Mr. McDaniel. His hourly wage was not decreased when he worked exclusively as a knot bumper and safety person. After he was no longer cutting shake bolts, Mr. Haney did the same job that Complainant was hired later to do. Mr. Haney did not mark logs as cull or mill logs.

11) Mr. Haney also worked as a fire watcher during fire season, but was paid a separate fee of $10.00 per day for this extra duty. Respondent ultimately fired Mr. Haney for drinking on the job.

12) Complainant did not object to being paid $4.50 per hour when she first began work because she was working only as a safety person and was not bumping knots. After she began working as a knot bumper, she regularly and frequently began asking to be paid $5.00 per hour. Mr. Bradley testified that Complainant "was always asking for a raise" and was "an agitator."

13) When Complainant would ask for a raise, Mr. Bradley would respond in different ways. He would tell her that when Respondent moved to a new logging site and Complainant was working with two log skidders, she would get a raise. Sometimes he would merely pass off her requests as a joke, or reply that "he'd see about a raise." He would also tell her occasionally that she would get a raise on her next check.

14) In the summer of 1979, when Respondent's logging crews were working on the Warm Springs Indian Reservation, Mr. Bradley made a statement to Complainant to the effect that "A woman is not worth a man's wages." This remark was made in the presence of Mr. Bill Hill. Complainant became embarrassed and angry as a result of Mr. Bradley's remarks.

15) In December 1979 and January 1980, Complainant told Mr. Bradley that she wanted a raise or she would quit. Mr. Bradley's response was to laugh.

16) When Complainant received her January 1980 paycheck, which did not include a raise, she again asked Mr. Bradley why she didn't get a raise. His reply was to the effect that "No woman is worth $5.00 per hour; I don't care what kind of job she does." Complainant replied that she was worth $5.00 an hour and was doing a good job. This exchange occurred in the vicinity of some of Respondent's other employees and Complainant was angry and embarrassed by the exchange. However, she did not perceive that she was treated any differently by her fellow workers as a result of the confrontation with Mr. Bradley.

17) Complainant had no knot bumping experience prior to being hired by Respondent. Complainant learned the job of knot bumping in a reasonably short period of time -- approximately four days -- and was competent at her job. She was able to handle and sharpen the chain saw used to bump knots. She also unhooked choker chains for the skidders and assisted Mr. Bradley with marking logs as cull or mill logs. Mr. Bradley did not complain about the quality of her work as a knot bumper and, on at least one occasion, he complimented her, saying that he didn't think at first that she could do the job, and that her work was as good as most knot bumpers and better than some. After a while Mr. Bradley no longer had Complainant marking logs because she had a 25-30 percent error rate. Marking logs was not part of the job of knot bumper, so that Complainant's inability to mark logs to Mr. Bradley's satisfaction did not cause her job performance

to be less demanding than those knot bumpers paid a higher salary.

18)Complainant worked between eight and nine hours per weekday on the average, with some overtime, and also worked many Saturdays. Work on Saturday was not compensated as overtime. Complainant was not on the payroll for the months of December 1978 and December 1979 due to lack of work.

19)The job of knot bumper involved some periods of waiting for logs from the skidders. During this time, the knot bumper would either sit on the log deck or, if the weather was bad, in the pickup truck at the landing. Complainant would rest or wait in the pickup truck during these slow periods. Other knot bumpers who worked for Respondent, including Mr. Haney, also had periods of waiting and resting in the truck. Complainant would also rest or sleep in the truck on her lunch break.

20)Complainant's work also required her occasionally to drive to the shop to procure parts for broken logging equipment. Other knot bumpers performed these same tasks. Complainant, like other knot bumpers, was also required to take equipment to the shop for repair and either wait for it or assist in repair.

21)Mr. Bradley remarked to Don Mura, another employee, to the effect that "No damn woman is worth $__." Mr. Mura cannot recall the amount of money which Mr. Bradley used. Mr. Bradley made this remark to Mr. Mura when the two of them were working together in the woods. At the time Mr. Bradley made the remark, he appeared to Mr. Mura to be in a bad mood as a result of having another confrontation that day with Complainant over the issue of her wage. Prior to that conversation, Mr. Mura had heard Complainant ask Mr. Bradley for a raise on more than one occasion. Complainant talked to Mr. Mura about wanting a raise.

22)Mr. Mura worked for Respondent as a log truck driver from August 1979 to January 1980. Prior to working for Respondent, Mr. Mura worked as a knot bumper for four and one-half to five years and is familiar with the duties. He had the opportunity to observe Complainant at work and his opinion is that she did a good job. He saw her sitting in the pickup truck on one occasion when it was snowing and there were no logs to be limbed. Every other time he observed her she was cutting limbs.

23)Respondent fired Mr. Mura for getting an overload ticket. Mr. Bradley told him that there were other reasons for his termination, but Mr. Bradley would not tell him what those reasons were.

24)Other of Respondent's employees realized that Complainant was not being paid the wage which she should have been receiving as a knot bumper and some workers remarked to Mr. Mura that Complainant should be receiving $5.00 per hour.

25)Complainant's last day of work for Respondent was February 28, 1980. Complainant telephoned Ms. Bradley and told her in a loud, agitated voice that she was quitting her job.

26)Complainant subsequently filed for state unemployment compensation in March of 1980, stating that she had been laid off because she asked for a raise, and further stating that Respondent was paying men more for the same work. Jerry Arnold, claims adjudicator for the State Employment Division, conducted a fact finding investigation to determine whether Complainant was eligible for unemployment compensation. A fact finding is conducted where there is a dispute as to whether an individual is eligible.

27)During his investigation, Mr. Arnold contacted Mr. Bradley by telephone and recorded by hand the statements which Mr. Bradley made concerning Complainant. Mr. Arnold recorded that Mr. Bradley said "I payd (*sic*) her $5.00 per hour, the same as all other knot bumpers (except if a faller helps out knot bumping I pay him faller wages)." Mr. Arnold is not an interested party to this proceeding and his testimony is credible.

28)Mr. Bradley testified that he made the remark to Mr. Arnold that Complainant was paid $5.00 an hour, the same as the other knot bumpers, because he was intending to give her a raise to $5.00 had she stayed another month. Mr. Bradley's testimony on this point was not credible.

29)Bill Warner, Sr., worked as a knot bumper for Respondent for approximately 10 days to two weeks after Complainant quit. Mr. Warner's son worked on the Bradley's farm and because of this, Mr. Warner volunteered to work as a knot bumper temporarily for Respondent without compensation. Mr. Warner did not work as fast as Complainant.

30)Approximately mid-March 1980, Respondent hired Don Freeman to replace Mr. Warner and to take over Complainant's job. Mr. Bradley admits that Mr. Freeman did the same job as Complainant, although he was never asked to mark logs cull or mill logs, nor did he buck shake bolts. Mr. Bradley did not know whether Mr. Freeman had any experience working in the woods at the time he was hired. Respondent did not have to train Mr. Freeman to use a saw, although Mr. Freeman's prior use of a chain saw was limited to cutting firewood himself. Respondent paid Mr. Freeman $5.00 per hour as a starting wage.

31)Mr. Bradley testified that he paid Mr. Freeman $5.00 an hour when Mr. Freeman began work, a few weeks after Complainant quit, because of inflation. He also testified that he told Complainant shortly before she quit that she was getting a raise.

32)Respondent was subpoenaed to produce the wage records for Complainant, Mr. Haney, and Mr. Warner, Sr. Ms. Bradley testified that Respondent did not produce the records because it is company policy to routinely destroy the records after the State Accident Insurance Fund audit. Also, no payroll records ever existed for Mr. Warner, Sr., since he was never on Respondent's payroll.

33)Complainant experienced frustration and anger during most of the time she was employed by Respondent as a result of being paid less than she would have been paid had she been a man doing the same job. She quit her job with Respondent because she was so angry and frustrated that her repeated efforts to obtain a raise to the level of her male predecessor had failed, and that Mr. Bradley was not dealing with her in good faith and had no intention of paying her an equal

wage. After she quit, Complainant continued to think about Respondent's discriminatory policy toward her and continued to be angry and upset.

34) Complainant received total gross wages of $1,575.00 for regular hours worked and $33.75 for documented overtime hours from September 1, 1978, to November 30, 1978, for a total gross income of $1,608.75. (The month of August is not included in a calculation of wages for 1978 because Complainant was not, in fact, doing the job of knot bumping, which carried a higher hourly wage.) Complainant did not work in December of 1978.

Complainant received total gross wages of $3,761.58 for regular hours worked and $220.72 for documented overtime hours worked from January 1, 1979, to July 31, 1979, for a total gross income of $3,982.30. She received gross wages of $2,168.80 for regular hours worked and $106.80 for documented overtime hours worked from August 1, 1979, to November 30, 1979, for a total gross income of $2,275.60. Complainant did not work in December of 1979. The above gross wages are based upon Complainant's W-2 and by calculating total average monthly earnings of $568.90 per month in 1979, figured on the eleven months she worked.

Complainant received total gross wages of $2,113.68 for regular hours worked and $7.12 for documented overtime hours worked from January 1, 1980, until February 29, 1980, for a total gross income of $2,120.80.

35) If Respondent had paid Complainant the same wage it paid Mr. Haney or Mr. Freeman at times material, Respondent would have paid Complainant $5.00 per regular work hour and $7.50 per overtime hour from the time Complainant began bumping knots – September 1, 1978 – until August 1, 1979. If Respondent had done this, Complainant's wage would have been $5.25 per regular work hour and $7.87 per overtime hour from August 1, 1979, to February 29, 1980.

AMENDED ULTIMATE FINDINGS OF FACT

1) Complainant, a female, was employed by Respondent as a safety person from August 21 until August 31, 1978. She was employed as a knot bumper from September 1, 1978, until February 29, 1980.

2) Although she had no previous experience working in the woods for a logging operation, Complainant learned the job of knot bumping quickly, and performed the job at a skill level as good or better than the males previously and subsequently hired by Respondent as knot bumpers.

3) Respondent paid Dale Haney, a male and Complainant's immediate job predecessor, at least $5.00 per hour when Mr. Haney was working full-time performing only the tasks of knot bumper and safety person. Respondent hired Don Freeman, a male and Complainant's next paid successor approximately two weeks after Complainant quit. His initial rate of pay was $5.00 per hour. Mr. Freeman performed the same tasks as Complainant.

4) Respondent paid Complainant $4.50 per hour regular wages and $6.75 per hour for overtime for her work as a safety person and knot bumper from approximately September 1, 1978, until August 1, 1979. Respondent paid Complainant $4.75 per hour regular wages and $7.12 per hour for overtime from August 1, 1979, until February 29, 1980. If Complainant had been paid the same wage that Respondent paid Mr. Haney or Mr. Freeman to do the same work, she would have received $5.00 per hour regular wages and $7.50 per hour for overtime from September 1, 1978, until August 1, 1979, and $5.25 per hour regular wages and $7.87 per hour for overtime from August 1, 1979, until February 29, 1980.

5) During the time Complainant worked for Respondent, she frequently asked to be raised to $5.00 per hour, the same salary paid to her male job predecessor. Respondent never paid her this wage.

6) Mr. Bradley made statements to Complainant and other employees which revealed that Complainant's salary was lower than her male predecessor's because of her sex. Complainant was angered and upset by these remarks.

7) Respondent paid Complainant less per hour for doing the job of knot bumper than it paid its male knot bumpers solely because Complainant is female. Respondent offered, and I find, no permissible reason for paying Complainant less than Respondent paid males for the same work.

8) Complainant quit her job with Respondent because of her anger, frustration, and humiliation at being paid less than a man for identical work, and at being rebuffed each of the many times that she asked to be paid $5.00 per hour.

9) As a direct result of Respondent's failure to pay Complainant the same wage earned by men doing the same job, Complainant has been damaged in the amount of $1,084.01. This amount represents the difference between the amount which Complainant actually earned during her employment with Respondent and what she would have earned had Respondent paid her a wage equal to that paid male knot bumpers. This amount is calculated by adding the underpayments for both regular and overtime pay for the two wage periods – September 1, 1978, to August 1, 1979, when Complainant earned $4.50 per hour, and August 1, 1979, to February 29, 1980, when Complainant earned $4.75 per hour. The underpayments were $.50 per hour for all regular hours worked and $.75 per hour for all documented overtime hours worked.

10) In calculating the amount of wages lost by Complainant because of Respondent's discriminatory policy, only that overtime for which Complainant could produce documentation has been included. Complainant did not have all of her pay slips and, through no fault of her own, was unable to obtain them through a subpoena to Respondent because Respondent had destroyed not only her wage records, but also those of her predecessor, Dale Haney. Although this lower amount may be less than full compensation for the actual wage loss suffered by Complainant as a result of Respondent's discrimination, Complainant could not testify with any certainty as to how much overtime she worked. Thus, it would be speculative and unfair to the Respondent to increase the

award by giving credit to Complainant for some arbitrary amount of overtime.

11) Complainant suffered humiliation over a period of time of at least a year and one-half as a result of Respondent's discrimination against her on the basis of her sex. She is generally damaged in the amount of $1,000.

12) Complainant did an adequate to good job as a knot bumper and the termination of her employment with Respondent was not caused by poor job performance or discipline problems. Complainant is entitled to a good job reference.

CONCLUSIONS OF LAW

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

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

3) The actions of Respondent's agents and employees as described herein are properly imputed to Respondent.

4) Paying Complainant lower wages than were paid to males doing the same job constitutes discrimination by Respondent against Complainant in the compensation, terms, and conditions of her employment because of her sex, and is an unlawful employment practice in violation of ORS 659.030(1)(a) (now ORS 659.030 (1)(b)).

5) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to the Complainant herein under the facts and circumstances of this record, and the sum of money awarded as damages in the Order below is an appropriate award.

OPINION

ORS 659.030(1)(a) (now ORS 659.030(1)(b)) makes discrimination in compensation on the basis of sex unlawful.

In order to show unlawful discrimination on the basis of sex, it is not necessary to have two persons, one male and one female, doing the same job at the same time, with one receiving a lower wage than the other. The circumstances whereby an employer, such as Respondent, employs individuals one at a time in serial or successor employment but pays different wages based on sex, will support a conclusion of unlawful discrimination.

Federal case law interpreting federal statutes and regulations which are similar to Oregon's laws, while not binding on the Bureau of Labor and Industries, is instructive and may be adopted as precedent in Oregon cases.

The case of *DiSalvo v. Kansas City Chamber of Commerce,* 568 F2d 593, 13 EPD 11,378 (8th Cir 1978), interprets Title VII of the Civil Rights Act of 1964, 42 USC 2000 *et seq,* which is the federal counterpart to ORS 659.030. The holding in that case has been adopted by this forum in *In the Matter of West Coast Truck Lines, Inc.,* 2 BOLI 192 (1981). The *DiSalvo* case held:

> "The fact that . . . (the employees compared) were not employed at the same time is immaterial because Title VII . . . does not require that jobs being compared be performed simultaneously but encompasses situations where an employee of one sex is hired for a particular job to replace an employee of the opposite sex . . . Furthermore, the fact that . . . (the comparator) had broader experience, greater . . . skills or owned . . . equipment is immaterial because the crucial issue is not what skills are possessed, but whether the duties actually performed require or utilize those additional skills . . ." 13 EPD 11,378 at page 6,262.

Thus, the fact that Dale Haney possessed and, at one period during his employment with Respondent had used, the requisite skill for cutting shake bolts does not entitle Respondent to pay Mr. Haney more, and Complainant less, when both were doing the same job. Complainant was the next person to hold the job of knot bumper after Respondent fired Mr. Haney. During the last several months he was employed by Respondent, Mr. Haney worked only as a knot bumper and safety person and was not cutting shake bolts. If Respondent had reduced Mr. Haney's wages to $4.50 per hour during this time, Respondent would obviously have been justified in paying Complainant $4.50 for the same job. But such was not the case.

Perhaps even more damaging to Respondent's position is the fact that Respondent paid the next person to hold the paid position as knot bumper after Complainant quit, Don Freeman, at the rate of $5.00 per hour. Mr. Bradley testified that Mr. Freeman was paid $5.00 per hour because economic conditions were different in March of 1980 than in August 1978. This justification cannot be used, however, when there was a period of only about two weeks from the time Complainant left and Mr. Freeman began. Economic conditions do not change so quickly that a wage of $4.75 per hour on February 29, 1980, is worth $5.00 per hour in mid-March of 1980. This justification also fails to hold up in light of the fact that Respondent paid Mr. Haney at least $5.00 per hour for the job of knot bumping in the summer of 1978.

The fact that the knot bumper hired before Complainant and the knot bumper hired after her were both male and were both paid at least $5.00 per hour, together with the remarks made by Mr. Bradley and recited in Findings of Fact – The Merits numbers 14, 16, and 21, leads to the inescapable conclusion that Complainant, a female, was paid $4.50 per hour and then $4.75 per hour, not because economic conditions were different while she was working, but rather because, and only because, Complainant was a female.

Mr. Bradley testified that he was going to give a cost of living increase in April. He also testified that he was planning to raise Complainant's wage to $5.00 per hour and that he told her this approximately a week before she left. Neither of these statements are credible because of Mr. Bradley's pattern of promising Complainant a raise, then failing to give one. Moreover, even if Respondent did in fact have every intention of raising Complainant's wage prospectively to the rate she should have been paid all along, this is not sufficient to avoid a finding of sex discrimination.

Mr. Bradley's statement to Jerry Arnold, the Employment Division Claims Adjuster, to the effect that Respondent paid Complainant "$5.00 an hour, the same as all other knot bumpers," is evidence of what in fact Respondent normally paid for the job of knot bumper, although this was not true as to Complainant. Mr. Bradley's initial promise to pay Complainant $5.00 an hour when he hired her is further evidence that he was aware of what she should have been paid as a knot bumper.

Lambert McDaniel testified that he heard Mr. Bradley state that Complainant would be paid $5.00 per hour. Mr. Bradley denied making this statement. I found Mr. McDaniel's testimony to be more credible, however, notwithstanding that he is Complainant's husband and has some pecuniary interest in the disposition of Complainant's claim. He was still employed by Respondent at the time of the hearing and would not have risked losing his job by lying about what he heard Mr. Bradley say in order to allow his wife to prevail on her claim. He appeared as a proud and independent person who testified that his wife makes her own decisions and controls her own money.

Mr. Bradley's own statements, made to both Complainant and to Mr. Mura, to the effect that a female employee is not worth a man's wages, are clear proof that the sole reason Complainant was not paid the usual knot bumper wages was because she was a female. Again, Mr. Bradley denied making these statements. The testimony of Complainant and Mr. Mura was more credible, however. Mr. Mura is a disinterested party to this proceeding and the fact that he was fired by Mr. Bradley for an overload ticket is not sufficient bias that his testimony would be viewed as more probably false than not.

The testimony of Virginia Bradley that Respondent hired and paid "a kid" as a knot bumper at $4.50 per hour during or near the time when Complainant was employed cannot be given any weight because it was so vague, and because there was no testimony or other evidence to show that this unknown person in fact performed the same job as Complainant.

Bill Warner, Sr. cannot be used as a comparator in assessing whether Complainant was paid a wage equal to that paid to male persons doing the same job, because he was an uncompensated volunteer helping out the Bradleys.

Complainant's damages for the purpose of interest are calculated as follows:

a) From September 1, 1978, to July 31, 1979, Complainant worked a total of 1,888.46 regular hours and 36 overtime hours. From this total 40 hours for the period of July 26, 1979, to July 31, 1979, are to be deducted and added to the period August 1, 1979, to February 29, 1980. This deduction is made because the legal rate of interest was changed from 6 % to 9 % on July 26, 1979.

Therefore, for this period, Complainant worked 1,148.46 regular hours and 36 overtime hours.

1148.46 hrs. x $.50/hr = $574.23

36 hrs. x $.75/hr. = 27.00

Total $601.23

b) For the period August 1, 1979, to February 29, 1980, Complainant worked a total 901.57 regular hours and 16 overtime hours. Adding the 40 hours worked after the interest rate changed, Complainant worked 941.57 regular hours.

941.57 hrs. x $.5O/hr. = $470.78

16 hrs. x $.75/hr. = 12.00

Total $482.78

The purpose of back pay awards is to make an aggrieved person whole for the monetary injuries that person suffered because of an employer's unlawful employment practices. An award of interest on the back pay award is justified to compensate Complainant fully for the effects of not having had the use of the back pay since it accrued. *In the Matter of City of Portland,* 2 BOLI 110, 142-44 (1981).

Therefore, interest upon Complainant's back pay award will be computed as follows:

A) Six percent annually on $601.23, the accrued differential between what Complainant actually earned and what Complainant would have earned if she had not been discriminated against on the basis of her sex during the period from September 1, 1978, to July 25, 1979. From July 26, 1979, until the date paid, interest shall accrue at the rate of 9 percent annually.

B) Nine percent annually on $482.78, the accrued differential between what Complainant actually earned and what she would have earned if she had not been discriminated against on the basis of her sex during the period from July 26, 1979, to the date Respondent complies with paragraph number 1 of the Order below.

The award for general damages here is supported by the fact that Respondent, through its president, Mr. Bradley, ridiculed and embarrassed Complainant when she demanded to be paid equal wages. Mr. Bradley complained about Complainant's equal wage demands to other workers and to her face in front of other workers. He humiliated and embarrassed her by telling her in effect that as a female she was worth less than a male employee. Mr. Bradley subjected Complainant to this humiliation over a period of approximately a year and one-half.

Mr. Bradley also responded to Complainant's equal wage demands by either laughing them off or by telling Complainant that she would receive a raise on her next pay check or when she changed jobs. Complainant never received the promised pay raise, however, and became angry and frustrated when confronted with Respondent's constant prevarication. This continued for approximately a year and one-half, most of Complainant's period of employment with Respondent. Complainant was still feeling this anger and frustration at the time of the hearing on this matter.

The fact that Complainant did not perceive that she was treated any differently by her fellow employees after confrontations occurred between her and Mr. Bradley within their hearing, does not lessen or mitigate in any way the humiliation, anger, and frustration which she experienced as a result of Respondent's unlawful discrimination.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 639.010(2), and in order to eliminate the effects of the unlawful practices found, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries upon execution of the Final Order in this matter, a certified check payable to the Bureau of Labor and Industries, in trust for Mary McDaniel, in the amount of TWO THOUSAND FOUR HUNDRED FIFTY-EIGHT DOLLARS and FORTY-THREE CENTS ($2,458.43), which represents $1,084.01 damages for wages lost by Complainant because of Respondent's unlawful employment practices set out above, plus interest thereon in the amount of $374.42 computed to September 1, 1982, and One Thousand Dollars ($1,000.00) damages for mental anguish, pain, and humiliation suffered by Complainant because of Respondent's unlawful employment practice set out above. Interest will continue to accrue at the legal rate until Respondent complies with this Order.

2) Provide an employment reference indicating that Complainant's work was good.

3) Cease and desist from discriminating on the basis of sex against employees.

In the Matter of

CLACKAMAS COUNTY,

Respondent.

Case Number 103-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued October 13, 1882.

SYNOPSIS

Complainant, who was of the Oriental race and Chinese national origin, was treated differently in the terms and conditions of his employment when his supervisor ridiculed and belittled him regarding his accent and appearance, and failed to take action regarding the discriminatory behavior of his subordinates, all because of Complainant's race and national origin. Finding that the supervisor's actions and Respondent's inadequate actions in alleviating the discriminatory behavior of its employees constituted unlawful employment practices, in violation of ORS 659.030(1)(b), for which Respondent was responsible, the Commissioner awarded Complainant $2,500 for mental suffering, and ordered Respondent to cease discriminating against employees on the basis of national origin, race, and color. The Commissioner found that a selection process for another position for which Complainant applied was not discriminatory. ORS 659.030(1)(a) and (b).

The above-entitled matter came on regularly for hearing before Andrew H. Josephson, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing commenced on January 8, 1981, in Room 911 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon, and continued through January 9, 1981, at the same location. The Bureau of Labor and Industries was represented by Daryl D. Wilson, Assistant Attorney General. Respondent Clackamas County was represented by Michael Montgomery, County Counsel, and Keith Kinsman, Assistant County Counsel. Complainant Paul Yi-Fei Wang was present and testified. Complainant also called William R. Pearl, Respondent's former Development Manager. Respondent called as witnesses Richard S. Danforth, Respondent's Housing and Community Development Director; Gary DiCenzo, Respondent's Director of Community Development; Jono D. Hildner, Administrator, Department of Human Resources; Roy Yamamura, Respondent's employee; Ronald Komers, Respondent's Personnel Director; and Joi E. Doi, Respondent's Personnel Division employee.

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

FINDINGS OF FACT – PROCEDURAL

1) On June 22, 1979, Paul Yi-Fei Wang filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by Respondent on the basis of his race, color, and national origin.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times materiel herein, Respondent was a public employer in the State of Oregon. Respondent engaged the personal service of more than one employee and reserved the right to control the means by which such services were performed in the business.

2) Complainant is of Chinese national origin and of Oriental race and color.

3) In March 1978, Complainant was hired by Respondent as Respondent's Rehabilitation Program Manager. Complainant's duties included managing the home weatherization program and the home maintenance program.

4) Complainant's staff consisted primarily of CETA funded employees. Complainant's immediate supervisor was Richard Danforth, Respondent's Housing and Community Development Director.

5) Upon Complainant's assumption of his job duties, he initiated a number of staff policy changes. One policy change required weatherization crew members to check in and out of the weatherization office. This allowed for closer crew supervision.

6) Crew members disliked the policy changes. One crew member expressed his dissatisfaction with the policy changes by turning a work schedule sheet posted on the board around to mimic Chinese calligraphy. The turned work schedule sheet was visible to employees, clients, and the general public.

7) Complainant informed Mr. Danforth about the work schedule sheet incident and other problems he was having with the crew working under him. He was told by Mr. Danforth "to not make waves." Mr. Danforth did discuss the incident concerning the time sheet with the Complainant's Crew members. However, this did not alleviate the overt discriminatory conduct of the crew toward Complainant. Crew members continued to tease and laugh at Complainant's mannerisms and speech patterns to his face and behind his back.

8) Complainant was aware that he was having communications problems with his staff and members of the public. These problems were noted in detail on his first and each subsequent performance evaluation. His first rating was "satisfactory" with a score of 4.5 of a possible 10. Complainant discussed these problems with Mr. Danforth. Mr. Danforth suggested that Complainant "loosen up" and dress more like the other crew members. Complainant wore a business suit to the office. The field crew he supervised wore jeans and clothes generally associated with manual labor. His dress was appropriate for a supervisor working in an office setting. Further, Complainant's dress was consistent with the formality he described as a part of his traditional background.

9) English is the Complainant's second language. The Complainant speaks English with an accent. Attentive listening is required by native English speakers to understand all of the Complainant's words. The Complainant can be adequately understood and his pronunciation and use of the English language at the time of the hearing was substantially the same as it was when he was employed by the Respondent. Complainant did realize his need to improve his oral command of the language and practiced at home by speaking into a tape recorder.

10) Mr. Danforth was a gruff, outspoken, and insensitive supervisor. He yelled at many subordinates and would make decisions before accumulating all the facts.

11) Although Mr. Danforth was harsh with all subordinates, he treated the Complainant differently because of Complainant's race and national origin. He complained frequently about Complainant's pronunciation problems and publicly corrected and quizzed him regarding English speech. Complainant's co-worker, William Pearl, Housing Coordinator, testified regarding Mr. Danforth's behavior. Mr. Pearl's testimony is given substantial weight since he had numerous opportunities to observe the Complainant and Mr. Danforth talking together. The three met frequently and Mr. Pearl had no difficulty recalling events. Testimony at the hearing established Mr. Danforth's different treatment of the Complainant as illustrated by the following:

a) Mr. Danforth would be impatient with Complainant as a direct result of Complainant's pronunciation problems and occasionally slow speech.

b) At public meetings where Complainant's subordinates were present, Mr. Danforth would cut Complainant off before he could complete a thought or raise his voice so that he would drown out Complainant's voice.

c) If a problem developed under Complainant's supervision, Mr. Danforth would take the task away from Complainant rather than assisting him in solving the problem.

Complainant suffered humiliation, ridicule and embarrassment as a direct result of Mr. Danforth's actions.

12) Complainant was informed orally in March 1979 and formally in writing in May 1979 that his unit would be phased out by the Respondent.

13) In May 1979 Complainant applied for another position with Respondent. The title of the position was Community Development Specialist II. Respondent's memo dated May 15, 1979, stated that the personnel department would

> "assist department's with vacancies in non general funded positions (to) find employees potentially affected by lay-off (positions) in general funded departments."

Complainant was assisted by Respondent in completing the application for the Community Development Specialist II position and given information concerning job openings in other agencies.

14) The Community Development Specialist II position became vacant due to resignation. The individual selected to fill this position was to be assigned to the Overland Park area of the county. The duties of this position consisted of on-going and close-working relationships with members of that community and required good communication and public relations skills. The Overland Park area of the county has high crime and high unemployment.

15) Complainant was given an oral examination for the Community Development Specialist II position by a panel of Civil Service interviewers. He received a final score of 73 of a possible 100. A score of 70 was required in order to be placed on the eligibility list. Complainant's name, along with one other name, was placed on an eligibility list and submitted to Mr. Danforth for review and selection. Mr. Danforth had the authority to select the individual to fill the position. He offered the position to one individual on the list, who declined. When less than three persons were submitted for consideration it was the policy of the agency that the individual making the selection could request a second list after reviewing the credentials of those on the list. Mr. Danforth requested an additional list of eligible candidates for the position, which under the Respondent's hiring procedures Mr. Danforth had the authority to request. The new list of eligible candidates was given to Mr. Danforth in September of 1979. Complainant's name did not appear on this list as his score was not among the top three on the new list. The individual selected to fill the position had also participated in an oral examination by a panel of Civil Service interviewers and had a score of 93.

16) Complainant's employment with Respondent terminated in June 1979.

17) The salary for the Community Development Specialist II position from July 1979 through June 30, 1980, was $1,246.00 per month. The salary for the Community Development Specialist II position from July 1980 through December 31, 1980, was $1,396.00 per month, plus $84.00 per month retirement contribution. Complainant's total mitigation of wage loss was $8,782.00. Complainant has made numerous attempts to obtain employment equal in pay to the position of Community Development Specialist II, but has failed to obtain such employment.

18) Complainant suffered humiliation, ridicule, and embarrassment as a result of the way he was treated by a supervisor employed by Respondent. Due to the public humiliation Complainant suffered, it affected his ability to sleep at night. His tension and lack of sleep due to discrimination on the job site affected his family relationships.

ULTIMATE FINDINGS OF FACT

1) Complainant is of Chinese national origin and Oriental race and color.

2) Complainant adequately performed his job duties as Respondent's Program Rehabilitation Manager.

3) Turning the time sheet around was an action that was motivated by racial discrimination. This action is one example of many incidents that occurred while Complainant was employed by Respondent. Respondent took inadequate steps to alleviate the continual discriminatory actions of Complainant's subordinates and allowed the behavior to persist by failing to support Complainant's management actions and belittling Complainant at public meetings where Complainant's subordinates were present.

4) Respondent's Housing and Community Development Director behaved in a racially discriminatory manner. He treated Complainant more harshly and with less respect than he did other workers. The Director's lack of support for Complainant as a supervisor of a work crew prevented Complainant from exercising adequate control over his own subordinates.

5) Respondent's treatment of Complainant on the job caused Complainant to suffer constant fear, anxiety, embarrassment, loss of human dignity, and familial tension during this time.

6) Respondent Clackamas County treated Complainant substantially the same as they treated other individuals affected by the phase out of the rehabilitation program.

7) Respondent's method of selecting an individual to fill the vacant position of Community Development Specialist II was similarly applied to all candidates.

CONCLUSIONS OF LAW

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

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

3) The actions and the motivations of Respondent's agents and Complainant's supervisors described herein are properly imputed to Respondent.

4) The treatment of Complainant by the supervisor employed by Respondent while on the job created a racially discriminatory work atmosphere and is in violation of ORS 659.030 (1)(b) because it constitutes discrimination in terms, conditions, and privileges of employment based upon Complainant's national origin and race.

5) Respondent's inadequate actions in alleviating the discriminatory behavior of its employees is in violation of ORS 659.030(1)(b) because it constitutes discrimination in terms, conditions, and privileges of employment based upon Complainant's national origin and race.

6) Respondent's similar treatment of Complainant in seeking another position was not discriminatory and did not constitute a violation of ORS 659.030(1)(a).

7) Respondent's method of selecting a candidate for the Community Development Specialist II position was not discriminatory and was not in violation of ORS 659.030(1)(a).

8) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant herein under the facts and circumstances of this record and the sum of money as damages in this order below is an appropriate award.

OPINION

The Specific Charges allege four categories of discrimination: employee harassment, supervisor harassment, inadequate assistance in seeking employment after layoff, and Respondent's failure to rehire Complainant.

1. Employee Harassment

The record indicates a number of instances of employee harassment. One instance occurred when Complainant's crew members turned a time sheet around to indicate their dissatisfaction with Complainant's new policy. Though this incident was reported to Mr. Danforth, Mr. Pearl's testimony indicates that the employee harassment continued.

It was Respondent's duty to alleviate the discriminatory behavior of its employees. Merely speaking to them was not adequate. Since the actions of Respondent's employees continued, Respondent was obligated to take additional actions to resolve the discriminatory behavior of its employees. Lack of supervisory support of Complainant contributed to the continued discriminatory behavior of Complainant's subordinates.

2. Supervisor Harassment

The record indicates that Respondent's supervisor, Mr. Danforth, was a brash and insensitive individual. He would also make decisions before having knowledge of all the facts. As one witness stated, he would "shoot from the hip." Mr. Danforth, however, treated Complainant differently than he treated others.

Mr. Danforth's actions indicate that his harassment of Complainant was based on Complainant's national origin and race. Mr. Danforth would ask Complainant to define terms and words that he knew would be difficult for Complainant to answer. Mr. Danforth would attempt to embarrass

Complainant in public by correcting his pronunciation of words during public meetings. He would also fail to listen to Complainant when Complainant expressed ideas to him. When Complainant told Mr. Danforth about his problems in communicating with his crew, Mr. Danforth told the Complainant to not make waves and to loosen up and start dressing like his crew members rather than making specific managerial suggestions unrelated to mannerisms that Complainant perceived as a result of his cultural heritage. Mr. Danforth failed to make constructive criticisms or provide assistance to Complainant that Complainant could assimilate into his management program in order to alleviate the disrespect and insubordination of the crew. Instead, Mr. Danforth's actions compounded Complainant's problems on the job. On one occasion, Mr. Pearl even asked Mr. Danforth why he treated Complainant differently than he treated others. Mr. Danforth did not answer and his behavior remained the same.

Mr. Danforth treated many individuals harshly, however, his treatment of Complainant was different and related to Complainant's race and national origin. His discriminatory treatment toward Complainant caused Complainant to suffer much anguish. Complainant lost sleep at night and his anguish and sleeplessness affected his family relationships. The effects of Mr. Danforth's treatment of Complainant remained with him and were in evidence on the day of the hearing. Complainant expressed his feeling of inadequacy based upon the treatment by Mr. Danforth. These feelings of inadequacy affected his ability to seek reemployment and caused feelings of alienation toward his new country.

3. Layoff Assistance

The record indicates that Respondent assisted Complainant in seeking further employment after he was laid off by Respondent. There is no evidence to indicate that the amount of help or assistance that Complainant received was any less than other individuals received who were affected by the layoff. There is direct testimony that Complainant was assisted in seeking and exploring job opportunities. Though Complainant did not find employment, the evidence does not support the assertion that the assistance he was given was any less than other similarly situated individuals.

4. Failure to Hire

The Complainant applied for a job with Respondent as a Community Development Specialist II. The county selection process was based upon resumes and an oral examination conducted by a Civil Service panel. There is absolutely no evidence that the individuals conducting the oral examination had a biased opinion of Complainant. Each candidate for the position received a score and the score was utilized in developing the eligibility list. Complainant made one eligibility list, but it was within Respondent's normal procedure to ask for an additional eligibility list.

Mr. Danforth was in charge of selecting the individual to fill the open position of Community Development Specialist II. As indicated earlier, Mr. Danforth had treated Complainant in a discriminatory manner on the job. The record indicates, however, that the successful candidate for the position had scored a 93 on the examination given by an unbiased panel, while Complainant had only scored 73. The evidence does not support a finding that Complainant was not selected for the open position due to his national origin, race, or color.

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 and to protect the rights of others similarly situated Respondent is ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Paul Yi-Fei Wang in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) representing compensation for Complainant's mental suffering.

2) Cease and desist in discriminating against its employees on the basis of national origin, race, and color.

In the Matter of

L. A. Swarens, Clyde Purcell, and Mary Lou Purcell, dba

THE RIVERHOUSE OF BEND,

Respondents.

Case Number 143-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued October 22, 1982.

SYNOPSIS

Respondents maintained a policy that restricted evening waiter positions to males. Finding that female Complainant, a busperson for Respondents, was not qualified for a waiter position due to her demeanor, personal appearance, and inadequate performance as a banquet waiter, the Commissioner found that Respondents' unlawful policy did not effect Complainant, because the refusal to place her as an evening waiter was not based on sex, and did not create intolerable working conditions justifying her resignation. While dismissing the Specific Charges as to the individual Complainant, the Commissioner ordered Respondents to cease discriminating on the basis of sex, submit a plan for implementation of unbiased treatment, and report on applications for the evening waiter positions and dispositions thereof for a period of one year. ORS 659.030(1)(a) and (b).

The above-entitled contested case came on regularly for hearing before Dale A. Price, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and

Industries of the State of Oregon. The hearing commenced on November 12, 1981, in the Community Room of the Far West Federal Building, 1701 N.E. Third Street, Bend, Oregon, and concluded on November 16, 1981, in the conference room of the Bureau of Labor and Industries office, Bend, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Respondents, doing business as The Riverhouse of Bend, were represented by Bradley Fancher and Lynn Jarvis, Attorneys at Law.

Complainant, Cheryl Ann Hayden, was present and testified. In addition to Complainant, the Agency called Allan McCullough, Investigator for the Civil Rights Division of the Bureau of Labor and Industries; Kayo Oakley, Manager of the Riverhouse Restaurant; Judy Knoll, friend and roommate of Complainant while she worked at the Riverhouse; Jonathan Skeele, Riverhouse busperson and waiter; and Andy Gold, Riverhouse busperson and waiter.

Respondents were present and testified. In addition to Respondents themselves, Respondents called Beverly Renwick, Director of Sales for Respondents; Allan Schneider, Riverhouse Chef; John Deconditis, Riverhouse Chef; Sharon Babcock, Riverhouse night cashier; Deitrich Schmidekenecht, former restaurant manager; Chalea Juhola, Riverhouse day shift head waiter; Christopher Woodward, Riverhouse night shift Maitre d' Hotel; and Paul Campbell, Riverhouse busperson and waiter. The depositions of Mariann Wilson, former Riverhouse busperson, and Dana Temple Rogers, former Riverhouse banquet waiter and busperson, were received into evidence.

Having considered the entire record in this matter, I, Mary Roberts, hereby make the following Rulings Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS UPON MOTIONS

1) At hearing, Respondents moved to strike those portions of the Specific Charges which pray for damages for mental suffering. Damages for mental suffering are within the purview of this forum under ORS 659.060(3). Respondents' Motion to Strike is hereby denied.

2) Prior to hearing, Respondents moved to strike certain paragraphs of the Specific Charges.

Respondent is not entitled to a jury trial under the ruling in *Fred Meyer v. Bureau of Labor,* 39 Or App 253, 262-63, 592 P2d 564, *rev den* 287 Or 129 (1979). ORS chapter 659 authorizes the award of damages in an administrative proceeding in which complainant alleges that he or she has been aggrieved by a violation of ORS 659.030. The rule was articulated in *Fred Meyer v. Bureau of Labor, supra.* Respondents' Motion to Strike is hereby denied.

FINDINGS OF FACT — PROCEDURAL

1) On April 15, 1980, Complainant Cheryl Ann Hayden filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in

connection with her employment by Respondents because of her sex.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

4) At hearing the Specific Charges were amended to include a new charge regarding a policy and practice which, if proven, would be a violation of ORS 659.030. This allegation was addressed by Respondents in their Amended Answer.

FINDINGS OF FACT -- THE MERITS

1) At all times material herein, Respondents were individuals doing business as the Riverhouse of Bend and engaged in the motel and restaurant business in the State of Oregon. In that business Respondents utilized the personal services of several employees and reserved the right to control the means by which such services were performed.

2) The behavior of the employees of Respondents' restaurant was governed by Respondents' "Employee Handbook."

3) Complainant was hired on May 17, 1978, as a night hostess at the Riverhouse Restaurant by Manager Kayo Oakley and Doug Brawley.

4) After working as a night hostess, Complainant became a busperson in June 1978. The duties of busperson included setting up tables, serving water and beverages and occasionally other items, and clearing away used dishes and utensils. In November 1978, Complainant was promoted to head busperson by Kayo Oakley. Complainant held this position until March 1980.

5) During 1978 and 1979, Complainant at times worked as a waiter for Respondents' Sunday brunch and as a waiter in Respondents' banquet room. A full menu selection was not available at the brunch. Waiters served drinks and certain food items, but customers served most of their own food. At banquets, all were served the same fare without the need for waiters to take orders.

6) During her employment, several complaints were made against Complainant. Deitrich Schmidekenecht, who was restaurant manager from August 15, 1979, through September 15, 1979, testified and this forum finds that Complainant was argumentative and had difficulty taking orders, and that he would have discharged her if he had remained in Respondents' employ. Beverly Renwick, banquet coordinator, testified and this forum finds she requested that Complainant be removed from service as banquet waiter after a particularly vociferous complaint from a regular banquet customer who had never before complained. This forum finds that Chalea Juhola, headwaiter for day shift, complained of Complainant's tendency to sit down on the job and that Ms. Juhola and Respondent Mary Lou Purcell were concerned about Complainant's unkempt personal appearance, that her hair was not always pulled back and she

failed to wear hosiery as required by the "Employee Handbook." Paul Campbell, one of Respondent's waiters, testified that while on duty, Complainant would occasionally follow male customers into the bar and spend time with them there.

7) Respondents employed no female evening waiters from the date of opening the Riverhouse restaurant through March 1980. Respondents hired the following male evening waiters between June 1978 and March 1980: Rodney Biocini, Jim Mayall, David Norton, and Jonathan Skeele. Kayo Oakley, Respondent's restaurant manager, had a policy of hiring no female evening waiters at times material herein.

8) The Riverhouse Restaurant features high quality food in a semi-formal atmosphere. The proper discharge of duties of evening waiters requires some knowledge of food and wine, and the ability to work efficiently taking orders, serving wine and cocktails, dinners of several courses, and at times preparing table-side dishes. Respondents' waiters are expected to make wine and dessert suggestions to customers and assist in other food selections if the customer so requests. These duties are carried out under pressure and waiters must simultaneously maintain a pleasant rapport with the customers they serve. Respondents also consider reliability and clean, well-groomed personal appearance as important requisites for evening waiters.

9) Complainant's two month tenure as a daytime waiter in Von Kohler's Hofbrau Haus Restaurant from January 1980 through February 1980, and her experience as a busperson and banquet and brunch waiter at the Riverhouse gave her as strong a background as at least one of the males hired as evening waiter.

10) The comparative demeanor of Complainant and several male waiters was observed by the Presiding Officer at hearing. Complainant's demeanor was at times flippant and brash. In contrast, the male waiters conducted themselves in a polite and reserved manner.

11) During her employment with Respondents, Complainant did, on at least one occasion, leave work without notice for a period of about ten days during which she worked at another job before returning to the Riverhouse. On another occasion Complainant was seen in downtown Bend after reporting her inability to work due to alleged illness.

12) In June 1979, Complainant asked Kayo Oakley for a promotion to the position of waiting on tables in the evening in Respondent's dining room. Mr. Oakley denied Complainant's request and told her that it was against the "policy." Complainant assumed this remark meant that only men may wait tables in the evening.

13) In February 1980, Complainant asked Kayo Oakley for a promotion to the position of waiting on tables in the evening in Respondents' dining room. Mr. Oakley denied Complainant's request without explanation.

14) In March 1980, Complainant asked Kayo Oakley for a promotion to fill a position vacated by Jim Mayall, who had been an evening waiter in Respondents' dining room. Mr. Oakley responded by asking Complainant "did you grow balls." Complainant was not hired as an evening waiter in the dining room. Mr. Oakley testified he replied to Complainant "Did you grow balls, you can't be a waiter, you'd have to be a waitress." Not withstanding the exact words of the remark, this and Complainant's two previous applications for a waiter position were denied by Mr. Oakley without the suggestion that the form of application was significant.

15) On the day of Mr. Oakley's remark, March 26, 1980, Complainant quit her job as busperson in Respondents' employ.

ULTIMATE FINDINGS OF FACT

1) Respondents are employers which, in the State of Oregon, engage or utilized the services of one or more employees reserving the right to control the means by which such service is or will be performed.

2) Respondents' manager, Kayo Oakley, had a policy against allowing women to be evening waiters in the Riverhouse Restaurant during the period of Complainant's employment with Respondents.

3) Complainant applied for the position of evening waiter by verbal application to Mr. Oakley on three separate occasions. Respondents had vacancies for evening waiters during the period of Complainant's application. Complainant was not hired as evening waiter.

4) Several males were hired as evening waiters during the pendency of Complainant's application.

5) Complainant was a competent busperson, but the qualifications for busperson are significantly different from those of evening waiter.

6) Complainant was considered by Respondent unqualified for the position of evening waiter because of her personal appearance, her inadequate performance as a banquet waiter, which led to a bitter customer complaint and Complainant's removal from banquet room service, and complaints regarding her demeanor from customers and co-workers. All of these problems had been brought to the attention of Respondents' manager, Mr. Oakley, to whom Complainant made application for promotion to a waiter position.

7) Although a violation of ORS 659.030(1)(a), in that no women were considered for positions of evening waiter, Mr. Oakley's policy had no adverse impact upon Complainant's failure to obtain the position of evening waiter as she was denied a position for which, as she had demonstrated to management, she was not qualified.

8) No attempt was made by Respondents or their managers to force Complainant to resign from the position as busperson by making working conditions intolerable.

CONCLUSIONS OF LAW

1) At all times material herein, Respondents were employers subject to the provisions of ORS 659.010 to 659.110.

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

3) The actions, and motivations for those actions, of Respondents' manager described herein are properly imputed to Respondents.

4) Complainant was not, at times material herein, qualified for the position of evening waiter. Respondents' failure to promote Complainant to the position of evening waiter does not constitute an unlawful employment practice under ORS 659.030(1)(a).

5) Respondents' failure to promote Complainant and the remark by Mr. Oakley did not render conditions for her continued employment as a busperson intolerable. Complainant was not constructively discharged in violation of ORS 659.030(1)(b).

6) Respondents' maintenance of a policy restricting evening waiter positions to male individuals constitutes an unlawful employment practice under ORS 659.030(1)(a).

OPINION

The initial burden of proof falls upon the Agency to establish a prima facie case that will withstand a Motion to Dismiss by providing evidence upon each of the constituent elements of a case of unlawful discrimination by failure to hire due to Complainant's sex. The necessary elements of such a case are the following:

1) There existed a position in Respondents' employ.

2) Complainant applied for said position.

3) Complainant possessed the minimum qualifications requisite to the position.

4) Complainant was not hired for the position.

5) A male applicant was hired.

These elements must be considered individually.

1. Existence of a Position

Respondents hired at least three evening waiters between June 1979, when Complainant first made application to become a waiter, and March 26, 1980. These waiters, Rodney Biocini, David Norton, and Jonathan Skeele, were all men as were all other evening waiters hired by Respondents since its dining room opened.

2. Complainant's Application

Complainant's testimony, as corroborated by that of Dana Rogers, establishes that she sought employment as an evening waiter by verbal application to Respondents' manager Kayo Oakley upon three occasions, June 1979, February 1980, and March 1980. Respondents have attempted to dismiss Complainant's verbal applications as inappropriate in form because of the allegedly proper means of application by meeting with the manager in his office and not while he is on the floor of the Restaurant. Complainant's requests were denied by Mr. Oakley without suggestion that the form of application was important. Although Mr. Oakley stated that he did not consider Complainant a serious applicant, her persistent reapplication permits the inference that Mr. Oakley realized that Complainant was a serious applicant.

3. Complainant's Qualifications

Respondents' practice was to hire people as buspersons to familiarize them with the operation of the Restaurant, and to promote qualified people from busperson to evening waiter when positions became available. Although, experience as a busperson does not automatically make an individual eligible for a promotion to evening waiter. Complainant's experience as busperson, banquet waiter, and brunch waiter afforded her a good working familiarity with Respondents' operation and systems. This experience combined with her experience as a waiter at Von Kohler's Restaurant are sufficient to establish that Complainant did possess the minimal qualifications for the position of evening waiter.

4. Complainant Was Not Hired For The Position

Respondents assert that Complainant's quitting her employment made hiring her for a waiter position impossible. This argument is not tenable in view of the repeated verbal applications tendered by Complainant over a period of several months. It is not disputed that Complainant was not hired for the position of waiter.

5. A Male Applicant Was Hired

Between June 1979 and March 1980, Rodney Biocini, Dave Norton, and Jonathan Skeele, all males, were appointed as evening waiters by Respondents. Respondents attempt to negate the impact of hiring these men by stating that Skeele's hiring was a mistake, and that Norton's and Biocini's appointments were arranged prior to Complainant's initial application. Alleged prior arrangements and mistakes cannot negate the basic fact that three men assumed duties as waiters during the period when Complainant, a woman, repeatedly expressed her interest in positions to which the men were appointed.

The Agency has provided evidence in support of each of the constituent elements of a case of unlawful discrimination based upon Complainant's sex. The burden is thereby shifted to Respondents to come forward with valid, non-pretextual, and non-discriminatory reasons for hiring the men instead of the Complainant. Respondents assert that Complainant was not qualified for the position of evening waiter. It is not disputed that the positions of waiter and busperson involved related and overlapping functions, however, the position of evening waiter involved additional abilities and significantly more customer contact. There can be no doubt from the evidence presented that a person could adequately serve as a busperson and not be qualified for a waiter position.

Demeanor

In the context of a high quality restaurant, such as the Riverhouse, the demeanor and social skills of a waiter become a significant consideration. An evening waiter is required to have a pleasant table-side manner to establish a rapport with the customers to encourage their return business while discharging the duties of his/her job. Several witnesses testified at hearing regarding Complainant's demeanor. Mr. Schmidekenecht, manager of the Restaurant during one month of Complainant's employment, stated that Complainant was not qualified to be a waiter because she had difficulty taking orders and that he actually sent her home on one occasion because she had started an argument in front of customers. He further testified that he would have let her go if he had continued as manager.

Beverly Renwick was banquet room coordinator while Complainant served as a banquet waiter. Ms.

Renwick testified that Complainant was inattentive to customers, that she acted as if she didn't want to be there. Following one complaint of a regular customer, where the customer who had never before complained sought out Ms. Renwick to complain about Complainant's attitude, Ms. Renwick asked Mr. Oakley to remove Complainant from service as a banquet waiter and she was removed.

Waiter Paul Campbell testified that Complainant sought out male customers while on duty and in uniform in violation of written policy and that she occasionally went into the bar with male customers.

Respondent Mary Lou Purcell described Complainant as a satisfactory busperson, but stated that she would not promote her to waiter because of attitude and personality problems.

At hearing Complainant's demeanor appeared flippant and impatient in contrast to the more reserved and deliberate demeanors of the male waiters who testified.

Personal Appearance

The personal appearance of waiters is a significant variable in the maintenance of a high quality restaurant environment such as the Riverhouse. Several of Complainant's supervisors and co-workers expressed dissatisfaction with Complainant's personal appearance. Beverly Renwick testified that in her opinion, Complainant did not take adequate care of her appearance, especially her hair. Mary Lou Purcell testified that Complainant looked sloppy and that her hair was long, frizzy, and frequently not pulled back as required by written restaurant policies. Chalea Juhola, supervisor of daytime waiters, testified that Complainant was frequently sloppy and unkempt.

Experience

Although Respondents preferred to hire waiters with experience in a formal dining room setting, they did hire at least one male waiter with experience comparable to Complainant's. The alleged distinction between Complainant's experience and that of Jonathan Skeele, who had no previous experience in a formal dining room setting, shows that this alleged reason for failure to hire Complainant was in fact pretextual.

Reliability – Career Motivation and Stability

Mr. Oakley testified that Complainant once called to say that she was sick and could not work and that she was later seen in the downtown area by another in Respondents' employ. On another occasion, Complainant admittedly left her employ with Respondents for a period of 10 days after which she returned and was allowed to continue as a busperson.

Supervisor Chalea Juhola testified that she decided to remove a chair from an area near the cash register because Complainant would not refrain from sitting in it while on duty when Ms. Juhola felt she should be on her feet observing tables to clear dishes and attend to waiter and customer needs.

Qualifications – Summary

Respondents must be afforded the right to render business decisions based upon necessities of the type of environment and quality of food service they wish to present to their

customers. Demeanor, personal appearance, and reliability of waiters are valid considerations within the realm of Respondents' discretion. It is apparent from the evidence, herein summarized, that Complainant was an adequate busperson, but was lacking in the proper demeanor, personal appearance, and reliability which Respondents reasonably deemed necessary for the proper accomplishment of the duties of evening waiter. Respondents have carried their burden to articulate valid non-discriminatory reasons for their failure to promote Complainant.

Constructive Discharge

The Agency asserts that Complainant did not voluntarily resign her position as busperson in Respondents' employ, but was constructively discharged by a vulgar and offensive remark made by her supervisor in responsé to her request to be a waiter and by their refusal to promote her.

Although not binding upon this forum, federal precedent provides helpful tools for analysis of constructive discharge issues. In *J. P. Stevens and Company, Inc. v. NLRB,* 461 F2d 490 (4th Cir 1972) the court articulated the doctrine which states that a constructive discharge exists where an employer deliberately makes an employee's working conditions intolerable, and thus forces him/her to quit his/her job. In the *Stevens* case, *supra,* the plaintiff sought relief under an alleged constructive discharge when the employer reduced the employee's wages to an artificially low level due to her union activity. This forum has adopted this standard for constructive discharge. *See In the Matter of West Coast Truck Lines,* 2 BOLI 192 (1981). Constructive discharge occurs when an employer creates a situation where working conditions become so difficult or unpleasant that a reasonable person in the employee's place would feel compelled to resign.

The evidence does not support the allegation of constructive discharge. Respondents were satisfied to allow Complainant to continue as a busperson, the job she was qualified to do, and no effort was made by Respondents to force her resignation by creating intolerable working conditions for her in her position as a busperson. The Agency has, therefore, failed to prove that Complainant was constructively discharged.

Discriminatory Policy Versus Causation of Damages

The evidence in this case establishes that Respondents did, at times material herein, maintain a discriminatory policy which forbade females from attaining the position of evening waiter. This policy is clearly a violation of ORS 659.030. his violation does not, however, automatically establish Complainant's right to damages in this case. It is necessary to ascertain whether Respondents' discriminatory policy caused damage to Complainant in that Complainant's attempts to become an evening waiter were unsuccessful. Respondents have proven valid, non-discriminatory reasons for their failure to promote Complainant. The weight of evidence indicates that, although a competent bus person, Complainant lacked the qualifications of an evening waiter as evidenced by her performance. Complainant's social skills as related to customer satisfaction to encourage the promotion of

return business, her reliability, her personal appearance, and her failure to adhere to written policies made Complainant unqualified for the position of evening waiter in a restaurant of the quality of the Riverhouse. Because Complainant was unqualified for the position in question, Respondents' discriminatory policy caused her no loss, and no damages may be awarded. But for Complainant's record of poor performance, this forum, having found discriminatory practices by Respondents, would have awarded damages herein.

Respondents have been found to have had a discriminatory policy and may be ordered to cease and desist from unlawful hiring practices based upon the sex of applicants.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and in order to protect the lawful interests of all applicants for the position of evening waiter, Respondents are hereby ordered to:

1) Cease and desist from discriminating on the basis of sex in accepting applications, conducting interviews for employment, hiring, and promotion for the position of evening waiter.

2) Submit to the Commissioner of the Bureau of Labor and Industries, sixty (60) days from the date of the service of this Order, a plan to ensure the fair and unbiased treatment of all of Respondents' present employees and all those who are or would be candidates for employment with Respondents.

3) Submit to the Commissioner of the Bureau of Labor and Industries, one (1) year from the date of the service of this Order, evidence of the implementation of their policy change. Such evidence should include, but is not limited to:

a) a list of the names and date of hire of all persons working as evening waiters at that time;

b) a list of all persons who made application for evening waiter positions during that one (1) year period;

c) copies of advertisements for available evening waiter positions; and,

d) any other evidence to show Respondents' good faith efforts to remedy the effects of Respondents' past discriminatory policies.

Those portions of the Amended Specific Charges relating to Cheryl A. Hayden are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of

UNION PACIFIC RAILROAD COMPANY, a Utah corporation doing business in Oregon, Respondent.

Case Number 44-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued November 3, 1982.

SYNOPSIS

Respondent's foreman exhibited a racially discriminatory attitude that was communicated to black Complainant by one of Respondent's managers. Finding that Complainant's disqualification from a temporary position during his probationary period was based on his lack of skills and proper tools, and not because of discrimination, the Commissioner nonetheless awarded Complainant $1,000 for mental anguish, pain, and humiliation resulting from the foreman's attitude, and ordered Respondent to cease discriminating against employees on the basis of race or color. ORS 659.022(1); OAR 839-04-120.

The above-entitled matter came on regularly for hearing before Andrew H. Josephson, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on July 15, 1980, in Room 511 of the Yeon Building, 522 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. Respondent Union Pacific Railroad Company was represented by Carolyn L. Larson, Attorney at Law. Complainant William Batsell was present and testified. In addition to Complainant, the Agency called Timothy Stell, Hostler Tender for Respondent. Respondents called William Haines, Respondent's Bridge and Building Supervisor, and Wayne Kernan, Respondent's Bridge and Building Foreman.

Having fully considered the entire record in this matter, I, Mary Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Ruling Upon Motion, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULING UPON MOTION

Respondent moved to strike portions of the agency's Response to Respondent's Exceptions relating to the deduction of unemployment insurance benefits from the proposed back pay award and the request for a front pay award, on the grounds that this constituted new rather than Responsive Exceptions.

Respondent's motion is granted. OAR 839-04-120 specifies that exceptions are to be filed within the fifteen (15) day period following the filing of exceptions, and are to respond to the other party's exceptions. The issues of deduction of unemployment benefits and front pay were not raised in Respondent's Exceptions and may not properly be considered by this forum as Responsive Exceptions.

FINDINGS OF FACT – PROCEDURAL

1) On August 9, 1978, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by Respondent on the basis of his race and color.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and

persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a Utah corporation doing business in Oregon in the business of railroad transportation and shipping. In that business, Respondent utilized the personal service of one or more employees and reserved the right to control the means by which such service was performed.

2) Complainant is a black person.

3) On September 15, 1975, Complainant was hired by Respondent as a carpenter's helper. He was assigned to Respondent's Record Shipping Department at Respondent's Albina location. His job consisted of loading business records into boxcars. This job assignment ended on October 15, 1975, and Complainant was laid off. Because Complainant hoped to regain employment with Respondent after the layoff, he retained his seniority date and kept his paperwork for Respondent in active status. This allowed Complainant to remain eligible for recall by the Respondent.

4) On March 15, 1976, Respondent recalled Complainant from layoff and temporarily assigned him to the railroad crossing gang as a temporary First Class Carpenter. The bidding process (described herein) was not used when Respondent temporarily assigned employees to positions. Complainant's duties were to repair railroad crossings and lay new railroad ties.

5) Complainant was scheduled to remain in the above mentioned First Class Carpenter position until it was filled permanently in accordance with Respondent's bidding system. This complied with Respondent's normal procedure for filling vacant positions. That procedure consisted of temporarily assigning a worker qualified for the position or not, to the position until a permanent employee was selected through the Respondent's bidding system. Both First and Second Class Carpenters were eligible to bid for vacant First Class Carpenter positions, but only those Carpenters actually qualified, as opposed to technically qualified due to temporary appointment, would be awarded the position. The bidding employee who met the job skill requirements and had the most seniority would be awarded the position.

6) Because Complainant was temporarily classified as a First Class Carpenter, he was technically qualified to bid for vacant First Class Carpenter positions. He was not, however, sufficiently qualified to be awarded or to perform the position permanently due to his lack of experience as a carpenter. First Class Carpenter positions required more skills than Second Class Carpenter or Carpenter's Helper positions.

7) On March 22, 1976, after one week as a temporary First Class Carpenter, Complainant was assigned to Respondent's Bridge and Building section as a temporary Second Class Carpenter. His primary duty was to assist First Class Carpenters by, among other things, carrying planks, measuring and hammering.

8) Near the end of March 1976, Complainant learned that Respondent had a carpentry position available in Centralia, Washington. The job bulletin posted in the employee lunchroom was dated March 26, 1976, and stated that a First Class Carpenter position was available in Centralia, Washington. Complainant was interested in the opening because he had lived in, and desired to move back to, the Centralia area.

9) As stated above, First and Second Class Carpenters were eligible to bid for the position here in issue. Soon after learning about the position, Complainant discussed his interest in bidding for the position with Tim Stell, a co-worker. Mr. Stell informed Complainant that it was common knowledge that Respondent's foreman in Centralia, Willis Grant, did not want black persons working on his crew.

10) Complainant attempted to inform his immediate supervisor and Respondent's foreman, Merle Aiken, that he was interested in bidding for the position in Centralia, but the foreman indicated that he did not have time to speak with Complainant. Complainant approached the foreman on two other occasions but was still unable to speak with him about the vacancy. Complainant asked for and received permission to contact Bill Haines, Respondent's Bridge and Building supervisor, about the vacancy.

11) Mr. Haines spoke with Complainant about Complainant's desire to bid for the position in Centralia. It was unusual for Mr. Haines to discuss a job opening with an employee. Mr. Haines knew that Mr. Grant did not want blacks working on his crew and conveyed this to Complainant. Mr. Haines, who was in a supervisory position to Mr. Grant, did not report Mr. Grant's attitude toward blacks to Respondent's Employee Relations Department, nor did he attempt to resolve the situation on his own. Complainant did not bid for the position because, even if he had been qualified for the position (*See* Finding of Fact 15), Complainant believed that Mr. Grant's racist attitude would have precluded consideration of him.

12) William Kernan, the Respondent's Bridge and Building foreman, informed Mr. Haines that Complainant's work was unsatisfactory; however, neither Mr. Haines nor Mr. Kernan informed Complainant that his work was unsatisfactory at that time.

13) During March and the beginning of April of 1976, Complainant was serving a sixty day probationary period. During this period, Respondent was to evaluate Complainant's job performance and either retain or disqualify him as a Second Class Carpenter.

14) Within Respondent's bidding system, an employee could not bid on other carpentry positions if the employee had been previously disqualified from a carpentry position. A disqualified carpenter, however, was allowed to bid for vacant, non-carpentry positions if the employee met the job qualifications.

15) Mr. Kernan testified, and this forum found him to be credible, that he decided to disqualify Complainant from his Second Class Carpentry position because, in his opinion, Complainant was unable to work independently and took too much time to completed various tasks.

16) On April 2, 1976, Mr. Kernan went to Complainant's worksite and

asked him into the lunchroom. Mr. Kernan told Complainant that he was going to disqualify him as he did not possess the skills or tools of a carpenter. Mr. Kernan informed Complainant that he was being disqualified as a carpenter, not fired. Mr. Kernan explained Complainant's options as: getting on a recall list, however, no laborer or carpenter's helper positions were available at that time; waiting for an office job which might be available sooner; or, resignation. Complainant and Mr. Kernan went to Respondent's office where Complainant severed his employment with Respondent by signing a resignation form. As a result, Complainant was no longer eligible to bid for other positions and lost his seniority date. To obtain another position with Respondent, Complainant would have been required to reapply for employment.

17) Complainant voiced expectations to co-workers of developing a career with Respondent. These expectations were not well founded. Even if Complainant had not been disqualified as a carpenter, all advertised positions were listed as temporary, including the position Complainant was filling at the time of his disqualification. Mr. Kernan testified, and this forum finds, that Respondent's employees were always subject to layoff.

18) Complainant was incredulous and upset by the remarks made by Respondent's agent Mr. Haines and experienced mental suffering as a result of Respondent's apparent acceptance of Mr. Grant's known discriminatory behavior.

19) After his employment was severed with Respondent, Complainant worked for Firestone from June 17, 1976, to October 5, 1976.

20) On October 5, 1976, Complainant returned to school to complete his G.E.D. When he returned to school Complainant was no longer available and able to work.

ULTIMATE FINDINGS OF FACT

1) Complainant is a black person.

2) Respondent permitted the racially discriminatory attitude of one of its agents to exist at the Centralia work location and communicated the existence of this attitude to Complainant.

3) Complainant's temporary classification as a First Class Carpenter technically enabled him to bid for vacant positions as First Class Carpenter. However, as a temporary First and Second Class Carpenter, Complainant was subject to disqualification any time during the 60 day probation period.

4) During his 60 day probation Complainant was disqualified as a Second Class Carpenter for inability to independently perform the tasks required and lack of necessary tools.

5) Complainant did not seek psychiatric or other assistance as a result of Respondent's actions; however, mental suffering can be inferred from the occurrence of discrimination that resulted from the remarks that Complainant would not be accepted at a particular work location regardless of his qualifications.

6) Complainant returned to school to complete his G.E.D. on October 5, 1976, six months after his disqualification and subsequent resignation from Respondent's employ.

CONCLUSIONS OF LAW

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

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

3) The actions and the motivations of Respondent's agents and Complainant's supervisors, described herein, are properly imputed to Respondent.

4) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant herein under the facts and circumstances of this record, and the sum of money awarded in the Order below is an appropriate award.

OPINION

The Specific Charges allege that Complainant was denied the position of First Class Carpenter in Centralia, Washington, and was constructively discharged from Respondent's employ because of his race and color. Complainant was not unlawfully denied the position of First Class Carpenter as he was not qualified for the position. Complainant's foreman, Wayne Kernan, testified, and this forum found him to be credible, that Complainant had neither the skills nor requisite tools to perform the jobs of either First or Second Class Carpenter. Further, Complainant testified he knew the First Class Carpenter position he held for one week was "just a title" and did not mean he was qualified to hold that position. Although Respondent's conduct regarding Complainant's inquiries concerning the position disclosed discriminatory attitudes of one of Respondent's foremen, it was not a factor in Complainant's disqualification. Complainant, at hearing, acknowledged he did not have the skills and tools of the other First Class Carpenters. Complainant's disqualification, then, was for legitimate, non-discriminatory reasons and within Respondent's normal procedures.

The issue then presented is whether Respondent's discriminatory conduct resulted in compensable damages to Complainant.

McDonnell Douglas Corp. v. Green, 411 US 792 (1973) provides the requisites for a prima facie discrimination case:

> 1) the complainant belongs to a protected class;
>
> 2) complainant applied for and was qualified for the position for which the employer was seeking application;
>
> 3) complainant was rejected despite his/her qualifications; and
>
> 4) after the rejection of complainant, the position remained open and the employer continued to seek applications from persons with complainant's qualifications.

This Forum adopted this standard in *In the Matter of McCoy Oil Company,* 3 BOLI 9 (1982).

The critical issue presented herein is Complainant's qualifications. As a member of a protected class and having inquired about the position and having determined that application would be a futile gesture (*See, e.g., In the Matter of Westland Investment Company,* 2 BOLI 1 (1980)), it was

then Complainant's burden to show that he met the minimum qualifications for the position. He failed to carry that burden. Mr. Kernan credibly testified that Complainant was not qualified or able to perform the tasks required of either a First or Second Class Carpenter.

Even if Complainant had been qualified for this First Class Carpenter position, his damages would be limited to the six month period in which he was able and available to work. This period was ended by his returning to school on October 5, 1976, to complete his G.E.D. It is a well established legal principle that an injured party is required to mitigate damages arising from an employer's unlawful conduct. Failure to do so will result in the termination of the accrual of damages. *In the Matter of County of Multnomah,* 3 BOLI 52 (1982). To attempt to mitigate, a complainant must actively seek other work for which he/she is qualified. When Complainant returned to school he was no longer actively seeking work and thus failed, as of that time, to attempt to mitigate his damages.

Mental anguish is recognized by the Oregon courts as one of the effects of racial discrimination. The evidence that Complainant was advised of the discriminatory attitudes of one of Respondent's foreman is uncontested, and the inference is reasonable that Complainant suffered humiliation as a consequence of this discrimination. *Fred Meyer v. Bureau of Labor,* 39 Or App 253, 264-265 (1979). Respondent unlawfully failed to provide Complainant a racially neutral work environment.

This forum finds the tacit acceptance by Respondent of one of its foremen's racially discriminatory attitudes deplorable. Although Respondent asserts the attitudes of his foreman did not affect his crew in Centralia, Washington, this assertion is specious. When Mr. Haines discouraged Complainant's application for the Centralia position (before he found out Complainant was not qualified) he allowed the racist attitudes of Mr. Grant to potentially affect working conditions in the Centralia location through racially biased hiring. As a superior to Mr. Grant, Mr. Haines had an affirmative duty to eliminate Mr. Grant's discriminatory practices which were perpetuated through Mr. Haines's "friendly warning" to Complainant.

The testimony concerning Complainant's resignation April 2, 1976, was conflicting. Not only was Complainant's and Mr. Kernan's testimony conflicting, Complainant's testimony was inconsistent during the hearing. On cross examination Complainant admitted that more than one day might have elapsed between his disqualification and his resignation. On direct examination Complainant's testimony seems to be that he signed the resignation the same day he was disqualified. Complainant was also confused as to who disqualified him.

Although the testimony was conflicting, some common themes appeared in Complainant's and Mr. Kernan's versions of Complainant's resignation. Complainant testified that he understood he was being disqualified and that no lower level positions were available. This agrees with Mr. Kernan's version that he told

Complainant he was being disqualified and that Complainant could not continue working because no lower level positions were available at that time. Mr. Kernan had vivid recall of this incident at the hearing, it was the first time he had ever disqualified anyone, and this forum found his testimony credible. (*See* Findings of Fact 15 and 16, above.)

Further, Complainant had previously worked for Respondent and been laid off due to lack of work. Thus, he had experience with Respondent's layoff procedures, both with respect to receipt of a final paycheck and keeping his paperwork current to maintain his seniority date.

Mr. Kernan did not feel he had the time or resources to train employees. He disqualified a white worker on his crew shortly after Complainant's disqualification for reasons similar to the reasons for Complainant's disqualification.

Although this forum finds abhorrent Respondent's acceptance of the racist behavior of one of its foreman, there is not sufficient evidence to support Complainant's contention that this attitude was the cause of his disqualification. Had Complainant been qualified for the First Class Carpenter position in Centralia, the fact that Mr. Grant's attitude would have affected his chances at procuring the position would clearly have been unlawful discrimination. It is incumbent on Respondent to take steps to insure that known discriminatory attitudes such as those of Mr. Grant's do not affect the terms or conditions of employment of qualified persons. Mr. Haines's frank admission that he warned Complainant that working for Mr. Grant would not be in his best interest establishes that Mr. Grant's discriminatory behavior would have affected the terms and conditions of employment for Complainant had he been qualified for the position.

Complainant is entitled to damages as set forth herein for the pain and humiliation he experienced as a result of Mr. Haines's remarks. Damages for pain and humiliation suffered as a result of a discriminatory work environment may be awarded where Complainant is not found to be entitled to other damages. Complainant may not recover damages for lost income herein, as he was not qualified for the Centralia position.

The purpose of the Commissioner's broad remedial powers in Civil Rights cases is

> "to insure the human dignity of all people within this state, and to protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of discrimination . . ." ORS 659.022(1).

These remedial powers include the discretionary authority to award money damages for mental anguish caused by the humiliation racial discrimination inflicts. *Fred Meyer v. Bureau of Labor, Supra.* The award as set forth below is appropriate to compensate Complainant for the mental suffering he experienced.

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 and to protect the lawful interests

of others similarly situated, the Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Bureau of Labor and Industries, upon service of this Final Order, a certified check payable to the Bureau of Labor and Industries in trust for William Batsell, in the amount of ONE THOUSAND DOLLARS and NO CENTS ($1,000.00). This amount represents damages for the mental anguish, pain, and humiliation suffered by Complainant.

2) Cease and desist from discriminating against its employees on the basis of race or color.

In the Matter of

TYRHOLM, INC.,

a Minnesota corporation, dba Big R,

Respondent.

Case Numbers 77-80 and 90-80

Final Order of the Commissioner

Mary Wendy Roberts

Issued November 26, 1982.

SYNOPSIS

Finding that two female Complainants managed departments that were smaller in floor space, inventory, dollar volume, and number of personnel employed than that of a male manager, the Commissioner held that Respondent did not commit an unlawful employment practice based on sex by paying the male manager more for managing the larger department, based on the skill, effort, and responsibility involved. The Commissioner dismissed the Specific Charges as to each Complainant. ORS 652.220(1); 659.030(1)(a).

The above-entitled matter came on regularly for hearing before Robert L. Chapman, designated at Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on October 30, 1980, in the third floor courtroom of the Klamath County Courthouse, Klamath Falls, Oregon. The Bureau of Labor and Industries was represented by Michael J. Tedesco, Assistant Attorney General. Respondent Tyrholm, Inc. was represented by Arthur J. Carter, Attorney at Law. Complainants Shirley Parrish and Rita Graham were present and testified. Also testifying were Jim Glenn, Respondent's former Automotive Department Manager; Steve Tyrholm, Respondent's Purchasing Agent; Boyd Mayer, Respondent's Controller; and Richard Hunsaker, Respondent's Store Manager.

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

FINDINGS OF FACT – PROCEDURAL

1) On October 4, 1979, Shirley Parrish filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her employment by Respondent because of her sex.

2) On July 10, 1979, Rita Graham filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her employment by Respondent because of her sex.

3) Following the filing of the aforementioned verified complaints, the Civil Rights Division investigated the allegations in the complaints and determined that substantial evidence existed to support these allegations.

4) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaints through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a Minnesota corporation doing business as Big R in Klamath Falls, Oregon. In this business, Respondent engaged in the retail sales of various consumer items and utilized the personal service of one or more employees, reserving the right to control the means by which such service was performed.

2) Respondent's Big R store is a retail sales facility consisting of several departments: the Tires, Batteries and Accessories (TBA) Department, which primarily sells automobile tires, batteries, and accessories; the Clothing Department; the Animal Health and Tack Department (which between November 1978 and May 1979 was split into two departments); the Hardware Department; and the Sporting Goods Department. Each department is managed by one employee.

3) Complainant Graham was initially employed by Respondent in 1972 as a clerk in Big R's Animal Health and Tack Department. She ceased her employment with Respondent in 1974, but returned to work in May 1978. At that time, she was hired to be manager of Big R's Animal Health and Tack Department by Steve Tyrholm, former manager, now purchasing agent of the store. Complainant Graham worked part time, 24 hours per week, at a starting salary of $3.25 per hour. Complainant Graham worked Tuesdays, Wednesdays, and Thursdays as manager of this department until November 1978, when the department was split into the Tack Department and the Animal Health Department. Complainant Graham continued as manager of the newly created Tack Department, still working on a part time basis until May 1979, when she again left Respondent's employ. At that time Complainant Graham's rate of pay was $3.85 per hour.

4) Complainant Parrish was employed by Respondent from August 1974 until August 1977 as a clerk and floor worker at Respondent's store. Complainant Parrish then temporarily left Respondent's employ but returned to work for Respondent as a clerk in August 1978. Her salary was then $3.25 per hour. In November 1978, she became manager of Big R's Animal Health Department when it split from the Tack Department. Her salary then became $3.50 per hour. When Complainant Graham quit

Respondent's employ in May 1979, the Animal Health and Tack Departments were rejoined, and Complainant Parrish became manager of that combined department, at a salary of $4.85 per hour. Complainant Graham's salary at the time of hearing was $6.00 per hour.

5) At all tines material herein, Jim Glenn was the manager of the TBA Department. Mr. Glenn was hired by the Respondent to manage that department in May 1978, at the pay rate of $4.50 per hour. Mr. Glenn left Respondent's employ in February 1980. At that time, he was paid $6.65 per hour by Respondent.

6) Four years before beginning her employment with Respondent, Complainant Parrish had graduated from vocational high school, where she had studied Animal Husbandry for four years. She has raised various types of livestock as an avocation since her graduation from school.

7) Prior to beginning her employment with Respondent, Complainant Graham had no formal training in Animal Husbandry or related fields, but she had practical experience working with horses at race tracks and had raised and shown registered quarter horses since 1961. She was also licensed by the State of Oregon to gallop horses at racetracks and, like Complainant Parrish, had raised other livestock avocationally.

8) Although neither Complainant Parrish nor Graham had formal business training before her employment with Respondent, Complainant Graham had previous work experience in retail sales and bookkeeping.

9) Prior to assuming his position with Respondent, Mr. Glen had automotive experience consisting of one year of experience as Parts Manager for a farm implement dealer; one and a half years of experience as a mechanic and warranty clerk with an automobile dealership; and two years of experience as a sales and mechanical trainee in the TBA department of a Sears store.

10) The manager of the Animal Health and Tack Department was responsible for supervising one half-time employee in the department; selecting, ordering and stocking inventory, subject to the store manager's approval; creating advertising copy concerning department goods and sales; customer sales and service; and department appearance. From August 1980 until the time of the hearing, the subordinate supervised by Complainant Parrish worked full-time.

In addition to the above-described duties, Complainant Parrish participated in three separate buying trips during which she and other employees reviewed and selected product offerings from manufacturers' displays at conventions or other gatherings.

11) The manager of the TBA Department was responsible for supervising one full-time employee in the department; selecting, ordering and stocking inventory, subject to the store manager's approval; creating advertising copy concerning department goods and sales; customer sales and service (including installation of batteries, tires, shock absorbers, and other automotive accessories); and department appearance. The TBA Department manager also had authority to make cash refunds on warranties of various products, in accordance with manufacturer warranty policies. The full-time employee Mr. Glenn supervised was primarily involved in mounting and changing automobile tires.

12) The physical area occupied by the TBA Department was nearly twice that occupied by the Animal Health and Tack Department.

13) The dollar value of the inventory of the Animal Health and Tack Department ranged from approximately two-thirds to the same or slightly more than that of the TBA Department. When the Animal Health and Tack Department was divided the resulting dollar value of the inventory of each separate department was less than half of the TBA Department. The average value of the inventory of the Animal Health and Tack Department as a whole was approximately 85 percent of that of the TBA Department.

14) The gross sales for the TBA Department in 1978 totaled $244,346.00. The TBA Department enjoyed approximately a 19 percent increase in 1979, to show total gross sales of $290,900.00. At the time of the hearing in October 1980, the department was experiencing approximately a 12 percent decrease in 1980 for total gross sales through September 1980 of $192,947.00.

15) The gross sales for the Animal Health and Tack Department in 1978 totaled $144,926.00. Gross sales rose approximately 38 percent in 1979 to a total of $199,526.00. 1980 total gross sales for the Animal Health and Tack Department had increased approximately 6 percent with sales of $158,056.00 through September 1980.

17) Big R's store manager, Mr. Tyrholm, determined employee rates of pay. Mr. Tyrholm asserted, and this forum finds him credible, that he considered employee responsibility an important factor in determining the employee's rate of pay. According to Mr. Tyrholm, the size of a department's inventory and the amount of its gross sales determined the level of responsibility of its manager and therefore were factors in determining the wages of that manager.

ULTIMATE FINDINGS OF FACT

1) Complainants Parrish and Graham were Department Managers in Respondent's store.

2) The duties of Respondent's Department Managers were substantially the same. Each Department Manager was responsible for the appearance of his/her department, the inventory, customer sales, and any employees in that department.

3) Complainants Parrish and Graham were responsible for significantly smaller departments and inventories than Mr. Glenn, and until August 1980, supervised a part-time employee while Mr. Glenn supervised a full-time subordinate.

4) Respondent based department manager salaries on the physical size of their department, the value of the inventory, and supervisory responsibilities. Respondent also considered whether an employee was full-time or part-time in determining their rate of pay.

5) The wage differential between Complainant's Parrish and Graham and Mr. Glenn was based on the difference in the size of the departments

managed, not on the sex of complainants.

CONCLUSIONS OF LAW

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

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

3) The actions and motivations for those actions of Respondent's agent Tyrholm, described herein, are properly imputed to Respondent.

5) Respondent did not commit an unlawful employment practice in violation of what was at times material ORS 659.030(1), and what is now ORS 659.030(1)(a).

OPINION

The Specific Charges filed by the Bureau of Labor and Industries allege a violation of ORS 659.030, which forbids an employer to discriminate against an individual in compensation, or in the other terms, privileges, and conditions of employment because of sex. Respondent's brief contrasts ORS 659.030 with 652.220, a portion of the wage and hour legislation of the State of Oregon, which also essentially forbids discrimination in payment of wages for work which requires "comparable skills." Respondent urges that ORS 652.220 be disregarded due to the fact it involves the "comparable work theory," and that the method of analysis under the two different statutes would be inconsistent. Respondent's contention is not relevant to the disposition of this matter as the Specific Charges filed herein allege violations of only ORS 659.030.

In assessing the pay differentials and the reasons therefore, both the Bureau and Respondent argue that analogies may be drawn from the Federal Equal Pay Act, 29 USC SS 206(d). The focal criteria enunciated by this act and the cases interpretive thereof are the skill, effort, responsibility and working conditions required in the performance of comparative jobs.

Although it is arguable that evidence adduced at the hearing did not demonstrate any appreciable difference in the degree of skill or effort required by the managers of the two departments, the demonstrated degree of responsibility between Complainants Parrish and Graham and Mr. Glenn was decidedly different.

The Respondent asserts that the difference which existed during times material herein between the pay scales of the managers of the Animal Health and Tack Department and the manager of the Automotive Department was justified in terms of the different responsibilities of those managers because of the difference in size of the departments. The evidence supports this assertion.

The differential which exists and existed during times material herein in the pay scales between the managers of the Animal Health and Tack Department and the manager of the Automotive Department can be explained in terms of the relative responsibilities of the managers of the respective departments. Responsibility must be measured in terms of the employees or actor's authority and accountability. Thus such factors as the number of subordinates supervised, the dollar amount of inventory and sales generated, and the decision making concomitant with management of a larger portion of Respondent's business must be considered in assessing responsibility. The fact that Mr. Glenn was responsible for warranty adjustments is not determinative of the issues presented herein. He was merely dealing with a type of product which manufacturers do warrant and the evidence presented does not justify a difference in pay for this reason. The products sold through Animal Health and Tack did not have comparable warranties but did have expiration dates and other manufacturer requirements.

Respondent asserts that salary levels for its department managers were based on inventory size, sales volume, and floor space in the manager's respective departments. Additional factors considered by Respondent were supervisory responsibilities and full time versus part-time employment. These factors are unrelated to the sex of the individual manager.

The departments managed by Complainants Parrish and Graham were significantly smaller in floor space occupied as well as in dollar inventory and sales, than the department managed by Mr. Glenn. Although Complainants may have performed duties similar to and frequently the same as Mr. Glenn's, their responsibility in terms of dollar value to the profitability of the store was much less. The evidence showed that the sales and inventory of the Animal Health and Tack Department increased substantially in 1979 and 1980. This growth and the substantial pay increases of Complainant Parrish buttresses Respondent's assertion that salary was based on inventory size and sales volume, which are factors unrelated to the sex of a department manager.

Complainants Parrish and Graham shared the supervisory responsibility for one-half time subordinate. Mr. Glenn was solely responsible for the work of a full-time subordinate. When Complainant Parrish was supervising a full-time employee she experienced salary increases commensurate with her increased responsibility.

Complainant Graham was a part-time employee, working 24 hours per week. The record does not disclose who managed her department on days other than Tuesday, Wednesday, and Thursday, but there can be no doubt that someone other than Complainant Graham was responsible. Respondent's manager, Steve Tyrholm, testified, and this forum found him credible, that the fact that Complainant Graham was part-time was one of the factors he considered in determining her salary.

Respondent has presented legitimate, non-discriminatory reasons for the difference in pay between Complainants Parrish and Graham and Mr. Glenn. An employer may make a salary differential even where job duties appear the same, when the responsibility required of the individual is different. *See, e.g., Gunther v. County of Washington,* 101 SCt 2242 (1981). Although Complainants Parrish and Graham and Mr. Glenn were all department managers, the responsibility of each position was varied. Pay differences based on the difference in the level of responsibility required of

each manager is not an unlawful act where it is unrelated to an individual's gender.

ORDER

NOW, THEREFORE, the Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and Complaints filed herein against the Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of
K-MART CORPORATION,
Respondent.

Case Number 52-79
Amended Final Order of
the Commissioner
Mary Wendy Roberts
Issued December 6, 1982.

SYNOPSIS

Finding that Complainant had previously worked satisfactorily as a cashier-bookkeeper at Respondent's Salem store, the Commissioner found that her discharge three days prior to the end of a 30 day probationary period as a cashier-bookkeeper at Respondent's Pendleton store was the result of telling her supervisor that she was pregnant, and was an unlawful employment practice based on sex, in violation of ORS 659.030(1)(a). The Commissioner awarded Complainant the full wage she would have earned up to the birth of her child but for the discriminatory discharge, deducted $459 for temporary work, and declined to deduct unemployment compensation, adopting the "collateral source" rule. The Commissioner ordered Respondent to pay interest on the net wage loss, and to cease discriminating against employees on the basis of pregnancy. ORS 183.450; 659.029; 659.030(1)(a).

The above-entitled contested case came on regularly for hearing before Dale A. Price, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on December 5, 1979, in the Conference Room of the State Employment Office, 408 S.E. Seventh Street, Pendleton, Oregon. The Bureau of Labor and Industries was represented by Douglas R. Andres, Assistant Attorney General. Respondent K-Mart Corporation was represented by Thomas Fredericks, Attorney at Law. Complainant Vickie Miller was present and testified for the Agency. Kathleen Iliff, Respondent's Personnel Manager during times material, testified for Respondent.

The Proposed Order of the Presiding Officer was issued on September 11, 1980. The Final Order of the Commissioner of the Bureau of Labor and Industries was issued on March 9, 1982.

On March 17, 1982, the Respondent filed a Motion for Reconsideration and Brief in support thereof. On April 16, 1982, the Commissioner of the

Bureau of Labor and Industries granted Respondent's Motion for Reconsideration and gave the Agency thirty (30) days in which to file a response. Having fully considered the briefs of both parties and the entire record in this matter, I, Mary Roberts, Commissioner of the Bureau of Labor and Industries, hereby make upon reconsideration the following Amended Findings of Fact, Amended Ultimate Findings of Fact, Amended Conclusions of Law, Amended Opinion, and Amended Order.

AMENDED FINDINGS OF FACT – PROCEDURAL

1) On January 26, 1979, Vickie Miller filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her employment by Respondent because of her sex.

2) Following the filing of the aforementioned complaint, the Civil Rights Division investigated the allegations contained therein and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

AMENDED FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent K-Mart Corporation was a Michigan corporation doing business in the State of Oregon. Also at all times material herein, K-Mart Enterprises, Inc. was a wholly owned subsidiary of Respondent which operated the automotive and sporting goods departments at Respondent's retail store in Pendleton, Oregon.

2) At all times material herein, Respondent engaged the personal service of one or more employees in its Pendleton store, reserving the right to control the means by which such service was performed.

3) Complainant is a female person.

4) Between May 1977 and September 21, 1977, Complainant was employed as a cashier-bookkeeper in the sporting goods department of Respondent's Salem, Oregon, store. She voluntarily resigned that employment in good standing for personal reasons.

5) On August 17, 1978, Complainant applied for work at Respondent's newly-opened Pendleton store. She informed the person to whom she submitted her application, and this forum finds, that she had been employed at Respondent's Salem store and the manager of that store was sending a positive recommendation of her to Respondent's district manager in Pendleton.

6) On August 17, 1978, Respondent hired Complainant as a cashier-bookkeeper in the sporting goods department of its Pendleton store.

7) At the time she was hired to work at Respondent's Pendleton store, Complainant was placed on a routine 30-day probation. Respondent apprised Complainant of this fact when it hired her.

8) Complainant's duties at Respondent's Pendleton store were to

operate a cash register and make entries on running bookkeeping logs. These were substantially the same duties as those of her employment at Respondent's Salem store.

9) Complainant worked at Respondent's Pendleton store on a full-time (40 hours per week) basis.

10) During Complainant's employment at Respondent's Pendleton store, her supervisor was Rod Krug, manager of the sporting goods department and Respondent's employee.

11) On Monday, September 11, 1978, Complainant informed Mr. Krug that she had just learned that she was pregnant. Mr. Krug seemed pleased at this announcement.

12) Complainant was not scheduled to, and did not, work the day after her announcement, September 12, 1978.

13) When Complainant reported for work on her next scheduled work day, Wednesday, September 13, 1978, she discovered that she was involuntarily discharged because, Mr. Krug told her, she was not "working out."

14) Complainant's probationary period would have ended Saturday, September 16, 1978.

15) Mr. Krug made the decision to, and did, terminate Complainant. When, in accordance with Respondent's standard procedure, he reported this termination to Kathleen Iliff, Personnel Manager (and Advertising Director) of Respondent's Pendleton store and Respondent's employee, he told Ms. Iliff that Complainant was discharged because she was "not able to fulfill job responsibilities" and "doesn't use company time wisely - idle talk with other employees." Mr. Krug also recommended against re-employing Complainant, telling Ms. Iliff that Complainant did not have "good overall working habits - only interested in work for money - not willing to use company time for company business." Based upon Mr. Krug's statements, Ms. Iliff prepared, on September 13, 1978, Complainant's Separation Report and the Termination Record on the back of Complainant's Confidential Employee Record Folder, from which the above quotations are taken.

16) Ms. Iliff never personally observed Complainant's job performance. She prepared the Separation Report and Record Folder solely on the basis of Mr. Krug's statements, and she has no personal knowledge of the accuracy of those statements.

17) During her employment at Respondent's Pendleton store, Complainant was given no oral or written performance evaluations, no oral or written criticisms or warnings, and no indication at all that her work at Respondent's Pendleton store was unsatisfactory.

18) Complainant did not sign her Separation Report because she believed that, contrary to what the report said, her work performance had been satisfactory.

19) The purpose of the probationary period for Respondent's employees was to give Respondent a time during which it had the option of terminating an employee at will. At times material herein, it was not uncommon for Respondent to discharge an employee during or immediately after his or her probationary period.

20) At times material herein, Respondent did not give its probationary employees written performance evaluations or written warnings that termination was imminent.

21) At times material herein, it was not uncommon for Respondent to discharge a probationary employee without having first given that employee a warning. However, Respondent had, at times material herein, given probationary employees informal oral warnings of unsatisfactory job performance.

22) At times material herein, Respondent had no written policy concerning pregnant employees except that "a leave of absence for pregnancy" was "granted by the Corporation if the employee intends to return to work within three months after the birth of the child." Respondent gave Complainant no opportunity to apply for such a leave of absence before discharging her.

23) During Complainant's employment at Respondent's Pendleton store, she was the only employee whom Respondent knew was pregnant.

24) Mr. Krug was no longer employed by Respondent or living in Oregon at the time of hearing. He did not appear at hearing, nor was his testimony presented by affidavit. There is evidence on the record that Respondent attempted to procure Mr. Krug's oral or written testimony.

25) On March 29, 1979, 28 weeks after Respondent discharged Complainant, her child was born.

26) Before being discharged from Respondent's employ, Complainant was paid $2.95 per hour and earned gross wages of $118.00 per week.

27) If Complainant had continued her employment as a cashier-bookkeeper at Respondent's Pendleton store from September 13, 1978, to March 29, 1979, she would have earned total gross wages of $3,304.00.

28) After her discharge from employment on September 13, 1978, Complainant received unemployment insurance benefits of $44.00 per week for six weeks, for a total of $264.00.

29) On November 10, 1978, Complainant began temporary seasonal employment as a salesperson at Montgomery Ward & Company, Inc. In this employment, Complainant was paid $2.80 per hour and worked on an "as needed" basis up to forty hours per week. Complainant earned a total of approximately $459.00 in this employment, which ended when her employer's seasonal business ended.

30) After working for Montgomery Ward & Company, Inc., Complainant received unemployment insurance benefits of $33.00 per week for ten weeks, for a total of $333.00. She remained unemployed until the birth of her child.

31) During Complainant's two periods of unemployment between September 13, 1978, and March 29, 1979, she made reasonable efforts to secure employment.

AMENDED ULTIMATE FINDINGS OF FACT

1) Complainant, a female, worked for Respondent as a cashier-bookkeeper in its Pendleton, Oregon, store from August 17, 1978, until Respondent discharged her on September 13, 1978.

2) Complainant was discharged by her supervisor on the next work day after she had told that supervisor that she was pregnant.

3) Complainant was discharged three work days before the end of her probationary period. It was not uncommon for Respondent to discharge a probationary employee during or immediately after his or her probationary period.

4) Respondent alleges that Complainant was discharged because she was "not able to fulfill job responsibilities." Respondent bases this allegation solely upon statements made by Complainant's supervisor to Respondent's Personnel Manager and written by that Personnel Manager in Complainant's employee records. These statements are, like the above-quoted remark, very general; the most specific statement is that Complainant made "idle talk with other employees" on Respondent's time.

5) Complainant had previously worked in the same capacity in Respondent's Salem, Oregon, store. Her work had been good enough to merit a positive recommendation from Respondent's Salem store manager to Respondent's Pendleton store.

6) Before Respondent discharged her, Complainant had been given no indication that Respondent felt her work was unsatisfactory. Although it was not Respondent's policy to give written performance evaluations or warnings that discharge was imminent to probationary employees, and it was not uncommon for Respondent to discharge a probationary employee without prior warning, Respondent had offered informal oral warnings to other probationary employees whose job performance was unsatisfactory.

7) Complainant reasonably believed that her work performance during her employment in Respondent's Pendleton store was satisfactory.

8) The reasons Respondent alleged for discharging Complainant (see Ultimate Finding of Fact 4 above) are not credible enough to be believed. Respondent discharged Complainant because of her pregnancy.

9) Between the date of her discharge by Respondent and the birth of her child, Complainant earned $459.00 in wages and received $597.00 in unemployment compensation benefits. If she had continued working as a cashier-bookkeeper for Respondent during that time, at her previous wage rate, she would have earned $3,304.00.

AMENDED CONCLUSIONS OF LAW

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

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

3) The actions, and motivations for those actions, of Respondent's employees Rod Krug and Kathleen Iliff described herein are properly imputed to Respondent.

4) A discharge because of pregnancy constitutes a discharge because of sex. ORS 659.029.

5) By discharging Complainant because of her pregnancy, Respondent committed an unlawful employment practice in violation of ORS 659.030(1)'s prohibition against discharging a person from employment because of that person's sex.

6) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record.

7) The appropriate measure of Complainant's damages caused by Respondent's unlawful employment practice is the difference between the amount she would have earned had she continued working as a cashier-bookkeeper in Respondent's Pendleton store and any amounts she actually earned between September 13, 1978, and March 29, 1979. The unemployment compensation benefits Complainant received during the latter time will not be deducted from her back pay damages, because those benefits are collateral to the back pay award and were received to serve a wholly separate social policy.

AMENDED OPINION

1. The Allocation of Burdens and Order of Presentation of Proof

In past Orders, this forum has set forth the basic allocation of burdens and order of presentation of proof in matters alleging discriminatory treatment violating ORS 659.030(1)(a). In order to address the specific questions related thereto which have been raised in this matter, this forum has adapted, with the minor necessary modifications, the language of the most recent opinion of the Supreme Court of the United States concerning these questions: *Texas Department of Community Affairs v. Burdine*, 450 US 248 (1981).

The initial burden of proof rests with the Agency, and it is the burden of proving by a preponderance of the evidence a prima facie case of discrimination. If the Agency succeeds in doing so, the burden shifts to the respondent to articulate some legitimate, non-discriminatory reasons for its allegedly discriminatory action. Should the respondent carry this burden, the Agency then has the opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the respondent was not its true reason, but was a pretext for discrimination.

The ultimate burden of persuading this forum that the respondent discriminated against the complainant remains at all times with the Agency. The above-described division of intermediate evidentiary burdens serves to bring the parties and this forum expeditiously and fairly to this ultimate question.

In this matter, the Agency has met its initial burden of proving a prima facie case of discrimination by showing that after Complainant had worked for Respondent for twenty-seven days in a manner which she believed was satisfactory, she was discharged after telling Respondent that she was pregnant.

A prima facie case is sufficient to withstand a motion to dismiss the Specific Charges. The burden that shifts to a respondent at this point is to rebut the prima facie case by producing evidence that it discharged the complainant for a legitimate, non-discriminatory reason. The respondent need not persuade the forum that it was actually motivated by the proffered reason. It is sufficient if the respondent's evidence

raises a genuine issue of fact as to whether it discriminated against the complainant. The respondent thereby avoids the administrative version of a directed verdict. To accomplish this, the respondent must clearly set forth, through the introduction of admissible evidence, the reasons for its action against the complainant. If the respondent carries this burden of production, the forum's factual inquiry proceeds to a new level of specificity. Placing this intermediate burden of production on the respondent thus serves simultaneously to meet the Agency's prima facie case by presenting a legitimate non-discriminatory reason for Respondent's action and to frame the factual issue with sufficient clarity so that the Agency will have a full and fair opportunity to demonstrate pretext. The sufficiency of the respondent's evidence is evaluated by the extent to which it fulfills these functions.

Respondent herein sought to meet its burden of production by introducing three documents and the testimony of their custodian. Two of these documents are pages from Complainant's employee file which contain statements which, Respondent alleges, Complainant's supervisor made to Respondent's Personnel Manager to explain the supervisor's discharge of Complainant. Those statements are: "Not able to fulfill job responsibilities" (stated twice), "Doesn't use company time wisely - idle talk with other employees," and "Not good overall working habits - only interested in work for money - not willing to use company time for company business." The third document Respondent offered was a page from the employee file of another of Respondent's employees who was discharged because he was "not able to fulfill responsibilities of (the) job without constant supervision - fraternizing with female employees while on duty." This document, along with testimony from its custodian, was offered to show it was not uncommon for Respondent to discharge probationary employees during or immediately after probation, even without having given those employees a warning.

The supervisor who allegedly made the above-quoted statements contained in the exhibits is no longer employed by Respondent or living in Oregon. As Respondent offered no other explanation on the record for the absence of this key person's oral or written testimony in this matter, Respondent has not adequately explained that absence. Accordingly, that absence weighs against Respondent. Respondent's sole witness was the above-mentioned Personnel Manager, who could only testify that the above-quoted statements concerning Complainant's discharge were her accurate renditions of the reasons the supervisor had given her for his discharge of Complainant. The Personnel Manager had no direct knowledge of the veracity of those statements. Her testimony, taken with the testimony of Complainant, shows nothing more than the fact that Complainant's supervisor gave Complainant and Respondent's Personnel Manager reasons other than pregnancy for discharging Complainant.

The statements are competent evidence, nonetheless, under both the civil standard enunciated in ORS 41.690 and the less stringent

"reasonably prudent person" standard of admissibility which governs this forum and which is contained in ORS 183.450. These statements do set forth non-discriminatory reasons for Complainant's discharge. However, none of these statements is more than a vague description of a general work problem. Statements such as the twice made "not able to fulfill job responsibilities" are insufficient specific or clear to allow the Agency to demonstrate their pretextuality or respond to them at all. The most clear and specific statement is "idle talk with other employees" (on company time). By Respondent's own standard for discharging probationary employees ("at will"), this ground alone could be sufficient reason for discharge. Although there is no evidence providing any examples, or specifying the time, place, or nature of any of Complainant's idle talk, this statement by itself is specific and clear enough to give the Agency an opportunity to demonstrate its pretextuality. Respondent has met its burden of articulating a legitimate, non-discriminatory reason for discharging Complainant.

The Agency retains the burden of persuasion. It now must have the opportunity to demonstrate that the reasons Respondent offered for Complainant's discharge were not the true reasons for that discharge. This burden now merges with the ultimate burden for persuading the forum that Complainant has been the victim of unlawful discrimination. The Agency may succeed in this either directly by persuading the forum that a discriminatory reason more likely than not motivated Respondent or indirectly by showing the Respondent's stated explanation is unworthy of credence.

The Agency has attempted to discharge this burden by showing that, since Complainant was terminated on the very next work day after she notified her supervisor of her pregnancy, that pregnancy more likely than not motivated Respondent. Because Complainant was discharged in the 27th day of her 30 day probation, and it was not uncommon for Respondent to discharge probationary employees, the immediate time proximity of the notice of pregnancy caused Respondent to discharge her.

At the same time, however, the Agency has attempted to meet its burden by showing that Respondent's explanations for Complainant's discharge is not worthy of belief because (1) Complainant's previous performance of the same job in another of Respondent's store was good enough to merit a positive recommendation of Complainant from the store's manager, (2) Complainant believed her work to be satisfactory, and (3) Respondent had not given Complainant even the slightest hint of criticism during her employment. Even though it is not Respondent's policy to give a formal written warning of imminent termination to probationary employees, and it was not uncommon for Respondent to discharge a probationary employee with no prior warning, this forum finds it incredible that an employee with a record of prior good work in a job would not have some inkling of her subsequent flaws in doing the same work, either through her own observation of her work or because of her employer's direct or indirect responses to her

work, if those flaws were sufficient to cause discharge. Certainly most, if not all, employees must present some problem in the initial days of employment, and it is difficult to believe that an employer would summarily discharge all such employees without first attempting in some way to induce correction of potentially correctable and minor flaws such as the "idle talk" problem. In addition, the very nebulous nature of Respondent's stated reasons for discharging Complainant, especially when contrasted with the more specific nature of the reasons offered for the discharge of another probationary employee, render Respondent's stated reasons for discharging Complainant much less credible.

The evidence described above, as a whole, establishes that Respondent's explanation for its discharge of Complainant is not credible enough to be believed and therefore is not viewed by this forum as the real reason for Complainant's discharge. If Respondent's evidence had been strengthened by more direct or more specific evidence of its proffered reasons for discharging Complainant, the Agency's evidence would have had to be much stronger to prove by a preponderance the pretextuality of those reasons. Given the weak (i.e., secondhand and very general) nature of Respondent's evidence concerning those reasons for discharging Complainant, the totality of the Agency's evidence establishes by a preponderance of the evidence that Respondent discharged Complainant because she was pregnant.

2. Deduction of Unemployment Compensation Benefits

This forum has ruled that it will not deduct unemployment compensation benefits from back pay awards. *In the Matter of Spear Beverage Company,* 2 BOLI 240, 245-46 (1982).

Taken together, ORS 659.060(2), 659.010(2), and 659.022 give this forum broad discretion in shaping remedies for persons who have been aggrieved by unlawful employment practices. Deciding whether to deduct unemployment compensation from this forum's awards of back pay damages is a proper exercise of that discretion.

Back pay awards in employment discrimination matters are calculated to compensate a complainant for the loss of wages, salary, or fringe benefits which the complainant would have received but for the respondent's unlawful discrimination. The purpose of such awards is to make the complainant whole for injuries he or she suffered because of such discrimination. *See Albemarle Paper Company v. Moody,* 422 US 405 (1975).

It can be argued that not deducting unemployment compensation from a back pay award would be wrong because it would make the complainant more than whole by allowing the complainant to receive the windfall recovery of both back pay and unemployment compensation for the same time period. One response to this argument is that unemployment compensation is a benefit which is purely collateral to a back pay award and is peculiarly the property of the complainant.

The US Supreme Court has made the following rationale in deciding that unemployment compensation need not be deducted from back pay awarded under the National Labor Relations Act.

> ". . . To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.
>
> ". . . Payments of unemployment compensation were not made to the employees by Respondent but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state. (Citations omitted.) We think these facts plainly show the benefits to be collateral. It is thus apparent from what we have already said that failure to take them into account in ordering back pay does not make the employees more than 'whole' as that phrase has been understood and applied."

National Labor Relations Board v. Gullet Gin Company, 340 US 361, 364-365 (1951) (hereinafter cited as *Gullett Gin*).

Oregon's unemployment compensation system has a purpose very similar to that described above: to deal with the social problems arising from the economic condition of a working person when he or she becomes unemployed. *Columbia Management Company v. Morgan,* 270 Or 109, 118, 526 P2d 571 (1974). It is intended to provide a means of living for an unemployed worker, not to compensate him or her for a wrong done by the employer. *McPherson v. Employment Division,* 285 Or 541, 556, 591 P2d 1381 (1979). According to the *Gullett Gin* criterion, therefore, Oregon's unemployment compensation benefits are collateral to a back pay award, and therefore need not be deducted from such an award.

Federal Circuit Courts reviewing employment discrimination cases under Title VII, which are directly analogous to this matter, have ruled, and ruled differently, on the question of whether unemployment compensation benefits should be deducted from a back pay award. Relying principally upon the "separate social policy" and "collateral source" doctrines inherent in *Gullett Gin,* or affirming such reliance, several federal Circuit Courts, including the Ninth Circuit Court of Appeals, have upheld the practice of refusing to deduct unemployment compensation from back pay awards. *Inda v. United Air Lines, Inc.,* 405 F Supp 426 (N.D. Cal. 1975), *aff'd in pertinent part and vacated in part* 565 F2d 554 (9th Cir 1977), *cert denied* 435 US 1007 (1978); *EEOC v. Ford Motor Company,* 25 EPD 31,636 (4th Cir 1981);

EEOC v. Scandia Corporation, 23 EPD 31, 175 (10th Cir 1980); *Marshall v. Goodyear Tire & Rubber Company,* 554 F2d 730 (5th Cir 1977). Of particular note is the following statement from *EEOC v. Ford Motor Company,*

> "Based on the . . . decision (in *Abron v. Black & Decker Manufacturing Co.,* 439 F Supp 1985 (D. MD. 1977), the analysis of the Supreme Court (in *Gullett Gin*), and the remedial policies of Title VII, we agree with the district court that 'awards of back pay under Title VII should not be affected by a system of compensation which is designed to serve a wholly independent social policy.' To decide otherwise would undercut to some degree the corrective force of a Title VII back pay award." *Id* at 19705.

On the other hand, several federal Circuit Courts have failed to uphold the practice of refusing to deduct unemployment compensation from back pay awards. *EEOC and Rios v. Enterprise Association Steamfitters, Local No. 638,* 542 F2d 579 (2nd Cir 1976), *cert denied* 430 US 911 (1977); *Ostapowicz v. Johnson,* 541 F2d 394 (3rd Cir 1976); *Satty v. Nashville Gas Company,* 384 F Supp 765 (M.S. Tenn. 1974), 522 F2d 850 (6th Cir 1975), *aff'd in pertinent part without comment, vacated in part, and remanded* 434 US 136 (1977); *Bowe v. Colgate Palmolive Company,* 416 F2d 711 (7th Cir 1969). These are, however, general affirmances of the discretionary power of the trial courts. "No one of them shows a marked preference for the doctrine of offsetting unemployment compensation against back pay awards." *EEOC v. Sandia Corporation, supra* at 17,141.

Finally, this forum has considered a recent ruling in the US District Court for the District of Oregon that unemployment benefits drawn by a Title VII plaintiff after retaliatory discharge need not be deducted from a back pay award: *Kauffman v. Sidereal Corporation,* Civil No. 79-142 (D. Or May 22, 1980). In making this ruling, Judge James Burns noted that

> " . . it is clear that those (unemployment compensation) programs are meant for the benefit of employees and the community at large, not employers, and especially not employers who violate the rights of employees."

Taking into consideration the guidance offered by all of the above opinions, this forum affirms its previous ruling that it will not deduct unemployment compensation from its awards of back pay. (This conclusion is not meant to be construed, however, as a ruling on the separate question of whether, in the calculation of monetary awards other than back pay awards, collateral benefits such as unemployment compensation will be deducted from any collateral losses for which damages are awarded.)

3. Interest

Interest upon Complainant's award will be computed as follows:

a. Six percent annually upon the monthly accrual of the differential between compensation Complainant received and compensation Complainant would have received had she continued her employment as a cashier-bookkeeper at Respondent's Pendleton store, according to the Findings of Fact above, during the period from September 13, 1978, to March 29, 1979.

b. Six per cent annually upon the above accrued differential from March 29, 1979, to July 25, 1979.

c. Nine percent annually upon the above accrued differential from July 26, 1979, to the date Respondent complies with paragraph number one of the Order below.

AMENDED 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, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Vickie Miller in the amount of FOUR THOUSAND ELEVEN DOLLARS AND THIRTY ONE CENTS ($4011.31). This amount represents $2,845.00 in damages for wages Complainant lost because of Respondent's unlawful employment practices set out above, interest thereon in the amount of $1,166.31 computed and compounded annually, starting September 13, 1978, at the annual rate of 6 percent interest through July 25, 1979, and then at the rate of 9 percent interest computed through and including December 15, 1982. Interest will continue to accrue until the date upon which Respondent complies with this paragraph.

2) Cease and desist from discriminating against any employee because of pregnancy.

In the Matter of
NORTHWEST TANK REPAIR,
an Oregon corporation, Respondent.

Case Number 19-81
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 20, 1982.

SYNOPSIS

Respondent refused to reinstate Complainant, a compensably injured worker with a medical release to return to work. Complainant had missed seven of 22 work days before his injury, and Respondent had determined to discharge him for absenteeism several days before he sustained his injury. Finding that the president's threat to fire anyone who was injured on the job was not a factor in Complainant's termination, the Commissioner held that Respondent did not commit an unlawful employment practice, and dismissed the Specific Charges. ORS 659.010(13); 659.415(1) and (2).

The above-entitled contested case came on regularly for hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and

Industries of the State of Oregon. The hearing was held on June 9, 1982, in the George Miller Room A-1 of the Linn County Armory, Fourth and Lyons Streets, Albany, Oregon. The Bureau of Labor and Industries was represented by Robert D. Bulkley, Jr., Assistant Attorney General. Respondent Northwest Tank Repair Co., Inc. was represented by John W. Stewart, Attorney at Law. The Agency called as witnesses Complainant Ronald D. Smith; Linda Whiley, Complainant's sister; Dee Smith, Complainant's mother; William I. Phillips, former employee of Respondent; Sam Hokland, former employee of Respondent; Alan McCullough, Investigator, Civil Rights Division, Bureau of Labor and Industries; and Jeremiah Rosas, former employee of Respondent. Respondent called as witnesses Rick Alexander, Manager and President of Respondent; and Jerry Kunze, foreman for Respondent.

Having fully considered the entire record in this matter, I, Mary Roberts, hereby make the following Rulings Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS UPON MOTIONS

At the beginning of the hearing, the Agency moved to amend the Specific Charges to delete the claim for general damages. There was no objection to this amendment and it was allowed.

At the conclusion of all testimony taken at the hearing, the Agency moved to further amend the Specific Charges to change the date contained in Paragraph II, page 2 from November 3, 1979, to October 29, 1979. The agency made this motion on the grounds that such an amendment would conform the Specific Charges to the evidence presented at the hearing. Respondent objected to the amendment on the grounds that the evidence as to this date was conflicting. The motion was denied.

FINDINGS OF FACT – PROCEDURAL

1) On April 28, 1980, Ronald D. Smith filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been discriminated against in connection with his employment in that Respondent did not reinstate Complainant to his former job or to available and suitable work after Complainant recovered from an on-the-job injury and demanded such reinstatement.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein Respondent was a corporation doing business in Oregon and employing six or more persons in its business.

2) Complainant began working for Respondent as a welder on Saturday, September 22, 1979.

3) Respondent hired Complainant to work at a job site known as the Fort Hill Lumber Company in Grande Ronde, Oregon. This job site was located 146 miles, round trip, from Lebanon, Oregon, where Respondent's office and shop were located and where Complainant lived. Complainant was hired only for the duration of the Fort Hill project.

4) Respondent's employees who were hired to work at the Fort Hill job site, including Complainant, were required to meet at 5:00 a.m. every work day morning at Respondent's shop to be transported to the job site.

5) Complainant lived, at most, approximately eight blocks from Respondent's shop.

6) Employees assigned to the Fort Hill job site averaged 10 hours of work a day, and often worked six days a week, from Monday through Saturday. These employees also work occasionally on Sunday.

7) On Friday, September 28, less than one week after beginning his job, Complainant missed work due to illness. Complainant's mother, with whom he lived, went to the pickup point at Respondent's shop and informed Jerry Kunze, Respondent's foreman, that Complainant would not be reporting for work.

8) Respondent's Fort Hill job crew did not work on Saturday, September 29.

9) Complainant worked Monday through Thursday, October 1st to the 4th. Complainant again missed work due to illness on Friday, October 5th; Saturday, October 6th, and Sunday, October 7th; one week after his first illness. Respondent's Fort Hill job crew worked all three of those days. Complainant consulted a physician concerning this illness and received a written note from the physician. Complainant's sister, Linda Whiley, delivered this note to someone at Respondent's shop.

10) Complainant reported back to work on Monday, October 8th, and also on Tuesday, October 9th. On Wednesday, October 10th., Complainant's car broke down on the way to work and he missed the crew car. On Thursday, October 11th, Complainant waited at a gas station near his home where he had told Mr. Kunze to have the crew car pick him up. The crew car never showed up. The Fort Hill crew always met at the shop, however, and did not have time to pick up people elsewhere and to have done so would have been an unusual arrangement.

11) On Friday, October 12th, Complainant took a day off to work on his car, because one of the supervisors at the Fort Hill job had told the crew members that they were free to take a day off.

12) Complainant did not telephone anyone about his absences on October 10, 11, and 12, because he was unable to locate the telephone number of anyone to call, including Respondent's main office number. The October 1979 telephone directory for the City of Lebanon, published by Northwestern Telephone Systems, Inc., lists a telephone number for Respondent Northwest Tank Repair. Respondent's office is open and staffed from 9:00 a.m. to 5:00 p.m. each weekday. Other employees would call the office after it opened whenever they were late or absent.

13) The superintendent at the Fort Hill Lumber Company telephoned Mr.

Alexander to complain about Complainant's absenteeism after Complainant's first absence. Mr. Alexander talked to Complainant after his first absence and told him "not to make a habit of it." Mr. Kunze also talked to Complainant after his second absence. Complainant's absences on the job were noticeable because other employees had to "pick up the slack."

14) Respondent had a fixed cost for renting equipment used at the Fort Hill job site and because of that it was necessary as a financial matter that all employees be working at all scheduled times.

15) On either Saturday, October 13th, or Sunday, October 14th, Mr. Alexander met with Mr. Kunze and talked about Complainant's absenteeism. At that time, Mr. Alexander instructed Mr. Kunze to fire Complainant because of the absenteeism.

16) After Mr. Kunze had this conversation with Mr. Alexander, Mr. Alexander telephoned him and told him that he (Kunze), would have to travel to a job site in Washington the next day. Mr. Kunze left for Washington on Monday, October 15, and was thus not at the Fort Hill job site for several days. Mr. Kunze was at the shop on the morning of the 15th, but did not see Complainant to fire him. Mr. Kunze did not inform Mr. Alexander that he did not fire Complainant before leaving for Washington.

17) One other employee working at the Fort Hill job site had already been fired for absenteeism. This person had a more important job than did Complainant.

18) Complainant worked on Saturday, October 13th, and on Monday, Tuesday, and Wednesday, October 15th, 16th, and 17th.

19) On Wednesday, October 17th, Complainant sustained a compensable injury at the Fort Hill job site and received medical care for that injury on October 18th.

20) Of the 22 work days between September 22nd, when Complainant began work, and October 17th, when he was injured, Complainant missed seven days of work, including every Friday and weekend work day during that period.

21) Shortly after Complainant was injured on the job, Mr. Alexander called a safety meeting of the workers at the Fort Hill job site and told the workers: "Anyone that gets hurt, that's their job." Mr. Alexander told employees at this meeting that Complainant was accident prone and had gotten hurt. Mr. Alexander said that anyone who got hurt would get "canned" and that he had fired Complainant.

22) There had been at least five accidents at the Fort Hill job site and Mr. Alexander was concerned because welding and construction work typically has a high rate of injury and high workers' compensation insurance premiums as a result. On previous occasions Mr. Alexander had called safety meetings and had told the employees that they would be fired if they had an accident on the job. He also told them that he knew the law prohibited firing because of a compensable injury, but he would fire them anyway. Mr. Alexander continually emphasized safety at all employee meetings.

23) After his initial visit on October 18th, Complainant saw his physician for treatment of his injury on Monday, October 22nd, Thursday, October 25th and on Monday, October 29th. The physician's notes of these visits are not entirely legible, but by calculating the dates of the month from the days of the week indicated, it is clear that Complainant's last visit was on Monday, the 29th of October, and that he was released to return to work "tomorrow" indicating Tuesday, October 30th.

24) Complainant did not report to work for several days after the doctor's release. Mr. Alexander asked Complainant why he waited before reporting for work, but Complainant had no response. Complainant also told Alan McCullough, an investigator for the Bureau of Labor and Industries, that he reported for work on November 3rd, although this day falls on a Saturday, when Respondent's office is normally closed. Complainant received Workers' Compensation payments only from October 22nd to October 29th.

25) Complainant was not reinstated in his position of employment with Respondent, although he requested reinstatement sometime after October 30th, and his position was still available.

26) Respondent did not fire other employees who sustained injuries on the job. Mr. Phillips injured his finger on the job and was not fired, even though he was a new, short-term employee, having only worked for Respondent from July to November of 1979. Other than the allegation about Complainant, Mr. Phillips did not know of anyone who was fired by Respondent because of an injury. One employee was injured on the job and Mr. Phillips took him to the hospital. He was not fired.

27) Sam Hokland, another one of Respondent's employees working at the Fort Hill job, broke his toes on the job in November of 1980, and filed for and received Workers' Compensation benefits. He was not reinstated to his position upon doctor's release in December of 1980, but he testified that he was satisfied that the reason for his non-reinstatement was the fact that the Fort Hill job, for which he had been hired, was completed by the time he was ready to return to work. Mr. Hokland was satisfied on this point despite the fact that at safety meetings Mr. Alexander had told him and other workers that they would lose their jobs if they were injured.

28) Claim forms filed with the State Accident Insurance Fund (SAIF) for employees of Respondent who suffered compensable injuries on the job show the dates on which these injured workers returned to their jobs. Respondent did not fire these workers or deny them reinstatement.

29) The Fort Hill job, for which Complainant was hired, ended in December of 1980.

30) At the time Complainant was denied reinstatement, he was earning $7.50 per hour and averaged 9 to 10 hours of work per day. If Complainant had remained employed with Respondent, his hourly wage would have increased to $8.20 an hour on December 20, the end of his 90-day probationary period. From November 3, 1979, until December 31, 1979, Complainant was not employed by anyone, but did earn some outside

income of approximately $900 to $1100 doing odd jobs. He was paid for these jobs in cash and has no record of his actual earnings during this time. He did not keep track of this income or declare it on his income tax. For tax year 1980, Complainant reported a total gross income of $1956. These were wages he earned working for two different employers. However, Complainant admitted under questioning that one of the employers, for whom he worked in the latter three months of 1980, paid him in cash for a while and he does not know the exact amount of these wages, nor did he report them on his 1980 income tax return. He also had additional income from odd jobs, which he stated was "maybe $700.00." This income was not reported.

ULTIMATE FINDINGS OF FACT

1) Complainant was hired by Respondent as a welder to work on the Fort Hill Lumber Company project and began work on Saturday, September 22, 1979.

2) Respondent's Fort Hill job crew worked six and sometimes seven days a week during the latter part of September and in October 1979. This work schedule was necessary in order for Respondent to utilize fully the equipment which had been rented for the project and in order for Respondent to complete the Fort Hill job on schedule.

3) Complainant missed work on Friday, September 28, due to illness. Other employees on Respondent's Fort Hill crew worked that day, but did not work on Saturday, the 29th, or Sunday, the 30th. Complainant worked on Monday, Tuesday, Wednesday and Thursday, October 1st through 4th. Complainant missed work again on Friday, October 5th, Saturday, October 6th, and Sunday, October 7th, due to illness. Other members of the crew worked on these days. Complainant worked on Monday and Tuesday, October 8th and 9th, but missed work again on Wednesday, October 10th, due to car trouble. He also missed work on Thursday, October 11th, because of confusion about where he was supposed to meet his ride connection. On Friday, October 12th, he again missed work because he took a day off. Other members of the crew worked on these three days. Complainant returned to work with the rest of the crew on Saturday, the 13th. No one worked on Sunday, October 14th. Complainant worked on Monday, Tuesday and Wednesday, October 15 through 17.

4) Complainant had been advised by both Mr. Alexander and Mr. Kunze that absenteeism was not acceptable on the Fort Hill job.

5) On the two occasions when Complainant had missed work due to illness, either his mother or his sister went to Respondent's shop, where the Fort Hill crew met to drive to the job site, to inform other crew members that Complainant could not come to work. On the days when Complainant missed work for other reasons, however, he failed to make any adequate effort to inform Respondent of his absence. He also elected to take a day off even though he had already missed a significant amount of work for other reasons.

6) Mr. Alexander received a complaint from the supervisor at the Fort Hill Lumber Company about Complainant's absenteeism. Other employees

were required to fill in for Complainant when he was absent.

7) On either Saturday, October 13th, or Sunday, October 14th, Mr. Alexander and Mr. Kunze met to discuss various aspects of Respondent's business and during this meeting Mr. Alexander instructed Mr. Kunze to fire Complainant because of his excess absenteeism. Mr. Kunze agreed to do so. After this conversation, Mr. Alexander telephone Mr. Kunze and told him that he should go to Washington state on a job first thing Monday morning, the 15th of October. Mr. Kunze left for Washington on the 15th and did not go out to the Fort Hill job site and did not fire Complainant. He did not inform Mr. Alexander of this and thus Mr. Alexander took no steps to terminate Complainant himself. At least one other employee at the Fort Hill job site had previously been terminated for absenteeism.

9) Complainant sustained a compensable injury on Wednesday, October 17th, and the first day on which he was certified by his physician to return to work was October 30th.

10) Complainant presented his back-to-work release to Respondent several days after the date on which his physician had said he was able to return to work, and asked to be reinstated. Respondent did not reinstate Complainant even though his job was still available.

11) Respondent denied reinstatement to Complainant for the separate, non-discriminatory reason that Complainant had missed seven out of 22 days during his employment with Respondent before his injury, and because Complainant waited before reporting back to work after his injury.

12) Even though Mr. Alexander had previously told employees at various safety meetings held before and after Complainant's injury that they would lose their jobs if they were injured, Respondent did not in fact fire any injured worker, or refuse to reinstate any worker, after that worker had sustained a compensable injury. Respondent's workers had sustained a number of injuries on the job and Mr. Alexander felt it was necessary to "scare" the employees into being more safety conscious, even to the extent of telling them that he knew it was illegal to fire a worker because of a compensable injury but he would do it anyway. Shortly after Complainant was denied reinstatement Mr. Alexander held a safety meeting at the Fort Hill project and told the workers that there was "one man no longer with us who go hurt." Mr. Alexander did not use a name, but the other workers understood he was referring to Complainant.

CONCLUSIONS OF LAW

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

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and the subject matter relating to the alleged violation of ORS 659.415 herein.

3) Respondent did not deny Complainant reinstatement to his job because Complainant had sustained a compensable injury but for the separate, non-discriminatory reasons of

Complainant's excessive absenteeism and his failure to report to work promptly after his doctor's release. Respondent did not violate the provisions of ORS 659.415.

OPINION

ORS 659.415, as written and in effect at the time involved in this matter, provided in relevant part that,

> "A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment or employment which is available and suitable upon demand for such reinstatement, provided that the worker is not disabled from performing the duties of such position." ORS 659.415(1).

Subsection 2 of ORS 659.415 provides that violation of this provision is an unlawful employment practice. ORS 659.415 was amended during the 1979 Session of the Oregon Legislature to add subsection 2, which as written specifically provides that refusal to reinstate a worker after a compensable injury is an unlawful employment practice and appears by its terms to impose strict liability. At the same time, the Legislature amended ORS 659.010(13), which defines what constitutes an unlawful employment practice over which the Commissioner has jurisdiction, to add a reference to 659.415. (Or Laws 1979, Ch 813) These amendments took effect on October 3, 1979, and thus were in effect at the time of Respondent's failure to reinstate Complainant in this matter.

The Agency presented a prima facie case of violation of ORS 659.415. The Complainant sustained a compensable injury on the job while working for Respondent, and when he presented the back-to-work release from his physician, Respondent denied him reinstatement. Respondent does not dispute these facts as stated and admitted them in its answer. Respondent alleged by way of affirmative defense in its answer, however, that although Complainant was denied reinstatement after being released by his physician, the denial was not for the impermissible reason that Complainant had availed himself of rights under the Workers' Compensation law, but rather for the reason that Complainant had an excessive absenteeism record. The Respondent also pled the affirmative defense that Complainant had poor welding skills and had misrepresented the level of his skills, but at the hearing Respondent elected not to pursue this defense.

Although the language of ORS 659.415 appears to impose an absolute duty on an employer to reinstate an injured worker, the Oregon Supreme Court has held that nothing in this statute "prevents an employer from discharging a worker for just cause." *Vaughn v. Pacific Northwest Bell Telephone,* 289 Or 73, 80, 611 P2d 281 (1980). The court noted that for purposes of ORS 659.415, "discharge" and "non-reinstatement" are synonymous.

In the *Vaughn* case the plaintiff filed a complaint in circuit court under ORS 659.121 alleging that the defendant had discharged her during the period after she had sustained a compensable injury and before she presented a return to work certificate from her physician and requested reinstatement. In her complaint plaintiff sought compensation for lost wages, reinstatement to her job, and an injunction restraining defendant from engaging in unlawful employment practices. The defendant interposed as affirmative defenses that plaintiff was terminated for the just cause of failing to accept preferred work suitable to her restricted physical condition and misrepresenting her physical condition and extent of disability. As to an employer's right to assert these defenses, the court held the "if the worker is discharged for just cause, an employer can prove this in the grievance proceeding or as a matter of defense in a suit pursuant to ORS 659.121." *Id* at 80.

In assessing what effect the employer's evidence of just cause for discharge/non-reinstatement has on the court's (here the Commissioner's) remedial authority, the court cited the case of *Yartzoff v. Democratics-Herald Publishing Co.*, 281 Or 651, 655, 576 P2d 356 (1978), for the "recognized rule that in the absence of a contract or statute to the contrary, an employer may discharge an employee for any cause." *Id* at 90. ORS 659.415 is a statute which puts limits on some of the rights of any employer to terminate an employee in that it prohibits termination of an employee who has sustained a compensable injury. However, it does not prevent termination for any other nondiscriminatory reason, even though, at the time of the termination, the employee may coincidentally be off work due to a compensable injury or may have just requested reinstatement.

The Court of Appeal's separate decision in the *Vaughn* case, which is upheld by the Supreme Court, states that when an employer defends an action brought under ORS 659.415 on the grounds that the employee was terminated for just cause, "the defendant's assertion is a matter of defense." *Vaughn v. Pacific Northwest Bell Telephone,* 40 Or App 427, 435, 595 P2d 829 (1979).

The agency initially does not have to prove that the employee was terminated or denied reinstatement <u>because</u> the employee sustained a compensable injury but merely has to prove that the employee sustained the injury and thereafter was denied reinstatement to an available position. Once the Agency has presented a prima facie case of violation of ORS 659.415, an employer has the burden of proving by a preponderance of the evidence that the termination or denial of the right to reinstatement was for a separate, nondiscriminatory reason. Applying this standard to the facts in this matter, Respondent has proved that Complainant was denied reinstatement for absenteeism and for not reporting back to work promptly after being released by his doctor. Complainant was not denied reinstatement as a result of his compensable injury.

There was no dispute as to how many work days there were for Respondent's Fort Hill job crew between September 22nd, when Complainant began work, and October 17th, when he sustained his injury; nor was there any dispute as to how many of those days Complainant missed. The record shows that Complainant missed seven out of 22 working days, or almost one-

third of the time. The fact that Complainant was ill for four of those days is irrelevant to the question of whether Respondent refused to reinstate Complainant because Complainant had filed a compensable injury claim. There is no reason to disbelieve Respondent's assertion that Complainant was refused reinstatement because of excess absenteeism merely because some of Complainant's absences were due to illness. Moreover, even if it was not reasonable for Respondent to refuse Complainant's reinstatement because his absences were caused by illness, the fact that Complainant missed three out of 22 work days for non-illness related reasons would be reasonable grounds for Respondent not to reinstate Complainant. Mr. Alexander testified that it was critical to Respondent's business that a full crew work every day at the Fort Hill job site. Respondent was paying for equipment that was not utilized if people were absent, regardless of the reason. When Complainant was not there the other employees would have to work harder to "pick up the slack" caused by Complainant's absenteeism. Complainant also failed to contact Respondent's office to explain his absences on those days when he was not ill. His testimony that he was unable to locate the telephone number of Respondent's office to inform someone of his absence was not credible. Whether Complainant had a good reason for missing work on those three days when he was not ill, again, is irrelevant, because it is not an unlawful employment practice for an employer to fire or to refuse to reinstate an employee for even the most justifiable absenteeism. However, none of Complainant's reasons for missing work on those three days when he was not ill were justifiable. Complainant could have walked the rest of the way to Respondent's shop the morning his car broke down as he only lived a short distance away. It was inappropriate for him to tell Mr. Kunze or anyone else to have the crew car pick him up at a location different than the one where all Fort Hill crew members were required to meet. And it was not justifiable for him to take a day off to repair his automobile merely because someone at the Fort Hill Lumber Company said he could, given that he had already missed a substantial number of work days and given that he did not need his automobile to get to work since, at most, Respondent's shop was only eight blocks from Complainant's home – an easy walking distance. Complainant's actions were not responsible for someone who was a new employee and for whom, as Complainant testified, work had been hard to find.

Mr. Alexander had gotten a complaint from the superintendent at the Fort Hill Lumber Company about Complainant's absenteeism and Mr. Kunze had mentioned it to him on a prior occasion. It is reasonable and credible that Mr. Alexander at their meeting on October 13th or October 14th instructed Mr. Kunze to terminate Complainant. This decision followed almost immediately the three days of October 10th, 11th, and 12th when Complainant was absent for non-illness related reasons and had not telephoned anyone about his absences. Mr. Kunze's testimony that he was unable to fire Complainant immediately because he got called to a job in Washington the next morning, October 15th, was credible and was substantiated by the time records of Mr. Kunze. These time records show that Mr. Kunze was still in Washington on the 16th and 17th of October and therefore, had no opportunity to terminate Complainant before his injury.

The fact that Complainant did not report back to work promptly after the doctor's release is further evidence that Complainant was not a reliable worker and had a rather lax attitude about job attendance. An employer cannot be expected to indefinitely keep a job available pending the return of an injured worker at the worker's convenience.

Perhaps the most damaging evidence against Respondent was the testimony of several witnesses that Mr. Alexander had made statements, both previously and after Complainant's injury, to the effect that any worker who sustained an on-the-job injury would be fired. Mr. Alexander's statement shortly after Complainant's injury to the effect that "one man who was hurt is no longer with us" was interpreted by the workers to mean Complainant and Mr. Alexander intended that statement to be so interpreted. But Mr. Alexander was candid in admitting that he made those statements, and his stated reason, to "scare" workers into being more safety conscious because there had been a rash of accidents, was not unbelievable. And although his statements to the employees were certainly imprudent, and absent other evidence could support a finding of a violation of ORS 659.415, other independent and credible evidence clearly showed that Respondent had not in fact fired complainant or any other worker for filing a Workers' Compensation claim.

In summary, I find that Respondent has proven its affirmative defense that Complainant was denied reinstatement to his job because of excess absenteeism and not because he had sustained a compensable injury.

ORDER

NOW, THEREFORE, Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and the Complaint filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of

BURLINGTON NORTHERN RAILROAD COMPANY, Respondent.

Case Number 20-81

Final Order of the Commissioner

Mary Wendy Roberts

Issued March 4, 1983.

SYNOPSIS

Complainant's condition of narcolepsy, a sleep disorder, is a physical handicap within the meaning of ORS 659.400 to 659.425. Finding that the job of switchman/brakeman for which Complainant applied was inherently hazardous, the Commissioner ruled that Respondent employer did not commit an unlawful employment

practice in refusing to hire Complainant because, even with accommodation, Complainant could perform that job only at a materially enhanced risk of incapacitation. The Commissioner dismissed the Specific Charges. ORS 659.400(2); 659.425(1)(a).

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on June 22, 1982, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Robert D. Bulkley, Jr., Assistant Attorney General. Respondent Burlington Northern Railroad Company was represented by Paul G. Hurd, Attorney at Law.

The Agency called as witnesses Complainant Jearlean Gaither and John Hammerstad, M.D., as an expert medical witness. Respondent called Daniel Meyers, Trainmaster at its Portland-Vancouver terminal, and presented the deposition testimony of R. Glenn Snodgrass, M.D., its expert medical witness.

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

FINDINGS OF FACT – PROCEDURAL

1) On April 8, 1980, Jearlean Gaither filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continued to be discriminated against in connection with her prospective employment by Respondent because of her physical handicap.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

4) Before the commencement of the hearing, Respondent received from this forum a document entitled "Information Relating To A Civil Rights Contested Case Hearing (B)" and stated, through its counsel, that it had no questions concerning this document. Before the commencement of the hearing, Complainant received from this forum a document entitled ."Information Relating To A Civil Rights Contested Case Hearing (A)" and stated that she had no questions concerning this document. Both documents are a part of the record.

5) At hearing, the Agency asked the forum to amend the Specific Charges in the following respects:

a) On page 2 and page 3, delete "January" and insert in its place "February."

b) Delete the plea for general damages for mental suffering.

Respondent did not object to these amendments, and the forum made them.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a Delaware corporation operating as a railroad in the State of Oregon. In that business, Respondent employed six or more employees in the State of Oregon.

2) At all times material herein, the essence of Respondent's business was the safe transportation of freight and passengers from one point to another.

3) Complainant has had a disease call narcolepsy since about September 1963. Narcolepsy is an abnormal or inappropriate intrusion into wakefulness of the physiological mechanisms involved in normal sleep.

In September 1963, Complainant's narcoleptic symptoms consisted of an abnormal tendency to get drowsy and involuntarily fall asleep within two or three minutes. She would sleep for just a few minutes, then awaken feeling refreshed. She sometimes had a headache for a few minutes after awakening. These episodes occurred about twice each day.

The nature, severity, and frequency of Complainant's narcoleptic symptoms remained for the most part the same until Complainant obtained treatment. She never suffered cataplexy, sleep paralysis, or sleep hallucinations.

4) Between 1965 and 1969, after Complainant had moved to Oregon and had begun seeing new physicians, her condition was diagnosed for the first time as narcolepsy. Complainant's physician explained to her what narcolepsy was and sometime between 1969 and 1971 began treating Complainant with one 15 milligram capsule of Dexedrine, a stimulant, each day.

5) After Complainant began dexedrine treatment, she did not experience narcoleptic symptoms for a few years, because the treatment controlled her narcolepsy very well.

6) After a few years, however, the 15 milligram per day dose of dexedrine no longer sufficiently controlled Complainant's narcolepsy. About twice each day, Complainant would become drowsy, but she would not actually fall asleep. Complainant continued taking the same dosage of dexedrine each day.

7) On March 17, 1978, Complainant first saw Eberhard Gloekler, M.D., for a neurological consultation. Dr. Gloekler was an internist practicing at the Kaiser-Permanente Medical Care Program, who had some interest in narcolepsy and some training in neurology. Complainant's narcoleptic symptoms at the time were the same as those described in Finding of Fact 6 above. Sometime in 1978, Dr. Gloekler had Complainant double her dexedrine dosage to two 15 milligram capsules each day.

8) From the time Complainant began taking the increased dosage of dexedrine until the hearing of this matter, Complainant's narcolepsy has been completely controlled by her medication, and she has experienced no symptoms of the disease. She has remained on the same dosage of dexedrine, which she will continue to take for an indefinite period of time.

9) Complainant has never lost a job, had an accident, or injured herself because of her narcolepsy.

10) Complainant has been given no specific times to take her two daily doses of medication, and her schedule for doing so is flexible. For this reason, she is able to vary the times of day at which she takes it according to the shift she is working at the time. The important thing is that she take her medication twice sometime during her waking hours. She usually takes the first dose when she awakens from sleeping and the second about halfway through her waking hours. Complainant has never taken both daily doses at once or forgotten to take a dose of her medication.

11) The dexedrine dosage which Complainant takes becomes effective fifteen to thirty minutes after she takes it. Because she takes a long-lasting formulation, Complainant cannot go to sleep, even if she wants to, for a few, and perhaps as many as four to six, hours after taking a dose.

12) As of September 1978, Complainant had suffered no discernible side effects from her medication. When it was checked April 19, 1982, Complainant's blood pressure had risen to a mildly high level, possibly an indication that she was beginning to suffer from hypertension, a potential side effect of dexedrine usage.

13) In September 1979, Complainant filed an application for employment with Respondent. In early 1980, Respondent interviewed Complainant for the position of switchman/brakeman.* During or after the interview, Respondent made arrangements for Complainant to undergo a physical examination and told Complainant that, upon passing that examination, she would start working as a switchman/brakeman the following Monday.

14) On or about February 6, 1980, Dr. D. E. Dine of the Portland Clinic conducted a physical examination of Complainant for Respondent. When Complainant told Dr. Dine that she had narcolepsy, he asked her about the history and treatment of her disease. After Complainant responded, Dr. Dine told her that as long as her illness was under control, he did not foresee any problem with her working for Respondent.

15) Dr. Dine sent a form report of Complainant's examination to Respondent. In that report, he remarked that "Complainant is physically intact. Does have history of sleep attacks (Narcolepsy) controlled on 15 mg Dexedrine BID." He also recommended that Complainant be "medically approved," but deferred to Respondent's Chief Medical Officer the decision as to whether Complainant was or was not "medically satisfactory" for employment.

16) On or before February 22, 1980, Respondent's Chief Medical Officer, who had received Dr. Dine's report, decided not to approve Complainant for employment. There is no evidence that he had made any attempt to determine the specific character of Complainant's narcolepsy or to question Dr. Dine's statement that it was controlled by her medication.

Thereafter, Respondent telephoned Complainant and told her that because of her narcolepsy, Respondent could not accept her for employment as a switchman/brakeman.

17) The Agency called John Hammerstad as an expert medical witness. Dr. Hammerstad is a physician specializing in neurology who currently serves on the faculty of the Department of Neurology of the Oregon Health Sciences University (hereinafter OHSU). Dr. Hammerstad obtained his M.D. at the University of Chicago, interned at Stanford University, and took his neurology training at a Harvard University program at the Children's Hospital in Boston, Massachusetts. After two years of service in the US Air Force as a neurologist, Dr. Hammerstad completed a postdoctoral fellowship at the University of Chicago. He then joined the OHSU faculty, where he has remained almost ten years. He is certified by the American Board of Psychiatry and Neurology. Dr. Hammerstad both teaches and treats at OHSU. The treatment of narcolepsy is within Dr. Hammerstad's specialty, and he treats narcoleptic patients. At present, five to ten narcoleptics are actively under his care. Dr. Hammerstad is an expert on Narcolepsy.

18) On the basis of his expertise, Dr. Hammerstad believes that the following general statements about narcolepsy are accurate.

a) Narcolepsy seems to involve a lack of suppression of a stage of sleep called REM (rapid eye movement) sleep, resulting in an intrusion of REM sleep into normal wakefulness. The two major potential symptoms of narcolepsy are the sleep attack and the cataplectic attack. During a sleep attack, a narcoleptic becomes drowsy and may eventually go to sleep involuntarily. In a cataplectic attack, a narcoleptic remains awake, but loses muscle tone or control.

b) Narcolepsy varies widely in the nature, severity, and frequency of its symptoms. The mildest cases of narcolepsy may involve drowsiness which the patient can overcome without sleeping, or minor weakness of the jaw or facial muscles. Persons with such a case may not even consult a physician concerning the narcolepsy. The most severe cases may involve frequent and severe sleep and cataplectic attacks in which the patient involuntarily falls to sleep for several hours or completely loses muscle control and falls down for a brief period of time. Most narcoleptics experience symptoms which fall between these extremes.

c) When a narcoleptic is not having an attack, his or her narcolepsy has no physical symptoms and therefore cannot be detected. For this reason, unless one examines a narcoleptic patient during an attack, one must rely upon the patient's particular medical history to determine the existence and nature of his or her narcolepsy.

d) Narcoleptics are more likely to suffer attacks in certain circumstances. Conditions which have a tendency to make anyone drowsy or sleepy (for example, boring or tedious situations) make a sleep attack more likely for a narcoleptic. Strong emotion of any kind is the most common precipitant of a cataplectic attack.

* Respondent's switchmen must be able to, and often do, work as brakemen. Accordingly, the position for which Complainant was interviewed, which apparently was first of all a switchman position, is referred to in this Order as a switchman/brakeman position.

e) There is a tendency for a narcoleptic to develop a given pattern in the type, frequency, and severity of his or her symptoms and for that pattern to persist in that person. For instance, generally the development of cataplexy occurs within the first few years of a narcoleptic's illness, if ever. However, a particular person's narcolepsy can get either better or worse with the passage of time. After a number of years, one can get a "pretty good idea" of how a particular narcoleptic is going to do, based upon the pattern which has already evolved in his or her case.

f) Narcoleptics usually have some warning that a sleep or cataplectic attack is about to occur, such as drowsiness or muscle weakness.

g) Narcolepsy is not curable but is controllable to varying degrees through the use of medication such as dexedrine. Dexedrine is a potentially dangerous drug, the long-term use of which can cause hypertension or the gradual development of a tolerance to itself. A general "rule of thumb" currently is that blood pressure above 150/100 indicates hypertension. Hypertension or drug tolerance from the use of dexedrine is treated by gradually reducing the dose of the medication, taking the patient off of it for a week or two (a "drug holiday"), or replacing the dexedrine with a different medication. Drug tolerance can also be treated by increasing the dosage.

h) As a general rule, neurologists advise that narcoleptic patients should not work in jobs involving the operation of heavy machinery.

19) Dr. Hammerstad examined Complainant once, in December 1980, for about one hour. Before he testified at the hearing, Dr. Hammerstad read Dr. Snodgrass' report and deposition and heard Complainant's testimony. On the basis of the information he obtained from all the latter sources, Dr. Hammerstad arrived at the following conclusions concerning Complainant's narcolepsy:

a) Complainant has a relatively mild form of narcolepsy, which she has controlled very well by medication.

b) The treatment of Complainant's narcolepsy has been and is appropriate for her disease as she describes it. Her response to the medication has been and is excellent.

c) Given Complainant's particularly mild form of narcolepsy and the fact that it is controlled so well, if Complainant takes her medication, there is a very low likelihood that she will have further narcoleptic attacks. That is, on a scale of likelihood ranging from 1 to 10, with 1 the least likely and 10 the most likely, Complainant has at most a 2 or 3 likelihood of further attacks. Complainant's narcolepsy is so well controlled by her medication that she probably would not become any sleepier while working as a switchman/brakeman for Respondent than the normal non-narcoleptic person.

d) Given Complainant's response to her medication, if she does suffer another narcoleptic attack, it will most likely be a mild sleep attack in which Complainant would experience drowsiness but not an irresistible urge to sleep. Any subsequent attacks might gradually increase in severity, i.e., Complainant might experience episodes of increasing drowsiness, especially in situations which would tend to make a non-narcoleptic person drowsy, and gradually might have more and more difficulty fighting off the urge to sleep.

e) It is quite possible that Complainant may never experience a cataplectic attack, since she has not had any cataplexy for the almost 20 years she has suffered from narcolepsy. However, it is always possible that she could have a cataplectic attack.

f) Given Complainant's prior narcoleptic history and the fact that she is taking dexedrine to control her narcolepsy, any first cataplectic attack she suffered would most likely be mild. Any subsequent cataplectic attacks might not go beyond this mild form, or might gradually increase in severity.

g) If Complainant began working for Respondent as a switchman/brakeman in her current asymptomatic condition, stopped working if she experienced any narcoleptic symptoms, and did not resume working until any such symptoms were under control, her work would not pose a substantially increased risk to herself or others.

h) Complainant is not suitable for work as a pilot on commercial aircraft because that work involves very long periods of sitting with a lack of visual stimulation (which could tend to induce drowsiness) and because of the potentially catastrophic results of involuntary pilot sleep or muscle weakness. As a general rule, Dr. Hammerstad himself would prefer not to ride on a passenger aircraft or passenger train being operated by a person with narcolepsy.

i) Complainant can work in a job involving the operation of heavy machinery.

j) Because of the effectiveness of Complainant's medication and the fact that it can be taken when she needs it most (even if that time varies), interruptions in Complainant's pattern of sleep caused by irregular work hours would not pose any particular problem for Complainant.

k) Complainant's dosage of 30 milligrams of dexedrine each day is a low to moderate dose. A high dose is 80-150 milligrams per day. If Complainant developed a tolerance to dexedrine, it would evolve gradually.

20) Respondent presented R. Glenn Snodgrass as an expert medical witness. Dr. Snodgrass testified by deposition taken on June 7, 1982. Dr. Snodgrass is a physician specializing in neurology who is currently in private practice in Portland, Oregon. He obtained his M.D. at the University of Kansas and interned afterward at a US Navy hospital in Virginia. After two years of active duty with the US Navy as a Medical Officer, Dr. Snodgrass took his neurology training at the University of Kansas Medical Center and Medical School. He then practiced for one year, after which he served as Chief of Neurology at a Veterans Administration hospital in Kansas City for one year. During that year, he was also an instructor with the Department of Neurology at the University of Kansas. Dr. Snodgrass then began the private practice in neurology, which he has continued for 19 years. He has also served on the volunteer faculty of OHSU, and for the last two years he has taught at Emanual Hospital in Portland. The treatment of narcolepsy is within Dr. Snodgrass' specialty, and he

has treated many narcoleptic patients. He is an expert on narcolepsy.

21) Overall, Dr. Snodgrass' testimony agreed generally with that of Dr. Hammerstad, but it was far less factually specific than Dr. Hammerstad's The following statements by Dr. Snodgrass differed from or addended Dr. Hammerstad's testimony.

a) In addition to sleep and cataplectic attacks, sleep paralysis and sleep hallucinations are potential symptoms of narcolepsy. Sleep paralysis consists of experiencing an inability to move while falling asleep or awakening. A sleep hallucination consists of the patient feeling as if there are people or things with him or her during sleep or during an episode of sleep paralysis.

b) Although narcoleptics usually have some warning of an oncoming sleep or cataplectic attack, some narcoleptics seem to have no warning at all.

c) Narcoleptic sleep attacks consistently result in involuntary sleep. When they worsen, it is in their frequency, not the irresistibility of sleep.

d) Even though a narcoleptic may not be aware specifically that he or she has had a mild sleep or cataplectic attack, he or she will realize that during an interval of time, he or she has not been aware of what was occurring.

e) A patient with narcolepsy should not engage in occupations in which an attack of sleepiness or loss of muscle tone could cause a hazard to himself or herself or to others.

22) Dr. Snodgrass examined Complainant once, at Respondent's request, on April 15, 1982. Before he was deposed, Dr. Snodgrass read a report by Dr. Hammerstad concerning Complainant. During his examination of Complainant, Dr. Snodgrass took her medical history, administered a neurological physical examination, and had Complainant undergo an electroencephalogram (EEG). The EEG was totally normal with one minor exception: it show brief episodes of drowsiness (with no REM movement) which occurred more frequently than in the average person. The EEG results were in accordance with what Dr. Snodgrass would expect to find in a narcoleptic. Based on the information he obtained from the above-described sources, Dr. Snodgrass arrived at the following conclusions concerning Complainant's narcolepsy.

a) on a scale of severity of 1 to 10, with 1 being minimal and 10 severe, and given Complainant's dosage of medication, the severity of Complainant's narcolepsy is 4.

b) On a scale of response to medication of 1 to 10, with 1 being bad and 10 good, Complainant's response to her medication is 9 or 10.

c) If Complainant worked for Respondent as a switchman/brakeman, she might fall asleep while she was waiting for something to happen or while she was standing still watching something go by. There would also be a possibility of a cataplectic attack if there were excitement; for example, if an accident were about to happen, which might require Complainant's quick action. Complainant might have difficulty coping with a totally unpredictable or frequently varying schedule, because of problems in adjusting the times of day at which she takes her medication.

d) There is a "significant risk" that Complainant could suffer a sleep attack "at some time on the job in the next 20 to 30 years (the time period she might be working for Respondent) and that could cause harm either to herself or to someone else." "Significant" means that "sometime in the next 20 to 30 years there is a reasonable medical probability that Complainant would fall asleep during a normal waking time" (i.e., "there is more than 50% chance that this will happen to Complainant at sometime in the future").

e) Complainant should not be working in any operating position on a train, i.e., as brakeman, switchman, fireman, or engineer. Narcolepsy places her at a greater risk of injury than if she did not have narcolepsy.

23) Because of the factual specificity and breadth of his testimony, Dr. Hammerstad impressed the forum as being more completely knowledgeable about narcolepsy in general than did Dr. Snodgrass. In addition, Dr. Hammerstad evidenced a much better ability than did Dr. Snodgrass to adapt his testimony to Complainant's specific case and to base his conclusions concerning Complainant upon her particular case of narcolepsy rather than upon the generalities concerning the disease. Accordingly, this forum has given more weight to the testimony of Dr. Hammerstad than to that of Dr. Snodgrass concerning narcolepsy in general and the nature and prognosis of Complainant's narcolepsy.

At the same time, it was evident that Dr. Hammerstad did not have sufficient knowledge of the responsibilities of a switchman/brakeman to appraise the hazards of that position in general and as they relate to Complainant's narcolepsy. Dr. Snodgrass, on the other hand, received a description of the job from Respondent before examining Complainant and was personally familiar with train operations. Accordingly, this forum has given greater weight to the testimony of Dr. Snodgrass than to that of Dr. Hammerstad concerning the work in question.

Having weighed the testimony of the expert witnesses as described above, this forum finds that all of the statements contained in Finding of Fact 18 above; parts a, b, d, e. f, and k of Finding of Fact 19 above; parts a, b, and d of Finding of Fact 21 above; and parts b and c of Finding of Fact 2 above are accurate. In addition, this forum finds that if Complainant continues to take her medication for narcolepsy, as prescribed, there is a low likelihood (3 on a scale of likelihood with 1 the least likely and 10 the most likely) that Complainant will experience another narcoleptic attack.

24) Respondent offered into evidence an article entitled "Narcolepsy: The Not So Gentle Tyrant." This article was published in Issue Two of Volume Two of the *Journal of Applied Rehabilitation Counseling* during the Summer of 1980. It deals with many of the questions concerning the nature of narcolepsy which are at issue herein and about which the expert medical witnesses testified at length. Its conclusions about the place of narcolepsy in the workplace are based upon its answers to these questions.

Overall, this article characterizes narcolepsy and its effects in much

more dire terms than thus far have been applicable to Complainant. It declares categorically that narcolepsy is a severe handicap, while admitting, almost as an aside, that there is tremendous variation among narcoleptics in the frequency, duration, and severity of symptoms they experience. Because the Agency's expert medical witness was given no opportunity to respond to this article, which differs from much of his testimony on the same points, and because neither expert medical witness referred to the article in his testimony, the usefulness of the article herein is minimal. This forum has no way of knowing how to apply the article to focus on its inquiry herein: Complainant's specific case of narcolepsy. For this reason, although the exhibit has been admitted into the record, it has been accorded little weight.

25) Before applying to Respondent, Complainant had the following employment. She worked full-time for about two years supervising the teenage recreation room at the Multnomah Athletic Club; for about four years as a molding machine operator at GAF Corporation; for two years as a part-time model; and for two years as a bookkeeper for the United States National Bank. During two to three months of the latter employment, Complainant also worked part-time stacking lumber at night. She has also worked as a telephone operator for Montgomery Ward and Company during Christmas holidays.

Finally, during the five years immediately preceding her application to Respondent, Complainant worked in her home, raising her children, including twins who were born in 1975.

26) Complainant's full-time work as a molding machine operator from 1966 until approximately 1970 involved standing and operating a machine which made parts for projectors, viewmasters, tape recorders, etc. As the machine molded parts, Complainant had to open the machine's gate, take out a part, trim it, pack, and be ready for another part, all within 3 to 4 minutes. The gate remained open for just two to three seconds. Like the rest of the molding machine, it operated automatically. If Complainant did not get a part out of the machine before the gate closed, her hand would get smashed. If she did not get the part out of the machine before another part emerged, the first part would fall on the floor.

In this employment, Complainant rotated between the day and graveyard shifts each week.

While Complainant worked as a molding machine operator, she did not experience any sleep attacks on the job.

27) From October 20, 1980, through the time of hearing, Complainant has been employed as a machine operator by Wacker Siltronics Corporation in Portland. In that position, she operates a machine which mixes liquid and solid chemicals, processing silicon wafers. Complainant obtains and weighs the chemicals (which include sodium hydroxide and lye), carries them in open containers 30 to 40 feet to her machine, and operates the machine while it mixes these chemicals, a liquid soap and boiling water in eleven baths, involving four different combinations of ingredients. After the silicon wafers emerge from Complainant's machine, she packs them in boxes.

She lifts and stacks the filled boxes seven high on a square-on-wheels located five to six feet away from her machine. At the same time, Complainant keeps exact written records of everything she does.

Complainant works a twelve hour shift at Wacker. For the first eleven hours, she does what was described in the previous paragraph. This is very physically demanding work, because Complainant has to be very physically active and lift fifty to one hundred pound loads. During the last hour of her shift, Complainant completes her paperwork, summarizing the records she has kept during her shift.

Complainant wears protective gloves, glasses, and face mask when she operates her machine. Her machine is centrally located, with other people and machines working around her. If Complainant were to spill a chemical, especially the lye, on the floor, it would react with the water on the floor. If the water were hot, there most probably would be a chemical reaction, blowing off dangerous sparks. If a chemical were to splash on Complainant's skin, either through a spill or while being mixed, it at least would irritate her skin, and the lye would burn her severely.

During her employment at Wacker up to the time of hearing, other Wacker employees, but not Complainant, spilled chemicals on the floor or splashed them. Complainant did not cause and was not a victim of any of the "quite a few" accidents which occurred during that time.

Complainant alternates monthly between the 9 a.m. to 9 p.m. and the 9 p.m. to 9 a.m. shifts. She works a split shift on occasion, and she sometimes works overtime. She is on call during her time off. She has been called to work on 30 to 45 minutes' notice fairly frequently. Complainant has been called to work after she has completed a work shift and gone to bed.

Complainant has experienced no sleep or drowsiness attacks, no unusual drowsiness, and no other narcoleptic symptoms, while she has worked at Wacker. She has become no more tired than a normal non-narcoleptic person while working. The shift rotation has not adversely affected her ability to take her medication.

28) Respondent called Daniel Meyers to testify as to the duties of Respondent's switchmen/brakemen. Mr. Meyers has worked for Respondent for six years. During five of those years, he was a switchman/brakeman. For eleven months, he was assistant trainmaster for Respondent's Portland terminal. Since May 1982, Mr. Meyers has been trainmaster at Respondent's Portland-Vancouver terminal. In that position, he is in charge of train operations in and out of, and at, that terminal. Mr. Meyers testified, and this forum finds, that the following statements are accurate:

A train consists of a group of engines, cars, and a caboose which are connected to each other. Cars are connected to each other ("coupled") with a coupler (which holds them together with a pin) and an air hose (which enables the train's air brakes to operate.) It is not unusual for Respondent's trains to weigh 10,000 tons (100 cars loaded with 100 tons of freight each) and travel 50-60 miles per hour. There can be up to seven locomotives

on a train (and there usually is more than one).

Trains move only on tracks. In most railroad yards, there is a main line (track) which runs through the terminal.

There are also switching yards, on, usually, either side of the main line. The switching yards are used to make ("build") trains by "switching" engines, cars, and cabooses from wherever they are to a given position on an outbound train. Switches are track segments which can be moved ("lined") to open or close junctions which allow a train to go, or stop it from going, from one line of track to another. Through pulling or, often, "shoving" (pushing) cars along tracks on which the switches are line correctly, an engine builds a train. Switches are commonly lined to go out onto the main line.

Respondent must have three switchmen or a conductor and two brakemen to run a train.

a) Switchmen

1. Switchmen (also called yardmen) are the male and female crew members who work day and night in the train yard to build the trains. They work in groups of three. One, designated the foreman, supervises and makes sure that pins are pulled to separate the appropriate cars. The other two switchmen (called the pinpuller and fieldman) are responsible for lining switches, coupling couplers, pulling pins, buckling air hoses, and tying handbrakes (to stop a car or keep it from rolling). Switchmen must also do "roll bys," which means inspecting any passing passenger or freight train for sticking brakes or dragging equipment.

To pull a pin, a switchman runs beside a moving boxcar and lifts up a twelve inch piece of metal which extends to the edge of a car.

To tie a handbrake, a switchman gets on the car and climbs up to a low or high handbrake. To reach a high handbrake, the switchman must climb up to the top of the car and swing around to the end of it. The handbrake is tied by spinning a wheel. If the handbrake is the older "staff" brake, it may be difficult to turn. Handbrakes are often tied on moving cars. Although the staff brake has no handhold, the other brakes have a handhold onto which the switchman can hold with one hand while turning the wheel with the other, if the car is moving.

2. A switchman gets on and off moving equipment all the time; it's a basic part of the job. A car or engine will come by the switchman at a speed of up to 12 miles per hour. To get on, the switchman puts one leg up on the car or engine. If it is an engine, the switchman then grabs both grabirons as the engine goes by and lifts himself or herself up onto the engine. If it is a car, the switchman grabs a handhold, puts his or her foot in a little "stirrup" (a piece of metal welded to the bottom of the car) and crawls up onto the car. If the car is moving fairly fast, the switchman must run alongside it and simply jump onto it.

Most occupational injuries and fatalities on the railroad occur when an employee is mounting or dismounting moving equipment. Employees twist ankles and turn knees when getting off. They may fall under the train when getting on it because they miss the stirrup or are not able to hold themselves onto the car. Severed limbs and deaths result.

3. To build a train, particularly on just one track, Respondent's operating crews, including its switchmen/brakemen, use intricate maneuvers which require split-second timing and precision teamwork in pulling pins, throttling the engine, throwing switches and tying brakes. Any failure to act correctly and at just the right moment can and does result in collisions, derailment, or other accidents causing incapacitating injury to the switchman/brakeman and/or others.

4. When a crew is switching, one switchman (the fieldman) is often as far as 3000 to 4200 feet from the rest of the crew or the train's engineer. Because they can be out of audible contact with each other, the crew members operate completely by hand signals. Switching is often done at night. The crew gives night signals using white lights ("lanterns"). Each lantern's light tells the rest of the crew where each crew member is, because they assume a crew member is always with his or her lantern. If a lantern's light disappears, the rest of the crew assumes that the person carrying than lantern has gone between the cars (for example, to buckle the air hoses) and is not clear of the train. The train is stopped completely and remains stopped when the crew or engineer cannot see a lantern. If a switchman left his or her lantern in a visible place and went between the cars, and the engineer moved the train because the lantern indicated the switchman was clear of the train, the switchman probably would not be able to move out of the way of the wheels of the moving cars and would be crushed.

When an engineer is shoving cars, he or she relies upon the switchman in the field to signal him or her as to when he or she should stop the train, because the engineer cannot see to the front of the cars being pushed. The engineer may not be able to see all of the switchman either, but the engineer (or the head brakeman next to him or her) can see the switchman's hand or lantern. A horizontal swing of the lantern or hand is a stop signal. If a switchman fails to give this stop signal at precisely the right time during shoving, the switchman easily can be hit by the train and/or cars can collide or be shoved to the wrong place, including onto the main line. A passenger train going through the St. Johns (Portland) or Vancouver train yard on the main line could not stop if another train were shoved onto the main line in front of it, and a collision would result. Any of these consequences would most likely result in serious bodily injury or death to Respondent's

employees and/or train passengers.

5. Respondent's cars have roller bearings which make no noise unless there is a loose joint in the rail. For this reason, there is no audible warning in a train yard when cars are moving. To avoid being hit by a car when working on or close to the tracks, a switchman must be totally alert to what is happening around him or her when he or she is working in the yard.

6. A roll-by is a fairly common occurrence. It is very important because it is sometimes the only way to detect problems on a moving train which can cause an accident and which are visible only from the ground. A roll-by can take as long as fifteen minutes, if the cars are moving slowly. The inspecting switchman may be only five feet from the moving cars. It is monotonous for the switchman to stand and watch the cars go by. Sometimes he or she is alone. If the inspecting switchman became disoriented or inattentive for even a moment and stumbled or fell into a moving train, the train would not be able to stop and the switchman would suffer serious bodily injury or death. If the inspecting switchman failed to detect a problem, an accident could result which would involve serious bodily injury or death to Respondent's employees and/or the public.

b) Brakemen

1. Brakemen (also called trainmen) are the male and female crew members who ride in the head end of a locomotive (head brakeman) and the caboose (rear brakeman). Every switchman must be able to perform the job of brakeman, because any switchman may be called upon to work an absent brakeman's shift. For example, if the roster of brakemen who are available is exhausted, Respondent will call upon a switchman to work as brakeman.

2. A head brakeman does a lot of what a switchman does, plus much more riding on trains. When on the train, the head brakeman is the engineer's eyes on the other side of the locomotive, for the locomotive's design prevents the engineer from being able to see what is on the head brakeman's side of the train. The head brakeman therefore must watch for obstacles on his or her side of the tracks, particularly vehicular or pedestrian traffic at railroad crossings, and call out to indicate if crossings are clear. Any person in the head of the locomotive has the responsibility of calling out the traffic ("block") signals which warn the train when it must slow (a yellow signal) or stop (a red signal). These signals are located on the engineers side of the track, so the engineer has the best view of them. If the crew misses a yellow signal and suddenly comes upon a red signal, or if the head brakeman fails to spot and immediately report something on or too near his or her side of the tracks, the train usually cannot be stopped in time to avoid a collision with another train or obstacle on or too near the tracks and possible derailment.

When riding the train, the head brakeman must also inspect it for sticking brakes or dragging equipment as it rounds curves.

It is sometimes monotonous to ride in a locomotive as a head brakeman, sitting and watching the tracks come. It is sometimes difficult for normal non-narcoleptic head brakemen to stay alert, but it is essential to the safe operation of the train that he or she do so.

3. When a train is coming into or leaving a yard, the head brakeman must prepare it to fully stop from a speed of 3 to 10 miles per hour or to accelerate to that range of speed. To do so, the head brakeman must line all the switches going out of and into the yard. This involves running ahead of the train, crossing back and forth between the tracks several times, and jumping onto and off of the locomotive. If the head brakeman were to get in front of the locomotive, it could not stop in time to avoid hitting him or her. This would seriously injure or kill the head brakeman.

4. The head brakeman operates the locomotive of the train, running the train as engineer, if the engineer becomes incapacitated or must leave the head unit temporarily. The latter can occur when the engineer has received a warning signal and must check another locomotive, which can take as much as 15 to 20 minutes or as little as thirty seconds. It can also happen if the engineer has to use the bathroom in the head or second locomotive. These are fairly common occurrences. During such times, the head brakeman is usually alone in the locomotive.

When the head brakeman operates the locomotive, he or she is very alert, because it is a change of pace which puts him or her in charge of the train. It is the least likely time a head brakeman will feel drowsy.

Anyone operating a train must push down on a spring-loaded "dead man's switch" at all times. If this switch is not pushed, it squeals for thirty seconds, after which time the train goes into emergency status and stops. Although it is against Respondent's work rules, it is fairly common for an engineer to shut off this switch. The dead man's switch exists because anyone can become incapacitated suddenly, with no warning.

5. The rear brakeman also does a lot of what a switchman does. In addition, he or she rides in the caboose and inspects the train for sticky brakes or dragging equipment when it rounds curves. If the train is stopped, the rear brakeman "protects" the train by walking a specified distance behind the train and setting up torpedo signals which warn an oncoming train of the train stopped ahead. (Torpedoes are little pieces of dynamite which explode with sixty pounds of pressure. If a train runs over a torpedo, it is signaled to immediately reduce its speed to twenty miles per hour and run at that speed for one mile.) The rear brakeman also stays behind the

stopped train to hand signal any oncoming train to stop. This can involve a long, monotonous wait alone, sometimes in the dark. If there are no block signals, these activities by the rear brakeman give the stopped train its only protection from being hit by another train. Any such collision would result in serious bodily injury or death to Respondent's employees.

6. The rear brakeman can be injured by a phenomenon called "slack action," which consists of movement between two cars. Dangerous slack actions occurs when a car is hit harder than usual and, in turn, hits the car behind it a bit harder than usual, and successively harder collisions proceed between the cars down the length of the train, gathering momentum. The caboose, as the last part of the train, can be hit very hard. The rear brakeman cannot hear slack action coming. He or she can be thrown up against the caboose's cupola and then thrown six feet down to the caboose's floor if he or she is not hanging on or is drowsy. This can easily result in incapacitating injury.

7. Riding in the caboose cupola can be boring and monotonous for the rear brakeman and can cause a normal non-narcoleptic person to fall asleep.

c) Work Schedules

1. Currently, for the first ten years of work, a switchman or brakeman for Respondent has no choice as to when he or she works his or her regular shift. Shifts are awarded according to seniority, and it takes more than 20 years of seniority to be able to choose day shift work.

2. Brakemen are on call 24 hours a day, seven days a week, for as long as they are brakemen. Switchmen are on the "extra board" for approximately their first ten years of work, during which time they are also on call 24 hours a day, seven days a week. "On call" means being able to report for work within one and a half hours if called. A brakeman can be called to work whenever Respondent needs a brakeman, and a switchman can be called whenever Respondent needs either a switchman or brakeman. It is not uncommon for a switchman on the extra board to work all three different shifts in one given week. When one is called for work, it is for a maximum of twelve straight hours of work. It is an "everyday occurrence" for a switchman or brakeman to get called to work in the middle of the night, report for work one and a half hours later, and work eight to ten consecutive hours thereafter. In those instances, it is very difficult to stay awake, especially in the caboose.

d) Normal Drowsiness

Virtually all operating crew members on the railroad sometimes have trouble staying awake while working. It is important to report to work well rested and to fight drowsiness when it occurs. Crew members riding on a train can get up, get a drink of water, and sometimes talk with each other to stimulate themselves.

e) Restricted Work

At present and at the time Complainant applied to Respondent, there is and was no such thing as restricted work for Respondent's switchmen or brakemen, even on a temporary basis. If a switchman or brakeman cannot do all the work involved in his or her job, that person cannot work at all as a switchman or brakeman.

f) Conclusion

The occupations of switchman and brakeman are very dangerous, because just one mistake, delay, or oversight by a switchman or brakeman can cause an accident. Accidents do occur very frequently on the railroad. Often, these accidents result in serious bodily injury or death to railroad employees and can seriously endanger the public.

29) If, at times material, there was a legally unacceptable risk that Complainant would have a narcoleptic attack while on the job as a switchman/brakeman, the attack would have exposed Complainant or others to a significant danger. This would have been a danger of death or serious bodily injury.

30) If Complainant had been hired pursuant to her interview with Respondent in early 1980, she would have begun employment as Respondent's switchman/brakeman on Monday, February 11, 1980. Six people began working in that capacity for Respondent on that date.

31) Between the time her application for employment with Respondent was rejected and October 20, 1980, when Complainant began working for Wacker Siltronics Corporation, Complainant made diligent efforts to obtain employment. She spent three or four days each week looking for virtually any kind of work she felt qualified to do (except housecleaning). She searched directly, with the help of newspaper advertisements, and through employment agencies. She visited and submitted applications at many businesses. The job at Wacker was the first position Complainant was offered, and she accepted it immediately.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was a railroad, engaged in the business of safely transporting freight and passengers from one point to another.

2) Complainant applied to Respondent for employment and was subsequently interviewed by Respondent for a position as switchman/brakeman. After reviewing the results of Complainant's physical examination, Respondent rejected Complainant's application because Complainant had narcolepsy. Due to Complainant's narcolepsy, Respondent regarded her as having a physical impairment which substantially limited one or more of her major life activities. If Complainant had been accepted for employment as a switchman/brakeman by Respondent, she would have begun working in the capacity on February 11, 1980.

3) Complainant has had narcolepsy for almost twenty years. Although this disease can be severe and involve several symptoms, Complainant has a relatively mild form of it. Until she began taking medication to treat her narcolepsy, Complainant suffered sleep attacks which led to her

involuntary sleeping for a few minutes about twice each day. She has never suffered other symptoms of narcolepsy. After beginning medication, Complainant's narcolepsy was well controlled and she suffered no sleep attacks or other symptoms for a few years. Thereafter, Complainant began experiencing narcoleptic attacks of drowsiness twice a day which did not culminate in involuntary sleep. Sometime in 1978, Complainant's daily dosage of medication was doubled and, since that time, she has maintained that dosage. Since her medication was increased, Complainant's narcolepsy has been under complete control and she has suffered no narcoleptic symptoms.

Complainant has never lost a job, had an accident, or injured herself because of her narcolepsy.

4) Before applying to Respondent for employment, Complainant had worked around machinery in a job which required her to be alert and act quickly in response to the routine operation of the machinery, in order to perform her work and avoid injuring herself. In this job, Complainant's work shift rotated weekly between day and graveyard work. Complainant suffered no narcoleptic sleep attacks on this job.

Since applying to Respondent, Complainant has worked in a job where she handles chemicals in open containers which can be hazardous to herself or others if dropped or splashed. This work is very physically demanding. Complainant works twelve hour shifts and is on call during her time off. At least once, she has been called to work after completing a shift and going to sleep. Complainant has experienced no narcoleptic symptoms on this job. She has never missed taking her two daily doses of medication.

5) Complainant has not worked around heavy moving equipment or in a job which she routinely protected the public from hazards which could cause accidents involving serious bodily injury or death.

6) At the time Respondent rejected Complainant's application, she had suffered no discernible side effects from her low to moderate dosage of medication.

7) Like most narcoleptics, Complainant is more likely to suffer a sleep attack under circumstances which would tend to make anyone drowsy and more likely to suffer a cataplectic attack when feeling strong emotion.

8) The pattern concerning the nature, severity, and frequency of Complainant's symptoms of narcolepsy which has evolved will tend to persist.

9) Before she began taking medication for her narcolepsy, Complainant had warnings (in the form of drowsiness) of impending attacks. Since she began taking medication, the attacks she has suffered have consisted themselves of drowsiness.

10) There is a low likelihood that Complainant will suffer further narcoleptic attacks.

If Complainant does experience another narcoleptic attack, it will most likely be a mild sleep attack, consisting of drowsiness rather than a sudden irresistible urge to sleep. Any subsequent attacks could gradually increase in severity or frequency. Complainant is not likely to suffer any cataplectic attacks, but she could. If she does, the first such attack would most likely be mild. Any subsequent cataplectic attacks could increase in severity.

11) Respondent's switchmen/ brakemen do difficult work under very hazardous conditions. They work next to, on and with very heavy moving equipment. They must mount and dismount this equipment when it is moving all the time. When they are building trains, switchmen/brakemen work on tracks which are next to, and connect with, main lines used by passenger and freight trains. When they are riding on a train, switchmen/ brakemen are traveling on lines used by other trains.

Respondent's switchmen/ brakemen are responsible for giving crucial signals and directions to move and stop trains, doing physical acts which separate, join, stop, slow, and direct trains and parts of trains, doing tedious inspections which are essential to the detection of dangerous problems, maintaining look outs for obstacles in the path of trains, and, occasionally, operating a train for brief time periods during which the engineer is not available. Switchmen/brakemen often work in isolated circumstances where they are out of audible contact with the coworkers and in visual contact with them only through the use of light or hand signals.

Respondent's switchmen/ brakemen work as part of a team which is building or operating a train. Each member of the team relies upon each other member to routinely make accurate and precise judgments and act competently upon those judgments with split-second timing, in what can be intricate and difficult maneuvering. There is little room for error or oversight by a switchman/brakeman, because there is in most instances no back-up system to detect such flaws and no time for any correction of them. Switchmen/brakemen must be completely alert to hazards and able to quickly and correctly respond to the many situations which their work involves, even when they are waiting, doing tedious or monotonous work, or when they are tired. There is very little margin for a flaw in timing, coordination, or judgment by a switchman/ brakeman.

The work schedule of Respondent's switchmen/brakemen varies a great deal and is unpredictable to a large extent. It can involve long periods of work time with little or no rest. This makes it even more difficult for Respondent's switchmen/ brakemen to be as alert as they should be.

12) If a switchman/brakeman makes any mistake or fails to do anything he or she should do while working, he or she poses a safety hazard to himself/herself and to others. The stakes are very high, for any hazard is likely to cause an incapacitating accident, and any incapacitating accident can easily, and often does, seriously injure or kill a railroad employee. Given the switchman's/brakeman's potential proximity to passenger trains and responsibility to detect problems on the tracks and at railroad crossings, any hazard the switchman/brakeman causes can also seriously endanger the life or limb of members of the public. For those reasons, the work of a switchman/brakeman is inherently very

dangerous, involving a substantial risk of incapacitation.

13) Any narcoleptic drowsiness that Complainant suffered while working as a switchman/brakeman would impair the alertness which is so essential to safe railroad operation. Since there is at least some likelihood that her narcolepsy would cause an attack of drowsiness while Complainant is working, Complainant's narcolepsy would increase by more than a negligible extent the hazardousness of her work as a switchman/brakeman, thereby materially heightening the risk of that work causing a seriously incapacitating accident. The accommodation by Respondent which the Agency suggests, letting Complainant work as switchman/brakeman unless and until she suffers narcoleptic symptoms, would not diminish that risk.

Because of Complainant's physical handicap of narcolepsy, therefore, there is and was at times material certainty that, even with Respondent's reasonable accommodation Complainant could do the work of a switchman/brakeman employed by Respondent only at a materially enhanced risk of incapacitating herself or another. Accordingly, even with Respondent's reasonable accommodation Complainant's physical handicap prevented her performance of the work of a switchman/brakeman.

CONCLUSIONS OF LAW

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

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

3) Before the commencement of the contested case hearing, the forum complied with ORS 183.413 by informing Respondent and Complainant of the matters described in ORS 183.413 (2)(a) through (i).

4) The actions, and motivations for those actions, of Respondent's Chief Medical Officer described herein are properly imputed to Respondent.

5) Because of her narcolepsy, Complainant was at all times material a handicapped person as defined in ORS 659.400(2).

6) Respondent did not engage in an unlawful employment practice in violation of ORS 659.425(1)(a) by refusing to hire Complainant because of her physical handicap, because even with Respondent's reasonable accommodation Complainant's physical handicap prevented the performance of the work of switchman/ brakeman in that, because of that handicap, there was certainty that Complainant's performing that work would materially enhance the substantial risk of seriously incapacitation of someone, including a member of the public.

OPINION

ORS 659.425 currently prohibits an employer from refusing to hire an individual because that individual has a physical handicap which, with reasonable accommodation by the employer, does not prevent the performance of the work involved. In interpreting an earlier version of this statute which was in pertinent part the same as the current statute except that it lacked the reasonable accommodation caveat,

the Oregon Supreme Court has concluded:

> "that the legislature intended by the statutory language to impose upon an employer the obligation not to reject a prospective employee because of a physical or mental handicap unless there is, because of the defect, a probability either that the employee cannot do the job in a satisfactory manner or that he can do so only at the risk of incapacitating himself."

Montgomery Ward and Company, Inc. v. Bureau of Labor, 280 Or 163, 168-169, 570 P2d 76 (1977).

The facts herein differ from those in *Montgomery Ward* in two key respects. First, unlike *Montgomery Ward,* this case involves a job which was inherently very dangerous. No one could do it without exposing himself or herself to the risk, the substantial risk, of incapacitation, because just one mistake or oversight was likely to cause an incapacitating accident. For this reason, there is no question as to whether, under the above *Montgomery Ward* test, there was a "probability," when Respondent refused to hire Complainant, that with or without her handicap she could do the job of switchman/brakeman "only at the risk of incapacitating" herself. Even without Complainant's handicap, there was not only a probability but a certainty of such risk. It was not possible, therefore, that Complainant's physical handicap might cause a probability of the risk of incapacitation, because a considerable risk of incapacitation was already inherent in the work. It was possible, however, that Complainant's physical handicap might enhance this risk. Second, although the risk of incapacitation in both *Montgomery Ward* and the instant case was a risk of serious bodily injury or death, the risk herein was not just to Complainant, who was apparently willing to expose herself to it, but also to Respondent's other employees and to the public. Accordingly, unlike *Montgomery Ward,* this matter involves safety to persons other than the complainant, even the public.

Because this case involves an inherently dangerous job which by itself poses a substantial risk of incapacitation to the people working it, the *Montgomery Ward* test must be modified as follows in order to apply to this matter:

> At times material, was there, because of Complainant's physical handicap, a probability that Complainant could do the job of a switchman/brakeman only at a materially enhanced risk of incapacitation?

This modification raises the question of how much enhancement of risk is material. How much probable enhancement of the inherently considerable risk does this modified test require to justify an employer's decision not to employ a handicapped person because of the handicap? Where, in work which itself poses substantial risk of serious incapacitation, not only the handicapped person but also coworkers and the public are exposed to that risk, a very compelling safety factor exists which must be considered. Under the particular circumstances described in the previous sentence, the probability of virtually any enhancement in risk beyond the minuscule is unacceptable and therefore material

and, consequently, will be sufficient to satisfy the above modified test.

It is this forum's responsibility to effectuate the statutes it is authorized to administer. *McPherson v. Employment Division,* 285 Or 541, 591 P2d 1381 (1979). While not binding on the Commissioner's interpretation of state statutes, the reasoning for the use of a modified test expressed in federal case law is persuasive and supports the adoption of this modified test in the circumstances described above. In *Hodgson v. Greyhound Lines, Inc.,* 499 F2d 859 (7th Cir 1974) *cert den sub nom Brennan v. Greyhound Lines, Inc.,* 419 US 112 (1975), the court considered a challenge to Greyhound Line's policy of declining to consider applications for inter-city bus driver jobs from persons aged 35 or more. In upholding Greyhound's requirements, the court stated:

> "Due to such compelling concerns for safety . . . Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only, demonstrate however minimal increase in risk of harm for it is enough to show that elimination of the hiring policy might jeopardize the life of one more person than might otherwise occur under the present hiring practice." *Id.* at 863.

Precisely the same issue was confronted by the Fifth Circuit Court of Appeals in *Usery v. Tamiami Trail Tours, Inc.,* 531 F2d 244 (5th Cir 1976). In upholding a bus line's age requirement, the court said:

> "The greater safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving." *Id.* at 236.

Finally, in light of the addition of a reasonable accommodation requirement to ORS 659.425 since the articulation of the *Montgomery Ward* test, this forum adds that the probability of materially enhanced risk of incapacitation must exist even if the employer reasonably accommodates the handicapped employee.

Accordingly, the test applicable to the factual question herein is whether, at times material, there was, because of Complainant's physical handicap, a probability that even with Respondent's reasonable accommodation, Complainant could do the job of a switchman/brakeman only at a materially enhanced risk of incapacitation. Because Respondent's other employees and the public were exposed in any case to the inherently substantial risk of serious incapacitation, virtually any enhancement in that risk because of Complainant's handicap would be material.

In this matter, the risk which Complainant's physical handicap posed at the time Respondent considered her (and poses now) was that, even with the accommodation by Respondent which the Agency suggests (letting Complainant work as switchman/brakeman unless and until she suffers narcoleptic symptoms), there was a likelihood, albeit low, that Complainant would experience a narcoleptic attack of drowsiness while working which would have rendered her at least less alert than she would have been had she not been narcoleptic. This was not a probable risk; it was an existing risk, and it was a risk of impairment of one of the most important requirements for minimally dangerous switchman/brakeman work: alertness. Any drowsiness in a switchman/brakeman enhanced the risk of an accident which would almost certainly incapacitate. Just a moment's inattention or hesitation, for example, could cause a switchman/brakeman to fail or delay to give a signal, line a switch, pull a pin, couple a coupler, tie a brake, buckle an air hose, notice an obstacle at an upcoming crossing or on the track, detect damage to the train, or fall into or from a moving train. In Complainant's case, the risk that she would become drowsy at work was heightened by the fact that some of the duties of a switchman/brakeman had to be performed in just the kind of monotonous, tedious setting which makes a narcoleptic attack more likely. Any of these problems easily could have caused either direct physical injury or death to Complainant or collision or derailment which could have seriously injured or killed Complainant, other employees of Respondent, or members of the public. Only when a switchman/brakeman was calling out passing traffic signals or operating a train was there some protection if that person made a mistake or delayed: another person also was supposed to be noting the signals, and there was a mechanical device to protect a train if the person operating it ceased to push down the device. In few if any of the other work activities of a switchman/brakeman was there any such protection, so minimally dangerous operations depended on the switchman/brakeman working fast and competently.

Complainant's relatively mild narcolepsy had been completely controlled and she had been asymptomatic for nearly two years when Respondent considered her application. The likelihood of further narcoleptic attacks was and remains low but, even according to the testimony most favorable to Complainant, at least two or three on a scale of one (least likely) to 10 (most likely). There simply was (and is) no medical assurance that Complainant would not suffer an attack of at least drowsiness at any time. In a very dangerous job where alertness at all times was mandatory to lessen the hazards as much as possible, it would have been very difficult if not impossible for Complainant to perform her work satisfactorily while she was suffering a drowsiness attack. This fact certainly enhanced the already considerable risk of accident. It was likely that any such accident would seriously incapacitate. There is little evidence of "minor" railroad accidents on record: the least serious incapacity's from such accidents mentioned were injured ankles and knees resulting from slipping when dismounting a railroad car. All other examples on the record concern lost limbs or death.

In conclusion, there existed at times material a low risk that Complainant would suffer another narcoleptic attack. But given the particularly hazardous circumstances of the job of Respondent's switchmen/brakemen, even the most mild manifestation of Complainant's physical handicap while she was working in that capacity would

have the risk of seriously incapacitation of Complainant, a co-worker, or the public. Because of Complainant's physical handicap and even with Respondent's reasonable accommodation, therefore, there was at times material a probability that Complainant could have done the job of a switchman/brakeman only at materially enhanced risk of incapacitation. Accordingly, Respondent did not violate the mandate of ORS 659.425 when it refused to hire Complainant because of her physical handicap.

ORDER

NOW, THEREFORE, Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and the Complaint filed herein against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of
JACK COKE,
Respondent.

Case Number 09-82
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 8, 1983.

SYNOPSIS

Wage claimant worked for Respondent for nearly three months at the agreed rate of $3.00 per hour. Finding that there was no agreement for an exchange of services in lieu of wages or any evidence of partial payment, and that Respondent willfully failed to pay the wages due to Claimant, the Commissioner ordered that Respondent pay Claimant $924 in wages and $660 in penalty wages, with interest. ORS 652.140; 652.150.

The above-entitled matter came on for contested case hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on December 13, 1982, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. The Employer was present and testified, but was not represented by counsel. Claimant Laura N. Johnston was present and testified.

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

FINDINGS OF FACT – PROCEDURAL

1) On May 8, 1980, Claimant Laura N. Johnston filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries alleging that the Employer, Jack Coke, was her former employer and that the Employer had failed to pay wages due to her.

2) On May 8, 1980, the Claimant assigned all wages due her under her claim to the Commissioner of the Bureau of Labor and Industries in trust for the Claimant.

3) On November 6, 1981, the Administrator of the Wage and Hour Division issued an Order of Determination which found that the Employer owed the Claimant $924.00 in unpaid wages, plus interest thereon at the legal rate compounded per annum from September 1, 1979, until paid. In addition, the Order of Determination found that the Employer owed the Claimant $660.00 in penalty wages, plus interest thereon at the legal rate compounded per annum from November 1, 1979, until paid. This Order of Determination was served upon the Claimant and upon the Employer.

4) Thereafter, the Employer filed with the Wage and Hour Division a request for an administrative hearing in this matter, and an answer to the above-mentioned order of Determination denying the wage claim and alleging as an affirmative defense that Claimant requested that Employer provide maintenance services for her motor vehicles and her home and that Claimant worked in Employer's store in exchange for these maintenance services. As an additional affirmative defense the Employer further alleged that whenever Claimant performed work in Employer's store at his request, which work was not in exchange for maintenance services by Employer, the Employer paid her and that all sums due her for this work have been paid.

5) The Bureau of Labor and Industries duly served the Employer and the Claimant with Notice of Time and Place of Hearing.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Employer owned and operated a general grocery store and gas station located in Gales Creek, Oregon. In this business, the Employer employed one or more persons in the State of Oregon.

2) Sometime in late May or June 1979, Claimant became acquainted with Employer and mentioned to him that she was in need of employment. A few days after this, Employer offered Claimant a job working in his grocery store and gas station and told her that she would be paid $3.00 per hour.

3) Claimant began work for Employer on June 13, 1979. She was hired to work only during the summer months and was initially scheduled to work five days a week. Employer told her to keep track of the hours which she worked and she used a calendar at home for this purpose. At the end of each work day, or the day immediately following, Claimant wrote down the number of hours worked on that particular day next to that date on the calendar. Employer did not separately keep track of Claimant's work hours.

4) Claimant's work days and number of hours worked per day were irregular. Employer would inform Claimant on the day before he needed her to work at the store.

5) Claimant worked 96 regular hours in June of 1979, 108 regular hours in July of 1979, and 104 regular hours in August of 1979, for a total of 308 hours.

6) Complainant did not have a regularly scheduled day on which she was to be paid. She first asked Employer to pay her for all wages then

due on or about July 1, 1979. Employer responded that it was not convenient for him to pay Claimant at that time. Thereafter, Claimant periodically asked to be paid, but Employer gave her various excuses as to why he could not pay her when she asked. Employer finally told Claimant that he could not pay her when she asked because the store had not been making as much money as he had anticipated, but would pay her at the end of the summer for all wages due.

7) Employer also employed Sandra Wood as a clerk in his store. Whenever Ms. Wood asked to be paid, Employer would take cash from the register and pay Ms. Wood. Employer would keep track of the wages which he had paid to Ms. Wood on slips of paper, which he would turn over to his bookkeeper to record for the purpose of claiming the wages as a deduction on his business income tax return. Employer had no records of ever having paid Claimant for her work.

8) Neither Claimant nor Ms. Wood filled out a W-4 form for wage withholding purposes although Claimant asked Employer about doing so. Employer stated that he did not want to withhold deductions from wages paid.

9) During the period before Claimant and Employer agreed that Claimant would be paid all wages at the end of the summer, Employer would comment to Claimant from time to time, particularly when Claimant had put in extra effort on the job, such as by cleaning the public restrooms, that he would have to get around to paying her.

10) Employer and Claimant were social friends and Employer did perform some maintenance services on Claimant's automobile and on her son's automobile. Employer performed other personal chores for Claimant, such as helping her son feed her pigs.

11) Employer never denied that he owed Claimant wages during the time that she was working for him and never represented to her that she would not be paid for her work. Claimant was not working for Employer as a personal favor nor was she working for him in exchange for automobile maintenance or other services. No other person had worked for free at Employer's store.

12) Claimant took outdated groceries home from the store during the period of her employment. Employer also gave these outdated groceries to customers. There was no agreement between Claimant and Employer that Claimant was to receive groceries in lieu of wages.

13) In mid-August 1979, Claimant gave Employer two weeks notice that she would be leaving her job on August 31st. After her last work day on August 31st, Claimant gave Employer a slip of paper on which she had recorded her hours and asked to be paid pursuant to the earlier agreement that she would be paid in full at the end of the summer.

14) Employer did not pay her at this time, again stating that it was inconvenient for him to do so.

15) In approximately mid-September Claimant worked for one day for Employer at the store and was paid at the end of the day.

16) Thereafter, Claimant moved away from the Gales Creek area, but

she continued to telephone Employer and asked to be paid all wages that were due and owing to her on August 31st, her last day of employment. Employer did not deny that he owed her any wages, but continued to put her off with excuses as to why he could not pay her. Claimant later wrote Employer a letter offering to settle the wage claim for less than what was owed her. Employer did not save the letter.

17) Employer has never paid Complainant for any of the 308 hours which she worked in his store.

ULTIMATE FINDINGS OF FACT

1) Claimant worked for Employer as a clerk in his general grocery store and gas station from June 13, 1979, through August 31, 1979, at an agreed upon wage of $3.00 per hour.

2) From June 13, 1979, through August 31, 1979, Claimant worked 308 hours. Claimant requested to be paid several times during the course of her employment and continued to ask for her wages after her employment ended.

3) Despite Claimant's requests for payment, Employer never paid her for any of the 308 hours which she worked. Although Employer did perform some personal tasks for Claimant, these were not in lieu of payment of wages to Claimant. The outdated groceries which Claimant received from Employer were likewise not in lieu of wages owed.

4) Employer willfully failed to pay Claimant the wages owed to her in the amount of $924.00, and still owes those wages to Claimant. Employer did not show financial inability to pay the wages at the time they accrued.

5) The testimony of Claimant was more credible than the Employer's and therefore was accepted on issues where the testimony of Claimant and Employer differed.

6) If the Employer is liable for penalty wages, they total $660.00, a sum computed by multiplying the Claimant's average daily wage at termination of $22.00 by 30 days, the maximum period during which penalty wages accrue.

CONCLUSIONS OF LAW

1) At all times material, the Employer was an employer 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 of the State of Oregon has jurisdiction over the persons and subject matter herein.

3) The Employer's failure to pay the Claimant $924.00 in earned and unpaid wages within 48 hours after the termination of Claimant's employment constitutes a violation of ORS 652.140.

4) Because the Employer willfully failed to pay the Claimant $924.00 in earned and unpaid wages, the Claimant's wages continued from the due date thereof at the same rate as her average daily wage for 30 days pursuant to ORS 652.150.

5) The Commissioner of the Bureau of Labor and Industries has the authority to order the Employer to pay the Claimant $924.00 in earned and unpaid wages and $660.00 in penalty wages, plus interest on both sums, under the facts and circumstances of this record.

OPINION

The Employer in this matter asserted as an affirmative defense in his answer and at the hearing that he did not owe any unpaid wages to Claimant because she had agreed to work for him in exchange for his services in repairing her and her son's automobiles. Claimant admitted in her testimony that she was social friends with Employer and that he had performed some minor automobile maintenance and repair for her, but denied that she had agreed to work for free in the store in exchange for these services. Claimant's testimony on this issue was more credible than that of Employer because, as the Employer himself testified, he had never had anyone work for free in his store, and also because it seems unlikely that Claimant would work 308 hours over the course of an entire summer in exchange for the automobile repair services which she received, even if Employer's version of how much repair work he performed is accepted.

The Employer also asserted in his answer that he had in fact paid Claimant for those hours which she worked at his request and which were not part of the barter agreement. However, Employer was not able to produce any record of any payment of wages to Claimant whatsoever, although he testified that when he paid his other employee, Sandra Wood, he would keep track of the amounts paid to her and his bookkeeper would record these amounts so he could deduct them as a business expense. His testimony that he paid Claimant for the hours when she worked at his request was not credible in light of the fact that he kept no record of these payments, even though they would be deductible as a business expense, and he did keep a record for his other employee. He was not able to testify to even an approximate amount of wages paid to Claimant.

The Employer's credibility was also damaged when he testified that he could not remember Claimant ever asking to be paid any wages before August 31st. Again, it seems improbable that Claimant would work for some two and a half months without inquiring as to when she would be paid.

There was no dispute about the fact that Claimant had indeed worked in Employer's store over the course of the summer. The dispute was over whether she was working there for free as part of a bartered services exchange. Where a dispute exists as to whether an employee was working for free, public policy requires that the dispute be resolved in favor of the employee who was performing valuable services for the employer.

The Employer here also disputed that Claimant had in fact worked 308 hours over the course of the summer, but could produce no testimony or records to show that she had worked a lesser number of hours. In *McGinnis v. Keen,* 189 Or 445, 221 P2d 907 (1950), the court held that an employer has a duty to know the amount of wages due to an employee at the time of termination of said employee's employment and that such amounts become due and payable immediately upon termination of employment. Since Employer offered no testimony or evidence of any kind to show the number of hours Claimant worked, although he had a legal duty to know the hours worked, Claimant's statement and record of the number of hours she worked must be accepted.

The awarding of penalty wages turns upon the issue of willfulness. In *State ex rel Nilsen v. Johnston et al,* 233 Or 103, 108, 377 P2d 331 (1962), the court adopted a test articulated in *Davis v. Morris,* 37 Cal App 2d 269, 99 P2d 345 (1960). This test states that in civil cases 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. The Employer in the case at hand must be deemed to have acted willfully under this test.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Employer is hereby ordered to pay to the Bureau of Labor and Industries, in trust for Laura N. Johnston, the amount of TWO THOUSAND ONE HUNDRED THIRTY-EIGHT DOLLARS and TWENTY-ONE CENTS ($2138.21), which represents $924.00 in unpaid and earned wages, and $660.00 in penalty wages; plus interest thereon in the amount of $554.21 computed at nine per cent compounded per annum, for the period September 1, 1979, until March 15, 1983, on $924.00, and for the period November 1, 1979, until March 15, 1983, on $660.00. Interest will continue to accrue at the legal rate of nine per cent, compounded annually until paid. This payment must be delivered to the Hearings Unit of the Bureau of Labor and Industries, State Office Building, Room 311, 1400 S.W. Fifth Avenue, Portland, Oregon 97201.

In the Matter of
PAPCO, INC.,
a foreign corporation, Respondent.

Case Number 22-81
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 9, 1983.

SYNOPSIS

Respondent retaliated against Complainant when it laid him off immediately after he protested safety hazards in the workplace. Finding that Respondent's purported reason – a reduction in force due to lack of work – was pretextual, the Commissioner held that Respondent discharged Complainant because of his opposition to perceived safety hazards on the job site, in violation of ORS 654.062(5), and awarded Complainant back wages and interest totaling $6,661. Finding that Complainant suffered mental anguish resulting from the economic uncertainty of layoff and for which he sought medical treatment, the Commissioner awarded Complainant $750 for mental suffering. Pursuant to the public records law, the Commissioner did not permit discovery of the Agency's investigative file because Respondent showed no public

interest in the disclosure. ORS 192.500(1)(h); 654.062(5)(a) and (b); 659.050; OAR 839-03-080(1); 839-04-030(1); 839-04-055.

The above entitled contested case came on regularly for hearing before Dale A. Price, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on March 31, 1982, in Conference Room A of the State Office Building, 455 Elrod Street, Coos Bay, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Respondent PAPCO, Inc. was represented by Richard Hunt, Attorney at Law. The Agency called as witnesses: Complainant Jason Brooks; Terry Neely, apprentice pipe fitter and co-worker; David Gates, carpenter and co-worker; and Kenneth Zarbano, carpenter who worked after Complainant was laid off. The Respondent called as its witness Lloyd Busbee, Labor Relations Representative and Safety Coordinator for PAPCO, Inc.

Having fully considered the entire record in this matter, I, Mary Roberts, hereby make the following Rulings Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS UPON MOTIONS

1) Prior to hearing, in a letter dated March 23, 1982, Respondent requested a subpoena be issued to Complainant requesting that he be required to appear at the hearing and that he be required to bring copies of all documents, notes, memoranda, diaries, and other materials pertaining to his charge of discrimination filed with the Civil Rights Division of the Bureau of Labor and Industries. Respondent argued that Complainant's testimony and the documents mentioned are relevant and necessary to its defense of this case.

Due to the short time before hearing, which was scheduled for March 31, 1982, the Presiding Officer issued an oral ruling upon Respondent's request. This ruling granted Respondent's request for a subpoena to require Complainant's appearance at hearing. The request to produce documents was granted, but limited to those not protected by the confidentiality provisions of ORS 192.500(1)(h) and OAR 839-03-080(1). The oral ruling on Respondent's motion is hereby affirmed.

2) Prior to hearing, in a letter dated March 23, 1982, Respondent requested a subpoena be issued to Assistant Attorney General Betty Smith requiring Ms. Smith to appear in the offices of Respondent's counsel on March 26, 1982, at 9:30 a.m. and that she be required to bring the official file of the investigations of Complainant's claim including all the notes, statements, investigative reports, correspondence, and other tabulated items and/or statements pertaining to conciliation. Respondent argued that the evidence sought is clearly relevant to Respondent's defense of this case, and that the request is reasonable in scope in that the evidence is all contained in the investigative file of the Bureau of Labor and Industries.

Due to the short time before the hearing, which was scheduled for March 31, 1982, the presiding officer issued an oral ruling upon Respondent's request. This ruling granted Respondent's request for a subpoena requiring the appearance of Ms. Smith. The request to produce documents was granted insofar as it did not conflict with the confidentiality provisions of ORS 192.500(1)(h) and OAR 839-03-080(1). The oral ruling upon Respondent's request is hereby affirmed.

3) Prior to hearing, in a letter dated March 23, 1982, Respondent filed a Motion to Quash a Subpoena which had been served upon CT Corporation, the registered agent for PAPCO, Inc., on March 18, 1982. Respondent argued that the subpoena was not properly served upon Respondent's counsel in spite of the Agency's knowledge that Respondent had retained local counsel. Respondent further argued that the subpoena requested documentation so extensive that compliance could not be accomplished without great expense in the few days which remained prior to hearing.

The Presiding Officer orally reserved ruling upon Respondent's Motion to Quash to enable counsel for the Agency to determine, at hearing, whether all or part of the requested information was necessary to the completion of the Agency's case. At hearing counsel for the Agency determined that the Agency's case was complete without the subpoenaed information. Counsel for the Agency withdrew her subpoena at hearing.

4) Prior to the hearing, in a letter dated March 23, 1982, Respondent filed a Motion to Compel production of the Agency's file containing documents relevant to Complainant's and the Agency's case against Respondent. Respondent argued that the public interest and due process require that the contents of said file be made available and disclosed to counsel for Respondent. Respondent further argued that the investigation was closed and the case was now in litigation and that it was necessary for Respondent to review the contents of said file to defend its position in this case and that its request imposed no unreasonable burden upon the Agency because all requested materials were gathered in a single file.

Due to the short time remaining prior to hearing, which was scheduled to commence on March 31, 1982, the Presiding Officer issued an oral ruling which granted Respondent's Motion to Compel to the extent it did not conflict with the requirements of ORS 192.500(1)(h) and OAR 839-03-080 (1). The oral ruling upon Respondent's motion is hereby affirmed.

5) At the completion of the presentation of the Agency's case at hearing, Respondent moved to dismiss the Specific Charges and Complaint on the ground that the Agency had allegedly failed to establish a prima facie case of discrimination against Respondent. The Presiding Officer reserved ruling upon Respondent's motion in order to facilitate a thorough consideration of the evidence presented by the Agency.

The Agency's initial burden of proof at hearing is to offer some evidence in support of its position on each of the constituent elements of the violation alleged. A thorough analysis of the evidence presented in support of the Agency's position on each of the

constituent elements is contained in the Opinion which follows. It is sufficient, at this point, to state that sufficient evidence was produced to establish a prima facie case of unlawful discrimination. Respondent's Motion to Dismiss is hereby denied.

FINDINGS OF FACT – PROCEDURAL

1) On February 12, 1980, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and continued to be discriminated against in connection with his employment by Respondent because of his opposition to safety hazards allegedly existent at Respondent's work site where he was employed.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a foreign corporation engaged in Oregon in the business of paper mill expansion. In that business, Respondent utilized the services of more than one employee and reserved the right to control the means by which such service was performed.

2) Complainant was hired by Respondent in July 1979 as a journeyman carpenter at the International Paper plant site in Gardiner, Oregon.

3) Complainant worked as a carpenter on various jobs within the plant from July 1979 until he was laid off on January 14, 1980. In July 1979, Complainant volunteered to work with asbestos and he received training from Lloyd Busbee in the proper and safe procedures for working with asbestos. Because of this special training, Complainant was told many times while working for PAPCO that he would probably be one of the last people to remain on the job at the International Paper Plant.

4) During the pendency of Complainant's employment with Respondent, Complainant and his co-workers believed they were obliged to work among several safety hazards. The hazards Complainant and co-workers perceived, included, but were not limited to the following:

a) Asbestos safety procedures were denigrated as unnecessary by management, and employees were directed not to follow them.

b) Floors in work areas were not kept free from debris.

c) Designated walkways through work areas were not maintained.

d) Scaffolding without kickboards and handrails to protect the workers was used.

e) Air monitors, to test particulate matter in the work area, were not always made available upon request. Used cartridges from air monitors were not promptly submitted to the testing laboratory after use. Test results obtained several months following the taking of samples were of little use in protecting the health of employees.

f) Lighting in the work areas was frequently inadequate.

g) Work areas were frequently overcrowded.

h) Welding took place above other workers who were subjected to eye damage and dripping hot metal.

5) During the last two to four weeks of his employment, Complainant, on more than one occasion, complained to Respondent's safety coordinator, Lloyd Busbee, about debris and general sloppiness in the work area and about other practices he considered to be safety hazards. During the same period, Complainant complained to his foreman, Pat Gordon, about the failure of management to allow employees to adhere to safety requirements for handling asbestos. During this period Mr. Busbee told Complainant that asbestos safety requirements were "chicken shit" and that everyone knew it. On this same occasion, Mr. Busbee ordered Complainant to don work clothes which were still wet from cleansing of asbestos.

6) On or about January 13, 1980, Complainant discovered a letter dated January 4, 1980, from the Accident Prevention Division of the Workers Compensation Board of the State of Oregon. The letter directed attention to certain safety hazards, relating to the handling of asbestos, existent in the plant. The letter was addressed to the General Manager of the International Paper Company at Gardiner. After showing the letter to some co-workers, Complainant removed it from its obscure position and placed it on the door of the elevator where he felt more workers would see it.

7) On or about January 13, 1980, Complainant was exposed to welding flashes at Respondent's work site. Several hours after exposure to these flashes Complainant experienced eye inflammations, conjunctivitis, and extreme pain.

8) On the day following his exposure to welding flashes, Complainant stayed home from work. About one hour after his scheduled time to report for work, Complainant called the number given him by Respondent's management to report his absence. Complainant was informed, by a woman who answered the telephone, that she would pass along the information to his foreman. Following Complainant's call, and on the same day, Mr. Busbee called Complainant at home and informed him that he had been laid off effective that day due to a reduction in force.

9) At the time he was laid off, Complainant was assigned to build scaffolding for the use of pipe fitters in the plant. There was additional scaffolding work to be done at the time Complainant was laid off. Complainant was replaced on the job by Kenneth Zarbano, a journeyman carpenter who worked twelve hours per day building scaffolding from January 14, 1980, through January 22, 1980.

10) On or about January 15, 1980, Complainant returned to the Gardiner plant to file a claim pursuant to a work agreement for replacement of tools which had been stolen from his locker. While on the premises, Complainant distributed handbills to Respondent's

employees encouraging them to contact him regarding safety hazards at the plant. The handbill stated Complainant's intention, among other things, to initiate a "class action" suit against Respondent on behalf of the employees of PAPCO. Mr. Busbee directed Complainant to leave the premises. He used abusive and profane language toward Complainant including the phrase "get your fucking ass out the gate." After Complainant refused to leave, Mr. Busbee called the local police who escorted Complainant off the premises.

11) The testimony of Mr. Busbee is in conflict with that of other witnesses on several issues. Mr. Busbee stated that Complainant was laid off because scaffolding work with pipe fitters was no longer needed, yet Terry Neely, David Gates, and Kenneth Zarbano all testified that the scaffolding work for the pipe fitters continued after Complainant was laid off. Mr. Busbee offered testimony regarding layoffs of carpenters at times material herein, but his testimony was based solely upon his own memory and was not corroborated by documentation normally kept in the ordinary course of business. Mr. Busbee testified that Complainant never brought safety hazards to his attention. This testimony is contradicted by Complainant and by Mr. Gates. Inconsistencies between Mr. Busbee's testimony and the testimony of several other witnesses strongly suggests that Mr. Busbee's testimony is untrustworthy and this forum will not rely on it where it conflicts with the testimony of other witnesses.

Damages

1) On or about January 15, 1980, Complainant went to his union hall where he signed the "out of work" list, which enabled him to be assigned a new job as soon as those ahead of him on the list had been re-employed.

2) During the week immediately following Complainant's discharge (from January 14 through January 22, 1980), Mr. Zarbano, who replaced Complainant, worked full time and overtime earning a gross pay of $1,243.09.

3) On March 6, 1980, Complainant obtained employment with Hoffman Construction Company at the rate of pay equal to that which he was earning when terminated from Respondent's employ. Complainant's back pay damages for the period January 14, 1980, to January 22, 1980, is that amount he would have earned had he remained in his position as evidenced by the amount earned by Mr. Zarbano, who replaced Complainant, or $1,243.09. Added to this are damages between January 23, 1980, and March 6, 1980, during which time Complainant lost wages at the rate of $12.12 per hour for 40 hours each week. In addition to this base pay rate, the following must be added:

a. Health and welfare - $ .45 per hour
b. Dental - $ .15 per hour
c. Vacation - $ .50 per hour
d. Travel - $4.00 per day

Pension pay is not included because Complainant would not have received those amounts in pay or benefits. For an eight-hour day Complainant's daily wage was $109.76.

Complainant lost six weeks' work between January 23, 1980, and March 6, 1980. Complainant lost wages of $3,292.80 during this period. Wages for the period January 14, 1980, to January 22, 1980, should be added to this amount for a total of $4,535.89.

4) Complainant felt very badly about losing his job. He was afraid he would be unable to pay his bills. He felt attacked and was subjected to public embarrassment and abusive language. He visited a physician three or four times during the period following his discharge, to seek help in coping with the depression which he felt because of his discharge.

ULTIMATE FINDINGS OF FACT

1) During Complainant's employment at the International Paper Plant at Gardiner, Complainant and his co-workers perceived several safety hazards in Respondent's work spaces.

2) Complainant believed these hazards created dangerous working conditions for him and his co-workers.

3) Respondent was made aware of Complainant's concerns by informal, oral complaints lodged by Complainant and his co-workers with a number of plant supervisors and the Safety Coordinator.

4) Complainant was laid off as a result of his persistent complaints regarding safety hazards. He was replaced by another carpenter who completed the work which Complainant had begun.

5) As a result of Respondent's unlawful actions, Complainant lost wages totaling $4,535.89. To this amount must be added interest compounded annually at nine percent per annum from March 6, 1980, the date when Complainant's damages ended, until paid.

6) Complainant has suffered considerable mental anguish, frustration and loss of human dignity for which he is entitled to compensation in the amount of $750.

CONCLUSIONS OF LAW

1) Under ORS 192.500(1)(h) Respondent is not entitled to access to confidential investigatory files of the Agency until such time as the complaint is resolved under ORS 659.050 or a final administrative determination is made under ORS 659.060 unless the public interest requires disclosure at an earlier time. Because the complaint in this matter has not been resolved either by conciliation under ORS 659.050 or by final administrative determination following an administrative hearing under ORS 659.060, Respondent is not entitled to access to the investigative file, where the only interest demonstrated is the interest of Respondent.

2) OAR 839-03-080(1) also bars Respondent's access to the investigative file with the following language:

> "The contents of the investigative file and related records including, but not limited to the names and addresses of the Complainant and Respondent, the nature of the complaint, all witness statements, documents and other evidence received by the division in the investigation of a complaint are confidential until the complaint is closed unless the public interest requires disclosure. However any individual may inspect and/or copy

information or statements he/she has given to the division."

Respondent has demonstrated no public interest sufficient to circumvent the confidentiality provisions of this rule.

3) OAR 839-04-030(1) states that the Specific Charges shall set forth:

"A) A claim for relief including a brief and plain statement of the allegations which support the claim and reference to the particular sections of the statutes and rules under which a claim is made.

"B) A description of the relief sought."

The Specific Charges in this case do identify the specific manner in which Oregon law is violated by alleging that Complainant was laid off because of his opposition to safety hazards, in violation of ORS 654.062(5). The Specific Charges are adequate to overcome a motion for dismissal based upon failure to state ultimate facts sufficient to constitute a claim and/or failure to specify which section of the statute is allegedly violated.

4) Under OAR 839-04-055 Respondent may move for the disqualification of the Hearings Officer if it believes that a fair hearing cannot be had before said Hearings Officer. Such motion must be filed within ten days of the date of designation of the Hearings Officer. By its failure to timely file such a motion, Respondent waived its right to allege as a defense a violation of due process by alleged failure to separate prosecutorial and investigative functions.

5) Respondent's assertion that the Specific Charges should be dismissed for failure to meet jurisdictional prerequisites of ORS chapters 654 and 659 must fail due to vagueness and the absence of any patent inadequacy of jurisdiction.

6) Respondent's assertion that the Specific Charges should be dismissed for failure to exhaust administrative remedies must fail because the doctrine of exhaustion relates to completion of the administrative process prior to entry into the court system and, therefore, has no relevance to this administrative proceeding in which those processes are being utilized.

7) Respondent discharged Complainant from its employ because of his opposition to safety hazards which existed at Respondent's job site. This discharge constitutes a violation of ORS 654.062(5).

8) The alleged failure of the Agency to conciliate the claim cannot serve as a basis for dismissal of the specific charges in view of Respondent's stipulation at hearing that conciliation was attempted and failed. The Agency may attempt conciliation under ORS 659.050, but does not have a duty to do so or to succeed in such attempts.

9) Respondent's assertion that some or all of the Specific Charges should be dismissed because they are barred by the statute of limitations is not supported by the facts. Complainant filed a verified complaint within thirty days from the date of his discharge as required by ORS 654.062(5)(b).

10) At all times material herein, Respondent was an employer under the provisions of ORS 654.005 and as such is subject to the provisions of ORS 654.062.

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

12) The actions and motivations for those actions of Respondent's agents, as described herein, are properly imputed to Respondent.

13) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record, and the sums of money awarded as damages in the Proposed Order are appropriate awards.

OPINION

Preliminary Motions

Prior to hearing, several Requests for Subpoenas and Motions to Compel Production of Documents were filed by Respondent. The common theme of these filings is Respondent's assertion that it has the right to inspect the entire investigative file compiled by the Agency during its investigation of Complainant's complaint. Analysis of these filings focuses on one statute and one administrative rule: ORS 192.500(1)(h) and OAR 839-03-080(1). ORS 192.500(1)(h) forbids Respondent access to the file until a final administrative determination is issued under ORS 659.050 or 659.060. This had clearly not occurred at the prehearing stage at which Respondent requested access to the file. One exception is contained in the statute. If the public interest requires disclosure of the file at an earlier date, then the aforestated requirement may be waived. Respondent has asserted that the public interest requires disclosure, but has offered no evidence in support of its assertion. It must be concluded, then, that only Respondent's private interest would be served by disclosure of the content of Complainant's file prior to hearing, and that the statute and rule cited do not require disclosure in such circumstances.

Agency's Prima Facie Case

The Agency's initial burden of proof requires production of evidence in support of the following elements:

1) Complainant's opposition to a practice forbidden by ORS 654.001 to 654.295.
2) Respondent's knowledge of Complainant's opposition to the forbidden practice.
3) The barring or discharge or otherwise discriminatory acts in the compensation or terms, conditions, or privileges of employment of Complainant by Respondent.
4) A causal connection between Complainant's opposition to hazards and the termination of Respondent's employment.
5) Damages resulting from Respondent's action.

These elements must be considered separately.

1) ORS 654.062 states that every employee should notify his employer of any violation of law, regulation, or standard pertaining to safety and health in his place of employment when the violation comes to the knowledge of the employee. The evidence in the case at hand establishes that Complainant discussed perceived safety hazards

with various members of Respondent's management team. This forum does not find herein that safety violations did exist at Respondent's worksite. However, such a finding is not required for Complainant to establish a prima facie case. Nor does the statute require that Complainant report perceived violations to the Accident Prevention Division of Oregon or OSHA. It need only be shown that Complainant objected to practices he reasonably believed to be safety violations, which if shown to exist would be prohibited by ORS 654.001 to 654.295.

2) The evidence establishes that Complainant made his concerns known on numerous occasions to several of Respondent's managers. Respondent thus had knowledge of Complainant's opposition to alleged unsafe practices. Included among his work related complaints to management were several complaints to Mr. Busbee about what Complainant considered to be unsafe conditions while working with asbestos. Complainant repeatedly requested air monitors for use in determining the level of asbestos dust in work areas.

3) It is not disputed that Complainant was laid off on January 14, 1980, and Complainant was not rehired for work with Respondent.

4) Complainant's termination immediately followed his discovery and discussion of a letter from the Accident Prevention Division directing workers' attention to certain possible safety hazards in working with asbestos. Although Complainant's layoff was allegedly necessitated by a reduction in force, he left an unfinished task and was replaced by another carpenter who had been hired for a brief period of time. This evidence is sufficient to establish a rebuttable presumption that, absent another explanation, Complainant's employment was terminated due to his opposition to safety hazards.

5) Complainant was unemployed from January 14, 1980, through March 5, 1980, and lost wages during that period of time as defined in the facts found herein and as a direct result of Respondent's discriminatory actions.

Respondent's Burden

Once Complainant has established a prima facie case, Respondent must articulate a legitimate, nondiscriminatory reason for its actions, which then affords Complainant a full and fair opportunity to persuade this forum that such reason is pretextual.

Respondent asserts that Complainant was laid off due to a reduction in force necessitated by lack of work. However, the evidence shows that another worker took Complainant's place in order to complete the job to which Complainant was assigned at the time of his layoff. Therefore, Respondent's assertion is not credible and this forum finds the legitimate, nondiscriminatory reason asserted by Respondent to be pretextual.

Credibility of Lloyd Busbee

Mr. Busbee's knowledge of complaints by Complainant of safety hazards is well established by the evidence. It was Mr. Busbee who was responsible for plant safety. His testimony on matters at issue contradicts that of other witnesses and is without corroboration. Documentation offered in support of his testimony is sparse and much of the documentation which would normally be kept in the ordinary course of business was stated by Mr. Busbee to be unavailable. Mr. Busbee's testimony is in conflict with that of other witnesses on several issues, including whether Complainant's scaffolding project was completed at the time of his termination and whether Complainant ever brought hazards to Mr. Busbee's attention. In each case where Mr. Busbee's testimony conflicts with Complainant's testimony, this forum has found Mr. Busbee's testimony untrustworthy and given it little weight in the resolution of the issues in these proceedings.

General Damages

The Agency seeks damages for mental suffering including loss of human dignity and frustration. Complainant testified that he felt badly about losing his job and that he was afraid he would be unable to pay his bills and that he had been subjected to abusive and profane language from Mr. Busbee. Mr. Busbee denied using such language but in view of findings of the trustworthiness of Mr. Busbee's testimony, Complainant's testimony is deemed the more reliable. Further, Complainant's undisputed testimony was that he visited a physician three or four times following his layoff for help in fighting depression that resulted from his layoff.

The Court of Appeals upheld a finding of general damages for mental suffering in *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979). More recently, in *City of Portland v. Bureau of Labor and Industries*, 61 Or App 182, 656 P2d 353 (1982), the court upheld an award for mental suffering for retaliation by an employer against an employee for filing a civil rights complaint. Where evidence of mental suffering as a result of discriminatory conduct is presented, this forum may appropriately award general damages. An award of $750 is justified by the evidence of Complainant's mental suffering in this matter.

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 as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, upon execution of the Order in this matter, a certified check payable to the Bureau of Labor and Industries in trust for Jason A. Brooks in the amount of SIX THOUSAND SIX HUNDRED SIXTY-ONE DOLLARS and SEVENTY-SEVEN CENTS ($6,661.77). This amount represents $4,535.89 in damages for wages Complainant lost because of Respondent's unlawful employment practices set out above, plus interest thereon computed and compounded annually at the rate of nine per cent, in the amount of $1,375.88 computed from March 6, 1980, through March 31, 1983. Interest will continue to accrue until the date upon which Respondent complies with this order, and SEVEN HUNDRED FIFTY DOLLARS ($750.00), which represents damages for mental anguish Complainant suffered because of Respondent's unlawful employment practices set out above.

2) Cease and desist from discriminating against employees because of said employee's opposition to safety hazards at Respondent's work sites.

In the Matter of
SOUTHERN ELECTRICAL AND PIPEFITTING CORPORATION,
a foreign corporation, Respondent.

Case Number 21-81
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 15, 1983.

SYNOPSIS

Complainant's original complaint, which alleged that Respondent retaliated against Complainant for expressing safety concerns, was timely filed, and an amendment over a year after the filing alleging failure to re-employ an injured worker was reasonably related and also timely. Finding that Respondent reinstated Complainant when he returned after an injury with an unrestricted release, the Commissioner ruled that Respondent fulfilled its legal obligation under ORS 659.415, and did not thereafter owe Complainant an available and suitable position under ORS 659.420. The Agency did not established that Complainant was disabled under ORS 659.425. Finding no violation of law, the Commissioner dismissed the Specific Charges and the complaint. Pursuant to the public records law, the Commissioner did not permit discovery of the Agency's investigative file because Respondent showed no public interest in the disclosure. ORS 192.500(1)(h); 654.062(5)(b); 659.040(1); 659.415; 659.420; 659.425; OAR 839-03-080 (1); 839-04-030(1)(a); 839-04-120.

The above-entitled contested case came on regularly for hearing before Dale A. Price, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held March 30, 1982, in the Blue Room of the State Forestry Building, 300 Fifth Street, Bay Park, Coos Bay, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Respondent Southern Electrical and Pipefitting Corporation (SEPCO), was represented by Richard Hunt, Attorney at Law. Complainant Terry L. Neely was present and testified.

The Agency called as witnesses: Gloria Tate, Transcriptionist for Complainant's physician; Fred King, Pipefitter and Union Steward; and James Anglin, Complainant's work partner. Respondent called as witness Lloyd Busbee, Labor Relations Representative and Safety Coordinator for SEPCO.

Having fully considered the entire record in this matter, I, Mary Roberts, hereby make the following Rulings Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS UPON MOTIONS

1) In a letter prior to hearing, Respondent requested a subpoena directing Complainant and counsel for the Agency to appear and produce all documents contained in the Agency file or held by Complainant which relate to this case. Respondent asserts that these materials are crucial for the adequate preparation of its defense. The Presiding Officer issued oral rulings upon Respondent's requests. These rulings granted Respondent's requests, but limited the production of documents to those not protected by the confidentiality provisions of ORS 192.500(1)(h) and OAR 839-03-080 (1). The oral rulings on Respondent's requests are hereby affirmed.

2) In a letter prior to hearing Respondent filed a Motion to Compel production of the investigative file in this matter. The Presiding Officer issued an oral ruling upon Respondent's motion, which granted said motion to the extent that it does not conflict with the confidentiality provisions of ORS 192.500(1)(h) and OAR 839-03-080 (1). The oral ruling on Respondent's motion is hereby affirmed.

3) In a letter prior to hearing Respondent filed a Motion to Dismiss the Specific Charges in this matter on the grounds that the Complaint was not timely filed and that the Commissioner, therefore, has no jurisdiction to proceed in this matter. Complainant's original complaint alleging a violation of ORS 654.062(5)(b) was filed by letter of his attorney to the Commissioner March 25, 1980. The letter stated that it was a complaint pursuant to a statute within the Commissioner's jurisdiction, set forth the facts of the alleged violation, gave Complainant's name, town of residence, and home phone number and was signed by the Complainant's attorney representative. ORS 654.062 (5)(b) requires the Commissioner to process such complaints as any complaint of unlawful employment discrimination under ORS 659.010 to 659.110. ORS 659.040 sets forth the procedures for filing a complaint of an unlawful employment practice and allows an aggrieved person to file through his/her attorney. This filing was within the 30-day statutory limit. This complaint was amended in form to comply with the Bureau of Labor and Industries verified complaint August 5, 1980. Although the original complaint alleged discrimination against a person filing safety complaints, the Agency asserts the facts alleged, if proven, would support a finding of violation of ORS 659.420. Respondent objects to the amendment of the complaint to allege such a violation on June 10, 1981, after the one year period required by ORS 659.040(1) had elapsed.

The Supreme Court stated in *School District No. 1 v. Nilsen*, 271 Or 461, 468, 534 P2d 1135 (1975), that the Attorney General is not limited to the allegations of a complaint originally filed by the lay complainant because:

> "A private complainant is not trained or experienced in the filing of complaints nor in the recognition of all the facets or effects of discrimination . . . .
>
> ". . . The only limitations placed on the specific charges entered by the Attorney General are:
>
> "a) The Complainant must have had standing in the first instance

to raise the issues which are first given explicit expression by the Attorney General; and

"b) The issues so raised may encompass discrimination only like or reasonably related to the allegations in the individual's complaint to the Commissioner."

The Specific Charges in this matter do meet these criteria.

A ruling upon this motion was reserved prior to hearing. Respondent's motion is hereby denied.

4) At hearing, counsel for the Agency moved to amend the Specific Charges as follows:

Charge IV, add "and he was disabled from working in that area"

Respondent opposed the amendment as untimely. A ruling was reserved thereby and the objecting party fails to satisfy the presiding officer that the admission of such evidence would prejudice its defense. Since no allegation of prejudice was offered, the Agency's motion to amend is hereby granted.

5) Prior to hearing, counsel for the Agency obtained a subpoena which would compel Respondent's appearance and production of numerous documents. Respondent filed a Motion to Quash the Subpoena. A ruling was reserved. At hearing, counsel for the Agency determined that the requested documentation was unnecessary and her request for its product was withdrawn.

6) At the conclusion of the presentation of the Agency's case, Respondent filed a Motion to Dismiss the Specific Charges because of the Agency's alleged failure to state a prima facie case. The Agency has met its initial burden to provide evidence in support of each element of the violation alleged. Respondent's Motion to Dismiss is hereby denied.

7) On March 4, 1983, the Agency submitted a Motion to Strike portions of Respondent's "Statement in Opposition to Agency's Exceptions and Respondent's Responsive Exceptions." OAR 839-04-120 provides:

"Parties may file specific written exceptions to the Proposed Order within 30 days of the date of service of such Proposed Order. Exceptions which respond to another party's exceptions to the Proposed Order may also be filed. These responsive exceptions must be filed within 15 days of the date of service of the other party's exceptions."

The language of this rule is a limitation upon the scope of responsive exceptions. Should a party fail to timely file exceptions, this deficit may not be made up by filing responsive exceptions of unlimited scope. The purpose of responsive exceptions is to give each party an opportunity to review the other's exceptions and then respond to the issues raised therein. The Motion to Strike is hereby granted. This forum has not considered those portions of Respondent's Responsive Exceptions so stricken.

FINDINGS OF FACT – PROCEDURAL

1) On or about March 25, 1980, Terry L. Neely filed through his attorney a complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that he had been and

continued to be discriminated against in connection with his employment by Respondent because of his opposition to safety hazards allegedly existent at Respondent's work site where he was employed.

2) On or about August 5, 1980, the March 25, 1980, complaint was submitted by Terry L. Neely on forms the Civil Rights Division of the Bureau of Labor and Industries referred to as a verified complaint which alleged the same violations as those set forth in the complaint filed through Complainant's attorney.

3) On or about June 10, 1981, Terry Neely amended his complaint to include the charge that Respondent had failed to reinstate him to available and suitable work following his recovery from a compensable injury and his demand for reinstatement.

4) Following the filing of the aforementioned verified complaint and its subsequent amendment, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

5) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a foreign corporation engaged in business in the State of Oregon. Respondent utilized the services of six or more employees, and as such is an employer as defined by ORS 659.400. Respondent is, therefore, subject to the provisions of ORS 659.420.

2) Complainant was hired on or about January 31, 1979, as an apprentice pipefitter to work at a plant owned by International Paper Company in Gardiner, Oregon.

3) At the International Paper Plant, Respondent performed work in five areas: caustics, powerhouse, paper, pulp, and chip receiving.

4) During his employment, Complainant worked in several different work areas within the International Paper Plant, including the caustics areas.

5) On or about January 29, 1980, Complainant suffered pulmonary distress while working around smudge pot fumes in the pulp area. He went to the company nurse and filled out workers' compensation forms. Complainant received workers' compensation for February 1, 1980.

6) Complainant returned to work February 2, 1980. At this time, no restrictions or limitations were imposed on his work activities by his physician. He was assigned to work in areas of the plant with low levels of caustic fumes until about February 28, 1980. On or about February 27, 1980 Complainant's foreman, Jim Crockett, informed him that he was to be reassigned to the caustics area effective February 29, 1980. At the time of Complainant's reassignment to the caustics area, pipefitters were working in several other areas of the plant where caustic fumes were of lesser levels, and Complainant was asked to train other pipefitters to replace him at the job he left to go to the caustics area.

7) On February 28, 1980, Complainant visited his physician and expressed concern regarding his return to work in the caustics area. His physician advised him to go ahead and work there and stop work in the caustics area if he experienced trouble.

8) On March 3, 1980, Complainant worked in the caustics area for a portion of the morning before his lungs began to bother him. He then went to the company nurse who gave him a note advising that he change work locations. Complainant then went home after asking shop steward, Fred King, to inform foreman Jim Crockett of his absence. Later on the same day Complainant saw his physician who administered a vitator exam which showed that Complainant was within the lower limits of normal. The doctor found no evidence of lung problems per se or reactive airway disease, but did believe it possible that Complainant was having a reactive airway problem when exposed to caustic fumes. He informed Complainant he would recommend he be reassigned to a work area with a lesser concentration of caustic fumes.

9) On or about March 4, 1980, Complainant showed his foreman, Jim Crockett, a note from the company nurse, Christy VanderBoom, that recommended he be transferred to another area and informed Mr. Crockett that another note recommending transfer was then being prepared by his physician. Complainant then asked his foreman, Jim Crockett, for a transfer out of the caustics area. On the same day, Complainant, Mr. Crockett, and Union Shop Steward Fred King went to General Foreman Jerry Storey to request a transfer the Complainant. Mr. Storey decided to call Charles Lamar, who was Assistant Pipe Foreman and the next senior man in the chain of command. Mr. Lamar arrived and Mr. King informed him of Complainant's prior lung injury and desire to be transferred to a work area with a lesser concentration of toxic fumes. Complainant told Mr. Lamar about the forthcoming note from his physician. Mr. Lamar told Complainant to return to the caustics area or he would have to terminate his employment. On or about March 4, 1980, Complainant's employment was terminated.

10) On the afternoon of his discharge, on or about March 4, 1980, Complainant obtained a letter from his physician which noted his possible pulmonary problems and recommended that he not work around caustic fumes for an undetermined length of time. Following procedures required of a discharged employee, Complainant presented this letter to his Union Business Agent. Although the letter was mistakenly dated March 5, 1980, this forum finds that the letter was written and delivered by hand to Complainant on March 4, 1980, after his termination.

11) On or about March 4, 1980, Complainant went to his union hall in Coos Bay and signed the "out of work" list. While unemployed, Complainant was not, under union rules, permitted to seek other work as a pipefitter; rather he was required to await assignment by his union. Complainant was allowed to seek work in other fields, which he did diligently, but without success. Complainant's next employment began March 26, 1980, with Hoffman Construction Company at the same rate of compensation he was paid by the Respondent at the time of his termination. Between March 4 and March 26, Complainant received unemployment compensation totaling $390.

12) Following Complainant's discharge, Complainant's replacement, Leon Farmer, and Complainant's former partner, James Anglin continued to work for Respondent until May 2, 1980, when they were laid off due to lack of work.

13) Complainant was paid $14.70 per hour in February of 1980 and received travel pay at the rate of one-half hour per two hours worked. Based on an eight hour day, plus two hours travel time, Complainant's daily rate of compensation at the time he was terminated was $147. Complainant lost 16 days of work between March 4 and March 26, 1980.

14) As a result of his termination, Complainant felt extremely frustrated and hurt. He felt his reputation in the field was damaged and feared his termination would affect his progress in the apprenticeship program. As an apprentice pipefitter, Complainant was required to have a job in order to attend and pass classes. He was mentally upset. He was proud to be a pipefitter and felt that his termination was a "slam" on his record. He had recently fathered his second child and was anxious about how he would support that child and his family without income. Complainant and his wife met with a psychologist in an attempt to relieve the tensions caused by his termination.

15) Lloyd Busbee testified that he assumed that Complainant and James Anglin were transferred to the caustics area because their current jobs were completed. Both Complainant and Mr. Anglin testified that this was not the case. Mr. Busbee testified that he was sure that only a few minor tasks remained to be done in the caustics area when Complainant and Mr. Anglin were transferred there. Mr. Anglin and Complainant's replacement worked in the caustics area for about one month after Complainant's termination.

Mr. Busbee testified that, at the time of Complainant's discharge, there was only one pipefitter crew working at the plant, yet Fred King and Complainant's father were both working on different pipefitting crews at the time of Complainant's discharge. Mr. Busbee's testimony was, at times, false or uninformed. His testimony must be disregarded where it conflicts with that of other witnesses.

ULTIMATE FINDINGS OF FACT

1) On January 28, 1980, during his employment as an apprentice pipefitter with Respondent at the International Paper Plant in Gardiner, Complainant suffered a compensable injury to his lungs caused by the inhalation of toxic fumes.

2) Complainant filed a workers' compensation claim and received compensation for one day of lost wages.

3) Complainant returned to work February 2, 1980. No work restrictions were imposed by his physician.

4) From February 2, 1980, through February 28, 1980, Complainant worked for Respondent in areas of the plant with low caustic fumes.

5) On or about February 27, 1980, Complainant was told he would be reassigned to the caustics area.

6) Complainant consulted his physician on February 28, 1980, who recommended he work in the caustics area, but stop work in this area if he experienced trouble.

7) Complainant attempted to work in the caustics area on March 3, 1980, but experienced pain from the caustic fumes. Complainant saw the company nurse, who gave him a note recommending his transfer. He left work and consulted his physician who found that his lungs were within normal limits and that there was no evidence of reactive airway disease, but believed that despite the test results, Complainant might be experiencing legitimate problems and recommended he work in another area.

8) Complainant returned to work March 4, 1980, showed his supervisors the nurse's note recommending transfer and advised them he would have a similar note from his doctor that day.

9) Complainant refused to go to work in the caustics area and was terminated.

CONCLUSIONS OF LAW

1) Under ORS 192.500(1)(h) Respondent is not entitled access to confidential investigatory files of the Agency until such time as the complaint is resolved under ORS 659.050 or final administrative determination is made under ORS 659.060, unless the public interest requires disclosure at an earlier time. Because the Complaint in this matter has not been resolved by conciliation under ORS 659.050 or by final administrative determination following an administrative hearing under ORS 659.060, Respondent is not entitled to access to the investigation file, where the only interest demonstrated is the private interest of Respondent.

2) OAR 839-03-080(1) also bars Respondent's access to investigative files with the following language:

> "The contents of the investigative file and related records including, but not limited to the names and addresses of the Complainant and Respondent, documents and other evidence received by the division in the investigation of a complaint are confidential until the complaint is closed unless the public interest requires disclosure. However, any individual may inspect and/or copy information or statements he/she has given to the division."

Respondent has demonstrated no public interest sufficient to circumvent the confidentiality provisions of the rule.

3) OAR 839-04-030(1)(a) states that the specific charges shall set forth:

> "A) A claim for relief including a brief and plain statement of allegations which support the claim and reference to the particular sections of the statutes and rules under which a claim is made.
>
> "B) A description of the relief sought."

The Specific Charges in this case do identify a specific alleged violation of Oregon law and the relief sought.

4) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.110 and 659. 400 to 659.435.

5) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter relating to the alleged violation of ORS 659.420 herein.

6) The actions and motivations for these actions of Charles Lamar and Lloyd Busbee described herein are properly imputed to Respondent.

7) Respondent did not fail to re-employ Complainant to available and suitable work after Complainant sustained a compensable injury and demanded re-employment. After his January 29, 1980, compensable injury, Respondent reinstated Complainant when he was released for work with no medical restrictions. On March 3, 1980, Complainant experienced pain while working, but filed no claim for workers' compensation and was not in fact compensated for the alleged injury. On March 4, 1980, he was terminated for refusing to work in his assigned area.

OPINION

Agency Prima Facie Case

The Agency's initial burden of proof requires production of evidence in support of the following elements:

1) Complainant sustained a compensable injury while in Respondent's employ.
2) Complainant was disabled from performing the duties of his former regular employment, but was able to perform described types of work.
3) Complainant demanded reemployment to available and suitable work.

Complainant sustained a compensable injury while in Respondent's employ.

It is undisputed that Complainant received workers' compensation for one day in February 1980 after reporting to the company nurse that he had pulmonary problems from inhaling toxic fumes while on the job for Respondent. An exhibit, a receipt for compensation, is evidence of an injury.

Complainant was unable to perform his regular work assignment.

The testimony of Complainant and co-workers establishes that he returned, without restriction, to work for Respondent on or about February 2, 1980, and successfully worked his regular schedule until February 28, 1980, when he received notice of reassignment to the caustics area. Respondent, having returned Complainant to his regular employment after he recovered from a compensable injury, met its statutory obligation under ORS 659.415.

If, in fact, Complainant was at any time unable to perform his regular job for Respondent, the disability did not arise until March 3, 1980, when his physician and the company nurse recommended his transfer in response to his complaint that he was experiencing pain in his lungs. When Complainant returned from a compensable injury on February 2, 1980, he returned with no medical restrictions, or at least he made no assertion to Respondent of any restrictions at that time. Respondent reinstated Complainant as required under ORS 659.415 to the job he had held prior to the injury, which was available and suitable, as no

medical limitations had been placed on Complainant's return to work.

The Agency has not established that the pain Complainant experienced March 3, 1980, was a disabling condition resulting from a compensable injury, since Complainant filed no workers' compensation claim and no other evidence was presented to establish the existence of a compensable injury. Nor has the Agency contended that Complainant's condition was a physical handicap, which Respondent could have accommodated as required under ORS 659.425. No evidence was presented that Complainant's termination was in retaliation for his previous workers' compensation claim. Indeed, the Specific Charges do not allege a violation of ORS 659.410.

The Agency has failed to establish a prima facie violation of ORS 659.420. Respondent fulfilled it's legal obligations when Complainant was reinstated to his former position on February 2, 1980, upon his return to work from a compensable injury. At the time Complainant refused to work in the caustics area, he was not a medically restricted injured worker making demand for available and suitable employment. Available and suitable employment had been provided by Respondent after Complainant's only documented compensable injury, and no more is required. Therefore, Respondent cannot be found to have committed an unlawful employment practice under this section.

ORDER

NOW, THEREFORE, Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and the Complaints filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of

MINI-MART FOODSTORES, INC.,

an Oregon corporation, Respondent.

Case Number 13-81

Final Order of the Commissioner

Mary Wendy Roberts

Issued March 28, 1983.

SYNOPSIS

Respondent's primary stockholder and president subjected Complainant to a polygraph examination in connection with funds allegedly missing from one of two stores she managed, and then terminated her. The Commissioner ruled that Complainant's signature giving consent for the examination, and the fact that one test was administered in the State of Washington, was not material under ORS 659.227. The Commissioner held that Respondent committed an unlawful employment practice under ORS 659.227, and awarded Complainant $24,110 in lost wages, $100 for expenses, $500 for mental distress, and pension and profit-share contributions, plus front pay and interest until reinstatement. ORS 659.225; 659.227; OAR 839-04-060(10)(b).

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 7, 1982, in the Flag Room of the Astoria Public Library, Astoria, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Respondent Mini-Mart Foodstores, Inc. was represented by Daniel Van Thiel, Attorney at Law. Complainant Victoria VanBuskirk was present and testified.

In addition to Complainant, the Agency called as witnesses Evelyn DeHaven, an employee at Respondent's Astoria, Oregon, store during times material; and Dennis VanBuskirk, Complainant's husband. Respondent called as witnesses Helen Gates, an employee at Respondent's Warrenton, Oregon, store during times material; Richard Delphia, who was present during a conversation at issue herein; John Jenkins, polygraph examiner; and Gene Cope, Respondent's primary stockholder and president.

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

RULINGS ON MOTIONS

At the beginning of the hearing, the Agency moved to amend the Specific Charges to conform to certain allegations in Respondent's answer. Respondent did not object to these amendments, and they were allowed.

At the same time, the Agency also moved to amend the Specific Charges to add two more items to the Agency's prayer for damages. Respondent objected to these amendments, stating that it would be prejudiced by their inclusion in the Specific Charges at this time, and asked the forum to deny the Agency's motion. Respondent also asked the forum to continue the hearing to afford Respondent an opportunity to review and respond to these amendments, if the forum allowed them to be made.

The Presiding Officer ruled that she would hear, at that time, evidence relating to the Specific Charges as amended by her granting of the Agency's above-mentioned initial motion, because Respondent would not be prejudiced thereby in maintaining its defense on the merits. The Presiding Officer also granted the Agency's motion to amend the prayer for damages, with the caveat that she would reconvene the hearing at a later date to hear evidence concerning these amendments, if either party so requested within thirty days after this hearing. (This is ten days more than OAR 839-04-030 gives respondents in these matters to file an answer to the Specific Charges.) The Presiding Officer had correctly concluded that since this caveat would give Respondent ample opportunity to review and respond to these amendments, allowing them would not prejudice Respondent in maintaining its defense upon the merits. Accordingly, the Presiding officer properly allowed these amendments.

An exhibit in the record recites the Specific Charges as amended. Within thirty days after the hearing, the parties

notified the forum that no reconvenement of the hearing was necessary.

FINDINGS OF FACT – PROCEDURAL

1) On March 30, 1981, Victoria R. VanBuskirk filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that Respondent had subjected her, directly or indirectly, to polygraph examinations when she was Respondent's employee or prospective employee.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Thereafter, the Civil Rights Division of the Bureau of Labor and Industries attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

4) After the hearing, the record remained open for several purposes, one of which was to allow Respondent to supply to the Agency, and the Agency to submit to this forum, if it wished, information clarifying Respondent's profit-sharing and pension plan figures and language in an exhibit and projection of what Complainant would have earned in 1982, had Respondent continued employing her. Thereafter, the Agency did submit this information, and the Agency and Respondent joined in requesting its admission into the record. Accordingly, this material has been marked and admitted.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation which operated convenience food stores in the State of Oregon. In that business, Respondent utilized the personal service of one or more employees and reserved the right to control the means by which such service was performed. Respondent's primary stockholder and president was Gene C. Cope at all times material.

2) On June 26, 1975, Complainant completed an application for employment with Respondent. At that time, her name was Victoria R. Styron. The application form she completed included the following section:

"AGREEMENT:

"I, the undersigned, am aware that Mini-Mart has a polygraph program as part of the Company's policy for my protection and the protection of the Company. I signify by my signature below, my agreement to take a polygraph examination (lie detector test) now or at any time in the future during my employment with Mini-Mart or upon request by management when I terminate my employment.

_____ _____
signature date

_____
witness

"Note: Agreement to polygraph is not a condition of employment."

Complainant signed the signature line in this section when she completed her application. As an applicant who wanted employment, she did not

believe that she could refuse to sign this "agreement."

3) Shortly after submitting this application, Complainant began working as a cashier at Respondent's Astoria, Oregon, store. She was employed by Respondent continuously thereafter until April 28, 1980.

4) During Complainant's employment, Respondent had its employees take polygraph tests periodically, to let employees know that Respondent expected them to be honest. Respondent termed this "preventive maintenance." At times material herein, if Respondent could have afforded it, Respondent would have liked to give polygraph tests to all its hirees before they started work.

5) Respondent has had employees who did not take a polygraph test during their employment, but there is no evidence as to when these persons were employed. At the time of hearing, no person who was unwilling to take a polygraph test was employed by Respondent.

6) Between June 26, 1975, and April 28, 1980, Complainant was given several polygraph tests in conjunction with her employment by Respondent. Each examination was administered by John Jenkins, a self-employed polygraph examiner whom Respondent paid to administer polygraph tests to its employees from 1975 to the date of hearing.

One polygraph test was administered to Complainant, at the request of Mr. Cope, in late 1975 or early 1976 at Respondent's store in Kelso, Washington. Mr. Cope transported Complainant to and from the test site and remained at the test site while the test was given.

On March 21, 1977, Complainant was given another polygraph examination in connection with her employment by Respondent. This test took place at Respondent's Astoria store. At the same time, every person working in this store was given a polygraph test. Again, Mr. Cope was at the test site while these tests were given.

Complainant was given another polygraph test in connection with her employment on June 28, 1979. This test also took place at Respondent's Astoria store. Each of the employees of Respondent's Astoria and Warrenton, Oregon, stores took a polygraph test at this time.

On another occasion, Complainant was scheduled to take another polygraph test in connection with her employment by Respondent. By this time, she had become manager of one of Respondent's Oregon stores. Respondent had instructed her to schedule Respondent's employees for testing, leaving herself for last. Because Mr. Jenkins had no more time after he had tested all other employees of Respondent's Astoria and Warrenton stores, Complainant was not actually tested on this occasion.

7) Respondent has not had any of its employees take a polygraph test in the State of Oregon since October 1979, when Oregon law was amended to include the provision which bars an employer from subjecting an employee to a polygraph examination.

8) As part of his standard procedure in administering a polygraph examination, Mr. Jenkins sought the

potential examinee's signature on a consent form which read:

"POLYGRAPH EXAMINATION CONSENT FORM

"Case No._____Date_____

"I,_____ , voluntarily and without threat, duress, force or promise of reward, agree to take a polygraph examination.

"I also realize that my _____ present position with this employer _____ prospects of being hired by this employer will not be in any way affected if I do not take this test. In spite of this, I request the test from _____ of Northwest Polygraph Consultants.

"I hereby authorize _____ to place the necessary polygraph attachments on my person (hand, arm and chest).

"I understand and agree that the results of this examination and any opinion related thereto may be made known to _____ of _____ and its security department, orally, or in writing, or both.

"Although I understand and realize that the examination results and opinions may prove favorable or unfavorable to me, I hereby release and forever hold harmless the said _____ and the above company from any and all claims, liability or legal action that I may have or could possibly have, growing out of, or as a result of, in any way whatsoever, this examination or making known as above such results therefrom.

_____ _____

Witness Person to be Examined

"This examination was concluded at _____ on the above date.

"Having submitted myself freely to this examination, I hereby reaffirm my agreement as expressed above. I swear that during said examination there were no threats or harm done to me or any promises made to me during the entire time I have been involved either with the polygraph examiner or the signing of this form.

_____ _____

Witness Person Examined"

9) In administering a polygraph examination, Mr. Jenkins explained the testing procedures and the consent form and obtained the testee's signature on the form. He then attached the testee to the polygraph machine and asked the testee to lie to him, so that he could see what the machine registered. He then read and explained the questions he was going to ask, turned on the polygraph machine and asked the questions and obtained the answers thereto several times.

10) The first time Mr. Jenkins administered a polygraph test to a particular person, he went through the consent form more thoroughly with that person than in subsequent tests of the same person. He did not administer the examination unless he believed that the testee understood the language on the form. After explaining the form, he gave the testee an opportunity to ask questions about it and asked the testee to sign it if in agreement with it said.

11) Mr. Jenkins adhered to the above-described procedures in testing Complainant.

12) Before April 28, 1980, none of Respondent's employees had failed a polygraph test administered by Mr. Jenkins.

13) By April 1980, Complainant had been promoted by Mr. Cope to manage Respondent's two Astoria and Warrenton stores. As such, she was responsible to Mr. Cope for the operation of those stores. For the most part, she "did the books, took care of the cash register on her shift, did freight, and did hiring and firing of employees." She had access to a great deal of money. Mr. Cope regarded Complainant as, and this forum finds that she was, an excellent and important employee.

14) During the time Complainant was a manager for Respondent, none of Respondent's employees or prospective employees with whom Complainant dealt refused to take a polygraph test, and Complainant was not aware of any of Respondent's employees or prospective employees doing so. There is no evidence that any of Respondent's employees was told that he or she could refuse to take a test, other than the language contained in the two "consent" forms discussed above.

15) Complainant reasonably assumed that she had to take the polygraph tests to which Respondent subjected her before April 1980, and that she could not refuse to take any of these tests without suffering some negative consequences related to her employment.

16) On or about the afternoon of Thursday, April 24, 1980, after Complainant's work shift was finished, Mr. Cope told Complainant that he wanted to talk with her. Richard Delphia, who knew both Mr. Cope and Complainant, was present during the conversation which ensued, at Mr. Cope's request. Mr. Cope indicated that he suspected Complainant of stealing money from Respondent. Complainant answered that she did not know what Mr. Cope was talking about. Mr. Cope explained that money was missing from Respondent's Warrenton store and that someone had marked "pay-outs" on its cash register tape for which there were no corresponding receipts. Mr. Cope had inferred therefore that someone had pocketed the money marked as paid out. He stated that he felt that Complainant was the only suspect at this point, because the money was taken when Complainant had access to it. Complainant denied Mr. Cope's accusation. Complainant and Mr. Cope then talked about how to ascertain who had taken the missing funds. Complainant made several suggestions. At some point thereafter, Mr. Cope asked Complainant if she would be willing to take a test. Complainant knew that Mr. Cope was referring to a polygraph examination and said she would be willing to take one, because she did not steal the money. This conversation took place at either Respondent's Astoria or Warrenton store.

17) Complainant agreed to take a polygraph test during the above-described conversation because she had already taken several such tests without objecting and because she did not really see any other way to keep Respondent from suspecting her. She did not want to take the test, but she did not feel that she had any option if she wanted to keep her job. She had

not felt free to refuse the polygraph tests Respondent had her take in the past, and for the above-cited reasons, she felt even less free to refuse the test which Respondent asked her to take on or about April 24, 1980.

18) Before she actually took a polygraph test on April 28, 1980, and in an attempt to prove her innocence without having to take the test, Complainant asked Mr. Cope to assist her in ascertaining who had taken the missing funds. Before April 28, 1980, Mr. Cope cooperated in these efforts. On two nights, Complainant and Mr. Cope watched Respondent's employee closing the Warrenton store and took a reading of the cash register after she had left the store. This reading matched the reading of the same machine which Complainant took each of the following mornings before the store opened, indicating that no funds had been taken during the night. Thereafter, Complainant checked the nightly closing readings on this register against the opening readings the following day. After the day that Mr. Cope accused Complainant, there were no further instances of missing funds.

19) Respondent continued Complainant's employment until the day she took the below-described polygraph examination.

20) Mr. Cope made all arrangements and paid for the administration of a polygraph test to Complainant by Mr. Jenkins on April 28, 1980, in Respondent's Kelso, Washington, store. He notified Complainant of these arrangements and told Mr. Jenkins his version of the events which led to this test.

21) On April 28, 1980, Complainant drove to Respondent's Kelso store to take the polygraph examination. Mr. Cope was at the store when she arrived. Mr. Jenkins briefly explained the consent form to Complainant. After glancing at it to make sure it was the same as the form she had signed before her previous tests, Complainant signed the pre-test portion. She signed it because, as explained above, she felt she had no other choice but to take the test in order to keep her job.

Mr. Jenkins then formulated and reviewed the test questions with Complainant, attached her to the machine, and asked her the questions three times. Afterward, Mr. Jenkins told Complainant that the results showed deceptive statements. He went out of the room and told Mr. Cope the results. Mr. Cope went into the testing room and discussed the results with Complainant. Complainant said that she was nervous and reiterated that she did not take the missing money. She indicated her willingness to answer the test questions one more time. Mr. Cope left the testing room, asking Mr. Jenkins to ask Complainant the test questions one more time which Mr. Jenkins did. The results again showed deceptive statements. Mr. Cope told Complainant that the results showed that she had taken the missing money. He added that he would like her to return her store keys and that he would have the assistant manager in each of the stores Complainant managed perform her work until they could figure out what to do about the missing money. This forum finds that these statements, taken together, constitute

Respondent's suspension of Complainant's employment.

22) Complainant did not respond to Mr. Cope. She believed that he meant that she should not come to work and therefore, that she was fired as of that time. She took Respondent's store keys out of her purse, laid them on the corner of a desk, and ran out of the store.

23) Complainant never signed the post-test portion of the Polygraph Examination Consent Form after she took any polygraph test to which Respondent subjected her.

24) If Complainant had passed the April 28, 1980, polygraph test, Respondent would have allowed her to continue working, and Mr. Cope and Complainant would have continued to try to discover what had happened to the missing funds. Mr. Cope believes that Complainant is not working for Respondent at present because of the poor results of her April 28, 1980, polygraph test. Cope felt Complainant was guilty of taking the missing funds because of the results of this examination.

25) When Complainant left Respondent's Kelso store after the April 28, 1980, polygraph test, she was very upset, angry and hurt because Mr. Cope had ended her employment. When she was driving back to Astoria, Complainant had to stop at the side of the road for 10-15 minutes to compose herself. Her vision was blurred by tears in her eyes caused by her severe agitation, so she could not focus on the road. She was still upset, crying, and very distraught when she arrived home.

26) Shortly after April 28, 1980, Complainant and her husband met with Mr. Cope, at their request, to discuss the possibility of Complainant's returning to her position in Respondent's employ. Complainant first asked if she could find out exactly how much money was missing and more about the circumstances of its loss, so that she could better discover the culprit. Mr. Cope responded that it would cost him too much to have his bookkeepers do the work necessary to ascertain exactly how much money was missing.

Complainant and her husband then asked if Complainant could take another polygraph test. Complainant wanted to do so to clear herself of suspicion. Mr. Cope was receptive to this, on the condition that Complainant would sign a form before taking the test which stipulated that either she or Mr. Cope could use the test results in court, whichever way they turned out. Complainant agreed to this stipulation. Mr. Cope told Complainant that if she passed this test, she could have her job with Respondent back. This discussion took place in the State of Oregon

27) After this meeting, Complainant consulted an attorney who instructed her not to take another test from Mr. Jenkins and referred her to another polygraph examiner, Kenneth Simmons.

28) Complainant arranged to, and did, take a polygraph examination in the State of Oregon from Mr. Simmons on May 3, 1980. Complainant passed this test by giving consistent responses indicative of truthfulness. Complainant made all arrangements and paid a

$100.00 fee to Mr. Simmons for this test.

29) As soon as possible thereafter, Complainant telephoned Mr. Cope and asked him if there was any way that she could get her job back. Mr. Cope asked, "Why?" and Complainant informed him that she had taken a polygraph test from Mr. Simmons and passed it. Mr. Cope told her that he wanted to talk with Mr. Simmons about the test's administration and with Mr. Jenkins about how the opposite results of Complainant's two tests could be reconciled. Mr. Cope said nothing at all to Complainant about reinstatement.

30) Thereafter, Mr. Cope had Mr. Jenkins analyze the results of the test Mr. Simmons administered to Complainant. After obtaining Mr. Simmons' written conclusions and charts of that test and consulting with at least one other polygraph examiner, Mr. Jenkins concluded that Mr. Simmons' test was inconclusive. Mr. Jenkins believed that Mr. Simmons' results were flawed because of the type of questions he had asked and because he had spoken only with Complainant before administering the test. Although there is no direct evidence that Mr. Jenkins conveyed his conclusion to Mr. Cope, this forum infers that he did.

31) Mr. Cope never contacted Complainant or offered to reinstate her. After waiting for a short time, Complainant tried several times to contact Mr. Cope by telephone. Unable to reach him directly, she left messages for him at his home. Mr. Cope never responded to these messages. Thereafter, Complainant's attorney took over her efforts to get back her job.

32) Complainant did not work for, and was not employed by, Respondent at any time after April 28, 1980.

33) On May 13, 1980, Complainant applied for unemployment compensation with the State of Oregon Employment Division. After she had explained what had happened and that she believed that Respondent had fired her, the Employment Division concluded that she was suspended from employment by Respondent and that she was eligible for benefits.

34) As of April 28, 1980, Complainant was earning $1440 every two pay periods in Respondent's employ.

35) As of April 28, 1980, Complainant was participating in Respondent's pension plan and its profit-sharing plans and Respondent had contributed a total of $4,543 on Complainant's behalf to these plans.

36) In addition to her regular salary, Complainant had received from Respondent at least two year-end bonuses, of $500 and $1000 respectively. These bonuses were based upon a certain percentage of Respondent's net profit for the year involved.

37) After April 28, 1980, Complainant began looking for alternative work as soon as possible. She found employment at Young's Bay Thriftway in mid-July 1980, and continued there until mid-February 1981. She was then off from work six to seven weeks. She subsequently returned to work at Thriftway until about the first of May 1981, when she was laid off. As of the date of hearing, she was still laid off from Thriftway.

Complainant earned a total of $6,566.06 from her employment with Thriftway in 1980 and $1,754.95 from this employment in 1981.

38) In July or August 1981, Complainant obtained work at Astoria Seafoods. This work was temporary, on an as-available basis, and it continued sporadically until sometime in September 1981. Complainant earned a total of $392.59 in this employment.

39) Complainant has had no other paid employment since April 28, 1980. There is no evidence on the record that she has failed to diligently search for employment at any time since that date.

40) Complainant's actual total earnings between April 28, 1980, and December 31, 1981, was $8,713.60.

41) If Complainant had worked for Respondent between April 28, 1980, and December 31, 1980, she would have earned a regular salary of $12,648 plus a $200 bonus. Respondent would have contributed an amount equal to ten per cent of her total earnings of $12,848, or $1,285, on Complainant's behalf to its pension plan. Because Respondent made no contributions to its profit-sharing plan in 1980, this forum concludes that Respondent would not have made any such contribution on Complainant's behalf between April 28, 1980, and December 31, 1980, had Respondent continued to employ Complainant.

42) If Respondent had continued to employ Complainant during all of 1981, Complainant would have earned a regular salary of $19,440.

At the end of 1981, the managers of Respondent's stores which Complainant managed received a total bonus of $535.62. In the absence of any contention to the contrary or any evidence as to how otherwise to calculate what Complainant's bonus would have been in 1981, this forum concludes that Complainant would have earned a $535.62 bonus had Respondent employed her at the end of 1981.

Respondent would have contributed an amount equal to ten per cent of Complainant's total 1981 earnings of $19,975.62, or $1,997.56, on Complainant's behalf to its pension plan, had Respondent employed Complainant during 1981.

Because Respondent made no contributions to its profit-sharing plan in 1981, this forum concludes that Respondent would not have made any such contribution on Complainant's behalf during 1981 had Respondent employed her during that year.

43) As of the time of hearing, no information was available as to what Complainant would have earned in Respondent's employ or what amounts Respondent would have contributed on Complainant's behalf to its profit-sharing and pension plans after December 31, 1981.

44) Before retirement age, Complainant would not have been entitled to receive any portion of what Respondent had contributed on her behalf to its pension or profit-sharing plan, unless she would have left Respondent's employ after her interest in those plans had vested. Complainant's interest would have vested when she had completed four years of participation in those plans. Complainant would not have had a vested interest as of the date of hearing, and there is no

evidence on the record as to when after the date of hearing Complainant would have gained a vested interest, had Respondent continued to employ her.

45) For three to four weeks after April 28, 1980, Complainant remained upset by the cessation of her employment with Respondent. Her agitation was heightened by the fact that the loss of her job had financial consequences which forced her family to give up a recently purchased boat and car. During this period, Complainant took non-prescription medication for the upset stomach caused by her distress.

For two months after April 28, 1980, Complainant remained sufficiently upset to cause her household to be in turmoil. Although her agitation has diminished since that time, she still becomes quite angry when she recalls the events of April 28, 1980.

All of the above-described mental distress was and is the direct result of Complainant having been subjected by Respondent to a polygraph examination.

46) For the reasons described in the Opinion below, this forum makes the following findings concerning witness credibility:

a) Where Mr. Cope's testimony differs from that of Complainant, this forum has found Complainant's testimony more credible and therefore attached more weight to it than to Mr. Cope's testimony.

b) This forum has given no weight to the efforts of Mr. Delphia in one instance, and Mr. Jenkins in another, to corroborate the testimony of Mr. Cope on major points at issue.

ULTIMATE FINDINGS OF FACT

1) Complainant was Respondent's employee from approximately June 26, 1975, to April 28, 1980. When her employment ended, she was manager of two of Respondent's convenience food stores in Oregon.

2) During Complainant's employment by Respondent, Respondent subjected Complainant and all its other employees to periodic polygraph examinations.

3) On April 24, 1980, Respondent accused Complainant of stealing money from one of the stores she managed.

4) After Respondent made this accusation, and during the same conversation, Respondent asked Complainant if she would be willing to take a polygraph test to clear herself of suspicion of theft. Complainant reasonably did not feel free to refuse to take this test, since she wanted to keep her job, so she agreed to take the test. Respondent made all arrangements and paid for the test. Because of the negative results of the test, Respondent suspended Complainant from its employ. If Complainant had passed the test, Respondent would have allowed Complainant to continue her employment since April 28, 1980.

As a direct result of Respondent's subjection of Complainant to two polygraph examinations administered on April 28, 1980, Complainant suffered the following adverse effects:

a) Complainant's loss of employment, which resulted in:

1) her earning, between April 24, 1980, and January 1, 1982, a total of $24,110.02 less in regular and bonus income than she would have earned during that time had Respondent continued employing her;

2) her potentially continuing to suffer earning losses, as measured by what she would have earned had Respondent continued employing her and what she actually earned or could have earned, from January 1, 1982, until January 1, 1984, or the date Respondent complies with paragraph 4 of the Order below;

3) her loss of $7,825.36 in contributions Respondent would have made on her behalf to its pension and profit-sharing plans as of January 1, 1982;

4) her loss of whatever contributions Respondent would have made on her behalf to its pension and profit-sharing plans, plus interest and any other benefits which would have accrued thereon, from January 1, 1982, until January 1, 1984, or the date Respondent complies with paragraph 4 of the Order below; and

5) the place Complainant would have earned in the vesting schedule for Respondent's pension and profit-sharing plans had Respondent continued to employ her from April 24, 1980, until the date Respondent complies with paragraph 4 of the Order below.

b) Complainant's mental anguish, consisting of her angry, upset, and hurt state of mind, which was severe on April 28, 1980, and continuing in steadily diminishing severity thereafter up to the time of hearing, and which manifested itself initially in physical discomfort and household turmoil.

c) Complainant's expenditure of $100 to pay for the May 3, 1980, polygraph test.

CONCLUSIONS OF LAW

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

2) Because those actions of Respondent which constitute its subjecting Complainant to two polygraph examinations in 1980 took place in the State of Oregon, the fact that one of these examinations was actually administered in the State of Washington has no relevance herein.

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

4) The actions, and motivations for those actions, of Respondent's agents Gene Cope and John Jenkins described herein are properly imputed to Respondent.

5) Complainant's signing a form which stated that the signer would take or was taking a polygraph test voluntarily does not affect the legal conclusion that Respondent subjected Complainant to the polygraph test. The Oregon Legislature enacted ORS 659.227 in recognition of the fact that an employee's "consent" to a polygraph examination related to his or her employment was in itself meaningless.

6) By conditioning in any way the employment or continuing employment

of a prospective employee or employee upon the results of a polygraph examination, an employer subjects, directly or indirectly, the employee or prospective employee to a polygraph examination in violation of ORS 659.227.

7) Respondent committed an unlawful employment practice in violation of ORS 659.227 as charged by subjecting Complainant, its employee and prospective employee, to two polygraph tests in 1980.

8) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant and order Respondent to offer her reinstatement under the facts and circumstances of this record, and the sum of money awarded as damages and the offer of reinstatement ordered in the Order below are an appropriate exercise of that authority.

OPINION

1. Did Respondent Subject Complainant To any Polygraph Examination?

ORS 659.227 provides that:

> "It is an unlawful employment practice for any employer to subject, directly or indirectly, any employee or prospective employee to any polygraph examination or psychological stress test."

This forum must ascertain herein the meaning of the phrase "to subject, directly or indirectly, any employee . . . to . . ." As far as this forum can determine, this is an issue concerning which no Oregon administrative or appellate forum has ruled. For this reason, certain parts of the discussion below will be detailed.

To determine the meaning of statutory language, this forum should first look at its plain meaning in common usage. The instant phrase is an imprecise, inexact term with no clear meaning: it can be given many different interpretations because it is ambiguous.

To determine the meaning which should be given to this inexact phrase, this forum must ascertain what the Legislature meant by using it. *Springfield Education Association v. Springfield School District No. 19,* 290 Or 217, 224, 621 P2d 547 (1980). To determine legislative intent, this forum must look to intrinsic aids such as construction of language used and extrinsic aids such as legislative history. *Cudd v. Aschenbranner,* 233 Or 272, 377 P2d 150 (1962); *Murphy v. Nilsen,* 19 Or App 282, 296, 527 P2d 736 (1974).

A. Statutory Construction

In arriving at the Legislature's intent in enacting a statute, this forum should read the statute in connection with all statutes relating to the same subject matter and give effect to every word, phrase, sentence, and section of all such statutes, if possible. *In re Holmlunds Estate,* 232 Or 49, 67, 374 P2d 393 (1962). ORS 659.225, like ORS 659.227, concerns the administration of polygraph tests. At the time SB 756, which became ORS 659.227, was enacted, ORS 659.225 provided that:

> "No person, or agent or representative of such person, shall require, as a condition for employment or continuation of employment, any person or employee to take a polygraph test or any form of a so-called lie detector test."

Because ORS 659.225 was in effect when SB 756 was enacted, it is to be assumed that "subject . . . to," as used in ORS 659.227, means something other than "require," as used in ORS 659.225. The alternative would be that ORS 659.227 was in part redundant to existing statute. It should not be presumed that any provision in a statute is redundant or useless. *M. & S. Const. Co. v. Commission,* 3 OTR 165, 167 (1968).

The words "directly or indirectly" strongly suggest that the meaning of "subject" in ORS 659.227 is very broad and certainly broader than the meaning of "require" in ORS 659.225. The legislative history of SB 756 reveals that this is true.

B. Legislative History

SB 756 was introduced in the Oregon Senate during the 1979 Legislative Session by Senator Stephen Kafoury. Senator Kafoury explained to the House Labor Committee that the administration of polygraph examinations to employees first came to his attention while he was on a Sunset Review Committee which was investigating the Polygraphers Examination Board. Senator Kafoury stated:

> "While we were looking through that Board and the laws that pertained to it, I discovered that the Oregon statutes presently say that . . . an employer can only use a polygraph examination on an employee if it's given voluntarily. So I looked at that and I thought . . . that's absurd on its face. How could an employee have a chance to turn . . . the test down; you would be admitting that you had been stealing or admitting that you had been doing something else by turning something down; it would be an impossibility.
>
> "So I said, we need to change that law. If we think it's bad policy for polygraphers . . . to use their tool on people . . . only in a voluntary way . . . it can't be done only in a voluntary way . . . it would have to be done involuntarily; and if you think it ought not to be done involuntarily, then you ought to abolish it. And that's what this bill does."
>
> House Labor Committee, Hearing on SB 756, Tape 25, Side 2, Tape Counter at 37-44 (May 14, 1979).

Senator Kafoury also testified to the Senate Committee on Local Government that:

> "If you thought it was wrong . . . to use lie detectors involuntarily in employment matters, then the only way to make it clearly involuntary (sic) is not to have them at all."
>
> Hearing on SB 756, Tape 14, Side 2, Tape Counter at 26-30 (March 19, 1979)

In addition, Senator Kafoury's intern submitted written testimony to the Senate Committee on Local Government, which was read aloud at the hearing on SB 756. That testimony indicated that the Oregon Legislature initially passed ORS 659.225:

> ". . . attempting to prevent an employee from being forced to take a polygraph examination if he or she doesn't want to. But two serious flaws have prevented (ORS 659.225) from doing what it is supposed to do. First the stipulation that an examination must be proven to have been 'required as a

condition of employment' makes the law so weak that it is almost meaningless. It is almost impossible to prove that a test was, in fact, mandatory. Again, from Mr. Linowes (Chairperson of the Privacy Protection Study Commission):

> 'Some argue that there is no harm or offensive intrusion if an applicant or employee voluntarily takes a polygraph or other truth verification test. The Commission believes that there can be nothing voluntary about agreeing to take a polygraph exam, particularly when one is applying for a job. If the employees do not agree to take a polygraph test to prove their innocence, or their honesty, there may be an assumption that they are less than honest and a cloud of guilt or of non-cooperation is created. The failure of an employee to voluntarily take a polygraph test may be interpreted by an employer as non-cooperative behavior and therefore, an employee may not be promoted or may even be fired.'

"And from Ms. Hayden (of the American Civil Liberties Union)

> 'It is sometimes argued that the polygraph test is not a violation of civil liberties when it is voluntary. That is sheer nonsense. Despite the formality, frequently observed, of asking applicants to sign a "free will" consent form before taking a test, the procedure is not voluntary if the employer won't consider anyone who refuses to be tested. Nor is it voluntary when the employee, given the opportunity to "prove his innocence" of a theft, is fired on some other pretext if he refuses a test. In the present state of our economy, no one can seriously maintain that an employer's "request" for a test is voluntary. The choice between a polygraph and unemployment is obviously no choice at all.'

"I should point out that many of the people who are subjected to a polygraph examination are in no position to say no to an employer or prospective employer. Firms which use the tests . . . tend to draw their employees from among the less skilled and less financially secure in the work force . . . ." Senate Committee on Local Government, Hearing on SB 756, Minutes, Exhibit A (March 19, 1979).

Senator Kafoury's belief that SB 756 would eliminate the use of polygraph tests by employers even when "voluntarily" requested by employees was shared by other legislators. For example in proposing amendments to the bill, Representative Jim Chrest explained to the House Labor Committee that:

> "This bill prohibits using polygraphs period. The amendments I am proposing would allow them to be used by law enforcement units; . . . financial institutions; and . . . employers primarily engaged in the production, transportation, and storage and (?) distribution of controlled substances . . . . No one else could use them." House Labor Committee, Hearing on SB 756, Tape 26, Side 2, Tape Counter 436439 (May 21, 1979) (Emphasis added.)

Representative Bill Rogerts, who opposed SB 756, stated to the House Labor Committee:

> "There's just no way that I'm going to support this bill . . . (I)t's just plain going to ban the use of them (polygraph tests) except by law enforcement . . . . I think it's ridiculous to . . . just plain prohibit the use . . . ." House Labor Committee, Hearing on SB 756 Tape 31, Side 2, Tape Counter at 52-55 (June 1, 1979).

The Staff Measure Analysis of SB 756 provided to the Senate Local Government Committee is also illustrative of the Legislature's intent that SB 756 go beyond the scope of ORS 659.225. In describing the problem addressed by this bill, the Analysis states:

> "Current state law (ORS 659.225) prohibits anyone from requiring a polygraph test or lie detector test as a condition of employment or re-employment. The current law has two weaknesses: (1) The statute carries a criminal penalty requiring formal prosecution to enforce the prohibition . . . . (2) Although employers may not require a polygraph, they may suggest that an employee or prospective employee take such a test. Testimony before the Committee indicated that employees exercising their right to refuse the exam may be placing their jobs in jeopardy. Under such conditions consent to take a polygraph examination may not be voluntary.
>
> "FUNCTION AND PURPOSE OF MEASURE AS REPORTED OUT.
>
> "SB 756 strengthens the limitation on the use of lie detection equipment by making the use of a polygraph exam for employment purposes (current and prospective) an unfair labor practice . . . .
>
> "The unfair labor practice would not only apply to any employer who requires that an employee take a polygraph exam, but also to an employer who subjects an employee to the exam." Senate Committee on Local Government, Staff Measure Analysis of SB 756 during the 1979 Session.

The understanding of the legislators that SB 756 made illegal any reliance upon polygraph tests in the employer/employee relationship was echoed by a number of persons commenting to the Legislature in favor of or opposition to the bill. Their comments show that it was generally understood, and told to the Legislature, that SB 756 would completely ban any use of polygraph examinations in an employment situation. Examples of these comments are set forth below.

1) Mr. Robert Bertalot, polygraphist, representing the City of Portland and the Northwest Polygraph Examiners Association, told the Senate Committee on Local Government that:

> "the way the bill (SB 756) was written, any polygraph testing done by an employer would be illegal." Senate Committee on Local Government, Hearing on SB 756, minutes 4 (April 15, 1979).

2) Mr. Bertalot's written testimony stated:

"The wording of Senator Kafoury's bill uses the word 'subject' as a verb, the inference seems to be that of words like 'exposed,' 'request.' The use of that word would certainly restrict all polygraph examinations of any employee of any victim (of property loss)." Hearing on SB 756, Minutes, Exhibit D (April 5, 1979).

3) A letter from Mr. Bertalot distributed to the House Labor Committee states:

"Passage of this bill (SB 756) would be detrimental to the employee who wishes to use the exculpatory value of a polygraph examination.

"If this bill could be re-written (sic) to delete the verb 'subject' from line 4 and replace it with 'require,' it would remain sufficiently strong to protect both the employee and employer." House Labor Committee, Hearing on SB 756, Minutes, Exhibit E (May 14, 1979).

4) A letter to the Senate Committee on Local Government from Gerald L. Blucher distributed to that Committee states:

"As I understand Senate Bill 756, it would effectively make illegal the use of polygraph examination unless under the auspices of a police agency." Hearing on SB 756, Minutes, Exhibit E (April 5, 1979).

5) At a hearing before the House Labor Committee on SB 756, four witnesses testified that they had asked to take polygraph examinations in order to clear themselves of any suspicion following a theft. Each was "opposed to the bill and requested the Committee to permit the examination to remain lawful." House Labor Committee, Hearing on SB 756, Minutes 6 (May 14, 1979).

6) A letter from Edward L Gelb, President of the American Polygraph Association, distributed to the House Labor Committee, states:

"This bill (SB 756) would, in effect ban the use of polygraphs by private industry in your state." House Labor Committee, Hearing on SB 756, Minutes, Exhibit A (May 14, 1979).

7) A letter from James A. Watters of Dairy Queen, distributed to the House Labor Committee, begins: "I am writing regarding House Bill 756 which will ban the use of polygraph (sic) in private business." House Labor Committee, Hearing on SB 756, Exhibit B (May 16, 1979).

8) A statement from Rudolph L. Bouwman's *Scientific Interrogations* distributed to the House Labor Committee includes the comment:

"This bill will remove ability of subject to refute adverse recommendations that have been made unjustly either by a previous employer or fellow employees." House Labor Committee, Hearing on SB 756, Minutes, Exhibit C (May 14, 1979).

9) A letter from James R. Wygant, Licensed General Examiner, distributed to the House Labor Committee, states:

"This bill (SB 756) would entirely prohibit an employer's use of polygraph testing to help resolve commercial theft." House Labor Committee, Hearing on SB 756, Minutes, Exhibit D (May 14, 1979).

10) A letter from Donald A. Ritchie, vice president of a jewelry firm, distributed to the House Labor Committee, states:

"As I understand the wording of SB 756, an employee would not be allowed to take a polygraph test regarding any employment issues, even if the employee specifically requests to do so. It would appear that the employee would be deprived of some rights and privileges if this bill is passed." House Labor Committee, Hearing on SB 756, Minutes, Exhibit G (May 14, 1979).

The statements quoted above, from legislators and their constituents, indicate that it was widely understood and stated to the Legislature, when SB 756 was before the Legislature, that this bill would have the effect of completely removing the polygraph test from the employee/employer relationship.

The legislative history of SB 756 shows that it resulted from Senator Kafoury's conviction that an employee cannot refuse to take a polygraph test without suffering prejudice, and that the intent of the Legislature, as embodied in ORS 659.227, was to make it an unlawful employment practice for an employer to ask an employee to take, or agree to an employee taking, a polygraph test, even if the employee "volunteered" to take the test.

Finally, it is significant that SB 756, as originally proposed, did not include the language which now appears as ORS 659.227(4). This portion of the bill, added by amendment, allows:

". . . the administration of a polygraph examination to an individual, if the individual consents to the examination, during the course of criminal or civil judicial proceedings in which the individual is a party or witness or during the course of a criminal investigation conducted by a law enforcement agency . . . ." (Emphasis added.)

Although the Legislature received written and oral testimony proclaiming the general understanding that SB 756 would eliminate polygraph tests from the employment relationship, there is no similar exception in SB 756 or ORS 659.227 for the administration of a polygraph examination to an individual if the individual consents to or volunteers for the examination by or for his or her employer. This is a practice the Legislature intended to eliminate.

It is interesting that the instant matter illustrates the very problem which the Legislature meant to prevent by enacting SB 756. Complainant did sign a form "consenting" to the April 28, 1980, administration of a polygraph test to her. However, under the circumstances of her employment, she felt that she had no choice but to sign this form and take the test in order to prove her innocence of theft. This is precisely the type of abuse which ORS 659.227 makes unlawful. The Legislature determined that the only way to cure this abuse was to remove the polygraph test entirely from the employer/employee relationship.

In conclusion, while the meaning of the phrase "subject . . . to" in ORS

659.227 is not absolutely clear, the application of relevant principles of statutory construction and the examination of the legislative history of SB 756 indicate that the effect of ORS 659.227 is to make illegal any use of a polygraph examination within an employee/ employer relationship. Given this conclusion and the facts found in this matter, it is obvious that Respondent did subject Complainant to polygraph examinations in 1980.

2. Does ORS 659.227 Forbid The Administration of a Polygraph Examination Outside the State of Oregon?

The polygraph examination which Mr. Jenkins administered to Complainant on April 28, 1980, was administered in the State of Washington. Respondent contends that because of this fact, Respondent did not violate ORS 659.227 and this forum has no jurisdiction herein. According to Respondent's argument, ORS 659.227 only prohibits subjecting a person to a polygraph test which is administered in the State of Oregon, and this forum has no authority over the acts of an employer which take place outside the State of Oregon.

Respondent is an Oregon employer, as defined in ORS 659. 010(6). The obvious purpose of ORS 659.227, as indicated by its language as well as the legislative history discussed above, is to regulate the activities of Oregon employers. While the application of ORS 659.227 to an employer whose employee is given a polygraph examination outside Oregon apparently was not explicitly considered in the legislative hearings on SB 756, the above-cited purpose would be totally subverted if an Oregon employer could legally ask, require, or encourage (by considering or indicating it would consider the results) its employee to take a polygraph test administered outside the boundaries of this state.

The effect of ORS 659.227 is to impose a restriction upon the employer/ employee relationship. When the relationship exists in the State of Oregon, it is an unlawful employment practice to burden that relationship with a requirement, suggestion, or agreement that the employee take a polygraph test, or in any other way condition that relationship upon a polygraph test. This is the subjection directly or indirectly of the employee to a polygraph test which is proscribed in ORS 659.227. The actual location of the administration of the test is not significant.

Had the Legislature's intent been to only prohibit administration of polygraph examinations in Oregon, the Legislature could have simply said so very simply. Instead the Legislature has addressed, in ORS 659.227, the duty of the employer to its employee, not the practices of polygraphers. It would be unreasonable to interpret ORS 659.227 to mean that an employer can do anything to subject his or her employee to a polygraph test, as long as the employer arranges that the test itself take place in an out-of-state location. Such a result would offer little protection to Oregon employees.

Respondent quotes an opinion of the Attorney General of the State of Oregon which is inapplicable to this matter because it was published well before the enactment of ORS 659. 227. Even if that weren't the case, this opinion has no relevance to the interpretation of ORS 659.227.

Respondent quotes language in the opinion which states that:

> ". . . the Oregon statutes have no controlling effect on the use of the PSE (Psychological Stress Evaluation) device in another state . . . ."

However, the civil and criminal penalties established in ORS 659.227 are not for polygraphers who administer tests outside the State of Oregon, but rather for employers whose acts – the subjection of their employees to polygraph tests – take place within Oregon. Specifically, in this matter, ORS 659.227 has not been violated by Mr. Jenkins or Mr. Simmons, the polygraphers who examined Complainant, but by Mr. Cope, who subjected her to those polygraph tests.

For all the above reasons, this forum concludes that ORS 659.227 forbids an Oregon employer from subjecting an employee to a polygraph examination, no matter where the examination itself takes place.

3. Witness Credibility: Complainant and Mr. Cope

Mr. Cope and Complainant absolutely differ on only one major factual point herein: whether, during their discussion on April 24, 1980, Mr. Cope asked Complainant if she would be willing to take a polygraph test and, if so, did Mr. Cope ask this question before Complainant said she would be willing to take such a test. In other words, who mentioned the polygraph examination first during that conversation? Complainant testified that Mr. Cope did, and Mr. Cope testified that he did not. Resolving this diametrical difference in testimony requires an assessment of the relative credibility of Complainant and Mr. Cope, as well as that of the other witness who testified concerning this conversation, Mr. Delphia.

Complainant impressed the Presiding Officer as firm, steady, and serious in her testimony. She appeared to remember clearly the pertinent aspects of the events in question. She was able and careful to fully and clearly explain her responses to most questions, with no equivocation, even when her thoroughness and forthrightness worked to her disadvantage. She was particularly explicit and consistent in describing her April 24, 1980, conversation with Mr. Cope. For all these reasons, her testimony was very credible.

Mr. Cope, on the other hand, was not nearly as specific, did not always make sense, and was not ever as forthright. For example, he repeatedly stated the same vague phrase, that he wanted to work with Complainant to solve the problem herein, when his actions amply demonstrated that in fact, although he initially did participate in Complainant's effort to clear herself, he was putting the burden on Complainant to prove her innocence, and that she had to figure out how to do so. There is no allegation that Mr. Cope took the initiative and planned or executed any such efforts himself, nor did he initiate any efforts himself to otherwise "work with Complainant to solve the problem," other than illegally by polygraph examination.

Mr. Delphia, who testified to corroborate Mr. Cope's rendition of his conversation with Complainant on April 24, 1980, could only testify that he did not remember asking Complainant if

she would take a polygraph test. However, since Mr. Delphia was not able to remember anything more than his general impression of that conversation, and certainly not specific words thereof, it is entirely possible that he could have forgotten that Complainant's statement of willingness to take a polygraph test was preceded by Mr. Cope's asking her if she would be willing to do so. Accordingly, the fact that Mr. Delphia does not remember if Mr. Cope asked this question lends no credence to Mr. Cope's assertion that he did not.

For the above-described reasons, this forum finds Complainant's testimony more credible than that of Mr. Cope where they differ concerning pertinent aspects of the events in question. Accordingly, this forum attaches more weight to the testimony of Complainant than to that of Mr. Cope. In addition, this forum gives no weight to the testimony of Mr. Delphia as to whether Mr. Cope asked Complainant if she would take a polygraph test during the conversation in question. This forum has concluded that Complainant's rendition of her discussion with Mr. Cope on April 24, 1980, is most accurate: Mr. Cope did ask her if she would be willing to take a polygraph test, and he did so before she said she would be willing to do so.

In making this finding, this forum does not mean to imply that it would conclude that Respondent had not subjected Complainant to the April 28, 1980, examination if it concluded that Mr. Cope had not first asked Complainant if she would be willing to take such examination. Even if Complainant had first mentioned taking a polygraph examination, Respondent's conditioning her employment in any way upon taking a polygraph test is a subjection of Complainant to that test. This forum makes a finding of fact as to whether Mr. Cope asked Complainant whether she would be willing to take the test only to make a factually complete rendition of this conversation.

Complainant and Mr. Cope also differ as to whether Mr. Cope asked Complainant for her keys to Respondent's stores after the April 28, 1980, polygraph test. Complainant clearly recalled that he did, in conjunction with his statement that Respondent's assistant managers would start performing Complainant's work. Mr. Cope, however, stated on both direct and cross examination that he cannot recall specifically what was said in that conversation. At the same time, he asks this forum to believe that he recalls that he did not ask Complainant for her keys. It would make far more sense to believe that Mr. Cope took some action to at least suspend Complainant's employment, since he admits that as a result of the just completed polygraph test, he believed that Complainant had stolen from Respondent.

Mr. Jenkins, who was also present during this encounter, does not recall that Mr. Cope asked Complainant for the keys. Neither, however, does he testify that Mr. Cope did not. In any case, Mr. Jenkins' testimony on this point would be given little or no credence because his other testimony demonstrated that he was not able to testify accurately even as to facts concerning which he had written evidence in his possession and because he, as a polygraph examiner, is not at all a disinterested party in this matter concerning Oregon's polygraph test proscriptions.

Because this forum has above found Complainant to be more credible than Mr. Cope generally, because Mr. Cope's recollection of the conversation in question is vague and makes less sense than Complainant's, and because of the lack of credible testimony corroborating Mr. Cope's recollection, this forum concludes that Complainant's rendition of the conversation in question is most accurate: Mr. Cope did ask Complainant for her store keys after the April 28, 1980, polygraph examination, as well as make the other statements Complainant ascribed to him immediately after the test.

4. Ms. Gates' Testimony

This forum dismisses the testimony of Ms. Gates to the effect that she was not forced to take the polygraph test which she took in Respondent's employ. Whether or not one of Respondent's other employees perceived the test as mandatory or not is not at issue herein, because the Legislature enacted ORS 659.227 in recognition of the fact that the taking of such a test by an employee, within an employment relationship, could not be truly voluntary.

5. Front Pay

When this forum finds that an unlawful employment practice has occurred, it must act to eliminate the effects of that practice and protect the lawful interests of others similarly situated. ORS 659.010(2) and ORS 659.060(3). So that this will be achieved and the Complainant placed, as much as possible, in the position she would have been in had Respondent not committed the unlawful practices found, the Agency asks that this forum award Complainant monetary damages which include both back and front pay.

Back pay is the difference between what Complainant would have earned had Respondent continued to employ her from April 28, 1980, until, approximately, the record herein closed and what she actually did earn during that time. If Complainant had failed to exercise reasonable diligence to mitigate her back pay damages, those damages would have been offset by what she could have earned with reasonable diligence, rather than what she did earn. It is Respondent's burden to prove such a failure, and Respondent has not done so. OAR 839-04-060 (10)(b).

Since back pay has continued accruing up to the time the record herein closed, Complainant could arguably be entitled to front pay, the continuing accrual of her pay damages for a period of time after, approximately the record has closed. To be as fair as possible to both parties, this forum calculates front pay on the same general basis as back pay. Of necessity, however, front pay usually must be calculated in a less exact manner, because it involves predicting the future; but it need not, and cannot, be purely speculative.

At this time, this forum is unwilling to exercise continuing jurisdiction to periodically adjudicate front pay damages in the future. In order to enforce the provisions of ORS chapter 659 and its other statutory responsibilities with limited financial resources, this forum will not adjudicate a contested case

more than once, barring extraordinary circumstances. For this reason, this forum either must determine in this Order the amount of any front pay award or articulate herein a formula for the determination thereof which will allow Respondent to compute the amount of the award in the future without further proceedings.

To limit to the greatest extent possible the speculative nature of an award of front pay, such award will be limited to when reinstatement occurs or a specific period of time.

In order to compute the amount of the front pay award at this time, this forum must find evidence on the record which provides it with a means of making a projection which is not purely speculative of what Complainant's actual future earnings will be (and would be with her reasonable diligence) and what her future earnings would be if Respondent had continued employing her. No such evidence exists. However, this forum can articulate now a formula for the computation of these figures at periodic intervals for a specific time period in the future which will allow Respondent to compute them without further proceedings.

Respondent has provided this forum with calculations of what Complainant would have earned had Respondent continued employing her from April 28, 1980, through December 31, 1981. The pay figures in those calculations are based upon what the person(s) doing Complainant's former job earned during this period. From this evidence, this forum has inferred that Complainant would have earned $32,823.62 in salary and bonuses had Respondent continued employing her during this period. In fact, she earned $8,713.60, which is 27 percent of the $32,823.62 she would have earned in Respondent's employ. In conformity with OAR 839-04-060(10)(b), because of the absence of any evidence to the contrary, this forum infers that Complainant exercised reasonable diligence to find employment from April 28, 1980, through December 31, 1981.

Given the fact that Complainant earned 27 percent of what she would have earned in Respondent's employ during the 20-month period between her last day in Respondent's employ and December 31, 1981; and the inference that Complainant exercised reasonable diligence to find employment during that period; and in the absence of any evidence that would cause this forum to conclude that, as of January 1, 1982, Complainant actually could have earned substantially more or less in relation to what her earnings would have been in Respondent's employ; this forum infers that, as of and after January 1, 1982, with reasonable diligence, Complainant would have continued actually earning 27 percent of what she would have earned had Respondent continued employing her then. Therefore, the front pay award in this matter will be computed, at specified times in the future, according to the following formula: what Respondent has paid the manager(s) of its Warrenton and Astoria stores during the pertinent period minus (1) 27 percent of that figure, or (2) Complainant's actual earnings during the period, whichever is greater, from January 1, 1982, until January 1, 1984, or until Respondent complies with the mandate in Paragraph 4 of the Order below. Respondent will pay this amount at quarterly intervals until such date or compliance. Complainant will provide Respondent with quarterly statements of her earnings so that Respondent can compute the amounts due Complainant. The Commissioner will grant no request for future adjudication of the appropriateness of this formula.

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, as well as to protect the lawful interests of others similarly situated, Respondent is ordered to:

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Victoria R. VanBuskirk in the amount of THIRTY THOUSAND SIXTEEN DOLLARS AND SEVENTY-TWO CENTS ($30,016.72). This amount represents damages of $24,110.02 in wages lost by Complainant between April 24, 1980, and January 1, 1982, and $100.00 in expenditures Complainant made, plus $500.00 for the mental distress Complainant has suffered, plus interest compounded annually at the rate of 9 percent from December 30, 1980, through and including March 31, 1983, all because of Respondent's unlawful employment practices set out above. Interest will continue to accrue and compound annually until the date upon which Respondent complies with this order.

2) Deliver by May 1, 1983, to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Victoria R. VanBuskirk in an amount equal to the total amount Respondent paid in wages and bonuses to the manager(s) of its Warrenton and Astoria, Oregon, stores during 1982, minus either 27 percent of that amount or Complainant's actual earnings during 1982, whichever is greater. Respondent is excused from the mandate in this paragraph if Complainant does not provide Respondent with a statement of her 1982 earnings by April 15, 1983.

3) Within one month of the end of each calendar quarter thereafter, until January 1, 1984, or Respondent complies with the mandate in paragraph 4 below, deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Victoria R. VanBuskirk in an amount equal to the total amount Respondent paid in wages and bonuses to the manager(s) of its Warrenton and Astoria, Oregon, stores during the pertinent calendar quarter, minus either 27 percent of that amount or Complainant's actual earnings during that quarter, whichever is greater. Respondent is excused from complying with the mandate in this paragraph if Complainant does not provide Respondent with a statement of her earnings during the pertinent calendar quarter within 15 days of the end of the quarter.

4) Offer Complainant reinstatement to the next available position comparable in nature and compensation to the position she held before her employment with Respondent ended.

5) Reinstate Complainant's accounts in Respondent's pension and profit-sharing plans, at the time Respondent complies with paragraph 4 above, at the levels and the place(s) in the vesting schedule they would have attained had her participation in those plans continued up to the time of such compliance. This includes, but is not limited to, reinstatement of $7,825.36, plus whatever other contributions Respondent would have made to those plans in Complainant's behalf, had Respondent continued to employ Complainant until the date Respondent complies with paragraph 4 above, plus any interest or other benefits which would have accrued thereon up to the date of Respondent's compliance.

6) If Complainant rejects Respondent's offer of reinstatement, Respondent is ordered to pay to Complainant whatever portions of the contributions, interest and other benefits described in paragraph 5 above would have belonged to Complainant had Respondent continued to employ her up to the date of such rejection.

7) Cease and desist from subjecting any employee or prospective employee directly or indirectly to any polygraph examination.

In the Matter of
Lucille Ogden, dba
LUCILLE'S HAIR CARE,
Respondent.

Case Number 26-81
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 4, 1983.

SYNOPSIS

Respondent employer considered Complainant, a 30-year-old experienced hairstylist, too young to service Respondent's elderly clientele, and hired a 49-year-old applicant. Rejecting Respondent's allegation that Complainant was unavailable to work on Saturdays, the Commissioner held that Respondent discriminated against Complainant because of her age, in violation of ORS 659.030(1)(a). In fashioning a back pay remedy, the Commissioner computed the average daily earnings of Respondent's other hairstylist employees, and awarded lost wages at that rate for the time Complainant would have worked, less both her actual and potential earnings elsewhere, for a total of $16,910, including interest to the date of the Final Order. ORS 659.030(1)(a); 659.050.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on July 15, 1982, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon.

The Bureau of Labor and Industries was represented by Robert D. Bulkley, Jr., Assistant Attorney General. Respondent Lucille Ogden was represented by Charles C. Erwin, Attorney at Law. Complainant Rebecca Miller was present. The Agency called Complainant and Respondent, and Respondent called herself, as witnesses.

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

FINDINGS OF FACT – PROCEDURAL

1) On May 7, 1979, Rebecca Miller filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that Respondent had discriminated against her in connection with her potential employment by Respondent because of Complainant's age.

2) Before the commencement of the hearing in this matter, Complainant received from this forum a copy of "Notice of Contested Case Rights and Procedures" and stated that she had no questions about it. Before the commencement of the hearing, Respondent received from this forum a copy of "Notice of Contested Case Rights and Procedures" and stated that she had no questions about it.

3) At hearing, Respondent asked the forum to amend the Specific Charges, deleting and inserting certain matter. The Agency agreed to these amendments, and the forum made them.

4) At the end of the hearing, Respondent asked the forum to mark, admit, and seal the Bureau's investigative file for this matter, in order to make it available to the Court of Appeals, should that Court review this forum's denial of Respondent's Motion to Compell (sic) . . . (Complainant) to respond to (certain) Questions relating to information in that file. In the absence of any significant objection by the Agency, and because the Agency stated that it did not need this file during the pendency of this matter, the forum granted Respondent's request and admitted the Bureau's investigative file for the limited purpose requested. The file was sealed immediately after it was submitted to the forum and has not been examined by this form.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent, a person, owned and managed the operation of Lucille's Hair Care, a beauty salon. In that business, Respondent, in the State of Oregon, engaged or utilized the personal service of one or more employees, reserving the right to control the means by which the service was performed.

2) At all times material herein, Lucille's Hair Care was located in the bottom floor of Terwilliger Plaza, a retirement home situated at 2545 S.W. Terwilliger Boulevard, Portland, Oregon. Most, but not all, of the clients of Respondent's salon were residents of Terwilliger Plaza. The average age of the salon's clients was eighty to ninety-five years.

3) Respondent's date of birth is September 2, 1897.

4) Respondent purchased Lucille's Hair Care about ten years before the date of the hearing.

5) On November 1, 1978, Respondent employed the following people as beauticians in her salon. Respondent did not work as a beautician in her salon.

a. Genevieve Huserik. Ms. Huserik worked at the salon when Respondent purchased it, and Respondent has employed her since that time. During November 1978, Ms. Huserik started a leave of absence from work due to her health. She returned to work for Respondent on November 5, 1979. During those periods of 1979 and 1980 when she was working for Respondent, Ms. Huserik worked four days per week. At the time of the hearing, Ms. Huserik's age was in the "fifties," and she had about thirty years of experience as a beautician.

b) Lucille Lienan. Ms. Lienan worked at the salon when Respondent had purchased it, and Respondent employed her thereafter until October 27, 1979, when Ms. Lienan was discharged as "unloyal." During all time material before her discharge., Ms. Lienan worked for Respondent one day per week. Ms. Lienan was born on January 22, 1922. At the time Ms. Lienan left Respondent's employ, she had "lots of experience" as a beautician.

c) Hope Miller. Respondent hired Ms. Miller on January 16, 1977, and has employed her since that time. Throughout this employment, Ms. Miller has worked three days per week. Ms. Miller was born on June 19, 1932. Before working for Respondent, Ms. Miller owned a beauty salon for many years and had been in the beauty business "a good many years."

d) Frances Navarra. Ms. Navarra began working for Respondent on December 18, 1974, and has worked for her since that time. At all times material herein, she worked for Respondent three days per week. Ms. Navarra's date of birth is August 27, 1918. Before working for Respondent, Ms. Navarra owned her own beauty salon for many years.

e) Anita Polani. Ms. Polani began working for Respondent on May 29, 1976, and has worked for her since that date. At all times material herein, she worked for Respondent three days per week. Ms. Polani's date of birth is July 26, 1924. Before working for Respondent, Ms. Polani had "a lot of experience" working as beautician in Italy.

f) Elsie Lund. Ms. Lund retired from her employment with Respondent on November 25, 1978. She had worked five days per week for Respondent. When she retired, she was "in her fifties."

6) Late in November 1978, in order to replace her only full-time beauticians (Ms. Lund, who was retiring, and Ms. Huserik, who was starting her leave of absence), Respondent sought two beauticians to each work for her five days per week, including Saturdays. Respondent publicized these openings in an advertisement in The Oregonian, a Portland newspaper, which was the same as the advertisement set out in Finding of Fact 7 below.

To fill one of her openings, Respondent hired Jeannie MacNair, who began working for her on November 28, 1978. Ms. MacNair's date of birth is October 14, 1929. Respondent terminated Ms. MacNair on February 10, 1979, for "not coming to work." During her employment for Respondent, Ms. MacNair was scheduled to work five days per week.

7) In order to replace Ms. MacNair, and because Respondent had not yet been able to fill the opening caused by Ms. Huserik's leave of absence, Respondent placed the following advertisement in the "Help Wanted" section of The Oregonian:

> "BEAUTICIAN: must have exper Full or part time for retirement home. 222-5910 or 236-2387"

This advertisement appeared on Tuesday, February 3, 1979.

8) In Respondent's February 1979 recruiting, as in her recruiting in November 1978, Respondent was seeking two people to each work as beauticians for her five days per week, including Saturdays. She wanted "good hairdresser(s)" who could "take care of the clients as they came in and get along with them." She was seeking employees who could lift her aged and incapacitated clients and deal with their special needs. Respondent wanted people who would be able to "understand elderly people (and) be kind and considerate and helpful" to them in every way possible. The styling services the new beauticians would have to perform would be mainly shampoos and sets, finger waves, marcelling, and permanent waving.

9) During her February 1979 selection process, Respondent determined whether an applicant had the qualifications she was seeking by talking with the applicant. Respondent considered what the applicant told her (his or her "word"), his or her "age" (how old he/she was), and his or her "experience." Respondent did not take written applications or seek references.

10) On or about the morning of February 13, 1979, Complainant saw Respondent's advertisement. At the time, Complainant was thirty years old. As a licensed beautician, she wanted to find work in that field. She preferred to work with elderly clients.

For two to four weeks before she saw Respondent's advertisement, Complainant had looked for available work in the "Help Wanted" sections of local newspapers regularly. By February 1979 she was also visiting salons personally, looking for beautician work. Her search was limited to Oregon, because she did not have a beautician's license elsewhere. Complainant was seeking full-time employment. By full-time, Complainant meant five days per week, including Saturdays.

Complainant did not find any work for which she wanted to or did apply until she saw Respondent's advertisement. Because that advertisement described exactly the kind of work Complainant wanted, she responded to it immediately, by telephone.

* Complainant and to a lesser extent Respondent used "beautician," "hairstylist," "hairdresser," and "cosmetologist" synonymously in describing Complainant's qualifications and the position at issue. To avoid confusion, this forum uses "beautician" throughout this Order, except where quoting a witness who used a synonym.

11)When Complainant telephoned one of the numbers listed in Respondent's advertisement, she talked with Respondent. Complainant explained that she was "calling about the ad in the paper for a beautician" and asked Respondent if the job were still available. Respondent said "yes." Respondent asked Complainant her age. (This was the first question Respondent asked Complainant.) Complainant informed Respondent that she was thirty years old. Complainant asked Respondent what difference her age made and told Respondent that she had experience, that she was a beautician, and that she wasted to come in and talk with Respondent, to at least tell Respondent what her experience was. Respondent hesitated and then made an appointment to meet Complainant at Respondent's salon at 2 p.m. that day.

12)When she went to her interview with Respondent, Complainant had the following work experience relating to Respondent's job vacancy:

a) Off and on for a total of eight years between ages thirteen and 25, Complainant had worked in nursing homes and hospital geriatric units. She had started as a cook and dishwasher and then worked as a nurse's aide and directly with patients, attending to their personal needs. Her patients were in various stages of ambulability.

b) For 2¼ years, between approximately April 1976 and July 1978, Complainant worked as a beautician at King Hair Styling Salon in Portland. That salon's clientele was elderly, as the salon catered to residents of a hotel at which many retired persons lived and the salon was located in a building whose other tenants were for the most part elderly people. Most of Complainant's clients were elderly, and many were crippled, several confined to wheelchairs. Some were older than eighty years. Some were men. Complainant obtained her Oregon beautician's license one month before starting work at this salon, and it was her first employment as a beautician. She earn sixty percent of her receipts at this salon, the standard rate of compensation for a beautician in Oregon at the time. Her total 1978 earnings for this employment were $4016.74.

Complainant resigned her employment at King Hair Styling Salon to prepare to get married. She did not seek work from the time she resigned through December 1978, because it was not economically necessary, she did not have a Washington beautician's license, and she knew the beauty business was "slow" in her area. Complainant started to look for work in January 1979, when it became economically necessary for her to work. By this time her former position at King had been filled.

c) In 1978, Complainant worked for one day at Agnes' Beauty Salon. She earned $46.80 in that employment.

d) Complainant occasionally cared for and did the hair of her aunt, who was wheelchair-bound.

13)Complainant arrived at Terwilliger Plaza for her interview with Respondent about one-half hour early. She went to Respondent's salon, introduced herself, and said that she was there to apply for the beautician vacancy. She and Respondent sat down and began talking.

During the first part of the interview, Respondent asked Complainant if she were the "30 year old." When Complainant said "yes," Respondent noted this in the top right hand corner of a piece of paper. Respondent warned Complainant that the job could be very difficult because it involved elderly people, a great many of whom needed to be lifted and otherwise helped in moving. Complainant described her experience and qualifications noted in Finding of Fact 12 above, and told Respondent that she really enjoyed the elderly and considered herself very capable of doing Respondent's job. Respondent asked Complainant where she lived, and when Complainant told her that she lived in Vancouver, Washington, Respondent wrote this on the above-mentioned piece of paper and asked Complainant if that weren't too far away. Complainant told her that the distance would pose no problem. Throughout the interview, Complainant evidenced her strong desire to work in Respondent's salon. At the end of the interview, Respondent told Complainant she would "call" Complainant.

14)During either the telephone conversation or the interview between the Complainant and Respondent, Respondent commented, in response to Complainant's statement of her age, that "that (Complainant's age) was 'pretty' (or 'awfully') young."

15)At all times material herein, Complainant has preferred to work with elderly people. She regards them as her "babies," and enjoys working them, particularly as a beautician. The kind of beautician services which elderly women prefer (especially shampoos and sets and finger waves) are Complainant's specialties. Complainant does not enjoy doing the "far out" styles which "young" people sometimes want. Complainant regards the elderly as a "piece of history," kind, and abused.

16)At all times material herein, Complainant's elderly clients have liked her. She has never had one "leave" her. She has always had "repeat" beautician business from her elderly clients, which she attributes to her showing concern for their well-being, loving them, and treating them with love. Complainant goes out of her way to do things for her elderly clients. In her employment as a beautician at the time of the hearing, most of Complainant's clients are elderly people who come to her once or twice each week for her professional services.

17)At all times material herein, Respondent paid her beautician employees weekly, at the sixty percent rate described in Finding of Fact 12 above. At the time of Complainant's application, Complainant assumed that if Respondent employed her, Respondent would pay her at this rate, which was acceptable to Complainant.

18)After her interview with Respondent, Complainant went directly to her aunt's house to do her aunt's hair. Complainant was visibly upset. When her aunt asked why, Complainant told her that she had just applied for a job and that the employer kept insisting that she was too young. Subsequently, Complainant's cousin, then an employee of the Agency, sent Complainant the documents necessary to make the instant complaint.

19) In response to her February 1979 newspaper advertisement, Respondent was contacted by eight to ten potential applicants. She interviewed about seven of them. Except for Complainant and a person named Irene Bynum, the interviewees were "in their teens or twenties." Only Complainant and Ms. Bynum remained interested in the job after Respondent explained that the clientele was elderly.

20) Respondent never called Complainant after the interview. Several days after it, Complainant telephoned Respondent, identified herself, and asked about Respondent's vacancy. Respondent told her that the position had been filled.

21) During Complainant's above described contacts with Respondent, Respondent did not express interest in Complainant's experience or qualifications. Respondent gave Complainant the strong impression that Respondent was not interested in listening to or considering her because she was too young to work effectively with Respondent's clients.

22) Sometime after Complainant's last telephone call to Respondent, and possibly as late as July 1979, Complainant visited Respondent. There is no other evidence on record concerning this visit.

23) Respondent hired Ms. Bynum, who began working for Respondent on about Monday, February 19, 1979. Ms. Bynum could work for only two days per week for Respondent, Saturday and Tuesday. At the time Respondent hired her, Ms. Bynum operated a beauty salon by herself and had 20 years of experience in the beauty business. Ms. Bynum was still employed by Respondent as of the date of hearing, and she has continued to work just two days per week throughout that employment. Ms. Bynum was born on October 14, 1929.

24) Respondent asserts that she hired Ms. Bynum because she could not find an applicant who would work five days per week. Respondent asserts that Complainant would not work five days per week or on Saturdays. Respondent maintains that it was solely Complainant's alleged refusal to work full time or on Saturdays which caused Respondent not to hire Complainant. Respondent asserts that Complainant's age had nothing to do with her decision not to hire Complainant.

25) Complainant did not refuse to work for Respondent full time or on Saturdays. In fact, Complainant wanted to work full time, because her husband was not working regularly. She expected and was willing to work Saturdays, because it is standard for barbers and beauticians to do so.

26) Ms. Bynum brought no clients with her when she started working for Respondent. Like each beautician starting work at Respondent's salon, she had to build up her own clientele, her repeat customers, over time. Despite this, her average daily earnings from February 19, 1979, through December 31, 1979, were the third highest of Respondent's six beauticians during that time. With one exception many years ago, none of Respondent's beauticians have had any difficulty building up their own clientele.

27) Respondent apparently did not seek any more beauticians after she hired Ms. Bynum. Sometime after that hiring, Respondent reduced the operation of her salon from six to five days per week.

28) From February 19, 1970, through November 6, 1980, the beautician's working at Respondent's salon were Ms. Navarra, Ms. Miller, Ms. Polani, and Ms. Bynum. In addition, Ms. Lienan worked there until October 27, 1979, and Ms. Huserik worked there again as of November 5, 1979.

29) Complainant has been a resident of the State of Washington continually since January 28, 1978. From the time Respondent rejected Complainant until December 24, 1981, Complainant did not seek employment as a beautician in Washington because she was not licensed in that state. Because she was licensed in Oregon, Complainant could have obtained, during times material, her Washington license through reciprocity, by paying a $50.00 fee. She did not have this amount of money until late 1981.

30) After Respondent told Complainant that Respondent's vacancy was filled, Complainant resumed looking for work. She inquired or applied for work at several beauty salons. The first work she obtained was at The Townhouse (beauty salon). She worked there as a beautician for about two days, earning no more than $49.00. Complainant left her employment at The Townhouse to begin working as a beautician full time at The Airliner Beauty Salon. The day after her last day of work at The Townhouse, on or before March 28, 1979, Complainant started work at The Airliner. She worked there for about one month. Her pay rate was $100.00 per week or sixty percent of her receipts, whichever was greater. Her total compensation from The Airliner was $433.05. Complainant left her employment at The Airliner voluntarily, because there was insufficient clientele. (The Airliner had hired Complainant to fill a vacancy which did not materialize.)

31) Immediately after leaving her employment at The Airliner Complainant found and on April 28, 1979, began full-time work as a beautician an Ann's Honeycomb Beauty Salon. She worked there for approximately eight months, until the last part of December 1979. Complainant's compensation at Ann's was sixty percent of her receipts. She earned a total of $2021.74 at Ann's. At times during her employment at Ann's, clients were scarce, and sometimes they were nonexistent. Complainant took "off" a "couple of times." Although she did not consider her work at Ann's entirely suitable, Complainant continued working there because, despite her inquiries about other employment, she had found no other work. Complainant left Ann's when the salon was sold and the new owner began catering to clients who wanted some hair styles which Complainant did not know how to execute.

32) Complainant worked five days per week, including Saturdays, at both the Airliner and Ann's Honeycomb Beauty Salons. She has always worked Saturdays when she has worked as a beautician.

33) At any time during her employment at The Airliner or at Ann's, Complainant would have quit that work to go to work at Respondents salon. This

is because Complainant believed that Respondent had more of a clientele, and therefore offered more secure and stable employment than the Airliner or Ann's, and because Respondent's salon catered to the elderly. Complainant assumed that Respondent's work was more stable because of its location close to many barely ambulatory clients, and because Complainant reasoned that Respondent must have had more clients than she could handle or she would not have been seeking another beautician.

34) After approximately six weeks of recovering from an injury following her employment at Ann's, Complainant began to look for work. She could not find beautician work which she enjoyed and wanted; most of the salons she visited catered to a "young" clientele who wanted contemporary styles which Complainant could do but did not enjoy doing. Complainant did find employment as a nurse's assistant at Hazel Dell Care Center, a nursing home in Vancouver, Washington. Complainant's work schedule at Hazel Dell was erratic; she worked between one and five days a week, including weekends. During this employment, Complainant made herself available for work at all times. She earned $3.10 per hour.

Complainant does not remember when she started or ended her employment at Hazel Dell or whether there was a period of unemployment after she stopped working at Hazel Dell. She only knows, and this forum finds, that she was employed there on July 4, 1980. Complainant's total compensation at Hazel Dell was $987.11. Complainant left her employment there because she heard that a job would be available at AM-PM Mini Market and because she thought she would be able to afford obtaining her Washington beautician's license. Complainant would have left her employment at Hazel Dell at any time in order to work in Respondent's salon.

35) On November 6, 1980, after she had terminated her employment at Hazel Dell Care Center, Complainant began working at AM-PM (St. John's) Mini Market in Vancouver, Washington. Complainant earned $4.00 per hour in this employment. She would not have left AM-PM Mini Market to work for Respondent, because she enjoyed the Mini Market work, it was very close to her home, and she was preparing to get her Washington beautician's license. Complainant worked on Saturdays and holidays at AM-PM Mini Market.

36) The parties agree, and this forum finds, that the last possible date on which any back pay damages can accrue was November 6, 1980, the starting day of Complainant's employment at AM-PM Mini Market.

37) Respondent's beauticians worked the following total days and earned the following total amounts between approximately February 18, 1979, and December 31, 1979:

Employee	Total Earnings	Total Days Worked	
Lienan	$2352.90	32 wks @ 1 day per week =	32 days
Bynum	$3800.80	45 wks @ 2 days per week =	90
Miller	$4846.80	43 wks @ 3 days per week =	129
Navarra	$7047.00	44 wks @ 3 days per week =	132
Polani	$5177.60	44 wks @ 3 days per week =	132
Huserik	$268.40	8 wks @ 4 days per week =	32
TOTALS	$23,493.50		547 days

The average daily wage Respondent paid its beauticians during this time was $42.95, the above total earnings divided by the above total days worked.

38) Respondent's beauticians worked the following total days and earned the following total amounts between approximately February 16, 1980, and November 1, 1980:

Employee	Total Earned	Total Days Worked	
Bynum	$3294.80	37 wks @ 2 days per week =	74
Miller	$3963.26	36 wks @ 3 days per week =	108
Navarra	$5889.10	37 wks @ 3 days per week =	111
Polani	$3937.80	33 wks @ 3 days per week =	99
Huserik	$3102.96	34 wks @ 4 days per week =	136
TOTAL	$20,187.92		528 days

The average daily wage Respondent paid its beauticians during this time was $38.23, the above total earnings divided by the above total days worked.

39) Although both Complainant and Respondent were at times factually inconsistent in their testimony, and Complainant was evasive at times, this forum finds the testimony of Complainant, overall, more credible than that of Respondent. Complainant offered a plausible explanation for most of her inconsistency, and her evasiveness seemed to be a response to feeling threatened by Respondent's counsel rather than an indication of untruthfulness. On the other hand, Respondent's testimony was inconsistent much more often than was that of Complainant, and Respondent's inconsistencies concerned facts which were essential to Respondent's defense in this matter. Furthermore, Respondent offered no explanation for her inconsistencies which did not itself impeach the accuracy of her testimony in pertinent parts. For these reasons, this forum has given more weight to Complainant's testimony than to that of Respondent, where they differ.

Where either Complainant or Respondent gave testimony which was inconsistent with other testimony of the same person, if there was no testimony by another witness on point and no other evidence which could resolve the inconsistency, this forum has adopted whichever version of the inconsistent testimony was least favorable to the position of the person who offered it.

ULTIMATE FINDINGS OF FACT

1) On February 13, 1979, an advertisement placed by Respondent in a Portland, Oregon, newspaper sought a "full or part time" beautician with "experience," "for a retirement home" beauty salon which Respondent owned and operated. Actually, Respondent was seeking two full-time beauticians who would work on Saturdays.

2) On February 13, 1979, Complainant was thirty years old and a licensed beautician who had experience working with elderly persons both as a beautician and in other types of employment. She was also unemployed.

3) Complainant was qualified for the position for which Respondent sought applicants in her February 13, 1979, advertisement.

4) On or about February 13, 1979, Complainant saw Respondent's advertisement. Because she was looking for work as a beautician and preferred to work with elderly clients, Complainant answered Respondent's advertisement immediately. Complainant talked with Respondent about Respondent's opening's, first by telephone and later in person. Respondent's first query of Complainant was what was Complainant's age. In response to Complainant's answer, Respondent voiced her concern that Complainant was, in effect, too young to work with the elderly people who composed all of the clientele at Respondent's salon. Respondent labeled Complainant in terms of her age and had such strong misgivings about Complainant's age that she did not express interest in Complainant's experience or qualifications during her two encounters with Complainant.

5) At the time Complainant answered Respondent's advertisement, the youngest of Respondent's four beauticians was 46 years old.

6) Complainant and Irene Bynum were the only two applicants for Respondent's openings who remained interested in them after being interviewed by Respondent. Ms. Bynum was 49 years old at the time. In evaluating the qualifications of Complainant and Ms. Bynum, Respondent considered three factors, one of which was the age of each of them. Respondent hired Ms. Bynum. Respondent did not hire or consider hiring Complainant.

7) Respondent maintains that the only reason she did not hire Complainant was Complainant's alleged refusal to work for her full time or on Saturdays. In fact, Complainant wanted full-time work and expected (and was willing) to work on Saturdays. Ms. Bynum, on the other hand, was available to work only two days per week, Tuesday and Saturday.

8) Respondent did not hire or consider hiring Complainant for employment because of Complainant's age.

9) Between February 13, 1979, and approximately January 1, 1980, and between approximately February 12, 1980, and November 6, 1980, Complainant remained ready and willing to work as a beautician in Respondent's salon.

10) Ms. Bynum started working for Respondent on or about February 19, 1979.

11) For the following reasons, this forum finds that had Complainant worked as a beautician for Respondent five days per week from February 19, 1979, to December 31, 1979, and then from February 12, 1980, to November 6, 1980, she would have earned at least as much as the average daily wage Respondent's beauticians received during those periods:

a) Respondent's salon was very proximate to many barely ambulatory clients and potential clients.

b) Complainant has been very successful in her beautician work with elderly clients.

c) Ms. Bynum earned relatively high wages immediately after beginning her employment with Respondent, even though she started out with no clientele of her own.

d) There is no evidence that the fact that Complainant had less experience as a beautician than Respondent's beauticians had would have affected Complainant's earning in Respondent's employ.

12) Between February 18, 1979, and December 31, 1979, Respondent's beauticians earned an average of $42.95 per working day. If Complainant had worked for Respondent five days per week during the 45 weeks and one day between February 19, 1979, and December, 31, 1979, she would have worked 223 days. (This assumes that she would not have worked on July 4, Thanksgiving or Christmas day.) At the wage of $42.95 per working day, Complainant would have earned a total of $9577.85 during this time.

In fact, Complainant earned a total of $2503.79 between February 19, 1979, and December 31, 1979, or $7074.06 less than she would have earned in Respondent's employ.

13) At the end of 1979, Complainant left her employment at Ann's Honeycomb Beauty Salon. She departed after a change of ownership, before she had obtained other work and without trying to continue there, serving her existing clientele and learning how to execute the styles requested by some of the new clients to which the new owner catered.

14) Between approximately January, 1, 1980, and February 12, 1980, Complainant was not able to work as a beautician because of an injury.

15) After about February 12, 1980, when Complainant began looking for work, she did not apply for some available work in her field for which she was qualified, because she preferred not to do the type of hairstyles involved.

16) Between February 16, 1980, and November 1, 1980, Respondent's beauticians earned an average of $38.23 per working day. If Complainant had worked for Respondent five days per week during the 38 weeks and two days between February 12 and November 6, 1980, she would have worked 191 days. (This assumes she would not have worked on July 4.) At the wage of $38.23 per working day, Complainant would have earned a total of $7301.93.

In fact, had Complainant continued her employment at Ann's Honeycomb Beauty Salon and earned at exactly the same rate as she had earned during her employment there over the last eight months of 1979, she would have earned $2232.34, or $5069.59 less than she would have earned in Respondent employ.

17) The difference between what Complainant would have earned in Respondent's employ from February 19, 1979, to November 6, 1980 and a) what she actually earned from February 19, 1979 to December 31, 1979, plus b) what she would have earned at Ann's Honeycomb Beauty Salon from February 12, 1980, to November 6, 1980, is $12,143.65.

18) On November 6, 1980, Complainant found alternate work which ended the accrual of any back pay award herein.

19) This forum finds the testimony of Complainant more credible overall than that of Respondent. For that reason, where Complainant's testimony differs from Respondent's testimony, this forum has given more weight to Complainant's testimony.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 650.110.

2) Before the commencement of the contested case hearing, this forum complied with ORS 183.413 by informing Respondent and Complainant of the matters described in ORS 183.413(2)(a) through (i).

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

4) Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(a) by refusing to hire Complainant, an individual 18 years of age or older and under 65 years of age, because of Complainant's age.

5) Because Complainant was not able to work as a beautician between approximately January 1, 1980, and February 12, 1980, she cannot accrue back damages herein for that period of time.

6) Complainant's failure to continue working at Ann's Honeycomb Beauty Salon and her failure to thereafter apply for available work in her field for which she was qualified each constitute a failure to exercise reasonable diligence to mitigate back pay damages which accrued between February 12, 1980, and November 6, 1980.

7) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record, and the sum of money awarded as damages is an appropriate exercise of that authority.

OPINION

1. Respondent's Affirmative Defenses

In paragraphs II, III, IV, and V of her answer to the Specific Charges, Respondent stated certain affirmative defenses. This Order does not mention those defenses, because the forum explicitly rejected each of them in its May 11, 1982, Ruling on Respondent's Motion to Dismiss and for Partial Dismissal.

As an additional affirmative defense, Respondent alleges that the Commissioner has failed, refused, and neglected to engage in the "concilliation (*sic*) specifically outlined in ORS 659.050." There is no substantial evidence that this allegation is accurate. Even if it were, the Legislature's use of the verb "may" throughout ORS 659.050 makes it clear that this statute permits but does not require the Commissioner to cause steps to be taken to effect settlement of a civil rights complaint. Accordingly, this defense fails.

2. Liability

The issues concerning liability herein are factual. Respondent and Complainant offered conflicting testimony as to why Respondent did not hire or consider hiring Complainant. Respondent maintained that she did not hire Complainant solely because Complainant told her that she would not work full time or on Saturdays. Complainant denied making this statement and insisted that in fact she wanted to work full time and expected to work Saturdays. Complainant contended that Respondent told her that she was "pretty" or "awfully" young to work for Respondent, and gave her the definite impression that Complainant's age disqualified her from consideration for Respondent's opening.

Both Respondent and Complainant offered inconsistent testimony during these proceedings. For example, Complainant gave different testimony as to the dates of her employment at The Townhouse and the inquiry which incapacitated her after her employment at Ann's Honeycomb Beauty Salon. Complainant explained these inconsistencies by stating that while she remembers names, people, and conversations, she also has difficulty remembering dates and information requiring her to recall dates. Complainant was also evasive about her tip income, her pay records, and her employment at Hazel Dell Care Center. This forum attributes this evasiveness to Complainant's aggressively protective (and sometimes hostile) response to the insistent probing of Respondent's counsel, whom she obviously perceived as an adversary in every sense of the word, rather than to a lack of truthfulness.

Respondent's testimony was fraught with factual inconsistencies, many of which concerned the bases of her key factual positions herein. For instance, Respondent testified that Irene Bynum was the only employee she hired during her ten years as owner of her beauty salon, while her records show that in fact she has hired at least four employees during that time. She confused the hiring process she carried out in November 1978 with that which occurred in February 7, 1979. She repeatedly contended that Genevieve Huserik had returned to work by the time Respondent did the February 1979 hiring at issue, while her own records show that Ms. Huserik did not return until nine months later. Respondent testified at various times that her salon changed from being open six to five days per week in February 1979, in November 1979, and sometime in 1980. She testified in her deposition that she had beauticians at her salon during times material who were aged "in their thirties," when her later testimony and her records reflect that her youngest beautician at those times was in her late forties. Respondent testified that when Complainant applied for work, Respondent needed and sought two new employees to each work five days per week, including Saturdays. The only applicants who remained interested in Respondent's positions after interviewing with Respondent were Complainant, who Respondent says would not work full time or on Saturdays, and Irene Bynum, who would work two days per week, including Saturdays. Respondent could offer no explanation as to why she had not hired Ms. Bynum *and* Complainant, who together would have filled the equivalent of one of the full-time openings (including Saturdays) which Respondent had. Respondent also did not explain why her advertisement solicited full- or part-time

applicants, if she were only going to consider full-time applicants.

Because Respondent's inconsistencies eroded her credibility concerning even the key facts herein, and because she offered no rehabilitating explanation for those inconsistencies, this forum does not believe that her testimony is as accurate as that of Complainant, especially where it differs from that of Complainant. In particular, this forum disbelieves that Complainant refused to work full time or on Saturdays. Complainant worked on Saturdays in every beautician job she had before, and has had since, applying to Respondent. She needed to work full time because of her husband's lack of employment. It would make absolutely no sense to conclude that Complainant refused to work full time or Saturdays on a job she particularly wanted. Moreover, it would make no sense to conclude that Respondent did not hire Complainant because Complainant could only work part time, when Respondent had advertised for full- or part-time beauticians, and when, even at part time, Complainant offered Respondent the only way Respondent had to fill the equivalent of even one full-time slot. For these reasons, this forum does not believe that Respondent did not hire Complainant because Complainant refused to work full time or on Saturdays.

This forum also does not believe Respondent's contention that Ms. Lienan, rather than Respondent, spoke with Complainant when Complainant answered Respondent's advertisement by telephone. In her May 18, 1982, deposition, Respondent stated that she did not remember talking with Complainant at all over the telephone, but she admitted at hearing that she had talked to Complainant once by telephone before their interview. Also, Respondent did not call Ms. Lienan to corroborate Respondent's contention that Ms. Lienan rather than Respondent talked with Complainant, even though Ms. Lienan, "a very good friend" of Respondent, was available to testify. This forum concludes that it was Respondent who talked with Complainant on the telephone and, therefore, that it was Respondent who voiced, during that call or in the subsequent interview, misgivings about the appropriateness of Complainant's age for her openings.

Respondent clearly testified in both her deposition and at hearing that she considers "age" in making hiring decisions. Respondent obviously had at least misgivings about Complainant's age and its appropriateness for her jobs. Respondent's opening form of identifying Complainant when Complainant appeared for her interview evidenced that Respondent already had labeled Complainant in terms of Complainant's age. Respondent was not interested in Complainant's qualifications for her openings. Furthermore, Respondent herself has not alleged any reason other than Complainant's alleged refusal to work full time or on Saturdays for not considering or hiring Complainant. Respondent admitted that Complainant was qualified to do the work and did not testify that she hired Ms. Bynum because she was more qualified than Complainant. Most of Respondent's beautician work force was aged at least fifty years, and there is no evidence that she had ever employed a beautician aged less than forty-six years. For these reasons, and because this forum does not believe the only reason that Respondent offered for not hiring or considering hiring Complainant, this forum concludes that Complainant's age did in fact cause Respondent not to hire or consider hiring Complainant.

3. Damages

As in all matters brought under ORS 659.030, Respondent has the burden of establishing facts mitigating the damages awardable to Complainant. In this case, the question relating to mitigation is whether Complainant failed to exercise reasonable diligence to mitigate her damages: a) by leaving her employment at Ann's Honeycomb Beauty Salon at the end of December 1979, and/or b) by thereafter failing to apply for certain work available in her field.

Complainant first testified that she stopped working at Ann's when its owner sold the salon and took Complainant off the payroll, putting Complainant out of work. Complainant later testified that she left Ann's because the new owner catered to black clients, whose hair Complainant did not "know how to do" (at least the "fancy braiding and beads"). From Complainant's last testimony on this subject, this forum has concluded that Complainant's departure from Ann's was by her own choice, because of her lack of knowledge as to how to execute some styles requested by some customers. Given the fact that Complainant knew, from her, continuous job inquiries while working at Ann's, that she had no other work to go to, this forum finds that Complainant's apparent failure to even try to continue working at Ann's after its change of ownership (at least until she had obtained other work), i.e., her failure to try to keep the clients she already had and work with new clientele, even if it meant learning some new hairstyling techniques, a failure to exercise reasonable diligence to mitigate her back pay damages herein.

For about six weeks after Complainant left Ann's salon, or from approximately January 1, 1980, through February 12, 1980, she was not able to work as a beautician. Thereafter, Complainant remained unemployed for some amount of time. Even though the pertinent time period occurred only about two years before the hearing, Complainant was unable to inform the forum as to how long she was unemployed, when she obtained her next job, how long she had her next job, or how many days per week she worked at her next job. She testified simply that she knew that she had her next job, as a nurse's aide at Hazel Dell Care Center, on July 4, 1980, that it paid her $3.10 per hour, that it was at least sometimes part-time work, that she earned a total of $987.11 at Hazel Dell, and that she started her subsequent employment on November 6, 1980. From this information, the forum deduces that Complainant worked, during the 38.3 week period between February 12, 1980, and November 6, 1980, approximately 318 hours, or the equivalent of 8 weeks of full-time work. The total wages of $987.11 which she earned during the 38.3 weeks she was available for work between January 1, 1980, and November 6, 1980, are much less than the total wages she earned during any equivalent period of

time since at least 1977 during which Complainant was looking for work or employed.

Complainant testified that she accepted her 1980 nursing home employment because she could not find work which she enjoyed and wanted in the beauty vocation. She elaborated by stating that most of the salons at which she considered applying catered to a "younger" group and were more "competitive" with the "far out styles" which weren't her "cup of tea," even though she could do them. This forum infers from this testimony that Complainant chose not to and did not apply for available work in her field because that work involved, in part, types of hairstyling which she was qualified to do but which she preferred not to do. This choice also constitutes a failure to exercise reasonable diligence to mitigate Complainant's back pay damages herein.

Complainant's total lack of information concerning most pertinent facts about her employment and unemployment between February, 12, 1980, and November 6, 1980, and her relatively small earnings during this period are not necessary to, but do buttress, the conclusion in the last sentence of the previous paragraph. This forum assumes that Complainant would have been more willing to at least try to supply information about such recent times if it would have been advantageous to her to do so. Although it is Respondent's burden to present evidence of any failure to mitigate back pay damages, Complainant is probably the only, and certainly the best, source of evidence concerning her own efforts to mitigate. Where a complainant is totally unresponsive to questions which a respondent asks concerning mitigation, and where that complainant could reasonably be expected to be able to supply some answers to such questions, this forum must infer that the answers, if given, would not have furthered the complainant's claim.

For all the reasons explained above, Complainant's departure from employment at Ann's Honeycomb Beauty Salon and her failure to thereafter apply for available work in her field for which she was qualified each constitute a failure by Complainant to exercise reasonable diligence to mitigate her back pay damages during 1980. Accordingly, this forum has reduced Complainant's back pay damages accrued between January 1, 1980, and November 6, 1980, by an amount equivalent to what she would have earned had she remained at Ann's Honeycomb Beauty Salon and earned at a rate equal to the rate at which she earned at Ann's during 1979.

During the six week period at the beginning of 1980 that Complainant could not work as a beautician, she would have earned nothing at Ann's. During the eight months between February 12 and October 12, 1980, Complainant could have earned $2021.74, the amount she earned at Ann's during the last eight months of 1979. During the period between October 12 and November 6, 1980, Complainant would have earned 5/6 of $252.72, her average monthly salary at Ann's during 1979, or $210.60. Between January 1, 1980, and November 6, 1980, therefore, Complainant would have earned

at least $2232.24 had she remained at Ann's. There is no evidence on the record that with reasonable diligence Complainant would have earned more than this sum at Ann's or at any other place of employment which had work available for which Complainant was qualified. Because $2232.34 is more than the $987.11 which Complainant actually earned between January 1, 1980, and November 6, 1980, $2232.34, rather than $987.11, has been deducted from the amount Complainant would have earned in Respondent's employ during 1980, in computing Complainant's 1980 back pay damages.

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, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries, a certified check payable to the Bureau of Labor and Industries in trust for Rebecca Miller in the amount of SIXTEEN THOUSAND NINE HUNDRED TEN DOLLARS and FORTY-ONE CENTS ($16,910.41). This amount represents $12,143.65 in damages for wages Complainant lost because of Respondent's unlawful employment practices set out above; interest thereon computed and compounded annually at the rate of 6 percent from February 19, 1979, through December 31, 1979, and at the rate of 9 percent thereafter through March 31, 1983, in the amount of $4,766.76; and interest accruing at the rate of 9 percent until the date upon which Respondent complies with this order.

2) Cease and desist from discriminating against any prospective employee on the basis of that person's age.