I. COMMISSIONER'S AUTHORITY

1.0 GENERALLY

❑ Respondent moved to dismiss the portion of the formal charges seeking damages on complainant's behalf on the grounds that BOLI lacks subject matter jurisdiction to assess damages, that the seeking of damages exceeds the statutory authority granted to BOLI, and that the Oregon Constitution, specifically Article I § 17 and Amended Article VII § 3, entitles respondent to a jury trial. In a supplementary motion, respondent argued that the present statutory scheme that allows a complainant to make a unilateral election to pursue his or her case in a contested case hearing under the commissioner's jurisdiction or to file a civil suit in circuit court, which would give respondent the option of a jury trial, presents an "equal protection issue" under Article I § 20 of the Oregon Constitution because of its arbitrary nature. The forum denied respondent's motion to dismiss, concluding that respondent was not constitutionally entitled to a jury trial and that the commissioner has the authority to award damages in an administrative hearing. The forum also rejected respondent's equal protection argument. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 245 (2006).***

Appeal pending.

2.0 JURISDICTION

❑ The commissioner's jurisdiction to find liability and to assess or award damages for emotional distress does not violate respondents' right to trial by jury as guaranteed by the Oregon constitution. The Oregon court of appeals has concluded that such awards carry out the commissioner's statutory duty to "eliminate the effects of any unlawful practice found." ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 287-88 (1996).***

❑ Respondent contended that the commissioner lacked jurisdiction because the agency had failed to issue an administrative determination and specific charges within one year of complainant's filing the administrative complaint. The commissioner found that the agency had issued its administrative determination timely and that there was no statutory requirement as to when the specific charges must be issued. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240***, ***249-50 (1991).***

❑ Respondent moved to dismiss the case, alleging that the agency lacked jurisdiction based on Article I, section 17, and Article VII, section 3 of the Oregon Constitution. The hearings referee initially declined to declare invalid the presumptively valid legislative scheme underlying the agency's contested case proceedings in discrimination cases. The commissioner noted that "this Forum and the courts have previously ruled on the cited constitutional issue adversely to the respondents' position" and denied the motion to dismiss. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 180 (1989).***

❑ Respondent, a public employer, moved to dismiss the specific charges on the grounds that the commissioner had no jurisdiction over the subject matter because ORS 659.026, which made it an unlawful employment practice for a public employer to discriminate on the basis of age, states that the procedure for an appeal of such decisions does not apply when another statute exists that provides for such administrative review, and that ORS chapter 240 provided for such review. The commissioner denied the motion, noting that ORS chapter 240 was limited to the areas of suspension, reduction, demotion or dismissal. Since complainant alleged that respondent had unlawfully failed to promote her, ORS 659.026, rather than ORS chapter 240, was applicable. ***----- In the Matter of State of Oregon, Department of Human Resources, 3 BOLI 89, 90-91 (1982).***

❑ In a public accommodations case, when the facts showed that respondent, the unincorporated owner of a tavern, was in the process of selling the tavern at the time of the hearing, the forum stated that respondent was personally liable and the pendency of a sale did not preclude the commissioner from entering a cease and desist order containing a posting requirement. The commissioner retains jurisdiction as long as respondent is the owner of the premises. ***----- In the Matter of The Pub, 6 BOLI 270, 286 (1987).***

3.0 ENFORCEMENT POWERS (*see also* Part IX)

3.1 --- In General

❑ The commissioner may award damages to compensate a complainant for mental suffering caused by a respondent's unlawful employment practice. Such damages would not be available in a circuit court action involving the same allegations. The statutory scheme that results in these differing remedies does not violate Article I, section 20, of the Oregon Constitution. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 219-20 (2000)***.

❑ When respondent argued that ORS chapter 659 does not authorize the commissioner to award economic or non-economic damages for a violation of ORS 659.330(1), the forum held that the commissioner is authorized to award economic and non-economic damages designed "to eliminate the effects of any unlawful practice found" and awarded complainant the sum of $40 to reimburse him for the cost of obtaining a medical certificate before returning to work. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 79 (1999)***.

❑ Remedies available under ORS 659.060(3) in the commissioner's administrative forum have not always run parallel to remedies available in circuit court under ORS 659.121(1). For instance, compensatory damages for mental suffering are recoverable under ORS 659.060(3). Compensatory damages for mental suffering, in contrast, are not available under ORS 659.121(1). Under ORS 659.010(2), the commissioner has authority to fashion a remedy adequate to eliminate the effects of any unlawful practice found and to protect the rights of other persons similarly situated to the person harmed. The loss of wages through loss of employment, as well as mental suffering, can be an effect of discrimination attributable to an employer,

although perpetrated by a victim's company-employee, manager, or a non-employee customer. The commissioner awarded both back pay and mental suffering damages against respondent corporation for violations of ORS 659.030(1)(a), (b), and (f), and against an individual respondent, who was the corporation's owner and president, for violations of ORS 659.030(1)(g). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 139-40 (1997).***

❑ When respondent argued that a conflict existed between the general provisions of ORS 659.030 and the specific provisions of the city charter, and respondent's action of complying with the charter was under apparent authority of law, the commissioner disregarded this argument, stating that ORS 659.030 prevailed over a city charter provision because the subject matter was of general concern to the state as a whole and concerned the substantive social objective of the right of persons to be free from insidious discrimination in employment. The commissioner noted that ORS 659.030 "is clearly designed to prevail over contrary local provisions, and it does not intrude upon the local community's freedom to choose its own political form." ***----- In the Matter of City of Portland, 2 BOLI 41, 52-53 (1980).***

3.2 --- Cease and Desist Orders (*see also* 103.0)

❑ The commissioner is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 97 (2001).***

❑ After hearing, the commissioner is authorized by ORS 659.010 and 659.060 to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. Such effects include any economic or non-economic damage suffered by a complainant because of the practice. The statutes and rules on which a contested case proceeding is based provide for redress of the complainant's grievance through administrative procedures. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 213-14 (1997).***

> Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ In a public accommodations case, when the facts showed that respondent, the unincorporated owner of a tavern, was in the process of selling the tavern at the time of the hearing, the forum stated that respondent was personally liable and the pendency of a sale did not preclude the commissioner from entering a cease and desist order containing a posting requirement. The commissioner retains jurisdiction as long as respondent is the owner of the premises. ***----- In the Matter of The Pub, 6 BOLI 270, 286 (1987).***

❑ When respondent argued that the commissioner did not have the authority to award money damages for a violation of ORS 659.415, the commissioner stated that the authority under ORS 659.060(3) to issue a cease and desist order described in ORS 659.060(3) was incorporated into ORS 659.435 and was therefore applicable to enforce the rights described in ORS 659.415. ***----- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 270 (1980).***

> Reversed on the ground that statutes did not specify failure to reinstate as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries*, 49 Or App 245, 619 P2d 663 (1980).

3.3 --- Commissioner's Complaint

❑ The commissioner filed a verified complaint with the Civil Rights Division of BOLI alleging she had reason to believe that respondent's place of public accommodation had engaged in unlawful practices based on complainant's race/color, in violation of ORS 659.037 and ORS 30.670 to 30.685. The complainant was identified only by initials due to her demonstrated fear of retaliation by respondent. ***----- In the Matter of The Pub, 6 BOLI 270, 271 (1987).***

3.4 --- Damages and Penalties

❑ The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices, including an award of back pay. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 213 (2007).***

> Appeal pending.

❑ When respondent argued that ORS chapter 659 does not authorize the commissioner to award economic or non-economic damages for a violation of ORS 659.330(1), the forum held that the commissioner is authorized to award economic and non-economic damages designed "to eliminate the effects of any unlawful practice found" and awarded complainant the sum of $40 to reimburse him for the cost of obtaining a medical certificate before returning to work. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 79 (1999)***.

❑ The commissioner is authorized to award compensatory damages, including mental suffering damages, in the administrative forum as a means reasonably calculated to eliminate the effects of any unlawful practice found. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 189 (1998)***.

> Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ The commissioner has authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. When respondent constructively discharged complainant on the basis of her sex, that remedy properly included an award of back pay. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 96 (1998)***.

❑ Remedies available under ORS 659.060(3) in the commissioner's administrative forum have not always run parallel to remedies available in circuit court under ORS 659.121(1). For instance, compensatory damages for mental suffering are recoverable under ORS

659.060(3). Compensatory damages for mental suffering, in contrast, are not available under ORS 659.121(1). Under ORS 659.010(2), the commissioner has authority to fashion a remedy adequate to eliminate the effects of any unlawful practice found and to protect the rights of other persons similarly situated to the person harmed. The loss of wages through loss of employment, as well as mental suffering, can be an effect of discrimination attributable to an employer, although perpetrated by a victim's company-employee, manager, or a non-employee customer. The commissioner awarded both back pay and mental suffering damages against respondent corporation for violations of ORS 659.030(1)(a), (b), and (f), and against an individual respondent, who was the corporation's owner and president, for violations of ORS 659.030(1)(g). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 139-40 (1997).***

❑ After hearing, the commissioner is authorized by ORS 659.010 and 659.060 to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. Such effects include any economic or non-economic damage suffered by a complainant because of the practice. The statutes and rules on which a contested case proceeding is based provide for redress of the complainant's grievance through administrative procedures. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 214, 225 (1997).***

❑ The court of appeals has considered and rejected the argument that the commissioner's award of damages is unconstitutional because it violates the employer's right to a jury trial guaranteed by Article I, section 17, and Article VII, section 3 of the Oregon Constitution. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 214 (fn) (1997).***

> Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ When respondent argued that the commissioner did not have the authority to award money damages for a violation of ORS 659.415, the commissioner stated that the authority under ORS 659.060(3) to issue a cease and desist order described in ORS 659.060(3) was incorporated into ORS 659.435 and was therefore applicable to enforce the rights described in ORS 659.415. ***----- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 270 (1980).***

> Reversed on the ground that statutes did not specify failure to reinstate as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries*, 49 Or App 245, 619 P2d 663 (1980).

4.0 RULEMAKING

❑ Although the Agency has statutory authority to process OSHA-based discrimination complaints, it does not have the power to fix standards or prescribe the regulations governing workplace health and safety. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 170 (2005).***

❑ When an administrative rule conflicts with express statutory language and legislative policy, it is invalid. ----- ***In the Matter of Tyree Oil, Inc., 17 BOLI 26, 42-43 (1998)***.

> Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ The commissioner has adopted rules, as authorized by ORS 659.103, to carry out the purpose of ORS 659.415. According to the Oregon Supreme Court, "[a]dministrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute." An employer's ignorance of the law is not a defense to its failure to comply with the requirements of the law. ***----- In the Matter of St. Vincent de Paul Salvage Bureau, 8 BOLI 293, 299 (1990).***

II. INTERPRETATION OF ANTIDISCRIMINATION LAWS

5.0 POLICY CONSIDERATIONS

❑ ORS 659.550 is a remedial statute, and remedial statutes are to be construed liberally to effectuate the purposes of the statute. ***----- In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 125 (1995).***

> Affirmed without opinion, *Earth Science Technology, Inc. v. Bureau of Labor and Industries*, 141 Or App 439, 917 P2d 1077 (1996).

❑ To deny the opportunity to work when the risk of incapacitation is less than probable would contravene the policy of the statute to guarantee the fullest employment of handicapped persons that is compatible with the reasonable demands of the job. ***----- In the Matter of WS, Inc., 13 BOLI 64, 83-84 (1994).***

❑ It is not the public policy of the State of Oregon to encourage or reward the weighing of the costs and benefits of discrimination. BOLI is charged with eliminating and preventing discrimination in employment. To allow private employers to offset unemployment compensation benefits in cases of employment discrimination would encourage and subsidize their unlawful practices. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 131 (1990).***

> Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

❑ Retaliation for opposing an unlawful employment practice "is a particularly insidious form of discrimination. The public interest is furthered * * * by having employees come forward with complaints of violations of the law without fear of retribution." ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 81 (1990).***

❑ When an employee filed a complaint pursuant to ORS 659.410 based on termination as a result of an on-the-job injury, the commissioner found that all that is required is invocation of the workers' compensation

system, that no compensable injury is required, and that the purpose of ORS 659.410 is to free workers from the threat of adverse employer action for invoking the system, regardless of the eventual compensability of the claim. ***----- In the Matter of Ed's Mufflers Unlimited, Inc., 7 BOLI 215, 226 (1988).***

Affirmed without opinion, *Ed's Mufflers Unlimited, Inc v. Bureau of Labor and Industries*, 95 Or App 220, 769 P2d 808 (1989).

❑ The purpose of the prohibitions of age discrimination in employment is to encourage to fullest possible utilization of employable persons by removing arbitrary standards that discriminate against those people solely because of age and to instead encourage measurement of an individual's fitness for employment by his or her abilities. ***----- In the Matter of City of Portland, 6 BOLI 101, 107-08 (1987).***

❑ When an employer constructively discharged complainant for his participation in a civil rights proceeding, the forum determined that such conduct constituted retaliation in violation of ORS 659.030(1)(f), stating that there is a public interest in discouraging retaliation to insure the free flow of information to law enforcement agencies. ***----- In the Matter of Richard Niquette, 5 BOLI 53 (1986).***

❑ The forum determined that respondent had discriminated against complainant for her opposition to practices forbidden by ORS 659.030, in violation of ORS 659.030(1)(d), and stated that the statute embodies a strong public interest in providing protection for individuals who exercise their rights to file such charges. This protection is extended regardless of the merits or outcome of the underlying claimant of discrimination. ***----- In the Matter of Boost Program, 3 BOLI 72, 80 (1982).***

❑ The purpose of the prohibition against discrimination in retaliation for safety complaints is to provide a way for employees to bring safety problems to the attention of the employer without fear of retribution, thus giving the employer the benefit of the employee's first-hand knowledge of conditions and an opportunity to correct defects. ***----- In the Matter of Veneer Services, Inc., 2 BOLI 179, 185 (1981).***

Affirmed without opinion, *Veneer Services, Inc. v. Bureau of Labor and Industries,* 58 Or App 76, 648 P2d 426 (1982).

❑ When respondent argued that a conflict existed between the general provisions of ORS 659.030 and the specific provisions of the city charter, and respondent's action of complying with the charter was under apparent authority of law, the commissioner disregarded this argument, stating that ORS 659.030 prevailed over a city charter provision since the subject matter was of general concern to the state as a whole and concerned the substantive social objective of the right of persons to be free from insidious discrimination in employment. The commissioner noted that ORS 659.030 "is clearly designed to prevail over contrary local provisions, and it does not intrude upon the local community's freedom to choose its own political form." ***----- In the Matter of City of Portland, 2 BOLI 41, 52-53 (1980).***

❑ The legislative objective underlying the adoption of Oregon's statutes prohibiting discrimination in employment is the same as the objective of Congress in enacting Title VII of the Civil Rights Act of 1964. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of employees over other employees. Under Oregon law, practices, procedures or job requirements neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices. ***----- In the Matter of School District No. 1, 1 BOLI 1, 16 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ Oregon and federal employment discrimination law requires the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of an impermissible classification of race, religion, color, national origin, sex, and age. ***----- In the Matter of School District No. 1, 1 BOLI 1, 16 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ Oregon civil rights law, like Title VII of the Civil Rights Act of 1964, proscribes not only overt discrimination, but also practices that are fair in form but disability in operation, regardless of any motive to discriminate. If the employment practice operates to exclude any person within the protected class and cannot be shown to be related to job performance, the practice is prohibited. ***----- In the Matter of School District No. 1, 1 BOLI 1, 16 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ Good intent or the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in headwinds for those in the protected classes of race, religion, color, national origin, sex, and age and are unrelated to measuring job capability. The civil rights laws of Oregon, like their federal counterpart, are directed toward the consequences of employment process, not simply the motivation. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

6.0 EFFECT OF FEDERAL LAW

❑ Relying on EEOC Guidelines that interpret provisions of the ADA that are similar to ORS 659.447 and 659.448, the forum concluded that mere placement of a job applicant in a job pool for possible consideration in the future for temporary work assignments does not constitute an offer of employment that elevates a job applicant to the status of employee. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 90-91 (2001).***

❑ Although federal case law interpreting federal statutes and regulations similar to Oregon laws are not binding on this forum, federal decisions are instructive in construing and applying similar state law. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 149 (2000)***.

Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ Oregon's Fair Employment Practices Law is analogous to Title VII of the Civil Rights Act of 1964, as amended. When a rule implementing ORS 659.030 was adopted against the backdrop of two 1998 United States Supreme Court decisions, the forum relied on those decisions in interpreting the rule. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 150-51 (2000).***

Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ Oregon's Fair Employment Process Law is analogous to Title VII of the Civil Rights Act of 1964, and federal court decisions based on Title VII are instructive and entitled to great weight on analogous issues of Oregon law. ***----- In the Matter of Wing Fong, 16 BOLI 280, 292 (1998).***

❑ While federal case law interpreting federal statutes and regulations that are similar to Oregon laws is not binding on this forum, it is instructive and may be adopted as precedent in Oregon cases. ***----- In the Matter of Kenneth Williams, 14 BOLI 16, 25 (1995).*** *See also In the Matter of C & V, Inc., 3 BOLI 152, 160 (1982).*

❑ Because some of Oregon's civil rights laws are modeled after federal civil rights laws, the commissioner has often looked to federal case law for guidance in interpreting and administering Oregon's laws. While federal case law interpreting federal statutes and regulations is not binding on this forum, it can be instructive and may be adopted as precedent in Oregon cases. ***----- In the Matter of WS, Inc., 13 BOLI 64, 86 (1994).***

❑ Oregon's Handicapped Persons' Civil Rights Act was derived directly from regulations adopted under sections 503 and 504 of the federal Rehabilitation Act of 1973. Accordingly, the forum sought guidance from federal case law regarding the Rehabilitation Act in a disability case. ***----- In the Matter of WS, Inc., 13 BOLI 64, 86 (1994).***

❑ When complainant, a newly converted Seventh-day Adventist, was discharged for failing to work his scheduled shift on a Saturday, the commissioner noted that this forum has previously followed federal case law in resolving a matter of an alleged unlawful employment practice based upon religion. The forum stated that an employer has an affirmative duty to make reasonable accommodation for religious observances of sincere beliefs among its employees to the extent that such accommodation does not cause undue hardship in the conduct of the employer's business. In this case, respondent was able to show that to reasonably accommodate complainant would cause undue hardship in the conduct of its business, and thus did not violate ORS 659.030(1)(a). ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 239 (1988).***

❑ The commissioner noted that Oregon's law protecting the rights of persons with disabilities is modeled after the federal Rehabilitation Act of 1973 and relied on federal precedent as well as the disability laws of other states in concluding that alcoholism is a disability for the purposes of ORS 659.400 to 659.460. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 248, 251 (1991).***

❑ When complainant, a newly converted Seventh-day Adventist, was discharged for failing to work his scheduled shift on a Saturday, the commissioner noted that this forum had previously followed federal case law in resolving a matter of an alleged unlawful employment practice based upon religion. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 239 (1988).***

❑ It is well established that federal law is not binding on this forum. In previous cases, the forum has, however, used the rationale of federal decisions as a framework for the resolution of matters before the forum. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 37 (1987).***

❑ When there has been alleged racial harassment, the commissioner determines what constitutes immediate and corrective action using the following considerations suggested by the EEOC: (1) what actions were taken; (2) when was it taken; (3) whether the action taken fully remedied the conduct without adversely affecting the term or conditions of complainant's employment; and (4) whether the employer had a policy and took steps to implement the policy. The commissioner also recognized the courts' consistent views in considering whether an employer took immediate and corrective action: (1) company policy against harassment and active enforcement of that policy; (2) disciplinary action against the perpetrator; (3) sensitivity training; (4) formal mechanism to deal with grievances; and (5) investigation. The commissioner found that a mere announcement of a policy against harassment and promise to discipline or discharge any employee who

fails to conform is not sufficient to relieve an employer of liability. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ When an employer continually made jokes, derogatory comments, and epithets regarding complainant's national origin, the forum determined that the employer's conduct created an offensive working environment and constituted harassment in violation of ORS 659.030. The forum adopted the standard set forth in Section 1608.8(b) of the EEOC Guidelines stating that ethnic slurs or other verbal or physical conduct relating to an individual's national origin constitutes harassment when this conduct: (1) has the purpose or effect of creating an intimidating, hostile, or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities. ***----- In the Matter of Deana Miller, 6 BOLI 12, 25 (1986).***

❑ If and to the extent that an Oregon statute and a federal statute further the same policy, Oregon courts have considered federal interpretations of the federal law when the Oregon statute has been copied from the federal statute. The Oregon statutory scheme prohibiting age discrimination in employment and the ADEA further the same policy. Accordingly, this forum looks to the federal interpretations of the ADEA, and particularly the language of 29 USC 623(f)(2). ***----- In the Matter of City of Portland, 6 BOLI 101, 110-11 (1987).***

❑ The ADEA benefit plan exception has the same purpose as that which appears in ORS 659.028 – "to permit employers to shape employee benefit plans which are significantly affected by age in a way that accounts for costs that increase because of age." As set forth in CFR 860.120(a)(1), the legislative history of this exemption indicates that its purpose is to "permit age based reductions in employee benefit plans when such reductions are justified by significant cost considerations." The Oregon legislature has shown a clear intent to copy the federal ADEA provisions in enacting ORS 659.028. ***----- In the Matter of City of Portland, 6 BOLI 101, 110-11 (1987).***

❑ The forum adopted the guidelines established by the EEOC for sexual harassment at 29 CFR 1604.11 as the standard for religious harassment or intimidation in employment: "Harassment on the basis of religion is a violation of ORS 659.030. Unwelcome religious advances and other verbal or physical conduct of a religious nature constitute religious harassment when: (1) submission to such conduct is made, either explicitly or implicitly, a term or condition of the subject's employment; (2) submission to or rejection of such conduct by the subject is used as the basis for employment decisions affecting the subject; or (3) such conduct has the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment." The forum emphasized that, by adopting this standard, it did not mean to state that general expressions of religious beliefs at the workplace, by themselves, constitute a violation of ORS 659.030. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 273 (1985).***

❑ Respondent alleged that the state was estopped from prosecuting specific charges when it had relied on an Attorney General opinion based on EEOC Guidelines held invalid by the U.S. Court of Appeals. The forum dismissed the argument, stating that the opinion was based on more than those guidelines. Moreover, federal law is instructive rather than binding on this forum and the state can grant greater protection against discrimination. ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 99-100 (1983).***

❑ While noting that federal court decisions are merely instructive and not binding on the agency, the forum cited *Trans World Airlines v. Hardison,* 442 U.S. 63 (1977) for the proposition that an employer has an affirmative duty to make reasonable accommodation for religious observances of sincere believers among its employees to the extent that such accommodation does not cause undue hardship in the conduct of the employer's business. ***----- In the Matter of Union Pacific Railroad Company, 3 BOLI 234, 237 (1982).***

❑ While the rationale of federal decisions is helpful as a framework for the resolution of matters before this forum, federal decisions are not binding on this forum. ***----- In the Matter of Union Pacific Railroad Company, 3 BOLI 234, 237-38 (1982).***

❑ The forum cited and relied on the decision in a federal case but made it clear that federal law in the matter was not "binding" on the agency. ***----- In the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 130 (1982).***

> Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries,* 63 Or App 871, 667 P2d 583 (1983).

❑ When respondent, an interstate trucking company, alleged coverage by the Federal Highway Administration and that complainants had failed to exhaust remedies provided by federal law, the forum determined those remedies to be cumulative rather than exclusive and complainants' failure to exhaust such remedies did not preclude pursuit of state remedies under ORS 659. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 108 (1982).***

> Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

❑ When a female complainant was discriminated against based on her sex, the commissioner used the model for a prima facie case set forth in *McDonnell Douglas Corp. v. Green,* 41 US 792 (1973) to determine whether any injury resulting from respondent's unlawful conduct was compensable. Such a case includes proof that: (1) 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 those qualifications; and (4) after rejecting complainant, the employer continued to seek applications from persons with

complainant's qualifications. ***----- In the Matter of McCoy Oil Company, 3 BOLI 9, 13-15 (1982).***

❑ When respondent employer-union trust defended a complaint a sex discrimination in benefits due to pregnancy on the basis that complainant had not followed its claim procedure providing for a Board hearing and eventual arbitration, the commissioner found that the rule set forth in *Alexander v. Gardner-Denver Co.,* 415 US 36, 94 SCt 1011 (1974), relating to Title VII, the federal counterpart to ORS chapter 659, applied and that complainant could pursue her statutory remedy without first exhausting other remedies. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 191 (1981).***

❑ The initial burden to establish a prima facie case of age discrimination falls upon the agency, the participant bringing the action. A prima facie case can be defined as a skeletal offering of proof containing at least some evidence in support of the agency's position on each element of the alleged violation. A helpful framework for analysis may be borrowed from federal case law interpreting the Federal Age Discrimination in Employment Act. ***----- In the Matter of Mutual Wholesale Drug Company, 2 BOLI 63, 67-68 (1981).***

❑ While a U.S. Supreme Court decision interpreting similar federal law was entitled to great deference, an earlier decision on point by the Oregon Supreme Court interpreting Oregon law was controlling. ***----- In the Matter of School District Union High 7J, 1 BOLI 163, 170 (1979).***

❑ In cases brought under the provisions of ORS chapter 659, the commissioner's enforcement of civil rights statutes are not subject to federal preemption through the National Labor Relations Act and a civil rights complainant alleging race discrimination in employment had no duty to exhaust the grievance procedure in an existing collective bargaining agreement. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 92-93 (1978).***

> Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).
>
> Order on remand, 1 BOLI 179 (1979).

❑ Oregon's Fair Employment Practices Law contained in ORS 659.010 to 659.110 is analogous to Title VII of the federal Civil Rights Act of 1964, and federal court decisions are entitled to great weight in Oregon on analogous issues in Oregon law. ***----- In the Matter of School District No. 1, 1 BOLI 1, 15 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

7.0 GENERAL PRINCIPLES OF CONSTRUCTION

7.1 --- Statutes

❑ Remedial statutes are to be construed broadly so as to effectuate the purposes of the statute. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 126 (2002).***

❑ When statutory interpretation is required, the forum must attempt to discern the legislature's intent. To do that, the forum first examines the text and context of the statute. The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature's intent. Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 122-23 (2002).***

❑ Because there was is no language in *former* ORS 659.550 that defined the term "reported" and no language in that statute or anywhere else in *former* ORS chapter 659 that modified the term, the forum interpreted the term using a natural reading of the plain words of the statute that yielded a single and unambiguous meaning. That meaning was: so long as criminal activity is reported, it does not matter to whom the report is made. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 122-23 (2002).***

❑ The forum rejected respondent's attempt to insert terms into *former* ORS 659.550 because ORS 174.010 mandates that a judge is "not to insert what has been omitted, or omit what has been inserted." ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 123 (2002).***

❑ ORS 659.550 is a remedial statute, and remedial statutes are to be construed broadly to effectuate the purposes of the statute. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 26 (1997).*** *See also In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 125 (1995); affirmed without opinion, Earth Science Technology, Inc. v. Bureau of Labor and Industries, 141 Or App 439, 917 P2d 1077 (1996).*

❑ It may be assumed that repeated statutory terms have the same meaning throughout a statute. ***----- In the Matter of Portland General Electric Company, 7 BOLI 253, 256 (1988).***

> Affirmed, *Portland General Electric Company v. Bureau of Labor and Industries, 116* Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

❑ In determining the legislative intent of a statute, the forum relied on *In re Holmlunds Estate*, 232 Or 49 (1962), for the proposition that the 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 statutes when possible. ***----- In the Matter of Mini-Mart Food Stores, Inc., 3 BOLI 262, 274 (1983).***

7.2 --- Administrative Rules

❑ ORS 651.060(4) gives the commissioner the authority to adopt administrative rules interpreting *former* ORS 659.550, but did not give the commissioner the authority to adopt rules inconsistent with that or any other statute. The forum declared that the provisions of OAR 839-010-0100(1)(a) and OAR 839-010-0110(2) in effect at the time two complainants were discharged as invalid because they impermissibly restricted the scope of *former* ORS 659.550. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 123 (2002).***

❑ The term "invoke," as used in ORS 659.410(1), is defined by rule to include the "worker's reporting of an on-the-job injury" to her employer. The commissioner held that respondent's contention this definition was too broad and beyond the intention of the legislative was without merit. "The agency's interpretation properly and logically identifies the first step by which an employee 'invokes' the procedures of the workers' compensation law." ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 292 (1991).***

❑ The commissioner has adopted rules, as authorized by ORS 659.103, to carry out the purpose of ORS 659.415. According to the Oregon Supreme Court, "[a]dministrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute." ***----- In the Matter of St. Vincent de Paul Salvage Bureau, 8 BOLI 293, 299 (1990).***

❑ When respondent objected to evidence involving complainant's mental suffering on the grounds that complainant had a pending claim with the Workers' Compensation Department for stress suffered as a result of the alleged harassment, also the basis for the specific charges, the forum overruled the objection. OAR 839-30-060 governs responsive pleadings and provides that the "failure of a party to raise an affirmative defense in the answer shall be deemed a waiver of such defense. Relying upon ORCP 19(b) that affirmative defenses include "payment * * * and any other matter constituting an avoidance," the commissioner found that respondent had failed to raise an affirmative defense in the answer to the charges and, pursuant to OAR 839-30-060, that defense was waived. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 4-5 (1987).***

❑ When an administrative rule, OAR 839-06-105, could not be applied directly in a contested case because it was not filed and effective until after the contested events arose, the rule was "nonetheless instructive of what the Bureau policy (was) and (had) been on the question of what (was) included within the term 'invoke' in ORS 659.410." ***----- In the Matter of Pacific Convalescent Foundation, Inc., 4 BOLI 174, 183 (1984).***

III. THEORIES OF DISCRIMINATION
(*see also* Part VII)

10.0 SPECIFIC INTENT

❑ Proof of a causal connection may be established through evidence that shows respondent knowingly and purposefully discriminated against complainant because she engaged in protected activity ["specific intent" test] or by showing that respondent treated complainant differently than her co-workers who were not engaged in the same protected activity ["different treatment" test]. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 300 (2007).***

❑ While specific intent may be established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 300 (2007).***

❑ As set forth in *former* OAR 839-005-0010(2), the "Specific Intent Test" is one method of determining a causal connection between a respondent's adverse action and a complainant's protected class and may be shown by circumstantial evidence. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 61 (2002).***

❑ ORS 659.425(1) requires an act of discrimination accompanied by discriminatory intent for a violation to occur. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 270 (fn), 275 (1997).***

11.0 DIFFERENT OR UNEQUAL TREATMENT

❑ Proof of a causal connection may be established through evidence that shows respondent knowingly and purposefully discriminated against complainant because she engaged in protected activity ["specific intent" test] or by showing that respondent treated complainant differently than her co-workers who were not engaged in the same protected activity ["different treatment" test]. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 300 (2007).***

❑ Comparative evidence related to a complainant's protected class and a respondent's prior acts related to the nature of the offense are relevant in discrimination cases alleging different or unequal treatment. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 215 (2007).***

Appeal pending.

❑ Respondent required that complainant, who had invoked the provisions of OFLA, sign respondent's break policy. Respondent then terminated her because she refused to sign, but did not terminate another employee who had not invoked a right under the OFLA provisions and did not sign the break policy. The forum drew an inference that respondent treated complainant differently than her counterpart because complainant engaged in a protected activity. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 241 (2004).***

❑ The forum applied the different treatment theory contained in OAR 839-005-0010(B) to determine if complainant's use of the workers' compensation system was a substantial factor in her termination. ***----- In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 87 (2004).***

❑ Respondent's assertion that one of the reasons for complainant's discharge was that his poor work performance had become a business liability was

negated by evidence that no other sales representative with equal or inferior records was discharged during the relevant time period. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 187 (1982).***

❑ When the timing of complainant's discharge was "extremely suspect" and respondent saw no need to immediately dismiss other poor performers who also would be costly to retain, the forum concluded that respondent's actions supported an inference that complainant was discharged because he and his interracial family were perceived to be an actual or potential embarrassment. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 187 (1982).***

❑ Respondent accommodated complainant's series of increasingly restrictive medical releases over a two month period, then terminated complainant, an injured worker who applied for and used the workers' compensation provisions, for violating respondent's policy prohibiting offensive language in the workplace, and did not terminate other workers who had not applied for or used the workers' compensation provisions who violated the same policy. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 62-63 (2002).***

❑ When evidence showed that after a series of absences due to his on the job injury, complainant was singled out for using the word "bitch" in the workplace, that the use of vulgar language was tolerated and widespread in the department complainant worked in, that no one else was terminated for using vulgar language in complainant's department, and that respondent summarily terminated complainant without following its own disciplinary procedure, the forum found respondent's reason for terminating complainant pretextual and concluded that respondent terminated complainant because he used the workers' compensation provisions. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 62-63 (2002).***

❑ When complainant was fired for reporting timecard falsification to respondent's corporate headquarters, respondent's failure to fire a co-worker of complainant, who also participated in reporting timecard falsification to corporate headquarters, did not prove respondent's manager lacked a retaliatory motive in the face of credible evidence that established the manager's retaliatory motive towards complainant. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 127-28 (2002).***

❑ The agency failed to prove that the respondent employer treated an African-American employee against whom sexual harassment complaints had been filed differently than it treated Caucasian employees against whom similar complaints had been filed. ***-----*** In ***the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 155 (2000)***.

Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ The employer investigated sexual harassment charges brought against a male African-American employee and several male Caucasian employees, found credible evidence that the African-American employee and two of the Caucasian employees had inappropriately touched female employees, and discharged all three of those employees. The employer did not discharge the other Caucasian employees, who had not touched or intimidated other employees. Under these circumstances, the employer's discharge of the African-American employee was part of a consistent pattern of discipline and did not constitute discrimination. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 155-56 (2000)***.

Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ When the agency alleged that respondents unlawfully reduced complainant's work hours because she was pregnant, the agency was required to prove that: (1) respondents were employers subject to ORS 659.010 to 659.110; (2) respondents employed complainant; (3) complainant was a pregnant woman; (4) respondents took an action that harmed complainant in compensation or in terms, conditions or privileges of employment; and (5) respondents took their action against complainant because of her pregnancy. ***---- In the Matter of Bob G. Mitchell, 19 BOLI 162, 185 (2000)***.

❑ When the agency alleged that respondent unlawfully discharged complainant because of his utilization of the workers' compensation system, the agency's prima facie case was comprised of four elements: (1) the respondent was a respondent as defined by statute; (2) the complainant was a member of a protected class; (3) the complainant was harmed by an action of respondent; and (4) the respondent's action was taken because of the complainant's protected class. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 133 (2000)***.

❑ The forum applied a different treatment analysis to determine if respondent discharged complainant "because of" his protected class. Different treatment occurs when a respondent "treats members of a protected class differently than others who are not members of the protected class. When the Respondent makes this differentiation because of the individual's protected class and not because of legitimate, nondiscriminatory factors, unlawful discrimination exists." ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 133 (2000)***.

❑ When a respondent successfully presents evidence that it took action against a complainant for a legitimate, nondiscriminatory reason, the agency still may prevail by proving that the proffered justification was a pretext for discrimination. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 134 (2000)***.

❑ When the specific charges alleged complainant had been subjected to different treatment regarding medical verification of illness and attendance, based on his use of the workers' compensation system, but the evidence showed that other employees were required to provide medical verification of illness and were subject to

disciplinary procedures regarding tardiness and attendance, the forum found that the agency did not establish by a preponderance that complainant was demonstrably treated differently than others in those particular terms and conditions of employment. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 74 (1999)***.

❑ Credible evidence established that respondent's employee treated two white customers very differently from the way in which he treated a black customer, whom he declined to serve and to whom he spoke rudely. The forum inferred that the employee treated the black customer differently because of her race. ***----- In the Matter of Westwind Group of Oregon, 17 BOLI 46, 51-52 (1998)***.

❑ When the agency alleged that complainant was subjected to disparate treatment based on her sex and/or retaliation, the forum stated that the agency must show that the treatment was discriminatory, that is, that it was not accorded to males and/or was not accorded to persons who had not opposed forbidden practices. ***----- In the Matter of Oregon Department of Fish and Wildlife, 16 BOLI 263, 278 (1998).***

❑ When respondent's bar manager required medical information about any restrictions on complainant's work due to her pregnancy, the commissioner held this did not constitute illegal different treatment because of sex since the evidence did not show that respondent treated complainant differently than other workers with temporary disabilities and the law permitted respondent to request information about a worker's ability to perform her job. ***----- In the Matter of Benn Enterprises, Inc., 16 BOLI 69, 76-78 (1997).***

❑ When a black complainant's supervisor did not regularly refer to other employees by nickname, but referred complainant to by his supervisor by the nickname of "Fred" and complainant objected to being called that name, this constituted discrimination in terms and conditions of employment. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 252 (1995).***

❑ When the agency presented evidence that respondent hit or pushed two female employees as he corrected their work, but did not subject the sole male employee to such treatment, the forum applied the different or unequal treatment test in OAR 839-05-010(2)(b) and held that the agency had presented sufficient evidence to support a prima facie case of unlawful discrimination based on sex. ***----- In the Matter of Howard Lee, 13 BOLI 281, 290-91 (1994).***

❑ When the agency presented evidence that respondent hit or pushed two female employees as he corrected their work, but did not subject the sole male employee to such treatment, and respondent made no demeaning comments about women in their presence and provided promotional opportunities, pay advances, loans, free long distance calls, and emergency transportation to all his employees, male and female alike, and complainant had received a promotion and four pay raises, was allowed to receive personal calls from her children because she was a single mother, and required and received pay advances, the forum did not find that complainant was hit and pushed because of her sex. ***----- In the Matter of Howard Lee, 13 BOLI 281, 290-91 (1994).***

❑ When a foreign-born complainant was treated unfavorably by his immediate supervisors, who referred to him as "Czech," "dumb Czech," and "fucking Czech," the commissioner found that respondent's discharge of complainant for "theft of company time," when similarly situated native-born employees received lesser discipline for repeated instances of "abuse of company time," was based on complainant's national origin. ***----- In the Matter of Yellow Freight System, Inc., 13 BOLI 201, 216-18 (1994).***

❑ When respondent produced clear and reasonably specific evidence that it acted upon legitimate, nondiscriminatory reasons when it discharged a black employee and not a similarly situated white employee and the agency was given a full and fair opportunity to show that those reasons were a pretext for discrimination but failed to show pretext, the forum found that respondent did not violate ORS 659.030(1)(a). ***----- In the Matter of Clackamas County Collection Bureau, Inc., 12 BOLI 129, 139-40 (1994).***

❑ When the agency presented evidence that two employees who performed the same job, one white and one black, gave notice of their intent to quit, and respondent discharged the black employee but permitted the white employee to work until the end of the month, the forum held that the agency presented a prima facie case of racial discrimination. ***----- In the Matter of Clackamas County Collection Bureau, Inc., 12 BOLI 129, 139 (1994).***

❑ When respondents employed a female complainant as a restaurant manager at a wage rate lower than the two male managers before her, lower than a male manager hired to replace her when complainant thought she was relocating, and lower than the male manager who was employed after her, the commissioner found that respondents discriminated against complainant because of her sex, in violation of ORS 659.030(1)(b). ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 161-62 (1993).***

❑ When the agency established that respondent was an employer of one or more employees in Oregon; respondent employed complainant; complainant was female; respondent discriminated against complainant in compensation because of her sex; and complainant was thereby damaged, the agency presented a prima facie case that respondent violated ORS 659.030(1)(b). ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 229 (1991).***

❑ When complainant alleged that she was treated differently by her co-workers after she had filed a sexual harassment charge, the commissioner found no retaliation when there was no evidence linking the employer with any direction to its employees to treat complainant differently, nor any notice by the complainant to the employer. ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 78 (1990).***

❑ When respondent objected to evidence of prior acts by respondent, the commissioner said that "[i]n the

context of discrimination law, when the nature of the offense alleged is that it was motivated by the victim's membership in a statutorily protected class, the manner in which other members of that class have allegedly been treated is clearly relevant to the inquiry. How other members of a complainant's protected class are treated as opposed to those not of that class is also relevant. Comparator evidence is common in employment discrimination cases." ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 179 (1989).***

❑ When respondent employed complainants, both female, as department managers but paid them less than a male department manager, the forum found the wage differential was based on the difference in the size of the departments managed rather than sex. The evidence established that respondent based manager salaries on the size of the department, value of inventory, supervisory responsibilities, and whether employees were full or part time. Complainants had significantly smaller departments and inventories than the male manager and supervised a part time employee, while the male manager supervised a full time employee. The forum, citing *Gunther v. County of Washington,* 101 SCt 2242 (1981), stated that an employer "may make a salary differential even when job duties appear the same, when the responsibility required of the individual is different." ***----- In the Matter of Tyrholm, Inc., 3 BOLI 188, 191, 193 (1982).***

❑ When the owner of a restaurant maintained a discriminatory policy of hiring only males to wait on tables in the evening, the commissioner still found that a female complainant busperson was denied a promotion to evening waiter because of her poor qualifications and would not have been hired as a waiter even if respondent had not maintained the policy. Complainant had a poor table-side manner, attitude and personality problems, was often sloppy and unkempt in violation of policy, was not reliable, and had lied about being ill. The commissioner stated that "[r]espondent] 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 respondent's discretion." ***----- In the Matter of The Riverhouse of Bend, 3 BOLI 171, 177-79 (1982).***

❑ In order to show unlawful discrimination based on 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. A respondent's employment of one-at-a-time individuals in serial or successive employment, when respondent pays different wages based on sex, will support a conclusion of unlawful discrimination. ***----- In the Matter of C & V, Inc., 3 BOLI 152, 160 (1982).***

❑ When a female complainant was employed as a knot bumper and safety person for a logging operation but paid 50 cents per hour less than her male predecessor in the same job, the forum found that respondent's payment of lower wages to complainant than respondent paid to males doing the same job constituted discrimination in compensation, terms and conditions of employment on the basis of sex. ***----- In the Matter of C & V, Inc., 3 BOLI 152, 161 (1982).***

❑ The agency alleged that complainant, a black waiter in respondent's restaurant, had been discharged because of his race when a white waiter who conducted himself in a similarly improper manner, resulting in greater detriment to respondent, was not discharged. The forum determined that complainant had not been discharged because of his race when the evidence established complainant had been uncooperative in the workplace and his job performance was not an asset, as was that of the comparator white waiter, to respondent. It is not unlawful for an employer to summarily discharge an employee for conduct that 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 the Matter of Horst Mager Specialty Restaurants, Inc., 3 BOLI 39, 45 (1982).***

❑ When a female complainant was discriminated against based on her sex, the commissioner used the model for a prima facie case set forth in *McDonnell Douglas Corp. v. Green,* 41 US 792 (1973) to determine whether any injury resulting from respondent's unlawful conduct was compensable. Such a case includes proof that: (1) 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 those qualifications; and (4) after rejecting complainant, the employer continued to seek applications from persons with complainant's qualifications. The commissioner found that complainant was a member of a protected class, but that the agency had not established that complainant was qualified for the position. The commissioner can award damages for lost wages only if the agency establishes either that complainant was qualified for the position for which others were hired, or a male with qualifications equal to complainant's was hired. ***----- In the Matter of McCoy Oil Company, 3 BOLI 9, 13-15 (1982).***

❑ When a female complainant who was paid as a police records clerk performed the same actual job duties as two higher paid male co-workers, who were sworn police officers and paid as sworn police officers, the commissioner found that complainant exercised the same skill, effort and responsibility as her male co-workers and that the disparity in pay was due to her sex. ***----- In the Matter of City of Portland, 2 BOLI 110, 136 (1981).***

> Reversed on back pay, affirmed on retaliation, *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

❑ Respondent did not violate ORS 659.030 by paying complainant, a female manager, less than respondent's two male managers when her work was not equal or substantially equal and required less skill, effort and responsibility, complainant had less experience as a

manager, complainant did not perform buying tasks, and the store she managed had less annual sales volume than the stores managed by respondent's male managers. ***----- In the Matter of Doyle's Shoes, Inc., 1 BOLI 295, 299-300 (1980).***

❑ When complainant alleged sex discrimination because she was paid less than a male employee who performed some of the same functions, the commissioner found respondent had not violated ORS 659.030 when the male employee had additional duties, stating that when a wage difference exists and the skills, efforts, responsibilities, and working conditions are "equal, substantially equal or comparable to the requisite degree, wage discrimination is unlawful," but an employer is justified in compensating employees at different rates when they perform at different levels of skill, efforts, or responsibility, or when they work under dissimilar conditions, regardless of the employee's sex. ***----- In the Matter of Jenks Hatchery, Inc., 1 BOLI 275, 279 (1980).***

❑ When a female complainant requested a raise in pay to equal the pay of a male possessing comparable skill and doing substantially similar work under similar working conditions, the employer's subsequent treatment of and discharge of complainant was not only further different treatment due to sex, but also was retaliation. ***----- In the Matter of Terminal Ice and Cold Storage Company, Inc., 1 BOLI 151, 157 (1978).***

❑ Interview questions asked of a female applicant concerning her children, her mode of dress, and her means of relating to the opposite sex that a male applicant was not asked were found not to be a factor in her rejection for hire as a salesperson when she had little sales experience and a restricted motor vehicle license preventing operation of respondent's vehicles, and the successful male applicant was an experienced salesperson with an unrestricted license. ***----- In the Matter of Marv Tonkin Ford Sales, Inc., 1 BOLI 41, 45, 46 (1976).***

❑ Complainant, a black man, was hired by respondent, a business depot, to perform custodial and baggage handling duties. After 3 ½ years, he sought and was denied promotion to a ticket agent position. Respondent asserted that complainant was denied the promotion because he was not qualified for the position and because he had not been a satisfactory employee in his custodial/baggage position, all reasons that the commissioner found were pretextual. The commissioner also found that white custodial/baggage handlers were promoted to ticket agent positions, and that during a period of 23 years respondent had employed only four black persons, none of whom were promoted. The commissioner concluded that complainant was denied the promotion because of his race and color, in violation of ORS 659.030(1). ***----- In the Matter of N. H. Kneisel, Inc., 1 BOLI 28, 30-36 (1976).***

Compliance amended, 1 BOLI 51 (1976).

12.0 HARASSMENT (in general)

12.1 --- Types of Harassment in Employment

12.1.1 --- Intimidating, Hostile, or Offensive Working Environment

❑ The standard for determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in complainant's particular circumstances. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 211 (2007).***

Appeal pending.

See also In the Matter of Robb Wochnick, 25 BOLI 265, 285 (2004).

❑ In determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 211 (2007).***

Appeal pending.

See also In the Matter of Robb Wochnick, 25 BOLI 265, 285 (2004).

❑ As complainant's employer, respondent had an obligation to take prompt remedial action to eliminate harassment even when the offensive conduct was by others he did not employ. In workplaces where employees have the ability to send and receive e-mail at will, employers have a duty to determine what steps can be taken to stop offensive e-mail that generates from outside the workplace. While evidence showed that current technology does not provide a fail-safe mechanism for filtering out or blocking all unwanted junk e-mail, the forum held that reasonable care includes an employer's obligation to use whatever current technology is available to block patently inappropriate e-mail and reduce the volume of offensive junk mail. Respondent did not use that technology and was held liable for the daily barrage of sexually explicit e-mail that was unwelcome and sufficiently pervasive to alter complainant's working conditions and create a hostile working environment. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 284-85 (2004).***

❑ Respondent, as a sole proprietor and complainant's employer, was strictly liable for any unwelcome sexual conduct he personally directed toward complainant because of her gender that was implicitly a condition of her employment or that resulted in a hostile, intimidating or offensive work environment. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 281 (2004).***

❑ In determining whether conduct has created an intimidating, hostile or offensive working environment, the forum applies an objective standard, that is, it determines whether a reasonable person would arrive at that conclusion. ***----- In the Matter of Western Stations Co., 18 BOLI 107, 119-20 (1999)***.

❑ In determining whether a working environment is

intimidating, hostile or offensive, the forum considers the totality of the circumstances, including: the nature of the conduct (verbal or physical); the context in which the alleged incidents occurred; the frequency, severity, and pervasiveness of the conduct; and whether the conduct was physically threatening or humiliating. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 92 (1998)***.

❑ To establish a prima facie case of sexual harassment, the agency must present evidence to show that (1) respondent is an employer defined by statute; (2) complainant was employed by respondent employer; (3) complainant is a member of a protected class (sex); (4) respondent employer, or respondent employer's agent, in the workplace made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature directed at complainant because of complainant's sex; (5) the conduct had the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment, or submission to such conduct was made an explicit or implicit term or condition of employment; (6) respondent employer had knowledge of the offensive conduct; and (7) complainant was harmed by the conduct. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 136 (1997).*** *See also In the Matter of A.L.P. Incorporated, 15 BOLI 211, 222 (1997)(also noting possibility of non-employee harassment), affirmed, A.L.P. Incorporated, v. Bureau of Labor and Industries, 161 Or App 417, 984 P2d 883 (1999); In the Matter of Soapy's, Inc., 14 BOLI 86, 96 (1995); In the Matter of Kenneth Williams, 14 BOLI 16, 24 (1995).*

❑ To establish a prima facie case of racial harassment in violation of ORS 659.030(1)(b), the agency must present evidence to show that (1) the respondent is an employer defined by statute; (2) the complainant was employed by respondent; (3) the complainant is a member of a protected class (race); (4) the respondent, or respondent's agent, supervisory employee, or non-employee in the workplace engaged in unwelcome conduct directed at complainant because of complainant's race; (5) the conduct had the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment, or submission to such conduct was made an explicit or implicit term or condition of employment; and (6) the complainant was harmed by the conduct. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 14 (1996).*** *See also In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 252 (1995).*

❑ To present a prima facie case of a violation of ORS 659.030(1) for sexual harassment, the agency must present evidence on the following elements: (1) the respondent is a respondent as defined by statute; (2) the complainant is a member of a protected class; (3) the complainant was harmed by an action of the respondent; and (4) the respondent's action was taken because of the complainant's membership in the protected class. ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 88 (1993).*** *See also In the Matter of RJ's All American Restaurant, 12 BOLI 24, 29 (1993); In the Matter of C. Vogar'd Amezcua, 11 BOLI 197, 203 (1993).*

❑ To constitute unlawful sexual harassment, the behavior or activity at issue must be sufficiently severe and pervasive so as to create what a reasonable person would consider an intimidating, hostile, or offensive work environment. The forum's approach to this issue recognizes an inverse relationship between the requisite severity and pervasiveness of harassing conduct – as the severity of the conduct increases, the frequency of the conduct necessary to establish harassment decreases. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 195-96 (1992).***

> Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ The behavior or activity of an employer or employer's agent creating an intimidating, hostile, or offensive work environment must be sexual in nature, unwelcome to the complainant, and based on sex. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 195 (1992).***

> Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ For religious conduct to violate ORS 659.030, it must be sufficient severe or pervasive to alter the conditions of the complainant's employment and create an intimidating, hostile, or offensive work environment. In making this determination, the commissioner evaluates the totality of the circumstances. The commissioner has previously examined the frequency, duration, and severity of harassing conduct to determine if it created a hostile working environment. The standard applied in this determination is objective and is directed to the reasonableness of the complainant's reaction to the work environment. In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found. This is not to say, however, that the specific circumstances of the complainant play no role in determining how a reasonable person would be affected by the work environment. All objective aspects of complainant's situation will be relevant to the reasonableness of complainant's reaction to the work environment, including characteristics of the complainant. Youth and inexperience, for example are appropriately considered in evaluating the environment's impact on complainant. The trier of fact must adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 115 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded

with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Harassment based on religion is a violation of ORS 659.030. Unwelcome religious advances and other verbal or physical conduct of a religious nature constitute religious harassment when: (1) submission to such conduct is made, either explicitly or implicitly, a term or condition of the subject's employment; (2) submission to or rejection of such conduct by the subject is used as the basis for employment decisions affecting the subject; or (3) such conduct has the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 112 (1992).***

Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ It is not a defense that an employee fails to leave employment immediately after experiencing sexual harassment. A victim of sexual harassment is often incapable of taking action for a period of time. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 215 (1991).***

❑ An owner's or manager's unwelcome, offensive speech of a sexual nature, directed toward an employee because of the employee's sex, which results in an intimidating and hostile work atmosphere, is sexual harassment. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 187 (1991).***

❑ This forum follows the position adopted by the EEOC and the federal courts – an employer has an affirmative duty to maintain a working environment free from harassment, intimidation or insult, and that duty requires an employer to take positive action when necessary to eliminate such practices respondent remedy their effects. Moreover, an employer has a duty to investigate complaints and appropriately deal with the offending personnel. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ Racially oriented statements or actions constitute racial harassment when the conduct: (1) has the purpose or effect of creating an intimidating, hostile, or offensive work environment; (2) has the purpose or effect of unreasonably interfering with complainant's work performance; or (3) otherwise adversely affects an individual's employment opportunities. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ When an employer continually made jokes, derogatory comments, and epithets regarding complainant's national origin, the forum determined that the employer's conduct created an offensive working environment and constituted harassment in violation of ORS 659.030. The forum adopted the standard set forth in Section 1608.8(b) of the EEOC Guidelines stating that ethnic slurs or other verbal or physical conduct relating to an individual's national origin constitutes harassment when this conduct: (1) has the purpose or effect of creating an intimidating, hostile, or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities. ***----- In the Matter of Deana Miller, 6 BOLI 12, 25 (1986).***

12.1.2 --- Submission to Unwanted Verbal or Physical Conduct Related to Protected Class Made Term or Condition of Employment or Used as Basis for Employment Decisions (*"Quid Pro Quo")(see* 31.2.3.3*)*

❑ To prove quid pro quo sexual harassment, the agency was required to show that respondent was an employer subject to former ORS 659.010 to 659.110; (2) respondent employed complainant; (3) complainant was a male; (4) respondent, as complainant's employer and direct supervisor, directed unwelcome sexual advances, requests, or conduct toward complainant because he is male; (5) respondent significantly changed complainant's employment status by reducing his pay and his work hours; and (6) respondent did so because complainant rejected her unwelcome sexual advances. ***----- In the Matter of Barbara Bridges, 25 BOLI 107, 119-120 (2003).***

❑ Under the religious harassment test, "quid pro quo" harassment occurs when submission to unwelcome religious conduct is made, either explicitly or implicitly, a term or condition of the subject's employment, or when submission to or rejection of such conduct by the subject is used as the basis for employment decisions affecting the subject. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 113 (1992).***

Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

12.2 --- Employer Liability

12.2.1 --- Harassment by Supervisor

❑ The conduct of respondent's corporate officer was properly imputed to respondent and respondent was held strictly liable for his unlawful sexual harassment. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 210 (2007).***

Appeal pending.

❑ Respondent argued that it was not liable for the conduct of its supervisor who was alleged to have harassed the complainant in an OFLA case because the supervisor engaged in the conduct on her own initiative, without respondent's knowledge, and away from respondent's workplace based on the common-law "scope of employment" test. The forum held that respondent's argument did not apply to the agency's harassment allegations. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 251 (2005).***

❑ Respondent, as a sole proprietor and complainant's employer, was strictly liable for any unwelcome sexual conduct he personally directed toward complainant because of her gender that was implicitly a condition of

her employment or that resulted in a hostile, intimidating or offensive work environment. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 281 (2004).***

❑ In order to prevail on its hostile environment claim, the agency was required to present evidence to show: (1) respondent was an employer subject to former ORS 659.010 to 659.110; (2) respondent employed complainant; (3) complainant was a member of a protected class; (4) respondent made unwelcome sexual advances, requests for sexual favors, or engaged in unwelcome conduct of a sexual nature directed toward complainant because of his gender; (5) the unwelcome conduct was so severe or sufficiently pervasive to have the purpose or effect of creating a hostile, intimidating, or offensive work environment; and (6) complainant suffered harm as a result of the unwelcome conduct. ***----- In the Matter of Barbara Bridges, 25 BOLI 107, 121-22 (2003).***

❑ To prove quid pro quo sexual harassment, the agency was required to show that respondent was an employer subject to former ORS 659.010 to 659.110; (2) respondent employed complainant; (3) complainant was a male; (4) respondent, as complainant's employer and direct supervisor, directed unwelcome sexual advances, requests, or conduct toward complainant because he is male; (5) respondent significantly changed complainant's employment status by reducing his pay and his work hours; and (6) respondent did so because complainant rejected her unwelcome sexual advances. ***----- In the Matter of Barbara Bridges, 25 BOLI 107, 119-120 (2003).***

❑ In a racial harassment case, a prima facie showing of harassment by a supervisor, with no tangible employment action, consists of the following elements: (1) respondent is a respondent as defined by statute; (2) complainant is a member of a protected class; (3) complainant was harmed by harassment directed at her by a supervisor with immediate or successively higher authority over her; (4) complainant's protected class was a reason for the supervisory harassment; (5) the harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the complainant's work performance or creating an intimidating, hostile or offensive working environment; (6) the standard for determining whether harassment was sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable African American in the circumstances of the complainant would so perceive it; (7) respondent knew or should have known of the harassment. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 25 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ When harassment is committed by the complainant's supervisor, but no tangible employment action is taken as a result, the employer may be liable if it knew or should have known of the harassment. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 150 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ If an employer had actual knowledge of harassment by a complainant's supervisor, its only defense is that it took immediate and appropriate corrective action. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 149 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ A low-level supervisor's knowledge of harassment, standing alone, did not establish that the employer had actual knowledge of the harassment. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 150 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ There is a presumption that an employer "should have known of" harassment by a supervisor of a subordinate employee. The employer can overcome that presumption by proving both elements of a two-pronged affirmative defense. The employer must prove both that: 1) it exercised reasonable care to prevent and correct promptly any harassing behavior; and 2) the complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 150-51 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ To establish a prima facie case that respondent, through a supervisory employee, unlawfully engaged in hostile work environment harassment of a worker who applied for benefits or invoked or utilized the workers' compensation system, the agency must present evidence to show that: (1) respondent is an employer of six or more persons; (2) respondent employed complainant; (3) complainant is a worker who applied for benefits or invoked or utilized the workers' compensation procedures; (4) respondent's supervisory employee engaged in unwelcome verbal or physical conduct directed at complainant because of his protected class; (5) the conduct had the purpose or effect of creating an objectively intimidating, hostile, or offensive working environment; (6) respondent knew or should have known of the conduct; and (7) complainant was harmed by the conduct. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 72 (1999)***. *See also In the Matter of LTM, Incorporated,* 17 BOLI 226, 238 (1998); *In the Matter of Central Oregon Building Supply, Inc.*, 17 BOLI 1, 9-10 (1998), *affirmed without opinion*, 160 Or App 700, 981 P2d 402 (1999).

❑ When respondent corporation's owner and

president subjected a female complainant to demeaning, sexually offensive comments on a frequent basis, including references to her sex life and to his own and referring to complainant as a "dumb fucking blond bitch," often threatened to "bitch slap" complainant, which put her in fear, and physically struck complainant on the top of the head and across her face, the commissioner found that the owner engaged in unwelcome physical and verbal conduct of a sexual nature, directed at complainant because of her sex, that the conduct had the effect of creating an intimidating, hostile, and offensive work environment, that submission to such conduct was made an explicit term or condition of employment, that the corporation knew of the conduct, and that the complainant was harmed by it. The commissioner held that the owner sexually harassed complainant, that the respondent corporation violated ORS 659.030(1)(b), and that the owner aided and abetted the corporation's unlawful practices, in violation of ORS 659.030(1)(g). ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 219-22 (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ To establish a prima facie case of racial harassment in violation of ORS 659.030(1)(b), the agency must present evidence to show that: (1) the respondent is an employer defined by statute; (2) the complainant was employed by respondent; (3) the complainant is a member of a protected class (race); (4) the respondent, or respondent's agent, supervisory employee, or non-employee in the workplace engaged in unwelcome conduct directed at complainant because of complainant's race; (5) the conduct had the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment, or submission to such conduct was made an explicit or implicit term or condition of employment; and (6) the complainant was harmed by the conduct. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 14 (1996).*** *See also In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 252 (1995).*

❑ When respondent excepted to being held liable in the proposed order for the racial comments of his manager, arguing that the agency's evidence consisted of hearsay from friends of complainant, the commissioner found that the manager admitted the substance of his remarks to the investigator and at hearing, that respondent acknowledged that the manager had repeated similar language to him, that all versions of the words used conveyed the message of racial inferiority, and that it was well settled that employers were liable for the discriminatory acts of supervisors toward other employees. ***----- In the Matter of Auto Quencher, 13 BOLI 14, 23 (1994).***

❑ When respondent argued that he had no record of racial complaints, had no knowledge of his manager's bias, questioned complainant's testimony that he had never been called "nigger" before, and received no complaint personally from the victim, the commissioner found that employers could take no comfort from an employee's choice not to report a supervisor's discriminatory speech before seeking legal redress under the law. ***----- In the Matter of Auto Quencher, 13 BOLI 14, 23 (1994).***

❑ Respondent's white manager told his sister-in-law that a black complainant's supposed lack of progress was due to blacks having smaller brains than whites and she reported the statement to complainant. Respondent argued that the manager's remarks were not only unauthorized but took place outside of working hours, away from the work site, and outside complainant's presence. The commissioner found that "time and place do not necessarily control whether there is an offense when there is an ongoing employment relationship" because a complainant's subsequent knowledge of such offensive statements by a supervisor might contribute to an offensive work environment experience by complainant. ***----- In the Matter of Auto Quencher, 13 BOLI 14, 22 (1994).***

❑ When a black male complainant informed respondent employer's management of his discomfort resulting from repeated insulting and demeaning comments by his supervisors regarding himself and other members of his race that created a negative racial atmosphere, the commissioner held respondent responsible for complainant's resulting discomfort and humiliation. ***----- In the Matter of Northwest Fitness Supply Company, 12 BOLI 246, 261-62 (1994).***

❑ An owner's or manager's unwelcome, offensive speech of a sexual nature, directed toward an employee because of the employee's sex, which results in an intimidating and hostile work atmosphere, is sexual harassment. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 187 (1991).***

❑ An employer is strictly liable for a supervisor's sexual harassment of an employee even when the company's enterprise involves mobile worksites and forecloses the employer from day-to-day oversight of its supervisory personnel. OAR 839-07-555. ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 78 (1990).***

❑ An employer is liable for its acts and "those of its agents and supervisory employees" when those acts constitute sexual harassment." OAR 839-07-555(1). The rule imposed liability on the employer for the acts "of its agents and supervisory employees with respect to sexual harassment regarding of whether: (a) The specific acts complained of were authorized by the employer; or (b) The specific acts complained of were forbidden b the employer; or (3) The employer knew or should have known of the occurrence of the specific acts complained of." The commissioner found that the rule imposed absolute liability on an employer for sexual harassment by the employer's agent or supervisory employee, and that strict liability thereby provides a powerful incentive to absentee management both to prevent harassment before it occurs and to provide effective and accessible means of complaint and information resolution. ***----- In the Matter of Colonial Motor Inn, 8 BOLI 45, 55-56 (1989).***

❑ The commissioner adopted EEOC guidelines in regard to employer liability for racial harassment in the

workplace: (1) an employer is strictly liable for the actions of its agent and supervisory employees; and (2) an employer is liable for nonsupervisory employees when the employer knew or should have known of their harassing activity unless the employer took immediate and corrective action. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

12.2.2 --- Harassment by Coworker or Agent

❑ When respondent's personnel manager made comments to complainant related to her marital status, but was an hourly employee with some low-level management duties and in no position to affect complainant's employment with respondent, the forum applied the agency's administrative rule that addresses harassment by co-workers. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 47 (2001).***

❑ A prima facie case of co-worker harassment based on race consists of the following elements: (1) respondent is a respondent as defined by statute; (2) complainant is a member of a protected class; (3) complainant was harmed by harassment directed at her by co-workers; (4) complainant's race was a reason for the co-worker harassment; (5) the harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the complainant's work performance or creating an intimidating, hostile or offensive working environment; 6) the standard for determining whether harassment was sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable African American in the circumstances of the complainant would so perceive it; (7) respondent knew or should have known of the harassment. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 23 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ A respondent employer is liable for sexual harassment by a co-worker if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action. ***----- In the Matter of Wing Fong, 16 BOLI 280, 290 (1998).***

❑ An employer is liable for harm caused to an individual when the individual is subjected to a co-worker's unwelcome, sexually-oriented physical and verbal conduct because of her sex and the employer knew or should have known of the conduct and took no action to correct or eliminate it. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 93-94 (1996).***

> Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 301, 954 P2d 804 (1998).

❑ When a female complainant repeatedly reported, to her supervisor, the unwelcome, pervasive, sexually oriented physical and verbal conduct of a male co-worker towards her and respondent employer took no action to correct, modify, or prevent the unwelcome behavior, respondent was liable for complainant's severe and long-lasting emotional distress. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 92-94 (1996).***

> Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 301, 954 P2d 804 (1998).

❑ When respondent's customer sexually harassed complainant, complainant repeatedly complained to respondent's management about the customer and tried to permanently eject him from respondent's liquor and entertainment establishment, but respondent failed and refused to take any immediate and appropriate, or any, corrective action, the forum held that respondent's failure to take such action made the continued sexual harassment a terms and conditions of complainant's employment, in violation of ORS 659.030(1)(b), and made respondent liable for the effects of the customer's activities. ***----- In the Matter of Soapy's, Inc., 14 BOLI 86, 94 (1995).***

❑ In order to establish a prima facie case of racial harassment, the agency must show that: (1) complainant was a member of a protected class; (2) complainant was subject to unwelcome harassment; (3) but for complainant's protected class, complainant would not have been the object of such harassment; (4) the terms and conditions of complainant's employment were affected; and (5) the employer, in the case of co-worker harassment, knew or should have known of the harassment and failed to take prompt action. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 6 (1987).***

❑ When complainant advised respondent he was being harassed based on his national origin, the forum stated it was respondent's "duty to alleviate the discriminatory behavior of its employees." Respondent was obligated to take additional action, besides merely talking to the employees, to resolve the problem. Respondent took inadequate action to correct the employee harassment of complainant and respondent was liable under ORS 659.030(1)(b). ***----- In the Matter of Clackamas County, 3 BOLI 164, 169 (1982).***

12.2.3 --- Harassment by Non-Employee

❑ When respondent acknowledged that complainant told him she was offended by a customer's conduct toward her that included excessive "leering" and staring at her breasts, but complainant testified that respondent ultimately complied with her request that he be present while the customer was in the workplace conducting business and she had no subsequent problems with the customer, the forum inferred that respondent's action effectively ended the harassment and that respondent took sufficient remedial action in response to complainant's complaint and was not liable for the harassment caused by the customer. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 285 (2004).***

❑ Employers are liable for any work place harassment its employees are subjected to by non-employees if they know or should have known of the conduct and fail to take immediate and appropriate corrective action. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 281 (2004).***

❑ An employer can be held liable for harassment by a non-employee, such as a customer, if the employer

knew or should have known of the conduct and failed to take immediate and appropriate corrective action. There is no presumption that an employer "should have known" that this type of harassment was occurring. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 153 (2000)***.

Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ When the assistant manager of a store knew that a customer had harassed an employee and instructed the employee to identify the customer the next time she entered the store, and the employee failed to do so, the assistant manager had taken all appropriate corrective action that was available. Consequently, the employer was not liable for the harassment by the customer. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 154 (2000)***.

Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ To establish a prima facie case of racial harassment in violation of ORS 659.030(1)(b), the agency must present evidence to show that: (1) the respondent is an employer defined by statute; (2) the complainant was employed by respondent; (3) the complainant is a member of a protected class (race); (4) the respondent, or respondent's agent, supervisory employee, or non-employee in the workplace engaged in unwelcome conduct directed at complainant because of complainant's race; (5) the conduct had the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment, or submission to such conduct was made an explicit or implicit term or condition of employment; and (6) the complainant was harmed by the conduct. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 14 (1996).*** *See also In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 252 (1995).*

❑ When respondent's customer sexually harassed complainant, complainant repeatedly complained to respondent's management about the customer and tried to permanently eject him from respondent's liquor and entertainment establishment, but respondent failed and refused to take any immediate and appropriate, or any, corrective action, the forum held that respondent's failure to take such action made the continued sexual harassment a terms and conditions of complainant's employment, in violation of ORS 659.030(1)(b), and made respondent liable for the effects of the customer's activities. ***----- In the Matter of Soapy's, Inc., 14 BOLI 86, 94 (1995).***

12.3 --- Withdrawn Consent

❑ If a complainant has previously been a willing participant in conduct that he or she later complains about, the complainant has a duty to notify the harasser that the conduct is unwelcome. The employer may be liable for the harassment if it knew or should have known that the employee had withdrawn his or her consent to the offensive conduct. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 117-18 (1992).***

Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

12.4 --- Harassment in Housing and Public Accommodations

13.0 CONSTRUCTIVE DISCHARGE (in general)

❑ This forum has consistently held that if an employer imposes objectively intolerable working conditions, *i.e.*, that a reasonable person in complainant's position would have resigned under those conditions, the employee's resignation due to those conditions is a constructive discharge. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 213 (2007).***

Appeal pending.

See also In the Matter of Executive Transport, Inc., 17 BOLI 81, 95 (1998).

❑ In a sexual harassment case, the forum found that respondent was liable for a constructive discharge if complainant's supervisor: 1) intentionally created or maintained discriminatory working conditions related to complainant's gender that were 2) so intolerable that a reasonable person in complainant's circumstances would have resigned because of them; 3) respondent desired to cause complainant to leave her employment as a result, or knew or should have known that complainant was certain, or substantially certain, to leave employment as a result of the working conditions; and 4) complainant left her employment as a result of those working conditions. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 213 (2007).***

Appeal pending.

❑ In a case alleging constructive discharge based on a hostile work environment, the agency must prove that respondent: (1) intentionally created or maintained discriminatory working conditions related to complainant's gender that were (2) so intolerable that a reasonable person in complainant's circumstances would have resigned because of them, (3) respondent desired to cause complainant to leave his employment as a result, or knew or should have known that complainant was certain, or substantially certain, to leave his employment as a result of the working conditions, and (4) complainant left respondent's employment as a result of the working conditions. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 287 (2004).*** *See also In the Matter of Barbara Bridges, 25 BOLI 107, 124 (2003); In the Matter of Entrada Lodge, Inc., 20 BOLI 229, 251-52* (2000), *reversed and remanded for reconsideration, Entrada Lodge v. Bureau of Labor and Industries, 184 Or App 315, P3d 444 (2002), final order on remand 24 BOLI 125 (2003); In the Matter of Body Imaging, P.C., 17 BOLI 162, 186 (1998), affirmed in part, reversed in part, Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries, 166 Or App 54 (2000); In the Matter of*

Executive Transport, Inc., 17 BOLI 81, 95 (1998).

❑ The elements of a constructive discharge resulting from unlawful employment practices are: (1) respondent must have intentionally created or maintained discriminatory working conditions related to the complainant's protected class status; (2) those working conditions were so intolerable that a reasonable person in complainant's circumstances would have resigned because of them, (3) respondent desired to cause complainant to leave employment as a result, or knew or should have known that complainant was certain, or substantially certain, to leave employment as a result of the working conditions, and (4) complainant did leave respondent's employment as a result of the working conditions. ***----- In the Matter of James Breslin, 16 BOLI 200, 217 (1997).***

> Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

See also In the Matter of Body Imaging, Inc., 16 BOLI 163, 183, 185 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998), affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries,* 166 Or App 54, 999 P2d 475 (2000).

❑ When the preponderance of evidence established that complainant quit each time respondent offered her an unacceptable schedule, but the agency did not plead or offer evidence to prove that respondent actually or constructively discharged complainant, the agency did not prove that respondent had violated ORS 659.030(1)(a). ***----- In the Matter of Katari, Inc., 16 BOLI 149, 151 (1997).***

> Affirmed without opinion, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).

❑ Respondent corporation, aided by its respondent-owner, created intolerable working conditions because of complainant's sex by subjecting complainant to unwelcome sexual touching and comments, and complainant's resignation was a constructive discharge whereby respondent corporation violated ORS 659.030(1)(a) and the owner violated ORS 659.030(1)(g). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 13, 135 (1997).***

❑ The forum has adopted the general rule that if the employer imposes working conditions so intolerable that the employee is forced into an involuntary resignation, the employer has encompassed a constructive discharge, provided that the forum is satisfied that the working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would resign. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 12 (1994).***

❑ When sexual harassment of a female complainant by respondent's manager, her immediate supervisor, resulted in intolerable working conditions for the complainant, the commissioner found that complainant's resignation was a constructive discharge. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 12 (1994).***

❑ If an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge. "Deliberately" does not mean that the employer's imposition of intolerable working conditions need be done with the intention of either forcing the employee to resign or relieving himself of that employee. The term "deliberately" refers to the imposition of the working conditions; that is, it means the working conditions were imposed by the deliberate or intentional actions of the employer. To find a constructive discharge, this forum must be satisfied that working conditions so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, caused the employee to resign, and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. If there has been a constructive discharge, an employer is liable for any unlawful conduct involved therein, as if the employer had formally discharged the employee. ***----- In the Matter of RJ's All American Restaurant, 12 BOLI 24, 30-31 (1993).***

❑ A constructive discharge results when an employee resigns over intolerable working conditions imposed by the employer. Unequal pay based on sex, when a demand for equality has been refused, creates intolerable working conditions over which a reasonable person would resign, and a resultant resignation is a constructive discharge. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 165 (1993).*** *See also In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 34 (1991).*

❑ When complainant resigned due to sexual harassment, and respondent argued that complainant would have quit in any event due to a scheduling change, the forum found that the issue was why she quit when she did, not why she might have done so at some later date, had respondent not constructively discharged her when it did. When the actual and immediate cause of complainant's resignation was what she reasonably believed to be a quid pro quo proposition from her supervisor, that proposition alone, or coupled with other repeated instances of harassment, would have compelled a reason person to resign. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 197-98 (1992).***

> Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ Respondent argued that allegedly intolerable working conditions leading to an employee's resignation must be created by the employer with the intent that the employee resign in order to hold the employer responsible for a constructive discharge. The commissioner stated that the subjective intent standard applied to the tort of wrongful discharge was unsuited to the statutory employment discrimination context and denied respondent's motion to dismiss the issue of constructive discharge. ***----- In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 21, 34 (1991).***

❑ When a female complainant was subjected to frequent, severe and pervasive sexual harassment by an individual proprietor on the job and had the choice of continuing to endure the harassment or quitting, the commissioner found that her resignation was a constructive discharge attributable to the unlawful employment practice without regard to whether the employer intended that the employee resign. ***----- In the Matter of Lee Schamp, 10 BOLI 1, 16-18 (1991).***

❑ Respondent argued that *Bratcher v. Sky Chefs, Inc.,* 308 Or 501, 783 P2d 4 (1989) required that the agency, in order to establish a constructive discharge based on unacceptable working conditions, must prove that the employer deliberately created or maintained the working conditions with the intention of forcing the employee to resign, and that the employee did in fact resign due to those working conditions. The commissioner held that when intolerable working conditions created by statutorily unlawful discrimination leave no reasonable alternative to resignation, the resignation equates to a discharge, regarding of the employer's intent about the employee's tenure. ***----- In the Matter of William Kirby, 9 BOLI 258, 274-79 (1991).***

❑ Noting that *Bratcher v. Sky Chefs, Inc.,* 308 Or 501, 783 P2d 4 (1989) enunciated a tort standard for constructive discharge in requiring proof that the employer deliberately created respondent maintained intolerable working conditions with the intention of forcing the employee to resign, the commissioner held that such a test for working conditions created by statutorily unlawful discrimination would produce results inconsistent with the commissioner's remedial authority under Oregon civil rights statutes. ***----- In the Matter of William Kirby, 9 BOLI 258, 276-77 (1991).***

❑ When respondent's creation of an intimidating, hostile, offensive work environment through unwelcome sexually abusive and intimidating language and gestures towards complainant because of her sex was deliberate and intentional, but was not done with the intent that complainant terminate her employment, the commissioner held that complainant's resignation was a constructive discharge and that respondent committed an unlawful employment practice, in violation of ORS 659.030(1)(a). ***----- In the Matter of William Kirby, 9 BOLI 258, 274 (1991).***

❑ The forum's standard for constructive discharge is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 215-16 (1991).***

❑ When unlawful different treatment has made the employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge, in violation of ORS 659.030(1)(a). ***----- In the Matter of City of Umatilla, 9 BOLI 91, 105 (1990).***

> Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ "This forum set forth the standard for constructive discharge in *In the Matter of West Coast Truck Lines, Inc.,* 2 BOLI 192, 215-16 (1981), *affirmed without opinion,* 63 Or App 383, 665 P2d 882 (1983), wherein the forum stated: 'The general rule, which this forum adopts, is that "if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary reason, then the employer has encompassed a constructive discharge * * *." In *In the Matter of Tim's Top Shop,* 6 BOLI 166, 187 (1987), this forum stated: 'that "deliberately" does not mean that the employer's imposition of "intolerable" working conditions need be done with the intention of either forcing the employee to resign or relieving himself of that employee. The term "deliberately" refers to the imposition of the working conditions; that is, <u>it means the working conditions were imposed by the deliberate or intentional actions of the employer.</u> (Emphasis in the original.)' In *West Coast Truck Lines, Inc., supra* at 215-16, the forum ruled that: 'To find a constructive discharge, this forum must be satisfied that "working conditions * * * so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign" caused the employee to resign and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. * * * The final rule concerning constructive discharge is that if there has been a constructive discharge, an employer is liable for any unlawful conduct involved therein as if the employer had formal discharged the employee.'" In this case, the commissioner found that respondent's "deliberate imposition of intolerable working conditions on [complainant] and her resulting resignation * * * constitute a constructive discharge, and respondents violated ORS 659.030(1)(a)." ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 19-20 (1989).***

❑ When a respondent deliberately made a complainant's working conditions so intolerable by creating a pervasive, intimidating, hostile, and offensive work environment that discriminated against complainant, who was forced into an involuntary resignation that encompassed a constructive discharge, the commissioner used the term "deliberately" to mean that the working conditions were imposed by the deliberate or intentional actions of the employer. ***----- In the Matter of Tim's Top Shop, 6 BOLI 166, 187-88 (1987).***

❑ When respondent deliberately failed to schedule complainant, a waitress, for any hours of work, it was reasonable for complainant not to return to work, as she could not work when she was not scheduled to do so. Respondent's actions constituted a constructive discharge consistent with the standard adopted by the forum: "To find a constructive discharge, this forum must be satisfied that working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, caused the employee to resign and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer." ***----- In the Matter of Richard Niquette, 5 BOLI 53, 61-62 (1986).***

❑ When the agency alleged that complainant, who claimed respondent had failed to promote him and that

he had been discriminated against on the basis of his age, resigned because of respondent's alleged unlawful conduct and was therefore constructively discharged, the forum found that the work atmosphere to which complainant was subjected was not so outrageous as to compel a reasonable person under similar circumstances to resign. The commissioner based this finding on complainant's statement that, even though he believed respondent to be wrong, it would have been possible for him to remain in the job while trying to correct the situation. ***----- In the Matter of the State of Oregon, Department of Human Resources, 3 BOLI 89, 95 (1982).***

❑ By paying a female complainant less and providing less benefits than male employees who performed work that was substantially equal in skill, effort and responsibility under similar working conditions, respondent created working conditions intolerable to complainant, amounting to a constructive discharge. The commissioner stated: "The general rule which this forum adopts is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation, then the employer has encompassed a constructive discharge." ***----- In the Matter of West Coast Truck Lines, 2 BOLI 192, 216-18 (1981).***

Affirmed without opinion, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983).

14.0 ADVERSE IMPACT (in general)

❑ Pursuant to OAR 839-05-020(2), an employer can justify the adverse impact that results from a seemingly neutral employment standard applied to all employees by showing that the policy or standard is a business necessity, unless another standard or policy with less adverse impact would work as well. ***----- In the Matter of City of Portland, 6 BOLI 101, 106 (1987).***

❑ Complainant, a female corrections officer, applied for a management position with the Corrections Division, but a male applicant with greater experience was selected. The forum found that respondent had failed to promote complainant based on an experience criterion that discriminated against complainant because of her sex. The facts established that respondent had a policy and practice of not permitting female employees to work with male prisoners that operated as a bar that kept complainant from obtaining the experience that distinguished her from the male applicant in significant respects. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 67-69 (1982).***

❑ In evaluating the rules and policies of school districts under Oregon's civil rights statutes, it is not enough that such rules and policies may appear neutral and reasonable on their face, operate equally against all persons, or are convenient. In the areas of race, religion, color, national origin, sex and age, such rules and regulations must treat the individual employee as an individual and not on any characteristic generally attributed to the group or class sought to be protected by the civil rights laws. The only exception is when the employer can establish that its requirements respondent or practices for the particular job amount to a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business. The test is business necessity, not business convenience. ***----- In the Matter of School District No. 1, 1 BOLI 1, 15-16 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ The legislative objective underlying the adoption of Oregon's statutes prohibiting discrimination in employment is the same as the objective of Congress in enacting Title VII of the Civil Rights Act of 1964. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of employees over other employees. Under Oregon law, practices, procedures or job requirements neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices. ***----- In the Matter of School District No. 1, 1 BOLI 1, 16 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ What is required by Oregon law, as well as federal law on the same subject, is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate based on impermissible classification (race, religion, color, national origin, sex and age). ***----- In the Matter of School District No. 1, 1 BOLI 1, 16 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ Oregon civil rights law, like Title VII of the Civil Rights Act of 1964, proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation, regardless of motive. The touchstone is business necessity. If the employment practice operates to exclude any person within the protected class and cannot be shown to be related to job performance, the practice is prohibited. ***----- In the Matter of School District No. 1, 1 BOLI 1, 16 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ Whatever criteria are used by the employer, there must be a demonstrable relationship to successful performance on the job for which the criteria are used. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ Good intent or the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in headwinds for members of protected classes (race, religion, color, national origin, sex and age) and are unrelated to measuring job capability. The civil rights laws of Oregon, like their federal counterpart, are directed toward to consequences of employment practices, not simply the motivation. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ Tests, procedures, and practices are not to become the masters of reality. Oregon's legislative, like Congress, has made qualifications to perform the job the controlling factor so that race, religion, color, national origin, and sex become irrelevant. Tests used must measure the person for the job and not the person in the abstract. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

15.0 FAILURE TO REASONABLY ACCOMMODATE (in general)

❑ Under Oregon's disability discrimination laws, among other things, "reasonable accommodation" means a change in working conditions made for an "otherwise qualified disabled employee" so that an employee can perform the essential functions of the job. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 272 (2006).***

Appeal pending.

❑ When an employee requests accommodation, the employee must let the employer know that the employee needs an adjustment or change at work for a reason related to a medical condition. The employee need not mention the ADA, Oregon laws protecting disabled persons, or the term "reasonable accommodation." ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 271 (2006).***

Appeal pending.

❑ An employer's duty to reasonably accommodate an employee or job applicant under Oregon's disability discrimination laws is triggered when an employee or applicant requests accommodation or when the employer recognizes the need for accommodation. ***------ In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 271 (2006).***

Appeal pending.

❑ Reasonable accommodation is required under ORS 659A.112(2)(e) & (f) when an employee is "an otherwise qualified disabled employee." ***------ In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 270 (2006).***

Appeal pending.

❑ An employer has an affirmative duty to accommodate an employee's physical impairment and cannot rely on ignorance or doubts about the nature or legitimacy of the impairment as the bass for denying accommodation. ***----- In the Matter of James Breslin, 16 BOLI 200, 214-15 (1997).***

Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ Oregon's law on the civil rights of disabled persons imposes upon employers the affirmative duty of reasonably accommodating employees' disabilities unless this imposes an undue hardship on respondent. ***----- In the Matter of James Breslin, 16 BOLI 200, 213-14 (1997).***

Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ A person with a disability must be able to perform the essential functions of the job, with or without accommodation. An accommodation is usually accomplished by adjustments to the way a job is customarily performed. Whether a job duty is an essential function is a factual determination that must be made on a case-by-case basis, and all relevant evidence should be considered. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 293 (1997).***

❑ When complainant suffered from the physical impairments of breast cancer and coronary artery disease, respondent was obligated under Oregon law to (1) do an individualized assessment of complainant's capabilities; and (2) determine whether he could reasonably accommodate complainant's disability without undue hardship. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 291 (1997).***

❑ While it is generally true that the accommodation process is initiated by an employee's request for accommodation, the employer's awareness of a disabling impairment by the employer, substantiated by

the employee, can trigger a duty to accommodate. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 275 (1997).***

❑ Under the Handicapped Persons' Civil Rights Act, an employer must perform an individualized assessment of a disabled person's capabilities, and try to find a reasonable accommodation that would allow the person to overcome the many kinds of barriers that restrict employment opportunities and perform the duties of the job. An employer may not let unfounded fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or acceptance by co-workers and customers to influence its employment decisions. ***----- In the Matter of WS, Inc., 13 BOLI 64, 89 (1994).***

❑ The Handicapped Persons' Civil Rights Act requires an employer to make a reasonable effort to provide an effective accommodation. When respondent's past accommodation – assigning complainant to work in a shop rather than in a ship – was not available, respondent was required to make another reasonable effort to accommodate complainant. An employer's obligation to provide a reasonable accommodation applies to all aspects of employment. This duty is ongoing and may arise any time that a person's disability or job changes. ***----- In the Matter of WS, Inc., 13 BOLI 64, 89 (1994).***

❑ The Handicapped Persons' Civil Rights Act requires reasonable accommodation as a way of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities. Respondent had an affirmative duty to reasonably accommodate complainant's disability so that he could perform the work involved in the position sought. Accommodation was required unless it imposed an undue hardship on respondent. One factor to consider in making this determination is the effect of the potential accommodation on safety. ***----- In the Matter of WS, Inc., 13 BOLI 64, 86 (1994).***

❑ The employer has an affirmative duty to evaluate an employee's capabilities. Otherwise, the employer cannot accurately and objectively determine (1) the individual's ability to perform the job; and (2) whether reasonable accommodation is necessary. Once the individualized assessment is done, the employer must then look for possible accommodations, if necessary. ***---- In the Matter of WS, Inc., 13 BOLI 64, 87 (1994).***

❑ The burden of proving inability to accommodate is on the employer. Once the employer presents credible evidence that indicates accommodation of the complainant would not reasonably be possible, the complainant may not remain silent. Once the employer presents such evidence, the complainant has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence. ***----- In the Matter of WS, Inc., 13 BOLI 64, 87 (1994).***

❑ To establish a prima facie case of an unlawful employment practice based on religion under ORS 659.030(1)(a), the agency has the burden of pleading and proving that: (1) complainant had a bona fide religious belief; (2) he informed respondent of his religious views and that they were in conflict with his responsibilities as an employee; and (3) he was discharged because of his observance of that belief. Once the agency has established a prima facie case, the burden shifts to respondent to prove that it made good faith efforts to accommodate the complainant's religious beliefs. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 240 (1988).***

❑ An employer is required to take some steps in negotiating with the employee to reach a reasonable accommodation to the particular religious beliefs at issue. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 241 (1988).***

❑ It is well recognized that, although complainants are under no burden to propose specific means of accommodating their religious practices to their employers, a complainant has the duty to cooperate with the measures suggested by their employers in reaching an accommodation. Employees are not required to modify their religious beliefs, only to attempt to satisfy them within the procedures offered by the employer. ***. ----- In the Matter of Albertson's, Inc., 7 BOLI 227, 240 (1988).***

❑ While noting that federal court decisions are merely instructive and not binding on the agency, the forum cited *Trans World Airlines v. Hardison,* 442 U.S. 63 (1977) for the proposition that an employer has an affirmative duty to make reasonable accommodation for religious observances of sincere believers among its employees to the extent that such accommodation does not cause undue hardship in the conduct of the employer's business. ***----- In the Matter of Union Pacific Railroad Company, 3 BOLI 234, 237 (1982).***

16.0 MIXED MOTIVE (in general)

❑ In a mixed motive case, a complainant can prevail despite a respondent's legitimate reason for termination if the complainant shows he or she would not have been terminated absent the respondent's unlawful discriminatory motive. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 308 (2007).***

❑ Respondent's internal memorandum citing complainant's medical leave in connection with her termination, and the testimony of respondent's personnel manager that complainant was discharged based on working for another employer without respondent's permission and that he felt it was unfair of complainant to take advantage of respondent's policy set up to benefit its employees, created an inference that complainant's medical leave was a motivating factor in respondent's decision to terminate complainant. However, based on respondent's legitimate, nondiscriminatory reason and the forum's finding that complainant's medical leave was mentioned in the memorandum to provide historical context, not cause, that evidence was insufficient to establish specific intent. This evidence was also insufficient to establish that complainant's use of OFLA played "a substantial role" in her discharge, which would have triggered a "mixed motive" analysis under OAR 839-005-015. ----- ***In the Matter of Roseburg Forest Products Co., 20 BOLI 8,***

29 (2000).

❑ If the evidence proved that respondent's LNDR and complainant's protected class status were both causative factors in respondent's discharge of complainant, the forum would apply the "mixed motive" test and decide if complainant's protected class status "played a substantial role in respondent's action at the time the action was taken." ----- ***In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 36 (2000)***.

IV. COMMON BASES OF DISCRIMINATION.

20.0 AGE

20.1 --- Employment

20.1.1 --- Generally

❑ If and to the extent that an Oregon statute and a federal statute further the same policy, Oregon courts have considered federal interpretations of the federal law when the Oregon statute has been copied from the federal statute. The Oregon statutory scheme prohibiting age discrimination in employment and the ADEA further the same policy. Accordingly, this forum looks to the federal interpretations of the ADEA, and particularly the language of 29 USC 623(f)(2). ***----- In the Matter of City of Portland, 6 BOLI 101, 110-11 (1987).***

❑ The ADEA benefit plan exception has the same purpose as that which appears in ORS 659.028 – "to permit employers to shape employee benefit plans which are significantly affected by age in a way that accounts for costs that increase because of age." As set forth in CFR 860.120(a)(1), the legislative history of this exemption indicates that its purpose is to "permit age based reductions in employee benefit plans When such reductions are justified by significant cost considerations." The Oregon Legislative has shown a clear intent to copy the federal ADEA provisions in enacting ORS 659.028. ***----- In the Matter of City of Portland, 6 BOLI 101, 110-11 (1987).***

❑ The prohibitions on age discrimination under Oregon law were not intended to protect only older workers. ***----- In the Matter of City of Portland, 6 BOLI 101, 110 (1987).***

❑ The purpose of the prohibitions of age discrimination in employment is to encourage to fullest possible utilization of employable persons by removing arbitrary standards that discriminate against those people solely because of age and to instead encourage measurement of an individual's fitness for employment by his or her abilities. ***----- In the Matter of City of Portland, 6 BOLI 101, 107-08 (1987).***

❑ In *Ogden v. Bureau of Labor and Industries,* 68 Or App 235 (1984), the court concluded that Oregon employment discrimination law prohibits use of age as a "determining factor," that is, as a factor that "made a difference" in the employment decision at issue. This, taken together with the court's reference to the prohibition against age being "a factor" in an employment decision leads the forum to conclude that any factor playing more than a minimal role is a determining factor. This conclusion reflects the description of "key role" in OAR 839-05-015. The court referred to all the protected classes named in ORS 659.030(1) as "criteria prohibited in employment decisions, whether used alone or with legitimate reasons." The rationale set forth by the court in support of the determining factor test is equally applicable to other protected classes named in ORS 659.030(1), and this forum concludes the test is in fact applicable to all those protected classes. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 313 (1985).***

20.1.2 --- Hiring, Promotion

❑ Respondents sent complainant a note stating they did not hire him because they "were looking for someone younger, to possibly take over the business." The forum found that note to be direct evidence of unlawful discrimination. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 209 (2000)***.

❑ When there was direct evidence that respondents refused to hire complainant because of his age, the forum concluded that respondents had engaged in unlawful employment practices, despite the fact that respondents did not hire anybody to fill the position for which complainant had applied. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 211 (2000)***.

❑ When the employer believed complainant, age 30, was too young to work with elderly clients, did not inquire into her actual qualifications for the position, and had a work force of beauticians over 50 years of age, complainant was discriminated against on the basis of her age when she was refused a job as a beautician to work with elderly women in a retirement home and the evidence showed she was qualified, having worked with elderly customers. ***----- In the Matter of Lucille's Hair Care, 3 BOLI 286, 296-99 (1983).***

> Modified as to wage loss and interest, *Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest, *Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).
>
> Order on remand, 5 BOLI 13, 30-31 (1985).

❑ Complainant, who was 57 years old at the time of the alleged unlawful action, applied for the position of vocational rehabilitation counselor II (VRC II) and was hired as a VRC I. Complainant filed a complaint alleging he had been discriminated against because of his age. After complainant asked on several occasions to be moved into a VRC II position and was refused, he resigned and filed a complaint alleging respondent had retaliated against him for filing the initial complaint. Complainant based both claims on three incidents: (1) failure to notify him of completion of trial service; (2) failure to notify him of a transfer position; and (3) failure to reclassify him. The forum found that: (1) although complainant's supervisor failed to advise him of the completion of trial service, complainant knew he had satisfactorily completed the period; (2) it was

complainant's responsibility to check the bulletin board for transfers; and (3) complainant's supervisor was not aware of a change in policy that would have made him eligible for reclassification. None of those events rose to the level of retaliatory conduct or could be considered sufficient to constitute a constructive discharge. ***----- In the Matter of the State of Oregon, Department of Human Resources, 3 BOLI 89, 98-99 (1982).***

❑ When complainant, 61 years old, applied with two younger applicants for the position of equipment operator in the purchasing division, the forum found that respondent's selection of another applicant did not result in discrimination against complainant on the basis of age when the evidence showed complainant had scored lower on tests and when the successful applicant was chosen for his greater interests and sales ability. ***----- In the Matter of State of Oregon, Department of General Services, 3 BOLI 46, 48-52 (1982).***

❑ Respondent, a city, unlawfully discriminated against complainant because of his age when complainant was qualified for the position of firefighter but was removed from the eligible list solely because of the age limit set forth in the city charter. ***----- In the Matter of City of Portland, 2 BOLI 21, 25 (1980).***

> Order on reconsideration, 2 BOLI 71 (1981), reversed, *Civil Service Board of the City of Portland v. Bureau of Labor and Industries*, 61 Or App 70, 655 P2d 1080 (1982), reversed and final order reinstated, 298 Or 307, 692 P2d 569 (1984).

❑ Respondent unlawfully discriminated against complainants because of their age when respondent sought applicants for the position of firefighter dispatcher and complainants attempted to apply, but were refused due to respondent's policy of not accepting applications from persons who had passed their 36th birthday. ***----- In the Matter of Clackamas County Fire District No. 1, 1 BOLI 244, 253 (1980).***

> Affirmed, *Clackamas Fire Protection Dist. No. 1 v. Oregon Bureau of Labor and Industries*, 50 Or App 337, 624 P2d 141, rev den 291 Or 9, 631 P2d 340 (1981).

❑ When respondent maintained a policy of not hiring anyone past their 36th birthday for the position of firefighter dispatcher, job descriptions from fire departments around the state showing the nonexistence of any maximum age limitation for hire of dispatchers were allowed into evidence for corroborative purposes. ***----- In the Matter of Clackamas County Fire District No. 1, 1 BOLI 244, 252 (1980).***

> Affirmed, *Clackamas Fire Protection Dist. No. 1 v. Oregon Bureau of Labor and Industries*, 50 Or App 337, 624 P2d 141, rev den 291 Or 9, 631 P2d 340 (1981).

❑ Respondent's search committee decided that a 63-year-old complainant's qualifications would not be considered for the reason that retirement at age 65 was required and complainant's availability was limited to one year. Respondent's dean advised complainant of this in writing. The forum determined that respondent unlawfully failed to consider complainant because of his age. ***----- In the Matter of Southern Oregon College, 1 BOLI 55, 58-59 (1976).***

❑ The hiring of a 58-year-old applicant over a 63-year-old applicant did not insulate respondent from a finding of unlawful age discrimination when the refusal to consider complainant was based on his proximity to respondent's retirement age of 65. ***----- In the Matter of Southern Oregon College, 1 BOLI 55, 55 (1976).***

20.1.3 --- Terms, Conditions, & Privileges of Employment

❑ The agency alleged that complainant, who claimed respondent had failed to promote him because of his age, resigned because of respondent's alleged unlawful conduct and was therefore constructively discharged. The forum found that the work atmosphere to which complainant was subjected was not so outrageous as to compel a reasonable person under similar circumstances to resign. The commissioner based this finding on complainant's statement that, even though he believed respondent to be wrong, it would have been possible for him to remain in the job while trying to correct the situation. ***----- In the Matter of the State of Oregon, Department of Human Resources, 3 BOLI 89, 95 (1982).***

20.1.4 --- Harassment

20.1.5 --- Discharge/Constructive Discharge

❑ When respondent tried to force complainant, who was 67 and disabled, into retirement and finally terminated her employment as an apartment manager, the commissioner held that respondent discriminated against complainant based on her age and disability, in violation of ORS 659.030(1)(a) and 659.425(1)(a). ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 278 (1997).***

❑ Complainant, who was 57 years old at the time of the alleged unlawful action, applied for the position of vocational rehabilitation counselor II (VRC II) and was hired as a VRC I. Complainant filed a complaint alleging he had been discriminated against because of his age. After complainant asked on several occasions to be moved into a VRC position and was refused, he resigned and filed a complaint alleging respondent had retaliated against him for filing the initial complaint. Complainant based both claims on three incidents: (1) failure to notify him of completion of trial service; (2) failure to notify him of a transfer position; and (3) failure to reclassify him. The forum found that: (1) although complainant's supervisor failed to advise him of the completion of trial service, complainant knew had had satisfactorily completed the period; (2) it was complainant's responsibility to check the bulletin board for transfers; and (3) complainant's supervisor was not aware of a change in policy that would have made him eligible for reclassification. None of those events rose to the level of retaliatory conduct or could be considered sufficient to constitute a constructive discharge. ***----- In the Matter of the State of Oregon, Department of Human Resources, 3 BOLI 89, 98-99 (1982).***

❑ When the agency alleged that complainant, who claimed respondent had failed to promote him and that

he had been discriminated against on the basis of his age, resigned because of respondent's alleged unlawful conduct and was therefore constructively discharged, the forum found that the work atmosphere to which complainant was subjected was not so outrageous as to compel a reasonable person under similar circumstances to resign. The commissioner based this finding on complainant's statement that, even though he believed respondent to be wrong, it would have been possible for him to remain in the job while trying to correct the situation. ***----- In the Matter of the State of Oregon, Department of Human Resources, 3 BOLI 89, 95 (1982).***

❑ The commissioner found evidence to support a 52-year-old complainant's claim that he had been terminated because of his age when, out of 11 millwrights working for respondent, complainant and two others about his age were terminated and two of the replacements hired were in their thirties and had less extensive knowledge and experience than complainant. ***----- In the Matter of Treplex, Inc., 2 BOLI 221, 226-27 (1982).***

❑ The agency established a prima facie case of age discrimination when it provided evidence that (1) complainants were, at times material, between 18 and 65 years of age and as such were members of a class of individuals protected against discrimination because of their age; and (2) complainants were qualified for their work as outside salespersons for respondent. At this point in the analysis, the agency was only required to show that complainants were satisfactory employees; and (3) complainants were discharged despite their qualifications for their jobs and that they were replaced by younger outside salespersons. ***----- In the Matter of Mutual Wholesale Drug Company, 2 BOLI 63, 68 (1981).***

❑ 53-year-old and 55-year-old complainants were among four salespersons, including one 35 years old, who were discharged during an economically-based reduction in staff. When respondent articulated several unrebutted legitimate, nondiscriminatory reasons for the selection of each, and two of the remaining salespersons were 48 years old, the commissioner declined to find that the business necessity defense was pretextual. ***----- In the Matter of Mutual Wholesale Drug Company, 2 BOLI 63, 68, 71 (1981).***

20.2 --- Real Property

20.3 --- Public Accommodation

21.0 DISABILITY

21.1 --- Generally

❑ The provisions of ORS 659.436(2) prohibit an employer from taking certain specific actions based on the disability of an applicant or employee. It necessarily follows that a person must be disabled or associated with a disabled person to come under the umbrella of protection afforded by ORS 659.436(2). ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 91 (2001).***

❑ Oregon's Handicapped Persons' Civil Rights Act was derived directly from regulations adopted under sections 503 and 504 of the federal Rehabilitation Act of 1973. Accordingly, the forum sought guidance from federal case law regarding the Rehabilitation Act in a disability case. ***----- In the Matter of WS, Inc., 13 BOLI 64, 86 (1994).*** *See also In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 40-41 (1992).*

❑ To deny the opportunity to work when a risk of incapacitation is less than probable would contravene the policy of the statute to guarantee the fullest employment of handicapped persons that is compatible with the reasonable demands of the job. ***----- In the Matter of WS, Inc., 13 BOLI 64, 83-84 (1994).***

❑ The commissioner noted that Oregon's law protecting the rights of persons with disabilities is modeled after the federal Rehabilitation Act of 1973 and relied on federal precedent as well as the disability laws of other states in concluding that alcoholism is a disability for the purposes of ORS 659.400 to 549.460. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 248, 251 (1991).***

21.2 --- Definitions

21.2.1 --- "Disability" or "Disabled Person"

❑ When prescription medicines used by a complainant to counter his stomach cramps, nausea, and vomiting did not work for an extended period of time and had negative side effects, and medical marijuana only gave him partial relief, the forum found that complainant was substantially limited in the major life activity of eating and was a "disabled person" as defined in ORS 659A.100(1)(a). ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 266 (2006).***

Appeal pending.

❑ The definition of "disabled person" in ORS 659A.100(1)(a) must be construed in light of mitigating measures that counteract or ameliorate an individual's impairment. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 265 (2006).***

Appeal pending.

❑ A "disabled person" is "an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment." ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 262 (2006).***

Appeal pending.

❑ The agency established that complainant was a disabled person through complainant's testimony that he had Parkinson's disease and the manner in which it substantially limited his ability to walk. ***----- In the Matter of C. C. Slaughter's, Ltd., 26 BOLI 186, 194 (2005).***

❑ The forum concluded that complainant was a disabled person at the time of the hearing based on her substantial limitation, caused by her fibromyalgia, in the major life activity of working. However, the record did not disclose that she fit within the statutory definition of a "disabled person" at the time of her application with respondent. She testified that she was able to work as a medical transcriptionist when she applied for work with

respondent and, in her opinion, became disabled from working based on her inability to sit for any extended period of time in the 2½ weeks following her unsuccessful application. Although complainant testified as to her fibromyalgia-related symptoms since 1994, the agency did not present any substantial evidence that, prior to complainant's application for work with respondent, complainant's fibromyalgia substantially limited her in any major life activity, including working, or that complainant had a record of being substantially limited in a major life activity because of her fibromyalgia. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 94-95 (2001).***

❑ A complainant who suffered from disabilities, including schizoaffective disorder that substantially limited his major life activities of self-care and socialization, was a disabled person. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 89 (1999)***.

❑ Multiple sclerosis is a progressive physical impairment that can substantially limit major life activities. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 180 (1998)***.

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ Epilepsy is a medically detectable condition that weakens, diminishes, restricts or otherwise damages an individual's health or physical activity and is a physical impairment under ORS 659.400(1). ***----- In the Matter of James Breslin, 16 BOLI 200, 211 (1997).***

Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ The fact that an individual has a record of being a disabled veteran, or of disability retirement, or is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of "disabled person" under ORS 659.400. Other statutes, regulations, and programs may have a definition of "disability" of "disabled person" that is not the same as the definition set forth in ORS 659.400. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 262 (1997).***

❑ HIV infection is a physical impairment that substantially limits one or more major life activities; a person so infected is a disabled person as a matter of law. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 147 (1995)***. *See also In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 41-42 (1992); In the Matter of Casa Toltec, 8 BOLI 149, 170-71 (1989).*

❑ At a prehearing conference, the agency and respondent stipulated to facts that were admitted by the pleadings, including the fact that complainant was a disabled person. Other stipulations were made during the hearing and were reflected in the findings. ***----- In the Matter of WS, Inc., 13 BOLI 64, 66 (1994).***

❑ The commissioner noted that Oregon's law protecting the rights of persons with disabilities is modeled after the federal Rehabilitation Act of 1973 and relied on federal precedent as well as the disability laws of other states in concluding that alcoholism is a disability for the purposes of ORS 659.400 to 549.460. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 248, 251 (1991).***

❑ "Obesity" is a term of art that denotes a medically detectable condition damaging to health, and describes an impairment of health of serious dimensions. Since respondent's medical director found that complainant suffered from obesity, the commissioner found that respondent regarded complainant as physically impaired. ***----- In the Matter of Oregon State Correctional Institution, 7 BOLI 161, 190 (1988).***

Reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

Order on remand, 9 BOLI 7, 33-34 (1990).

❑ At the close of a hearing, the assistant attorney general moved to amend the specific charges to conform to the evidence alleging that respondent considered complainant to be "accident prone" and that this perception or designation constituted a mental or physical handicap in violation of ORS 659.425. The commissioner denied the motion because "no proof was offered that would require this amendment." ***----- In the Matter of City of Coos Bay, 3 BOLI 85, 88 (1982).***

21.2.2 --- "Employee"

❑ Complainant applied for a medical transcriptionist job with respondent, an employer that provided staffing services to other employers. Based on complainant's credible testimony that was supported by respondent's written policy and contemporaneous handwritten notes of respondent's employee who interviewed complainant, the forum concluded that respondent did not offer complainant a medical transcriptionist position or placement in respondent's job pool and that complainant never became respondent's employee. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 90 (2001).***

❑ Relying on EEOC Guidelines that interpret provisions of the ADA that are similar to ORS 659.447 and 659.448, the forum concluded that mere placement of a job applicant in a job pool for possible consideration in the future for temporary work assignments does not constitute an offer of employment that elevates a job applicant to the status of employee. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 90-91 (2001).***

21.2.3 --- "Essential Functions"

❑ "Essential functions" are the "fundamental duties of a position a disabled person holds or desires." ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 270 (2006).***

Appeal pending.

21.2.4 --- "Otherwise Qualified"

❑ Undisputed evidence that complainant performed all the duties of drill press operator, the position he was hired to perform, in a satisfactory manner during his employment with respondent made him an "otherwise qualified disabled person." ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 270 (2006).***

Appeal pending.

21.2.5 --- "Physical or Mental Impairment"

❑ The forum concluded that complainant's depression, anxiety, panic attacks, sleep disorder, long-term nausea, stomach cramps, and vomiting constitute physical and mental impairments as defined in OAR 839-006-0205(10). ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 263 (2006).***

Appeal pending.

❑ Epilepsy is a medically detectable condition that weakens, diminishes, restricts or otherwise damages an individual's health or physical activity and is a physical impairment under ORS 659.400(1). ***----- In the Matter of James Breslin, 16 BOLI 200, 211 (1997).***

❑ HIV infection is a physical impairment that substantially limits one or more major life activities; a person so infected is a disabled person as a matter of law. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 147 (1995)***. *See also In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 41-42 (1992); In the Matter of Casa Toltec, 8 BOLI 149, 170-71 (1989).*

❑ The commissioner noted that Oregon's law protecting the rights of persons with disabilities is modeled after the federal Rehabilitation Act of 1973 and relied on federal precedent as well as the disability laws of other states in concluding that alcoholism is a disability for the purposes of ORS 659.400 to 549.460. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 248, 251 (1991).***

❑ "Impairment" means "any apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or mental activity." Under that definition, "the failure to maintain ideal levels of physical health, or for that matter intellectual acuity or emotional well-being, is not an impairment" for purposes of the Handicapped Persons' Civil Rights Act. The emphasis should be placed on the phrase "apparent or medically detectable condition," a usage that implies pathological or abnormal deficits in health or capacity. ***----- In the Matter of Oregon State Correctional Institution, 7 BOLI 161, 188 (1988).***

Reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

Order on remand, 9 BOLI 7, 33-34 (1990).

❑ "Obesity" is a term of art that denotes a medically detectable condition damaging to health, and describes an impairment of health of serious dimensions. Since respondent's medical director found that complainant suffered from obesity, the commissioner found that respondent regarded complainant as physically impaired. ***----- In the Matter of Oregon State Correctional Institution, 7 BOLI 161, 190 (1988).***

Reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

Order on remand, 9 BOLI 7, 33-34 (1990).

21.2.6 --- "Record" of Impairment

❑ A person "has a record of impairment" if the person has a history of, or has been misclassified as having an impairment that substantially limits one or more major life activities. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 209 (1999)***.

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ When the complainant's medical history showed that he had some previous back injuries, but nothing in the history indicated more than a temporary impairment, the forum held that complainant did not have a record of an impairment that substantially limited a major life activity. Consequently, complainant was not protected under *former* ORS 659.425(1)(b). ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 209-10 (2000)***.

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ ORS 659.425(1)(b) prohibits discrimination because an "individual has a record of a physical or mental impairment." When ORS 659.425(1)(b) is read in light of the definitions in ORS 659.400(1) and (2), "has a record of such an impairment" means that an individual has a history of, or has been misclassified as having an impairment which substantially limits one or more major life activities." ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 262 (1997).***

❑ Complainant, a Vietnam veteran, had a record of a mental impairment once he was diagnosed with post-traumatic stress disorder (PTSD), a mental impairment. However, when insufficient evidence showed that the PTSD substantially limited a major life activity of complainant, or that he was misclassified in any respect, he did not enjoy the protection of ORS 659.425(1)(b). ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 2462-64 (1997).***

❑ The fact that an individual has a record of being a disabled veteran, or of disability retirement, or is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of "disabled person" under ORS 659.400. Other statutes, regulations, and programs may have a definition of "disability" of "disabled person" that is not the same as the definition set forth in ORS 659.400. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 262 (1997).***

❑ When the gravamen of complainant's allegations concerned his current HIV infection, and there was no evidence from which to conclude that he was misclassified, the forum found that complainant had no record of HIV infection and therefore did not enjoy the protection of ORS 659.425(1)(b). ***----- In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 41 (1992).***

❑ When the evidence established that complainant suffered from alcoholism in 1986 and successfully completed treatment and attended AA meetings thereafter, it was reasonable to infer that her subsequent treatment for alcoholism in July 1988 was caused by her disability and the commissioner held that complainant had a record of having a disability and was protected under ORS 659.425(1)(b). ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 252 (1991).***

21.2.7 --- "Regarded" as Impaired

❑ *Former* ORS 659.400(2)(c)(C) was designed to protect individuals who do not have an impairment but are treated adversely by an employer or potential employer as though they had an impairment that substantially limits a major life activity. The question is whether the employer treated the employee adversely because the employer perceived that the employee was substantially limited in one or more major life activities. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 210-11 (2000).***

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ When respondent erroneously treated complainant, based on his permanent partial disability rating or upon an unsupported fear of injury or reinjury, as if he was disabled not only from his position as an automobile service support representative but from any other position that involved loading, unloading, or stocking, respondent unlawfully barred complainant from employment because respondent regarded him as having a physical impairment. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 75-76 (1999)***.

❑ When respondent placed complainant on "illness leave" because it erroneously believed his neck injury substantially limited his performance of any work that involved stocking and/or lifting, respondent treated complainant as though he was substantially limited in a class of jobs based on its erroneous perception that he was substantially limited in the major life activity of employment. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 80 (1999)***.

❑ ORS 659.425 is violated when an individual is regarded as having a disability. An individual is regarded as having a disabling impairment when she is seen as unemployable, or uninsurable, or incapable or incompetent because of either a known or a suspected medical condition. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 180 (1998)***.

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ It is unnecessary under ORS 659.425(1)(c) that a person regarded as disabled have the actual impairment they are perceived to have. The statute is violated when an individual is regarded as having a disability. An individual is regarded as having a disabling impairment when he or she is seen as unemployable, or uninsurable, or incapable or incompetent because of either a known or a suspected medical condition. ***----- In the Matter of Body Imaging, Inc., 16 BOLI 163, 181 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998).***

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000).

Order on remand, 9 BOLI 7, 33-34 (1990).

❑ When respondent did not treat complainant, who was diagnosed with post-traumatic stress disorder, a mental impairment, as substantially limited in employment because of his PTSD and did not have an attitude toward PTSD that substantially limited complainant's major life activity of employment, respondent did not regard complainant as having a substantially limiting impairment, and complainant was not protected from discrimination by ORS 659.425(1)(c). ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 270 (1997).***

❑ ORS 659.425(1)(c) prohibits discrimination because an individual is regarded as having a physical or mental impairment that substantially limits a major life activity. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 264 (1997).***

❑ Whether a respondent erroneously treated complainant's impairment as substantially limiting a major life activity is a question of fact. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 264 (1997).***

❑ ORS 659.400(2)(c)(A) protects the person who has a nonsubstantial impairment that the employer erroneously treats as substantial. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 264 (1997).***

❑ ORS 659.400(2)(c)(B) protects the individual whose impairment is substantially limiting only as a result of the "attitude of others toward such impairment." "The attitude of others toward such impairment means an opinion, evaluation, or belief, held by another person or persons toward the individual's perceived or actual physical or mental impairment." ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 265 (1997).***

❑ When respondents erroneously believed that complainant was HIV infected and discharged him based on that belief, respondents violated ORS 659.425(1)(c) by regarding and treating him as having an impairment that substantially limited one or more major life activities when, in fact, he had no impairment. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 147 (1995).***

❑ When respondents asked complainant, who was infected with HIV, not to handle fresh strawberries that were for sale from respondents' nursery, and apparently treated complainant's HIV infection as potentially dangerous to employees and customers if he handled food products, the forum found that respondent treated complainant as if he had a substantially limiting physical impairment because respondents' perception, if true, would substantially limit complainant's major life activities of at least employment and socialization, since it would substantially limit his abilities to be employed as a chef, a profession he had worked in for 15 years, and to socialize. Complainant would be a "disabled person" under ORS 659.400(2)(c)(A). ***----- In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 42 (1992).***

❑ To establish class membership under ORS 659.400(3)(c)(C) (1973) – that is, the individual "has no physical or mental impairment but is treated by an employer or supervisor as having an impairment" – "the employer must erroneously perceive the existence of an impairment and then compound this misperception by regarding the impairment as substantially limiting a major life activity. This may be done in one of two ways, by regarding 'the unimpaired person as having an impairment that, if actually present, would substantially limit a major life activity (for example, erroneously believing that the person is blind) or regard the unimpaired person as having a non-substantial impairment that, in turn, the employer erroneously believes is substantial * * *.'" ***----- In the Matter of Oregon State Correctional Institution, 9 BOLI 7, 33 (1990).***

Order on remand of 7 BOLI 161 (1988) which was reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

❑ Not just any employer perception that leads to an adverse employment decision bestows class membership on an individual. "It is the nature of the employer's perception which bestows protected class status: The perception must be of an impairment, not merely a characteristic disliked by the employer, and the employer must regard the impairment as substantially limiting a major life activity." ***----- In the Matter of Oregon State Correctional Institution, 7 BOLI 161, 187-88 (1988).***

Reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

Order on remand, 9 BOLI 7, 33 (1990).

❑ When respondent's medical director regarded complainant's weight (50 pounds overweight) as a physical impairment, and assigned complainant to a job group classification that made complainant ineligible for an entire category of employment for which he had applied, respondent regarded complainant as being substantially limited in the major life activity of employment by adopting the doctor's opinion, and the commissioner determined that complainant was not in fact impaired, complainant was a "handicapped person" as defined in ORS 659.400(2) and (3)(c)(C) (1973). ***----- In the Matter of Oregon State Correctional Institution, 7 BOLI 161, 190 (1988).***

Reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

Order on remand, 9 BOLI 7, 33-34 (1990).

❑ "Obesity" is a term of art that denotes a medically detectable condition damaging to health, and describes an impairment of health of serious dimensions. Since respondent's medical director found that complainant suffered from obesity, the commissioner found that respondent regarded complainant as physically impaired. ***----- In the Matter of Oregon State Correctional Institution, 7 BOLI 161, 190 (1988).***

Reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

21.2.8 --- "Substantially Limits" a "Major Life Activity"

❑ In considering whether complainant' was substantially limited in his inability to eat, the commissioner took notice that the average person in the general population does not become nauseated and vomit after eating. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 266 (2006).***

Appeal pending.

❑ When there was substantial evidence that complainant's anxiety, panic attacks, nausea, stomach cramps, and vomiting were chronic ongoing conditions that had chronically impaired his ability to eat for at least 10 years, there was no evidence that these conditions were likely to go away, and prescription medications did not give him relief from his conditions for an extended period of time and some had negative side effects, the forum concluded that, even with mitigating measures, complainant was significantly restricted in the condition and manner in which he was able to eat, compared to the condition and manner under which the average person in the general population can eat, and that complainant was substantially limited in the major life activity of eating. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 266 (2006)***

Appeal pending.

❑ When the medical evidence presented was insufficient for the forum to determine the specific nature and severity of sleep disorder complainant suffered from, the extent to which his sleeping had been affected and how consistently it had been affected, how long it was expected to persist, and the resultant permanent or expected long-term effect, the forum could not conclude that complainant was "substantially limited" in his

sleeping. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 264 (2006).***

Appeal pending.

❑ Although complainant's medical records revealed a continuing diagnosis of depression, no evidence was presented to show which of complainant's major life activities, if any, were specifically impacted by his depression. As a result, the forum was unable to conclude that his depression substantially limited a major life activity. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 263-64 (2006).***

Appeal pending.

❑ Complainant's medical records documented that his anxiety and panic attacks triggered his nausea, stomach cramps, and vomiting, which in turn make it difficult or impossible for him to eat, and that complainant's sleep disorder caused problems with his sleep, both of which are major life activities. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 263-64 (2006).***

Appeal pending.

❑ Complainant had Parkinson's disease. Complainant credibly testified and the ALJ observed that Parkinson's restricts the condition and manner in which complainant was able to walk, in that he walks with a shuffle and cannot keep the same pace as an average person and his body sometimes "locks up" and he cannot walk at all without the aid of an outside impetus, either an assist from another person or something he can grasp to pull himself along. These facts established that Parkinson's "substantially limits" one of complainant's major life activity of ambulation. ***----- In the Matter of C. C. Slaughter's, Ltd., 26 BOLI 186, 194 (2005).***

❑ To be substantially limited in the major life activity of employment, a person must be unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 211 (2000).***

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ Respondent, who leased workers to timber companies, refused to refer complainant for jobs in the logging industry because of its erroneous belief that complainant's prior back injuries left him unable to perform such jobs. Under these circumstances, respondent perceived complainant as being unable to perform a class of jobs and violated ORS 659.425(1)(c) by refusing to refer complainant to timber jobs because of that perception. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 211 (2000).***

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ When respondent placed complainant on "illness leave" because it erroneously believed his neck injury substantially limited his performance of any work that involved stocking and/or lifting, respondent treated complainant as though he was substantially limited in a class of jobs based on its erroneous perception that he was substantially limited in the major life activity of employment. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 80 (1999)***.

❑ Given complainant's history of epileptic seizures resulting in motor vehicle accidents, the inherent risks to himself and others when he operated a vehicle, and his training and education as a diesel mechanic, which involved diesel vehicles and heavy equipment, the forum concluded that complainant might be unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes that involved operating a motor vehicle, thereby substantially limiting him in the major life activity of employment. ***----- In the Matter of James Breslin, 16 BOLI 200, 211-12 (1997).***

Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ When complainant's epilepsy caused him to have several motor vehicle accidents due to epileptic seizures, complainant's driver's license had been suspended several times because of the seizures, and complainant's ability to drive was constantly in peril due to his epilepsy, the forum concluded that complainant's epilepsy substantially limited his major life activity of transportation. ***----- In the Matter of James Breslin, 16 BOLI 200, 211 (1997).***

Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ In order to be substantially limited in employment, one must be unable to perform either a class of jobs or a broad range of jobs in various classes. Clearly, it is not preclusion from or significant restriction in the ability to perform just any class of jobs that is significant; the individual must have some relevant connection to the identified class of jobs. One such connection might be to a class of jobs encompassing the individual's chosen field. For an individual without a clear career direction or who is changing career paths, the connection could be to a class of jobs encompassing the type of labor sought or obtained, *i.e.,* manual labor requiring heavy lifting. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 265, 271-72 (1997).***

❑ The inability to perform, or a significant restriction in the ability to perform, a single, particular job does not constitute a substantially limitation in the major life activity of employment. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 273 (1997).***

❑ Complainant, a Vietnam veteran, had a record of the impairment once he was diagnosed with post-traumatic stress disorder, a mental impairment,. However, when insufficient evidence showed that the PTSD substantially limited a major life activity of complainant, or that he was misclassified in any respect, he did not enjoy the protection of ORS 659.425(1)(b). ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 262-64 (1997).***

❑ The public's beliefs, opinions, and prejudices toward individuals infected with the human immunodeficiency virus (HIV) substantially curtail their major life activities. They are shunned socially and often excluded from public life. Their employment activities are substantially limited. The forum held that the "attitude of others" toward persons with the AIDS virus results in substantially limitations on those persons' major life activities, and that complainant, a person with asymptomatic HIV infection, was a "disabled person" under ORS 659.400(2)(c)(B) and for purpose of ORS 659.425(1)(c). ***----- In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 41-42 (1992).***

❑ ORS 659.425(1)(b) and (c) do not require that an individual have a present or an actual impairment that substantially limits a major life activity to be protected from discrimination. ***----- In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 42-43 (1992).***

❑ A person who is disqualified from employment in his chosen field has a substantial handicap to employment and is substantially limited in one of his major life activities. It is the impaired individual who must be examined, and not just the impairment in the abstract. ***----- In the Matter of Oregon State Correctional Institution, 9 BOLI 7, 9 (1990).***

Order on remand of 7 BOLI 161 (1988) which was reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

21.3 --- Employment

21.3.1 --- Generally

❑ ORS 659.425(1) requires an act of discrimination accompanied by discriminatory intent for a violation to occur. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 270 (fn), 275 (1997).***

21.3.2 --- Pre-Employment Disability Inquiries and Medical Exams

❑ ORS 659.447 protects all job applicants, regardless of whether or not they have a disability, from medical examinations, inquiries as to whether the applicant is a disabled person, and inquiries as to the nature or severity of any disability of the applicant. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 91 (2001).***

❑ An employer is allowed to inquire into the ability of a job applicant to perform job-related functions. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 91 (2001).***

❑ A "disability-related inquiry" is "a question that is likely to elicit information about a disability." ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 92 (2001).***

❑ Complainant was asked to answer a number of questions on her employment application with respondent that fit within the category of questions "likely to elicit information about a disability." For example, asking "Are you now taking any <u>medications</u> that may affect the quality, quantity, or safety of your work?" By requiring complainant to answer them, respondent violated ORS 659.447(1) and ORS 659.436. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 92-93 (2001).***

❑ Respondent's medical history form asked complainant to "explain" if she answered "yes" to the question of whether she was "under the <u>care of a physician</u> of any type for any physical ailment or illness that may affect the quality, quantity or safety of [her] work." The form also asked complainant to "describe" if she "presently ha[d] a condition that may require a special <u>work place accommodation</u>." The forum interpreted these open-ended questions as seeking specific information as to the nature and severity of any disability that complainant had. Had complainant completed the form and answered the questions truthfully, she would have had no choice but to provide details about her fibromyalgia. These inquiries violated ORS 659.447(1) and ORS 659.436. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 93 (2001).***

❑ OAR 839-006-0205(7) defines "medical" as "authored by or originating with a licensed health care professional." There was no evidence that the medical forms respondent asked complainant to fill out were authored by or originated with a "licensed health care professional." Therefore, even if respondent's requirement that complainant complete the medical forms was construed as an "examination," by definition it would not be a "medical examination." Accordingly, the forum concluded that respondent did not violate OAR 839-006-0242 and the language in ORS 659.447(1) prohibiting pre-employment "medical examinations." ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 96 (2001).***

21.3.3 --- Post-Employment Disability Inquiries and Medical Exams

❑ ORS 659.448 protects all employees, regardless of whether or not they have a disability, from medical examinations, inquiries as to whether the employee is a disabled person, and inquiries as to the nature or severity of any disability of the employee, unless the examination or inquiry is shown to be job-related and consistent with business necessity. It is irrelevant whether or not the employee has a disability. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 91 (2001).***

❑ A "disability-related inquiry" is "a question that is likely to elicit information about a disability." ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 92 (2001).***

21.3.4 --- Hiring, Promotion

❑ Respondent, who leased workers to timber companies, refused to refer complainant for jobs in the logging industry because of its erroneous belief that complainant's prior back injuries left him unable to perform such jobs. Under these circumstances, respondent perceived complainant as being unable to perform a class of jobs, and violated ORS 659.425(1)(c) by refusing to refer complainant to timber jobs because

of that perception. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189,211 (2000).***

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ Respondent's refusal to lease complainant to timber companies constituted an act of barring complainant from employment or refusing to hire him. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 212 (2000).***

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ When complainant, a deaf welder, possessed the training, experience, education, and skill necessary to perform the duties of a boilermaker; he possessed the ability to perform the job safely and efficiently with reasonable accommodation and without present risk of probable incapacitation to himself; and the inherent risk to his coworkers was not materially enhanced because of his impairment, respondent violated ORS 659.425(1)(a) by refusing to hire him because of his disability. ***----- In the Matter of WS, Inc., 13 BOLI 64, 79-82 (1994).***

❑ When complainant applied for a truck driver job and respondent refused to hire him after a medical assessment found that he had a degenerative back condition and was at "present risk of probable incapacitation," the commissioner found that a preponderance of the evidence supported respondent's assessment. When no reasonable accommodation of complainant's physical impairment was possible due to the requirements of a valid collective bargaining agreement, including requirements governing and defining job descriptions, seniority, and job bidding, the commissioner found that respondent did not violate ORS 659.425 by refusing to hire complainant. ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 168, 172-73 (1990).***

❑ When respondent refused to hire complainant because respondent regarded complainant as handicapped – as defined in ORS 659.400(2) and (3)(c)(C) (1973) – because of his weight, and respondent did not have a factual basis for believing, to a reasonable probably under all the circumstances, that complainant's weight rendered complainant unable to safely perform the job for which he had applied, respondent violated ORS 659.425(1)(c). ***----- In the Matter of Oregon State Correctional Institution, 7 BOLI 161, 184 (1988).***

Reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

Order on remand, 9 BOLI 7, 33-34 (1990).

❑ When complainant was diagnosed as having grade one spondylolisthesis and was rejected for full time employment by respondent for the job of heavy truck driver, the forum determined that the rejection of complainant's application constituted a violation of ORS 659.425 when the evidence established that, while complainant's condition could worsen, it could also remain asymptomatic as it was; when complainant had successfully performed other jobs requiring heavy lifting without difficulty and when complainant had the current ability to perform the duties of the job. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 111 (1982).***

Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

❑ When complainant was diagnosed as having spina bifida occulta and was rejected by respondent for the job of heavy truck driving, the forum determined that complainant's rejection constituted unlawful discrimination on account of physical handicap in violation of ORS 659.425 when the evidence established the condition was asymptomatic, not likely to cause debilitating complications with age, and complainant was fully capable of performing the duties of a heavy duty truck driver without any risk of incapacitating himself due to the condition. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 111 (1982).***

Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

❑ When complainant was diagnosed as having osteoarthritis of the spine and was rejected by respondent for the job of heavy truck driver, the forum determined that respondent's actions constituted unlawful discrimination in violation of ORS 659.425 on account of physical handicap when the evidence established that the condition did not present any risk of injury or incapacity beyond that faced by the general population and when complainant was fully capable of performing the duties of the job. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 108, 110-11 (1982).***

Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

❑ When complainant's prior back injury and resulting partial disability were not considered by the persons making the hiring decision, complainant's physical handicap did not play a role in her rejection for the position of police dispatcher. ***----- In the Matter of the City of Chiloquin, 2 BOLI 151, 157 (1981).***

❑ When complainant was found to be a fully qualified appliance salesperson but had a history of a heart attack, respondent violated ORS 659.425(1) by rejecting him for such employment in the absence of a probability, because of this handicap, either: (a) that he could not perform the job satisfactorily; or (b) that he would be incapacitated by such employment. ***----- In the Matter of Montgomery Ward and Company, Inc., 1 BOLI 100, 107 (1976).***

Order on remand of 1 BOLI 62 (1976), which was reversed, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, reversed and remanded, 280 Or 163, 570 P2d 76 (1977).

1 BOLI 100 (1978) affirmed as modified (removing general damages as unsupported), *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979).

❑ When respondent's physician testified that he "would imagine [appliance salespersons] probably move, 3, 4, maybe 5 refrigerators a day" at a store with which he was not familiar, and the appliance sales supervisor stated that the moving of appliances was normally handled by warehouse staff and that sales staff only occasionally moved appliances, the physician's rejection of complainant for employment as an appliance salesperson due to a previous heart attack was not justified. ***----- In the Matter of Montgomery Ward and Company, Inc., 1 BOLI 100, 103 (1976).***

Order on remand of 1 BOLI 62 (1976), which was reversed, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, reversed and remanded, 280 Or 163, 570 P2d 76 (1977).

1 BOLI 100 (1978) affirmed as modified (removing general damages as unsupported), *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979).

❑ Respondent demonstrated a predisposition to deny complainant the job of appliance salesperson because of a physical handicap when, upon learning of complainant's previous heart attack, respondent's medical staff initially refused to schedule a pre-employment physical as futile, subsequently performed a brief examination that included a single blood pressure reading, and failed to consult complainant's treating cardiologist. ***----- In the Matter of Montgomery Ward and Company, Inc., 1 BOLI 100, 108-09 (1976).***

Order on remand of 1 BOLI 62 (1976), which was reversed, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, reversed and remanded, 280 Or 163, 570 P2d 76 (1977).

1 BOLI 100 (1978) affirmed as modified (removing general damages as unsupported), *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979).

21.3.5 --- Terms, Conditions, & Privileges of Employment

❑ A violation of ORS 659.425 could occur with the imposition of a negative term or condition of employment, even though the impaired employee was not suspended or terminated. One example would be removal of a job duty from an impaired employee because of a misperception of the existence or extent of limitation. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 274 (fn) (1997).***

❑ When respondent granted complainant a leave of absence for treatment of alcoholism and then placed her on probation for excessive absenteeism associated with her disability, the commissioner held that respondent violated ORS 659.425. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 253 (1991).***

21.3.6 --- Harassment

21.3.7 --- Discharge/Constructive Discharge

❑ When complainant had no prior performance problems, respondent discharged complainant shortly after he disclosed his use of medical marijuana; respondent shortly thereafter hired three persons to work in its machine shop to perform work that complainant had the skills to perform; and respondent's legitimate, nondiscriminatory reason was not credible, the forum concluded that respondent discharged complainant solely because he disclosed his use of medical marijuana. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 269 (2006).***

Appeal pending.

❑ When respondent knew that complainant was substantially certain to resign as a result of working conditions he imposed on complainant based on her perceived disability, and complainant in fact resigned as a result of those working conditions, the forum held that complainant had been constructively discharged. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 186-87 (1998)***.

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ A respondent's refusal to accommodate complainant's disability of epilepsy and constructive discharge of complainant were "very severe types of discrimination against a disabled person." ***----- In the Matter of Body Imaging, Inc., 16 BOLI 163, 186 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998).***

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000).

❑ By refusing to reasonably accommodate complainant's physical impairment of epilepsy, respondent intentionally created discriminatory working conditions related to complainant's protected class status. By requiring complainant to work without reasonable accommodation, respondent created working conditions that were so intolerable that a reasonable person in complainant's position would have resigned because of them, constituting a constructive discharge. ***----- In the Matter of James Breslin, 16 BOLI 200, 217 (1997).***

Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ When respondent knew that complainant was substantially certain to resign as a result of working conditions he imposed based on complainant's perceived disability, and complainant in fact resigned as a result of those working conditions, the forum held that complainant had been constructive discharged. ***----- In the Matter of Body Imaging, Inc., 16 BOLI 163, 181 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998).***

Affirmed in part, reversed in part, Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries, 166 Or App 54, 999 P2d 475 (2000).

❑ When respondent tried to force complainant, who was 67 and disabled, into retirement and finally terminated her employment as an apartment manager, the commissioner held that respondent discriminated against complainant based on her age and disability, in violation of ORS 659.030(1)(a) and 659.425(1)(a). ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 278 (1997).***

❑ When respondents erroneously believed that complainant was HIV infected and discharged him based on that belief, respondents violated ORS 659.425(1)(c) by regarding and treating him as having an impairment that substantially limited one or more major life activities when, in fact, he had no impairment. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 147 (1995).***

❑ When the agency alleged complainant was discharged based on his sexual orientation and respondent's perception that he had become HIV positive during his employment, and respondent and all of respondent's employees were aware of complainant's sexual orientation throughout his employment, but complainant was only fired when respondent perceived he was HIV infected, the commissioner held that complainant was not discharged on the basis of his sexual orientation, but he was discharged on the basis of his perceived disability. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 146-47 (1995).***

❑ When respondents discharged complainant the day after she had been interviewed on television and revealed that she had the AIDS virus, the commissioner held that respondents violated ORS 659.425(1)(a). ***----- In the Matter of Casa Toltec, 8 BOLI 149, 170, 173 (1989).***

❑ When complainant's fused knee was known to respondent at hire and complainant was subsequently absent from work due to a compensable injury and during his absence failed to comply with the respondent's written weekly call-in rule, his discharge for not calling in was not due to a physical handicap. ***----- In the Matter of Chase Bag Company, 2 BOLI 159, 162 163 (1981).***

21.3.8 --- Interactive Process

❑ Engaging in a meaningful interactive process is the mandatory first step in the process of reasonable accommodation, and failure to engage in that process is a *per se* violation of ORS 659A.112(2)(e), regardless of whether respondent was ultimately able to provide complainant with a reasonable accommodation. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 272 (2006).***

Appeal pending.

❑ At the point complainant disclosed his use of medical marijuana and disability to his supervisor by showing documentation that he used medical marijuana for the debilitating medical conditions of severe nausea, vomiting, and chronic cramps, respondent became legally obligated to engage in a meaningful interactive process with complainant to see if reasonable accommodation was possible. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 272 (2006).***

Appeal pending.

❑ Respondent's failure to engage in a meaningful interactive process to determine if complainant's disability could be reasonably accommodated was a violation of ORS 659A.112(2)(e). ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 272 (2006).***

Appeal pending.

21.3.9 --- Failure to Reasonably Accommodate Otherwise Qualified Disabled Person (*see also* 15.1, 97.1)

❑ When respondent discharged complainant based on his use of medical marijuana, a drug that complainant legally used to enable him to cope with his physical and mental impairments, this created a "need" for respondent to make reasonable accommodation for complainant's physical or mental impairments so that complainant could continue his "employment opportunity" as a temporary employee. Respondent's discharge of complainant violated ORS 659A.112(2)(e). ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 275 (2006).***

Appeal pending.

❑ When complainant disclosed his use of medical marijuana and related disability to his supervisor because he hoped to become a permanent employee and was aware he would need to pass a drug test if respondent decided to extend a job offer to him, respondent was put on notice that complainant required reasonable accommodation in order to continue his employment, as a positive drug test for marijuana, an illegal drug in Oregon except when used under the provisions of the Oregon Medical Marijuana Act. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 274-75 (2006).***

Appeal pending.

❑ In a medical marijuana discharge case, the agency showed that respondent could have reasonably accommodated complainant in two ways. First, proving that complainant performed his job duties satisfactorily for seven weeks without any accommodation whatsoever, showing that the accommodation of simply

allowing complainant to continue his employment was available. Second, by drawing an inference from evidence presented by respondent concerning its drug testing policy and the use of illegal drugs by its employees that a second accommodation was available. The primary concern raised by respondent at hearing was whether complainant was using illegal drugs that would have been detected through tests administered by respondent or complainant's temporary employer. Respondent could have required complainant to take the standard drug test that complainant's temporary employer usually conducted on employees referred to respondent. If the test showed no illegal drugs other than marijuana, which complainant was authorized to use under Oregon law, respondent could have allowed complainant to continue his temporary employment so long as there was work for him, then engage in an interactive dialog with complainant to address any concerns about how complainant's off-duty use of medical marijuana related to his work. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 273-74 (2006).***

Appeal pending.

❑ Under Oregon's disability discrimination laws, among other things, "reasonable accommodation" means a change in working conditions made for an "otherwise qualified disabled employee" so that an employee can perform the essential functions of the job. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 272 (2006).***

Appeal pending.

❑ When complainant told his supervisor that he used medical marijuana for a medical problem and disclosed his problem as "severe nausea and vomiting" and "chronic cramps" while inquiring if this would affect his chances at permanent employment, this constituted a request for reasonable accommodation. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 271 (2006).***

Appeal pending.

❑ When an employee requests accommodation, the employee must let the employer know that the employee needs an adjustment or change at work for a reason related to a medical condition. The employee need not mention the ADA, Oregon laws protecting disabled persons, or the term "reasonable accommodation." When complainant told his supervisor that he used medical marijuana for a medical problem and disclosed his problem as "severe nausea and vomiting" and "chronic cramps" while inquiring if this would affect his chances at permanent employment, this constituted a request for reasonable accommodation under Oregon law. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 271 (2006).***

Appeal pending.

❑ An employer's duty to reasonably accommodate an employee or job applicant under Oregon's disability discrimination laws is triggered when an employee or applicant requests accommodation or when the employer recognizes the need for accommodation. ***------ In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 271 (2006).***

Appeal pending.

❑ Reasonable accommodation is required under ORS 659A.112(2)(e) & (f) when an employee is "an otherwise qualified disabled employee." ***------ In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 270 (2006).***

Appeal pending.

❑ The forum's conclusion that respondent did not violate ORS 659A.112(1) by discharging complainant did not resolve the agency's allegations that respondent failed to reasonably accommodate complainant's known physical or mental limitations and denied him employment opportunities based on respondent's need to make reasonable accommodation to Complainant's physical or mental impairments. ***------ In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 269 (2006).***

Appeal pending.

❑ When respondent contended that it was not common knowledge that epilepsy can require a certain amount of sleep and that he had good reason to doubt complainant's medical claims because complainant had previously worked graveyard shifts, the forum held that these arguments raised no defense. An employer has an affirmative duty to accommodate an employee's physical impairment and cannot rely on ignorance or doubts about the nature or legitimacy of the impairment as the basis for denying accommodation. ***----- In the Matter of James Breslin, 16 BOLI 200, 214-15 (1997).***

Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ When complainant possessed the necessary training, experience, education, and skill necessary to perform the duties of a gas service station attendant and cashier, including the abilities normally required by respondent of other candidates for these positions, and had the ability to perform the job safely and efficiently, with reasonable accommodation and without present risk of probable incapacitation to himself, the forum concluded that complainant had the ability to perform the duties of the positions occupied with reasonable accommodation. ***----- In the Matter of James Breslin, 16 BOLI 200, 212 (1997).***

Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ Oregon's law on the civil rights of disabled persons imposes upon employers the affirmative duty of reasonably accommodating employees' disabilities unless this imposes an undue hardship on respondent. When the preponderance of credible evidence established that respondent tried to and often did accommodate employees' shift requests, had done so in the past for complainant, and respondent refused to accommodate complainant's request that he be relieved of graveyard shift because of his epilepsy, the forum

concluded that respondent had failed to reasonably accommodate complainant as required by ORS 659.425(1)(a). ***----- In the Matter of James Breslin, 16 BOLI 200, 213-14 (1997).***

> Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ A respondent's refusal to accommodate complainant's disability of epilepsy and constructive discharge of complainant were "very severe types of discrimination against a disabled person." ***----- In the Matter of Body Imaging, Inc., 16 BOLI 163, 186 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998).***

> Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000).

❑ A person with a disability must be able to perform the essential functions of the job, with or without accommodation. An accommodation is usually accomplished by adjustments to the way a job is customarily performed. Whether a job duty is an essential function is a factual determination that must be made on a case-by-case basis, and all relevant evidence should be considered. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 293 (1997).***

❑ When complainant suffered from the physical impairments of breast cancer and coronary artery disease, respondent was obligated under Oregon law to: (1) do an individualized assessment of complainant's capabilities; and (2) determine whether he could reasonably accommodate complainant's disability without undue hardship. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 291 (1997).***

❑ While it is generally true that the accommodation process is initiated by an employee's request for accommodation, the employer's awareness of a disabling impairment by the employer, substantiated by the employee, can trigger a duty to accommodate. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 275 (1997).***

❑ Under the Handicapped Persons' Civil Rights Act, an employer must perform an individualized assessment of a disabled person's capabilities, and try to find a reasonable accommodation that would allow the person to overcome the many kinds of barriers that restrict employment opportunities and perform the duties of the job. An employer may not let unfounded fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or acceptance by co-workers and customers to influence its employment decisions. ***----- In the Matter of WS, Inc., 13 BOLI 64, 89 (1994).***

❑ The Handicapped Persons' Civil Rights Act requires an employer to make a reasonable effort to provide an effective accommodation. When respondent's past accommodation – assigning complainant to work in a shop rather than in a ship – was not available, respondent was required to make another reasonable effort to accommodate complainant. An employer's obligation to provide a reasonable accommodation applies to all aspects of employment. This duty is ongoing and may arise any time that a person's disability or job changes. ***----- In the Matter of WS, Inc., 13 BOLI 64, 89 (1994).***

❑ When respondent, a ship building and repair company, assigned complainant, a deaf welder, to its ship rather than to a ship because of safety concerns; when on one occasion, complainant was sent by the union hall to work for respondent, and respondent only had enough work in its shop to keep its foremen and leadpersons busy; and when respondent had a collective bargaining agreement that provided that "it is not the intention of [respondent] to use leadpersons or foremen to replace journeymen regarding their production assignments," the forum found that to replace a foreman or a leadperson in the shop with complainant and send that person to a ship to work as a journeyman welder would violate the terms of the agreement, and would have imposed an undue hardship on respondent. Respondent was not required to accommodate complainant by transferring a leadperson or foreman out of the shop to a ship. ***----- In the Matter of WS, Inc., 13 BOLI 64, 88 (1994).***

❑ The employer has an affirmative duty to evaluate an employee's capabilities. Otherwise, the employer cannot accurately and objectively determine: (1) the individual's ability to perform the job; and (2) whether reasonable accommodation is necessary. Once the individualized assessment is done, the employer must then look for possible accommodations, if necessary. ***----- In the Matter of WS, Inc., 13 BOLI 64, 87 (1994).***

❑ The employer has an affirmative duty to evaluate the employee's capabilities. Otherwise the employer cannot accurately and objectively determine: (1) the individual's ability to perform the job; and (2) whether reasonable accommodate is necessary. Once the individualized assessment is done, the employer must then look for possible accommodations, if necessary. ***----- In the Matter of WS, Inc., 13 BOLI 64, 87 (1994).***

❑ The Handicapped Persons' Civil Rights Act requires reasonable accommodation as a way of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities. Respondent had an affirmative duty to reasonably accommodate complainant's disability so that he could perform the work involved in the position sought. Accommodation was required unless it imposed an undue hardship on respondent. One factor to consider in making this determination is the effect of the potential accommodation on safety. ***----- In the Matter of WS, Inc., 13 BOLI 64, 86 (1994).***

❑ Granting a leave in order that an employee with a disability may seek treatment for a disability is a form of reasonable accommodation when granting a leave of absence to an employee does not impose an undue hardship on the employer. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 252-54 (1991).***

❑ When an employer has reasonably accommodated a disabled person by granting a leave of absence for

treatment of the disability, the employer cannot argue after the fact that such an accommodation is unreasonable and consider the treatment in assessing the employee's absentee rate. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 252-54 (1991).***

❑ When complainant applied for a truck driver job and respondent refused to hire him after a medical assessment found that he had a degenerative back condition and was at "present risk of probable incapacitation," the commissioner found that a preponderance of the evidence supported respondent's assessment. When no reasonable accommodation of complainant's physical impairment was possible due to the requirements of a valid collective bargaining agreement, including requirements governing and defining job descriptions, seniority, and job bidding, the commissioner found that respondent did not violate ORS 659.425 by refusing to hire complainant. ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 168, 172-73 (1990).***

❑ In order to justify rejection of an applicant with a physical handicap, ORS 659.425 requires that an employer show that the particular handicap prevents the performance of the work involved. The standard was set forth in *Montgomery Ward v. Bureau of Labor,* 280 Or 163, 570 P2d 76 (1977), in which the court stated: "It is our conclusion that the legislative 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." The determination of probability is a question for the experts. To effectuate the public policy set forth in ORS 659.405, the forum has determined that risk of injury means "current or present risk of injury." To allow an employer to disqualify the handicapped because of some potential future injury would make the policy meaningless. The forum noted that other jurisdictions have adopted the "present risk" standard. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 112-13 (1982).***

Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

21.3.10 --- Threat to Self or Others

❑ When respondent erroneously treated complainant, based on his permanent partial disability rating or upon an unsupported fear of injury or reinjury, as if he was disabled not only from his position as an automobile service support representative but from any other position that involved, loading, unloading, or stocking, respondent unlawfully barred complainant from employment because respondent regarded him as having a physical impairment. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 75-76 (1999)***.

❑ When respondents limited complainant's driving duties pending the receipt of medical evaluations, respondents did not even inquire about complainant's symptoms, and when the facts showed that complainant had no impairment that limited her ability to drive, the change in complainant's job duties violated ORS 659.425. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 181-83 (1998)***.

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ Under the Handicapped Persons' Civil Rights Act, an employer must perform an individualized assessment of a disabled person's capabilities, and try to find a reasonable accommodation that would allow the person to overcome the many kinds of barriers that restrict employment opportunities and perform the duties of the job. An employer may not let unfounded fears, stereotypes, presumptions, and misconceptions about job performance, safety, absenteeism, costs, or acceptance by co-workers and customers to influence its employment decisions. ***----- In the Matter of WS, Inc., 13 BOLI 64, 89 (1994).***

❑ Whether an applicant's own personal safety or that of others is in question, the Handicapped Persons' Civil Rights Act requires an individual assessment of the safety risk. ***----- In the Matter of WS, Inc., 13 BOLI 64, 87 (1994).***

❑ The burden of proving inability to accommodate is on the employer. Once the employer presents credible evidence that indicates accommodation of the complainant would not be reasonably possible, the complainant may not remain silent. Once the employer presents such evidence, the complainant has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence. ***----- In the Matter of WS, Inc., 13 BOLI 64, 87 (1994).***

❑ The Handicapped Persons' Civil Rights Act requires reasonable accommodation as a way of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities. Respondent had an affirmative duty to reasonably accommodate complainant's disability so that he could perform the work involved in the position sought. Accommodation was required unless it imposed an undue hardship on respondent. One factor to consider in making this determination is the effect of the potential accommodation on safety. ***----- In the Matter of WS, Inc., 13 BOLI 64, 86 (1994).***

❑ To deny the opportunity to work when a risk of incapacitation is less than probable contravenes the policy of the statute to guarantee the fullest employment of handicapped persons that is compatible with the reasonable demands of the job. ***----- In the Matter of WS, Inc., 13 BOLI 64, 83-84 (1994).***

❑ An employee's risk of probable incapacitation should be considered at the time of rejection. The word "present" refers to when the risk of probable incapacitation occurs, not when an "event" might occur. To refuse to allow a discharge to be based on an employee's risk of injury in the future is consistent with the statute's policy. If the risk does not arise for a year,

or a month, or some other time after "the time of rejection," then the applicant is not at "present risk of probable incapacitation." ***----- In the Matter of WS, Inc., 13 BOLI 64, 83 (1994).***

❑ The test for "probability" is whether, under all the circumstances, there is a reasonable probability that the applicant's condition renders him unable to perform the job duties in a manner that will not endanger himself or others. Inherent in that analysis is a consideration of the likelihood and probable severity of harm in the event of an accident; the more hazardous the job, the more stringent employment qualifications may be. In this case, the inquiry then is whether respondent has demonstrated a factual basis for believing, to a reasonable probability, that complainant, because of his deafness, could not safely perform the job of boilermaker in a ship. ***----- In the Matter of WS, Inc., 13 BOLI 64, 83 (1994).***

❑ When complainant, a deaf welder, possessed the training, experience, education, and skill necessary to perform the duties of a boilermaker; when he possessed the ability to perform the job safely and efficiently with reasonable accommodation and without present risk of probable incapacitation to himself; and when the inherent risk to his coworkers was not materially enhanced because of his impairment, respondent violated ORS 659.425(1)(a) by refusing to hire him because of his disability. ***----- In the Matter of WS, Inc., 13 BOLI 64, 79-82 (1994).***

❑ When working as a boilermaker (welder) in the tank of an oil tanker, by its very nature, included an inherent risk of injury or incapacitation to workers from fire and falling objects, the forum found that, with reasonable accommodation, the inherent risk to complainant's co-workers was not materially enhanced because of his hearing impairment. ***----- In the Matter of WS, Inc., 13 BOLI 64, 85-86 (1994).***

❑ When complainant applied for a truck driver job and respondent refused to hire him after a medical assessment found that he had a degenerative back condition and was at "present risk of probable incapacitation," the commissioner found that a preponderance of the evidence supported respondent's assessment. When no reasonable accommodation of complainant's physical impairment was possible due to the requirements of a valid collective bargaining agreement, including requirements governing and defining job descriptions, seniority, and job bidding, the commissioner found that respondent did not violate ORS 659.425 by refusing to hire complainant. ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 168, 172-73 (1990).***

❑ In the phrase "present risk of probable incapacitation," "present" refers to when the risk of probable incapacitation occurs. "Present" does not refer to when an incapacitating event might occur. A rejection for employment that is based upon a risk in the future is inconsistent with the policy of ORS 659.425. Thus, if the risk (of probable incapacitation) does not arise for a year, or a month, or some other time after the time of rejection, then the applicant is not at "present risk of probable incapacitation." ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 172 (1990).***

❑ In the phrase "present risk of probable incapacitation," "probable" means a "51 percent or greater chance," or "more likely to occur than not." ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 172 (1990).***

❑ When respondent did not hire complainant as a truck driver after respondent's doctor determined complainant was at "present risk of probable incapacitation," the commissioner gave greater weight to the testimony of respondent's doctor than to that of complainant's doctor because respondent's doctor was specialized in occupational medicine, specifically in head, neck and spine injuries, and was experienced in assessing risks of injury. Complainant's doctor did not have that specialized training or experience, had treated complainant primarily for high blood pressure, and did not believe anyone could assess the risk of injury. In addition, another doctor specializing in occupational medicine agreed with respondent's doctor's assessment; other medical evidence agreed with the doctor's findings; and the scope of his examination, a pre-employment examination, was more relevant to the issues in the case than the ODOT examination performed by complainant's doctor. ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 170-72 (1990).***

❑ When evidence showed that complainant successfully performed truck driver duties before and after his rejection by respondent for a truck driver job because of a back problem, the commissioner held that "the fact he may not have experienced problems is not necessarily probative of the medical risk of injury." The commissioner also held that "the 'probable incapacitation' standard does not require that incapacitation be certain." ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 170-72 (1990).***

❑ The determination of probability in OAR 839-06-225 and 839-06-235 "appears to be left to the testimony of experts." ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 171 (1990).***

❑ The "present risk of probable incapacitation" standard required by OAR 839-06-225 and 839-06-235 must be interpreted so that it is consistent with the standards stated in *Montgomery Ward v. Bureau of Labor,* 280 Or 163, 570 P2d 76, 79 (1977) and *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983). The commissioner held that an employer may not refuse to hire an individual unless the medical evaluation verifies either: (1) a physical or mental impairment affecting the ability to perform the work involved safely and efficiently; or (2) a present ("at the time of rejection") risk of probable incapacitation; and, in either case, no reasonable accommodation is possible. ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 169-70 (1990).***

❑ To determine whether respondent's termination of complainant is a violation of ORS 659.425 in an employment setting in which the employer "owes an extraordinarily high degree of care in its operation, and in which "safety is an essential part of its business," the

forum must determine whether, given all the circumstances, respondent has demonstrated a factual basis for believing, to a reasonable probability, that complainant, because of his weight, could not safely perform the job of correctional officer, *i.e.,* in a manner that would not endanger himself or others. ***----- In the Matter of Oregon State Correctional Institution, 7 BOLI 161, 190-91 (1988).***

Reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

Order on remand, 9 BOLI 7, 33-34 (1990).

❑ When respondent refused to hire complainant because respondent regarded complainant as handicapped – as defined in ORS 659.400(2) and (3)(c)(C) (1973) – because of his weight, and respondent did not have a factual basis for believing, to a reasonable probability under all the circumstances, that complainant's weight rendered complainant unable to safely perform the job for which he had applied, respondent violated ORS 659.425(1)(c). ***----- In the Matter of Oregon State Correctional Institution, 7 BOLI 161, 184 (1988).***

Reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

❑ When complainant, who had narcolepsy, applied for a position as railroad brakeman, the forum determined that there was no medical evidence to establish that complainant might not have an attack at any time, and therefore, even with respondent's reasonable accommodation, complainant could have done the job "only at materially enhanced risk of incapacitation" to herself and others. ***----- In the Matter of Burlington Northern Railroad Company, 3 BOLI 215, 237-38 (1983).***

❑ When complainant suffered from narcolepsy, a disease causing sudden drowsiness, but had no symptoms for two years prior to applying for work with respondent for the position of railroad brakeman, the commissioner found that there was no "medical assurance" that complainant might not suffer an attack at any time, and that this was not a "probable risk; it was an existing risk." The forum found that since the position was one that inherently involved the risk of incapacitation, complainant's condition considerably enhanced that risk and posed a threat of injury or death to complainant, respondent's other employees, and the public. ***----- In the Matter of Burlington Northern Railroad Company, 3 BOLI 215, 237 (1983).***

❑ When the position complainant applied for involved an inherent, considerable risk of incapacitation, and complainant had controlled narcolepsy, the commissioner adopted the following test: "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 only at a materially enhanced risk of incapacitation" to herself or others. ***----- In the Matter of Burlington Northern Railroad Company, 3 BOLI 215, 236 (1983).***

❑ In order to justify rejection of an applicant with a physical handicap, ORS 659.425 requires that an employer show that the particular handicap prevents the performance of the work involved. The standard was set forth in *Montgomery Ward v. Bureau of Labor,* 280 Or 163, 570 P2d 76 (1977), in which 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." The determination of probability is a question for the experts. To effectuate the public policy set forth in ORS 659.405, the forum has determined that risk of injury means "current or present risk of injury." To allow an employer to disqualify the handicapped because of some potential future injury would make the policy meaningless. The forum noted that other jurisdictions have adopted the "present risk" standard. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 112-13 (1982).***

Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

❑ When complainant was diagnosed as having spina bifida occulta and was rejected by respondent for the job of heavy truck driving, the forum determined that complainant's rejection constituted unlawful discrimination on account of physical handicap in violation of ORS 659.425 when the evidence established the condition was asymptomatic, not likely to cause debilitating complications with age, and complainant was fully capable of performing the duties of a heavy duty truck driver without any risk of incapacitating himself due to the condition. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 111 (1982).***

Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

❑ When complainant was diagnosed as having osteoarthritis of the spine and was rejected by respondent for the job of heavy truck driver, the forum determined that respondent's actions constituted unlawful discrimination in violation of ORS 659.425 on account of physical handicap when the evidence established that the condition did not present any risk of injury or incapacity beyond that faced by the general population and when complainant was fully capable of performing the duties of the job. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 108, 110-11 (1982).***

Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or

773, 670 P2d 1036 (1983).

❑ When complainant was diagnosed as having grade one spondylolisthesis and was rejected for full time employment by respondent for the job of heavy truck driver, the forum determined that the rejection of complainant's application constituted a violation of ORS 659.425 when the evidence established that, while complainant's condition could worsen, it could also remain asymptomatic as it was; complainant had successfully performed other jobs requiring heavy lifting without difficulty; and complainant had the current ability to perform the duties of the job. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 111 (1982).***

Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

❑ When complainant was found to be a fully qualified appliance salesperson but had a history of a heart attack, respondent violated ORS 659.425(1) by rejecting him for such employment in the absence of a probability, because of this handicap, either: (a) that he could not perform the job satisfactorily; or (b) that he would be incapacitated by such employment. ***----- In the Matter of Montgomery Ward and Company, Inc., 1 BOLI 100, 107 (1976).***

Order on remand of 1 BOLI 62 (1976), which was reversed, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, reversed and remanded, 280 Or 163, 570 P2d 76 (1977).

1 BOLI 100 (1978) affirmed as modified (removing general damages as unsupported), *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979).

❑ When respondent's physician testified that he "would imagine [appliance salespersons] probably move, 3, 4, maybe 5 refrigerators a day" at a store with which he was not familiar, and the appliance sales supervisor stated that the moving of appliances was normally handled by warehouse staff and that sales staff only occasionally moved appliances, the physician's rejection of complainant for employment as an appliance salesperson due to a previous heart attack was not justified. ***----- In the Matter of Montgomery Ward and Company, Inc., 1 BOLI 100, 103 (1976).***

Order on remand of 1 BOLI 62 (1976), which was reversed, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, reversed and remanded, 280 Or 163, 570 P2d 76 (1977).

1 BOLI 100 (1978) affirmed as modified (removing general damages as unsupported), *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979).

21.3.11 --- Illegal Drug Use

21.3.12 --- Medical Marijuana

❑ Respondent's discharge of Complainant based on his use of medical marijuana was not a *per se* violation of ORS 659A.112(1). ***------ In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 269 (2006).***

Appeal pending.

21.3.13 --- ORS 659A.112(2)(c)

❑ The agency alleged that respondent violated ORS 659A.112(2)(c) by "apparently assum[ing], when the record was to the contrary, that complainant was unable to perform the essential functions of his job, that complainant had job safety issues, that complainant was intoxicated or under the influence of marijuana while performing his job, or that complainant could not pass a drug screening test." The agency produced no credible evidence support a conclusion that respondent assumed that complainant was unable to perform the essential functions of his job or had job safety issues, that complainant was intoxicated or under the influence of marijuana while performing his job, or that complainant could not pass a drug screening test, and the forum concluded that respondent did not violate ORS 659A.112(2)(c). ***------ In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 271 (2006).***

Appeal pending.

21.3.14 --- ORS 659A.112(2)(g)

❑ The agency alleged that respondent acted on the apparent assumptions, "when the record was to the contrary, that complainant was unable to perform the essential functions of his job, that complainant had job safety issues, that complainant was intoxicated or under the influence of marijuana while performing his job, or that complainant could not pass a drug screening test," and that these assumptions amounted to use of qualification standards that screen out or tend to screen out a disabled person, with no showing that the standard is job related and consistent with business necessity. However, the agency produced no proof that respondent discharged complainant based on these assumptions and the forum concluded that respondent did not violate ORS 659A.112(2)(g). ***------ In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 275-76 (2006).***

Appeal pending.

21.4 --- Employment Agency, Labor Organization

21.5 --- Interaction with Federal ADA

❑ Based on its similarity to ORS 659A.112(2)(e), the forum relied in part on 42 U.S.C. § 12112(b)(5)(A) of the ADA and on federal case law interpreting this provision in the forum's interpretation and application of ORS 659A.112(2)(e). ***------ In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 270 (2006).***

Appeal pending.

❑ When neither ORS chapter 659 nor the agency's administrative rules interpreting those statutes defined what an offer of employment is that elevates a job applicant to "employee" status upon acceptance of the offer, the forum relied on EEOC Guidelines interpreting

similar provisions of the ADA. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 90-91 (2001).***

❑ Relying on EEOC Guidelines that interpret provisions of the ADA that are similar to ORS 659.447 and 659.448, the forum concluded that mere placement of a job applicant in a job pool for possible consideration in the future for temporary work assignments does not constitute an offer of employment that elevate a job applicant to the status of employee. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 90-91 (2001).***

❑ The forum relied on EEOC Guidelines to define a "disability-related inquiry." ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 92 (2001).***

21.6 --- Public Accommodation

❑ Complainant, who has Parkinson's disease, visited respondent's nightclub and was accused of being drunk because of his unsteady gait and asked to leave, despite complainant's statement that he had Parkinson's, that he had not been drinking, and the absence of any other physical signs that complainant had been drinking. Complainant was not belligerent and was not asked to stay and have refreshments until he sobered up, respondent's usual policy for dealing with drunks. Instead, he was asked to bring in a note from his doctor stating that he had Parkinson's and told to leave, which he did. When complainant returned with a medical note, respondent's manager told him to leave, even though complainant stated he had brought a note from his doctor. Respondent's manager refused to look at the documentation, saying it made no difference because he had talked to respondent's owner, who said complainant should not have been allowed into respondent's club. The forum inferred from these circumstances that the only reason complainant was asked to leave was because of his Parkinson's. ***----- In the Matter of C. C. Slaughter's, Ltd., 26 BOLI 186, 195 (2005).***

❑ To establish a prima facie case, the Agency must present credible evidence of the following: (1) respondent was a place of public accommodation as defined in ORS 659A.400; (2) complainant is a disabled person; (3) respondent made a distinction, discrimination or restriction against complainant because he is a disabled person; and (4) complainant was harmed by respondent's conduct. ***----- In the Matter of C. C. Slaughter's, Ltd., 26 BOLI 186, 193 (2005).***

❑ Through undisputed testimony by complainant and other agency witnesses, the agency established that respondent was a nightclub that was open to the public and provided food, beverages, and music to its patrons, meeting the ORS 659A.400(1) definition of a place of public accommodation. ***----- In the Matter of C. C. Slaughter's, Ltd., 26 BOLI 186, 193 (2005).***

21.7 --- Real Property

❑ To prove that respondent violated ORS 659.430(1) the agency must establish that: (1) complainant was a disabled person; (2) respondent sold, leased, or rented real property to complainant; (3) respondent made a distinction or restriction against complainant in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or the furnishing of any facilities or services in connection therewith; and (4) respondent made the distinction or restriction against complainant because of his disability. The agency is not required to also prove that respondent treated the disabled complainant differently than it treated non-disabled persons. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 88-89, 93-94, 96 (1999)***.

❑ Respondent's threat to evict complainant if he did not take certain medications constituted a "distinction or restriction against" complainant in the terms or conditions of his real property rental because it forced him to choose between asserting his legal right to refuse medications and maintaining his housing. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 89 (1999)***.

❑ Complainant's unmedicated behaviors were frustrating and inconvenient for respondent, and respondent threatened to evict complainant if he did not take his medications in hopes that he either would start taking the medication (albeit under duress) or would leave respondent's facility. Under these circumstances, the forum found that respondent made the threat "because of" complainant's disability, in violation of ORS 659.430(1). ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 89-90 (1999)***.

22.0 INJURED WORKER

22.1 --- Definitions

❑ A worker's former position is "available" even if it has been filled by a replacement worker during the injured worker's absence. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 35-36 (1998)***.

> Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ The term "invoke," as used in ORS 659.410(1), is defined by rule to include the "worker's reporting of an on-the-job injury" to her employer. The commissioner held that respondent's contention this definition was too broad and beyond the intention of the legislative was without merit. "The agency's interpretation properly and logically identifies the first step by which an employee 'invokes' the procedures of the workers' compensation law." ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 292 (1991).***

> Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ Termination is covered under ORS 659.410 by the word "tenure." ***----- In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 115 (1989).***

❑ When an administrative rule, OAR 839-06-105, could not be applied directly in a contested case because it was not filed and effective until after the contested events arose, the rule was "nonetheless instructive of what the Bureau policy (was) and (had) been on the question of what (was) included within the term 'invoke' in ORS 659.410." ***----- In the Matter of***

Pacific Convalescent Foundation, Inc., 4 BOLI 174, 183 (1984).

❑ The commissioner interpreted "available," as used in ORS 659.415, to require an employer to offer an injured worker the first suitable position available after the worker's recovery and demand for reinstatement. However, "nothing in the statute requires an employer to hold the injured worker's job open until such time as the employee had recovered." While the statute is silent as to how long this obligation continues, the commissioner found the obligation continued for at least the 3 ½ months involved in the case. ***----- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 271 (1980).***

> Reversed on the ground that statutes did not specify failure to reinstate as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980).

22.2 --- Generally

❑ To present a prima facie case in an injured worker case, the agency must present evidence to prove: (1) the respondent is a respondent as defined by statute; (2) the complainant is a member of a protected class; (3) the complainant was harmed by an action of the respondent; and (4) the respondent's action was taken because of the complainant's membership in the protected class. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 178 (1993).*** *See also In the Matter of Community First Building Maintenance, 9 BOLI 1, 5 (1990); In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 115 (1989); In the Matter of Dillard Hass Contractor, Inc., 7 BOLI 244, 250 (1988); In the Matter of Jake's Truck Stop, 7 BOLI 199, 212 (1988).*

❑ Complainant became a member of a protected class as soon as he reported his on-the-job injury to respondent and thereby invoked the procedures provided for in the workers' compensation law. In addition, complainant applied for and received benefits provided for in Oregon's workers' compensation law. ***----- In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 115 (1989).***

❑ When the employee has invoked Oregon's workers' compensation procedures, an employer may make employment decisions that are adverse to an unsafe worker, as long as those decisions are made without regard to any on-the-job injuries the employee has had,. ***----- In the Matter of Ed's Mufflers Unlimited, Inc., 7 BOLI 215, 225 (1988).***

> Affirmed without opinion, Ed's Mufflers Unlimited, Inc v. Bureau of Labor and Industries, 95 Or App 220, 769 P2d 808 (1989).

❑ The forum noted that the mere fact that no workers' compensation claim is pending at the time an employer terminates an injured employee is not dispositive of a claim of discrimination. An employer cannot avoid the proscriptions of ORS 659.410 merely by terminating an injured worker immediately after an injury and before a formal claim is filed. The forum further noted that ORS 659.410 cannot be avoided by coercing an employee into withdrawing a claim and then firing the employee when the claim no longer exists. ***----- In the Matter of Willamette Electric Products Company, Inc., 5 BOLI 32, 46 (1985).***

❑ When an administrative rule, OAR 839-06-105, could not be applied directly in a contested case because it was not filed and effective until after the contested events arose, the rule was "nonetheless instructive of what the Bureau policy (was) and (had) been on the question of what (was) included within the term 'invoke' in ORS 659.410." ***----- In the Matter of Pacific Convalescent Foundation, Inc., 4 BOLI 174, 183 (1984).***

❑ When respondent showed that he believed that the complainant's workers' compensation claim would have little or no effect on respondent's insurance rates and was unconcerned that the complainant received compensation for the work time lost due to injury, the commissioner found that respondent had not discriminated against complainant because he had applied for workers' compensation benefits, and therefore did not violate ORS 659.410. ***----- In the Matter of James Haring, 2 BOLI 146, 148 (1981).***

22.3 --- Hiring, Promotion

❑ When complainant applied for a position with respondent after having previously resigned from a different position with respondent due to a compensable on-the-job injury, the forum found that complainant was not qualified for the position and respondent had not violated ORS 659.420 by refusing to hire complainant. The evidence showed that complainant had applied for the same position before his resignation and had been rejected as not qualified. The evidence also showed that complainant had been injured on the job four other times and respondent had taken no adverse action. ***----- In the Matter of West Coast Grocery Company, 4 BOLI 47, 65 (1983).***

❑ Complainant, who had 27 on-the-job accidents, four of which were compensated through the State Accident Insurance Fund, applied for a position with respondent after being laid off for budgetary reasons. The forum found that respondent's refusal to hire complainant was not because complainant had invoked or utilized workers' compensation benefits, but because of complainant's lack of promotion potential, his difficulty in operating sophisticated equipment, and his lack of supervisory experience. ***----- In the Matter of City of Coos Bay, 3 BOLI 85, 88 (1982).***

22.4 --- Terms, Conditions, & Privileges of Employment

❑ In a contested case proceeding brought under ORS 659.410, the agency has the burden of proving that respondent discriminated against complainant in a term or condition of employment because complainant "applied for benefits or invoked or utilized the procedures provided for" in the workers' compensation statutes. ***----- In the Matter of Pacific Convalescent Foundation, Inc., 4 BOLI 174, 182-83 (1984).***

22.5 --- Harassment

❑ To establish a prima facie case of hostile environment harassment by supervisory employees of a worker who has applied for benefits or invoked or utilized the workers' compensation procedures, the agency must present evidence to show that: (1) respondent is an employer of six or more persons; (2) respondent employed complainant; (3) complainant was a worker who applied for benefits or invoked or utilized the workers' compensation procedures; (4) respondent's supervisory employee engaged in unwelcome verbal or physical conduct directed at complainant because of his protected class; (5) the conduct had the purpose or effect of creating an objectively intimidating, hostile, or offensive working environment; (6) respondent knew or should have known of the conduct; and (7) complainant was harmed by the conduct. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 72 (1999)****. See also In the Matter of LTM Incorporated, 17 BOLI 226, 238 (1998); In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 9-10 (1998), affirmed without opinion, 160 Or App 700, 981 P2d 402 (1999).*

❑ The agency established a prima facie case of hostile environment harassment by supervisory employees of a worker who had applied for benefits or invoked or utilized the workers' compensation procedures by proving that the supervisors attempted to discourage complainant from filing a workers' compensation claim, reminding him that each filed claim would negatively affect each employee's accident free bonus; telling him that his filing a claim had "blown" the chance for the bonus; and making numerous negative remarks concerning the genuineness of complainant's injury.***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 72-73 (1999)****.*

❑ When complainant, an injured worker, asked his supervisor to review his written work restrictions, the supervisor responded by calling him a "sissy," instructed him to drive under the influence of pain medication (an activity outside complainant's work restrictions), and told him he could drive in that condition because he probably had driven drunk before. Complainant subsequently obtained a "no-work" order from his treating physician, whereupon the same supervisor told him he would be letting down respondent's other employees if he collected workers' compensation "time-loss" benefits and told him he should instead take a light duty assignment that would consist of sitting in a room with three girls, answering the telephone, and drooling all day. Earlier, this supervisor had actively discouraged another employee from invoking the workers' compensation system. These facts combined to create an environment that a reasonable person would find hostile and offensive. ***----- In the Matter of LTM, Incorporated, 17 BOLI 226, 239 (1998)****.*

❑ Evidence that an employer discouraged workers from filing workers' compensation claims may support an inference that harassment of an injured worker who filed such a claim was based on his utilization of the workers' compensation system. ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 10, 11-12 (1998)****.*

Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

❑ Evidence that an injured worker wished to return to employment with a respondent does not mandate the conclusion that respondent did not harass the worker. ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 12 (1998)****.*

Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

❑ Harassment of an injured worker does not necessarily amount to an unlawful employment practice. Rather, the agency must prove that the harassment was directed at the worker because he or she applied for benefits or invoked or utilized the worker's compensation system. ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 12 (1998)****.*

Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

❑ ORS 659.410(1) prohibits harassment based on applying for benefits or invoking or utilizing the state's workers' compensation procedures. ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 9 (1998)****.*

Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

22.6 --- Discharge/Constructive Discharge

❑ While the temporal relationship between complainant's work injury and his discharge alone was not dispositive, the progression of events following complainant's injury and his supervisor's expressed concern that complainant was "milking his injury" was enough to establish a link between the two events. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 61 (2002).***

❑ When evidence showed that, after a series of absences due to his on the job injury, complainant was singled out for using the word "bitch" in the workplace, that the use of vulgar language was tolerated and widespread in the department complainant worked in, that no one else was terminated for using vulgar language in complainant's department, and that respondent summarily terminated complainant without following its own disciplinary procedure, the forum found respondent's reason for terminating complainant pretextual and concluded that respondent terminated complainant because he used the workers' compensation provisions. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 62-63 (2002).***

❑ The forum found complainant had been subjected to different treatment based on his use of the workers compensation system when he violated respondent's cut glove policy and cut himself, suffering a compensable

injury, then was discharged, whereas other similarly situated kitchen staff who violated the same policy but did not suffer compensable injuries received only verbal warnings. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 139 (2000)***.

❑ In a wrongful discharge case, respondent produced evidence that numerous employees other than complainant had filed workers' compensation claims. Those employees were properly considered comparators in the forum's causation analysis. However, there was no evidence concerning the circumstances of these employees' employment, whether any of them had violated respondent's knife policy (the violation of which purportedly was the basis for complainant's discharge) and, if so, whether they were injured as a result of that violation. Consequently, the forum gave evidence regarding these employees less weight than it gave evidence concerning five other employees who were shown to have violated respondent's knife policy in the same manner as complainant. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 136 (2000)***.

❑ When respondent placed complainant on "illness leave" for retraining and left him there when retraining was no longer an option, and no other realistic options existed because complainant had received a workers' compensation permanent partial disability rating, the forum found that respondent's act had the effect of ending complainant's tenure as respondent's employee because he had invoked and utilized the workers' compensation statutes. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 75 (1999)***.

❑ To establish a prima facie case of a violation of ORS 659.410, the agency must provide credible evidence of the following elements: (1) complainant's application for benefits or utilization of the workers' compensation procedures; (2) respondent's knowledge that complainant applied for benefits or utilized the workers' compensation procedures; (3) the barring or discharge of complainant by respondent; (4) a causal connection between complainant's filing of the claim and the termination of complainant's employment; and (5) harm resulting from respondent's action. ***----- In the Matter of Tony Chan, 15 BOLI 68, 76 (1996).***

❑ When there was absolutely no credible evidence to show a correlation between the fact that complainant had filed a workers' compensation claim and the fact that her supervisor was upset and discharged complainant because she failed to show up for her scheduled shift, the forum concluded that the agency had not met its burden of proof and dismissed the charges. ***----- In the Matter of Tony Chan, 15 BOLI 68, 76 (1996).***

❑ The commissioner found that complainant, a compensably injured worker, failed to report to work after advising respondent of her medical release to regular duty, and concluded that respondent did not discharge her in retaliation for using the workers' compensation system. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 58 (1993).***

❑ When respondent discharged complainant because he had a bad attitude and damaged an auto part while removing it, respondent did not discharge complainant because he claimed workers' compensation benefits and did not violate ORS 659.410. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 178, 180 (1993).***

❑ When complainant, an injured worker who had applied for workers' compensation benefits, took a company vehicle after working hours, got drunk and totaled the vehicle, then several days later came late to work appearing hung over, unshaven, disheveled, and smelling of alcohol, the commissioner found that respondent discharged complainant because he wrecked the vehicle while drunk and came to work late and unfit, not because he had applied for workers' compensation benefits. ***----- In the Matter of Chem-Ray Company, 10 BOLI 163, 172 (1992).***

❑ When complainant had an on-the-job injury and prepared an incident report regarding his injury for an insurance claim within a few days, respondent terminated complainant within one week of her injury, and respondent's agent was found to have "created" supporting documents in order to adhere to company policy, the commissioner found there was a causal connection between respondent's discharge of complainant and her invocation of the workers' compensation procedures. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 296 (1991).***

Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ When respondent's manager knew of complainant's injury on the day it happened, created a "sham" memorandum to give the appearance that performance-related reasons caused the discharge, and terminated complainant within three or four days, the commissioner inferred that complainant's reporting of the injury played a key role in the termination, and concluded that respondent knowingly and purposely terminated complainant because she had reported an injury. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 296 (1991).***

Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ In an alleged unlawful discharge case, an investigator's testimony regarding interviews with complainant's co-workers and the testimony of complainant established that complainant had performed his duties in a satisfactory manner. Respondent had no workers' compensation insurance. After complainant reported an on-the-job injury (carpal tunnel syndrome) to respondent and said that he intended to file a workers' compensation claim, respondent attempted to dissuade complainant from asserting his claim. The commissioner held that "these facts lead to the inference that respondent's employment decision – to discharge complainant – was caused by complainant's protected class membership." ***----- In the Matter of Community First Building Maintenance, 9 BOLI 1, 5 (1990).***

❑ Termination is covered under ORS 659.410 by the word "tenure." ***----- In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 115 (1989).***

❑ When respondent learned about complainant's statement to an injured co-worker that the injury was respondent's fault, respondent would have committed an unlawful employment practice under ORS 654.062(5) if complainant's statement played a key role in respondent's decision to terminate complainant. ***----- In the Matter of Daniel Duron, 8 BOLI 23, 31 (1989).***

❑ Respondent reinstated complainant to his tree faller job for 13 days after his release to return to his former job following an on-the-job injury, then permanently laid off complainant. Respondent then recalled workers who had not been injured and hired 25 new workers, although it knew complainant wanted the work and could do the work. The evidence showed that respondent treated another injured worker the same way respondent treated complainant. The commissioner found that respondent treated complainant differently from uninjured workers, creating a reasonable inference that respondent discharged complainant because of his membership in the protected class of injured workers. Respondent, who was in default, submitted no evidence to support its suggested nondiscriminatory reasons for the discharge. The commissioner found respondent's reasons not credible and held that respondent violated ORS 659.410. ***----- In the Matter of Dillard Hass Contractor, Inc., 7 BOLI 244, 251-52 (1988).***

❑ When an injured worker was fired after he cut his finger and invoked the workers' compensation procedures and the evidence showed that respondent discouraged employees with minor on-the-job injuries from filing workers' compensation claims and stated a preference for directly paying employees for medical expenses, the commissioner found that, since adverse employment decisions must be separate from an on-the-job injury when workers' compensation procedures have been invoked, respondent violated ORS 659.410. ***----- In the Matter of Ed's Mufflers Unlimited, Inc., 7 BOLI 215, 225 (1988).***

> Affirmed without opinion, *Ed's Mufflers Unlimited, Inc v. Bureau of Labor and Industries*, 95 Or App 220, 769 P2d 808 (1989).

❑ When an employee filed a complaint pursuant to ORS 659.410 alleging termination as a result of an on-the-job injury, the commissioner found that all that is required is invocation of the workers' compensation system, that no compensable injury is required, and that the purpose of ORS 659.410 is to free workers from the threat of adverse employer action for invoking the system, regardless of the eventual compensability of the claim. ***----- In the Matter of Ed's Mufflers Unlimited, Inc., 7 BOLI 215, 226 (1988).***

❑ When respondent discharged complainant because complainant applied for workers' compensation benefits, the commissioner found that this constituted discrimination against complainant with respect to the tenure of his employment, an unlawful employment practice in violation of ORS 659.410. ***----- In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 64 (1987).***

> Affirmed, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

❑ Respondent asserted that complainant was absent from work too often, that he performed his duties in a careless and negligent manner, and that complainant's performance endangered complainant and his fellow workers. Those allegations were scarcely supported by evidence, but the record showed with certainty that complainant's status as an injured worker who had applied for workers' compensation benefits played a key role in respondent's actions, leading the commissioner to conclude that complainant's status could be said to have caused respondent's action. The commissioner found that complainant's protected class membership played a key role in respondent's firing of complainant and its failure to reinstate complainant to his former job or an available and suitable job. This constitutes evidence of unlawful discrimination. ***----- In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 66 (1987).***

> Affirmed, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

❑ When the facts indicated that the owner of the business who terminated complainant had no knowledge of complainant's alleged injury and application for workers' compensation, the owner did not violate ORS 659.410 by discharging complainant, even though complainant had told respondent's manager that she had suffered an on-the-job injury. ***----- In the Matter of In the Matter of KBOY Radio Station, 5 BOLI 94, 96 (1986).***

❑ The forum noted that the mere fact that no workers' compensation claim is pending at the time an employer terminates an injured employee is not dispositive of a claim of discrimination. An employer cannot avoid the proscriptions of ORS 659.410 merely by terminating an injured worker immediately after an injury and before a formal claim is filed. The forum further noted that ORS 659.410 cannot be avoided by coercing an employee into withdrawing a claim and then firing the employee when the claim no longer exists. ***----- In the Matter of Willamette Electric Products Company, Inc., 5 BOLI 32, 46 (1985).***

❑ When complainant was injured on May 16, filed a claim for workers' compensation on May 23, and the employer offered complainant light duty work on May 27, the forum found that complainant's discharge in July was not because complainant had applied for or utilized the procedures provided in the workers' compensation law, but was for just cause based on evidence that established complainant had indicated his injury was not work related as claimed and other employees testified that complainant had made numerous comments regarding the race and national origin of other employees that caused problems in the workplace. ***----- In the Matter of Willamette Electric Products Company, Inc., 5 BOLI 32, 45-46 (1985).***

❑ When respondent moved to dismiss specific charges, arguing that an employee who has been terminated and files a claim under ORS 659.410 cannot also file a claim under 659.415 for failure to reinstate, the forum denied the motion, quoting the court: "In *Shaw*,

we recognized the general rule that in absence of a contract or statute to the contrary, an employer may discharge an employee at any time for any cause. 297 Or at 254. However, we also noted alleging that ORS 659.415 constitutes a statutory exception to the general rule. However, this does not mean that the employer may never lawfully refuse to reinstate an employee who makes a demand for reinstatement pursuant to ORS 659.415(1). As we recognized in *Vaughn v. Pacific Northwest Bell Telephone*, that statute requires reinstatement unless the employer had just cause to discharge the employee * * *. A worker's statutory reinstatement right under ORS 659.415(1) cannot be lost due to fortuitous timing. The right to demand reinstatement survives any interim discharge occurring before the worker is entitled, under the terms of the statute, to assert that statutory right. Otherwise the statutory right embodied in ORS 659.415 could be so readily circumvented in many cases that this could not have been intended in the statutory scheme." ***----- In the Matter of Willamette Electric Products Company, Inc., 5 BOLI 32, 35-36 (1985).***

❑ The forum cited *Yartzoff v. Democratic-Herald Publishing Company,* 281 Or 651 (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." While ORS 659.415 puts limits on an employer's right to terminate an employee, it does not prevent termination for any non-discriminatory reason "even though, at the time of termination, the employee may coincidentally be off work due to a compensable injury or may have just required reinstatement." ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 213 (1982).***

❑ In an injured worker case, the agency does not have to prove that the employee was terminated or denied reinstatement because 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, an employer has the burden of proving by a preponderance of the evidence that termination or denial of the right to reinstatement was for a separate, nondiscriminatory reason. ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 213 (1982).***

❑ Respondent proved that complainant, an injured worker, was denied reinstatement because of excessive absenteeism before his injury based on credible testimony by complainant's supervisor that he planned to fire complainant before complainant was hurt, but was unable to when he was temporarily called away on another job. ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 215 (1982).***

❑ When complainant sustained a compensable injury on respondent's premises, applied for workers' compensation benefits and was put on layoff status on the day he was able to return to work, the forum found complainant had been discharged because he applied for workers' compensation benefits when the evidence showed complainant's supervisor had stated that such claims were costing a lot of money, the supervisor had advised others they would be terminated for filing claims, and when at least one employee with less seniority than complainant on respondent's seniority list was retained after complainant was laid off. ***----- In the Matter of Spear Beverage Company, 2 BOLI 240, 243-44 (1982).***

❑ When respondent claimed to have discharged complainant for failure to follow grooming policies by not trimming his sideburns three days after his return from a compensable injury, complainant had worn the sideburns at work for three years prior to his injury without being disciplined and others with sideburns were not disciplined, and respondent deliberately frustrated his filing for and obtaining workers' compensation benefits, the commissioner found that respondent's reason was pretextual and that respondent had violated ORS 659.410. ***----- In the Matter of Barker Motors, Inc., 2 BOLI 169, 176-78 (1981).***

❑ When complainant had to repeatedly request a workers' compensation claim form after respondent's general manager sent complainant to respondent's group health insurer for injury-related expenses, the insurer denied the claim because it was incurred at work, and respondent then caused its workers' compensation carrier to initially deny the claim by questioning the validity of the injury because of a late report and an alleged history of back problems, the commissioner found that respondent had violated ORS 659.410 in that respondent's real reason for the subsequent discharge of complainant was his application for workers' compensation benefits. ***----- In the Matter of Barker Motors, Inc., 2 BOLI 169, 176-77 (1981).***

❑ Proof that respondent had not fired another employee with a $40,000 workers' compensation claim did not offset proof that respondent intentionally thwarted complainant's filing for workers' compensation benefits and the pretextual reason for his discharge. ***----- In the Matter of Barker Motors, Inc., 2 BOLI 169, 176 (1981).***

22.7 --- Termination of Health Benefits

22.8 --- Reinstatement of Worker to Former Job

❑ "It is a *per se* violation of ORS 659.415 not to reinstate an employee when reinstatement is required. A discriminatory motive need not be proved to establish a violation of the statute." ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 35 (1998)***.

Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ To present a prima facie case of a violation of ORS 659.415, the agency must prove: (1) the worker suffered a compensable on-the-job injury; (2) the worker demanded reinstatement to the worker's former position, which existed and was available; (3) the worker was not disabled from performing the duties of such position; and (4) the employer denied the worker reinstatement. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 35 (1998)***.

Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ A complainant is ineligible for reinstatement if the employer had 20 or fewer employees at the time of the injury *and* the employer had 20 or fewer employees at the time of demand for reinstatement. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 41 (1998)***.

Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ The commissioner found that complainant, a compensably injured worker, was not disabled when released to her regular, available position by her physician and was entitled to reinstatement but respondent did not unlawfully fail to reinstate complainant when she failed to report to work. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 58 (1993).***

❑ When respondent was charged with violating ORS 659.415 and failed to satisfy its obligation of reinstating the complainant by mailing a written offer to complainant's last known address, as required by OAR 839-06-130(5)(a), the commissioner held it was not necessary for the agency to charge the respondent with violations of the rules related to ORS 659.415. "Once the agency has charged a respondent with a violation of the statute, the issues addressed by the rules are clearly within the scope of the issues to be addressed at hearing." ***----- In the Matter of St. Vincent de Paul Salvage Bureau, 8 BOLI 293, 301 (1989).***

❑ An employer's failure to reinstate an injured worker is a *per se* violation of ORS 659.415 when reinstatement is required, and a discriminatory motive need not be proved to establish a violation of the statute. ***----- In the Matter of St. Vincent de Paul Salvage Bureau, 8 BOLI 293, 299 (1990).***

❑ In order to be reinstated to a former job, an injured worker must be physically able to perform the duties of the former job and make demand for the former job. At that point, the employer shall reinstate the worker in his or her former position, provided the position is available. When the former job is not available, the worker shall be reinstated in any other position that is available and suitable. The employer's obligation to reinstate/reemploy the injured worker continues until the employer offers the next suitable job that becomes available according to the employer's non-discriminatory written policy that has been effectively made known to the employer's work force and is practiced by the employer. In the absence of such a policy, the employer can satisfy the obligation by mailing a written offer to the injured worker's last known address. When respondent's practice was to tell workers to check in periodically, try to call a worker if it had the worker's telephone number, or notify the worker if the worker checked in, the commissioner found that these efforts did not satisfy respondent's obligation under the law. It was not the injured worker's obligation to report to the employer, unless the employer had a non-discriminatory, written reporting policy. ***----- In the Matter of St. Vincent de Paul Salvage Bureau, 8 BOLI 293, 299-300 (1990).***

❑ When respondent failed to reinstate complainant to his former position upon demand when the position became available, complainant was able to perform the duties of his former position, and respondent failed to reinstate complainant to any other position that was available and suitable, respondent violated ORS 659.415. ***----- In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 64 (1987).***

Affirmed, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

❑ Respondent asserted that complainant was absent from work too often, that he performed his duties in a careless and negligent manner, and that complainant's performance endangered complainant and his fellow workers. Those allegations were scarcely supported by evidence, but the record showed with certainty that complainant's status as an injured worker who had applied for workers' compensation benefits played a key role in respondent's actions, leading the commissioner to conclude that complainant's status could be said to have caused respondent's action. The commissioner found that complainant's protected class membership played a key role in respondent's firing of complainant and its failure to reinstate complainant to his former job or an available and suitable job. This constitutes evidence of unlawful discrimination. ***----- In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 66 (1987).***

Affirmed, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

❑ An employer does not violate ORS 659.415 by refusing to reinstate an injured worker when the worker is terminated for just cause before the demand for reinstatement. An employer can rely on information discovered between the time of a worker's injury and the time of the worker's demand for reinstatement to terminate the worker for just cause. The forum cited the Oregon Supreme Court: "In *Shaw*, we recognized the general rule that in absence of a contract or statute to the contrary, an employer may discharge an employee at any time for any cause. 297 Or at 254. However, we also noted alleging that ORS 659.415 constitutes a statutory exception to the general rule. However, this does not mean that the employer may never lawfully refuse to reinstate an employee who makes a demand for reinstatement pursuant to ORS 659.415(1). As we recognized in *Vaughn v. Pacific Northwest Bell Telephone*, that statute requires reinstatement unless the employer had just cause to discharge the employee * * *. ***----- In the Matter of KBOY Radio Station, 5 BOLI 94, 120-21 (1986).***

❑ Complainant suffered an on-the-job injury, filed a claim for workers' compensation, and was discharged before her demand for reinstatement. The forum determined that respondent did not violate ORS 659.415 by refusing to reinstate complainant because she had been terminated for just cause -- her unsatisfactory work performance. ***----- In the Matter of KBOY Radio Station, 5 BOLI 94, 120-21 (1986).***

❑ When respondent moved to dismiss specific charges, arguing that an employee who has been terminated and files a claim under ORS 659.410 cannot also file a claim under 659.415 for failure to

reinstatement, the forum denied the motion, quoting the court: "In *Shaw*, we recognized the general rule that in absence of a contract or statute to the contrary, an employer may discharge an employee at any time for any cause. 297 Or at 254. However, we also noted alleging that ORS 659.415 constitutes a statutory exception to the general rule. However, this does not mean that the employer may never lawfully refuse to reinstate an employee who makes a demand for reinstatement pursuant to ORS 659.415(1). As we recognized in *Vaughn v. Pacific Northwest Bell Telephone*, that statute requires reinstatement unless the employer had just cause to discharge the employee * * *. A worker's statutory reinstatement right under ORS 659.415(1) cannot be lost due to fortuitous timing. The right to demand reinstatement survives any interim discharge occurring before the worker is entitled, under the terms of the statute, to assert that statutory right. Otherwise the statutory right embodied in ORS 659.415 could be so readily circumvented in many cases that this could not have been intended in the statutory scheme." ***----- In the Matter of Willamette Electric Products Company, Inc., 5 BOLI 32, 35-36 (1985).***

❑ When the agency alleged that respondent violated ORS 659.415 by failing to reinstate an injured worker, the commissioner found that the agency met its burden of proof by presenting a prima facie case that complainant suffered a compensable injury and was denied reinstatement when he requested his job back with a doctor's release. ***----- In the Matter of Pacific Convalescent Foundation, Inc., 4 BOLI 174, 184 (1984).***

❑ Although the language of ORS 659.415 appears to impose an absolute duty on an employer to reinstate an injured worker, the employer may defend a complaint brought under ORS 659.415 on the ground that an employee was denied reinstatement for "just cause." This is an affirmative defense and the employer has the burden of proving the defense by a preponderance of the evidence. Respondent met its burden of proof by proving complainant was excessively absent from his job, and on several occasions was warned of excessive absenteeism orally and in writing. ***----- In the Matter of Pacific Convalescent Foundation, Inc., 4 BOLI 174, 184 (1984).***

❑ Respondent proved that complainant, an injured worker, was denied reinstatement because of excessive absenteeism before his injury based on credible testimony by complainant's supervisor that he planned to fire complainant before complainant was hurt, but was unable to when he was temporarily called away on another job. ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 215 (1982).***

❑ Complainant, who sustained a compensable injury on-the-job while in respondent's employ, alleged that respondent had refused to reinstate him in violation of ORS 659.415. The forum found respondent had not violated the statute, but had denied reinstatement for the separate, non-discriminatory reasons of complainant's excessive absenteeism and his failure to report to work promptly after his doctor's release. The forum noted that respondent had attempted to "scare" employees by saying that injured employees would lose their jobs, but determined that the evidence supported respondent's defense. Complainant began working for respondent on September 22, 1979 and missed nine days of work between that date and October 17, 1979, the date he was injured. He failed to adequately inform respondent of his absences and other employees were required to fill in for complainant. ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 213-15 (1982).***

❑ In an injured worker case, the agency does not have to prove that the employee was terminated or denied reinstatement because 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, an employer has the burden of proving by a preponderance of the evidence that termination or denial of the right to reinstatement was for a separate, nondiscriminatory reason. ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 213 (1982).***

❑ The forum cited *Yartzoff v. Democratic-Herald Publishing Company,* 281 Or 651 (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." While ORS 659.415 puts limits on an employer's right to terminate an employee, it does not prevent termination for any non-discriminatory reason "even though, at the time of termination, the employee may coincidentally be off work due to a compensable injury or may have just required reinstatement." ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 213 (1982).***

❑ In determining whether a respondent committed an unlawful employment practice under ORS 659.415 by filing to reinstate a compensably injured worker, the commissioner found only those facts necessary to conclude that the case involved allegations governed by ORS 659.415 before October 1979, because at that time the statute did not specify that failure to reinstate was an unlawful employment practice. ***----- In the Matter of Fred McKee, 2 BOLI 167, 169 (1981).*** *See also In the Matter of Chase Bag Company, 2 BOLI 159, 163 (1981); In the Matter of Edco Corporation, 2 BOLI 149, 151 (1981); In the Matter of James Haring, 2 BOLI 146, 148 (1981).*

❑ The commissioner interpreted "available," as used in ORS 659.415, to require an employer to offer an injured worker the first suitable position available after the worker's recovery and demand for reinstatement. However, "nothing in the statute requires an employer to hold the injured worker's job open until such time as the employee had recovered." While the statute is silent as to how long this obligation continues, the commissioner found the obligation continued for at least the 3 ½ months involved in the case. ***----- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 271 (1980).***

Reversed on the ground that statutes did not specify failure to reinstate as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663

(1980).

❑ Complainant, who had previously injured his left knee, began working for respondent and again injured his left knee. He underwent surgery and received workers' compensation. Although complainant's unemployment form indicated that he had "quit," he advised respondent he had not quit. After being released for work, complainant's prior position had been filled and he was advised there was no work for him. Although another position like complainant's became available, respondent never contacted complainant. The commissioner found that respondent violated ORS 659.415. ***----- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 267-69 (1980).***

Reversed on the ground that statutes did not specify failure to reinstate as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980).

22.9 --- Reemployment of Disabled Worker in Available and Suitable Job

❑ To establish a violation of *former* ORS 659.420, the agency must prove by a preponderance of evidence that: (1) complainant sustained a compensable injury; (2) complainant was disabled from performing the duties of his former regular employment; (3) complainant made demand for (4) available and (5) suitable employment; and (6) respondent denied complainant reemployment. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 62-63 (2002).***

❑ Evidence showed complainant was temporarily disabled from performing some of his regular job duties; his work restrictions were temporary and fluctuated week to week; he was terminated while still working under temporary restrictions. When he acknowledged that he was not medically released for "full" duty until two months after he was terminated from his employment, the forum found that it was axiomatic that complainant would not seek reemployment until he was reasonably certain he could no longer be reinstated to his former employment. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 63-64 (2002).***

❑ Respondent was not required to offer complainant suitable employment under *former* ORS 659.420 until respondent knew the extent of complainant's physical disability to a reasonable degree of certainty. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 63-64 (2002).***

❑ When evidence showed respondent offered complainant suitable modified work that conformed to complainant's ever-changing medical restrictions and when complainant did not deny that he voluntarily worked beyond his medical restrictions, the forum found no credible evidence that respondent repeatedly asked complainant to work beyond his temporary medical restrictions. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 64 (2002).***

❑ Even if a preponderance of evidence showed complainant was forced to work beyond the temporary medical restrictions imposed by his physician, complainant's claim was under *former* ORS 659.410(1) with respect to the terms and conditions of his employment and not under *former* ORS 659.420. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 64 (2002).***

❑ In a case based on allegations of failure to reinstate a compensably injured worker and of discrimination for using the workers' compensation system, the agency moved at the close of its case to amend the specific charges to include an allegation that respondent violated ORS 659.420 based on the assignment of the compensably injured complainant to work beyond her light duty release. Respondent objected to the amendment as untimely and as unsupported by the evidence. The forum denied the motion because there was no medical evidence that the duties assigned were unsuitable, and the mere light duty release, without more, was insufficient to allow the trier of fact to evaluate suitability. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 49 (1993).***

❑ When a complainant was given a limited work release by her doctor and there was no evidence that respondent had an available and suitable job for her to return to, the forum found that the employer was not required to create a job for the injured worker. When an employer voluntarily creates a job or makes a job available, it must be suitable, as defined in OAR 839-06-145. The commissioner found that respondent had designed the job to accommodate restrictions imposed by the limited work release issued by complainant's doctor. The job was suitable because it was one that the injured worker was physically capable of performing and was substantially similar to the former job in compensation, location, duration, and shift. The commissioner found that complainant accepted the job with its restrictions and there was no evidence to show that complainant found the job unsuitable and so notified respondent in writing. ***----- In the Matter of Jake's Truck Stop, 7 BOLI 199, 212 (1988).***

❑ When complainant applied for a position with respondent after having previously resigned from a different position with respondent due to a compensable on-the-job injury, the forum found that respondent had not violated ORS 659.420 by refusing to hire him, as complainant was not qualified for the position. The evidence showed that complainant had applied for said position before his resignation and had been rejected as not qualified. The evidence also showed that complainant had been injured on the job four other times and respondent had taken no adverse action. ***----- In the Matter of West Coast Grocery Company, 4 BOLI 47, 65 (1983).***

❑ On January 28, complainant suffered a compensable injury to his lungs caused by inhalation of toxic fumes and received workers' compensation benefits. Complainant returned to work on February 2 with no restrictions from his doctor. From February 2 to February 28, complainant worked for respondent in an area of low caustic fumes. On February 27, complainant was told he would be reassigned to the caustic area. Complainant's doctor recommended he try to work there,

but to stop if he experienced trouble. On March 3, complainant began work there, experienced difficulty, left work and consulted his doctor, who found his lungs normal but recommended work in another area. Respondent refused to transfer him. Complainant showed these recommendations to his supervisor. He thereafter refused to work in a caustic area and was terminated. The forum held that respondent had not violated ORS 659.420, as respondent did not fail to reemploy complainant to available and suitable work after complainant sustained a compensable injury and demanded reinstatement. Complainant had been released after his January injury with no restriction. ***----- In the Matter of Southern Electrical and Pipefitting Corporation, 3 BOLI 254, 262 (1983).***

❑ In an injured worker case, the agency does not have to prove that the employee was terminated or denied reinstatement because the employee sustained a compensable injury, but merely has to prove that the employee sustained the injury and was thereafter denied reinstatement to an available position. Once the agency has presented a prima facie case, an employer has the burden of proving, by a preponderance of the evidence, that termination or denial of the right to reinstatement was for a separate, non-discriminatory reason. ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 213 (1982).***

22.10 --- Reemployment Rights of State Workers

23.0 MARITAL STATUS

23.1 --- Employment

23.1.1 --- Hiring, Promotion

❑ When respondent's rejection of a qualified complainant in August 1976 for the position of police dispatcher was based in part on respondent's preference for "a dispatcher who was living with someone" because 24 hour coverage was desired, the agency did not bring and the commissioner did not consider an unlawful employment practice charge based on marital status for the reason that employment discrimination based on marital status was not unlawful at that time. ***----- In the Matter of City of Chiloquin, 2 BOLI 151, 158 (1981).***

23.1.2 --- Terms, Conditions, & Privileges of Employment

❑ Complainant testified that an assistant manager in the respondent's store's garden center told her that complainant could not be transferred back to the garden center as long as complainant's boyfriend worked there and that, at a later date, the manager asked complainant to work in the garden center during another employee's lunch hour and reminded her "there are cameras back there and you are working" and then admonished complainant and her boyfriend to "behave themselves." The forum concluded that, even if the comments occurred, the agency produced no evidence showing the comments were made because of the marital status of complainant and her boyfriend. Considering respondent's policy prohibiting romantic conduct in the workplace, irrespective of an employee's marital status, the forum concluded the purported comments did not create an inference they were directed toward complainant because of her marital status and the marital status of the co-worker she was admittedly dating. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 47-48 (2001).***

❑ During an interview related to a sexual harassment investigation involving complainant and another employee, respondent's store manager started to ask complainant if she was dating a co-worker and then said, "Never mind, I don't want to go there." The store manager testified credibly that his query had nothing to do with complainant's marital status or that of her boyfriend. The forum found no discriminatory animus inherent in the store manager's comment and the agency produced no evidence whatsoever showing his comment to complainant was motivated by a perception that she was engaging in an adulterous relationship. The forum concluded that the store manager's comment was not related to the marital status of complainant or her boyfriend. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 48 (2001).***

23.1.3 --- Harassment

❑ Respondent's personnel manager remarked to complainant's boyfriend that complainant "is a married woman, you know," and to complainant that "being almost divorced is like being almost pregnant, you're not until you are." There was no credible evidence that the comments were made for any reason other than in jest during a chance meeting. While complainant may have perceived the comment as moralistic censure, it was not severe enough that she felt compelled to tell anyone about it nor did she file a complaint even though she was aware of and had previously made use of respondent's harassment procedures. There were no witnesses to the comment and there is no evidence the personnel manager continued to make remarks about or pass judgment on complainant's relationship with her boyfriend. The forum concluded that, although the comment was related to complainant's protected class, it was not severe or pervasive enough to create a hostile, intimidating, and offensive work environment. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 47-48 (2001).***

❑ In a case alleging harassment based on marital status, when several alleged discriminatory comments, evaluated singly and in context with each other, did not meet the threshold criterion of being related to complainant's marital status, it was not necessary to take them into account when determining whether the one comment that did relate to complainant's marital status created a hostile work environment. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 51 (2001).***

23.1.4 --- Discharge/Constructive Discharge

❑ In order to prevail on its theory that complainant was discharged based on her marital status, the agency must show by a preponderance of the credible evidence that complainant's protected class, her marital status, was the reason for her termination. The agency, at all times, has the burden of proving complainant was terminated for unlawful reasons. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 49 (2001).***

❑ The agency's theory was that, but for complainant's

marital status, as it related to her relationship with an unmarried male co-worker, she would not have been terminated. To support its theory, the agency relied on the alleged comments made by respondent's management as demonstrating a corporate culture that was intolerant of any perceived adulterous relationships in the workplace. In essence, the agency argued that respondent's intolerance for adulterous relationships was the motive for terminating complainant and the effect was discrimination on the basis of marital status. However, the agency presented no evidence that complainant would not have been fired for violating the company's harassment policy had she been unmarried and having a romantic relationship with the same co-worker, and the alleged comments made to her, with one exception, analyzed individually or collectively, did not reveal a discriminatory motive. The one exception was an isolated observation by someone who had no authority over complainant and was not involved in any way with the decision to terminate complainant. The forum concluded there was no direct or circumstantial evidence to substantiate the agency's theory. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 49 (2001).***

23.2 --- Public Accommodation

23.3 --- Real Property

24.0 NATIONAL ORIGIN

24.1 --- Employment

24.1.1 --- Hiring, Promotion

❑ The commissioner found that respondent discriminated against complainant based on his national origin in his position as rehabilitation program manager, but found, for two reasons, that respondent did not discriminate against complainant by filing to hire him for the position of development specialist. First, complainant scored a 73 and was one of only two names on the eligibility list that required a score of 70. Second, respondent's county hiring procedures allowed a request for a second list when there were less than three names submitted. Respondent did so and complainant's name did not appear on the second list due to his low score and respondent selected an applicant who scored a 93. ***----- In the Matter of Clackamas County, 3 BOLI 164, 170-71 (1982).***

❑ When another applicant filled respondent's one available position the day before complainant applied, the commissioner found that complainant's national origin as a Mexican American bore no relationship to respondent's failure to hire him. ***----- In the Matter of Bright's Arco, 1 BOLI 46, 50 (1976).***

24.1.2 --- Term or Condition of Employment

❑ When respondent publicly corrected the grammatical mistakes of complainant, a man of Chinese descent, quizzed him on his English, and allowed workers to tease and laugh at complainant's mannerisms, the forum found that respondent had discriminated against complainant on the basis of his national origin. ***----- In the Matter of Clackamas County, 3 BOLI 164, 169-70 (1981).***

24.1.3 --- Harassment

❑ When an employer continually made jokes, derogatory comments, and epithets regarding complainant's national origin, the forum determined that the employer's conduct created an offensive working environment and constituted harassment in violation of ORS 659.030. The forum adopted the standard set forth in Section 1608.8(b) of the EEOC Guidelines stating that ethnic slurs or other verbal or physical conduct relating to an individual's national origin constitutes harassment when this conduct: (1) has the purpose or effect of creating an intimidating, hostile, or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities. ***----- In the Matter of Deana Miller, 6 BOLI 12, 25 (1986).***

❑ When complainant advised respondent he was being harassed based on his national origin, the forum stated it was respondent's "duty to alleviate the discriminatory behavior of its employees." Respondent was obligated to take additional action, besides merely talking to the employees, to resolve the problem. Respondent took inadequate action to correct the employee harassment of complainant and respondent was liable under ORS 659.030(1)(b). ***----- In the Matter of Clackamas County, 3 BOLI 164, 169 (1982).***

24.1.4 --- Discharge/Constructive Discharge

❑ When a foreign-born complainant was treated unfavorably by his immediate supervisors, who referred to him as "Czech," "dumb Czech," and "fucking Czech," the commissioner found that respondent's discharge of complainant for "theft of company time," when similarly situated native-born employees received lesser discipline for repeated instances of "abuse of company time," was based on complainant's national origin. ***----- In the Matter of Yellow Freight System, Inc., 13 BOLI 201, 216-18 (1994).***

❑ When respondent produced clear and reasonably specific evidence that it acted upon legitimate, nondiscriminatory reasons when it discharged a black employee, but not a similarly situated white employee, and the agency was given a full and fair opportunity to show that those reasons were a pretext for discrimination but failed to show pretext, the forum found that respondent did not violate ORS 659.030(1)(a). ***----- In the Matter of Clackamas County Collection Bureau, Inc., 12 BOLI 129, 139-40 (1994).***

❑ When the agency presented evidence that two employees who performed the same job, one white and one black, gave notice of their intent to quit, and respondent discharged the black employee but permitted the white employee to work until the end of the month, the forum held that the agency presented a prima facie case of racial discrimination. ***----- In the Matter of Clackamas County Collection Bureau, Inc., 12 BOLI 129, 139 (1994).***

❑ When respondent asserted that is used an objective standard of an "unintended act" vs. a "premeditated" act in evaluating whether an employee's non-work activity during work hours was "abuse of company time" or "theft of company time," but that standard was subject to the subjective evaluation by complainant's supervisors, who

considered complainant's national origin when they discharged complainant for "theft of time," the commissioner found that complainant's national origin was the cause of his discharge. ***----- In the Matter of Yellow Freight System, Inc., 13 BOLI 201, 215-18 (1994).***

❑ Employees who failed to clock out for lunch were routinely allowed by their supervisors to correct their time cards afterwards to reflect a lunch hour. Complainant's supervisors initiated his discharge after finding him asleep in his workstation during a lunch break for which he had forgotten to clock out. When those supervisors had considered his national origin, the commissioner found that complainant's national origin unlawfully played a key role in the discharge. ***----- In the Matter of Yellow Freight System, Inc., 13 BOLI 201, 215-18 (1994).***

❑ When respondent alleged that complainant left her employment as a result of his criticism of her job performance rather than because of harassment based on her national origin, the forum determined that complainant's primary reason for leaving her job was the atmosphere created by respondent's unlawful conduct. ***----- In the Matter of Deana Miller, 6 BOLI 12, 24 (1986).***

❑ When respondent made derogatory remarks to complainant, regularly told ethnic jokes, and used insulting slang terms, the commissioner found that respondent's deliberate actions made complainant's working conditions so intolerable that complainant was forced into an involuntary resignation, constituting a constructive discharge. ***----- In the Matter of Deana Miller, 6 BOLI 12, 24 (1986).***

❑ When the commissioner found that complainant, a native of Ceylon, was discharged due to his accented English and that the employer's allegation of unsatisfactory performance was pretextual, complainant's "foreign accent" was related to his national origin and was thus an unlawful basis for termination. ***----- In the Matter of Midas Muffler Shops, 1 BOLI 111, 118 (1976).***

❑ In determining that complainant's Ceylonese accent did not adversely affect his ability to understand and be understood in English in a job involving telephone price quotation and taking orders as significant duties, the hearings referee's reliance upon his own auditory observation, as well as on the evidence of a previous employer and the absence of customer complaints, was adopted by the commissioner in refuting respondent's assertion that complainant's foreign accent would be offensive to the American public. ***----- In the Matter of Midas Muffler Shops, 1 BOLI 111, 117 (1976).***

24.2 --- Public Accommodation

24.3 --- Real Property

❑ When complainant alleged she was denied housing in a mobile home park based on her race, color, or national origin, the forum determined that the agency had failed to show that the respondent owner of a mobile home park had given pretextual reasons for rejecting complainant when the evidence established that the owner had, at the first meeting with complainant and thereafter, voiced concerns regarding complainant's children and financial situation and that the owner's investigation of complainant's finances was being hindered by her realtor. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 164 (1987).***

Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

❑ Prospective purchasers of a mobile home located in a mobile home park were determined to be purchasers, as that term is defined for purposes of ORS 659.033, in that both were prospective lessees of rental space for the mobile home they sought to purchase. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 162 (1987).***

Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

❑ The owner of a mobile home in a mobile home park who attempted to sell his mobile home was determined to be a purchaser, as that term is defined for purposes of ORS 659.033, in that he was an occupant of a leased mobile home space in the park. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 164 (1987).***

Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

25.0 OPPOSITION TO SAFETY HAZARD (ORS 654.062)

25.1 --- Generally

❑ When the agency proved that complainant's fears about working with lacquer thinner that contained toluene were objectively and subjectively reasonable, the protection of ORS 654.062(5) extended to complainant because she was confronted with a choice of either refusing to work in her assigned area or risking serious injury from exposure to lacquer thinner. ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 206-07 (1998)***.

❑ ORS 654.010 requires an employer to provide a place of safe employment, furnish safeguards, and to do everything to protect employees. Respondent's practice of requiring employees to drive trucks before known hazardous conditions were repaired is a violation of the statute. ***----- In the Matter of Associated Oil Company, 6 BOLI 240, 252 (1987).***

❑ The purpose of the prohibition against discrimination in retaliation for safety complaints is to provide a means for employees to bring safety problems to the attention of the employer without fear of retribution, thus giving the employer the benefit of the employee's first-hand knowledge of conditions and an opportunity to correct defects. ***----- In the Matter of Veneer Services, Inc., 2 BOLI 179, 185 (1981).***

Affirmed without opinion, *Veneer Services, Inc. v. Bureau of Labor and Industries,* 58 Or App 76, 648 P2d 426 (1982).

25.2 --- Prima Facie Case

❑ To prove a violation of ORS 654.062(5)(a), the agency need not establish that complainant opposed conditions that actually violated a statute or rule. The agency need only prove that complainant was discriminated against for expressing safety concerns "under or related to" the OSEA. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 248 (2007).***

❑ ORS 654.062(6)(a) provides that allegations of unlawful employment practices under ORS chapter 654 shall be processed "in the same manner and to the same extent that the complaint would be processed if the complaint involved allegations of unlawful employment practices under ORS 659A.030(1)(f)," an anti-retaliation statute. To prevail, the agency is required to prove by a preponderance of credible evidence that: (1) complainant was an employee who complained about or opposed a practice forbidden under or related to the OSEA; (2) respondent subjected complainant to an adverse employment action; and (3) there is a causal connection between respondent's adverse employment action and complainant's opposition to practices forbidden under or related to OSEA. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 247 (2007).***

❑ The agency's prima facie consists of the following elements: (1) respondent is an employer as defined by statute; (2) complainant was employed by respondent; (3) complainant opposed practices forbidden by ORS 654.001 to 654.295; (4) respondent discharged complainant; (5) complainant's opposition to practices forbidden by ORS 654.001 to 654.295 was a substantial factor in respondent's discharge of complainant. ***----- In the Matter of Logan International Ltd., 26 BOLI 254, 281-82 (2005).***

❑ The agency's prima facie case in an OSEA case consists of the following elements: (1) respondent engaged the personal services of one or more persons in Oregon; (2) complainant was a worker who opposed any practice forbidden under or related to the Oregon Safe Employment Act (OSEA); (3) respondent discharged complainant; and (4) complainant's opposition to practices forbidden under or related to OSEA was a substantial factor in respondent's decision to discharge complainant. ***----- In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 181 (2005).***

❑ When complainant alleged he had been discharged for opposing a safety and health hazard, respondent moved to dismiss the specific charges and complaint at the completion of the agency's case in chief on the grounds that the agency had failed to establish a prima facie case of discrimination. The forum denied the motion, stating that the agency had met its initial burden of proof, which was to offer some evidence in support of its position on each of the constituent elements of the violation alleged. In this case, the agency's initial burden of proof required production of evidence in support of the following elements, each of which must be considered separately: (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 his employment; and (5) damages resulting from respondent's action. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 251-52 (1983).***

25.3 --- Causal Connection

❑ Because the various explanations given by complainant's supervisor for demoting complainant proved false, the forum made a reasonable inference that the supervisor was concocting explanations to conceal a discriminatory motive for the demotion, which was to retaliate against complainant for complainant's pursuit of the truth about a safety issue implicating the supervisor's wife. Given the close proximity of events and the false explanations, the forum concluded that the agency established, by a preponderance of credible evidence, a causal connection between respondent's decision to demote complainant and complainant's opposition to unsafe practices. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 250-51 (2007).***

❑ The Oregon Court of Appeals has held that when relying on "mere temporal proximity" between the protected action and the allegedly retaliatory employment decision to indirectly establish a causal connection, the "events must be 'very close' in time." ***----- In the Matter of Trees, Inc., 28 BOLI 218, 249 (2007).***

❑ When complainant was demoted less than three business days after he reported unsafe working conditions to respondent's supervisors and the union, that proximity in time was close enough that the forum inferred causation. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 249 (2007).***

25.4 --- Nature of Opposition

❑ The agency proved through witness testimony that one of respondent's employees was permitted to engage in an activity that was in violation of respondent's safety practices and the collective bargaining agreement. A preponderance of credible evidence showed those facts were brought to complainant's attention in his capacity as union steward, and that complainant thereafter reported those facts to two of respondent's supervisors and expressed his concern about the reported unsafe conditions. Based on this evidence, the forum concluded that complainant reported and opposed unsafe working conditions to respondent that were under or related to OSEA. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 248 (2007).***

❑ Respondent and the agency agreed that complainant's "opposition" consisted of complainant's report of "drug use" by his co-workers and supervisor. When complainant had no basis in fact for concluding that his co-workers and supervisor were using drugs, and there was no other credible evidence in the record to support a conclusion that drug use was occurring in respondent's workplace, the forum concluded that complainant did not oppose a practice forbidden by ORS 654.001 to ORS 654.295. ***----- In the Matter of Logan International Ltd., 26 BOLI 254, 282 (2005).***

❑ To prove a violation of ORS 654.062(5)(a), the agency need not establish that a complainant opposed

conditions that actually violated a statute or an OR-OSHA rule. The agency only needs to prove that the complainant was discharged for expressing safety concerns "under or related to" the OSEA. The complainant's concerns over ladder safety, given that the potential consequences of ladder slippage, fell within safety concerns related to the OSEA and complainant's opposition to his employer's cavalier reaction to his expression of those concerns was activity protected under ORS 654.062(5)(a) and OAR 839-004-0004. ***----- In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 183 (2005).***

❑ When complainant had received extensive safety training, including training on ladder use, as a union apprentice and from OR-OSHA, had been taught that an extension ladder must be "footed" by a person on the ground or tied to a support with a rope at its top, and was particularly concerned because the jobsite floor was wet and he or a co-worker would be working at a height of 15' above a cement floor and a fall under those conditions would most likely cause serious injury, his opposition to respondent's instructions to use an extension ladder without the safety precautions he had been taught was opposition to a practice forbidden under or related to OSEA. ***----- In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 182 (2005).***

❑ After hearing, the forum granted respondent's motion to dismiss the agency's formal charges alleging an OSHA violation when complainant first alleged facts supporting an OSHA violation 118 days after his discharge. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 153-54, 170 (2005).***

❑ The agency is not required to establish that a complainant opposed conditions that actually violated an OSHA statute or rule. The agency only need prove that a complainant was retaliated against for expressing safety concerns "under or related to" ORS chapter 654. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 170 (2005).***

❑ In an OSHA case involving the allegation that respondent's workplace was hazardous because unlicensed electrical personnel were allowed to perform electrical work, the forum disagreed with the agency's assertion that merely permitting unlicensed personnel to perform electrical work was "inherently unsafe," noting that while an electrical license may serve as verification the holder has the training and skills to perform electrical work, the lack of one does not automatically denote an inability to safely perform the work. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 169 (2005).***

❑ When complainant plainly alleged he was discriminated against for "reporting criminal activity" under a whistleblower theory, the forum stated that criminal activity and workplace safety concerns are discrete issues governed by completely different statutory schemes. Thus, disclosure of criminal activity under ORS 659A.230 is not the same as a complaint about workplace safety and health hazards under ORS 654.062. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 168 (2005).***

❑ To prove a violation of ORS 654.062(5), the agency need not establish that the employee opposed conditions that actually violated a statute or an OR-OSHA rule. Rather, the agency need prove only "retaliation for a reasonable refusal to work due to safety concerns." ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 206 (1998)***.

❑ When the agency proved that complainant's fears about working with lacquer thinner that contained toluene were objectively and subjectively reasonable, the protection of ORS 654.062(5) extended to complainant because she was confronted with a choice of either refusing to work in her assigned area or risking serious injury from exposure to lacquer thinner. ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 206-07 (1998)***.

❑ It is well established that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an employee who refuses to work in hazardous conditions, not inherent in the job, that the employee reasonably believes present a risk of serious injury or death. Respondent violated ORS 654.062(5) when it insisted that complainant either work in an area with toxic fumes or take a "voluntary layoff." ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 207 (1998)***.

❑ When complainant, a roofer, was ordered by respondent to work without minimum safety equipment for the pitch of a segment of roof that was above a height rated by OR-OSHA as life-threatening, he was entitled to the protection of ORS 654.062(5) when he refused to work. ***----- In the Matter of Rare Construction, Inc., 12 BOLI 1, 9-10 (1993).***

❑ The purpose of the Oregon Safe Employment Act could be too easily frustrated and chilled if employees reported unsafe conditions or avoided life and limb threatening hazards in the workplace only at the risk of being right, of being procedurally correct, and of "deserving" recognition of their concerns. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 82 (1992).***

❑ Absent an outrageous expression of complaint or outright insubordination, there can be no distinction for purposes of the Oregon Safe Employment Act between terminating a worker for complaining of an unsafe condition and terminating a worker for the manner in which such a complaint is made. The strongest complaint of an unsafe practice an employee can make is withdrawal from an unsafe area. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 81 (1992).***

❑ Under the agency's rule, OAR 839-06-020, regarding when an employee may refuse to subject himself to a dangerous condition and be protected by ORS 654.062(5), the protection is conditioned up the objective reasonableness of the employee's evaluation of the risk and also upon the absence or unavailability of a means of redress from the employer or a regulatory agency. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 81 (1992).***

❑ When complainant, a roofing crane operator, refused to load a roof based upon his reasonable belief

that the danger of serious injury or death from overhead power lines would be real and immediate if he did the work, and there was insufficient time or opportunity to seek effective redress from respondent or a regulatory agency, the forum held that complainant was entitled to the protection of ORS 654.062(5). ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 81 (1992).***

❑ When respondent ordered complainant to enter a building closed by OR-OSHA due to the presence of friable asbestos, complainant entered the building without protective clothing or equipment, and complainant reported the entry to OR-OSHA, the commissioner held that complainant was entitled to the protection of ORS 654.062(5). ***----- In the Matter of West Linn School District, 3 JT, 10 BOLI 45, 59-60 (1991).***

❑ An employee who requests information from and furnishes information to an agent of the Accident Prevision Division is exercising an employee right afforded by ORS 654.001 to 654.295 and 654.270 to 654.780. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 199, 203 (1991).***

Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ When an employee or prospective employee opposes an employer's unsafe practices by filing complaints and instituting proceedings against the employer, who then discharges or refuses to hire that complainant, the commissioner has jurisdiction over the persons and subject matter related to alleged ORS 654.062 violations. ***----- In the Matter of Arkad Enterprises, Inc., 8 BOLI 263, 275 (1990).***

Affirmed, *Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991).

❑ Cooperation and participation by an employee in an investigation conducted by agents of the Accident Prevision Division are exercises of employee rights afforded by the Oregon Safe Employment Act. ***----- In the Matter of Harry Markwell, 8 BOLI 80, 93 (1989).***

❑ When complainant told an injured co-worker, directly after the co-worker's injury, that it was respondent's fault that the worker had been injured, the commissioner held that complainant's statement could constitute opposition to health or safety hazards. ***----- In the Matter of Daniel Duron, 8 BOLI 23, 31 (1989).***

❑ Complainant, a roofer, complained about working on a roof in wet weather. A co-worker later slipped off a roof and was injured and complainant told the worker that his injury was caused by respondent making them work in the rain. The commissioner held that complainant had not opposed a safety hazard, and that his statement to the co-worker therefore did not constitute opposition to any practice forbidden by the Oregon Safe Employment Act. The commissioner found that respondent was working with experienced roofers and had provided them with safety training and the materials necessary to safely perform the assigned tasks. The commissioner did "not find that respondent acted unreasonably. With the safeguards furnished and the safety practices followed, the wet condition of the roof, in the judgment of a reasonable person, did not make the workplace or the performance of assigned tasks unsafe or unhealthy. * * * Thus, complainant did not oppose any practice forbidden by the OSEA, and did not become a member of a protected class." Respondent did not violate ORS 654.010 or 654.015, and thus did not violate ORS 654.062(5). ***----- In the Matter of Daniel Duron, 8 BOLI 23, 31 (1989).***

❑ Complainant advised his supervisor that he refused to inflate tires without the safety cage required by OAR 437-56-070(4) and 437-56-060(1). The forum determined that complainant's actions constituted opposition to a perceived safety hazard. Although the facts revealed that no safety hazard may have resulted, complainant was not aware of such facts, and the forum determined that complainant had a reasonable basis for his belief that a safety hazard existed. ***----- In the Matter of 3 Son Loggers, Inc., 5 BOLI 65, 75 (1986).***

❑ The forum stated that there is no question that the prohibition in ORS 654.062(5) against taking adverse action against an employee because that employee has made a complaint under or related to ORS 654.001 to 654.295 encompasses complaints to the employer or the state agency enforcing the statutes in question. This is reflected in OAR 839-06-025(1)(a) and (b). ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 312 (1985).***

❑ Respondent was held to have had knowledge of complainant's opposition to safety and health hazards when complainant made his concerns regarding those hazards known to respondent's managers. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 252 (1983).***

❑ The commissioner stated that the strongest complaint an employee can register is his or her temporary withdrawal from an unsafe area and that the law would be meaningless if employees were subject to termination for taking breaks from exposure to unsafe conditions and determined that, while outright insubordination would ordinarily justify termination, a failure or refusal by an employee to work in an area with documented safety hazards should be characterized as a constructive complaint of safety hazards. ***----- In the Matter of Veneer Services, Inc., 2 BOLI 179, 185 (1981).***

Affirmed without opinion, *Veneer Services, Inc. v. Bureau of Labor and Industries,* 58 Or App 76, 648 P2d 426 (1982).

❑ The purpose of the prohibition against discrimination in retaliation for safety complaints is to provide a way for employees to bring safety problems to the attention of the employer without fear of retribution, thus giving the employer the benefit of the employee's first-hand knowledge of conditions and an opportunity to correct defects. ***----- In the Matter of Veneer Services, Inc., 2 BOLI 179, 185 (1981).***

Affirmed without opinion, *Veneer Services, Inc. v. Bureau of Labor and Industries,* 58 Or App 76, 648 P2d 426 (1982).

❑ The commissioner found that there could be no distinction for purposes of ORS 654.062(5)(1) between laying off a worker for making a safety complaint and laying off a worker because of the manner in which the complaint was made and stated that the legislative policy of encouraging workers to report safety problems would be thwarted if they feared retaliation due to the manner in which they expressed their complaints. The commissioner noted that this case did not involve a situation in which the worker expressed the complaint in an outrageous manner. ***----- In the Matter of Oregon Metallurgical Corporation, 2 BOLI 73, 82 (1981).***

❑ A crew of workers filed a safety complaint, the employer then laid off the entire crew, and the wife of one crew member wrote a letter to a local paper protesting the employer's action. The commissioner found that the employer, in removing the husband from a lead position upon reinstatement, did not violate the statute because "the statute does not protect an employee from the results of a complaint not his own. No evidence was offered that Ms. Morana's complaint was her husband's complaint," citing the language "No person shall discriminate against any employe * * * because such employe has made any complaint * * * related to ORS 654.001 to 654.295 * * *." ***----- In the Matter of City of North Bend, 1 BOLI 230, 235 (1980).***

25.5 --- Term or Condition of Employment

❑ Because the various explanations given by complainant's supervisor for demoting complainant proved false, the forum made a reasonable inference that the supervisor was concocting explanations to conceal a discriminatory motive for the demotion, which was to retaliate against complainant for complainant's pursuit of the truth about a safety issue implicating the supervisor's wife. Given the close proximity of events and the false explanations, the forum concluded that the agency established, by a preponderance of credible evidence, a causal connection between respondent's decision to demote complainant and complainant's opposition to unsafe practices. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 250-51 (2007).***

❑ When respondent ordered complainant to enter a building closed by OR-OSHA due to the presence of friable asbestos, complainant entered to building without protective clothing or equipment, complainant reported the entry to OR-OSHA, and respondent thereafter demoted and transferred complainant, the commissioner found that respondent discriminated against complainant because he called OR-OSHA, in violation of ORS 654.062(5). ***----- In the Matter of West Linn School District, 3 JT, 10 BOLI 45, 59-61 (1991).***

❑ Discharge is only one example of retaliation by an employer for an employee's complaints of safety hazards under ORS 654.062(5)(a). Other forms of retaliation, such as alteration of job duties, unusually close supervision, or predisposition to terminate upon reduced grounds, all present in this case, can constitute unlawful discrimination. ***----- In the Matter of Veneer Services, Inc., 2 BOLI 179, 183 (1981).***

Affirmed without opinion, *Veneer Services, Inc. v. Bureau of Labor and Industries,* 58 Or App 76, 648 P2d 426 (1982).

25.6 --- Discharge/Constructive Discharge

❑ When the person who made the decision to discharge complainant was lacked knowledge of complainant's "opposition" prior to deciding to discharge complainant, the forum concluded that he could not have discharged complainant because complainant opposed drug use in respondent's workplace. ***----- In the Matter of Logan International Ltd., 26 BOLI 254, 282 (2005).***

❑ When complainant was discharged within two minutes of opposing respondent's ladder safety practices and complainant had no prior performance problems, the forum concluded that complainant's opposition to his supervisor's directive about extension ladder safety was not only a substantial factor in respondent's decision to discharge complainant, but the only reason for complainant's discharge. ***----- In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 183 (2005).***

❑ To prove a violation of ORS 654.062(5), the agency need not establish that the employee opposed conditions that actually violated a statute or an OR-OSHA rule. Rather, the agency need prove only "retaliation for a reasonable refusal to work due to safety concerns." ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 206 (1998)***.

❑ It is well established that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an employee who refuses to work in hazardous conditions, not inherent in the job, that the employee reasonably believes present a risk of serious injury or death. Respondent violated ORS 654.062(5) when it insisted that complainant either work in an area with toxic fumes or take a "voluntary layoff." ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 207 (1998)***.

❑ When the evidence established that complainant was fired two days after an OR-OSHA inspection of respondent's worksite, and that respondent's owner believed at the time of the inspection and termination that complainant had filed the OR-OSHA complaint, a rebuttable presumption was created, absent another explanation, that complainant was terminated due to the filing of the safety complaint with OR-OSHA. ***----- In the Matter of Industrial Carbide Tooling, Inc., 15 BOLI 33, 46 (1996).***

❑ When complainant notified respondent of potential workplace safety and health hazards that he feared might be the cause of his rash and requested that respondent arrange to have the air quality tested for toxins and called OR-OSHA to report these hazards; OR-OSHA conducted an inspection on July 5, 1994, and respondent assumed complainant had called OR-OSHA and terminated complainant two days later based on his absenteeism and negative and disruptive attitude; the forum concluded that complainant had been terminated based on a legitimate, nondiscriminatory reason when respondent presented significant evidence tending to establish that the decision to terminate complainant was made on June 28 based on attitude and attendance problems. ***----- In the Matter of Industrial Carbide***

Tooling, Inc., 15 BOLI 33, 46-47 (1996).

❑ Respondent ordered complainant, a roofer, to work without minimum safety equipment for the pitch of a segment of roof that was above a height rated by OR-OSHA as life-threatening. When complainant refused to work, and respondent discharged complainant because he refused to work, thereby violating ORS 654.062(5). ***----- In the Matter of Rare Construction, Inc., 12 BOLI 1, 9-10 (1993).***

❑ Respondent violated ORS 654.062(5) when it discharged complainant, a roofing crane operator, after he refused to load a roof with roofing materials because of his reasonable fear of high voltage power lines near the roof. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 78, 80 (1992).***

❑ When the evidence showed that complainant had been counseled regarding tardiness, but that reason did not appear to guide respondent's discharge action, the forum found that, even if it had been a factor, it would not be a defense so long as complainant's call to report unsafe working conditions was also a factor in the decision. The evidence had established that complainant's report to the Accident Prevision Division had played a key role in respondent's discharge of complainant. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 203-04 (1991).***

Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ The evidence showed that respondent more likely than not discharged complainant because he exercised rights under the Oregon Safe Employment Act. No other reason was given at the time of discharge; the complainant had called the Accident Prevision Division, which resulted in respondent's characterizing complainant as a "troublemaker"; and the other employees appeared to be concerned over respondent's reactions to calling the Accident Prevision Division and kept a "lookout" for him while the call was made. The commissioner inferred from these facts that complainant's exercise of his statutory rights as a protected class member was the cause of respondent's action. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 203-04 (1991).***

Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ Complainant made a complaint to Accident Prevision Division, which inspected respondent's business and fined respondent $1125. Complainant was fired the day after the fine was imposed and the commissioner found that he was fired in violation of ORS 654.062(5) based upon his voicing safety and health concerns and causing an Accident Prevision Division inspection. The commissioner held that respondent's stated reasons for firing complainant, involving low productivity, were pretextual. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 124-27 (1990).***

Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

❑ When an employee or prospective employee opposes an employer's unsafe practices by filing complaints and instituting proceedings against the employer, who then discharges or refuses to hire that complaint, the commissioner has jurisdiction over the persons and subject matter related to alleged ORS 654.062 violations. ***----- In the Matter of Arkad Enterprises, Inc., 8 BOLI 263, 275 (1990).***

Affirmed, *Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991).

❑ When respondent required complainant to change a fuse in a fuse box that was blowing fuses and was hot and sparking, then discharged complainant for not following orders to change the fuse, the commissioner held that respondent carried on a practice forbidden by ORS 654.010 and 654.015 by maintaining an unsafe electrical fuse box and by requiring complainant to perform the unsafe operation of replacing a fuse in the box. The commissioner held that respondent violated ORS 654.062(5). ***----- In the Matter of Peggy's Café, 7 BOLI 281, 287-88 (1989).***

❑ When a respondent asserted that she discharged complainant because complainant refused to follow orders, one of which was to change a fuse in an unsafe fuse box, the commissioner said that "[f]requently, the evidence indicates that several factors contribute to causing a respondent's action, of which only one factor is the complainant's protected class. In such cases, the agency uses the key role test. Under that test, the crucial question is whether or not the harmful action – here, the discharge – would have occurred had the complainant not been a member of the protected class. The answer in this case is that complainant would not have been discharged if she had not been a member of a protected class. Put another way, the forum found by a preponderance of the evidence that respondent discharged complainant because she opposed a practice forbidden by the Oregon Safe Employment Act." ***----- In the Matter of Peggy's Café, 7 BOLI 281, 287-88 (1989).***

❑ When complainant refused to drive respondent's truck in an unsafe condition and respondent told complainant to "go home" and thereafter failed to schedule complainant for work, the forum found that complainant had been discharged. When a second complainant also refused to drive the truck and respondent told him he had "quit" when he refused and did not schedule him for work, the forum held that the second complainant was discharged. ***----- In the Matter of Associated Oil Company, 6 BOLI 240, 253-54 (1987).***

❑ When complainants refused to drive respondent's truck in an unsafe condition, believing it posed a risk of injury or death, their conduct was protected by ORS chapter 654 and OAR 839-06-020(4). ***----- In the Matter of Associated Oil Company, 6 BOLI 240, 252 (1987).***

❑ When complainant advised his supervisor that he would not inflate tires without a safety cage as required by OAR 437-56-070(4) and 437-56-060(1), and

respondent fired complainant for his refusal, respondent violated ORS 654.062. ***----- In the Matter of 3 Son Loggers, Inc., 5 BOLI 65, 75 (1986).***

❑ Complainant was terminated by his supervisor immediately after she learned that he had reported a safety hazard to the Accident Prevision Division, the supervisor testified that she remained angry about the incident for weeks thereafter, and the employer argued that complainant was discharged due to his unsatisfactory work performance and insubordinate attitude toward his supervisor. The commissioner found that complainant's constant complaints of safety hazards to his supervisor "ultimately predisposed her to discharge complainant"; that the report to Accident Prevision Division "triggered the pre-existing tension," causing her to discharge him; and that the discharge was due to his opposition to safety hazards. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 312 (1985).***

❑ In a case in which complainant alleged he had been discharged for his opposition to safety hazards, the forum made it clear that it follows the "key role" test to aid in resolving causality questions; that is, did complainant's complaints regarding safety hazards play a key role in his discharge? ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 313 (1985).***

❑ When complainant alleged he had been discharged for opposing a safety and health hazard, respondent moved to dismiss the specific charges and complaint at the completion of the agency's case in chief on the grounds that the agency had failed to establish a prima facie case of discrimination. The forum denied the motion, stating that the agency had met its initial burden of proof, which was to offer some evidence in support of its position on each of the constituent elements of the violation alleged. In this case, the agency's initial burden of proof required production of evidence in support of the following elements, each of which must be considered separately: (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 his employment; and (5) damages resulting from respondent's action. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 251-52 (1983).***

❑ Complainant alleged he was terminated due to his opposition to safety hazards and respondent alleged complainant was laid off due to a reduction in work force. When the evidence presented showed complainant was terminated immediately following his discovery and discussion of a letter from the Accident Prevision Division concerning safety hazards and that he was discharged from an unfinished task for which he was replaced by another employee, the forum determined this established a rebuttable presumption that, absent another explanation, complainant was terminated due to his opposition to safety hazards. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 252 (1983).***

❑ When complainant reported safety hazards to respondent's safety coordinator, was injured as a result of a hazard that he reported, and the safety coordinator laid him off immediately, the forum noted that other employees continued to work on the project to which complainant had been assigned and determined that complainant had been discharged due to his opposition to safety hazards. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 252 (1983).***

❑ Complainant made complaints to respondent's supervisor regarding safety hazards in the workplace, suffered an illness verified by his doctor as a result of those hazards, and was subsequently terminated for his refusal to work in the hazardous area. The commissioner concluded that the supervisor had deliberately created a situation in which complainant was expected to fail or refuse to perform, and as a result, complainant was discharged in retaliation for his opposition to safety hazards. ***----- In the Matter of Veneer Services, Inc., 2 BOLI 179, 184-85 (1981).***

Affirmed without opinion, *Veneer Services, Inc. v. Bureau of Labor and Industries,* 58 Or App 76, 648 P2d 426 (1982).

❑ When complainant advised his employer's repair shop of the need for repairs to a truck and reported his concerns that same day to the Accident Prevision Division, and the employer's agent told complainant he did not want someone working for him who reported safety violations, the commissioner determined that complainant was discharged for his opposition to safety hazards. ***----- In the Matter of Day Trucking, Inc., 2 BOLI 83, 88 (1981).***

❑ The commissioner found that other reasons may have contributed to complainant's discharge, but his discharge was discriminatory when his opposition to safety hazards played a key role. ***----- In the Matter of Day Trucking, Inc., 2 BOLI 83, 88 (1981).***

❑ Complainant filed a grievance through his union regarding unsafe working conditions and was laid off shortly afterwards without being given the required notice. The commissioner determined that complainant was laid off because of his opposition to safety hazards based on evidence that established he was laid off by the supervisor to whom he had complained; the supervisor was openly angry about the manner in which the complaint was made; and the decision was closely related in time. ***----- In the Matter of Oregon Metallurgical Corporation, 2 BOLI 73, 80 (1981).***

❑ When an employer has some good cause to discharge an employee, the discharge may still violate ORS 654.062(5)(a) if the employer's knowledge of the employee's opposition to safety hazards plays a key role in the employer's decision. The word "because" in that statute demands knowledge and action upon that knowledge to constitute retaliatory intent, a state of mind that is rarely susceptible to direct proof and which must be inferred from the facts of the case. In this case, the commissioner found that the agency's evidence was entirely circumstantial, lacked sufficient corroboration to permit the inference that the employee's opposition was

a key factor in his discharge, and that the close proximity in time between the discharge and the act of opposition, by itself, was insufficient to permit the inference of a discriminatory intent. ***----- In the Matter of Dee Wescott, 2 BOLI 29, 38-39 (1980).***

❑ When complainant complained of safety hazards to his foreman and respondent's company-owner on October 10th and 16th, the hazards were verified by a resulting safety inspection, and complainant was terminated on October 17th by his foreman, who advised him that his association with the company ended when he made his complaints, the commissioner determined that respondent terminated complainant for his opposition to safety hazards, in violation of ORS 654.062(5). ***----- In the Matter of Acco Contractors, Inc., 1 BOLI 260, 262-63 (1980).***

❑ When workers complained to the city administrator and later, through their representative, notified the Accident Prevision Division of health and safety problems concerning their work on the city's sewers, the commissioner found there was an insufficient causal connection between the complaints and a subsequent layoff to establish a violation of ORS 654.062(5). There was an insufficient showing that respondent knew that the Accident Prevision Division inspection, which resulted in the finding of a serious violation, was the result of an employee complaint. The cause of the layoff was respondent's frustration and anger at discovering that an order had not been transmitted to the workers to not enter the sewer until the unsafe conditions had been corrected. The commissioner found that the motivating factor and immediate cause of the layoff was the respondent's anger and frustration at its continuing problems with not the complaints, but the violations themselves. The layoff was perhaps an arbitrary or capricious response to anger and frustration, but it was not a reprisal for an employee complaint and therefore not illegal under ORS 654.062(5)(a). ***----- In the Matter of City of North Bend, 1 BOLI 230, 234-35 (1980).***

❑ When a safety engineer determined complainant's work area to be unsafe, complainant advised respondent, who ordered him to continue working in the area. Complainant refused, citing the hazard, and respondent told him he might as well leave the job site, as there was no other work to be done. Complainant did not return and respondent did not contact him. The commissioner found that respondent violated ORS 654.062(5)(a) by discharging complainant for opposing a practice forbidden by ORS 654.010. ***----- In the Matter of Frontier Construction Company, 1 BOLI 224, 229-30 (1979).***

❑ When complainant apparently had some work performance problems and was terminated immediately after requesting additional safety equipment, the commissioner relied heavily on the "sequence of events" and determined that complainant was terminated in part because of opposition to a safety hazard. ***----- In the Matter of LeeBo Line Construction, Inc., 1 BOLI 210, 214 (1979).***

26.0 OPPOSITION TO UNLAWFUL PRACTICE (ORS 659.030)

26.1 --- Generally

❑ Retaliation for opposing an unlawful employment practice "is a particularly insidious form of discrimination. The public interest is furthered * * * by having employees come forward with complaints of violations of the law without fear of retribution." ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 81 (1990).***

❑ When an employer constructively discharged complainant for his participation in a civil rights proceeding, the forum determined that such conduct constituted retaliation in violation of ORS 659.030(1)(f), stating that there is a public interest in discouraging retaliation to insure the free flow of information to law enforcement agencies. ***----- In the Matter of Richard Niquette, 5 BOLI 53 (1986).***

❑ Complainant, who failed a complaint of discrimination against respondent, alleged she had been discriminated against by respondent for her opposition to a practice forbidden by ORS 659.030. The forum stated 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 the complaint was a substantial factor in a subsequent adverse decision. ***----- In the Matter of Boost Program, 3 BOLI 72, 80 (1982).***

❑ When the forum determined that respondent had discriminated against complainant for her opposition to practices forbidden by ORS 659.030, in violation of ORS 659.030(1)(d), the forum stated that the statute embodies a strong public interest in providing protection for individuals who exercise their rights to file such charges. This protection is extended regardless of the merits or outcome of the underlying claim of discrimination. ***----- In the Matter of Boost Program, 3 BOLI 72, 80 (1982).***

26.2 --- Prima Facie Case

❑ A violation of ORS 659A.030(1)(f) is established by evidence that shows a complainant opposed an unlawful practice, the respondent subjected the complainant to an adverse employment action, and there is a causal connection between the complainant's opposition and the respondent's adverse action. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 247 (2007).***

❑ In order to establish a prima facie case of retaliation, the agency is required to prove that (1) complainant opposed an unlawful employment practice; (2) respondent made an employment decision that adversely affected complainant; and (3) there is a causal connection between complainant's opposition and respondent's adverse employment action. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 287 (2004).*** *See also In the Matter of Barbara Bridges, 25 BOLI 107, 123 (2003).*

❑ When the agency's evidence established that: (1) respondent was an employer of one or more employee in Oregon; (2) respondent employed complainant; (3) complainant was female; (4) respondent, because of complainant's sex, discriminated against her in compensation; (5) complainant opposed that practice; (6) respondent immediately discharged complainant

because of that opposition; and (7) complainant was damaged thereby; the agency presented a prima facie case that respondent violated ORS 659.030(1)(f). ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 230 (1991).***

26.3 --- Nature of Opposition

❑ Any person who asserts his or her rights under the statute is protected, even if it is found that no discrimination occurred, as long as that person's belief that it occurred is reasonable. ***----- In the Matter of H.R. Satterfield, 22 BOLI 198, 209 (2001).***

❑ Respondent's statement to complainant he was a married man and would have to check with his wife before hiring a woman for the Jobs Plus training position was enough to raise a question about respondents' hiring practices and complainant had the right under the statute to oppose what she reasonably perceived to be an unlawful employment practice. ***----- In the Matter of H.R. Satterfield, 22 BOLI 198, 209 (2001).***

❑ ORS 659.030(1)(f) prohibits an employer from discharging an employee because the employee has opposed any practice forbidden by ORS chapter 659. It gives an employee the right to oppose what the employee reasonably believes to be an unlawful practice. As long as the employee's belief that discrimination has occurred is a reasonable one, the employee is protected against retaliation for complaining about the discrimination. The rationale is that appropriate opposition should not be chilled by fear of retaliation – even if, as a matter of fact or law, there is no violation. The manner of opposition must be reasonable. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 28-29 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Complainant's reasonable subjective belief that her race/color was the reason for at least one incident of co-worker harassment that she complained about to respondent was a reasonable belief that brought her under the protection of ORS 659.030(1)(f) for complaining about the incident. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 29 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Complainant had the absolute right to complain to her joint employer, or anyone else for that matter, about racial harassment she experienced at respondent's place of business. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 29 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Based on the following reasons, the forum concluded that respondent discharged complainant based on her opposition to racial harassment in the workplace: (1) by failing to take appropriate corrective action after complainant's first complaint by requiring that complainant try to work things out herself with a co-worker who allegedly harassed her; failing to adequately consider transferring her to another department where she did not have to work with that co-worker; and threatening to retaliate against complainant by discharging her if the co-worker was discharged; complainant's supervisor created a situation whereby complainant reasonably believed that he would not take appropriate action with regard to any harassment complaint she brought to his attention and brought her next complaint to the attention of her joint employer instead; (2) complainant's joint employer had instructed complainant to bring any harassment to their attention; (3) a retaliatory motive was established on the supervisor's part after the first incident of co-worker harassment, when he told complainant that he could tell her joint employer about the incident and that the joint employer might suggest ending both and complainant's and the co-worker's assignments to respondent, noting that he would probably agree with that suggestion; (4) complainant testified credibly that the joint employer's representative who formally terminated complainant's assignment with respondent, told her "You made the complaint; you have to go" in response to complainant's query about why respondent wanted her discharged; and (5) complainant's supervisor did not discharge complainant after she complained to him about the incident of harassment, but only after she went to joint employer, giving rise to the inference that she was terminated because she went "whistleblowing" to the joint employer. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 29-30 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Respondent's discharge of a female complainant for striking a male co-worker did not violate ORS 659.030(1)(a) or (1)(f) because complainant was not justified in striking the co-worker when there was a manager immediately available, even though complainant had repeatedly reported the co-worker's unwelcome, sexually oriented conduct to her immediate supervisor, and respondent had taken no action to correct, modify, or prevent the unwelcome behavior. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 94 (1996).***

> Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries,* 152 Or App 301, 954 P2d 804 (1998).

❑ ORS 659.030(1)(f) gives an employee the right to oppose what the employee reasonably believes to be an unlawful practice. As long as the employee's belief that discrimination has occurred is reasonable, the employee is protected against retaliation for protesting the discrimination and/or for expressing an intent to file a civil rights complaint with the agency, even if the agency should eventually find that no discrimination occurred. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240,***

255 (1991).

❑ Respondent placed complainant on probation for excessive absenteeism after granting her a leave of absence for treatment of her disability of alcoholism. Complainant questioned the legality of the probation and threatened to file a civil rights complaint and respondent refused to revoke the probation. A loud argument ensued and respondent discharged complainant. The commissioner held that respondent discharged complainant for opposing what complainant perceived to be an unlawful practice, constituting retaliation in violation of ORS 659.030(1)(f). ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 254-55 (1991).***

❑ The forum determined that respondent had discriminated against complainant for her opposition to practices forbidden by ORS 659.030, in violation of ORS 659.030(1)(d), and stated that the statute embodies a strong public interest in providing protection for individuals who exercise their rights to file such charges. This protection is extended regardless of the merits or outcome of the underlying claimant of discrimination. ***----- In the Matter of Boost Program, 3 BOLI 72, 80 (1982).***

❑ Complainant alleged he had been discriminated against for assisting another employee to file a complaint with the Civil Rights Division. When there was evidence of complainant's insubordination and poor work performance and no evidence to establish that respondent had knowledge that complainant had assisted the other employee, the commissioner determined that respondent had not violated ORS 659.030. ***----- In the Matter of Oregon Rural Opportunities, 2 BOLI 8, 13-14 (1980).***

❑ A black custodian/baggage handler filed a civil rights complaint alleging he had been denied a promotion because of his race and color. He was later discharged after he refused to clean an office because he thought it was harassment based on his opposition to respondent's unlawful practice. The commissioner found that, while complainant "did not have a duty to immediately carry out every order from his supervisor, for example orders which were immoral, illegal, unfair or degrading," the order to clean the office did not fall "within the category of orders that could reasonably be disobeyed, particularly since his regular duties included general maintenance." Complainant's employment was covered by a collective bargaining agreement that included a grievance procedure for resolving the issue of his specific duties. Because complainant's refusal to clean the office was not justified or warranted, the commissioner held that respondent did not violate ORS 659.030(4) by discharging complainant. ***----- In the Matter of N. H. Kneisel, Inc., 1 BOLI 28, 37-38 (1976).***

Compliance amended, 1 BOLI 51 (1976).

26.4 --- Term or Condition of Employment

❑ When the agency alleged that complainant was subjected to disparate treatment based on her sex and/or retaliation, the forum stated that the agency must show that the treatment was discriminatory, that is, that it was not accorded to males and/or was not accorded to persons who had not opposed forbidden practices. ***----- In the Matter of Oregon Department of Fish and Wildlife, 16 BOLI 263, 278 (1998).***

❑ Complainant filed a sexual harassment charge against respondent with the Oregon Department of Transportation. Within days, respondent issued a memo threatening to discharge any employee who filed any more complaints with the state. The commissioner found that the employer had retaliated against complainant in violation of ORS 659.030(1)(f). An employer is prohibited from discharging a person because she has opposed an unlawful practice. Since sexual harassment is an unlawful employment practice, it is discriminatory for an employer to threaten to terminate an employee for opposing it. ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 79 (1990).***

❑ An employer's issuance of a warning/probationary letter to complainant and another employee 10 days after they filed a charge of sexual harassment with the Oregon Department of Transportation was considered retaliatory, in violation of ORS 659.030(1)(f), when neither woman had received any previous verbal or written warnings about their work performance. ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 81 (1990).***

❑ When complainant alleged that she was treated differently by her co-workers after she had filed a sexual harassment charge, the commissioner found no retaliation when there was no evidence linking the employer with any direction to its employees to treat complainant differently, nor any notice by the complainant to the employer. ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 78 (1990).***

❑ When complainant filed a complaint based on sex, race, and marital status, respondent had actual notice of the pendency of the complaint, and respondent thereafter began to impose burdensome and unnecessary requirements on complainant, pursued a course of conduct intended to provoke, frustrate and discourage complainant to cause her to resign, and demoted complainant, the forum found that respondent had discriminated against complainant in violation of ORS 659.030(1)(d) for her opposition to practices forbidden by ORS chapter 659. ***----- In the Matter of Boost Program, 3 BOLI 72, 80, 82 (1982).***

❑ Complainant publicly protested unequal compensation and subsequently filed an administrative complaint with the agency. When there was no credible evidence that her job performance actually deteriorated after her protest, and she was subjected to an unjustified reprimand, negative performance evaluations based on suspect documentation of trivial incidents, and petty criticism by her commander, accompanied by a total absence of counseling as to how to improve her alleged deficiencies, the commissioner found that complainant had been the victim of unlawful retaliation by respondent. ***----- In the Matter of City of Portland, 2 BOLI 110, 132-33 (1981).***

Reversed on back pay, affirmed on retaliation, *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668

P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

❑ Complainant filed a sex discrimination complaint against respondent in 1972 and was told by respondent that if she persisted, she would not be considered for any future openings in its art department. In November 1973, she applied for any position that might become open in that department. The commissioner found that respondent's failure to consider her for an open position for which she qualified from the time of her November 1973 application and the date of the hearing on her 1972 complaint (December 20, 1977) constituted retaliation for filing the 1972 complaint. ***----- In the Matter of Lewis and Clark College, 1 BOLI 130, 148 (1978).***

Reversed on other grounds, *Lewis and Clark College v. Bureau of Labor,* 43 Or App 245, 602 P2d 1161 (1979), rev den 288 Or 667 (1980).

❑ When a black custodian/baggage handler filed a civil rights complaint alleging that he had been denied a promotion because of his race and color and later was discharged after he refused to clean an office because he thought it was harassment based on his opposition to the unlawful practice, the commissioner found that, while complainant's refusal to clean the office was not justified or warranted, and respondent did not violate ORS 659.030(4) by discharging complainant, respondent's "actions and statements created an atmosphere * * * that encouraged [complainant's] fellow employees and supervisors to be less friendly toward him and critical of his work performance. This hostile atmosphere was the background that set the stage for [complainant's] abrupt termination. * * * [T]his change of attitude toward [complainant], which resulted in different treatment, was directly attributable to the fact that he wrote letters to [companies with which respondent had contracts] and because he filed a complaint with the Civil Rights Division." The commissioner held that respondent violated ORS 659.030(4) by discriminating against complainant because he opposed practices forbidden by ORS 659.030 and because he filed a complaint pursuant to ORS 659.040. ***----- In the Matter of N. H. Kneisel, Inc., 1 BOLI 28, 36, 39 (1976).***

Compliance amended, 1 BOLI 51 (1976).

26.5 --- Discharge/Constructive Discharge

❑ The agency established that respondent forced complainant's constructive discharge by continuing a pattern of offensive conduct, despite complainant's requests that he cease the conduct, and by thwarting her attempt at self-help. For the purposes of former ORS 659.030(1)(f), a constructive discharge is the legal equivalent of an actual discharge and by forcing the constructive discharge, respondent made an employment decision that adversely affected complainant. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 288 (2004).***

❑ The agency established a causal connection between complainant's opposition to respondent's unlawful conduct and her constructive discharge by proving she quit as a direct result of respondent's actions that signaled to complainant that sexual harassment complainant was subjected to would not only continue, but any further attempts on her part to stop or limit the scope of the harassment would be futile. The forum concluded that, by forcing complainant's constructive discharge, respondent retaliated against complainant for having opposed sexual harassment, constituting an unlawful employment practice, in violation of former ORS 659.030(1)(f). ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 288 (2004).***

❑ When the individuals who discharged the complainant were not aware that the complainant had complained about racial harassment, the discharge did not constitute unlawful retaliation for opposition to an unlawful practice. ***-----*** In ***the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 154 (2000).***

Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ When the complainant never complained to respondent's manager about a co-worker's sexual comments, and there was no other evidence that the manager was aware that complainant had made complaints about those comments, respondent's manager could not have fired complainant in retaliation for making those complaints. ***----- In the Matter of Western Stations Co., 18 BOLI 107, 122-23 (1999)***.

❑ When the agency alleged that complainant was subjected to disparate treatment based on her sex and/or retaliation, the forum stated that the agency must show that the treatment was discriminatory, that is, that it was not accorded to males and/or was not accorded to persons who had not opposed forbidden practices. ***----- In the Matter of Oregon Department of Fish and Wildlife, 16 BOLI 263, 278 (1998).***

❑ When the agency established that respondent's manager who reprimanded complainant might have had a retaliatory motive, based on a reprimand the manager received regarding his management of subordinates, particularly complainant, but complainant was not the employee who initiated respondent's investigation of the manager and the investigation found no evidence of sexual misconduct, the forum concluded that the reprimand complainant received was not based on an unlawful employment practice. ***----- In the Matter of Oregon Department of Fish and Wildlife, 16 BOLI 263, 278 (1998).***

❑ Complainants consulted an attorney about an individual respondent's unwelcome sexual touching and comments. After learning they had consulted an attorney, respondent angrily advised complainants that he knew "two little girls that aren't going to have a job tomorrow" and fired one of them, reportedly because she refused to serve customers. The commissioner found that the individual respondent's reason for the discharge was "clearly pretext" and that the discharge was in retaliation for complainant's resistance to the offensive actions. The commissioner held that respondent corporation violated ORS 659.030(1)(f) and the individual respondent violated ORS 659.030(g). ***----- In***

the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 133-36, 138 (1997).

❑ Respondent's discharge of a female complainant for striking a male co-worker did not violate ORS 659.030(1)(a) or (1)(f) because complainant was not justified in striking the co-worker when there was a manager immediately available, even though complainant had repeatedly reported the co-worker's unwelcome, sexually oriented conduct to her immediate supervisor, and respondent had taken no action to correct, modify, or prevent the unwelcome behavior. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 94 (1996).***

Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 301, 954 P2d 804 (1998).

❑ Respondent placed complainant on probation for excessive absenteeism after granting her a leave of absence for treatment of her disability of alcoholism. Complainant questioned the legality of the probation and threatened to file a civil rights complaint and respondent refused to revoke the probation. A loud argument ensued and respondent discharged complainant. The commissioner held that respondent discharged complainant for opposing what complainant perceived to be an unlawful practice, constituting retaliation in violation of ORS 659.030(1)(f). ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 254-55 (1991).***

❑ When the agency's evidence established that (1) respondent was an employer of one or more employee in Oregon; (2) respondent employed complainant; (3) complainant was female; (4) respondent, because of complainant's sex, discriminated against her in compensation; (5) complainant opposed that practice; (6) respondent immediately discharged complainant because of that opposition; and (7) complainant was damaged thereby; the agency presented a prima facie case that respondent violated ORS 659.030(1)(f). ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 230 (1991).***

❑ When a female complainant was paid differently than males doing the same work and was fired when she told respondent's corporate president that her pay scale was wrong, and respondent's pre-hearing assertions about her poor performance were found to be unsupported and pretextual, the commissioner held that the discharge was in retaliation for opposing respondent's practice of discriminatory compensation. ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 230-31 (1991).***

❑ When respondent learned of complainant's statement to an injured co-worker that the injury was respondent's fault, respondent would have committed an unlawful employment practice under ORS 654.062(5) if complainant's statement played a key role in respondent's decision to terminate complainant. ***----- In the Matter of Daniel Duron, 8 BOLI 23, 31 (1989).***

❑ When an employer constructively discharged complainant for his participation in a civil rights proceeding, the forum determined that such conduct constituted retaliation in violation of ORS 659.030(1)(f), stating that there is a public interest in discouraging retaliation to insure the free flow of information to law enforcement agencies. ***----- In the Matter of Richard Niquette, 5 BOLI 53, 61 (1986).***

❑ When respondent observed complainant in a hallway outside a civil rights proceeding involving respondent and another employee, and respondent thereafter failed to schedule complainant, a waitress, for any more hours of work, the commissioner concluded that respondent's actions amounted to a constructive discharge of complainant and constituted retaliation in violation of ORS 659.030(1)(f). ***----- In the Matter of Richard Niquette, 5 BOLI 53, 61 (1986).***

❑ When respondent demoted complainant after she filed a complaint with the Civil Rights Division, the forum found respondent had retaliated against complainant in violation of ORS 659.030(1)(d) when the evidence showed that complainant had not been inefficient or ineffective before that time; her performance evaluations for the previous 19 years had been favorable; her unit provided good service despite increases in workload and staff shortages; and that complainant had been considered a competent and valuable manager. ***----- In the Matter of City of Salem, 4 BOLI 1, 44 (1983).***

❑ Complainant, who was 57 years old at the time of the alleged unlawful action, applied for the position of vocational rehabilitation counselor II (VRC II) and was hired as a VRC I. Complainant filed a complaint alleging he had been discriminated against because of his age. After complainant asked on several occasions to be moved into a VRC II position and was refused, he resigned and filed a complaint alleging respondent had retaliated against him for filing the initial complaint. Complainant based both claims on three incidents: (1) failure to notify him of completion of trial service; (2) failure to notify him of a transfer position; and (3) failure to reclassify him. The forum found that: (1) although complainant's supervisor failed to advise him of the completion of trial service, complainant knew had had satisfactorily completed the period; (2) it was complainant's responsibility to check the bulletin board for transfers; and (3) complainant's supervisor was not aware of a change in policy that would have made him eligible for reclassification. None of those events rose to the level of retaliatory conduct or could be considered sufficient to constitute a constructive discharge. ***----- In the Matter of the State of Oregon, Department of Human Resources, 3 BOLI 89, 98-99 (1982).***

❑ When there was substantial, undisputed and well-documented evidence of respondent's dissatisfaction with complainant's work before complainant filed a complaint with the Civil Rights Division, and the unsatisfactory performance continued after the filing, the commissioner was unable to infer from the mere sequence of an involuntary discharge following the complaint that the discharge was in retaliation for the complaint. ***----- In the Matter of Dee Wescott, 2 BOLI 29, 40 (1980).***

❑ When both black and white workers were affected by a reduction in force from 39 to 18 workers over a three year period that was caused by computerization, and all were laid off in inverse seniority order except one

white employee who was temporarily assigned based on her applicable experience, and the black complainant had informed the employer that she would be leaving her job within a year, the commissioner found that complainant's layoff was not based on her race and was not retaliation for filing an unlawful employment practice complaint. ***----- In the Matter of Blue Cross of Oregon, 1 BOLI 272, 275 (1980).***

❑ When a female complainant requested a raise in pay to equal the pay of a male possessing comparable skill and doing substantially similar work under similar working conditions, the employer's subsequent treatment of and discharge of complainant was not only further different treatment due to sex, but also was retaliation. ***----- In the Matter of Terminal Ice and Cold Storage Company, Inc., 1 BOLI 151, 157 (1978).***

❑ A black custodian/baggage handler filed a civil rights complaint alleging he had been denied a promotion because of his race and color. He was later discharged after he refused to clean an office because he thought it was harassment based on his opposition to respondent's unlawful practice. The commissioner found that, while complainant "did not have a duty to immediately carry out every order from his supervisor, for example orders which were immoral, illegal, unfair or degrading," the order to clean the office did not fall "within the category of orders that could reasonably be disobeyed, particularly since his regular duties included general maintenance." Complainant's employment was covered by a collective bargaining agreement that included a grievance procedure for resolving the issue of his specific duties. Because complainant's refusal to clean the office was not justified or warranted, the commissioner held that respondent did not violate ORS 659.030(4) by discharging complainant. ***----- In the Matter of N. H. Kneisel, Inc., 1 BOLI 28, 37-38 (1976).***

Compliance amended, 1 BOLI 51 (1976).

26.6 --- To "Otherwise" Discriminate

❑ Respondent readily acknowledged that complainant was the best candidate of three job applicants and specifically asked an Employment Department representative to let complainant know she was being considered for the job and indicated she was the best qualified. After complainant complained to the Employment Department about respondent's statement that he was a married man and would have to check with his wife before hiring a woman, respondent then called an Employment Department representative and angrily complained about the complaint complainant filed and the "type of people" the program was sending him, stating he "didn't need this kind of problem" and, by his attitude, conveyed to her that he was no longer interested in using the program. The forum inferred from these facts that, but for complainant's complaint to the Department, respondents would have hired her for the training position. ***----- In the Matter of H.R. Satterfield, 22 BOLI 198, 209-10 (2001).***

27.0 RACE OR COLOR

27.1 --- Employment

27.1.1 --- Generally

❑ When respondent excepted to being held liable in the proposed order for the racial comments of his manager, arguing that the agency's evidence consisted of hearsay from friends of complainant, the commissioner found that the manager admitted the substance of his remarks to the investigator and at hearing; that respondent acknowledged that the manager had repeated similar language to him; that all versions of the words used conveyed the message of racial inferiority; and that it was well settled that employers were liable for the discriminatory acts of supervisors toward other employees. ***----- In the Matter of Auto Quencher, 13 BOLI 14, 23 (1994).***

❑ When 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 to provisions of ORS 659.060(3). ***----- In the Matter of Horst Mager Specialty Restaurants, Inc., 3 BOLI 39, 43-44 (1982).***

❑ The commissioner considered statements made by respondent's president to a Civil Rights Division investigator regarding his general beliefs about black persons in concluding that the adverse employment decision made by respondent was based on race. ***----- In the Matter of Sierra Tile Manufacturing, Inc., 1 BOLI 291, 294 (1980).***

27.1.2 --- Hiring, Promotion

❑ Complainant called respondent to respond to a job advertisement. The commissioner found that respondent's president, even though he was not told that complainant was black, inferred from complainant's "drawl" that he was black and, based on his beliefs about black employees, refused to consider complainant for the job in violation of ORS 659.030(1)(a). ***----- In the Matter of Sierra Tile Manufacturing, Inc., 1 BOLI 291, 292-94 (1980).***

❑ Complainant, a black person whose duties were to supervise and carry out respondent's equal employment opportunity program, alleged he had been discriminated against on the basis of his race when he received a reprimand and took a voluntary demotion after complainant investigated a complaint in violation of his supervisor's directions. The forum found respondent had not discriminated against complainant when the evidence showed he took a demotion in lieu of layoff when respondent's workforce had to be reduced due to a budget cut. ***----- In the Matter of State of Oregon, Employment Division, 2 BOLI 228, 232-33 (1982).***

❑ Complainant, a black man, was hired by respondent, a business depot, to perform custodial and baggage handling duties. After 3½ years, he sought and was denied promotion to a ticket agent position. Respondent asserted that complainant was denied the promotion because he was not qualified for the position and because he had not been a satisfactory employee in his custodial/baggage position, all reasons that the commissioner found to be pretextual. The commissioner also found that white custodial/baggage handlers were promoted to ticket agent positions and that during a period of 23 years, respondent had employed only four

black persons, none of whom were promoted. The commissioner concluded that complainant was denied the promotion because of his race and color, in violation of ORS 659.030(1). ***----- In the Matter of N. H. Kneisel, Inc., 1 BOLI 28, 30-36 (1976).***

Compliance amended, 1 BOLI 51 (1976).

27.1.3 --- Terms, Conditions, & Privileges of Employment

❑ When complainant, a black man, was referred to by his supervisor by the nickname of "Fred" and complainant objected to being called that name, this constituted discrimination in terms and conditions of employment when the supervisor did not refer to other employees regularly by nickname. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 252 (1995).***

❑ One of respondent's managers implemented a shoplifting warning when black customers entered respondent's store, suggested that a black female employee was the black complainant's "sister," suggested to another that no other blacks need be hired because respondent already employed complainant, and opposed scheduling a company picnic near the black community. A second manager expressed distrust of complainant "and the other black guy." The commissioner found that a negative racial atmosphere was created that made complainant feel insulted, devalued and demeaned, and awarded mental distress damages for the unlawful on-the-job treatment. ***----- In the Matter of Northwest Fitness Supply Company, 12 BOLI 246, 249-50, 259-62 (1994).***

❑ When a black male complainant informed respondent's management of his discomfort from repeated insulting and demeaning racial comments by his supervisors regarding himself and other members of his race that created a negative racial atmosphere, the commissioner held respondent responsible for complainant's resulting discomfort and humiliation. ***----- In the Matter of Northwest Fitness Supply Company, 12 BOLI 246, 261-62 (1994).***

❑ The forum found that complainant, a black male, was refused a job based on lack of qualifications rather than race, but still determined that respondent "unlawfully failed to provide complainant a racially neutral work environment." Thus, even though complainant could not recover damages for lost income because he was not qualified for the position, he could be awarded damages for pain and humiliation suffered because of the discriminatory work environment. ***-----*** In ***the Matter of Union Pacific Railroad Company, 3 BOLI 180, 187 (1982).***

❑ Complainant, a black person whose duties were to supervise and carry out respondent's equal employment opportunity program, alleged he had been discriminated against on the basis of his race when he received a reprimand and took a voluntary demotion after complainant investigated a complaint in violation of his supervisor's directions. The forum found respondent had not discriminated against complainant when the evidence showed he took a demotion in lieu of layoff when respondent's workforce had to be reduced due to a budget cut. ***----- In the Matter of State of Oregon, Employment Division, 2 BOLI 228, 232-33 (1982).***

27.1.4 --- Harassment

❑ A prima facie case of co-worker harassment based on race consists of the following elements: (1) respondent is a respondent as defined by statute; (2) complainant is a member of a protected class; (3) complainant was harmed by harassment directed at her by co-workers; (4) complainant's race was a reason for the co-worker harassment; (5) the harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the complainant's work performance or creating an intimidating, hostile or offensive working environment; 6) the standard for determining whether harassment was sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable African American in the circumstances of the complainant would so perceive it; (7) respondent knew or should have known of the harassment. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 23 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ In a case of racial harassment, the "harm" element of the agency's prima facie case was satisfied by complainant's credible testimony that she was offended by a noose incident and so upset that she had to leave her work station temporarily and felt she could no longer work with the harassing co-worker, as evidenced by her subsequent requests to her supervisor for a transfer to a different department. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 23 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Although circumstantial evidence led an African American complainant to reasonably conclude that her race/color were a reason for a noose made by her co-worker, this conclusion was not supported by a preponderance of the evidence and the forum concluded that the agency failed to meet its burden of proving that complainant's race/color were a reason for the noose. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 23-24 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ In a racial harassment case, a prima facie showing of harassment by a supervisor, with no tangible employment action, consists of the following elements: (1) respondent is a respondent as defined by statute; (2) complainant is a member of a protected class; (3) complainant was harmed by harassment directed at her by a supervisor with immediate or successively higher authority over her; (4) complainant's protected class was a reason for the supervisory harassment; (5) the harassment was sufficiently severe or pervasive to have

the purpose or effect of unreasonably interfering with the complainant's work performance or creating an intimidating, hostile or offensive working environment; (6) the standard for determining whether harassment was sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable African American in the circumstances of the complainant would so perceive it; (7) respondent knew or should have known of the harassment. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 25 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ In a case of racial harassment, the "harm" element of the agency's prima facie case was satisfied by emotional upset complainant experienced after observing a full-sized noose in her supervisor's office while meeting with him to discuss racial harassment she believed she had experienced from a co-worker's noose. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 25 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ When a Caucasian co-worker directed remarks towards an African American complainant referring to himself as "poor white trash" and asked her if she thought he was "poor white trash," and at the time the remarks were made, complainant perceived them as "harassment," but not as "racial discrimination," the forum concluded that complainant suffered "harm" based on her credible testimony that she felt harassed by the remarks. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 26 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ When a Caucasian co-worker referred to himself as "poor white trash" and asked an African American complainant if she thought he was "white trash," the forum found that several facts gave rise to an inference that complainant's race/color was a reason for the remarks. First, their subject matter was race/color, albeit the co-worker's race/color. Second, they were directed at complainant, the only African American in the room. Third, the co-worker had no explanation for his remarks when questioned about them by management. Giving rise to the opposite inference were the facts that the co-worker's remarks were derogatory towards himself, not African Americans; complainant did not believe until later that they were directed at her because of her race; and there was no testimony, credible or incredible, to shed light on the co-worker's state of mind when he made these remarks. The co-worker's remarks may have been intended to racially harass complainant or may have been intended as self-deprecation. The agency bears the burden of proving, by a preponderance of the evidence, that complainant's race/color was a reason for the co-worker's remarks and did not meet that burden. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 26-27 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ A Caucasian co-worker, on the afternoon of the same day that he made "white trash" remarks in an African American complainant's presence, made additional comments in complainant's presence about "gangbangers," made some gestures that complainant believed were "gang signs," and commented "what you got on this bag," which complainant interpreted as being related to drug dealers. Complainant perceived that the co-worker was speaking and acting in a way that was intended to imitate African American males and was offended by these remarks. Complainant's credible testimony that she was offended by this conduct satisfied the "harm" element of the agency's prima facie case. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 27 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ When complainant testified credibly to her perception and the basis for her perception that a Caucasian co-worker was speaking and acting in a way intended to imitate African-American males and portray them as gang members and drug dealers, that she was the only African American present when this behavior occurred, and that his behavior was "racial," the forum concluded that the co-worker's behavior was based on Complainant's race/color. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 27 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ The forum applied an objective standard to determine whether a Caucasian co-worker's behavior of speaking and acting in a way intended to imitate African-American males and portray them as gang members and drug dealers was sufficiently severe or pervasive to have created an "intimidating, hostile or offensive working environment" for a "reasonable person in the circumstances of the Complainant," applying this standard in light of the "totality of the circumstances." This forum noted its previous recognition that "there is an inverse relationship between the requisite severity and pervasiveness of harassing conduct: as the severity of the conduct increases, the frequency of the conduct necessary to establish harassment decreases" and concluded that the co-worker's conduct, standing alone, was not sufficiently severe to have created an intimidating, hostile or offensive working environment for a reasonable African American in the circumstances of the complainant. Furthermore, because it was the only incident in which complainant's race/color was a reason

for the harassment, the forum found that the incident was not part of an environment or series of events in which harassment was sufficiently pervasive to have created an intimidating, hostile or offensive working environment for a reasonable African American in the circumstances of the complainant. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 28 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ A hostile, intimidating, or offensive work environment was created for an African-American complainant when a customer made racially insulting remarks to the complainant. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 153 (2000).***

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ When an African American's immediate supervisor, who was Caucasian, made racial remarks toward complainant between March 1995 and October 1995 concerning "mixed marriages" and complainant's marriage to a white woman in March and April, then repeatedly addressed complainant as "Toby" and "boy" from May through October, the forum concluded that these remarks were directed at complainant because of his race and were sufficiently severe to create a hostile, intimidating or offensive working environment for a reasonable person in the circumstances of complainant, and in fact did so for complainant. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 148 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ To establish a prima facie case of racial harassment in violation of ORS 659.030(1)(b), the agency must present evidence to show that: (1) the respondent is an employer defined by statute; (2) the complainant was employed by respondent; (3) the complainant is a member of a protected class (race); (4) the respondent, or respondent's agent, supervisory employee, or non-employee in the workplace engaged in unwelcome conduct directed at complainant because of complainant's race; (5) the conduct had the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment, or submission to such conduct was made an explicit or implicit term or condition of employment; and (6) the complainant was harmed by the conduct. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 14 (1996).*** *See also In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 252 (1995).*

❑ When complainant, a black female, was referred to as a "nigger" and "black bitch" by a white male respondent in his conversations with a co-worker outside of complainant's presence and complainant was made aware of his comments, the comments constituted unlawful racial harassment. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 12-14 (1996).***

❑ When complainant, a black person, was deliberately assaulted by his white supervisor and the supervisor made no comments that directly linked the assault to complainant's race or color, the forum held that the supervisor's inconsistent statements about the incident, coupled with his routine racial harassment of complainant, made it reasonable to infer that complainant's race or color played a key role in the incident, given the totality of the circumstances. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 253 (1995).***

❑ When complainant, a black man, was regularly called racially derogatory names by his white supervisor and occasionally called his supervisor a "white honkey," the forum held that complainant's limited comments failed to establish that the supervisor's conduct was not unwelcome, noting that the inherent imbalance of power between an employer and an employee tends to make it difficult for an employee to counter an employee's inappropriate remarks without fear of damaging the employee's employment status. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 253 (1995).***

❑ Complainant, a black man, was regularly subjected to comments and behavior from his supervisor that included the following: (1) Addressing complainant as "boy"; (2) Touching complainant's air and asking complainant, "Do all you black people wear this greasy shit in year hair?" (3) Calling complainant a "greasebag"; (4) Inadvertently drinking out of complainant's coffee cup, then telling complainant "I've got this black shit all over my lips"; (5) Asking complainant "Why are all you black people always grabbing your crotch? To see if it's there or what?" (6) Referring to a rap music tape as "jungle bunny music"; (7) Referring to complainant's black predecessor as "the N who used to work here"; (8) Asking complainant if black men "ate pussy"; and (9) Asking complainant to salute the Confederate flag. The forum concluded that complainant had been subjected to unlawful racial harassment. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 252-53 (1995).***

❑ When complainant, a black man, was referred to as "boy" by his supervisor, the forum found that that this, together with other evidence, constituted racial harassment because the word "boy," applied to a black employee, "implies an inherent inferiority because of race." ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 252 (1995).***

❑ When respondent argued that he had no record of racial complaints, had no knowledge of his manager's bias, questioned complainant's testimony that he had never been called "nigger" before, and received no complaint personally from the victim, the commissioner found that employers could take no comfort from an employee's choice not to report a supervisor's discriminatory speech before seeking legal redress under the law. ***----- In the Matter of Auto Quencher, 13 BOLI 14, 23 (1994).***

❑ Respondent's white manager told his sister-in-law that a black complainant's supposed lack of progress was due to blacks having smaller brains than whites and

she reported the statement to complainant. Respondent argued that the manager's remarks were not only unauthorized but took place outside of working hours, away from the work site, and outside complainant's presence. The commissioner found that "time and place do not necessarily control whether there is an offense when there is an ongoing employment relationship" because a complainant's subsequent knowledge of such offensive statements by a supervisor might contribute to an offensive work environment experience by complainant. ***----- In the Matter of Auto Quencher, 13 BOLI 14, 22 (1994).***

❑ When respondent's manager used the words "black assed nigger" in speaking to and about a black complainant and subsequently attributed complainant's supposed lack of progress to blacks having smaller brains than whites, the commissioner found that complainant had been "subjected to the ultimate pejorative for a black man" and had been evaluated on the basis of "a vicious racial stereotype." ***----- In the Matter of Auto Quencher, 13 BOLI 14, 21 (1994).***

❑ When a black male complainant informed respondent's management of his discomfort resulting from repeated insulting and demeaning racial comments by his supervisors regarding himself and other members of his race, and when the offensive activity continued thereafter, the commissioner held that racial invective and disparagement directed at members of complainant's race were as offensive as if they were directed at him. The commissioner held respondent responsible for the demonstrated and damaging racial attitudes of its managers and for failing to take immediate and appropriate corrective action. ***----- In the Matter of Northwest Fitness Supply Company, 12 BOLI 246, 261-62 (1994).***

❑ The forum found it relevant to consider the following factors in determining whether a pattern of harassment existed at respondent's workplace: (A) The general course of conduct at respondent's workplace. That it may be the normal state of affairs at employer's workplace to consistently violate civil rights laws does not legitimize discrimination. This atmosphere is, however, relevant to determining whether an incident was racial and whether complainant was singled out for such treatment. In addition, this factor is relevant to determining what type of action would be reasonable for respondent under the circumstances; (B) Complainant's demeanor; (C) Complainant's perception of the incident; (D) The number of incidents; (E) Whether the incidents were directed to complainant in particular; (F) Whether the incidents were racial in nature. The commissioner used these factors as a premise to analyze the involved incidents separately and in their totality. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 37 (1987).***

❑ When the racial implications of a workplace incident were not apparent to some, the commissioner found that complainant's perception of the incident was a significant factor in determining whether such acts were racial harassment. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 37 (1987).***

❑ When racial harassment is alleged, the forum agrees with federal law that more than a few isolated incidents must have occurred to trigger the protection of the law. The commissioner relies upon the following principles: (1) Racial slurs must be more than infrequent, outside of casual conversation, and directed at the complainant; (2) The general course of conduct at the employer's place of work can be considered; (3) Since discrimination by its nature is often a subjective inquiry, the complainant's "perception of his environment" is a significant factor; and (4) Conduct must be racially oriented. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 36 (1987).***

❑ Racially oriented statements or actions constitute racial harassment when the conduct: (1) has the purpose or effect of creating an intimidating, hostile, or offensive work environment; (2) has the purpose or effect of unreasonably interfering with complainant's work performance; or (3) otherwise adversely affects an individual's employment opportunities. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ The commissioner adopted EEOC guidelines in regard to employer liability for racial harassment in the workplace: (1) an employer is strictly liable for the actions of its agent and supervisory employees; and (2) an employer is liable for nonsupervisory employees when the employer knew or should have known of their harassing activity unless the employer took immediate and corrective action. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ When there has been alleged racial harassment, the commissioner determines what constitutes immediate and corrective action using the following considerations suggested by the EEOC: (1) what actions were taken; (2) when was it taken; (3) whether the action taken fully remedied the conduct without adversely affecting the term or conditions of complainant's employment; and (4) whether the employer had a policy and took steps to implement the policy. The commissioner also recognized the courts' consistent views in considering whether an employer took immediate and corrective action: (1) company policy against harassment and active enforcement of that policy; (2) disciplinary action against the perpetrator; (3) sensitivity training; (4) formal mechanism to deal with grievances; and (5) investigation. The commissioner found that a mere announcement of a policy against harassment and promise to discipline or discharge any employee who fails to conform is not sufficient to relieve an employer of liability. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ In order to establish a prima facie case of racial harassment, the agency must show that: (1) complainant was a member of a protected class; (2) complainant was subject to unwelcome harassment; (3) but for complainant's protected class, complainant would not have been the object of such harassment; (4) the terms and conditions of complainant's employment were affected; and (5) the employer, in the case of co-worker harassment, knew or should have known of the harassment and failed to take prompt action. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 6 (1987).***

❑ Even though the forum accepted as a fact that complainant had some job performance problems, the

forum found that complainant had been discharged after being racially harassed and that more than half of her job performance problems were related to this harassment. ***----- In the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 132-33 (1982).***

Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ When complainant, a black female, was referred to as "girl" by her white male supervisor, the forum found that this, together with other evidence, constituted racial harassment. The forum stated that the term "girl" or "boy," applied to a black employee, "implies an inherent inferiority" because of race. In Decision 172-0679 (12-27-71), the EEOC determined as follows: "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 with no discriminatory intent, there will nonetheless be a foreseeable disparate effect." ***----- In the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 131-32 (1982).***

Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ When complainant's supervisor publicly and, in complainant's presence, often called her "girl" and "darkie," told her "year kind of people stink – they don't know how to use soap," issued five entries in 11 days criticizing her job performance (compared to six entries in the previous six months under another supervisor), and complainant became upset and left, attempted to return several days later, and was told that her job was no longer available, the commissioner found that complainant had been harassed on the basis of her race and unlawfully discharged. ***----- In the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 130 (1982).***

Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ The utterance of one racial slur on a single occasion by one employee within the premises of respondent's plant does not constitute racial harassment or failure to maintain an environment free from racism by respondent when respondent "took appropriate timely corrective action." One single utterance in anger without any hint of an ongoing racist atmosphere is not adequate to give rise to the duty to conduct an elaborate investigation into potential discrimination. ***----- In the Matter of Kirsten Corporation, 2 BOLI 257, 263 (1982).***

❑ Complainant, a black woman, filed a complaint alleging that she had been racially harassed when her supervisor referred to her, after an argument, as a "nigger," and that she was terminated because of her race when she was discharged after an argument with her white supervisor. When the term "nigger" was used on only one isolated occasion and the employer took immediate corrective action, the forum found that complainant was not harassed. The forum found that complainant was not discharged because of her race when she violated a direct order of her supervisor in divulging the contents of the foreman's conversation with complainant to complainant's supervisor, which precipitated the argument. ***----- In the Matter of Kirsten Corporation, 2 BOLI 257, 260 (1982).***

❑ When a black complainant was subjected to repeated offensive racial remarks and attitudes by his supervisors, respondent had an affirmative legal duty to provide complainant with a racially neutral work environment, was obligated to prevent its supervisory agents from subjecting complainant to racial abuse and harassment, and should have taken active steps to maintain a racially neutral work environment. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 90 (1978).***

Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).

Order on remand, 1 BOLI 179 (1979).

27.1.5 --- Discharge/Constructive Discharge

❑ When respondent repeatedly made intentional references in the workplace to complainant using racial slurs such as "nigger," complainant was made aware of the slurs and given a written warning about the same time that she believed was an attempt to get her to quit, and respondent did not deny having made the racial slurs when confronted by complainant, the forum determined that respondent knew with substantial certainty that complainant would quit as a result of his behavior and concluded that complainant's decision to resign was a constructive discharge. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 15 (1996).***

❑ When respondent produced clear and reasonably specific evidence that it acted upon legitimate, nondiscriminatory reasons when it discharged a black employee and not a similarly situated white employee and the agency was given a full and fair opportunity to show that those reasons were a pretext for discrimination but failed to show pretext, the forum found that respondent did not violate ORS 659.030(1)(a). ***----- In the Matter of Clackamas County Collection Bureau, Inc., 12 BOLI 129, 139-40 (1994).***

❑ When the agency presented evidence that two employees who performed the same job, one white and one black, gave notice of their intent to quit, and respondent discharged the black employee but permitted the white employee to work until the end of the month, the forum held that the agency presented a prima facie case of racial discrimination. ***----- In the Matter of Clackamas County Collection Bureau, Inc., 12 BOLI 129, 139 (1994).***

❑ A black complainant with absentee and tardiness problems tendered her resignation, attempted to withdraw it, and was discharged for cause before respondent's opportunity to act on the request for

withdrawal. The commissioner found that complainant's allegation that white employees with absentee and tardiness problems were allowed to withdraw their resignations was moot. ***----- In the Matter of Fred N. Bay News Company, 3 BOLI 149, 151-52 (1982).***

❑ Even though the forum accepted as a fact that complainant had some job performance problems, the forum found that complainant had been discharged after being racially harassed and that more than half of her job performance problems were related to this harassment. ***----- In the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 132-33 (1982).***

> Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ When complainant's supervisor publicly and, in complainant's presence, often called her "girl" and "darkie," told her "your kind of people stink – they don't know how to use soap," issued five entries in 11 days criticizing her job performance (compared to six entries in the previous six months under another supervisor), and complainant became upset and left, attempted to return several days later, and was told that her job was no longer available, the commissioner found that complainant had been harassed on the basis of her race and unlawfully discharged. ***----- In the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 130 (1982).***

> Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ The agency alleged that complainant, a black waiter in respondent's restaurant, had been discharged because of his race when a white waiter who had conducted himself in a similarly improper manner resulting in greater detriment to respondent was not discharged. The forum determined that complainant had not been discharged because of his race when the evidence established complainant had been uncooperative in the workplace and his job performance was not an asset, as was that of the comparator white waiter, to respondent. It is not unlawful for an employer to summarily discharge an employee for conduct that 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 the Matter of Horst Mager Specialty Restaurants, Inc., 3 BOLI 39, 45 (1982).***

❑ Complainant, a black woman, filed a complaint alleging that she had been racially harassed when her supervisor referred to her as a "nigger" after an argument, and that she was terminated because of her race when she was discharged after an argument with her white supervisor. When the term "nigger" was used on only one isolated occasion and the employer took immediate corrective action, the forum found that complainant was not harassed. The forum found that complainant was not discharged because of her race when she violated a direct order of her supervisor in divulging the contents of the foreman's conversation with complainant to complainant's supervisor, which precipitated the argument. ***----- In the Matter of Kirsten Corporation, 2 BOLI 257, 260 (1982).***

❑ Complainant, a black woman, alleged she had been discharged because of her race. The evidence established that she was subjected to comments by co-workers regarding her race and white male friend, to false accusations of rule violations, to constant reporting to supervisors of infractions, and to extra assignments by a particular supervisor. The commissioner determined that a nursing home has special responsibilities as trustee of a patient's well being and found that complainant had been lawfully discharged for patient abuse and violation of rules after a written warning. ***----- In the Matter of Roderick Enterprises, Inc., 2 BOLI 14, 20 (1980).***

❑ When both black and white workers were affected by a reduction in force caused by computerization, from 39 to 18 workers over a three year period, , and all were laid off in inverse seniority order except one white employee who was temporarily assigned based on her applicable experience, and the black complainant had informed the employer that she would be leaving her job within a year, the commissioner found that complainant's layoff was not based on her race and was not retaliation for filing an unlawful employment practice complaint. ***----- In the Matter of Blue Cross of Oregon, 1 BOLI 272, 275 (1980).***

❑ In a racial discrimination case, there was "an abundance of evidence concerning ridicule, embarrassment and humiliation meted out to the complainant by the respondent" and part of the evaluation of complainant's performance was by the persons who were guilty of the discriminatory acts. The racial abuse and slurs directed at the complainant affected his work performance and reflected the racial prejudice of those evaluating him. The commissioner found that complainant's discharge was caused, at least in part, by respondent's unlawful activity. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 90, 93 (1978).***

> Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).
>
> Order on remand, 1 BOLI 179 (1979)..

27.2 --- Public Accommodation

❑ To prove that a place of public accommodation discriminated against a person on account of the person's race, the agency must prove: (1) the respondent is a respondent as defined by statute; (2) the complainant is a member of a protected class (race); (3) the complainant was harmed by an action of respondent; and (4) the respondent took its action because of the complainant's protected class. ***----- In the Matter of Westwind Group of Oregon, 17 BOLI 46, 51 (1998)***.

❑ Credible evidence established that respondent's employee treated two white customers very differently from the way in which he treated a black customer,

whom he declined to serve and to whom he spoke rudely. The forum inferred that the employee treated the black customer differently because of her race. ***----- In the Matter of Westwind Group of Oregon, 17 BOLI 46, 51-52 (1998)***.

❑ Respondent displayed signs in his tavern that read "VIVA APARTHEID" and "NO SERVICE – NO NIGGERS." Respondent argued that, in order to find a violation of ORS 659.037, respondent must be shown to have personally written the signs. The forum found that respondent's argument lacked merit because the statute only requires respondent to have "caused" the signs to be displayed. Respondent "caused" their display because he knew the signs were displayed and failed to remove them. ***----- In the Matter of The Pub, 6 BOLI 270, 279 (1987).***

❑ ORS 659.037 must be read to balance the guarantee of free speech in Article 1, Section 8 of the Oregon Constitution and the interest of the State of Oregon in eliminating discrimination in places of public accommodation. When respondent displayed a sign on the door of his tavern that read "VIVA APARTHEID" in close proximity to a sign stating "NO SERVICE – NO NIGGERS," the forum found the sign violated ORS 659.037. While the sign may be protected political speech in another context, the facts of this case dictate otherwise. The forum cited *New York Times v. Sullivan,* 379 US 254 (1964) and *Garrison v. Louisiana,* 379 US 64 (1964) for the principle that, while political speech is accorded the utmost deference, it is not "completely unfettered." ***----- In the Matter of The Pub, 6 BOLI 270, 281 (1987).***

❑ When respondent had a sign on the door of his tavern essentially stating "NO SERVICE – NO NIGGERS," the forum found that ORS 30.670 did not require complainant to enter and request service to establish a violation of that statute. The forum noted that courts, as well as this forum, have held that the law does not require a complainant to perform a futile act. ***----- In the Matter of The Pub, 6 BOLI 270, 283 (1987).***

❑ Respondent argued that, despite the fact that he had a sign stating "NO SERVICE – NO NIGGERS" on the front door of his tavern, he had not actually refused service to anyone because of race. The forum found that the argument was without merit, as the plain language of ORS 659.037 indicates otherwise; that is, the statute is violated when a sign is displayed "to the effect" that services "will be refused." The same rational upholds for ORS 30.670, as narrow construction of that statute would thwart the clear intention of the legislation to insure access and service to all persons in places of public accommodation. ***----- In the Matter of The Pub, 6 BOLI 270, 279 (1987).***

❑ When respondent's security guard required black female complainants to show identification but did not require white females to do so, and complainants were refused entrance to respondent's supper club even after showing identification, the forum found that respondent harassed and discouraged complainants and denied them the full and equal enjoyment of their premises by imposing conditions because of their race, in violation of ORS 659.010(4) and 30.670. ***----- In the Matter of Joseph Gaudry, 3 BOLI 32, 36-37 (1982).***

❑ When a white female complainant was accompanied by a black male and subjected to stringent age and identification requirements to enter respondent's supper club, and evidence established that respondent had a standard practice of discouraging racially mixed couples and black persons by enforcing a more rigid proof-of-age requirement for them, the commissioner found that respondent had engaged in a practice designed and intended to harass, discourage, and deny to complainant the full and equal enjoyment of accommodations, advantages, and facilities by imposing restrictions, distinctions, and conditions for admission due to the race of complainant's companion. ***----- In the Matter of Joseph Gaudry, 1 BOLI 235, 239 (1980).***

Affirmed in part, reversed and remanded as to posting in other establishments by respondent, *Gaudry v. Bureau of Labor and Industries,* 48 Or App 589, 617 P2d 668 (1980).

❑ When respondent, a restaurant and lounge, hired a security company to supply a guard to check patron's age identification, and the guard discriminated against black persons and racially mixed groups by placing admission restrictions on them, respondent was held liable for the violations of ORS 659.010(14) "engaged in by any person or persons acting on its behalf whether such person or persons be employees, independent contractors or employees of independent contractors." ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 27 (1975).***

❑ When one respondent, an independent contractor hired by a respondent lounge to provide a security guard to check patrons' age identification, instructed and directed his employee to discriminate against black persons seeking admission to the lounge because of their race and color, the commissioner found that the independent contractor violated ORS 659.037. ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 27 (1975).***

❑ When an employee of an independent contractor, a security company, was employed as a security guard to check age identification at the door of a lounge, and the employee performed that job in a manner as to deny admission to as many black persons and as many mixed racial groups as possible because of their race and color, the commissioner found that the employee violated ORS 659.010(14). ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 27 (1975).***

27.3 --- Real Property

❑ When the forum determined that respondents had refused to sell complainant real property on the basis of her race and color and ordered respondents to sell the property to complainant and respondents thereafter sold the property to a third party, the forum held a supplemental hearing and ordered substitute damages to complainant for those made moot by respondents' further unlawful practices. ***----- In the Matter of Harold E. and Ruth B. Carlson, 24 BOLI 168, 174-75 (1975).***

❑ When respondents presented credible evidence that they did not rent a vacant apartment to a black applicant because the manager's wife thought the apartment

would be rented by a couple who were inspecting it, and the agency's evidence offered to show that respondents' reason was pretextual was unpersuasive, the commissioner held that respondents did not violate ORS 659.033(1)(a). ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 212 (1993).***

❑ Resident apartment managers violated ORS 659.033(1)(b) by evicting a white woman from her apartment because of the race of her cotenant, a black man. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 248 (1990).***

❑ When respondent, the owner of a mobile home park, attempted to discourage complainant, a prospective purchaser, from renting real property in the park because of complainant's race or color, thereby discouraging the sale of the mobile home owned by a second complainant, the forum determined that these actions discriminated against the owner of the mobile home in the terms, conditions, and privileges relating to his lease because of the race or color of the prospective purchaser. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 162-63 (1987).***

Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

❑ When complainant alleged she had been denied housing in a mobile home park based on her race, color, or national origin, the forum determined that the agency had failed to show that the reasons of the respondent owner of the mobile home park for rejection were pretextual when the evidence established that the owner had, at the first meeting with complainant and thereafter, voiced concerns regarding complainant's children and financial situation and that the owner's investigation of complainant's finances was being hindered by her realtor. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 162 (1987).***

Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

❑ Prospective purchasers of a mobile home located in a mobile home park were determined to be purchasers, as that term is defined for purposes of ORS 659.033, in that both were prospective lessees of rental space for the mobile home they sought to purchase. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 162 (1987).***

Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

❑ The owner of a mobile home in a mobile home park who attempted to sell his mobile home was determined to be a purchaser, as that term is defined for purposes of ORS 659.033, in that he was an occupant of a leased mobile home space in the park. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 164 (1987).***

Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

❑ A black complainant alleged that an apartment manager violated a rent agreement honored by the previous manager, made racial remarks to her, and evicted her because of her race. When complainant's witnesses known to be present during the relevant events were not called at hearing or deposed and complainant's testimony was internally inconsistent, the commissioner found that the eviction was for refusal to pay rent. ***----- In the Matter of Scott Paskett, 1 BOLI 190, 192-93 (1979).***

28.0 RACE, RELIGION, COLOR, SEX, NATIONAL ORIGIN, MARITAL STATUS OR AGE OF PERSON WITH WHOM INDIVIDUAL ASSOCIATES

28.1 --- Employment

28.1.1 --- Hiring, Promotion

28.1.2 --- Terms, Conditions, & Privileges of Employment

28.1.3 --- Discharge/Constructive Discharge

❑ When evidence showed that complainant, a white male, was discharged immediately after he requested on-site housing for his interracial family on respondent's recreational property, the forum concluded that respondent perceived the "permanent" presence of an interracial family at the Crooked River Ranch as a potential embarrassment to the company and a deterrent to potential buyers of property and that respondent unlawfully discharged complainant. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 185-86 (1982).***

❑ When the timing of complainant's discharge was "extremely suspect" and respondent saw no need to immediately dismiss other poor performers who also would be costly to retain, the forum concluded that respondent's actions supported the inference that complainant was discharged because he and his interracial family were perceived to be an actual or potential embarrassment. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 187 (1982).***

❑ When credible evidence showed that some members of respondent's managerial staff at the Crooked River Ranch made derogatory comments concerning black persons on two occasions, the forum held that such evidence supported an inference that complainant was discharged because the presence of his interracial family as residents at the Crooked River Ranch was perceived to be bad for business. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 182 (1982).***

❑ When respondent was charged with discharging a married black male complainant because of the race of a married white female co-worker with whom he became romantically involved, the forum found that their mutual discharge was for disruptive behavior on store premises during business hours and that neither of their respective races was a factor. The forum dismissed the specific charges as to the discharge. ***----- In the Matter of Northwest Fitness Supply Company, 12 BOLI 246,***

261-62 (1994).

❑ Complainant, a black woman, alleged she had been discharged because of her race. The evidence established that she was subjected to comments by co-workers regarding her race and white male friend, to false accusation of rule violations, to constant reporting to supervisors of infractions, and to extra assignments by a particular supervisor. The commissioner determined that a nursing home has special responsibilities as trustee of a patient's well being and found that complainant had been lawfully discharged for patient abuse and violation of rules after a written warning. ***----- In the Matter of Roderick Enterprises, Inc., 2 BOLI 14, 20 (1980).***

29.0 RELIGION

29.1 --- Employment

29.1.1 --- Hiring, Promotion

29.1.2 --- Terms, Conditions, or Privileges of Employment

29.1.3 --- Harassment

❑ ORS 659.030 does not prohibit proselytizing in the workplace, just as it does not proscribe all conduct of a sexual nature in the workplace. Occasional expressions of religious opinions in the workplace would probably not establish an offensive environment, just as "sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment." Employers are responsible to exercise control over their proselytizing so that it does not cross the line to become unlawful harassment. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 126 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Employers may be liable for religious harassment regarding of their motivation for committing the harassing act. The prohibition against religious harassment does not speak at all to religious motivations for the prohibited acts. "This forum does not mean to state that general expressions of religious beliefs at the workplace, by themselves, constitute a violation of ORS 659.030." Employers are not prohibited from witnessing. They are prohibited from creating an unwelcome and objectively offensive atmosphere at work that constitutes religious harassment of their employees. Such conduct results in acts offensive to the positive law. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 122 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ In a religious harassment case, respondent argued that complainant had a duty to notify respondent that his conduct was unwelcome and was creating a hostile environment, and that the harassment test required proof that respondent knew or should have known that his conduct was unwelcome and created a hostile work environment. The commissioner rejected those arguments. Except for cases when an employee complains about conduct that was previously consented to, the forum found no statute, administrative rule, EEOC Guideline, harassment court case, or Final Order regarding any protected class that required such proof. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 113 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ If a complainant has previously been a willing participant in conduct that he or she later complains about, the complainant has a duty to notify the harasser that the conduct is unwelcome. The employer may be liable for the harassment if it knew or should have known that the employee had withdrawn his or her consent to the offensive conduct. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 117-18 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ An employee has the right to hold religious beliefs that are different from the employer's, or the right to hold no religious beliefs. Employees have the right under ORS 659.030 to work in a harassment-free environment. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 116 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ When respondent invited complainant to church twice per week during complainant's one month of employment and, based on complainant's religion, repeatedly criticized complainant and his life style, and when such unwelcome conduct occurred both on and off the job and invaded the private life of complainant, his mother, and fiancé, respondent violated ORS 659.030(1)(b). ***----- In the Matter of James Meltebeke, 10 BOLI 102, 111-12, 115-16 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ For religious conduct to violate ORS 659.030, it must be sufficient severe or pervasive to alter the conditions of the complainant's employment and create a intimidating, hostile, or offensive work environment. In making this determination, the commissioner evaluates the totality of the circumstances. The commissioner has previously examined the frequency, duration, and

severity of harassing conduct to determine if it created a hostile working environment. The standard applied in this determination is objective and is directed to the reasonableness of the complainant's reaction to the work environment. In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found. This is not to say, however, that the specific circumstances of the complainant play no role in determining how a reasonable person would be affected by the work environment. All objective aspects of complainant's situation will be relevant to the reasonableness of complainant's reaction to the work environment, including characteristics of the complainant. Youth and inexperience, for example are appropriately considered in evaluating the environment's impact on complainant. The trier of fact must adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 115 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ While a complaint or protest is helpful to a complainant's case, it is not a necessary element of the claim. The commissioner recognizes that victims may fear repercussions from complaining about harassment and that such fear may explain a delay in opposing the conduct. While a contemporaneous complaint or protest is persuasive evidence of a complainant's claim that conduct is unwelcome, it is not a necessary element of the harassment test. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 114-15 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ An employer's "good motives" are no defense to a religious harassment claim. In cases in which employers held devotional matters or Bible studies for employees on the job, the employer's "good motives" did not affect the harassment analysis. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 113 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Religious conduct in the workplace becomes unlawful only when it is unwelcome. The challenged conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." ***----- In the Matter of James Meltebeke, 10 BOLI 102, 113 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ In a religious harassment case, the agency must prove its case by a preponderance of the evidence. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 113 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Harassment based on religion is a violation of ORS 659.030. Unwelcome religious advances and other verbal or physical conduct of a religious nature constitute religious harassment when: (1) submission to such conduct is made, either explicitly or implicitly, a term or condition of the subject's employment; (2) submission to or rejection of such conduct by the subject is used as the basis for employment decisions affecting the subject; or (3) such conduct has the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 112 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Unwelcome religious conduct that unreasonably interferes with the subject's work performance or creates an intimidating, hostile, or offensive work environment constitutes "environmental" religious harassment, even if it leads to no tangible or economic job consequences. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 113 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Under the religious harassment test, "quid pro quo" harassment occurs when submission to unwelcome religious conduct is made, either explicitly or implicitly, a term or condition of the subject's employment, or when submission to or rejection of such conduct by the subject is used as the basis for employment decisions affecting the subject. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 113 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132,

903 P2d 351 (1995).

❑ When respondent employer and respondent's manager engaged in conversations with complainant regarding the merits of her religion, the forum determined that respondent had not harassed complainant, as complainant's continued employment was not dependent upon listening to these discussions, the remarks were not of a continuous nature, and the remarks were not in the nature of preaching or proselytizing. ***----- In the Matter of Deana Miller, 6 BOLI 12, 27-28 (1986).***

❑ Respondent argued that the application of ORS 659.030(1)(a) to theories of constructive discharge and religious harassment would be "unconstitutionally vague, broad and overreaching" and would violate respondent's "constitutional right to exercise their religion, and express free thought." The forum found no merit in the argument, finding that the guarantee of religious freedom contained in the First Amendment to the U.S. Constitution is identical to that of the Oregon Constitution and provides for the freedom to believe and to act. However, the right to religious freedom is not beyond reasonable limitations. The evidence established that respondent's proselytizing about his religion was not required by his religion, but was a matter of personal zeal. In *U.S. Bank of Portland v. Snodgrass,* 202 Or 530 (194), the Oregon Supreme Court determined that the right to religious expression shall be protected "unless it is found that the fanatical and unrestrained enthusiasm of its followers results in acts offensive to the positive law." The forum stated that a state may restrain the expression of religious beliefs in order to protect a legitimate state interest, and the public policy enouncing discrimination in ORS 659.020 is such an interest. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 278-81 (1985).***

❑ The forum adopted the guidelines established by the EEOC for sexual harassment at 29 CFR 1604.11 as the standard for religious harassment or intimidation in employment: "Harassment on the basis of religion is a violation of ORS 659.030. Unwelcome religious advances and other verbal or physical conduct of a religious nature constitute religious harassment when: (1) submission to such conduct is made, either explicitly or implicitly, a term or condition of the subject's employment; (2) submission to or rejection of such conduct by the subject is used as the basis for employment decisions affecting the subject; or (3) such conduct has the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment." The forum emphasized that, by adopting this standard, it did not mean to state that general expressions of religious beliefs at the workplace, by themselves, constitute a violation of ORS 659.030. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 273 (1985).***

❑ When complainant, a secretary, was subjected to aggressive and constant proselytizing by her employer about his religion and negative comments about her religion for a period of 7½ months, the forum determined that the employer's actions constituted religious harassment. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 269-71 (1985).***

29.1.4 --- Discharge/Constructive Discharge

❑ To establish a prima facie case of an unlawful employment practice based on religion under ORS 659.030(1)(a), the agency must plead and prove that (1) complainant had a bona fide religious belief; (2) he informed respondent of his religious views and that they were in conflict with his responsibilities as an employee; and (3) he was discharged because of his observance of that belief. Once the agency has established a prima facie case, the burden shifts to respondent to prove that it made good faith efforts to accommodate complainant's religious beliefs***. ----- In the Matter of Albertson's, Inc., 7 BOLI 227, 240 (1988).***

❑ When complainant, a newly converted Seventh-day Adventist, was discharged for failing to work his scheduled shift on a Saturday, the commissioner noted that this forum had previously followed federal case law in resolving a matter of an alleged unlawful employment practice based upon religion. The forum stated that an employer has an affirmative duty to make reasonable accommodation for religious observances of sincere beliefs among its employees to the extent that such accommodation does not cause undue hardship in the conduct of the employer's business. In this case, respondent was able to show that to reasonably accommodate complainant would cause undue hardship in the conduct of its business, and thus did not violate ORS 659.030(1)(a). ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 239 (1988).***

❑ When complainant alleged that respondent's actions in consistently proselytizing about respondent's religion forced her to resign, the forum determined that the complainant's age and work experience should be considered in determining whether a reasonable person in complainant's place would have resigned employment. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 276 (1985).***

❑ When respondent frequently discussed religion with complainant, subjecting her to listening to discussions of religion, gave complainant religious literature, criticized complainant's lifestyle for the reason that it differed from the teachings of respondent's religion, and respondent persisted in these actions in the knowledge that complainant did not welcome these overtures, the forum determined that complainant's resignation constituted a constructive discharge when a reasonable person in complainant's situation would have resigned. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 275-76 (1985).***

❑ Complainant, a signalman on a railroad crew, was discharged after he advised respondent that he could not work on Saturday because he was a Seventh-day Adventist whose Sabbath was observed from sundown on Friday to sundown on Saturday. The forum found the discharge violated of ORS 659.030 when there was no evidence to suggest that accommodation of complainant's religious beliefs would have created an undue hardship on the respondent. ***-----*** In ***the Matter of Union Pacific Railroad Company, 3 BOLI 234, 238-39***

(1982).

29.1.5 --- Failure to Reasonably Accommodate (*see also* 97.2)

❑ When complainant, a Seventh-day Adventist, was the "second man" in a two person meat department, the meat department manager and the second man were the primary meat cutters on Saturdays, respondent's busiest day, and complainant demanded every Saturday off, the commissioner said "To appoint a different second man and give complainant fewer hours would have changed his status, and would not satisfy respondent's obligation of reasonable accommodation." ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 243 (1988).***

❑ An employer is required to take some steps in negotiating with the employee to reach a reasonable accommodation to the particular religious beliefs at issue. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 241 (1988).***

❑ When complainant had no history of religious beliefs and had never informed respondent that he was studying any religion, the fact that respondent did not take complainant's sudden adoption and declaration of religious beliefs seriously until they had a chance to sit down with him and discuss his beliefs did not show a lack of good faith by respondent. "Respondent had no duty to accommodate complainant's religious beliefs until complainant established that he had sincere beliefs. It was reasonable for respondent to require something more than a mere declaration of sincerity." ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 240-41 (1988).***

❑ It is well recognized that, although complainants are under no burden to propose specific means of accommodating their religious practices to their employers, a complainant has the duty to cooperate with the measures suggested by their employers in reaching an accommodation. Employees are not required to modify their religious beliefs, only to attempt to satisfy them within the procedures offered by the employer. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 240 (1988).***

❑ To establish a prima facie case of an unlawful employment practice based on religion under ORS 659.030(1)(a), the agency must plead and prove that: (1) complainant had a bona fide religious belief; (2) he informed respondent of his religious views and that they were in conflict with his responsibilities as an employee; and (3) he was discharged because of his observance of that belief. Once the agency has established a prima facie case, the burden shifts to respondent to prove that it made good faith efforts to accommodate complainant's religious beliefs***. ----- In the Matter of Albertson's, Inc., 7 BOLI 227, 240 (1988).***

❑ Complainant, a newly converted Seventh-day Adventist, told his employer he could no longer work Saturdays. On the first Saturday thereafter, respondent could not find a replacement worker for half of complainant's shift and required complainant to work half of the shift. The commissioner held that "such a requirement did not eliminate the conflict with complainant's religious beliefs, since that belief did not permit secular work, either full-time or part-time. Thus, respondent failed to reasonably accommodate complainant's religious belief." ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 240 (1988).***

❑ Respondent spent numerous hours attempting to contact possible replacement workers to fill in for complainant after he declared he was unable to work a scheduled Saturday shift because he had converted to the Seventh-day Adventist faith. The commissioner stated that "the fact that respondent was unsuccessful in contacting sufficient replacement meat cutters to cover complainant's shift does not show a lack of good faith effort. Nor does the fact that respondent failed to ask others, such as * * * the regional meat manager in Portland, to work as a replacement show alack of good faith. The question is whether the efforts respondent made were reasonable and made in good faith." ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 240 (1988).***

❑ When complainant, a newly converted Seventh-day Adventist, was discharged for failing to work his scheduled shift on a Saturday, the commissioner noted that this forum had previously followed federal case law in resolving a matter of an alleged unlawful employment practice based upon religion. The forum stated that an employer has an affirmative duty to make reasonable accommodation for religious observances of sincere beliefs among its employees to the extent that such accommodation does not cause undue hardship in the conduct of the employer's business. In this case, respondent was able to show that to reasonably accommodate complainant would cause undue hardship in the conduct of its business, and thus did not violate ORS 659.030(1)(a). ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 239 (1988).***

❑ Respondent employer's manager denied the request of complainant, a Catholic, to have Sunday off to attend mass. Respondent accommodated complainant after being made aware of her request. The forum determined that, since there was no evidence to establish that the manager was a supervisor for whose actions respondent would be liable, and since respondent, upon knowledge of the request, accommodated complainant, there was no discrimination. The forum indicated that an employer would be liable for the acts of a supervisor who could hire or discharge complainant or who could effectively recommend hiring or discharge, even when the employer had no knowledge. ***----- In the Matter of Deana Miller, 6 BOLI 12, 28 (1986).***

❑ Complainant, a signalman on a railroad crew, was discharged after he advised respondent that he could not work on Saturday because he was a Seventh-day Adventist whose Sabbath was observed from sundown on Friday to sundown on Saturday. The forum found the discharge was a violation of ORS 659.030 when there was no evidence to suggest that accommodation of complainant's religious beliefs would have created an undue hardship on the respondent. ***-----*** In ***the Matter of Union Pacific Railroad Company, 3 BOLI 234, 238-39 (1982).***

❑ While noting that federal court decisions are merely instructive and not binding on the agency, the forum

cited *Trans World Airlines v. Hardison,* 442 U.S. 63 (1977) for the proposition that an employer has an affirmative duty to make reasonable accommodation for religious observances of sincere believers among its employees to the extent that such accommodation does not cause undue hardship in the conduct of the employer's business. ***----- In the Matter of Union Pacific Railroad Company, 3 BOLI 234, 237 (1982).***

29.1.6 --- Permissible Preference of Employee Based on Religion in Certain Employment

29.2 --- Public Accommodation

29.3 --- Real Property

30.0 RETALIATION (*See* 26.0 – Opposition To Unlawful Practices)

31.0 SEX

31.1 --- Pregnancy and Related Conditions (in general)

❑ The agency proved that respondents violated ORS 659.030(1)(b) by establishing that respondents reduced complainant's work hours because she was pregnant. The forum disbelieved respondents' claim that they reduced claimant's hours because of her poor work performance because the evidence established that respondents offered complainant work in one of their other businesses, which they believed was a more suitable environment for a pregnant employee. If complainant had been such a poor employee, respondents would not have offered her the other job. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 187 (2000)***.

❑ To prove that respondents violated ORS 659.030(1)(b) by reducing complainant's work hours because she was pregnant, the agency had to establish that: (1) respondents were employers subject to ORS 659.010 to 659.110; (2) respondents employed complainant; (3) complainant was a pregnant woman; (4) respondents took an action that harmed complainant in compensation or in terms, conditions or privileges of employment; (5) respondents took their action against complainant because of her pregnancy. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 185 (2000)***.

❑ An employee whose hours are severely cut because of her pregnancy and who knows that her employer wants to get rid of her is justified in quitting her job before she is subjected to an outright termination. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 188 (2000)***.

❑ By firing complainant because they believed her pregnancy made her a liability to their business, respondents fired complainant "because of" pregnancy or sex. ***----- In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 270 (1998)***.

❑ Although respondents may have believed in good faith that complainant could not safely lift heavy objects or vacuum based on her pregnancy, that determination was impermissibly based on stereotypes and assumptions, not on objective medical evidence. The fact that other pregnant employees may have needed or appreciated special accommodation that respondents provided did not relieve respondents of the responsibility to not to make the assumption that complainant was not capable of heavy work. ***----- In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 273 (1998)***.

❑ When respondent's bar manager requested medical information about any restrictions on complainant's work due to her pregnancy, the commissioner held this did not constitute illegal different treatment because of sex since the evidence did not show that respondent treated complainant differently than other workers with temporary disabilities, and the law permitted respondent to request information about a worker's ability to perform her job. The commissioner took guidance from OAR 839-007-0510(5) (which took effect after complainant's employment) and *former* OAR 839-06-235 (BL 2-1984), which, under some circumstances, permit an employer to inquire whether an individual has the ability to perform the duties of the position occupied. ***----- In the Matter of Benn Enterprises, Inc., 16 BOLI 69, 76-78 (1997).***

❑ Complainant, a cocktail waitress, claimed that respondent's manager cut her hours in half after he learned she was pregnant. When the evidence showed that: (1) complainant had no agreement with respondent for any set number of work hours per day or per week; (2) waitresses' hours normally varied each week; and (3) the summer was respondent's slowest season and everyone's hours were reduced, the commissioner held that the agency did not prove that respondent cut complainant's hours significantly, much less in half. The preponderance of credible evidence in the whole record regarding work hours did not prove that complainant was treated differently than other non-pregnant cocktail waitresses, nor did it support an inference that respondent cut complainant's hours because she was pregnant. ***----- In the Matter of Benn Enterprises, Inc., 16 BOLI 69, 76 (1997).***

❑ Complainant, a cocktail waitress, claimed that respondent's manager discharged her because she was pregnant. The commissioner found no violation of ORS 659.030(1)(a) when the evidence showed that the manager laid complainant off and attempted to call her back to work, but complainant never returned his calls; the manager credibly testified that complainant's pregnancy had nothing to do with the layoff; and there was no persuasive evidence that this reason was pretextual. ***----- In the Matter of Benn Enterprises, Inc., 16 BOLI 69, 78 (1997).***

❑ Complainant, who was breast-feeding her newborn baby, experienced breast leakage. In discharging complainant, respondent's manager commented that she had returned to work too soon after giving birth. The commissioner found that complainant was fired for a condition related to pregnancy and childbirth, and was therefore discharged due to her sex, in violation of ORS 659.029 and 659.030. ***----- In the Matter of Motel 6, 13 BOLI 175, 184-85 (1994).***

❑ Complainant, a pregnant salesperson, was discharged for alleged lack of acceptable sales production. The commissioner found that respondent's reason was pretextual when two of the managers who participated in the decision to discharge her "were

influenced" in their evaluation by knowledge of her pregnancy. The forum found that respondent's managers thought that complainant's pregnancy would make her performance worse or prevent it from improving, "an impermissible standard." Respondent violated ORS 659.030(1)(a.) ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 65 (1990).***

❑ Respondent was guilty of sex discrimination when complainant's pregnancy, combined with her being overweight, which respondent treated as an impairment, played a key role in her discharge. ***----- In the Matter of Baker Truck Corral, Inc., 8 BOLI 118, 138 (1989).***

❑ When respondent employer and union agreed to purchase a medical benefits policy that provided benefits to the spouses of female employees but excluded coverage for pregnancy of the spouses of male employees, the forum found that respondent employer's failure to provide equal medical benefits constituted discrimination in the "compensation, terms and conditions" of employment on the basis of sex and that respondent union's failure to reopen the collective bargaining agreement to obtain such benefits constituted discrimination. ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 89 (1983).***

❑ When the complainant showed that she had worked for respondent in another location satisfactorily; she had worked for respondent for 27 days in a manner which she had reasonably believed was satisfactory; and she was discharged after telling her supervisor she was pregnant; the commissioner found this evidence was an adequate prima facie case. The inference was raised and a presumption created that respondent's discharge of complainant was more likely than not based upon her sex and pregnancy. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 200, 202 (1982).***

❑ When a respondent claimed that its discharge of a probationary employee was not an uncommon practice and gave complainant a reason other than pregnancy for her discharge, the commissioner found that respondent's statements met respondent's burden of setting forth nondiscriminatory reasons for complainant's discharge. When the agency presented evidence that complainant did not receive any criticism of her job performance before discharge, a claim unrebutted by respondent; respondent stated reasons that were of a nonspecific nature when compared with another discharged employee's record that was offered as evidence; and the time proximity of complainant's notification to respondent of her pregnancy and her discharge (the next day), the commissioner found that respondent's explanation was not credible and respondent would not have discharged complainant, had she not been pregnant. For this reason, the forum found that respondent discharged complainant because of her sex and pregnancy. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 200, 202 (1982).***

❑ When complainant worked satisfactorily as a bookkeeper for respondent for nearly three months and was terminated immediately after she advised her supervisor that she was pregnant, the forum determined that complainant was unlawfully discharged because of her sex, in violation of ORS 659.030(1), when respondent could not support its defense that complainant was discharged for poor work performance. Respondent merely provided statements to that effect, but the supervisor who allegedly made the statement failed to appear at hearing and the personnel manager could not verify the statements. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 200-02 (1982).***

❑ Respondent selected complainant, whom he knew was pregnant, for discharge during a period of declining business. The forum accepted respondent's reason for termination -- that he believed complainant would be a temporary employee – as a legitimate, nondiscriminatory reason when the evidence showed that, before announcing her pregnancy, complainant had stated she was seeking other employment and would only be working "a short time" for respondent. ***----- In the Matter of International King's Table, Inc., 3 BOLI 29, 30-31 (1982).***

❑ In a sex/pregnancy case, the forum took official notice of the fact that among human beings, only females become pregnant. ***----- In the Matter of International Kings Table, Inc., 3 BOLI 29, 31 (1982).***

❑ When respondent employer was a member of a union-employer trust fund established by collective bargaining to pay premiums of insurance policies for disability, medical and dental benefits for employees, the exclusion of pregnancy from the weekly income benefits for disability was an unlawful employment practice based on sex in violation of ORS 659.030 for which the employer was jointly liable. The commissioner specifically found that the trust agreement did not preclude the employer from providing benefits in addition to those provided through the trust. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 190 (1981).***

❑ When the commissioner found complainant's pregnancy played a key role in respondent's decision not to allow her to return to work after maternity leave, but respondent produced evidence of personality and loyalty problems that had been documented prior to the pregnancy, the commissioner also found that the pregnancy did not play a key role in respondent's recommendation not to offer her a contract for the next year, stating that the agency could not "merely presume the continuation of unlawfulness." ***----- In the Matter of Polk County E.S.D., 1 BOLI 280, 287-88 (1980).***

Affirmed without opinion, *Donaldson v. Polk County ESD,* 50 Or App 611, 625 P2d 1390 (1981).

❑ When respondent required complainant to remove herself from the classroom before her pregnancy became "unseemly," the commissioner found this to be a violation of ORS 659.030, as the decision infringed on complainant's right to work and would have caused her to forfeit pay. ***----- In the Matter of Polk County E.S.D., 1 BOLI 280, 288 (1980).***

Affirmed without opinion, *Donaldson v. Polk County ESD,* 50 Or App 611, 625 P2d 1390 (1981).

❑ When respondent had a sick leave policy, respondent's failure to award complainant sick pay

benefits for absence due to her childbirth related disability constituted discrimination based on sex in terms and conditions of employment in violation of ORS 659.030. ***----- In the Matter of Polk County E.S.D., 1 BOLI 280, 287 (1980).***

Affirmed without opinion, *Donaldson v. Polk County ESD,* 50 Or App 611, 625 P2d 1390 (1981).

❑ When a pregnant complainant, a clerk in a fabric store, took excessive breaks, rested on the displays respondent at the counter, and requested help from others to keep her department in order, and her physician testified that she was able to work except for heavy lifting, the commissioner found that, although her condition may have contributed to the "overall quality of her performance," the "weight of the evidence leads to a conclusion that performance itself, rather than pregnancy, was the reason for discharge." ***----- In the Matter of Cornet Stores, 1 BOLI 208, 209-10 (1979).***

❑ Respondent's failure to allow use of accumulated sick leave for pregnancy disability was sex discrimination in violation of ORS 659.030(1) when respondent employer could not show that such a policy was the result of a bona fide occupational requirement reasonably necessary to the normal operation of its business. ***----- In the Matter of School District Union High 7J, 1 BOLI 163, 170 (1979).***

❑ Pregnancy is a natural condition and childbirth is a natural process for females. ***----- In the Matter of School District No. 1, 1 BOLI 1, 19 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ Respondent violated ORS 659.030 since August 21, 1969, the effective date of the anti-sex discrimination legislation administered by the commissioner, by continuously discriminating against all female teacher employees of the district by requiring the resignation of pregnant probationary teachers and requiring lengthy leaves of absence of tenured pregnant teaches regardless of the circumstances in each individual's case. Respondent violated ORS 659.030 since on or about September 1969 by continuously discriminating against complainant in employment and in the terms or conditions thereof with respondent because of her sex. ***----- In the Matter of School District No. 1, 1 BOLI 1, 19 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ With or without a specific statute preventing discrimination based upon sex, several tribunals have held the conduct of school boards to be arbitrary and unconstitutional when pregnant probationary teachers and other female employees were either not granted maternity leaves or were forced to resign. The civil rights laws of Oregon are not more permissive than the 14th Amendment in this field. ***----- In the Matter of School District No. 1, 1 BOLI 1, 18 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ When a school district required pregnant probationary teachers to resign and pregnant tenured teachers to take an extended absence, the forum found that respondent discriminated against complainant and all persons similarly situated, namely female teachers, "as a consequence of artificial, arbitrary and unnecessary barriers imposed by [the district] upon female teachers, that class of employees suffered unequal treatment by their employer based upon their sex." ***----- In the Matter of School District No. 1, 1 BOLI 1, 13 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

31.2 --- Employment

31.2.1 --- Hiring, Promotion

❑ On remand from the Oregon Court of Appeals, the commissioner explained the finding of sex discrimination using the standards articulated by the U.S. Supreme Court in *McDonnell-Douglas v. Green,* 47 US 792 (1973), and in *Texas Department of Community Affairs v. Burdine,* 450 US 248 (1981). ***----- In the Matter of Jeffrey Brady, 4 BOLI 211, 217 (1984).***

Order on remand of 2 BOLI 58 (1980) for clarification of finding of sex discrimination from *Brady, DMD v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982).

❑ When the owner of a restaurant maintained a discriminatory policy of hiring only males to wait on tables in the evening, the commissioner nevertheless found that a female complainant busperson was denied a promotion to evening waiter because of her poor qualifications and would not have been hired as a waiter even if respondent had not maintained the policy. Complainant had a poor table-side manner, attitude and personality problems, was often sloppy and unkempt in violation of policy, was not reliable, and had lied about being ill. The commissioner stated that "[r]espondent] 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 [r]espondent's discretion." ***----- In the Matter of The Riverhouse of Bend, 3 BOLI 171, 177-79 (1982).***

❑ The forum found that respondent's policy of hiring only males to wait tables during the evening constituted an unlawful employment practice under ORS 659.030(1)(a). ***----- In the Matter of The Riverhouse of Bend, 3 BOLI 171, 176 (1982).***

❑ Complainant, a female corrections officer, applied for a management position with the Corrections Division, but a male applicant with greater experience was selected. The forum found that respondent had failed to promote complainant based on an experience criterion that discriminated against complainant because of her sex. The facts established that respondent had a policy and practice of not permitting female employees to work with male prisoners that operated as a bar that kept complainant from obtaining the experience that distinguished her from the male applicant in significant respects. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 67-69 (1982).***

❑ Complainant, a male busboy at respondent's restaurant, was refused a job as waiter based on respondent's policy of hiring only male busboys and only female waiters. The forum found that respondent's policy violated ORS 659.030(1)(a), that respondent committed an unlawful employment practice by refusing to hire complainant, and that complainant, who had complained about the policy and was terminated, was discharged on the basis of his sex. ***----- In the Matter of Love's Woodpit Barbeque Restaurant, 3 BOLI 18, 24 (1982).***

❑ When a female complainant was discriminated against based on her sex, the commissioner used the model for a prima facie case set forth in *McDonnell Douglas Corp. v. Green,* 41 US 792 (1973) to determine whether any injury resulting from respondent's unlawful conduct was compensable. Such a case includes proof that: (1) 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 those qualifications; and (4) after rejecting complainant, the employer continued to seek applications from persons with complainant's qualifications. The commissioner found that complainant was a member of a protected class, but that the agency had not established that complainant was qualified for the position. The commissioner can award damages for lost wages only if the agency establishes either that complainant was qualified for the position for which others were hired, or a male with qualifications equal to complainant's was hired. ***----- In the Matter of McCoy Oil Company, 3 BOLI 9, 13-15 (1982).***

❑ Complainant answered an advertisement by respondent for the position of "furnace repair person" by calling the listed number and was advised by respondent's agent that respondent could not hire a woman, that a woman "might get raped," that it was "no job for a woman," and that it would do no good to put in an application. The forum found that respondent unlawfully discriminated against complainant on the basis of sex in violation of ORS 659.030(1) by denying her the opportunity to submit an application. ***----- In the Matter of McCoy Oil Company, 3 BOLI 9, 13 (1982).***

❑ Application for a position need not be made when it would be a futile gesture. When complainant, a female, was advised that the position she sought was a "man's job" and that it would do no good to apply, the forum found that application for the position would have been futile. ***----- In the Matter of McCoy Oil Company, 3 BOLI 9, 11, 14 (1982).***

❑ In a sex discrimination hiring case, the score on an oral interview made up 40% of the total score. One of the four interview board members admitted a bias against female police officers that he expressed to the rest of the board. At least one other board member may have shared that bias. Three of the four board members were aware of sex bias among current police personnel. The applicant rating was subjective enough to allow sex bias to operate, in that scoring of another factor weighted at 20% undervalued complainant while overvaluing male candidates. The commissioner found that complainant's female sex played "at least a key role in respondent's failure to hire her as a police officer * * *." ***----- In the Matter of City of Dallas, 2 BOLI 93, 109 (1981).***

❑ When a female complainant was a finalist for the position of police officer, the absence of the successful male candidate's application from the evidence presented by respondent limited the commissioner to the male's known experience and education in assessing his selection for the reason that his overall score, which was higher than complainant's, was otherwise based on ratings of an oral interview board that were susceptible to "subjectivity, inconsistency and bias." ***----- In the Matter of City of Dallas, 2 BOLI 93, 108 (1981).***

❑ Complainant was hired as and worked as a clerk dispatcher and thereafter, with supervisory approval, wore a police uniform, attended police training, became certified, and was given sworn officer status to assist in a limited capacity. The commissioner found that the respondent city did not have to promote or reclassify her to police officer so long as her basic duties remained that of clerk dispatcher and she did not apply for three vacancies that existed. ***----- In the Matter of City of Dallas, 2 BOLI 93, 107 (1981).***

❑ Complainant alleged that she was not hired due to her sex. Evidence was presented that respondent hired a female before the year complainant applied and another the year after complainant applied. The commissioner found this evidence irrelevant because it did not pertain to the year in which respondent failed to hire complainant. ***----- In the Matter of Jeffrey Brady, 2 BOLI 58, 62 (1984).***

Reversed and remanded for clarification of finding of sex discrimination, *Brady, DMD v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982).

Amended order on remand, 4 BOLI 211 (1984).

❑ When complainant alleged that respondent did not hire her as a dental technician because of her sex, the

commissioner found that evidence of respondent's male/female employee ratio in the entire dental office was irrelevant because it concerned more than the dental technicians, the "work force at issue." ***----- In the Matter of Jeffrey Brady, 2 BOLI 58, 62 (1984).***

Reversed and remanded for clarification of finding of sex discrimination, *Brady, DMD v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982).

Amended order on remand, 4 BOLI 211 (1984).

❑ The commissioner found that respondent violated ORS 659.030 when a female complainant, who was qualified for the position of dental technician, had a pending application that respondent was aware of and was not offered an open position after a former male employee had rejected the position following layoff. ***----- In the Matter of Jeffrey Brady, 2 BOLI 58, 60-61 (1984).***

Reversed and remanded for clarification of finding of sex discrimination, *Brady, DMD v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982).

Amended order on remand, 4 BOLI 211 (1984).

❑ When the evidence established that, during the relevant period of time, 96.69% of the adult female population in the U.S. was under 5'9" and 97.7% of the adult female population between the ages of 25 and 34 was under 5'9", the commissioner determined that a minimum height requirement of 5'9" for the position of police officer had a disparate impact on women and that respondent's failure to allow female complainants to apply for the position was an unlawful employment practice. ***----- In the Matter of City of Portland, 2 BOLI 41, 45, 48-49 (1980).***

❑ When a male applicant was advised that respondent preferred to hire women, the commissioner found that the male's formal "application would be a futile gesture" and was not necessary to prove a violation of ORS 659.030. ***----- In the Matter of Westland Investment Company, 2 BOLI 1, 4 (1980).***

❑ A male complainant responded to a job advertisement and was advised by respondent's executive secretary that respondent preferred to hire women and that men were not encouraged to apply. When complainant had a male friend call respondent regarding the job and the male friend was similarly advised, the commissioner found that respondent had discriminated against complainant on the basis of sex. ***----- In the Matter of Westland Investment Company, 2 BOLI 1, 3 (1980).***

❑ When the commissioner found complainant's pregnancy played a key role in respondent's decision not to allow her to return to work after maternity leave, but respondent produced evidence of personality and loyalty problems that had been documented prior to the pregnancy, the commissioner also found that the pregnancy did not play a key role in respondent's recommendation not to offer her a contract for the next year, stating that the agency could not "merely presume the continuation of unlawfulness." ***----- In the Matter of Polk County E.S.D., 1 BOLI 280, 288-90 (1980).***

Affirmed without opinion, *Donaldson v. Polk County ESD,* 50 Or App 611, 625 P2d 1390 (1981).

❑ Respondent, a millworks company, directed its security company not to hire females due to its concern that it would be unsafe for females to work on the premises at night. The commissioner found that respondent discriminated against a female complainant because of sex when she was refused hire as a security guard. ***----- In the Matter of Bend Millworks Company, 1 BOLI 214, 220-21 (1979).***

❑ A female complainant applied for an advertised position of stock clerk but was not tested as to physical ability to do the work; was told by respondent's male manager that the job was "man's work"; that he did not want to work with a woman; that he did not seek "woman's work" and that complainant should not seek "man's work." The commissioner found that complainant was denied employment because of her sex. ***----- In the Matter of Healthways Food Center, 1 BOLI 205, 207 (1979).***

❑ When a supervisor interviewing applicants for hire rejected a qualified male in favor of a female applicant based in part on the reason "* * * because he's a man * * * [he would] try to climb up over others," the commissioner ruled that the male complainant's sex was a factor in respondent's rejection of his application. ***----- In the Matter of Marion County, 1 BOLI 159, 161-62 (1978).***

❑ Even though a male plant manager's protective attitude toward women, and particularly toward a female complainant, caused him to discourage her from seeking a higher position, the commissioner found that the employer did not exclude complainant from promotion when there was no evidence that the manager's opinion had been communicated to the person making the promotional selection. ***----- In the Matter of Terminal Ice and Cold Storage Company, Inc., 1 BOLI 151, 156 (1978).***

❑ Interview questions asked of a female applicant concerning her children, her mode of dress, and her means of relating to the opposite sex that a male applicant was not asked were found not to be a factor in her rejection for hire as a salesperson when she had little sales experience and a restricted motor vehicle license preventing operation of respondent's vehicles, and the successful male applicant was an experienced salesperson with an unrestricted license. ***----- In the Matter of Marv Tonkin Ford Sales, Inc., 1 BOLI 41, 45-46 (1976).***

31.2.2 --- Term or Condition of Employment

❑ When the agency alleged that complainant was subjected to disparate treatment based on her sex and/or retaliation, the forum stated that the agency must show that the treatment was discriminatory, that is, that it was not accorded to males and/or was not accorded to persons who had not opposed forbidden practices. ***-----***

In the Matter of Oregon Department of Fish and Wildlife, 16 BOLI 263, 278 (1998).

❑ When shifts first offered to complainant, a female bartender, were taken away from her because she was a female and respondent wanted a male to work those shifts, the forum found that respondent discriminated against complainant in the terms and conditions of her employment, in violation of ORS 659.030(1)(b). ***----- In the Matter of Katari, Inc., 16 BOLI 149, 159 (1997).***

> Affirmed without opinion, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).

❑ When the evidence was persuasive that complainant's sex was the only reason respondent did not schedule her to work weekend night shifts at respondent's bar, the forum found that respondent discriminated against complainant in the terms and conditions of her employment, in violation of ORS 659.030(1)(b). ***----- In the Matter of Katari, Inc., 16 BOLI 149, 159 (1997).***

> Affirmed without opinion, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).

❑ When respondent's bar manager requested medical information about any restrictions on complainant's work due to her pregnancy, the commissioner held this did not constitute illegal different treatment because of sex since the evidence did not show that respondent treated complainant differently than other workers with temporary disabilities and the law permitted respondent to request information about a worker's ability to perform her job. The commissioner took guidance from OAR 839-007-0510(5) (which took effect after complainant's employment) and *former* OAR 839-06-235 (BL 2-1984), which, under some circumstances, permit an employer to inquire whether an individual has the ability to perform the duties of the position occupied. ***----- In the Matter of Benn Enterprises, Inc., 16 BOLI 69, 76-78 (1997).***

❑ When the agency presented evidence that respondent hit or pushed two female employees as he corrected their work, but did not subject the sole male employee to such treatment, the forum applied the different or unequal treatment test in OAR 839-05-010(2)(b) and held that the agency had presented sufficient evidence to support a prima facie case of unlawful discrimination based on sex. ***----- In the Matter of Howard Lee, 13 BOLI 281, 290-91 (1994).***

❑ When the agency presented evidence that respondent hit or pushed two female employees as he corrected their work, but did not subject the sole male employee to such treatment, and respondent made no demeaning comments about women in their presence and provided promotional opportunities, pay advances, loans, free long distance calls, and emergency transportation to all his employees, male and female alike, and complainant had received a promotion and four pay raises, was allowed to receive personal calls from her children because she was a single mother, and required and received pay advances, the forum did not find that complainant was hit and pushed because of her sex. ***----- In the Matter of Howard Lee, 13 BOLI 281, 290-91 (1994).***

❑ In a sex discrimination case in which the complainant alleges she was discriminated against in compensation, the forum looks at the job content and the skill, effort, and responsibility that must be exercised on the job. When the skill, effort, and responsibility required of two jobs are the same, it is the skills that must be exercised, rather than those possessed, that determine job value. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 164 (1993).***

❑ When a disparity in pay exists between employees of different sexes, the job duties are the same or insignificantly different, and there is no factor other than sex to account for the disparity, the employer encompasses an equal pay violation of ORS 659.030. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 164 (1993).***

❑ When respondents employed a female complainant as a restaurant manager at a wage rate lower than the two male managers before her, lower than a male manager hired to replace her when complainant thought she was relocating, and lower than the male manager who was employed after her, the commissioner found that respondents discriminated against complainant because of her sex, in violation of ORS 659.030(1)(b). ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 161-62 (1993).***

❑ In an equal pay case, the commissioner found it was possible that some of a complainant's contributions as an employee were not rewarded by the employer, but stated "It is not the function of this forum to restructure the salary schedule of an employer to achieve equality and fairness between similarly situated employees unless the inequality in the salary structure is the result of a prohibited criteria such as the sex of those employees." ***----- In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 35 (1991).***

❑ When the agency charged that a female complainant was paid less as restaurant manager than males exercising the same skill, effort and responsibility at other restaurants owned by respondents, the commissioner found that the skill, effort and responsibility required to manage each restaurant differed when measured by location, customer capacity, work force size and gross sales, and determined that any pay disparity was not based on sex. ***----- In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 31-33 (1991).***

❑ When the agency established that respondent was an employer of one or more employees in Oregon; respondent employed complainant; complainant was female; respondent discriminated against complainant in compensation because of her sex; and complainant was thereby damaged, the agency presented a prima facie case that respondent violated ORS 659.030(1)(b). ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 229 (1991).***

❑ Respondent paid a majority of its probationary female employees the probationary rate based on union

scale and paid the majority of its probationary male employees the full union scale. Respondent suggested that the differential was due to differences in departments or the potential for tips. The commissioner found those reasons to be pretexts for discrimination in compensation against complainant based on her sex, in violation of ORS 659.030(1)(b). ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 227, 229-30 (1991).***

❑ When duty assignments, training opportunities, promotional opportunities, and daily civil treatment by an employer differ based upon an employee's sex, the employer is guilty of discrimination based on sex, in violation of ORS 659.030(1)(b). ***----- In the Matter of City of Umatilla, 9 BOLI 91, 104 (1990).***

Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ ORS 659.030(1)(b) makes discrimination in compensation based on sex unlawful. To show such discrimination, it is not necessary to have two persons, one male and one female, doing the same job at the same time with one being paid less than the other. When, as in this case, an employer employs individuals in serial or successor employment but pays different wages based on gender, this forum has concluded that the statute is violated. ***----- In the Matter of Courtesy Express, Inc., 8 BOLI 139, 148 (1989).***

❑ When the duties of a position require the exercise of the same skill, effort and responsibility, and the only distinction between current or past incumbents is their sex, there is a disparity in pay attributable to sex, and the measure of the damage is the difference between what the offended complainant was paid and what she should have been paid, absent the discriminatory standard. ***----- In the Matter of Courtesy Express, Inc., 8 BOLI 139, 148 (1989).***

❑ When different positions chiefly involved equivalent combinations of similar responsibilities, and similar skills and efforts were required to meet those responsibilities, and working conditions were similar, the commissioner found those positions to be substantially similar. ***----- In the Matter of City of Roseburg, 4 BOLI 105, 147 (1984).***

Affirmed, *Bureau of Labor and Industries v. City of Roseburg*, 75 Or App 306, 706 P2d 956 (1985), rev den 300 Or 545, 715 P2d 92 (1986).

❑ When respondent's agent knew or should have known that a female complainant was underpaid in comparison with certain male workers doing substantially similar work, and when respondent rejected a proposal to raise complainant's pay to be commensurate with that of those males doing substantially similar work, the commissioner inferred that respondent's decision was based on sex. ***----- In the Matter of City of Roseburg, 4 BOLI 105, 152 (1984).***

Affirmed, *Bureau of Labor and Industries v. City of Roseburg*, 75 Or App 306, 706 P2d 956 (1985), rev den 300 Or 545, 715 P2d 92 (1986).

❑ When respondent employer and union agreed to purchase a medical benefits policy that provided benefits to the spouses of female employees but excluded coverage for pregnancy of the spouses of male employees, the forum found that respondent employer's failure to provide equal medical benefits constituted discrimination in the "compensation, terms and conditions" of employment on the basis of sex and that respondent union's failure to reopen the collective bargaining agreement to obtain such benefits constituted discrimination. ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 89 (1983).***

❑ When complainant, a female records section supervisor, alleged she had been discriminated against because of her sex in that she was not paid the same as males who were sergeants performing some of the same functions as complainant, the forum found that respondent had not committed an unlawful employment practice when respondent conducted a study of office positions and the evidence established that complainant's job did not require the "skill, effort, and responsibility which were equal or substantially equal to the skill, effort, and responsibility which had been required to perform the work" of a sergeant. ***----- In the Matter of City of Salem, 4 BOLI 1, 36, 42 (1983).***

❑ When respondent paid two female department managers less than a male department manager, the forum found the wage differential was based on the difference in the size of the departments managed rather than sex. The evidence established that respondent based manager salaries on the size of the department, value of inventory, supervisory responsibilities, and whether employees were full or part time. Complainants had significantly smaller departments and inventories than the male manager and supervised a part time employee, while the male manager supervised a full time employee. Citing *Gunther v. County of Washington,* 101 SCt 2242 (1981), stated that an employer "may make a salary differential even when job duties appear the same, when the responsibility required of the individual is different." ***----- In the Matter of Tyrholm, Inc., 3 BOLI 188, 191, 193 (1982).***

❑ In order to show unlawful discrimination based on 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. A respondent's employment of one-at-a-time individuals in serial or successor employment, when respondent pays different wages based on sex, will support a conclusion of unlawful discrimination. ***----- In the Matter of C & V, Inc., 3 BOLI 152, 160 (1982).***

❑ When a female complainant was employed as a knot bumper and safety person for a logging operation but paid 50 cents per hour less than her male predecessor in the same job, the forum found that respondent's payment of lower wages to complainant than respondent paid to males doing the same job constituted discrimination in compensation, terms and conditions of employment on the basis of sex. ***----- In the Matter of C & V, Inc., 3 BOLI 152, 161 (1982).***

❑ Complainant, a female employed as a helper in a foundry, was consistently given inadequate supervision

although she complained about the situation; was told that the "movement of her breasts" was distracting to co-workers; was advised to get a "support bra" or "consider a bust-reduction operation"; and was "yelled at" for no reason. The forum determined that respondent's treatment of complainant created a "sexually discriminatory work atmosphere 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." ***----- In the Matter of Rich Manufacturing Company, 3 BOLI 137, 142 (1982).***

> Affirmed without opinion, *Rich Manufacturing Company v. Bureau of Labor and Industries*, 64 Or App 855, 669 P2d 843 (1983).

❑ When respondent, a public employer, traditionally filled the positions of recorder and treasurer with women and paid that position less than other department head positions held by men, the forum determined that respondent committed an unlawful employment practice in violation of ORS 659.030(1) on the basis of sex when complainant performed substantially equal work, requiring substantially equal skill, effort and responsibility compared to the work of other department heads. In making this determination, the forum considered the following: (1) Skill – The forum considered the educational background, job experience, complexity of the job duties; (2) Effort – The forum compared the physical effort and "on call" requirements of other department head jobs to the mental exertion and stress inherent in complainant's job; (3) Responsibility – The forum reviewed the duties of the jobs, including policy making authority, to whom the position reported, authority to hire and fire, number of persons supervised, and importance of the position to the routine operation. ***----- In the Matter of City of Cannon Beach, 3 BOLI 115, 121-23 (1982).***

❑ Complainant, a female corrections officer, applied for a management position with the Corrections Division, but a male applicant with greater experience was selected. The forum found that respondent had failed to promote complainant based on an experience criterion that discriminated against complainant because of her sex. The facts established that respondent had a policy and practice of not permitting female employees to work with male prisoners that operated as a bar that kept complainant from obtaining the experience that distinguished her from the male applicant in significant respects. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 67-69 (1982).***

❑ When respondent employer-union trust defended a complaint of sex discrimination in benefits due to pregnancy on the basis that complainant had not followed its claim procedure providing for a Board hearing and eventual arbitration, the commissioner found that the rule set forth in *Alexander v. Gardner-Denver Co.,* 415 US 36, 94 SCt 1011 (1974), relating to Title VII, the federal counterpart to ORS chapter 659, applied and that complainant could pursue her statutory remedy without first exhausting other remedies. in construing and applying similar state law. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 191 (1981).***

❑ When respondent employer was a member of a union-employer trust established by collective bargaining to pay premiums of insurance policies for disability, medical, and dental benefits for employees, the exclusion of pregnancy from the weekly income benefits for disability was an unlawful employment practice based on sex in violation of ORS 659.030 for which the employer was jointly liable. The commissioner specifically found that the trust agreement did not preclude the employer from providing benefits in addition to those provided through the trust. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 190 (1981).***

❑ When respondent defended the charges of unequal pay due to sex based on differing job classes, the commissioner found that the actual job duties performed, and not the potential or theoretical responsibilities of the higher class, were the determining factor. ***----- In the Matter of City of Portland, 2 BOLI 110, 139-40 (1981).***

> Reversed on back pay, affirmed on retaliation, *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

❑ When a female complainant who was paid as a police records clerk performed the same actual job duties as two higher paid male co-workers who were sworn police officers and paid as sworn police officers, the commissioner found that complainant exercised the same skill, effort and responsibility as her male co-workers and that the disparity in pay was due to her sex. ***----- In the Matter of City of Portland, 2 BOLI 110, 136 (1981).***

> Reversed on back pay, affirmed on retaliation, *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

❑ When it was alleged that a female complainant was paid less than males performing substantially similar work requiring substantially equal skill, effort, and responsibility under similar working conditions, the commissioner found an unlawful employment practice under ORS 659.030 based on disparate compensation due to sex, and was not limited to the narrower coverage of the Oregon Equal Pay Act. ***----- In the Matter of City of Portland, 2 BOLI 110, 136 (1981).***

> Reversed on back pay, affirmed on retaliation, *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

❑ Respondent did not violate ORS 659.030 by paying complainant, a female manager, less than respondent's two male managers when her work was not equal or substantially equal and required less skill, effort and

responsibility; complainant had less experience as a manager; complainant did not perform buying tasks; and the store she managed had less annual sales volume than the stores managed by respondent's male managers. ***----- In the Matter of Doyle's Shoes, Inc., 1 BOLI 295, 299-300 (1980).***

❑ When respondent had a sick leave policy, respondent's failure to award complainant sick pay benefits for absence due to her childbirth related disability constituted discrimination based on sex in terms and conditions of employment in violation of ORS 659.030. ***----- In the Matter of Polk County E.S.D., 1 BOLI 280, 287 (1980).***

Affirmed without opinion, *Donaldson v. Polk County ESD,* 50 Or App 611, 625 P2d 1390 (1981).

❑ When complainant alleged sex discrimination because she was compensated less than a male employee who performed some of the same functions, the commissioner found respondent had not violated ORS 659.030 when the male employee had additional duties, stating that when a wage difference exists and the skills, efforts, responsibilities, and working conditions are "equal, substantially equal or comparable to the requisite degree, wage discrimination is unlawful," but an employer is justified in compensating employees at different rates when they perform at different levels of skill, efforts, or responsibility, or when they work under dissimilar conditions, regardless of the employee's sex. ***----- In the Matter of Jenks Hatchery, Inc., 1 BOLI 275, 279 (1980).***

❑ Respondent's failure to allow use of accumulated sick leave for pregnancy disability was sex discrimination in violation of ORS 659.030(1) when respondent employer could not show that such a policy was the result of a bona fide occupational requirement reasonably necessary to the normal operation of its business. ***----- In the Matter of School District Union High 7J, 1 BOLI 163, 165 (1979).***

❑ When a female complainant was paid less than a male possessing comparable skill and performing substantially similar work under similar working conditions, respondent violated ORS 659.030, which prohibits sex discrimination. ***----- In the Matter of Terminal Ice and Cold Storage Company, Inc., 1 BOLI 151, 157 (1978).***

❑ When a female complainant requested a raise in pay to equal the pay of a male possessing comparable skill and doing substantially similar work under similar working conditions, the employer's subsequent treatment of and discharge of complainant was not only further different treatment due to sex, but also was retaliation. ***----- In the Matter of Terminal Ice and Cold Storage Company, Inc., 1 BOLI 151, 157 (1978).***

❑ Interview questions asked of a female applicant concerning her children, her mode of dress, and her means of relating to the opposite sex not asked of a male applicant were found not to be a factor in her rejection for hire as a salesperson when she had little sales experience and a restricted motor vehicle license preventing operation of respondent's vehicles, and the successful male applicant was an experienced salesperson with an unrestricted license. ***----- In the Matter of Marv Tonkin Ford Sales, Inc., 1 BOLI 41, 45-46 (1976).***

❑ Respondent violated ORS 659.030 since August 21, 1969, the effective date of the anti-sex discrimination legislation administered by the commissioner, by continuously discriminating against all female teacher employees of the district by requiring the resignation of pregnant probationary teachers and by requiring lengthy leaves of absence of tenured pregnant teaches regardless of the circumstances in each individual's case. Respondent violated ORS 659.030 since on or about September 1969 by continuously discriminating against complainant in employment and in the terms or conditions thereof with respondent because of her sex. ***----- In the Matter of School District No. 1, 1 BOLI 1, 19 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

31.2.3 --- Harassment

31.2.3.1--- Intimidating, Hostile, or Offensive Working Environment

❑ To establish sexual harassment, the agency is required to prove the following elements: (1) respondent was an employer subject to ORS 659A.001 to 659A.030; (2) respondent employed complainant; (3) complainant is a member of a protected class (sex); (4) respondent, through its proxy, engaged in unwelcome conduct (verbal or physical) directed at complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) complainant was harmed by the unwelcome conduct. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 210 (2007).***

Appeal pending.

❑ The forum reasonably inferred, from the specific actions of complainant's male supervisor -- touching a particularly intimate part of complainant's body and telling her he was "feeling her up," that his conduct was directed toward complainant because of her sex. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 211 (2007).***

Appeal pending.

❑ The act of complainant's male supervisor -- touching complainant's breast and telling her he was "feeling her up" – was unwelcome sexual conduct. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 210-11 (2007).***

Appeal pending.

❑ In a sexual harassment case, a witness credibly testified that she had received complaints about the alleged male harasser from other female employees who

were uncomfortable accompanying him alone on "garbage runs" and who did not like the way he "hugged" them. The harasser's comment to the witness ("Yeah, but just look at her tits") when the witness pointed out one female employee's work performance problems further demonstrates his conduct was part of an overall pattern of sexually aggressive behavior based on gender. Absent any evidence that he treated male employees in a similar fashion, the forum concluded that but for complainant's sex, she would not have been subjected to the harasser's offensive sexual conduct. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 211 (2007).***

Appeal pending.

❑ The standard for determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in complainant's particular circumstances. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 211 (2007).***

Appeal pending.

❑ In determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 211 (2007).***

Appeal pending.

❑ Although the case involved an isolated incident, the conduct, when viewed in light of the particular circumstances, was sufficiently severe to have created a hostile work environment and altered complainant's working conditions. Credible evidence showed the supervisor's conduct was well beyond the good natured horseplay he initially represented to law enforcement. He purposely touched complainant on an intimate part of her body without her consent. He not only squeezed her breast, he told her he was "feeling her up." As business owner and complainant's ultimate supervisor, he was directly responsible for complainant's job and regular paycheck. Her dependence on him for her livelihood made her susceptible to the terms and conditions he implied by his overt sexual conduct. Respondent had no sexual harassment policies in place and the most that complainant's supervisor could do for her was to recommend that she call the police and BOLI. With no remediation, complainant was placed in the untenable position of choosing between a regular paycheck and the likelihood that the owner's cavalier and unsolicited liberties would continue. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 211-12 (2007).***

Appeal pending.

❑ Complainant believed her supervisor's conduct toward her was hostile and sexually abusive and the forum found that any reasonable person in her circumstances would have believed the same. Based on the totality of circumstances, the forum determined that the supervisor's conduct, subjectively and objectively at best was inappropriate, demeaning, and discrimination based on sex, and, at worst, constituted sexual abuse. By any description, it was unlawful and created a hostile, humiliating, and intimidating work environment that significantly altered complainant's working conditions. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 212-13 (2007).***

Appeal pending.

❑ Respondent engaged in a pattern of verbal and physical conduct that, when viewed as a whole, permeated the workplace with more than a modicum of hostility and intimidation toward women in general and complainant in particular and created a hostile and intimidating working environment for the complainant. That conduct consisted of the following: (1) respondent regularly told jokes to complainant and her co-worker that targeted women as sexual objects and could not be characterized as isolated instances of social banter. The jokes were frequent, particularly targeted at women as sexual objects, and directly affronted complainant's sensibilities; (2) respondent demonstrated a disregard for complainant's personal boundaries by regularly approaching her from behind and massaging or caressing her shoulders and back unexpectedly and without her permission, despite her clear discomfort with his touching, he continued to sneak up on her throughout her employment and subject her to unwanted physical contact; (3) respondent's regular use of complainant's work station in the evenings and on weekends to access pornographic websites and intentional leaving of graphic sexual images and semen for her to discover; and (4) complainant's daily exposure to a barrage of sexually explicit e-mail. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 285-86 (2004).***

❑ As complainant's employer, respondent had an obligation to take prompt remedial action to eliminate harassment even when the offensive conduct was by others he did not employ. In workplaces where employees have the ability to send and receive e-mail at will, employers have a duty to determine what steps can be taken to stop offensive e-mail that generates from outside the workplace. While evidence showed that current technology does not provide a fail-safe mechanism for filtering out or blocking all unwanted junk e-mail, the forum held that reasonable care includes an employer's obligation to use whatever current technology is available to block patently inappropriate e-mail and reduce the volume of offensive junk mail. Respondent did not use that technology and was held liable for the daily barrage of sexually explicit e-mail that was unwelcome and sufficiently pervasive to alter complainant's working conditions and create a hostile working environment. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 284-85 (2004).***

❑ When respondent engaged in sexual conduct towards complainant, a preponderance of the evidence established that respondent's conduct was unwelcome. That evidence consisted of complainant's credible testimony that she neither welcomed nor invited

respondent's sexual conduct; a co-worker's credible testimony that complainant stated several times that she "hated it" when respondent touched her and was noticeably distressed whenever he massaged her neck and shoulders without invitation; the co-worker's credible testimony that complainant openly expressed her disgust whenever respondent recited his offensive jokes to both of them and that she and complainant signaled their disinterest by words or body language; and credible evidence that complainant was outspoken to her co-worker and others, including respondent, about the appearance of sexually explicit website images on her computer screen and was frustrated by her inability to stop its recurrence. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 283-84 (2004).***

❑ Complainant's credible testimony, which was corroborated by other credible evidence, established that Complainant was subjected to sexual conduct directed towards her based on her gender. Respondent's sexual conduct consisted of the following: respondent regularly approached complainant from behind and caressed her neck and shoulders in a manner that caused her extreme discomfort; respondent stroked her hand in a sexual manner on at least one occasion; respondent repeatedly told her and another female employee sexually explicit jokes that were degrading to women; and respondent used complainant's workstation on several occasions to access pornographic websites on her computer for sexual gratification and purposely left behind evidence of his activities, including sexually explicit images on her computer screen and apparent semen traces on her desk. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 283 (2004).***

❑ The agency's prima facie case in a sexual harassment case consists of evidence of the following: (1) respondent was an employer subject to *former* ORS 659.010 to 659.110; (2) respondent employed complainant; (3) complainant is female; (4) respondent made unwelcome sexual advances, requests for sexual favors, or engaged in unwelcome conduct of a sexual nature directed toward complainant because of her gender; (5) the unwelcome conduct was made an implicit term or condition of complainant's employment or was so severe or sufficiently pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) complainant was harmed by the unwelcome conduct. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 282 (2004).***

❑ Respondent touched or patted her employees on occasion, touched complainant's hair on one occasion, remarked she wished her husband had long hair because she thought it was "sexy," made occasional comments to male employees about the appearance of their "rears" in "tight pants," and made one comment to complainant that she would "recognize that butt anywhere." Based on the totality of circumstances, and in the absence of credible evidence that respondent's conduct toward complainant or any other employee was unwelcome, the forum concluded that respondent did not create or maintain a sexually intimidating, hostile, or offensive work environment. ***----- In the Matter of Barbara Bridges, 25 BOLI 107, 123 (2003).***

❑ In order to prevail on its hostile environment claim, the agency was required to present evidence to show: (1) respondent was an employer subject to former ORS 659.010 to 659.110; (2) respondent employed complainant; (3) complainant was a member of a protected class; (4) respondent made unwelcome sexual advances, requests for sexual favors, or engaged in unwelcome conduct of a sexual nature directed toward complainant because of his gender; (5) the unwelcome conduct was so severe or sufficiently pervasive to have the purpose or effect of creating a hostile, intimidating, or offensive work environment; and (6) complainant suffered harm as a result of the unwelcome conduct. ***----- In the Matter of Barbara Bridges, 25 BOLI 107, 121-22 (2003).***

❑ The standard for evaluating whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in the complainant's particular circumstances. Respondent's conduct, while only verbal, consisted of ongoing sexual slurs and jokes, repeated remarks to complainant detailing his sex life, and at least one reference to complainant as a "fucking slut" during the six months she was employed. Complainant was the only employee and a captive audience to his ongoing behavior that occurred in relatively close quarters. The forum found respondent engaged in a pattern of offensive conduct that particularly demeaned women and that from the perspective of a reasonable person in complainant's circumstances, it was sufficiently pervasive as to create an offensive working environment. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 32 (2002), amended 23 BOLI 67 (2002).***

❑ When there was no evidence that complainant engaged in any conduct that would invite the obscenity that pervaded complainant's work environment, or that she used vulgar language in the workplace or initiated any sexually oriented conversations with respondent or anyone else, and there was evidence that complainant told respondent at least once that she was not interested in hearing about his sexual exploits and expressed concern to another person about respondent's language, the forum found there was sufficient evidence in the record to conclude that complainant found respondent's verbal conduct unwelcome. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 32 (2002), amended 23 BOLI 67 (2002).***

❑ Respondent engaged in a pattern of verbal conduct that included regular remarks to complainant about his sexual exploits, including accounts of his lunches at strip clubs, his "$20 dates" with prostitutes, and "blow jobs" he claimed to receive regularly. He also often referred to women as "fucking bitches" or "god damn fucking sluts" within complainant's earshot, and at least once during her six-month employment called her a "god damn fucking slut." Due to the proximity of their respective desks, complainant regularly overheard respondent relate sexually explicit jokes, usually involving oral sex, to others over the telephone. Additionally, complainant was required to perform some of her job duties in respondent's office and several times came across publications depicting unclad women on the covers.

While there was no evidence that respondent intended anyone to see the publications, he was, at best, indifferent to their detection. The forum found that respondent's conduct was sexual conduct that was particularly offensive to women and directed at complainant, respondent's only employee, because of her gender. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 31 (2002), amended 23 BOLI 67 (2002).***

❑ In order to prevail in a sexual harassment complaint, the agency is required to prove the following elements: (1) respondent is an employer defined by statute; (2) complainant was employed by respondent; (3) complainant is a member of a protected class; (4) respondent, through its proxy, engaged in conduct of a sexual nature toward complainant because of her gender; (5) the conduct created a hostile, intimidating, or offensive work environment; (6) complainant was harmed by the conduct. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 31 (2002), amended 23 BOLI 67 (2002).***

❑ The agency proved that one of the respondent's supervisors once tugged on the complainant's skirt, told her she had a nice dress, and made a comment to her along the lines of "looking mighty fine today, are you." The forum found that those incidents, standing alone, were not sufficiently severe or pervasive to create a hostile, intimidating, or offensive work environment. ***---- In the Matter of Moyer Theatres, Inc., 18 BOLI 123, 136 (1999)***.

❑ Same-sex sexual harassment may constitute a violation of ORS 659.030(1)(b), whether or not the harassment is motivated by sexual desire. ***----- In the Matter of Western Stations Co., 18 BOLI 107, 119 (1999)***.

❑ In determining whether conduct has created an intimidating, hostile or offensive working environment, the forum applies an objective standard, that is, it determines whether a reasonable person would arrive at that conclusion. ***----- In the Matter of Western Stations Co., 18 BOLI 107, 119-20 (1999)***.

❑ The legal analysis for a same-sex sexual harassment case is the same as in any other sexual harassment case. To meet its burden of proving that respondents sexually harassed complainant, the agency had to produce evidence establishing the following elements: (1) respondents were employers subject to ORS 659.010 to 659.110; (2) respondents employed complainant; (3) complainant is female; (4) respondents, through their agents, engaged in unwelcome verbal or physical conduct directed at complainant because of her sex; (5) the unwelcome conduct had the purpose or effect of creating an intimidating, hostile or offensive working environment; (6) respondent knew or should have known of the conduct; and (7) complainant was harmed by the conduct. ***----- In the Matter of Western Stations Co., 18 BOLI 107, 119 (1999)***.

❑ When a female co-worker's jokes and remarks were vulgar and offensive, but she did not make jokes for complainant's benefit, hoping they would adversely affect her; the remarks were not inherently demeaning or belittling to women more so than men; and the co-worker was not motivated by a hostility toward women in the workplace and her remarks did not evince any such hostility; the forum found that the jokes and remarks did not constitute sexual harassment of the complainant. ***---- In the Matter of Western Stations Co., 18 BOLI 107, 120 (1999)***.

❑ To establish a prima facie case of sexual harassment, the agency must present evidence to show: (1) respondent was an employer subject to ORS 659.010 to 659.110; (2) respondent employed complainant; (3) complainant is a member of a protected class (sex); (4) respondent engaged in unwelcome verbal or physical conduct directed at complainant because of her protected class; (5) the conduct had the purpose or effect of creating an intimidating, hostile or offensive work environment; (6) respondent knew or should have known of the conduct; and (7) complainant was harmed by the conduct. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 92 (1998)***.

❑ Whether particular conduct directed toward a person constitutes sexual harassment is viewed from the perspective of a reasonable person in the circumstances of the person alleging harassment. This is an objective standard. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 94 (1998)***.

❑ The forum found that respondent created an intimidating, hostile, and offensive working environment when he frequently directed unwelcome verbal and physical conduct of a sexual nature at complainant; he put his hands under complainant's shirt, touched her, and rubbed her back; he once approached complainant from behind and put his arms on either side of her, holding a knife in front of her; he once appeared in his bathrobe in the office; the conduct occurred in respondent's home office, which was located close to his bedroom, which had an open door; and these frequent incidents took place during a span of only a few weeks. ***---- In the Matter of Executive Transport, Inc., 17 BOLI 81, 93 (1998)***.

❑ The agency established that respondent's conduct was unwelcome to complainant through credible testimony that complainant repeatedly and clearly objected to respondent's conduct, physically moved away from him, refused his social invitations, and attempted to discuss his harassing behavior. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 93 (1998)***.

❑ The agency established that respondent's conduct was directed at complainant because of her sex through evidence that he attempted to date her, spoke to her of his sexual encounters with other women, stated that sex relaxed him, and stated that complainant "was naïve and had been hurt by other men and that he was not like other men." ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 93 (1998)***.

❑ In determining whether a working environment is intimidating, hostile or offensive, the forum considers the totality of the circumstances, including the nature of the conduct (verbal or physical); the context in which the alleged incidents occurred; the frequency, severity, and

pervasiveness of the conduct; and whether the conduct was physically threatening or humiliating. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 92 (1998)***.

❑ Respondents were found not to have had constructive notice of sexual harassment by complainant's co-worker when the co-worker's conduct was neither pervasive or open and notorious, and when one respondent was only generally aware of only one prior complaint of a sexual nature against the co-worker that was made many months before complainant's employment with respondents. ***----- In the Matter of Wing Fong, 16 BOLI 280, 294 (1998).***

❑ A prima facie case of sex harassment by a co-worker consists of the following: (1) respondents were employers as defined by statute; (2) complainant was employed by respondents; (3) complainant is a member of a protected class (sex); (4) respondents' employee made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature directed at complainant because of her sex; (5) the employee's conduct had the purpose or effect of creating a hostile, intimidating, or offensive work environment; (6) respondents knew or should have known of the offensive conduct and failed to take immediate and appropriate corrective action; and (7) complainant was harmed by the conduct. ***----- In the Matter of Wing Fong, 16 BOLI 280, 290 (1998).***

❑ A respondent employer is liable for sexual harassment by a co-worker if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action. ***----- In the Matter of Wing Fong, 16 BOLI 280, 290 (1998).***

❑ To establish a prima facie case of sexual harassment, the agency must present evidence to show that: (1) respondent is an employer defined by statute; (2) complainant was employed by respondent employer; (3) complainant is a member of a protected class (sex); (4) respondent employer, or respondent employer's agent, in the workplace made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature directed at complainant because of complainant's sex; (5) the conduct had the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment, or submission to such conduct was made an explicit or implicit term or condition of employment; (6) respondent employer had knowledge of the offensive conduct; and (7) complainant was harmed by the conduct. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 136 (1997).*** *See also In the Matter of A.L.P. Incorporated, 15 BOLI 211, 222 (1997)(also noting possibility of non-employee harassment), affirmed, A.L.P. Incorporated, v. Bureau of Labor and Industries, 161 Or App 417, 984 P2d 883 (1999); In the Matter of Soapy's, Inc., 14 BOLI 86, 96 (1995); In the Matter of Kenneth Williams, 14 BOLI 16, 24 (1995).*

❑ A male respondent, the owner and president of respondent corporation that operated a café, subjected three female complainants to unwanted and offensive sexual touching and comments because of their sex, creating a hostile and abusive work environment for each complainant. The commissioner held that the individual respondent sexually harassed and discriminated against each complainant because of her sex in terms and conditions of employment, whereby the respondent corporation violated ORS 659.030(1)(a) and the individual respondent violated ORS 659.030(1)(g) by aiding in the unlawful acts. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 133-36 (1997).***

❑ When respondent corporation's owner and president subjected a female complainant to demeaning, sexually offensive comments on a frequent basis, including references to his own and her sex life and referring to complainant as a "dumb fucking blond bitch," often threatened to "bitch slap" complainant, which put her in fear, and physically struck complainant on the top of the head and across her face, the commissioner found that the owner engaged in unwelcome physical and verbal conduct of a sexual nature; directed at complainant because of her sex; that the conduct had the effect of creating an intimidating, hostile, and offensive work environment; that submission to such conduct was made an explicit term or condition of employment; that the corporation knew of the conduct, and that the complainant was harmed by it. The commissioner held that the owner sexually harassed complainant, that the respondent corporation violated ORS 659.030(1)(b), and that the owner aided and abetted the corporation's unlawful practices, in violation of ORS 659.030(1)(g). ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 219-22 (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ An employer is liable for harm caused to an individual when the individual is subjected to a co-worker's unwelcome, sexually-oriented physical and verbal conduct because of her sex and the employer knew or should have known of the conduct and took no action to correct or eliminate it. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 93-94 (1996).***

Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 301, 954 P2d 804 (1998).

❑ When a female complainant repeatedly reported the unwelcome, pervasive, sexually oriented physical and verbal conduct of a male co-worker towards her to her supervisor, and respondent employer took no action to correct, modify, or prevent the unwelcome behavior, respondent's failure to act created a sexually intimidating and offensive work environment that became a condition of complainant's employment. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 93-94 (1996).***

Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 301, 954 P2d 804 (1998).

❑ An employer is liable for harm caused to an individual when the individual is subjected to a co-worker's unwelcome, sexually oriented physical and

verbal conduct because of her sex, and the employer knew respondent should have known of the conduct and took no action to correct or eliminate it. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 93-94 (1996).***

> Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 301, 954 P2d 804 (1998).

❑ When respondents in a sexual harassment case excepted to a proposed order that did not include a factual finding regarding an incident when complainant, while on a camping trip, went swimming nude in the company of strangers, the commissioner rejected the exception, commenting "[s]exual harassment is not about whether the victim is chaste or angelic; it is in most cases but whether the behavior of the harasser is an unwelcome exercise of the inherent imbalance of power between owner and employee. A complainant's life outside of work has no bearing on whether the employer discriminated against her in the terms and conditions of employment by subjecting her to sexual harassment." ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 286-87 (1996).***

❑ Same sex sexual harassment may constitute unlawful discrimination under ORS 659.030(1)(b) in the hostile environment context. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 253 (1995).***

❑ Sexual harassment is sex discrimination. ***----- In the Matter of Soapy's, Inc., 14 BOLI 86, 96 (1995).*** *See also In the Matter of William Kirby, 9 BOLI 258, 280 (1991).*

❑ When respondent's customer sexually harassed complainant, complainant repeatedly complained to respondent's management about the customer and tried to permanently eject him from respondent's liquor and entertainment establishment, but respondent failed and refused to take any immediate and appropriate, or any, corrective action, the forum held that respondent's failure to take such action made the continued sexual harassment a terms and conditions of complainant's employment, in violation of ORS 659.030(1)(b), and made respondent liable for the effects of the customer's activities. ***----- In the Matter of Soapy's, Inc., 14 BOLI 86, 94 (1995).***

❑ When two female complainants testified that they were subjected to unwelcome sexual touching by their immediate supervisor, who was respondent's manager, and other witnesses had seen the incidents or witnessed similar behavior by the manager, that evidence preponderated over the manager's unsupported denials. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 11-12 (1994).***

❑ Over a two day period: (1) respondent, who was complainant's supervisor, asked complainant to go out with him and made an unwelcome visit to complainant's home while intoxicated; (2) complainant received flowers, which she concluded came from respondent; (3) complainant declined to join a group of employees for dinner because she was uncomfortable with respondent; and (4) respondent called complainant at home to review performance evaluations of other workers, asked whether complainant would have sex with her boyfriend that night, and complainant refused to join respondent at a bar or permit him to come to her house. The forum found that respondent's unwelcome conduct was not sufficiently severe and pervasive so as to create an intimidating, hostile, or offensive work environment. ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 89-90 (1993)***.

❑ To present a prima facie case of a violation of ORS 659.030(1) for sexual harassment, the agency must present evidence on the following elements: (1) the respondent is a respondent as defined by statute; (2) the complainant is a member of a protected class; (3) the complainant was harmed by an action of the respondent; and (4) the respondent's action was taken because of the complainant's membership in the protected class. ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 88 (1993).*** *See also In the Matter of RJ's All American Restaurant, 12 BOLI 24, 29 (1993); In the Matter of C. Vogar'd Amezcua, 11 BOLI 197, 203 (1993).*

❑ Respondent twice grabbed complainant by the waist and then slid his hands up until he was touching her breasts; suggested to complainant that she could pay him for cigarettes by giving him sexual favors; had unwelcome sexual contact with another female employee; and made a show of giving attention to attractive female customers. The forum found that respondent's conduct was unwelcome to complainant, and that a reasonable person would have found this working environment to be intimidating, hostile, and offensive. The forum found these facts proved the fourth element of the prima facie case of sexual harassment – that respondent's actions were taken because of complainant's sex, *i.e.*, because of her membership in the protected class. ***----- In the Matter of RJ's All American Restaurant, 12 BOLI 24, 29-30 (1993).***

❑ Respondent made sexual advances to complainant, made requests for sexual favors, made numerous comments of a sexual nature, and grabbed complainant's buttocks, all because of her sex. Respondent's actions were unwelcome and had the purpose or effect of creating an intimidating and, offensive work environment. The commissioner found this constituted "hostile environment" sexual harassment, in violation of ORS 659.030(1)(b). ***----- In the Matter of C. Vogar'd Amezcua, 11 BOLI 197, 204 (1993).***

❑ Complainant's supervisor asked complainant for dates and to take weekend trips with him on a nearly daily basis despite her repeated refusals; made repeated vulgar sexual comments about complainant and other female employees and customers that complainant learned of from male co-workers; used company records to discover complainant's home address, then made an unannounced and unsolicited evening visit to complainant's home, during which, in front of complainant's 11-year-old son, put his arm around complainant and suggestively played with her hair; and led complainant to believe that he was responsible for a change in her work schedule in retaliation for her resistance to his overtures and could change the schedule back in exchange for her cooperation with him.

The forum found that the supervisor's conduct was clearly sufficiently severe and pervasive to establish what a reasonable person would consider an intimidating, hostile, or offensive work environment. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 195-96 (1992).***

Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ Statements of a supervisor that contribute to a intimidating, hostile, or offensive work environment need not be made directly to a complainant. Depending on the circumstances of each case, statements conveyed to other employees or to customers may significantly affect the complainant's work environment. This impact is particularly obvious when the complainant learns of the statements from co-worker and must bear the embarrassment of having a supervisor communicate his sexual desires for her to co-workers. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 195-96 (1992).***

Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ To constitute unlawful sexual harassment, the behavior or activity at issue must be sufficiently severe and pervasive so as to create what a reasonable person would consider an intimidating, hostile, or offensive work environment. The forum's approach to this issue recognizes an inverse relationship between the requisite severity and pervasiveness of harassing conduct – as the severity of the conduct increases, the frequency of the conduct necessary to establish harassment decreases. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 195-96 (1992).***

Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ The behavior or activity of an employer or employer's agent creating an intimidating, hostile, or offensive work environment must be sexual in nature, unwelcome to the complainant, and based on sex. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 195 (1992).***

Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ When the individual employer repeatedly snapped the bra straps of female employees including complainant, squirted water on their breasts and buttocks, crowded against them in a sexual manner, touched their breasts and buttocks, and commented on their breasts and on their private lives, the commissioner found that frequent, severe and pervasive sexual harassment occurred, in violation of ORS 659.030(1)(b). ***----- In the Matter of Lee Schamp, 10 BOLI 1, 17-18 (1991).***

❑ When a respondent employer alleged, in defense of sexual harassment charges, that complainant was predisposed to perceive sexual behavior when none occurred and had initiated the proceeding as retaliation for respondent's prosecution of her for drunken driving, and the only evidence revealed an unpursued rape accusation over five years prior to employment and a driving conviction over seven years prior to employment, the commissioner found those occurrences too remote in time to be persuasive as defenses. ***----- In the Matter of William Kirby, 9 BOLI 258, 280 (1991).***

❑ When respondent directed unwelcome sexually abusive and intimidating language and gestures toward complainant because of her sex and created an intimidating, hostile, and offensive work environment, respondent committed an unlawful employment practice in violation of ORS 659.030(1)(b). ***----- In the Matter of William Kirby, 9 BOLI 258, 273-74 (1991).***

❑ It is not a defense that an employee fails to leave employment immediately after experiencing sexual harassment. A victim of sexual harassment is often incapable of taking action for a period of time. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 215 (1991).***

❑ Respondent argued that his "crude, inappropriate and unwarranted" remarks did not constitute sex discrimination because they were directed to the complainant out of frustration and anger with the complainant's job performance and because the comments did not occur during work hours. The commissioner stated "the respondent's reasoning would allow, if not condone, the most scurrilous and demeaning terminology, undeniably sexual and gender-based, because it occurred out of an employer's disappointment with an employee, or because it occurred after work hours. That would frustrate the purpose of the statute. Employers have control over and responsibility for working conditions created by their own attitudes and responses. The law allows the termination of a worker who will not or cannot perform the duties of the job. It does not allow sexual harassment of a worker because of alleged performance problems." ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 189 (1991).***

❑ A complainant's life outside work has no bearing on whether or not a respondent discriminated against her in terms and conditions of employment by subjecting her to sexual harassment. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 188 (1991).***

❑ An owner's or manager's unwelcome, offensive speech of a sexual nature, directed toward an employee because of the employee's sex, which results in an intimidating and hostile work atmosphere, is sexual harassment. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 187 (1991).***

❑ The inherent imbalance of power between owner and employee makes it difficult for an employee to repulse an owner's inappropriate sexual remarks without fear of damaging the employee's employment status. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 187 (1991).***

❑ When respondent twice directed comments to complainant that branded her as a common prostitute, and those comments were part of an overall pattern of

continuing, deliberate behavior by respondent, the commissioner found that respondent had sexually harassed complainant in violation of ORS 659.030(1)(b). ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 187 (1991).***

❑ In a sexual harassment case, respondent argued that any offensive activity on the part of respondent occurred off the job and not as part of any employment relationship. The commissioner ruled that "time and place do not necessarily control whether there is an offense when there is an ongoing employer-employee relationship." "The mere fact that the offensive remarks to an employee were made other than during duty hours does not serve to insulate the employer from liability for harassment based on the employment relationship. Time and place were part of the total factual context from which the issue of liability was to be decided. Respondent's overt actions and the employer-employee relationship were involved." ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 175 (1991).***

❑ An employer is strictly liable for a supervisor's sexual harassment of an employee even when the company's enterprise involves mobile worksites and forecloses the employer from day-to-day oversight of its supervisory personnel. ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 78 (1990).***

❑ When an employee's supervisor makes unwelcome sexual overtures off the job, it may still create an intimidating, hostile, and offensive work environment for which the employer will be held strictly liable. ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 78 (1990).***

❑ An employer is liable for its acts and "those of its agents and supervisory employees" when those acts constitute sexual harassment." OAR 839-07-555(1). The rule imposed liability on the employer for the acts "of its agents and supervisory employees with respect to sexual harassment regarding of whether: (a) The specific acts complained of were authorized by the employer; or (b) The specific acts complained of were forbidden b the employer; or (3) The employer knew or should have known of the occurrence of the specific acts complained of." The commissioner found that the rule imposed absolute liability on an employer for sexual harassment by the employer's agent or supervisory employee, and that strict liability thereby provides a powerful incentive to absentee management both to prevent harassment before it occurs and to provide effective and accessible means of complaint and information resolution. ***----- In the Matter of Colonial Motor Inn, 8 BOLI 45, 55-56 (1989).***

❑ When two respondents were co-owners and operators of a café in which one of the respondents sexually harassed two complainants, both respondents were held to have violated ORS 659.030(1)(a) and (b). ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 16-17 (1989).***

❑ The commissioner rejected respondent's denials of sexual harassment and excuses for his sexually suggestive remarks, stating "There is an inherent imbalance of power in any employment situation between the owner or manager and the employees. This imbalance makes it difficult for an employee, male or female, to repulse an owner or manager's inappropriate sexual touching or sexual remarks without fear of damaging his or her employment status. Respondent took advantage of this inherent imbalance of power to subject his female employees to inappropriate touch and sexual innuendo for his own titillation. Respondent appeared to view his employees as 'his girls.' It is not likely that respondent would have felt free to engage in the kind of touching and sexual commentary that he did in this case if the female working with him in the restaurant, even in the confined spaces, had been his boss." ***----- In the Matter of Stop Inn Drive In, 7 BOLI 97, 114 (1988).***

❑ When a respondent brought out evidence of complainant's moral character and her relations with other men in an attempt to besmirch her and to focus attention away from his own behavior, none of it was relevant to the issue of whether respondent discriminated against complainant in terms and conditions of her employment on the basis of sex by subjecting her to sexual harassment on the job. The commissioner held that complainant's life outside of work had no bearing on whether or not respondent had sexually harassed her. ***----- In the Matter of Stop Inn Drive In, 7 BOLI 97, 114 (1988).***

❑ When employees and respondent alike worked in several cramped work spaces of a restaurant that were so narrow that people could not get around each other without coming in very close proximity or actually touching each other, the commissioner found that respondent's touching of complainant was beyond what could be considered necessary or businesslike under the circumstances. ***----- In the Matter of Stop Inn Drive In, 7 BOLI 97, 114 (1988).***

❑ When respondent repeatedly patted and grabbed complainant on the buttocks and touched her in the area of her breast, made repeated sexual comments about complainant's anatomy and other sexual comments to complainant, all of which were unwelcome and offensive to complainant, these actions created a hostile and abusive working environment. The commissioner found that conduct constituted discrimination based on sex against complainant in the terms and conditions of her employment in violation of ORS 659.030(1)(b). ***----- In the Matter of Stop Inn Drive In, 7 BOLI 97, 112 (1988).***

❑ Conduct by a male respondent toward a female complainant that was considered unwelcome and sexual in nature, but did not unreasonably interfere with complainant's work performance – the conduct bothered her, but it occurred infrequently, and the conduct did not make complainant consider resigning – was not sufficiently pervasive, by itself, to create an intimidating, hostile, or offensive work environment under ORS 659.030(1)(b) and did not amount to a constructive discharge of complainant. However, when respondent propositioned complainant to prove sexual favors for money, and respondent's escalating sexual pressure indicated to complainant that respondent's sexual harassment of her would continue and worsen, and complainant resigned because of this conduct, the commissioner held that respondent sexually harassed

and constructively discharged complainant. ***----- In the Matter of Tim's Top Shop, 6 BOLI 166, 188, 192 (1987).***

31.2.3.2--- Submission Made Term or Condition of Employment

❑ To prove quid pro quo sexual harassment, the agency was required to show that: (1) respondent was an employer subject to former ORS 659.010 to 659.110; (2) respondent employed complainant; (3) complainant was a male; (4) respondent, as complainant's employer and direct supervisor, directed unwelcome sexual advances, requests, or conduct toward complainant because he is male; (5) respondent significantly changed complainant's employment status by reducing his pay and his work hours; and (6) respondent did so because complainant rejected her unwelcome sexual advances. ***----- In the Matter of Barbara Bridges, 25 BOLI 107, 119-120 (2003).***

❑ When respondent corporation's owner and president subjected a female complainant to demeaning, sexually offensive comments on a frequent basis, including references to his own and her sex life and referring to complainant as a "dumb fucking blond bitch," often threatened to "bitch slap" complainant, which put her in fear, and physically struck complainant on the top of the head and across her face, the commissioner found that the owner engaged in unwelcome physical and verbal conduct of a sexual nature, directed at complainant because of her sex; that the conduct had the effect of creating an intimidating, hostile, and offensive work environment; that submission to such conduct was made an explicit term or condition of employment; that the corporation knew of the conduct; and that the complainant was harmed by it. The commissioner held that the owner sexually harassed complainant, that the respondent corporation violated ORS 659.030(1)(b), and that the owner aided and abetted the corporation's unlawful practices, in violation of ORS 659.030(1)(g). ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 219-22 (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries,* 161 Or App 417, 984 P2d 883 (1999).

❑ Sexual harassment is sex discrimination. ***----- In the Matter of Soapy's, Inc., 14 BOLI 86, 96 (1995).*** *See also In the Matter of William Kirby, 9 BOLI 258, 280 (1991).*

❑ Respondent, who was complainant's supervisor, was sexually and romantically attracted to complainant; made sexual advances to her in the form of repeated social invitations and, ultimately, demands; made comments of a sexual nature concerning complainant's relationship with her boyfriend; and characterized the boyfriend's presence at complainant's house as an obstacle to his own romantic designs. Complainant found respondent's overtures unwelcome and rejected them and respondent terminated complainant's employment because she refused to submit to his demands. The forum found this to be "quid pro quo" harassment, in violation of ORS 659.030(1)(a).***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 89 (1993).***

❑ Respondent made unwelcome sexual advances to complainant, made requests for sexual favors, made numerous comments of a sexual nature, and grabbed complainant's buttocks, all because of her sex. Complainant's submission to respondent's sexual conduct was made implicitly a term or condition of her employment, and complainant's rejection of respondent's advances and requests was the basis for respondent's decision to terminate complainant. The commissioner found that this constituted "quid pro quo" sexual harassment, in violation of ORS 659.030(1)(a) and (b). ***----- In the Matter of C. Vogar'd Amezcua, 11 BOLI 197, 204 (1993).***

❑ When respondent's supervisory employee offered to change complainant's work schedule in exchange for sexual cooperation and had the apparent authority to change the schedule, the forum found this was a form of quid pro quo sexual harassment, in violation of ORS 659.030(1)(b). ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 196 (1992).***

Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

31.2.3.3--- Submission Used as a Basis for Employment Decisions

❑ The forum found that respondent did not convert complainant's salary to an hourly rate based on complainant's rejection of and objection to respondent's alleged sexual advances when complainant's testimony about his objections was not credible, there was no other credible testimony to support the agency's allegation, there was credible testimony that respondent was not at work on the day complainant claimed to have confronted respondent, and credible evidence was presented that complainant's salary was converted because he began working a second job. ***----- In the Matter of Barbara Bridges, 25 BOLI 107, 121 (2003).***

❑ To establish a prima facie case of sexual harassment, the agency must present evidence to show that: (1) respondent is an employer defined by statute; (2) complainant was employed by respondent employer; (3) complainant is a member of a protected class (sex); (4) respondent employer, or respondent employer's agent, in the workplace made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature directed at complainant because of complainant's sex; (5) the conduct had the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment, or submission to such conduct was made an explicit or implicit term or condition of employment; (6) respondent employer had knowledge of the offensive conduct; and (7) complainant was harmed by the conduct. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 136 (1997).*** *See also In the Matter of A.L.P. Incorporated, 15 BOLI 211, 222 (1997)(also noting possibility of non-employee harassment), affirmed, A.L.P. Incorporated, v. Bureau of Labor and Industries, 161 Or App 417, 984 P2d 883*

(1999); In the Matter of Soapy's, Inc., 14 BOLI 86, 96 (1995); In the Matter of Kenneth Williams, 14 BOLI 16, 24 (1995).

❑ Respondent made unwelcome sexual advances to complainant, made requests for sexual favors, made numerous comments of a sexual nature, and grabbed complainant's buttocks, all because of her sex. Complainant's submission to respondent's sexual conduct was made implicitly a term or condition of her employment, and complainant's rejection of respondent's advances and requests was the basis for respondent's decision to terminate complainant. The commissioner found that this constituted "quid pro quo" sexual harassment, in violation of ORS 659.030(1)(a) and (b). ***----- In the Matter of C. Vogar'd Amezcua, 11 BOLI 197, 204 (1993).***

31.2.4 --- Discharge/Constructive Discharge

❑ In a sexual harassment case, the forum found that respondent was liable for a constructive discharge if complainant's supervisor: 1) intentionally created or maintained discriminatory working conditions related to complainant's gender that were 2) so intolerable that a reasonable person in complainant's circumstances would have resigned because of them; 3) respondent desired to cause complainant to leave her employment as a result, or knew or should have known that complainant was certain, or substantially certain, to leave employment as a result of the working conditions; and 4) complainant left her employment as a result of those working conditions. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 213 (2007).***

Appeal pending.

See also In the Matter of Robb Wochnick, 25 BOLI 265, 287 (2004); In the Matter of Barbara Bridges, 25 BOLI 107, 124 (2003); In the Matter of Bob G. Mitchell, 19 BOLI 162, 187 (2000).

❑ When the forum found that: 1) respondent's male owner knowingly and purposely engaged in conduct that was 2) objectively intolerable; 3) respondent's male owner knew or should have known that complainant was substantially certain to leave because of the particular conduct; and 4) complainant had no other recourse and, in fact, left her employment because of the male owner's conduct, the forum concluded that respondent, through its proxy, its male owner, constructively discharged complainant. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 213 (2007).***

Appeal pending.

❑ When the forum found that respondent engaged in a course of conduct constituting a continuing pattern of sexual harassment directed toward complainant that she rejected either by words or body language, and that complainant quit her employment following a particularly egregious incident involving respondent and her computer station in the reasonable belief that respondent had no intention of stopping his offensive conduct or of eliminating the causes of the hostile and intimidating work environment to which she was subjected, despite his knowledge that it caused her distress, the forum imputed to respondent the substantial certainty that complainant would quit her employment once she realized her efforts to stop the harassment were futile and concluded that a reasonable person in complainant's position would have resigned under those circumstances and that complainant was constructively discharged. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 287 (2004).***

❑ When the agency failed to establish that respondent subjected complainant to hostile working conditions because of his gender, or that the terms and conditions of his employment changed to his detriment because he complained about those conditions, or that respondent intentionally created or maintained the conditions, and complainant's conflicting versions of his last day of employment significantly impaired his overall credibility, the forum found that respondent did not constructively discharge complainant. ***----- In the Matter of Barbara Bridges, 25 BOLI 107, 124 (2003).***

❑ Respondent is liable for a constructive discharge only if it is established that respondent: (1) intentionally created or maintained discriminatory working conditions related to complainant's gender that were (2) so intolerable that a reasonable person in complainant's circumstances would have resigned because of them; and (3) respondent desired to cause complainant to leave her employment as a result, or knew or should have known that complainant was certain, or substantially certain, to leave her employment as a result of the working conditions; and (4) that she left her employment as a result of the working conditions. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 33 (2002), amended 23 BOLI 67 (2002).***

❑ Evidence showed that when complainant agreed to leave her employment for the first time in June 1999, after three months, the agreement was mutual and for reasons other than respondent's pattern of discriminatory conduct that had already developed by that time. Credible evidence suggested that complainant's voluntary quitting three months later in September 1999 was more likely than not related to complainant's anger at respondent for telling another individual that she was allegedly using drugs, rather than respondent's continued conduct. From the totality of the circumstances surrounding complainant's quit, including complainant's own testimony, the forum concluded that complainant did not leave her employment as a result of the discriminatory working conditions. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 33 (2002), amended 23 BOLI 67 (2002).***

❑ The forum concluded that respondents constructively discharged complainant when the evidence established that: (1) respondents reduced complainant's hours because she was pregnant and made negative comments about her pregnancy; (2) complainant reasonably concluded, from respondents' actions, that the reduction in her work hours would last for the duration of her pregnancy, creating intolerable working conditions; (3) respondents reduced complainant's hours and commented negatively on her pregnancy with the hope and expectation that she would quit as a result; and (4) complainant quit her job because of the reduction in work hours, which she expected to

last for the duration of her pregnancy. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 187-88 (2000)***.

❑ ,An employee whose hours are severely cut because of her pregnancy and who knows that her employer wants to get rid of her is justified in quitting her job before she is subjected to an outright termination. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 188 (2000)***.

❑ When the preponderance of evidence established that complainant quit each time respondent offered her an unacceptable schedule, but the agency did not plead or offer evidence to prove that respondent actually or constructively discharged complainant, the agency did not prove that respondent had violated ORS 659.030(1)(a). ***----- In the Matter of Katari, Inc., 16 BOLI 149, 157 (1997).***

> Affirmed without opinion, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).

❑ Respondent corporation, aided by its respondent-owner, created intolerable working conditions because of complainant's sex by subjecting complainant to unwelcome sexual touching and comments, and complainant's resignation was a constructive discharge whereby respondent corporation violated ORS 659.030(1)(a) and the owner violated ORS 659.030(1)(g). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 13, 135 (1997).***

❑ Complainant, a cocktail waitress, claimed that respondent's manager discharged her because she was pregnant. The commissioner found no violation of ORS 659.030(1)(a) when the evidence showed that the manager laid complainant off and attempted to call her back to work, but complainant never returned his calls; the manager credibly testified that complainant's pregnancy had nothing to do with the layoff; and there was no persuasive evidence that this reason was pretextual. ***----- In the Matter of Benn Enterprises, Inc., 16 BOLI 69, 78 (1997).***

❑ Respondent's discharge of a female complainant for striking a male co-worker did not violate ORS 659.030(1)(a) or (1)(f) because complainant was not justified in striking the co-worker when there was a manager immediately available, even though complainant had repeatedly reported the co-worker's unwelcome, sexually oriented conduct to her immediate supervisor and respondent had taken no action to correct, modify, or prevent the unwelcome behavior. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 94 (1996).***

> Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 301, 954 P2d 804 (1998).

❑ Complainant, who was breast-feeding her newborn baby, experienced breast leakage at work. Respondent's manager discharged complainant and, in discharging her, commented she had returned to work too soon after giving birth. The commissioner found that complainant was fired for a condition related to pregnancy and childbirth, and was therefore discharged due to her sex, in violation of ORS 659.029 and 659.030. ***----- In the Matter of Motel 6, 13 BOLI 175, 184-85 (1994).***

❑ When sexual harassment of a female complainant by respondent's manager, her immediate supervisor, resulted in intolerable working conditions for the complainant, the commissioner found that complainant's resignation was a constructive discharge. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 12 (1994).***

❑ When a corporate respondent's president, who was also a respondent, sexually harassed and discharged complainant, the forum held that the corporation violated ORS 659.030(1)(a), and the president aided and abetted the corporation in violation of ORS 659.030(1)(g). ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 88-89 (1993).***

❑ Respondent twice grabbed complainant by the waist and then slid his hands up until he was touching her breasts, suggested to complainant that she could pay him for cigarettes by giving him sexual favors, had unwelcome sexual contact with another female employee, and made a show of giving attention to attractive female customers. The forum found that these working conditions were so difficult or unpleasant that a reasonable person in complainant's shoes would have felt compelled to resign. Respondent's deliberate imposition of intolerable working conditions on complainant and her resulting resignation constituted a constructive discharge, in violation of ORS 659.030(1)(a). ***----- In the Matter of RJ's All American Restaurant, 12 BOLI 24, 30-31 (1993).***

❑ Respondent made unwelcome sexual advances to complainant, made requests for sexual favors, made numerous comments of a sexual nature, and grabbed complainant's buttocks, all because of her sex. Complainant's submission to respondent's sexual conduct was made implicitly a term or condition of her employment, and complainant's rejection of respondent's advances and requests was the basis for respondent's decision to terminate complainant. The commissioner found that this constituted "quid pro quo" sexual harassment, in violation of ORS 659.030(1)(a) and (b). ***----- In the Matter of C. Vogar'd Amezcua, 11 BOLI 197, 204 (1993).***

❑ A constructive discharge results when an employee resigns over intolerable working conditions imposed by the employer. Unequal pay based on sex, when a demand for equality has been refused, creates intolerable working conditions over which a reasonable person would resign, and a resulting resignation is a constructive discharge. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 165 (1993).*** *See also In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 34 (1991).*

❑ Complainant's supervisor asked complainant for dates and to take weekend trips with him on a nearly daily basis despite her repeated refusals; made repeated vulgar sexual comments about complainant and other female employees and customers that complainant learned of from male co-workers; used company records to discover complainant's home address, then made an

unannounced and unsolicited evening visit to complainant's home, during which, in front of complainant's 11-year-old son, put his arm around complainant and suggestively played with her hair; and led complainant to believe that he was responsible for a change in her work schedule in retaliation for her resistance to his overtures and could change the schedule back in exchange for her cooperation with him. The forum found that the work environment created by respondent was so intolerable that a reasonable person would have felt compelled to resign and that complainant had been constructively discharged. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 195-96 (1992).***

Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ When complainant resigned due to sexual harassment, and respondent argued that complainant would have quit in any event due to a scheduling change, the forum found that the issue was why she quit when she did, not why she might have done so at some later date, had respondent not constructively discharged her when it did. When the actual and immediate cause of complainant's resignation was what she reasonably believed to be a quid pro quo proposition from her supervisor, that proposition alone, or coupled with other repeated instances of harassment, would have compelled a reason person to resign. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 197-98 (1992).***

Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ Respondent argued that allegedly intolerable working conditions leading to an employee's resignation must be created by the employer, with the intent that the employee resign, in order to hold the employer responsible for a constructive discharge. The commissioner stated that the subjective intent standard applied to the tort of wrongful discharge was unsuited to the statutory employment discrimination context and denied respondent's motion to dismiss the issue of constructive discharge. ***----- In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 21, 34 (1991).***

❑ When a female complainant was subjected to frequent, severe and pervasive sexual harassment on the job by respondent, an individual proprietor, and had the choice of continuing to endure the harassment or quitting, the commissioner found that her resignation was a constructive discharge attributable to the unlawful employment practice without regard to whether the employer intended that the employee resign. ***----- In the Matter of Lee Schamp, 10 BOLI 1, 16-18 (1991).***

❑ When respondent's unlawful employment practice of sexual harassment created intolerable working conditions, the commissioner rejected the tort standard for constructive discharge that the employer must intend that the employee resign, stating "This forum has consistently held * * * that the test for constructive discharge is an objective one based on intolerable working conditions [created by discrimination] that leave no reasonable alternative to resignation, rather than a subjective one involving a finding of the employer's intent to cause the employee to quit." ***----- In the Matter of William Kirby, 9 BOLI 258, 278 (1991).***

❑ When respondent's creation of an intimidating, hostile, offensive work environment through unwelcome sexually abusive and intimidating language and gestures towards complainant because of her sex was deliberate and intentional, but was not done with the intent that complainant terminate her employment, the commissioner held that complainant's resignation was a constructive discharge and that respondent committed an unlawful employment practice, in violation of ORS 659.030(1)(a). ***----- In the Matter of William Kirby, 9 BOLI 258, 274 (1991).***

❑ The forum's standard for constructive discharge is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, the employer has encompassed a constructive discharge. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 215-16 (1991).***

❑ When unlawful different treatment has made the employee's working conditions so intolerable that the employee is forced into an involuntary resignation, the employer has encompassed a constructive discharge in violation of ORS 659.030(1)(a). ***----- In the Matter of City of Umatilla, 9 BOLI 91, 105 (1990).***

Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ Complainant, a pregnant salesperson, was discharged for alleged lack of acceptable sales production. The commissioner found that respondent's reason was pretextual when two of the managers who participated in the decision to discharge her "were influenced" in their evaluation by knowledge of her pregnancy. The forum found that respondent's managers thought that complainant's pregnancy would make her performance worse or prevent it from improving, "an impermissible standard." Respondent violated ORS 659.030(1)(a.) ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 65 (1990).***

❑ Respondent was guilty of sex discrimination when complainant's pregnancy, combined with her being overweight, which respondent treated as an impairment, played a key role in her discharge. ***----- In the Matter of Baker Truck Corral, Inc., 8 BOLI 118, 138 (1989).***

❑ "This forum set forth the standard for constructive discharge in the case of *In the Matter of West Coast Truck Lines, Inc.,* 2 BOLI 192, 215-16 (1981), *affirmed without opinion,* 63 Or App 383, 665 P2d 882 (1983), wherein the forum stated: 'The general rule, which this forum adopts, is that "if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary reason, then the employer has encompassed a constructive discharge * * *." In *In the Matter of Tim's Top Shop,* 6 BOLI 166, 187 (1987), this forum stated: 'that "deliberately" does not mean that the employer's imposition of "intolerable"

working conditions need be done with the intention of either forcing the employee to resign or relieving himself of that employee. The term "deliberately" refers to the imposition of the working conditions; that is, it means the working conditions were imposed by the deliberate or intentional actions of the employer. (Emphasis in the original.)' In *West Coast Truck Lines, Inc., supra* at 215-16, the forum ruled that: 'To find a constructive discharge, this forum must be satisfied that "working conditions * * * so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign" caused the employee to resign and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. * * * The final rule concerning constructive discharge is that if there has been a constructive discharge, an employer is liable for any unlawful conduct involved therein as if the employer had formal discharged the employee.'" In this case, the commissioner found that respondent's "deliberate imposition of intolerable working conditions on [complainant] and her resulting resignation * * * constitute a constructive discharge, and respondents violated ORS 659.030(1)(a)." ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 19-20 (1989).***

❑ Respondent, who owned a café and cooked at the café, repeatedly sexually harassed complainant, a female waitress, and retaliated against her rejection of his sexually offensive conduct by becoming angry and deliberately botching her food orders. On the date she was fired, he twice yelled, "eat me" at her and she responded by throwing her apron at him. The commissioner found that complainant was not discharged because she refused a sexual proposition as alleged by the agency, but her "termination was the direct result of the hostile environment [respondent] created with his sexually offensive conduct, and of his unreasonable interference with her work performance. * * * [T]hus respondents violated ORS 659.030(1)(a)." ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 18 (1989).***

❑ Conduct by a male respondent toward a female complainant that was considered unwelcome and sexual in nature, but did not unreasonably interfere with complainant's work performance – the conduct bothered her, but it occurred infrequently, and the conduct did not make complainant consider resigning – was not sufficiently pervasive, by itself, to create an intimidating, hostile, or offensive work environment under ORS 659.030(1)(b) and did not amount to a constructive discharge of complainant. However, when respondent propositioned complainant to provide sexual favors for money, and respondent's escalating sexual pressure indicated to complainant that respondent's sexual harassment of her would continue and worsen, and complainant resigned because of this conduct, the commissioner held that respondent sexually harassed and constructively discharged complainant. ***----- In the Matter of Tim's Top Shop, 6 BOLI 166, 188, 192 (1987).***

❑ When the complainant showed that she had worked for respondent in another location satisfactorily; she had worked for respondent for 27 days in a manner which she had reasonably believed was satisfactory; and she was discharged after telling her supervisor she was pregnant, the commissioner found this evidence was an adequate prima facie case. The inference was raised and a presumption created that respondent's discharge of complainant was more likely than not based upon her sex and pregnancy. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 200, 202 (1982).***

❑ When a respondent claimed that its discharge of a probationary employee was not an uncommon practice and gave complainant a reason other than pregnancy for her discharge, the commissioner found that respondent's statements met respondent's burden of setting forth nondiscriminatory reasons for complainant's discharge. When the agency presented evidence that complainant did not receive any criticism of her job performance before discharge, a claim unrebutted by respondent; respondent stated reasons that were of a nonspecific nature when compared with another discharged employee's record that was offered as evidence; and the time proximity of complainant's notification to respondent of her pregnancy and her discharge (the next day), the commissioner found that respondent's explanation was not credible and respondent would not have discharged complainant, had she not been pregnant. For this reason, the forum found that respondent discharged complainant because of her sex and pregnancy. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 200, 202 (1982).***

❑ When complainant worked satisfactorily as a bookkeeper for respondent for nearly three months and was terminated immediately after she advised her supervisor that she was pregnant, the forum determined that complainant was unlawfully discharged because of her sex, in violation of ORS 659.030(1), when respondent could not support its defense that complainant was discharged for poor work performance. Respondent merely provided statements to that effect, but the supervisor who allegedly made the statement failed to appear at hearing and the personnel manager could not verify the statements. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 200-02 (1982).***

❑ When respondent, the owner of a restaurant, maintained a discriminatory policy of hiring only males as evening waiters, the forum found that complainant, a female busperson, was not constructively discharged when she was denied a position as evening waiter, since the evidence showed that complainant was not qualified for that position, and when respondent would have allowed complainant to remain working as a busperson. ***----- In the Matter of The Riverhouse of Bend, 3 BOLI 171, 179 (1982).***

❑ When respondent, the owner of a restaurant in which complainant worked as a waitress, told complainant he had heard rumors that the two of them were "having an affair" and that her clothing was suggestive and offensive to customers, complainant alleged she had been discharged because of her sex. The forum found that respondent discharged complainant for the legitimate, nondiscriminatory reason of falsifying her time records when the evidence showed that, two weeks before her discharge, complainant's manager had discussed the importance of keeping accurate time records and when there was a

discrepancy between complainant's actual departure times and complainant's time cards. ***----- In the Matter of Lynn Edwards, 3 BOLI 134, 136-37 (1982).***

❑ Respondent selected complainant, whom he knew was pregnant, for discharge during a period of declining business. The forum accepted respondent's reason for termination -- that he believed complainant would be a temporary employee – as a legitimate, nondiscriminatory reason when the evidence showed that, before announcing her pregnancy, complainant had stated she was seeking other employment and would only be working "a short time" for respondent. ***----- In the Matter of International King's Table, Inc., 3 BOLI 29, 30-31 (1982).***

❑ By paying a female complainant less and providing less benefits than male employees who performed work that was substantially equal in skill, effort and responsibility under similar working conditions, respondent created working conditions intolerable to complainant, amounting to a constructive discharge. The commissioner stated: "The general rule which this forum adopts is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation, then the employer has encompassed a constructive discharge." ***----- In the Matter of West Coast Truck Lines, 2 BOLI 192, 216-18 (1981).***

❑ When a female complainant had previously been awarded promotion unsuccessfully sought by males, and there were documented warnings concerning her unauthorized early leaving of her work station and excessive socializing on the job, and there was unsupported opinion testimony from some males that she was treated differently from other females, the commissioner found that her discharge for leaving her early was not based on her sex. ***----- In the Matter of Jeld-Wen, Inc., 2 BOLI 163, 164-67 (1981).***

❑ A male complainant who was a counter agent/management trainee was unlawfully discharged when the evidence established that respondent's preference for hiring attractive female counter agents played a key role in the discharge. ***----- In the Matter of Todd Investments, Inc., 2 BOLI 5, 7 (1980).***

❑ When respondent required complainant to remove herself from the classroom before her pregnancy became "unseemly," the commissioner found this to be a violation of ORS 659.030 because the decision infringed on complainant's right to work and would have caused her to forfeit pay. ***----- In the Matter of Polk County E.S.D., 1 BOLI 280, 288 (1980).***

> Affirmed without opinion, *Donaldson v. Polk County ESD,* 50 Or App 611, 625 P2d 1390 (1981).

❑ When a pregnant complainant, a clerk in a fabric store, took excessive breaks, rested on the displays respondent at the counter, and requested help from others to keep her department in order, and her physician testified that she was able to work except for heavy lifting, the commissioner found that, although her condition may have contributed to the "overall quality of her performance," the "weight of the evidence leads to a conclusion that performance itself, rather than pregnancy, was the reason for discharge." ***----- In the Matter of Cornet Stores, 1 BOLI 208, 209-10 (1979).***

❑ When a female complainant requested a raise in pay to equal the pay of a male possessing comparable skill and doing substantially similar work under similar working conditions, and the employer's subsequent treatment of and discharge of complainant was not only further different treatment due to sex, but also was retaliation. ***----- In the Matter of Terminal Ice and Cold Storage Company, Inc., 1 BOLI 151, 157 (1978).***

❑ When a female complainant requested a raise in pay to equal the pay of a male possessing comparable skill and doing substantially similar work under similar working conditions, and the plant manager refused her access to a vice president to discuss the matter, refused both an increase and a promotion, rejected her request as an ultimatum, removed her as "head office girl," told her she would "no longer be anything in the office," and then attempted to document the termination as a "quit," the commissioner found an involuntary discharge based on sex. ***----- In the Matter of Terminal Ice and Cold Storage Company, Inc., 1 BOLI 151, 156-57 (1978).***

❑ Respondent violated ORS 659.030 since August 21, 1969, the effective date of the anti-sex discrimination legislation administered by the commissioner, by continuously discriminating against all female teacher employees of the district by requiring the resignation of pregnant probationary teachers and by requiring lengthy leaves of absence of tenured pregnant teaches regardless of the circumstances in each individual's case. Respondent violated ORS 659.030 since on or about September 1969 by continuously discriminating against complainant in employment and in the terms or conditions thereof with respondent because of her sex. ***----- In the Matter of School District No. 1, 1 BOLI 1, 19 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ With or without a specific statute preventing discrimination based upon sex, several tribunals have held the conduct of school boards to be arbitrary and unconstitutional when pregnant probationary teachers and other female employees were either not granted maternity leaves or were forced to resign. The civil rights laws of Oregon are not more permissive than the 14th Amendment in this field. ***----- In the Matter of School District No. 1, 1 BOLI 1, 18 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ When a school district required pregnant probationary teachers to resign and pregnant tenured

teachers to take an extended absence, the forum found that respondent discriminated against complainant and all persons similarly situated, namely female teachers "as a consequence of artificial, arbitrary and unnecessary barriers imposed by [the district] upon female teachers, that class of employees suffered unequal treatment by their employer based upon their sex." ***----- In the Matter of School District No. 1, 1 BOLI 1, 13 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

31.2.5 --- Medical Examinations or Inquiries

❑ When respondent's bar manager required medical information about any restrictions on complainant's work due to her pregnancy, the commissioner held this did not constitute illegal different treatment because of sex since the evidence did not show that respondent treated complainant differently than other workers with temporary disabilities and the law permitted respondent to request information about a worker's ability to perform her job. ***----- In the Matter of Benn Enterprises, Inc., 16 BOLI 69, 76-78 (1997).***

31.3 --- Public Accommodation

31.4 --- Real Property

❑ When respondent solicited complainant for a sexual relationship by offering complainant free rent and use of his credit cards in exchange for sex and also suggested that he might not allow complainant to continue to rent the house if she refused his offers, and respondent subsequently evicted complainant because she refused, the commissioner found that respondent had violated ORS 659.033(1). ***----- In the Matter of Dan Stoller, 7 BOLI 116, 123-24 (1988).***

32.0 SEXUAL ORIENTATION (CITY CODES)

❑ When the agency alleged complainant was discharged based on his sexual orientation and respondent's perception that he had become HIV positive during his employment, and respondent and all of respondent's employees were aware of complainant's sexual orientation throughout his employment, but complainant was only fired when respondent perceived he was HIV infected, the commissioner held that complainant was not discharged on the basis of his sexual orientation, but he was discharged on the basis of his perceived disability. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 146-47 (1995).***

❑ When the commissioner had contracted with the City of Portland to enforce the city's civil rights ordinances using the same procedures and remedies as in cases filed under ORS chapter 659, the commissioner heard and determined liability on an allegation of unlawful discharge based on complainant's sexual orientation. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 144-47 (1995).***

V. OTHER BASES OF DISCRIMINATION

40.0 ACCESS TO EMPLOYER-OWNED HOUSING

41.0 BONE MARROW DONATION

42.0 BREATHALYZER, POLYGRAPH, AND OTHER TESTS

❑ Requiring a prospective employee to submit to a polygraph test as a condition of employment violates ORS 659.227. ***----- In the Matter of Mini-Mart Food Stores, Inc., 3 BOLI 262, 275 (1983).***

❑ When complainant signed a form stating that she was voluntarily submitting to a polygraph test, this did not alter the legal conclusion that respondent unlawfully subjected complainant to the test in violation of ORS 659.227. The legislature, in enacting that statute, recognized that consent to an employment-related polygraph test was meaningless. ***----- In the Matter of Mini-Mart Food Stores, Inc., 3 BOLI 262, 273 (1983).***

❑ When the employment relationship was established in Oregon and respondent took action in Oregon that resulted in unlawfully administering polygraph tests to complainant, the fact that one of the tests was administered in Washington was irrelevant. ***----- In the Matter of Mini-Mart Food Stores, Inc., 3 BOLI 262, 280 (1983).***

43.0 EXPUNGED JUVENILE RECORD

44.0 FAMILIAL RELATIONSHIP

❑ In a case in which the specific charges alleged discharge based on family relationship and respondent was held in default, it was the agency's task to present a prima facie case in support of the specific charges. When the agency presented evidence that respondent was an employer of complainant, that complainant was the daughter of respondent's former employee, that respondent fired complainant because of her relationship to her mother, and that complainant was harmed by the discharge, this evidence constituted a prima facie case under ORS 659.340. ***----- In the Matter of Short Stop Cafe, 12 BOLI 201, 207 (1994).***

❑ When complainant's mother, a former employee of respondent employer, became involved in a wage dispute with respondent and respondent then discharged complainant, who had no performance problems, the commissioner found that respondent had discharged complainant in violation of ORS 659.340 because a member of her family had worked for respondent. ***----- In the Matter of Short Stop Cafe, 12 BOLI 201, 207 (1994).***

❑ When complainant's brother was also employed by respondent, and the agency alleged that complainant was discharged because of his family relationship with his brother due to his brother's having filed an OSHA complaint against respondent that resulted in an OSHA inspection of respondent's business, but there was no evidence that respondent knew complainant's brother had filed an OSHA complaint at the time it made the decision to discharge complainant, the forum did not

conclude that complainant was discharged based on familial relationship. ***----- In the Matter of Arkad Enterprises, Inc., 8 BOLI 263, 277 (1990).***

Affirmed, *Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991).

❑ When a complainant believes that he or she has been discriminated against at the place of employment solely because another member of complainant's family works or has worked for respondent, the commissioner has jurisdiction over the persons and the subject matter related to ORS 659.340 violations. ***----- In the Matter of Arkad Enterprises, Inc., 8 BOLI 263, 275-76 (1990).***

Affirmed, *Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991).

45.0 GENETIC INFORMATION

46.0 LEGISLATIVE TESTIMONY

47.0 LIMITING ELIGIBILITY FOR EMPLOYEE HEALTH OR BENEFIT PLAN

48.0 REPORTING PATIENT ABUSE

49.0 REQUIRED PAYMENT FOR MEDICAL EXAMINATIONS

❑ Respondent required complainant to provide a "release/evaluation" as a condition of his continued employment. Complainant would have had to pay for the medical examination that the "release/evaluation" would have entailed. By requiring complainant to obtain such an evaluation at his own expense, respondent violated ORS 659.330. The fact that complainant never obtained the examination was irrelevant. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 213 (2000).***

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ When respondent required complainant to bring in a doctor's excuse in order to return to work after complainant had been off with the flu and complainant paid for the examination and return to work slip, respondent violated ORS 659.330. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 76-77 (1999)***.

❑ The fact that the cost for a medical examination is payable from any fringe benefit contributed entirely by respondent or that the examination and/or certificate is required by federal, state, or local ordinance are affirmative defenses to ORS 659.330. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 76-77 (1999)***.

❑ The commissioner, who is authorized to award economic and non-economic damages designed "to eliminate the effects of any unlawful practice found," properly awarded complainant the sum of $40 to reimburse him for the cost of obtaining a medical certificate before returning to work. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 79 (1999)***.

50.0 SOURCE OF INCOME

51.0 UNEMPLOYMENT HEARING TESTIMONY

❑ The commissioner found that the mere filing of an unemployment benefits claim, whether successful or unsuccessful, does not invoke the protection of ORS 659.035. It is the good faith testimony of an individual, whether as a witness or as a claimant, at an Employment Division hearing that "triggers the prohibitions of ORS 659.035." ***----- In the Matter of Lebanon Public Schools, 11 BOLI 294, 307-08 (1993).***

Affirmed without opinion, *Brigham v. Bureau of Labor and Industries,* 129 Or App 304, 79 P2d 245 (1994).

❑ When there was evidence that respondent was hostile toward unemployment claims by casual employees, but no evidence that respondent had actual notice that complainant's appeal of the denial of unemployment benefits was successful, the commissioner declined to infer that complainant was discharged for her testimony at the unemployment compensation hearing. ***----- In the Matter of Lebanon Public Schools, 11 BOLI 294, 308 (1993).***

Affirmed without opinion, *Brigham v. Bureau of Labor and Industries,* 129 Or App 304, 79 P2d 245 (1994).

52.0 USE OF TOBACCO IN NONWORKING HOURS

53.0 WHISTLEBLOWING BY PUBLIC EMPLOYEES

54.0 WHISTLEBLOWING BY PRIVATE EMPLOYEES

54.1 --- Generally

❑ When complainant plainly alleged he was discriminated against for "reporting criminal activity" under a whistleblower theory, the forum stated that criminal activity and workplace safety concerns are discrete issues governed by completely different statutory schemes. Thus, disclosure of criminal activity under ORS 659A.230 is not the same as a complaint about workplace safety and health hazards under ORS 654.062. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 168 (2005).***

❑ ORS 659.550 is a remedial statute, and remedial statutes are to be construed broadly to effectuate the purposes of the statute. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 26 (1997).*** *See also In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 125 (1995); affirmed without opinion, Earth Science Technology, Inc. v. Bureau of Labor and Industries, 141 Or App 439, 917 P2d 1077 (1996).*

❑ Under ORS 659.550(1), Oregon's whistleblower statute, the public interest is furthered by having employees come forward with complaints of violations of the law without fear of retribution. Retaliation is a particularly insidious form of discrimination, and there is a public interest in discouraging retaliation to insure the free flow of information to law enforcement agencies. ****----***

- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 26 (1997).

54.2 --- Prima Facie Case

❑ To establish a prima facie case, the agency must show: (1) respondent was an employer as defined by statute; (2) respondent employed complainant; (3) complainant, in good faith, reported criminal activity; (4) respondent discharged complainant; (5) respondent discharged complainant because she, in good faith, reported criminal activity. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 132 (2005).***

❑ When the agency charged that complainant was fired for whistleblowing, the agency's prima facie case consisted of the following elements: (1) respondent is an employer as defined by statute; (2) complainant was employed by respondent; (3) complainant in good faith reported criminal activity; (4) respondent suspended, then discharged complainant; and (5) respondent suspended, then discharged complainant for the reason that she in good faith reported criminal activity. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 121 (2002).***

❑ When the agency charged that complainant was fired because he was perceived as a whistleblower, the agency's prima facie case consisted of the following elements: (1) respondent is an employer as defined by statute; (2) complainant was employed by respondent; (3) someone reported criminal activity; (4) respondent suspended, then discharged complainant; (5) respondent suspended, then discharged complainant for the reason that it believed that complainant reported criminal activity. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 121 (2002).***

❑ A prima facie case of a violation of ORS 659.550(1), Oregon's whistleblower statute, consists of the following elements: (1) respondent is an employer as defined by statute; (2) respondent employed complainant; (3) complainant in good faith brought a civil proceeding against respondent; (4) respondent discharged complainant; (5) respondent's action in discharging complainant was taken because complainant, in good faith, brought a civil proceeding against respondent; and (6) complainant was harmed by respondent's action. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 25 (1997).*** *See also In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 122 (1995); affirmed without opinion, Earth Science Technology, Inc. v. Bureau of Labor and Industries, 141 Or App 439, 917 P2d 1077 (1996).*

❑ Respondent lacked actual knowledge at the time it discharged complainant that he had filed a complaint with DEQ, but believed that complainant had filed such a complaint. This satisfied the causal connection element of complainant's prima facie case. ***----- In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 125 (1995).***

> Affirmed without opinion, *Earth Science Technology, Inc. v. Bureau of Labor and Industries*, 141 Or App 439, 917 P2d 1077 (1996).

54.3 --- Making a "Report"

❑ When complainant and respondent agreed that complainant told his supervisors that that employees in respondent's shipping department were using drugs, this constituted an oral "report" within the meaning of 659A.230(1) and OAR 839-010-0110(1) that satisfied the reporting element of the agency's prima facie case. ***----- In the Matter of Logan International Ltd., 26 BOLI 254, 279 (2005).***

❑ Under the whistleblower statute, complainant was not required to report what she believed to be criminal activity to a law enforcement agency. So long as criminal activity is *reported*, it does not matter to whom the report is made. Complainant's communication to respondent's manager met the statutory reporting requirement. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 133 (2005).***

❑ Complainant's act of faxing a co-worker's timecards to respondent's corporate headquarters with handwritten notes that accused a co-worker of falsifying her timecards constituted a "report" under *former* ORS 659.550. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 122-23 (2002).***

❑ Because there was is no language in *former* ORS 659.550 that defined the term "reported" and no language in that statute or anywhere else in *former* ORS chapter 659 that modified the term, the forum interpreted the term using a natural reading of the plain words of the statute that yielded a single and unambiguous meaning. That meaning was: so long as criminal activity is reported, it does not matter to whom the report is made. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 122-23 (2002).***

❑ Complainant made a complaint to a regulatory agency that was charged with licensing respondent and that had the authority to bring civil proceedings and seek injunctive relief against respondent. When the regulatory agency inspected respondent's restaurant as a result of his complaint and found critical violations which, if not immediately corrected, could result in the agency suspending or revoking respondent's license, the commissioner held that making a complaint to a regulatory agency that is the licensing agency or can bring a civil proceeding or obtain injunctive relief against the employer will invoke the protection of ORS 659.550. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 25-26 (1997).***

54.4 --- "Civil Proceeding"

❑ As used in ORS 659.550(1), "brought a civil proceeding" is intended to encompass good faith complaints made by employees against their employers that result in an administrative agency bringing a civil proceeding against that employer. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 25 (1997).*** *See also In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 124 (1995); affirmed without opinion, Earth Science Technology, Inc. v. Bureau of Labor and Industries, 141 Or App 439, 917 P2d 1077 (1996).*

❑ Considering the public interest in having employees

come forward with complaints of violations of the law without fear of retribution and in discouraging retaliation to insure the free flow of information to law enforcement agencies, and considering the intent of the legislature that workers be protected when cooperating, in good faith, with civil or criminal law enforcement in any way, the commissioner held that "civil proceeding," as used in ORS 659.550(1), should not be construed to mean a formal contested case hearing or civil court action. This construction would result in no statutory protection for the employee, would not effectuate the purposes of the statute, would frustrate public policy, and would be contrary to the intention of the legislature. To bring a civil proceeding under ORS 659.550(1), it is enough that an employee complains to or cooperates with a regulatory agency that has the authority to initiate enforcement action such as license revocation, civil penalties, or injunctive relief against the employer. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 26-27 (1997).***

54.5 --- "Criminal Activity"

❑ When complainant and respondent agreed that complainant reported to respondent's managers that employees in the shipping department were using drugs, and complainant testified at hearing that he believed employees were using methamphetamine, but did not report a specific drug or report that "illegal" drugs were being used. The forum inferred that complainant's managers assumed complainant was reporting illegal drug use based on the fact that the managers considered administering drug tests to shipping department employees based on complainant's report, the type of drugs that respondent's drug screening service screened for, and the fact that the managers considered that complainant's report raised a safety issue. ***----- In the Matter of Logan International Ltd., 26 BOLI 254, 279 (2005).***

❑ When complainant reported theft, she reported criminal activity. As a matter of law, theft is a criminal activity. Complainant reported criminal activity on the part of respondent by reporting theft, an activity that, if proven under the criminal law standard, *i.e.*, beyond a reasonable doubt, constitutes criminal activity. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 133-34 (2005).***

❑ The forum held that complainant had reported "criminal activity" when the activity she reported - falsifying an employee's timecards - fit within the statutory definition of "falsifying business records" in ORS 165.080 and, if proven, was a Class A misdemeanor. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 121-22 (2002).***

54.6 --- "Good Faith"

❑ To determine whether or not complainant's report of drug use was made in "good faith," the forum examined the reasons that prompted his report, including his beliefs about the nature of the alleged drug use. ***----- In the Matter of Logan International Ltd., 26 BOLI 254, 279-80 (2005).***

❑ The "good faith" requirement in ORS 659A.230 is met when a whistleblower has a reasonable belief that the wrongdoing reported has occurred, and the wrongdoing reported, if proven, constitutes criminal activity. ***----- In the Matter of Logan International Ltd., 26 BOLI 254, 280 (2005).***

❑ The presence of ulterior motives, such as malice, spite, jealousy, or personal gain, does not *per se* demonstrate the absence of "good faith," but may tend to show that the whistleblower lacked reasonable belief that criminal activity was occurring. ***----- In the Matter of Logan International Ltd., 26 BOLI 254, 280 (2005).***

❑ Based on complainant's lack of credibility, his resentment towards the two individuals whom he reported were using drugs, and the absence of any credible evidence to suggest that complainant had a reason in fact for suspecting that the two individuals were using illegal drugs, the forum concluded that complainant's report was a vindictive act based on his resentment and jealousy, that he did not have a reasonable belief that criminal activity was occurring, and that his report was not made in "good faith." ***----- In the Matter of Logan International Ltd., 26 BOLI 254, 280 (2005).***

❑ Complainant made a good faith report when she worked for respondent well over a year without incident, enjoyed the benefits of health insurance, and was genuinely taken aback when she learned her health insurance had been cancelled without notice and the funds she had previously agreed to contribute toward her health insurance premiums were misapplied over a three month period. Her belief and report that respondent was "stealing" from her was reasonable because respondent's actions, if proven under the requisite standard, constitute theft or misapplication of entrusted property. Whether respondent actually had the requisite intent to deprive complainant of her "property" or actually had knowledge that misapplying funds is unlawful was irrelevant, as complainant was not necessarily privy to respondent's intent. Based on her knowledge of respondent's actions, she reasonably concluded those actions constituted criminal activity and she reported her perception to respondent's management with no apparent ulterior motive, *i.e.*, in good faith. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 134 (2005).***

❑ The good faith requirement in Oregon's whistleblower law is met "when a whistleblower has a reasonable belief that the wrongdoing reported has occurred, and the wrongdoing reported, if proven, constitutes criminal activity. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 134 (2005).***

❑ The forum found that complainant acted in good faith when she immediately contacted respondent, through its manager, upon learning that her health insurance had been cancelled and that respondent had continued to withhold premiums from her paycheck for three months after the cancellation, and told the manager her belief that the continued payroll deductions amounted to theft and that she expected reimbursement for what she believed were purloined funds. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 133 (2005).***

❑ The "good faith" requirement for reporting criminal

activity under *former* ORS 659.550 is met when a whistleblower has a reasonable belief that the wrongdoing reported has occurred, and the wrongdoing reported, if proven, constitutes criminal activity. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 126 (2002).***

❑ The "good faith" element of the agency's prima facie case contains three interrelated requirements. First, a complainant must make a report. Second, the report must concern criminal activity. Third, the criminal activity must be reported in good faith. All three requirements must be satisfied in order for a complainant to prevail. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 121-22 (2002).***

❑ The "good faith" requirement of *former* ORS 659.550 does not require the absence of ulterior motives on the whistleblower's part, but only a belief that is reasonable. However, evidence of ulterior motives on the part of the whistleblower may shed light on whether the whistleblower in fact had a belief that was "reasonable." ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 124-25 (2002).***

❑ When the criminal activity reported by complainant was falsification of employee timecards, the forum held that complainant had a "reasonable belief" at the time she made her report that her co-worker was falsifying timecards based on the following facts. There was undisputed testimony that complainant and a number of other employees believed, at the time of complainant's report, that the co-worker was falsifying the hours worked written on her timecards. This belief was based on undisputed facts that the co-worker was gone from respondent's premises during some of the hours that she reported as having worked, that respondent's manager did not inform persons on her staff that she had assigned duties to the co-worker that took the co-worker off the premises, and that the co-worker handwrote all the hours on her timecards instead of using the standard procedure of using respondent's time clock. Complainant was aware of all of these facts. The belief was strong enough that a number of complainant's co-workers were prepared to walk off the job in protest if their immediate supervisor did not take action to deal with the situation. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 125-26 (2002).***

❑ Complainant, in good faith, made a complaint to a county health department that was a regulatory licensing agency authorized to bring a civil proceeding or seek injunctive relief against respondent. In response to the complaint, the county health department inspected respondent's restaurant and threatened to lower its sanitation rating. When respondent's president discharged complainant because he complained to the health department and complainant suffered lost wages and mental distress due to the discharge, the commissioner held that respondent violated ORS 659.550(1). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 24 (1997).***

54.7 --- Terms, Conditions, & Privileges of Employment

❑ When credible testimony by complainant and a witness and a written warning showed that respondent's manager believed complainant had been involved in reporting falsified timecards to respondent's corporate headquarters, complainant was suspended immediately followed a discussion about the timecards with respondent's manager, and the falsified timecards were the only subject discussed, the forum concluded that respondent's manager's belief that complainant had been involved in reporting falsified timecards was a substantial factor in her decision to suspend complainant. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 128 (2002).***

❑ The forum found that complainant's report of timecard falsification was a substantial factor in respondent's manager's decision to suspend complainant based on a number of reasons. Complainant had no performance problems and was never disciplined for any reason before her suspension. When respondent's manager became aware of the report, she called complainant into her office and angrily confronted her with this information. Complainant acknowledged she had faxed the falsified timecards to corporate headquarters. Respondent's manager called complainant a "backstabber" and suspended her. Complainant's involvement and knowledge concerning the faxed timecards was the only subject discussed in that meeting, and her confession of involvement was the event that immediately precipitated her suspension. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 126-27 (2002).***

54.8 --- Discharge/Constructive Discharge

❑ Even if complainant had made a good faith report of criminal activity, he would still not prevail when there was no credible evidence that the person who made the decision to discharge him had any knowledge of complainant's report before he made the decision to fire complainant. ***----- In the Matter of Logan International Ltd., 26 BOLI 254, 280-81 (2005).***

❑ The agency established a causal connection between complainant's discharge and her good faith report of criminal activity through credible evidence showing complainant was never given any written warnings or disciplined for any reason while in respondent's employ; complainant was discharged one week after she in good faith reported criminal activity; respondent gave complainant no reason for her discharge; and respondent told the Employment Department that complainant was laid off due to a reduction in force, then hired another bartender to replace complainant soon after she was discharged. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 134-35 (2005).***

❑ When respondent's reasons for discharging complainant were not credible, respondent's manager demonstrated a retaliatory motive towards complainant, and complainant was discharged the day after respondent's manager perceived that he reported timecard falsification, the forum found that complainant was discharged because respondent's manager believed he had reported timecard falsification to respondent's corporate headquarters. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 129-***

31 (2002).

❑ The forum found that complainant's report of timecard falsification was a substantial factor in respondent's decision to discharge complainant based on the contemporaneous and continuing retaliatory animus of respondent's manager, who recommended that complainant be discharged, credible testimony by complainant, and the untruthful testimony of respondent's manager. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 127-28 (2002).***

❑ Complainant, in good faith, made a complaint to a county health department that was a regulatory licensing agency authorized to bring a civil proceeding or seek injunctive relief against respondent. In response to the complaint, the county health department inspected respondent's restaurant and threatened to lower its sanitation rating. When respondent's president discharged complainant because he complained to the health department and complainant suffered lost wages and mental distress due to the discharge, the commissioner held that respondent violated ORS 659.550(1). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 24 (1997).***

54.9 --- "Perceived" Whistleblowers

❑ When complainant was discharged based on the perception of respondent's manager that he had reported timecard falsification, a criminal activity, to respondent's corporate headquarters, complainant was protected under *former* ORS 659.550 and *former* OAR 839-010-0110(3) and respondent violated *former* ORS 659.550. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 131-32 (2002).***

❑ When the agency charged that complainant was fired because he was perceived as a whistleblower, the agency's prima facie case consisted of the following elements: (1) respondent is an employer as defined by statute; (2) complainant was employed by respondent; (3) someone reported criminal activity; (4) respondent suspended, then discharged complainant; (5) respondent suspended, then discharged complainant for the reason that it believed that complainant reported criminal activity. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 121 (2002).***

VI. COMPLAINT AND HEARING PROCESS

60.0 COMPLAINT OF UNLAWFUL EMPLOYMENT PRACTICE (*see also* Ch. I, sec. 5.0)

60.1 --- Generally

❑ In Oregon, a complainant aggrieved by an alleged unlawful employment practice as defined by ORS Chapter 659 may pursue a claim with BOLI through an administrative proceeding or may file a civil suit in circuit court. The remedies available to the complainant are different in the two forums. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 218 (2000)***.

❑ When respondent was charged with violating ORS 659.415 and failed to satisfy its obligation of reinstating the complainant by mailing a written offer to complainant's last known address, as required by OAR 839-06-130(5)(a), the commissioner held it was not necessary for the agency to charge the respondent with violations of the rules related to ORS 659.415. "Once the agency has charged a respondent with a violation of the statute, the issues addressed by the rules are clearly within the scope of the issues to be addressed at hearing." ***----- In the Matter of St. Vincent de Paul Salvage Bureau, 8 BOLI 293, 301 (1989).***

60.2 --- Commissioner's Complaint (*see also* 2.2)

61.0 COMPLAINT OF DISCRIMINATION IN HOUSING OR PUBLIC ACCOMMODATION

62.0 INVESTIGATION; SUBSTANTIAL EVIDENCE DETERMINATION

62.1 --- Generally (*see also* Ch. I, secs. 6.0 - 6.7, 8.2)

❑ When the agency failed to follow its rule regarding investigation of civil rights complaints, the commissioner held that "[a]n agency which is vested with discretion by statute may limit its own discretion in its rules. Once it has limited its discretion, the agency 'may be compelled, * * * to act in accordance with its self-imposed limitations.' * * *. The Oregon Supreme Court has said, "[a]dministrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute.' * * * The Oregon Court of Appeals has said regarding Bureau of Labor and Industries' rules that, "[r]ules prescribing methods of procedure of an administrative board or commission have the effect of law, are binding on the board or commission and must be followed by it so long as they are in effect." Under the facts of this case, OAR 839-03-065 states that an administrative determination is final when the exceptions are not met. The agency did not follow its own rule when it reopened complainant's case in July 1987. When agencies have failed to follow their own rules, the courts have remanded the cases to the agencies with directions that they follow those rules. In this case, to follow the rule means to treat the administrative determination issued in November 1986 as amended, as final. That determination says the agency found no substantial evidence of unlawful discrimination. The commissioner granted respondent's motion for summary judgment and dismissed the complaint and the specific charges according to ORS 659.060(3). ***----- In the Matter of Kristen Corporation, 8 BOLI 195, 205 (1990).***

62.2 --- Conciliation (*see also* Ch. I, sec. 7.0)

❑ The administrative procedure used by the agency to process a civil rights complaint, including conference, conciliation, and persuasion, is not a matter the agency needs to plead and prove in a contested case. If a respondent believes the agency has not followed the procedure, it can raise that issue as an affirmative defense. When a respondent raises the issue, it has the burden of presenting evidence to support its affirmative defense. ***----- In the Matter of WS, Inc., 13 BOLI 64, 92***

(1994).

62.3 --- Cease and Desist Orders (Prior to Hearing)

62.4 --- Civil Penalties (ORS 659.050(2))

62.5 --- Request for Contested Case Hearing

63.0 CONTESTED CASE PROCESS (*see generally* Ch. I -- Admin. Proc.)

63.1 --- Formal/Specific Charges (*see also* Ch. 1, secs. 8.0 - 8.5)

❑ Respondent contended that the commissioner lacked jurisdiction because the agency had failed to issue an administrative determination and specific charges within one year of complainant's filing the administrative complaint. The commissioner found that the agency had issued its administrative determination timely and that there was no statutory requirement as to when the specific charges must be issued. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240***, ***249-50 (1991).***

63.2 --- Cease and Desist Orders (After Hearing) (*see* 103.0)

63.3 --- Dismissal of Charges

❑ After hearing, the forum granted respondent's motion to dismiss the agency's formal charges alleging an OSHA violation when complainant first alleged facts supporting an OSHA violation 118 days after his discharge. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 153-54, 170 (2005).***

❑ When the agency failed to follow its rule regarding investigation of civil rights complaints, the commissioner held that "[a]n agency which is vested with discretion by statute may limit its own discretion in its rules. Once it has limited its discretion, the agency 'may be compelled, * * * to act in accordance with its self-imposed limitations.' * * *. The Oregon Supreme Court has said, "[a]dministrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute.' * * * The Oregon Court of Appeals has said regarding Bureau of Labor and Industries' rules that, "[r]ules prescribing methods of procedure of an administrative board or commission have the effect of law, are binding on the board or commission and must be followed by it so long as they are in effect." Under the facts of this case, OAR 839-03-065 states that an administrative determination is final when the exceptions are not met. The agency did not follow its own rule when it reopened complainant's case in July 1987. When agencies have failed to follow their own rules, the courts have remanded the cases to the agencies with directions that they follow those rules. In this case, to follow the rule means to treat the administrative determination issued in November 1986 as amended, as final. That determination says the agency found no substantial evidence of unlawful discrimination. The commissioner granted respondent's motion for summary judgment and dismissed the complaint and the specific charges according to ORS 659.060(3). ***----- In the Matter of Kristen Corporation, 8 BOLI 195, 205 (1990).***

64.0 ELECTION OF REMEDIES (*see also* Ch. I, sec. 8.6)

VII. ESTABLISHING DISCRIMINATION

70.0 AGENCY'S BURDEN OF PROOF (*see also* Ch. I, secs. 21.3 - 21.4)

70.1 --- Generally

❑ The agency, at all times, has the burden of proving complainant was terminated for an unlawful reason. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 61 (2002).***

❑ The agency has the burden of proving unlawful discrimination. ***----- In the Matter of Wing Fong, 16 BOLI 280, 289 (1998).*** *See also In the Matter of Benn Enterprises, Inc., 16 BOLI 69, 76 (1997); In the Matter of Motel 6, 13 BOLI 175, 186 (1994).*

❑ A prima facie case of an unlawful employment practice is established when there is proof acceptable to the forum that: (1) Respondent is a respondent as defined by statute; (2) The complainant is a member of a protected class; (3) The complainant was harmed by an action of respondent; and (4) The respondent's action was taken because of the complainant's membership in the protected class. ***----- In the Matter of Soapy's, Inc., 14 BOLI 86, 95 (1995).*** *See also In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 178 (1993); In the Matter of Community First Building Maintenance, 9 BOLI 1, 5 (1990); In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 115 (1989); In the Matter of Dillard Hass Contractor, Inc., 7 BOLI 244, 250 (1988); In the Matter of Jake's Truck Stop, 7 BOLI 199, 212 (1988).*

❑ In a sex discrimination case, the commissioner stated that Oregon courts have rejected any burden shifting and the burden of proving unlawful discrimination remains with the agency throughout the case. ***----- In the Matter of Motel 6, 13 BOLI 175, 186 (1994).***

❑ The initial burden to establish a prima facie case of age discrimination falls upon the agency, the participant bringing the action. A prima facie case can be defined as a skeletal offering of proof containing at least some evidence in support of the agency's position on each element of the alleged violation. A helpful framework for analysis may be borrowed from federal case law interpreting the Federal Age Discrimination in Employment Act. ***----- In the Matter of Mutual Wholesale Drug Company, 2 BOLI 63, 67-68 (1981).***

70.2 --- Specific Intent

❑ Proof of a causal connection can be established: (1) *indirectly*, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) *directly*, through evidence of retaliatory animus directed against a complainant by the respondent. The agency, at all times, has the burden of proving that complainant was terminated or otherwise discriminated against for

unlawful reasons. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 301 (2007).***

❑ While specific intent may be established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 300 (2007).***

❑ As set forth in *former* OAR 839-005-0010(2), the "Specific Intent Test" is one method of determining a causal connection between a respondent's adverse action and a complainant's protected class and may be shown by circumstantial evidence. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 61 (2002).***

❑ Specific intent is generally established by direct evidence of a respondent's discriminatory motivation. ----- ***In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 29 (2000)***.

❑ Respondent's internal memorandum citing complainant's medical leave in connection with her termination and the testimony of respondent's personnel manager that complainant was discharged based on working for another employer without respondent's permission, and that he felt it was unfair of complainant to take advantage of respondent's policy set up to benefit its employees created an inference that complainant's medical leave was a motivating factor in respondent's decision to terminate complainant. However, based on respondent's legitimate, nondiscriminatory reason and the forum's finding that complainant's medical leave was mentioned in the memorandum to provide historical context, not cause, that evidence was insufficient to establish specific intent. ----- ***In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 29 (2000)***.

❑ Respondents sent complainant a note stating they did not hire him because they "were looking for someone younger, to possibly take over the business." The forum found that note to be direct evidence of unlawful discrimination. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 209 (2000)***.

❑ When there was direct evidence that respondents refused to hire complainant because of his age, the forum concluded that respondents had engaged in unlawful employment practices, despite the fact that respondents did not hire anybody to fill the position for which complainant had applied. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 211 (2000)***.

❑ ORS 659.425(1) requires an act of discrimination accompanied by discriminatory intent for a violation to occur. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 270 (fn), 275 (1997).***

❑ In the context of discrimination law, when the nature of the offense alleged is that it was motivated by the victim's membership in a statutorily protected class, the manner in which other members of that class have allegedly been treated is clearly relevant to the inquiry. To the extent that comparative evidence relating to the protected class at issue may also reflect prior bad acts by respondent, that evidence will not be excluded for that reason. ***----- In the Matter of Howard Lee, 13 BOLI 281, 292 (1994).***

❑ In the context of discrimination law, when the nature of the offense alleged is that it was motivated by the victim's membership in a statutorily protected class, the manner in which other members of that class have allegedly been treated is clearly relevant to the inquiry. To the extent that comparative evidence relating to the protected class at issue may also reflect prior bad acts by respondent, that evidence will not be excluded for that reason. ***----- In the Matter of Howard Lee, 13 BOLI 281, 292 (1994).***

70.3 --- Different or Unequal Treatment

❑ Proof of a causal connection can be established: (1) *indirectly*, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) *directly*, through evidence of retaliatory animus directed against a complainant by the respondent. The agency, at all times, has the burden of proving that complainant was terminated or otherwise discriminated against for unlawful reasons. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 301 (2007).***

❑ Comparative evidence related to a complainant's protected class and a respondent's prior acts related to the nature of the offense are relevant in discrimination cases alleging different or unequal treatment. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 215 (2007).***

Appeal pending.

❑ Respondent required that complainant, who had invoked the provisions of OFLA, sign respondent's break policy, then terminated her because she refused to sign, but did not terminate another employee who had not invoked a right under the OFLA provisions and did not sign the break policy. The forum drew an inference that respondent treated complainant differently than her counterpart because complainant engaged in a protected activity. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 241 (2004).***

❑ When the agency established that respondent employed at least three other persons at the time of complainant's termination who had missed entire shifts of work, who had not been compensably injured while in respondent's employ, and who were not terminated, the forum found the comparative evidence sufficient to establish that complainant, who had missed one shift because of her daughter's illness and had followed respondent's written policy by reporting her pending absence, was terminated because of her use of the workers' compensation system. ***----- In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 87 (2004).***

❑ Respondent's assertion that one of the reasons for complainant's discharge was that his poor work performance had become a business liability was negated by evidence that no other sales representative with equal or inferior records was discharged during the relevant time period. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 187 (1982).***

❑ After accommodating complainant's series of increasingly restrictive medical releases over a two month period, respondent terminated complainant, an injured worker who applied for and used the workers' compensation provisions, for violating respondent's policy prohibiting offensive language in the workplace, and did not terminate other workers who had not applied for or used the workers' compensation provisions who violated the same policy, violating former ORS 659.410(1). ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 62-63 (2002).***

❑ The agency argued that respondent's reason for terminating complainant was a pretext for discrimination because respondent knew a co-worker had violated the same harassment policy as complainant and did not terminate her. Though she was treated differently, evidence showed the co-worker was a member of complainant's protected class and, therefore, not a proper comparator. Moreover, respondent articulated a believable reason -- that a pattern emerged during respondent's investigation of harassment allegations that made it obvious to management that complainant and her boyfriend were the principals responsible for perpetuating the harassment and the co-worker appeared less culpable. Complainant's pattern of inconsistent and exaggerated testimony during hearing only served to bolster this reason. The agency did not prove by a preponderance of the evidence that complainant would not have been terminated for violating respondent's harassment policy had she been unmarried and dating an unmarried co-worker. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 50 (2001).***

❑ Under the different treatment test, the Agency's burden of proving that complainant's utilization of OFLA was the reason for respondent's alleged unlawful action can be met as follows. The complainant begins this process [of proof] by showing harm because of an action of the respondent which makes it appear that the respondent treated complainant differently than comparably situated individuals who were not members of the complainant's protected class. The respondent must then rebut this showing. If the respondent fails to rebut this showing, the Division will conclude that substantial evidence of unlawful discrimination exists. If the respondent does rebut the showing, the Complainant may then show that the respondent's reasons are a pretext for discrimination." ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 29-30 (2000)***.

❑ When respondent provided an LNDR by producing clear and reasonably specific admissible evidence that its collective bargaining agreement required employees who take any kind of leave of absence to obtain prior permission from respondent before taking a job elsewhere while on their leave, that complainant was discharged based on that policy, and that the policy is uniformly applied to all employees on leave of absence for any reason, the forum stated that the agency could still prevail by proving that respondent's LNDR was a pretext for discrimination. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 30 (2000)***.

❑ The agency's burden of showing pretext merges with the ultimate burden of persuading the forum that complainant was the victim of intentional discrimination. Pretext may be established through credible evidence that similarly situated employees (comparators) outside of the complainant's protected class received favored treatment or did not receive the same adverse treatment. Respondent's treatment of other members of complainant's protected class, i.e. employees who took OFLA leave, was also relevant in a different treatment analysis. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 30 (2000)***.

❑ The forum determined that the appropriate comparators in an OFLA retaliation case were other employees who took leaves of absence of any kind. When other employees regularly took OFLA and are reinstated to their former positions, and only one other person had, like complainant, taken another job without obtaining respondent's prior permission while on an "authorized" leave of absence, and that person was fired for that reason, the forum concluded that complainant was not subjected to disparate treatment based on his use of OFLA leave. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 30-31 (2000)***.

❑ To prove that respondents violated ORS 659.030(1)(b) by reducing complainant's work hours because she was pregnant, the agency had to establish: (1) respondents were employers subject to ORS 659.010 to 659.110; (2) respondents employed complainant; 3) complainant was a pregnant woman; (4) respondents took an action that harmed complainant in compensation or in terms, conditions or privileges of employment; (5) respondents took their action against complainant because of her pregnancy. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 185 (2000)***.

❑ In a case in which the agency alleges that a respondent engaged in unlawful discrimination, the agency must prove: 1) the respondent is a respondent as defined by statute; 2) complainant is a member of a protected class; 3) complainant was harmed by an action of respondent; and 4) respondent's action was taken because of complainant's protected class. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 133 (2000)***. *See also In the Matter of Alpine Meadows Landscape*, *19 BOLI 191, 208 (2000).*

❑ The agency met its initial burden of proof by producing evidence that: complainant cut himself when he failed to wear a protective "cut glove"; complainant invoked or utilized the workers' compensation system; respondent discharged complainant when he was released to return to work and attempted to return to work, purportedly for failing to wear the cut glove; and respondent did not discharge other kitchen staff who failed to wear a cut glove. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 134 (2000)***.

❑ In a wrongful discharge case, respondent produced evidence that numerous employees other than complainant had filed workers' compensation claims. Those employees were properly considered comparators in the forum's causation analysis. However, there was no evidence concerning the

circumstances of these employees' employment, whether any of them had violated respondent's knife policy (the violation of which purportedly was the basis for complainant's discharge), and, if so, whether they were injured as a result of that violation. Consequently, the forum gave evidence regarding these employees less weight than it gave evidence concerning five other employees who were shown to have violated respondent's knife policy in the same manner as complainant. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 136 (2000)***.

❑ To prove that a place of public accommodation discriminated against a person on account of the person's race, the agency must prove: (1) the respondent is a respondent as defined by statute; (2) the complainant is a member of a protected class (race); (3) the complainant was harmed by an action of respondent; and (4) the respondent took its action because of the complainant's protected class. ***----- In the Matter of Westwind Group of Oregon, 17 BOLI 46, 51 (1998)***.

❑ When the agency alleged that complainant was subjected to disparate treatment based on her sex and/or retaliation, the forum stated that the agency must show that the treatment was discriminatory, that is, that it was not accorded to males and/or was not accorded to persons who had not opposed forbidden practices. ***----- In the Matter of Oregon Department of Fish and Wildlife, 16 BOLI 263, 278 (1998).***

❑ When the agency presented evidence that respondent hit or pushed two female employees as he corrected their work, but did not subject the sole male employee to such treatment, the forum applied the different or unequal treatment test in OAR 839-05-010(2)(b) and held that the agency had presented sufficient evidence to support a prima facie case of unlawful discrimination based on sex. ***----- In the Matter of Howard Lee, 13 BOLI 281, 290-91 (1994).***

❑ In order to show unlawful discrimination based on 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. A respondent's employment of one-at-a-time individuals in serial or successor employment, when respondent pays different wages based on sex, will support a conclusion of unlawful discrimination. ***----- In the Matter of C & V, Inc., 3 BOLI 152, 160 (1982).***

❑ It is lawful for an employer to summarily discharge an employee for conduct that 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 the Matter of Horst Mager Specialty Restaurants, Inc., 3 BOLI 39, 45 (1982).***

❑ Different treatment cases require proof of respondent's discriminatory intent. When respondent had a policy of not permitting female employees to work with male prisoners, the forum determined that the policy intentionally discriminated against a female complainant because of her sex. Basing an employment decision on this policy perpetuated the effect of the intentional discrimination. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 70 (1982).***

70.4 --- Pretext

❑ To overcome respondent's stated reason for terminating complainant, the agency must establish by a preponderance of evidence that Respondent's reason was not worthy of belief. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 304 (2007).***

❑ Because the various explanations given by complainant's supervisor for demoting complainant proved false, the forum made a reasonable inference infer that the supervisor was concocting explanations to conceal a discriminatory motive for the demotion, which was to retaliate against complainant for complainant's pursuit of the truth about a safety issue implicating the supervisor's wife. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 250-51 (2007).***

❑ The agency argued that respondent's reason for terminating complainant was a pretext for the discriminatory reason because respondent knew a co-worker had violated the same harassment policy as complainant and did not terminate her. Though she was treated differently, evidence showed the co-worker was a member of complainant's protected class and, therefore, not a proper comparator. Moreover, respondent articulated a believable reason -- that a pattern emerged during respondent's investigation of harassment allegations that made it obvious to management complainant and her boyfriend were the principals responsible for perpetuating the harassment and the co-worker appeared less culpable. Complainant's pattern of inconsistent and exaggerated testimony during hearing only served to bolster this reason. The agency did not prove by a preponderance of the evidence that complainant would not have been terminated for violating respondent's harassment policy had she been unmarried and dating an unmarried co-worker. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 50 (2001).***

❑ Under the different treatment test, the agency's burden of proving that complainant's utilization of OFLA was the reason for respondent's alleged unlawful action can be met as follows. The complainant begins this process [of proof] by showing harm because of an action of the respondent which makes it appear that the respondent treated complainant differently than comparably situated individuals who were not members of the complainant's protected class. The respondent must then rebut this showing. If the respondent fails to rebut this showing, the Division will conclude that substantial evidence of unlawful discrimination exists. If the respondent does rebut the showing, the complainant may then show that the respondent's reasons are a pretext for discrimination. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 29-30 (2000)***.

❑ When respondent provided a legitimate, nondiscriminatory reason by producing clear and reasonably specific admissible evidence that its collective bargaining agreement required employees who take any kind of leave of absence to obtain prior permission from respondent before taking a job

elsewhere while on their leave, that complainant was discharged based on that policy, and that the policy is uniformly applied to all employees on leave of absence for any reason, the forum stated that the agency could still prevail by proving that respondent's legitimate, nondiscriminatory reason was a pretext for discrimination. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 30 (2000)***.

❑ When the respondent successfully presents evidence that it took action against a complainant for a legitimate, nondiscriminatory reason, the agency still may prevail by proving that the proffered justification was a pretext for discrimination. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 134 (2000)***.

❑ In the context of discrimination law, when the nature of the offense alleged is that it was motivated by the victim's membership in a statutorily protected class, the manner in which other members of that class have allegedly been treated is clearly relevant to the inquiry. To the extent that comparative evidence relating to the protected class at issue may also reflect prior bad acts by respondent, that evidence will not be excluded. ***----- In the Matter of Howard Lee, 13 BOLI 281, 292 (1994).***

❑ When the inquiry involves the employer's treatment of an employee based on the employee's protected class, comparative evidence bearing on the employer's treatment of other employees of the same protected class, whether direct or circumstantial, is both relevant and admissible. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 175 (1991).*** *See also In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 176-77, 179 (1989).*

70.5 --- Harassment

❑ The standard for evaluating whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in the complainant's particular circumstances. Respondent's conduct, while only verbal, consisted of ongoing sexual slurs and jokes, repeated remarks to complainant detailing his sex life, and at least one reference to complainant as a "fucking slut" during the six months she was employed. Complainant was the only employee and a captive audience to his ongoing behavior that occurred in relatively close quarters. The forum found respondent engaged in a pattern of offensive conduct that particularly demeaned women and that from the perspective of a reasonable person in complainant's circumstances, it was sufficiently pervasive as to create an offensive working environment. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 32 (2002), amended 23 BOLI 67 (2002).***

❑ In order to prevail in a sexual harassment complaint, the agency is required to prove the following elements: (1) respondent is an employer defined by statute; (2) complainant was employed by respondent; (3) complainant is a member of a protected class; (4) respondent, through its proxy, engaged in conduct of a sexual nature toward complainant because of her gender; (5) the conduct created a hostile, intimidating, or offensive work environment; (6) complainant was harmed by the conduct. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 31 (2002), amended 23 BOLI 67 (2002).***

❑ Respondent engaged in a pattern of verbal conduct that included regular remarks to complainant about his sexual exploits, including accounts of his lunches at strip clubs, his "$20 dates" with prostitutes, and "blow jobs" he claimed to receive regularly. He also often referred to women as "fucking bitches" or "god damn fucking sluts" within complainant's earshot, and at least once during her six-month employment called her a "god damn fucking slut." Due to the proximity of their respective desks, complainant regularly overheard respondent relate sexually explicit jokes, usually involving oral sex, to others over the telephone. Additionally, complainant was required to perform some of her job duties in respondent's office and several times came across publications depicting unclad women on the covers. While there was no evidence that respondent intended anyone to see the publications, he was, at best, indifferent to their detection. The forum found that respondent's conduct was sexual conduct that was particularly offensive to women and directed at complaint, respondent's only employee, because of her gender. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 31 (2002), amended 23 BOLI 67 (2002).***

❑ When there was no evidence that complainant engaged in any conduct that would invite the obscenity that pervaded complainant's work environment, that she used vulgar language in the workplace or initiated any sexually oriented conversations with respondent or anyone else, and there was evidence that complainant told respondent at least once that she was not interested in hearing about his sexual exploits and expressed concern to another person about respondent's language, the forum found there was sufficient evidence in the record to conclude that complainant found respondent's verbal conduct unwelcome. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 32 (2002), amended 23 BOLI 67 (2002).***

❑ Respondent's personnel manager remarked to complainant's boyfriend that complainant "is a married woman, you know," and to complainant that "being almost divorced is like being almost pregnant, you're not until you are." There was no credible evidence that the comments were made for any reason other than in jest during a chance meeting. While complainant may have perceived the comment as moralistic censure, it was not severe enough that she felt compelled to tell anyone about it nor did she file a complaint even though she was aware of and had previously made use of respondent's harassment procedures. There were no witnesses to the comment and there is no evidence the personnel manager continued to make remarks about or pass judgment on complainant's relationship with her boyfriend. The forum concluded that, although the comment was related to complainant's protected class, it was not severe or pervasive enough to create a hostile, intimidating, and offensive work environment. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 47-48 (2001).***

❑ Complainant testified that an assistant manager in

the respondent's store's garden center told her that complainant could not be transferred back to the garden center as long as complainant's boyfriend worked there and that, at a later date, the manager asked complainant to work in the garden center during another employee's lunch hour and reminded her "there are cameras back there and you are working" and then admonished complainant and her boyfriend to "behave themselves." The forum concluded that even if the comments occurred, the agency produced no evidence showing the comments were made because of the marital status of complainant and her boyfriend. Considering respondent's policy prohibiting romantic conduct in the workplace, irrespective of an employee's marital status, the forum concluded the purported comments did not create an inference they were directed toward complainant because of her marital status and the marital status of the co-worker she was admittedly dating. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 47-48 (2001).***

❑ During an interview related to a sexual harassment investigation involving complainant and another employee, respondent's store manager started to ask complainant if she was dating a co-worker and then said, "Never mind, I don't want to go there." The store manager testified credibly that his query had nothing to do with complainant's marital status or that of her boyfriend. The forum found no discriminatory animus inherent in the store manager's comment and the agency produced no evidence whatsoever showing his comment to complainant was motivated by a perception that she was engaging in an adulterous relationship. The forum concluded that the store manager's comment was not related to the marital status of complainant or her boyfriend. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 48 (2001).***

❑ In a case alleging harassment based on marital status, several alleged discriminatory comments, evaluated singly and in context with each other, did not meet the threshold criterion of being related to complainant's marital status, and it was not necessary to take them into account when determining whether the one comment that did relate to complainant's marital status created a hostile work environment. ***----- In the Matter of Wal-Mart East, Inc., 22 BOLI 27, 51 (2001).***

❑ A prima facie case of co-worker harassment based on race consists of the following elements: (1) respondent is a respondent as defined by statute; (2) complainant is a member of a protected class; (3) complainant was harmed by harassment directed at her by co-workers; (4) complainant's race was a reason for the co-worker harassment; (5) the harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the complainant's work performance or creating an intimidating, hostile or offensive working environment; 6) the standard for determining whether harassment was sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable African American in the circumstances of the complainant would so perceive it; (7) respondent knew or should have known of the harassment. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 23 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ In a case of racial harassment, the "harm" element of the agency's prima facie case was satisfied by complainant's credible testimony that she was offended by a noose incident and so upset that she had to leave her work station temporarily and felt she could no longer work with the harassing co-worker, as evidenced by her subsequent requests to her supervisor for a transfer to a different department. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 23 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Although circumstantial evidence led an African American complainant to reasonably conclude that her race/color were a reason for a noose made by her co-worker, this conclusion was not supported by a preponderance of the evidence and the forum concluded that the agency failed to meet its burden of proving that complainant's race/color were a reason for the noose. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 23-24 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ In a racial harassment case, a prima facie showing of harassment by a supervisor, with no tangible employment action, consists of the following elements: (1) respondent is a respondent as defined by statute; (2) complainant is a member of a protected class; (3) complainant was harmed by harassment directed at her by a supervisor with immediate or successively higher authority over her; (4) complainant's protected class was a reason for the supervisory harassment; (5) the harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the complainant's work performance or creating an intimidating, hostile or offensive working environment; (6) the standard for determining whether harassment was sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable African American in the circumstances of the complainant would so perceive it; (7) respondent knew or should have known of the harassment. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 25 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ In a case of racial harassment, the "harm" element of the agency's prima facie case was satisfied by emotional upset complainant experienced after observing a full-sized noose in her supervisor's office while meeting with him to discuss racial harassment she believed she had experienced from a co-worker's noose.

----- In the Matter of Servend International, Inc., 21 BOLI 1, 25 (2000).

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Although circumstantial evidence In a racial harassment case led an African American complainant to reasonably conclude that her race/color were a reason for a full-sized noose hanging in her supervisor's office, this conclusion was not supported by a preponderance of the evidence and the forum concluded that the agency failed to meet its burden of proving that complainant's race/color were a reason for the noose. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 25-26 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ When a Caucasian co-worker directed remarks towards an African American complainant referring to himself as "poor white trash" and asked her if she thought he was "poor white trash," and at the time the remarks were made, complainant perceived them as "harassment," but not as "racial discrimination," the forum concluded that complainant suffered "harm" based on her credible testimony that she felt harassed by the remarks. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 26 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ When a Caucasian co-worker referred to himself as "poor white trash" and asked an African American complainant if she thought he was "white trash," the forum found that several facts gave rise to an inference that complainant's race/color was a reason for the remarks. First, their subject matter was race/color, albeit the co-worker's race/color. Second, they were directed at complainant, the only African American in the room. Third, the co-worker had no explanation for his remarks when questioned about them by management. Giving rise to the opposite inference were the facts that the co-worker's remarks were derogatory towards himself, not African Americans; complainant did not believe until later that they were directed at her because of her race; and there was no testimony, credible or incredible, to shed light on the co-worker's state of mind when he made these remarks. The co-worker's remarks may have been intended to racially harass complainant or may have been intended as self-deprecation. The agency bears the burden of proving, by a preponderance of the evidence, that complainant's race/color was a reason for the co-worker's remarks and did not met that burden. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 26-27 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ In a racial harassment case, a Caucasian co-worker, on the afternoon of the same day that he made "white trash" remarks in an African American complainant's presence, made additional comments in complainant's presence about "gangbangers," made some gestures that complainant believed were "gang signs," and commented "what you got on this bag," which complainant interpreted as being related to drug dealers. Complainant perceived that the co-worker was speaking and acting in a way that was intended to imitate African American males and was offended by these remarks. Complainant's credible testimony that she was offended by this conduct satisfied the "harm" element of the agency's prima facie case. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 27 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ In a racial harassment case, when complainant testified credibly to her perception and the basis for her perception that a Caucasian co-worker was speaking and acting in a way intended to imitate African-American males and portray them as gang members and drug dealers, that she was the only African American present when this behavior occurred, and that his behavior was "racial," the forum concluded that the co-worker's behavior was based on complainant's race/color. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 27 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ The forum applied an objective standard to determine whether a Caucasian co-worker's conduct consisting of speaking and acting in a way intended to imitate African-American males and portray them as gang members and drug dealers was sufficiently severe or pervasive to have created an "intimidating, hostile or offensive working environment" for a "reasonable person in the circumstances of the [c]omplainant," applying this standard in light of the "totality of the circumstances." This forum noted its previous recognition that "there is an inverse relationship between the requisite severity and pervasiveness of harassing conduct: as the severity of the conduct increases, the frequency of the conduct necessary to establish harassment decreases" and concluded that the co-worker's conduct, standing alone, was not sufficiently severe to have created an intimidating, hostile or offensive working environment for a reasonable African American in the circumstances of the complainant. Furthermore, because it was the only incident in which complainant's race/color was a reason for the harassment, the forum found that the incident was not part of an environment or series of events in which harassment was sufficiently pervasive to have created an intimidating, hostile or offensive working

environment for a reasonable African American in the circumstances of the complainant. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 28 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ To establish a prima facie case of sexual harassment, the agency must present evidence to show: (1) respondent was an employer subject to ORS 659.010 to 659.110; (2) respondent employed complainant; (3) complainant is a member of a protected class (sex); (4) respondent engaged in unwelcome verbal or physical conduct directed at complainant because of her protected class; (5) the conduct had the purpose or effect of creating an intimidating, hostile or offensive work environment; (6) respondent knew or should have known of the conduct; and (7) complainant was harmed by the conduct. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 92 (1998)***.

❑ The agency established that respondent's conduct was unwelcome to complainant through credible testimony that complainant repeatedly and clearly objected to respondent's conduct, physically moved away from him, refused his social invitations, and attempted to discuss his harassing behavior. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 93 (1998)***.

❑ In a sexual harassment case, the agency established that respondent's conduct was directed at complainant because of her sex through evidence that he attempted to date her, spoke to her of his sexual encounters with other women, stated that sex relaxed him, and stated that complainant "was naïve and had been hurt by other men and that he was not like other men." ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 93 (1998)***.

❑ To establish a prima facie case of hostile environment harassment by a supervisor of a worker who applied for benefits or invoked or utilized the workers' compensation procedures, the agency must prove that: (1) respondent is an employer of six or more persons; (2) respondent employed complainant; (3) complainant was a worker who applied for benefits or invoked or utilized the worker's compensation procedures; (4) respondent's supervisory employee engaged in unwelcome verbal or physical conduct directed at complainant because of his protected class; (5) the conduct had the purpose or effect of creating an objectively intimidating, hostile, or offensive working environment; (6) respondent knew or should have known of the conduct; and (7) complainant was harmed by the conduct. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 72 (1999)***. *See also In the matter of LTM, Incorporated, 17 BOLI 226, 238 (1998); In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 9-10 (1998), affirmed without opinion, Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries, 160 Or App 700, 981 P2d 402 (1999).*

❑ Evidence of the pervasiveness of harassment may give rise to an inference of knowledge or establish constructive knowledge. ***----- In the Matter of Wing Fong, 16 BOLI 280, 294 (1998).***

❑ In the harassment context, "constructive knowledge" means "If one by exercise of reasonable care would have known a fact. "Constructive notice" means "Such notice as is implied or imputed by law * * *. Notice with which a person is charged by reason of the notorious nature of thing to be noticed, as contrasted with actual notice of such thing. That which the law regards as sufficient to give notice and is regarded as a substitute for actual notice." ***----- In the Matter of Wing Fong, 16 BOLI 280, 292 (1998).***

❑ A prima facie case of sex harassment by a co-worker consists of the following: (1) respondents were employers as defined by statute; (2) complainant was employed by respondents; (3) complainant is a member of a protected class (sex); (4) respondents' employee made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature directed at complainant because of her sex; (5) the employee's conduct had the purpose or effect of creating a hostile, intimidating, or offensive work environment; (6) respondents knew or should have known of the offensive conduct and failed to take immediate and appropriate corrective action; and (7) complainant was harmed by the conduct. ***----- In the Matter of Wing Fong, 16 BOLI 280, 290 (1998).***

❑ To establish a prima facie case of sexual harassment, the agency must present evidence to show that (1) respondent is an employer defined by statute; (2) complainant was employed by respondent employer; (3) complainant is a member of a protected class (sex); (4) respondent employer, or respondent employer's agent, in the workplace made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature directed at complainant because of complainant's sex; (5) the conduct had the purpose respondent effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment, or submission to such conduct was made an explicit or implicit term or condition of employment; (6) respondent employer had knowledge of the offensive conduct; and (7) complainant was harmed by the conduct. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 136 (1997).*** *See also In the Matter of A.L.P. Incorporated, 15 BOLI 211, 222 (1997)(also noting possibility of non-employee harassment), affirmed, A.L.P. Incorporated, v. Bureau of Labor and Industries, 161 Or App 417, 984 P2d 883 (1999); In the Matter of Soapy's, Inc., 14 BOLI 86, 96 (1995); In the Matter of Kenneth Williams, 14 BOLI 16, 24 (1995).*

❑ To establish a prima facie case of racial harassment in violation of ORS 659.030(1)(b), the agency must present evidence to show that (1) the respondent is an employer defined by statute; (2) the complainant was employed by respondent; (3) the complainant is a member of a protected class (race); (4) the respondent, or respondent's agent, supervisory employee, or non-employee in the workplace engaged in unwelcome conduct directed at complainant because of complainant's race; (5) the conduct had the purpose or

effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment, or submission to such conduct was made an explicit or implicit term or condition of employment; and (6) the complainant was harmed by the conduct. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 14 (1996).*** *See also In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 252 (1995).*

❑ To present a prima facie case of a violation of ORS 659.030(1) for sexual harassment, the agency must present evidence on the following elements: (1) the respondent is a respondent as defined by statute; (2) the complainant is a member of a protected class; (3) the complainant was harmed by an action of the respondent; and (4) the respondent's action was taken because of the complainant's membership in the protected class. ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 88 (1993).*** *See also In the Matter of RJ's All American Restaurant, 12 BOLI 24, 29 (1993); In the Matter of C. Vogar'd Amezcua, 11 BOLI 197, 203 (1993).*

❑ For religious conduct to violate ORS 659.030, it must be sufficient severe or pervasive to alter the conditions of the complainant's employment and create a intimidating, hostile, or offensive work environment. In making this determination, the commissioner evaluates the totality of the circumstances. The commissioner has previously examined the frequency, duration, and severity of harassing conduct to determine if it created a hostile working environment. The standard applied in this determination is objective and is directed to the reasonableness of the complainant's reaction to the work environment. In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found. This is not to say, however, that the specific circumstances of the complainant play no role in determining how a reasonable person would be affected by the work environment. All objective aspects of complainant's situation will be relevant to the reasonableness of complainant's reaction to the work environment, including characteristics of the complainant. Youth and inexperience, for example are appropriately considered in evaluating the environment's impact on complainant. The trier of fact must adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 115 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ In a religious harassment case, the agency must prove its case by a preponderance of the evidence. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 113 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Harassment based on religion is a violation of ORS 659.030. Unwelcome religious advances and other verbal or physical conduct of a religious nature constitute religious harassment when: (1) submission to such conduct is made, either explicitly or implicitly, a term or condition of the subject's employment; (2) submission to or rejection of such conduct by the subject is used as the basis for employment decisions affecting the subject; or (3) such conduct has the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 112 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Unwelcome religious conduct that unreasonably interferes with the subject's work performance or creates an intimidating, hostile, or offensive work environment constitutes "environmental" religious harassment, even if it leads to no tangible or economic job consequences. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 113 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Under the religious harassment test, "quid pro quo" harassment occurs when submission to unwelcome religious conduct is made, either explicitly or implicitly, a term or condition of the subject's employment, or when submission to or rejection of such conduct by the subject is used as the basis for employment decisions affecting the subject. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 113 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ When racial harassment is alleged, the forum agrees with federal law that more than a few isolated incidents must have occurred to trigger the protection of the law. The commissioner relies upon the following principles: (1) Racial slurs must be more than infrequent, outside of casual conversation and directed at the complainant; (2) The general course of conduct at the employer's place of work can be considered; (3) Since discrimination by its nature is often a subjective inquiry, the complainant's "perception of his

environment" is a significant factor; and (4) Conduct must be racially oriented. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 36 (1987).***

❑ Racially oriented statements or actions constitute racial harassment when the conduct: (1) has the purpose or effect of creating an intimidating, hostile, or offensive work environment; (2) has the purpose or effect of unreasonably interfering with complainant's work performance; or (3) otherwise adversely affects an individual's employment opportunities. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ The commissioner adopted EEOC guidelines in regard to employer liability for racial harassment in the workplace: (1) an employer is strictly liable for the actions of its agent and supervisory employees; and (2) an employer is liable for nonsupervisory employees when the employer knew or should have known of their harassing activity unless the employer took immediate and corrective action. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ When there has been alleged racial harassment, the commissioner determines what constitutes immediate and corrective action using the following considerations suggested by the EEOC: (1) what actions were taken; (2) when was it taken; (3) whether the action taken fully remedied the conduct without adversely affecting the term or conditions of complainant's employment; and (4) whether the employer had a policy and took steps to implement the policy. The commissioner also recognized the courts' consistent views in considering whether an employer took immediate and corrective action: (1) company policy against harassment and active enforcement of that policy; (2) disciplinary action against the perpetrator; (3) sensitivity training; (4) formal mechanism to deal with grievances; and (5) investigation. The commissioner found that a mere announcement of a policy against harassment and promise to discipline or discharge any employee who fails to conform is not sufficient to relieve an employer of liability. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ In order to establish a prima facie case of racial harassment, the agency must show that: (1) complainant was a member of a protected class; (2) complainant was subject to unwelcome harassment; (3) but for complainant's protected class, complainant would not have been the object of such harassment; (4) the terms and conditions of complainant's employment were affected; and (5) the employer, in the case of co-worker harassment, knew or should have known of the harassment and failed to take prompt action. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 6 (1987).***

❑ When an employer continually made jokes, derogatory comments, and epithets regarding complainant's national origin, the forum determined that the employer's conduct created an offensive working environment and constituted harassment in violation of ORS 659.030. The forum adopted the standard set forth in Section 1608.8(b) of the EEOC Guidelines stating that ethnic slurs or other verbal or physical conduct relating to an individual's national origin constitutes harassment when this conduct: (1) has the purpose or effect of creating an intimidating, hostile, or offensive work environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities. ***----- In the Matter of Deana Miller, 6 BOLI 12, 25 (1986).***

❑ The forum adopted the guidelines established by the EEOC for sexual harassment at 29 CFR 1604.11 as the standard for religious harassment or intimidation in employment: "harassment on the basis of religion is a violation of ORS 659.030. Unwelcome religious advances and other verbal or physical conduct of a religious nature constitute religious harassment when: (1) submission to such conduct is made, either explicitly or implicitly, a term or condition of the subject's employment; (2) submission to or rejection of such conduct by the subject is used as the basis for employment decisions affecting the subject; or (3) such conduct has the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating, or offensive work environment." The forum emphasized that, by adopting this standard, it did not mean to state that general expressions of religious beliefs at the workplace, by themselves, constitute a violation of ORS 659.030. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 273 (1985).***

❑ When a female complainant was discriminated against based on her sex, the commissioner used the model for a prima facie case set forth in *McDonnell Douglas Corp. v. Green,* 41 US 792 (1973) to determine whether any injury resulting from respondent's unlawful conduct was compensable. Such a case includes proof that: (1) 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 those qualifications; and (4) after rejecting complainant, the employer continued to seek applications from persons with complainant's qualifications. ***----- In the Matter of McCoy Oil Company, 3 BOLI 9, 13-15 (1982).***

70.6 --- Discharge/Constructive Discharge

❑ To prove a constructive discharge claim, the agency must establish that: (1) respondents intentionally created or intentionally maintained discriminatory working condition(s) related to complainant's protected class; (2) those working conditions were so intolerable that a reasonable person in complainant's position would have resigned because of them; (3) respondents desired to cause complainant to leave employment as a result of those working conditions or knew that complainant was certain, or substantially certain, to leave employment as a result of those working conditions; and (4) complainant did leave the employment as a result of those working conditions. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 287 (2004)****. See also In the Matter of Barbara bridges, 25 BOLI 107, 124 (2003); In the Matter of Bob G. Mitchell, 19 BOLI 162, 187 (2000); In the Matter of James Breslin, 16 BOLI 200, 217 (1997), affirmed without opinion, Breslin v. Bureau of Labor and Industries, 158 Or App 247, 972 P2d 1234 (1999); In the Matter of Body Imaging, Inc., 16 BOLI 163, 183, 185 (1997), withdrawn for reconsideration, order on*

reconsideration, 17 BOLI 162 (1998), affirmed in part, reversed in part, Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries, 166 Or App 54, 999 P2d 475 (2000).

❑ A prima facie case of a violation of ORS 659.550(1), Oregon's whistleblower statute, consists of the following elements: (1) respondent is an employer as defined by statute; (2) respondent employed complainant; (3) complainant in good faith brought a civil proceeding against respondent; (4) respondent discharged complainant; (5) respondent's action in discharging complainant was taken because complainant, in good faith, brought a civil proceeding against respondent; and (6) complainant was harmed by respondent's action. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 25 (1997).*** *See also In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 122 (1995); affirmed without opinion, Earth Science Technology, Inc. v. Bureau of Labor and Industries, 141 Or App 439, 917 P2d 1077 (1996).*

❑ The forum has adopted the general rule that if the employer imposes working conditions so intolerable that the employee is forced into an involuntary resignation, the employer has encompassed a constructive discharge, provided that the forum is satisfied that the working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would resign. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 12 (1994).***

❑ If an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge. "Deliberately" does not mean that the employer's imposition of intolerable working conditions need be done with the intention of either forcing the employee to resign or relieving himself of that employee. The term "deliberately" refers to the imposition of the working conditions; that is, it means the working conditions were imposed by the deliberate or intentional actions of the employer. To find a constructive discharge, this forum must be satisfied that working conditions so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, caused the employee to resign, and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. If there has been a constructive discharge, an employer is liable for any unlawful conduct involved therein, as if the employer had formally discharged the employee. ***----- In the Matter of RJ's All American Restaurant, 12 BOLI 24, 30-31 (1993).***

❑ A constructive discharge results when an employee resigns over intolerable working conditions imposed by the employer. Unequal pay based on sex, when a demand for equality has been refused, creates intolerable working conditions over which a reasonable person would resign, and a resultant resignation is a constructive discharge. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 165 (1993).*** *See also In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 34 (1991).*

❑ Noting that *Bratcher v. Sky Chefs, Inc.,* 308 Or 501, 783 P2d 4 (1989) enunciated a tort standard for constructive discharge in requiring proof that the employer deliberately created respondent maintained intolerable working conditions with the intention of forcing the employee to resign, the commissioner held that such a test for working conditions created by statutorily unlawful discrimination would produce results inconsistent with the commissioner's remedial authority under Oregon civil rights statutes. ***----- In the Matter of William Kirby, 9 BOLI 258, 276-77 (1991).***

❑ When the agency's evidence established that: (1) respondent was an employer of one or more employee in Oregon; (2) respondent employed complainant; (3) complainant was female; (4) respondent, because of complainant's sex, discriminated against her in compensation; (5) complainant opposed that practice; (6) respondent immediately discharged complainant because of that opposition; and (7) complainant was damaged thereby; the agency presented a prima facie case that respondent violated ORS 659.030(1)(f). ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 230 (1991).***

❑ The forum's standard for constructive discharge is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, the employer has encompassed a constructive discharge. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 215-16 (1991).***

❑ When unlawful different treatment has made the employee's working conditions so intolerable that the employee is forced into an involuntary resignation, the employer has encompassed a constructive discharge in violation of ORS 659.030(1)(a). ***----- In the Matter of City of Umatilla, 9 BOLI 91, 105 (1990).***

> Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ "This forum set forth the standard for constructive discharge in the case of *In the Matter of West Coast Truck Lines, Inc.,* 2 BOLI 192, 215-16 (1981), *affirmed without opinion,* 63 Or App 383, 665 P2d 882 (1983), wherein the forum stated: 'The general rule, which this forum adopts, is that "if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary reason, then the employer has encompassed a constructive discharge * * *." In *In the Matter of Tim's Top Shop,* 6 BOLI 166, 187 (1987), this forum stated: 'that "deliberately" does not mean that the employer's imposition of "intolerable" working conditions need be done with the intention of either forcing the employee to resign or relieving himself of that employee. The term "deliberately" refers to the imposition of the working conditions; that is, <u>it means the working conditions were imposed by the deliberate or intentional actions of the employer.</u> (Emphasis in the original.)' In *West Coast Truck Lines, Inc., supra* at 215-16, the forum ruled that: 'To find a constructive discharge, this forum must be satisfied that "working conditions * * * so difficult or unpleasant that a

reasonable person in the employee's shoes would have felt compelled to resign" caused the employee to resign and that the conditions were imposed by the deliberate,

liable for any unlawful conduct involved therein as if the employer had formal discharged the employee.'" In this case, the commissioner found that respondent's "deliberate imposition of intolerable working conditions on [complainant] and her resulting resignation * * * constitute a constructive discharge, and respondents violated ORS 659.030(1)(a)." ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 19-20 (1989).***

❑ To establish a prima facie case of an unlawful employment practice based on religion under ORS 659.030(1)(a), the agency must plead and prove that: (1) complainant had a bona fide religious belief; (2) he informed respondent of his religious views and that they were in conflict with his responsibilities as an employee; and (3) he was discharged because of his observance of that belief. Once the agency has established a prima facie case, the burden shifts to respondent to prove that it made good faith efforts to accommodate complainant's religious beliefs***. ----- In the Matter of Albertson's, Inc., 7 BOLI 227, 240 (1988).***

❑ To find a constructive discharge, this forum must be satisfied that working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign, caused the employee to resign and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. ***----- In the Matter of Richard Niquette, 5 BOLI 53, 61-62 (1986).***

❑ When complainant alleged he had been discharged for opposing a safety and health hazard, respondent moved to dismiss the specific charges and complaint at the completion of the agency's case in chief on the grounds that the agency had failed to establish a prima facie case of discrimination. The forum denied the motion, stating that the agency had met its initial burden of proof, which was to offer some evidence in support of its position on each of the constituent elements of the violation alleged. In this case, the agency's initial burden of proof required production of evidence in support of the following elements, each of which must be considered separately: (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 his employment; and (5) damages resulting from respondent's action. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 251-52 (1983).***

❑ The general rule which this forum adopts is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into involuntary resignation, then the employer has encompassed a constructive discharge." ***----- In the Matter of West Coast Truck Lines, 2 BOLI 192, 216-18 (1981).***

Affirmed without opinion, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983).

or intentional, actions or policies of the employer. * * * The final rule concerning constructive discharge is that if there has been a constructive discharge, an employer is

70.7 --- Adverse Impact

❑ The burden of proof to establish that a requirement is necessary to the normal operation of the employer's business is on the employer, not on the commissioner, the complainant, or the attorney general. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

70.8 --- Mixed Motive

❑ If the evidence proved that respondent's legitimate, nondiscriminatory reason and complainant's protected class status were both causative factors in respondent's discharge of complainant, the forum would apply the "mixed motive" test and decide if complainant's protected class status "played a substantial role in respondent's action at the time the action was taken." ----- ***In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 36 (2000)***.

71.0 KEY ROLE

❑ When complainant, a black person, was deliberately assaulted by his white supervisor and the supervisor made no comments that directly linked the assault to complainant's race or color, the forum held that the supervisor's inconsistent statements about the incident, coupled with his routine racial harassment of complainant, made it reasonable to infer that, given the totality of the circumstances, complainant's race or color played a key role in the incident. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 253 (1995).***

❑ The commissioner inferred from the evidence that complainant's national origin played a key role in complainant's discharge and found that the agency had established a prima facie case. ***----- In the Matter of Yellow Freight System, Inc., 13 BOLI 201, 218 (1994).***

❑ Employees who failed to clock out for lunch were routinely allowed by their supervisors to correct their time cards allowed by their supervisors to correct their time cards afterwards to reflect a lunch hour. Complainant's supervisors initiated his discharge after finding him asleep in his workstation during a lunch break for which he had forgotten to clock out. When those supervisors had considered his national origin, the commissioner found that complainant's national origin unlawfully played a key role in the discharge. ***----- In the Matter of Yellow Freight System, Inc., 13 BOLI 201, 215-18 (1994).***

❑ When respondent presented persuasive evidence of a legitimate, nondiscriminatory reason for discharging complainant, and the agency failed to show that

respondent's reason was pretextual or that complainant's protected class played a key role in the discharge, the commissioner found no violation of ORS 659.410 as alleged. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 179-80 (1993).***

❑ When respondent's manager knew of complainant's injury on the day it happened, created a "sham" memorandum to give the appearance that performance-related reasons caused the discharge, and terminated complainant within three or four days, the commissioner inferred that complainant's reporting of the injury played a key role in the termination, and concluded that respondent knowingly and purposely terminated complainant because she had reported an injury. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 296 (1991).***

> Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ When the evidence showed that complainant had been counseled regarding tardiness, but that reason did not appear to guide respondent's discharge action, the forum found that, even if it had been a factor, it would not be a defense so long as complainant's call to report unsafe working conditions was also a factor in the decision. The evidence had established that complainant's report to the Accident Prevision Division had played a key role in respondent's discharge of complainant. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 203-04 (1991).***

> Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ When complainant was discharged after cooperating in an Accident Prevention Division inspection, the forum concluded that his cooperation played a key role in his discharge. The commissioner inferred that respondent's contentions that complainant was "getting out of hand" and was "very insubordinate" flowed directly from the complainant's cooperation with the agent from the Accident Prevention Division. ***----- In the Matter of Arkad Enterprises, Inc., 8 BOLI 263, 277 (1990).***

> Affirmed, *Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991).

❑ Respondent was guilty of sex discrimination when complainant's pregnancy, combined with her being overweight, which respondent treated as an impairment, played a key role in her discharge. ***----- In the Matter of Baker Truck Corral, Inc., 8 BOLI 118, 138 (1989).***

❑ When respondent learned about complainant's statement to an injured co-worker that the injury was respondent's fault, respondent would have committed an unlawful employment practice under ORS 654.062(5) if complainant's statement played a key role in respondent's decision to terminate complainant. ***----- In the Matter of Daniel Duron, 8 BOLI 23, 31 (1989).***

❑ When a respondent asserted that she discharged complainant because complainant refused to follow orders, one of which was to change a fuse in an unsafe fuse box, the commissioner said that "[f]requently, the evidence indicates that several factors contribute to causing a respondent's action, of which only one factor is the complainant's protected class. In such cases, the agency uses the key role test. Under that test, the crucial question is whether or not the harmful action – here, the discharge – would have occurred had the complainant not been a member of the protected class. The answer in this case is that complainant would not have been discharged if she had not been a member of a protected class. Put another way, the forum found by a preponderance of the evidence that respondent discharged complainant because she opposed a practice forbidden by the Oregon Safe Employment Act." ***----- In the Matter of Peggy's Café, 7 BOLI 281, 287-88 (1989).***

❑ When the evidence indicates the several factors contribute to causing a complainant's termination, of which the complainant's protected class is only one factor, the agency uses the Key Role Test, set out in OAR 839-05-015. "The test requires that the complainant's protected class be more than a minimal, but not the only, cause of the respondent's action. The crucial question is whether or not the harmful action would have occurred had the complainant not been a member of the protected class. ***----- In the Matter of Jake's Truck Stop, 7 BOLI 199, 214 (1988).***

❑ Respondent asserted that complainant was absent from work too often, that he performed his duties in a careless and negligent manner, and that complainant's performance endangered complainant and his fellow workers. Those allegations were scarcely supported by evidence, but the record showed with certainty that complainant's status as an injured worker who had applied for workers' compensation benefits played a key role in respondent's actions, leading the commissioner to conclude that complainant's status could be said to have caused respondent's action. The commissioner found that complainant's protected class membership played a key role in respondent's firing of complainant and its failure to reinstate complainant to his former job or an available and suitable job. This constituted evidence of unlawful discrimination. ***----- In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 66 (1987).***

> Affirmed, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

❑ In *Ogden v. Bureau of Labor and Industries,* 68 Or App 235 (1984), the court concluded that Oregon employment discrimination law prohibits use of age as a "determining factor," that is, as a factor that "made a difference" in the employment decision at issue. Taken together with the court's reference to the prohibition against age being "a factor" in an employment decision, this leads the forum to conclude that any factor playing more than a minimal role is a determining factor. This conclusion reflects the description of "key role" in OAR 839-05-015. The court referred to all the protected classes named in ORS 659.030(1) as "criteria prohibited

in employment decisions, whether used alone or with legitimate reasons." The rationale set forth by the court in support of the determining factor test is equally applicable to other protected classes named in ORS 659.030(1), and this forum concludes the test is in fact applicable to all those protected classes. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 313 (1985).***

❑ In a case in which complainant alleged he had been discharged for his opposition to safety hazards, the forum made it clear that it follows the "key role" test to aid in resolving causality questions; that is, did complainant's complaints regarding safety hazards play a key role in his discharge? ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 313 (1985).***

❑ When respondent selected complainant for discharge during a period of declining business, the forum found that complainant's notice that she was pregnant was a consideration but did not play a key role in complainant's discharge when respondent reasonably assumed complainant's employment would be temporary because complainant had previously stated she was looking for other employment and would only be working for respondent a short time. ***----- In the Matter of International Kings Table, Inc., 3 BOLI 29, 30-31 (1982).***

❑ In a sex discrimination hiring case, the score on an oral interview made up 40% of the total score. One of the four interview board members admitted bias against female police officers that he expressed to the rest of the board. At least one other board members may have shared that bias. Three of the four board members were aware of sex bias among current police personnel. The applicant rating was subjective enough to allow sex bias to operate, in that scoring of another factor weighted at 20% undervalued complainant while overvaluing male candidates. The commissioner found that complainant's female sex played "at least a key role in respondent's failure to hire her as a police officer * * *." ***----- In the Matter of City of Dallas, 2 BOLI 93, 109 (1981).***

❑ The commissioner determined that it was unnecessary to specifically find that complainant would have been hired as a police officer, but for the admitted sex bias of the oral selection panel, when the complainant's female sex played a "key role" in respondent's failure to select her. ***----- In the Matter of City of Dallas, 2 BOLI 93, 109 (1981).***

❑ The commissioner found that other reasons may have contributed to complainant's discharge, but his discharge was discriminatory when his opposition to safety hazards played a key role. ***----- In the Matter of Day Trucking, Inc., 2 BOLI 83, 88 (1981).***

❑ When an employer has some good cause to discharge an employee, the discharge may still violate ORS 654.062(5)(a) if the employer's knowledge of the employee's opposition to safety hazards plays a key role in the employer's decision. The word "because" in that statute demands knowledge and action upon that knowledge to constitute retaliatory intent, a state of mind that is rarely susceptible to direct proof and which must be inferred from the facts of the case. In this case, the commissioner found that the agency's evidence was entirely circumstantial, lacked sufficient corroboration to permit the inference that the employee's opposition was a key factor in his discharge, and that the close proximity in time between the discharge and the act of opposition, by itself, was insufficient to permit the inference of a discriminatory intent. ***----- In the Matter of Dee Wescott, 2 BOLI 29, 38-39 (1980).***

❑ A male complainant who was a counter agent/management trainee was unlawfully discharged when the evidence established that respondent's preference for hiring attractive female counter agents played a key role in the discharge. ***----- In the Matter of Todd Investments, Inc., 2 BOLI 5, 7 (1980).***

❑ The commissioner adopted the key role test in a case in which complainant alleged she had been discriminated against because of her sex after she became pregnant; the test required more than minimal but less than maximum causal relationship between the worker's pregnancy and the employer's action. ***----- In the Matter of Polk County E.S.D., 1 BOLI 280, 288 (1980).***

> Affirmed without opinion, *Donaldson v. Polk County ESD,* 50 Or App 611, 625 P2d 1390 (1981).

❑ When the commissioner found complainant's pregnancy played a key role in respondent's decision not to allow her to return to work after maternity leave, but respondent produced evidence of personality and loyalty problems that had been documented prior to the pregnancy, the commissioner also found that the pregnancy did not play a key role in respondent's recommendation not to offer her a contract for the next year, stating that the agency could not "merely presume the continuation of unlawfulness." ***----- In the Matter of Polk County E.S.D., 1 BOLI 280, 287-88 (1980).***

> Affirmed without opinion, *Donaldson v. Polk County ESD,* 50 Or App 611, 625 P2d 1390 (1981).

❑ When workers complained to the city administrator and later, through their representative, notified the Accident Prevision Division of health and safety problems concerning their work on the city's sewers, the commissioner found there was an insufficient causal connection between the complaints and a subsequent layoff to establish a violation of ORS 654.062(5). There was an insufficient showing that respondent knew that the Accident Prevision Division inspection, which resulted in the finding of a serious violation, was the result of an employee complaint. The cause of the layoff was respondent's frustration and anger at discovering that an order had not been transmitted to the workers to not enter the sewer until the unsafe conditions had been corrected. The commissioner found that the motivating factor and immediate cause of the layoff was the respondent's anger and frustration at its continuing problems with not the complaints, but the violations themselves. The layoff was perhaps an arbitrary or capricious response to anger and frustration, but it was not a reprisal for an employee complaint and therefore

not illegal under ORS 654.062(5)(a). ***----- In the Matter of City of North Bend, 1 BOLI 230, 234-35 (1980).***

❑ When respondent alleged other reasons for complainant's discharge, the commissioner found that the "fact that respondent may have had several reasons for firing him is not a defense if the opposition to a safety hazard played any part in the decision to fire the complainant." ***----- In the Matter of LeeBo Line Construction, Inc., 1 BOLI 210, 214 (1979).***

72.0 EVIDENCE (*see also* Ch. I, secs. 20.0 - 20.18)

72.1 --- Generally

❑ Proof of a causal connection can be established: (1) *indirectly*, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) *directly*, through evidence of retaliatory animus directed against a complainant by the respondent. The agency, at all times, has the burden of proving that complainant was terminated or otherwise discriminated against for unlawful reasons. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 301 (2007).***

❑ While specific intent may be established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 300 (2007).***

❑ Proof of a causal connection may be established through circumstantial evidence. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 247 (2007).***

❑ Comparative evidence related to a complainant's protected class and a respondent's prior acts related to the nature of the offense are relevant in discrimination cases alleging different or unequal treatment. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 215 (2007).***

Appeal pending.

❑ While the forum may draw on the Oregon Evidence Code for guidance in a matter not addressed in this forum's contested case hearing rules, these proceedings are not governed by the Oregon Evidence Code. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 215 (2007).***

Appeal pending.

❑ In a sexual harassment case, a witness credibly testified that she had received complaints about the alleged male harasser from other female employees who were uncomfortable accompanying him alone on "garbage runs" and who did not like the way he "hugged" them. The harasser's comment to the witness ("Yeah, but just look at her tits") when the witness pointed out one female employee's work performance problems further demonstrates his conduct was part of an overall pattern of sexually aggressive behavior based on gender. Absent any evidence that he treated male employees in a similar fashion, the forum concluded that but for complainant's sex, she would not have been subjected to the harasser's offensive sexual conduct. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 211 (2007).***

❑ A complainant's testimony about the effects of a respondent's unlawful conduct, if believed, is sufficient to support a claim for mental suffering damages. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 215 (2000).***

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ Respondents sent complainant a note stating they did not hire him because they "were looking for someone younger, to possibly take over the business." The forum found that note to be direct evidence of unlawful discrimination. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 209 (2000)***.

❑ When there was direct evidence that respondents refused to hire complainant because of his age, the forum concluded that respondents had engaged in unlawful employment practices, despite the fact that respondents did not hire anybody to fill the position for which complainant had applied. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 211 (2000)***.

❑ Evidence of workplace comments may be relevant to a constructive discharge claim, in terms of evaluating whether the working conditions were intolerable, even though the comments may not, by themselves, have been enough to establish unlawful harassment. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 187 (2000)***.

❑ The agency met its initial burden of proof by producing evidence that: complainant cut himself when he failed to wear a protective "cut glove"; complainant invoked or utilized the workers' compensation system; respondent discharged complainant when he was released to return to work and attempted to return to work, purportedly for failing to wear the cut glove; and respondent did not discharge other kitchen staff who failed to wear a cut glove. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 134 (2000)***.

❑ In a wrongful discharge case, respondent produced evidence that numerous employees other than complainant had filed workers' compensation claims. Those employees were properly considered comparators in the forum's causation analysis. However, there was no evidence concerning the circumstances of these employees' employment, whether any of them had violated respondent's knife policy (the violation of which purportedly was the basis for complainant's discharge), and, if so, whether they were injured as a result of that violation. Consequently, the forum gave evidence regarding these employees less weight than it gave evidence concerning five other employees who were shown to have violated respondent's knife policy in the same manner as complainant. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 136 (2000)***.

❑ The ALJ denied respondent's motions to exclude from evidence the agency's notice of substantial

evidence determination, the complainant's original BOLI complaint, and BOLI's letter to respondent accompanying the notice of substantial evidence determination. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 119 (2000)***.

Oregon Building Supply, Inc., 17 BOLI 1, 10, 11-12 (1998).

Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

❑ Evidence that an injured worker wished to return to employment with a respondent does not mandate the conclusion that the worker was not harassed by the respondent. Harassment of an injured worker does not necessarily amount to an unlawful employment practice. Rather, the agency must prove that the harassment was directed at the worker because he or she applied for benefits or invoked or utilized the worker's compensation system. ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 12 (1998)***.

Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

❑ The ALJ judged the credibility of testimony "based upon its inherent probability, its internal consistency, whether it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrated it was logically incredible." ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 13 (1998)***.

Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

❑ In the context of discrimination law, when the nature of the offense alleged is that it was motivated by the victim's membership in a statutorily protected class, the manner in which other members of that class have allegedly been treated is clearly relevant to the inquiry. To the extent that comparative evidence relating to the protected class at issue may also reflect prior bad acts by respondent, that evidence will not be excluded. ***----- In the Matter of Howard Lee, 13 BOLI 281, 292 (1994).***

❑ When the inquiry involves the employer's treatment of an employee based on the employee's protected class, comparative evidence bearing on the employer's treatment of other employees of the same protected class, whether direct or circumstantial, is both relevant and admissible. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 175 (1991).*** *See also In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 176-77, 179 (1989).*

❑ When respondent objected to evidence of prior acts by respondent, the commissioner said that "[i]n the context of discrimination law, When the nature of the offense alleged is that it was motivated by the victim's membership in a statutorily protected class, the manner in which other members of that class have allegedly been treated is clearly relevant to the inquiry. How other members of a complainant's protected class are treated as opposed to those not of that class is also relevant. Comparator evidence is common in employment discrimination cases." ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 179 (1989).***

❑ Evidence that an employer discouraged workers from filing workers' compensation claims may support an inference that harassment of an injured worker who filed such a claim was based on his utilization of the workers' compensation system. ***----- In the Matter of Central***

❑ When a respondent brought out evidence of complainant's moral character and her relations with other men in an attempt to besmirch her and to focus attention away from his own behavior, none of it was relevant to the issue of whether respondent discriminated against complainant in terms and conditions of her employment on the basis of sex by subjecting her to sexual harassment on the job. The commissioner held that complainant's life outside of work had no bearing on whether or not respondent had sexually harassed her. ***----- In the Matter of Stop Inn Drive In, 7 BOLI 97, 114 (1988).***

❑ The forum overruled respondent's objection to evidence involving complainant's mental suffering on the grounds that complainant had a pending claim with the workers' compensation department for stress suffered as a result of harassment alleged in the specific charges. OAR 839-30-060 governs responsive pleadings and provides that the failure of a party to raise an affirmative defense in the answer shall be deemed a waiver of such defense. Relying on ORCP 19(b) that states affirmative defenses include "payment * * * and any other matter constituting an avoidance," the commissioner found that respondent had failed to raise an affirmative defense in the answer to the charges and thereby waived that defense. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 4-6 (1987).***

❑ The forum may draw on the Oregon Rules of Civil Procedure or the Oregon Evidence Code for guidance in matters not addressed in the forum's administrative rules, but the proceedings are not governed by the rules of civil proceeding or the evidence code. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 2 (1987).***

❑ Respondent testified that complainant filed a similar complaint of sex discrimination with EEOC, as well as one against another employer. The commissioner found this evidence irrelevant because the allegations in the BOLI complaint against respondent must be measured on their own merits. ***----- In the Matter of Jeffrey Brady, 2 BOLI 58, 61-62 (1984).***

Reversed and remanded for clarification of finding of sex discrimination, *Brady, DMD v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982).

Amended order on remand, 4 BOLI 211 (1984).

❑ The medical testimony of a cardiologist who had treated and monitored complainant's heart condition for eight years as to complainant's ability to perform

appliance sales duties was given greater weight than that of a general practitioner who examined complainant for ½ hour before rejecting him for such employment. ***----- In the Matter of Montgomery Ward and Company, Inc., 1 BOLI 62, 65-66 (1976).***

Reversed, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, reversed and remanded, 280 Or 163, 570 P2d 76 (1977).

Order on remand, 1 BOLI 100 (1978).

Affirmed as modified (removing general damages as unsupported), *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979).

72.2 --- Statistics

❑ 53-year-old and 55-year-old complainants were among four salespersons, including one 35 years old, who were discharged during an economically-based reduction in staff, and respondent articulated several unrebutted legitimate, nondiscriminatory reasons for the selection of each complainant. Two of the remaining salespersons were 48 years old, and several months later three of the positions were filled by persons 42, 36, and 26 years of age. The commissioner found these "statistics" unpersuasive as to the occurrence of age discrimination. ***----- In the Matter of Mutual Wholesale Drug Company, 2 BOLI 63, 68, 71 (1981).***

❑ When complainant alleged that respondent did not hire her as a dental technician because of her sex, the commissioner found that evidence of respondent's male/female employee ratio in the entire dental office was irrelevant because it concerned more than the dental technicians, the "work force at issue." ***----- In the Matter of Jeffrey Brady, 2 BOLI 58, 62 (1984).***

Reversed and remanded for clarification of finding of sex discrimination, *Brady, DMD v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982).

Amended order on remand, 4 BOLI 211 (1984).

❑ When the evidence established that, during the relevant period of time, 96.69% of the adult female population in the U.S. was under 5'9" and 97.7% of the adult female population between the ages of 25 and 34 was under 5'9", the commissioner determined that a minimum height requirement of 5'9" for the position of police officer had a disparate impact on women and failure to allow female complainants to apply for the position was an unlawful employment practice. ***----- In the Matter of City of Portland, 2 BOLI 41, 45, 48-49 (1980).***

❑ When respondent had two job openings at a single point in 1972, seven men and three women were interviewed, and two of the women were hired into an unskilled work force totaling four males and 24 females, the forum held that, in the absence of additional data pertaining to applicant flow and relevant labor market for prior hiring periods, these "numbers" did not amount to proof of discrimination against males and the burden of going forward with the evidence did not shift to respondents. ***----- In the Matter of Pacific Paper Box Co., Inc., 1 BOLI 95, 99-100 (1978).***

❑ In a sex/pregnancy case, the forum gave no weight to respondent's statistical studies regarding granting or requiring absences for pregnancy, maternity, and other authorized purposes when the statistics: (1) were "spotty rather than complete and consistent over several years"; (2) "lacked a full explanation of how they were selected"; (3) were "subject to various interpretations"; and (4) were "not meaningful because the School District * * * used different criteria in granting or requiring pregnancy and maternity absences as distinguished from granting or requiring absences for other authorized purposes." ***----- In the Matter of School District No. 1, 1 BOLI 1, 8 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

73.0 RESPONDENTS

73.1 --- Aider/Abettor

❑ A person may be held liable as an aider and abettor of an unlawful employment practice even when that person does not himself fall within the definition of "employer." ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 213-14 (2000)***.

❑ The forum imposed liability on an individual respondent who was a member of a respondent LLC because the member aided and abetted the LLC's unlawful employment practice by informing the complainant that the LLC was not hiring him because of his age. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 214 (2000)***.

❑ An individual respondent who was sole owner and president of a professional corporation and who testified that he was an employee of the professional corporation was held liable as an aider and abettor for the acts he committed that rendered his corporation liable. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 183-84 (1998)***.

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ An individual respondent who was sole owner and president of a professional corporation and who was held liable as an aider and abettor for the acts he committed that rendered his corporation liable was also held jointly and severally liable for back pay and mental suffering damages resulting from the act or acts committed. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 185 (1998)***.

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ A corporate president and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided and abetted the corporation's unlawful employment practice. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 94 (1998)***.

❑ A corporate president and owner who commits an act making the corporation liable for an unlawful employment practice may also be found to have aided and abetted the corporation's unlawful employment practice and is jointly and severally liable for back pay and mental suffering damages resulting from the act or acts committed. ***----- In the Matter of Body Imaging, Inc., 16 BOLI 163, 182-83 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998).***

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000).

❑ When respondent's corporate president made the hiring and scheduling decisions that resulted in complainant's hours being reduced because of her sex, he was held to have directly aided and abetted the corporate respondent's discriminatory acts and was held jointly and severally liable for those acts. ***----- In the Matter of Katari, Inc., 16 BOLI 149, 161 (1997).***

Affirmed without opinion, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).

❑ A corporate president and sole owner who personally participated in or precipitated the corporation's unlawful practice may be held liable under ORS 659.030(1)(g) for aiding and abetting the corporation's acts that constituted unlawful employment practices. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 138 (1997).***

❑ Complainants consulted an attorney about an individual respondent's unwelcome sexual touching and comments. After learning they had consulted an attorney, respondent angrily advised complainants that he knew "two little girls that aren't going to have a job tomorrow" and fired one of them, reportedly because she refused to serve customers. The commissioner found that the individual respondent's reason for the discharge was "clearly pretext" and that the discharge was in retaliation for complainant's resistance to the offensive actions. The commissioner held that respondent corporation violated ORS 659.030(1)(f) and the individual respondent violated ORS 659.030(g). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 133-36, 138 (1997).***

❑ When a male respondent, the owner and president of respondent corporation that operated a café, subjected three female complainants to unwanted and offensive sexual touching and comments because of their sex and this behavior created a hostile and abusive work environment for each complainant, the commissioner held that the individual respondent sexually harassed and discriminated against each complainant because of her sex in terms and conditions of employment, whereby the respondent corporation violated ORS 659.030(1)(a) and the individual respondent violated ORS 659.030(1)(g) by aiding in the unlawful acts. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 133-36 (1997).***

❑ By subjecting complainant to unwelcome sexual touching and comments, respondent corporation, aided by its respondent-owner, created intolerable working conditions because of complainant's sex, and her resignation was a constructive discharge, whereby respondent corporation violated ORS 659.030(1)(a) and the owner violated ORS 659.030(1)(g). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 135 (1997).***

❑ When respondent corporation's owner and president subjected a female complainant to demeaning, sexually offensive comments on a frequent basis, including references to his own and her sex life and referring to complainant as a "dumb fucking blond bitch," often threatened to "bitch slap" complainant, which put her in fear, and physically struck complainant on the top of the head and across her face, the commissioner found that the owner engaged in unwelcome physical and verbal conduct of a sexual nature; directed at complainant because of her sex; that the conduct had the effect of creating an intimidating, hostile, and offensive work environment; that submission to such conduct was made an explicit term or condition of employment; that the corporation knew of the conduct, and that the complainant was harmed by it. The commissioner held that the owner sexually harassed complainant, that the respondent corporation violated ORS 659.030(1)(b), and that the owner aided and abetted the corporation's unlawful practices, in violation of ORS 659.030(1)(g). ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 219-22 (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ When a corporate respondent's president was found to have personally engaged in the racial harassment of the complainant, the corporate president was held to be individually liable as an aider and abettor to respondent's unlawful employment practices. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 254 (1995).***

❑ When respondent's manager, in firing complainant, treated him as if he had HIV infection when he did not, the manager aided, abetted, and compelled the corporate respondent's violation of ORS 659.425(1)(c) and was liable with the corporation for complainant's damages. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 143 (1995).***

❑ When female complainants were subjected to unwelcome sexual conduct by their employer's manager, the commissioner found that the manager aided and abetted the employer's unlawful practice and ordered financial remedy for each complainant against both the manager and the employer. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 11, 13-14 (1994).***

❑ When a corporate respondent's president, who was

also a respondent, sexually harassed and discharged complainant, the forum held that the corporation violated ORS 659.030(1)(a), and the president aided and abetted the corporation in violation of ORS 659.030(1)(g). ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 90 (1993).***

❑ In a sex discrimination case alleging unequal pay, when respondent's corporate president was more than a mere agent of the corporation, directed the operations of respondent's restaurants, and set salaries, the commissioner permitted the agency to amend the charging document to add the president as a respondent and allege a violation of ORS 659.030(1)(g). A corporate president and sole owner may be held liable for aiding and abetting his or her corporation in the commission of an unlawful employment practice. ***----- In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 33 (1991).***

❑ When respondent's corporate president and sole owner sexually harassed complainant, the president aided and abetted the corporation in discriminating against the complainant, in violation of ORS 659.030(1)(g), and the commissioner found the president and corporation jointly and severally liable. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 214, 218 (1991).***

❑ The forum relied on the definition set forth in Black's Law Dictionary (5th edition 1979) of aiding and abetting a crime to define those terms in the context of an unlawful employment practice: "to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission." ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 277 (1985).***

❑ The president and owner of the charged corporation's stock and the corporate director who also served as a salesperson for the corporation were found to have aided and abetted the charged corporation. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 277 (1985).***

❑ Respondent labor organization was found to have aided and abetted the employer when the union agreed to discriminatory terms in a benefit plan in a collective bargaining agreement that the employer thereafter implemented. ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 103-04 (1983).***

❑ When a benefit plan provided benefits for the spouses of female employees but did not cover pregnancy for the spouses of male employees, the respondent labor organization was held liable, together with the respondent employer, when the benefit plan agreed to pursuant to collective bargaining was discriminatory. The forum determined that the union was liable when it failed to insist or initiate reopening of the contract to provide for such benefits since the union was charged with "representing its members and protecting their legal rights in employment." The tacit agreement to the discriminatory scheme constituted aiding and abetting an unlawful employment practice under ORS 659.030(1)(g). ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 103-04 (1983).***

❑ When an employer and a union-employer trust of which employer was a member jointly provided a disability insurance policy that excluded pregnancy from the weekly income disability benefits, each was held to have aided, abetted, compelled or coerced the doing of an act forbidden under ORS 659.010 to 659.110. The commissioner interpreted the phrase in ORS 659.030(1)(e) "whether an employer or an employee" to be exemplary rather than restrictive and concluded it was applicable to the respondent trust. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 190 (1981).***

❑ When the agency alleged that respondent's manager aided, abetted or incited the doing of an act forbidden by ORS chapter 659, the manager was named individually as a respondent, together with the respondent business. ***----- In the Matter of Oregon Rural Opportunities, 2 BOLI 8, 9, 12 (1980).***

❑ The individual respondent could not aid and abet the commissioner of an unlawful employment practice in violation of ORS 659.030 when the evidence failed to show that the corporate respondent had committed an unlawful employment practice. ***----- In the Matter of Pacific Paper Box Co., Inc., 1 BOLI 95, 99 (1978).***

❑ When an individual was the sole owner and president of a respondent corporation and retained for himself and exercised exclusive authority with respect to employment matters, including hiring, firing, promoting, assigning, and transferring corporate employees, the commissioner held the individual aided and abetted the unlawful employment practices of the corporation under ORS 659.030(5). ***----- In the Matter of N. H. Kneisel, Inc., 1 BOLI 28, 38 (1976).***

Compliance amended, 1 BOLI 51 (1976).

73.2 --- Corporation

❑ "Employer" is defined in ORS 659A.001(4) as "any person who, in this state, directly or through an agent, engages or uses the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed." A "person" includes a corporation. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 262 (2006)***

Appeal pending.

❑ ORS 659A.001(4) defines "employer" as "any person who in this state, directly or through an agent, engages or uses the personal services of one or more employees, reserving the right to control the means by such service is or will be performed." A corporation is a "person" under the statute. ORS 659A.001(9). The record as a whole showed that at times material, respondent was a corporation that used complainant's personal services as bartender and was an employer for the purpose of enforcing ORS 65A.230. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 133 (2005).***

❑ A corporate president and owner who commits an act making the corporation liable for an unlawful employment practice may also be found to have aided and abetted the corporation's unlawful employment

practice and is jointly and severally liable for back pay and mental suffering damages resulting from the act or acts committed. ***----- In the Matter of Body Imaging, Inc., 16 BOLI 163, 182-83 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998).***

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000).

❑ Complainants consulted an attorney about an individual respondent's unwelcome sexual touching and comments. After learning they had consulted an attorney, respondent angrily advised complainants that he knew "two little girls that aren't going to have a job tomorrow" and fired one of them, reportedly because she refused to serve customers. The commissioner found that the individual respondent's reason for the discharge was "clearly pretext" and that the discharge was in retaliation for complainant's resistance to the offensive actions. The commissioner held that respondent corporation violated ORS 659.030(1)(f) and the individual respondent violated ORS 659.030(g). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 133-36, 138 (1997).***

❑ When a male respondent, the owner and president of respondent corporation that operated a café, subjected three female complainants to unwanted and offensive sexual touching and comments because of their sex and this behavior created a hostile and abusive work environment for each complainant, the commissioner held that the individual respondent sexually harassed and discriminated against each complainant because of her sex in terms and conditions of employment, whereby the respondent corporation violated ORS 659.030(1)(a) and the individual respondent violated ORS 659.030(1)(g) by aiding in the unlawful acts. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 133-36 (1997).***

❑ By subjecting complainant to unwelcome sexual touching and comments, respondent corporation, aided by its respondent-owner, created intolerable working conditions because of complainant's sex, and her resignation was a constructive discharge, whereby respondent corporation violated ORS 659.030(1)(a) and the owner violated ORS 659.030(1)(g). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 135 (1997).***

❑ When respondent corporation's owner and president subjected a female complainant to demeaning, sexually offensive comments on a frequent basis, including references to his own and her sex life and referring to complainant as a "dumb fucking blond bitch," often threatened to "bitch slap" complainant, which put her in fear, and physically struck complainant on the top of the head and across her face, the commissioner found that the owner engaged in unwelcome physical and verbal conduct of a sexual nature, directed at complainant because of her sex; that the conduct had the effect of creating an intimidating, hostile, and offensive work environment; that submission to such conduct was made an explicit term or condition of employment; that the corporation knew of the conduct; and that the complainant was harmed by it. The commissioner held that the owner sexually harassed complainant, that the respondent corporation violated ORS 659.030(1)(b), and that the owner aided and abetted the corporation's unlawful practices, in violation of ORS 659.030(1)(g). ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 219-22 (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ When a corporate respondent's president, who was also a respondent, sexually harassed and discharged complainant, the forum held that the corporation violated ORS 659.030(1)(a), and the president aided and abetted the corporation in violation of ORS 659.030(1)(g). ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 90 (1993).***

❑ When respondent's corporate president and sole owner sexually harassed complainant, the president aided and abetted the corporation in discriminating against the complainant, in violation of ORS 659.030(1)(g), and the commissioner found the president and corporation jointly and severally liable. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 214, 218 (1991).***

❑ Corporations must be represented by an Oregon attorney as required by ORS 9.320 and OAR 839-30-057. When a corporation's president and sole owner attempted to represent the corporate respondent, the hearings referee refused to allow him to represent the corporation and found it in default. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 214 (1991).***

❑ Property management corporations are liable for the acts of their agents – resident apartment managers and owner/directors – that violate ORS 659.033(1)(b). ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 245, 247 (1990).***

❑ When respondent, a corporate motel, employed a resident manager, the actions of the manager were properly imputed to the corporation. ***----- In the Matter of Colonial Motor Inn, 8 BOLI 45, 53-54 (1989).***

❑ The actions, inactions, knowledge and motivation of individual respondents, the owners and operators of respondent's restaurant, were imputed to their principal, the corporate respondent. The liability thereby created was assumed by the individual respondents when they became successor operators in place of the involuntarily dissolved corporate respondent. ***----- In the Matter of Palomino Café and Lounge, Inc., 8 BOLI 32, 41 (1989).***

❑ The words, actions and inactions, and the motivations of respondent's corporate directors were imputed to the charged corporation. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 309-10 (1985).***

❑ Respondent was an out-of-state corporation doing business in Oregon. ***----- In the Matter of Tyrholm, Inc., 3 BOLI 188, 189 (1982).*** *See also In the Matter of Union*

Pacific Railroad Company, 3 BOLI 180, 182 (1982).

❑ Respondent, a California corporation doing business in Oregon, was the proper respondent in an injured worker case. ***----- In the Matter of Medo-Bel Creamery, Inc., 3 BOLI 1, 2 (1982).***

❑ The actions and motivations for the actions of respondent's personnel committee and board of directors were imputed to respondent, a nonprofit Oregon corporation engaged in operating residential care facilities for the rehabilitation of children committed by the courts to the custody of the State of Oregon Children's Services Division. ***----- In the Matter of Lane County Youth Care Center, Inc., 2 BOLI 246, 248, 252 (1982).***

❑ The actions and motivations for the actions of an officer of the employer corporation were imputed to the corporation charged. ***----- In the Matter of Day Trucking, Inc., 2 BOLI 83, 88 (1981).***

❑ The actions and motivations for the actions of respondent's corporate board of directors, its sole shareholder and president, and its employee store manager were imputed to the corporate respondent. ***----- In the Matter of Doyle's Shoes, Inc., 1 BOLI 295, 299 (1980).***

❑ Respondent, a California corporation doing business in Oregon, was the proper respondent in a sex discrimination case arising out an incident at one of respondent's Oregon stores. ***----- In the Matter of Cornet Stores, 1 BOLI 208, (1979).***

❑ Eastern Air Lines, Inc., a common carrier having a place of business within the State of Oregon, was named as the respondent in a sex discrimination case. ***----- In the Matter of Eastern Air Lines, Inc., 1 BOLI 193, 194 (1979).***

73.3 --- Coworker

73.4 --- Employment Agency

73.5 --- Franchiser

❑ When one of three respondents was a franchiser of a chain of donut shops and the other two respondents were franchisees, the commissioner granted the franchiser's motion to dismiss the specific charges against it. Under the definition of employer in ORS 659.010(6), which provides that an employer "reserve[es] the right to control the means by which such service is or will be performed," the franchiser was not an employer of the complainant or her co-worker, or of the franchisees. The commissioner found that, while the franchiser imposed certain standards regarding appearance, cleanliness, advertising and product, it had no right to control the manner and means by which the operator accomplished the mutually desired result. The franchisees hired, fired and disciplined, supervised, assigned work hours and rates of pay, paid, withheld taxes, and the like. No money flowed from the franchiser to the franchisees as compensation; rather, the franchisee paid the franchiser a percentage of sales for the use of the trade name and log, an agreement that was within the franchise agreement containing a disclaimer of agency as to the franchise. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 176-77, 192-93 (1989).***

73.6 --- Labor Organization

❑ A respondent labor organization was found to have aided and abetted the employer when the union agreed to discriminatory terms in a benefit plan in a collective bargaining agreement that the employer thereafter implemented. ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 103-04 (1983).***

❑ When a benefit plan provided benefits for the spouses of female employees but did not cover pregnancy for the spouses of male employees, the respondent labor organization was held liable, together with the respondent employer, when the benefit plan agreed to pursuant to collective bargaining was discriminatory. The forum determined that the union was liable when it failed to insist or initiate reopening of the contract to provide for such benefits since the union was charged with "representing its members and protecting their legal rights in employment." The tacit agreement to the discriminatory scheme constitutes aiding and abetting an unlawful employment practice under ORS 659.030(1)(g). ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 103-04 (1983).***

73.7 --- Limited Liability Company

73.8 --- Owner of Real Property

❑ Part owners of real property are vicariously liable for the acts of their agents – property management companies and those companies' agents, including resident apartment managers -- when those acts violate ORS 659.033(1)(b). "Owners of real property reap a share of whatever benefit or profit the letting or sale of that property might produce, and also absorb a like share of any loss. An owner, whether of all or a portion of real property, cannot be insulated from liability for unlawful discrimination by the appointment of a managing agent. This is true even if the agent was not directly hired by the owner in question, and even if the act or acts giving rise to liability were not specifically approved. So long as the act or acts were within the scope of the managership, as eviction of a tenant most assuredly was, all owners are liable therefore to persons harmed by use of an unlawful standard for eviction. Liability flows from allowing to the offending managers the unrestricted authority to evict. In this context, the term 'managers' includes those entities engaged in property management as well as their agents, the resident managers." ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 249 (1990).***

73.9 --- Partnership

❑ Because respondent's wife was a partner in the business and actively participated in making the decision not to hire complainant, the forum found she was jointly and severally liable for any damages complainant suffered as a result of respondent's unlawful retaliation. ***----- In the Matter of H.R. Satterfield, 22 BOLI 198, 209 (2001).***

❑ When a corporate respondent was in an "involuntarily dissolved" status and the individual

respondents, who were the owners and operators of the restaurant business, continued operating the same business at the same location with the same work force and under the same name, the commissioner held that the individual respondents were operating as a company-proprietorship and succeeded to the corporation's liability. ***----- In the Matter of Palomino Café and Lounge, Inc., 8 BOLI 32, 38, 41 (1989).***

❑ When two respondents were company-owners and operators of a café in which one of the respondents sexually harassed two complainants, both respondents were held to have violated ORS 659.030(1)(a) and (b). ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 16-17 (1989).***

❑ Co-owners of a business who both participated in its management were both liable to complainant for damages arising from a finding of discrimination. ***----- In the Matter of Deana Miller, 6 BOLI 12, 23 (1986).***

73.10 --- Public Accommodation

❑ When respondent, a restaurant and lounge, hired a security company to supply a guard to check patron's age identification, and the guard discriminated against black persons because of their race and color, the commissioner found that the security company and the guard acted on behalf of the place of public accommodation, and held that the lounge, the security company, and the guard were "each jointly and severally liable for the damages" found to have been suffered by three complainants. ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 27 (1975).***

73.11 --- Public Employer

❑ The actions, inactions, knowledge and motivations of respondent's regional manager and complainant's immediate supervisor were imputed to respondent, a state agency. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 103 (1992).***

❑ The actions, inactions, knowledge and motivations of respondent's maintenance manager, district superintendent, director of support services, and accounting supervisor were imputed to respondent. ***----- In the Matter of West Linn School District, 3 JT, 10 BOLI 45, 46, 61 (1991).***

❑ Respondent, a public employer, moved to dismiss the specific charges on the grounds that the commissioner had no jurisdiction over the subject matter, alleging that ORS 659.026, which made it an unlawful employment practice for a public employer to discriminate on the basis of age, states that the procedure for an appeal of such decisions does not apply when another statute exists that provides for such administrative review, and that ORS chapter 240 provided for such review. The commissioner denied the motion, noting that ORS chapter 240 was limited to the areas of suspension, reduction, demotion or dismissal. Since complainant alleged that respondent had unlawfully failed to promote her, ORS 659.026, rather than ORS chapter 240, was applicable. ***----- In the Matter of State of Oregon, Department of Human Resources, 3 BOLI 89, 90-91 (1982).***

❑ The actions of respondents' agents, a warehouse floor manager, equipment operator, and program coordinator, were imputed to respondent. ***----- In the Matter of State of Oregon, Department of General Services, 3 BOLI 46, 47, 51 (1982).***

❑ The actions and motivations for the actions of respondent's administrator, deputy administrator, and complainant's supervisor were imputed to respondent. ***----- In the Matter of State of Oregon, Employment Division, 2 BOLI 228, 232 (1982).***

❑ When both the city and the city's police department were named as respondents in the specific charges, the commissioner ruled that it was not necessary to name the department, as it was merely an agency of the city, and deleted the city's police department as a respondent. ***----- In the Matter of City of Dallas, 2 BOLI 93, 94 (1981).***

❑ When the City of Portland Civil Service Board argued that it was not properly named as a respondent because it was not so specified before the issuance of specific charges, the finding at the investigation stage being against the City of Portland Bureau of Police, the commissioner found no merit in the argument for the following reasons: (1) there was no evidence that the legislature intended that a respondent named in the specific charges be exactly the same as the respondent against whom substantial evidence of discrimination was found; (2) neither respondent Civil Service Board nor respondent Bureau of Police had shown it was prejudiced, in that both were agencies of the City of Portland, both were represented by the city attorney and the city's Personnel Bureau, which participated in the investigation and in the conciliation attempts on behalf of the City and its Bureau of Police, and shared staff and offices with the Board. ***----- In the Matter of City of Portland, 2 BOLI 41, 54-55 (1980).***

❑ The actions of the superintendent and Board of Education were imputed to respondent, the county education district. ***----- In the Matter of Polk County E.S.D., 1 BOLI 280, 287 (1980).***

> Affirmed without opinion, *Donaldson v. Polk County ESD,* 50 Or App 611, 625 P2d 1390 (1981).

❑ When an agency of county government employed several persons in a variety of positions, the Oregon county was a public employer subject to the provisions of ORS 659.010 to 659.110. ***----- In the Matter of Marion County, 1 BOLI 159, 159-60 (1978).***

❑ The discriminatory action of a search committee of Southern Oregon College, ratified in writing by a college dean, was imputed to the State of Oregon as employer through the Oregon State Board of Higher Education, which operated the college. ***----- In the Matter of Southern Oregon College, 1 BOLI 55, 58, 61 (1976).***

73.12 --- Sole Proprietor

❑ In a public accommodations case, when the facts showed that respondent, the unincorporated owner of a tavern, was in the process of selling the tavern at the time of the hearing, the forum stated that respondent was personally liable and the pendency of a sale did not preclude the commissioner from entering a cease and desist order containing a posting requirement. The

commissioner retains jurisdiction as long as respondent is the owner of the premises. In a commissioner's complaint case alleging race discrimination in public accommodation, the complainant was identified only by initials due to her demonstrated fear of retaliation by respondent. ***----- In the Matter of The Pub, 6 BOLI 270, 286 (1987).***

❑ When respondent, the unincorporated owner of a fuel oil business, operated under more than one business name, the forum stated that respondent remained personally liable to complainants for damages awarded by the forum. ***----- In the Matter of Associated Oil Company, 6 BOLI 240, 257 (1987).***

73.13 --- Successor in Interest (*see also* Ch. IX, sec. 3.6)

❑ Nine factors must be considered in determining whether one employer is a "successor" to another for purposes of liability for the predecessor's liability for discrimination: (1) whether the successor had notice of the charge; (2) the predecessor's ability to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same plant; (5) whether the new employer uses the same or substantially the same work force; (6) whether the new employer uses the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether the new employer uses the same machinery; and (9) whether the new employer produces the same product. "Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision." ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 36-37 (1998)***.

> Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ Even when the new employer has purchased only some of the predecessor's assets, and the predecessor continues to exist, the new employer may be found to be a successor. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 38 (1998)***.

> Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ When the predecessor employer still existed but had no employees and existed primarily to receive the proceeds of the sale of its assets, the forum found that it was unable to provide the requested relief of reinstatement. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 39 (1998)***.

> Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries,* 168 Or App 278 (2000).

❑ The test for determining whether or not an employer is considered a "successor" is an individualized determination, linked to the similarities between the predecessor and successor entities. The elements to consider are the similarities of: the name or identity of the business; its location; the lapse in time between the previous operation and the new operation; the work force employed; the product or service that is provided; and the machinery, equipment, or methods of production used. When the sole owner and president of a dissolved corporation continued operation of the same business after the dissolution, the owner was held liable as a successor for the dissolved corporation's unlawful employment practices. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 254-55 (1995).***

❑ In determining whether an entity is a successor in interest, the forum considers the similarities of: the name or identity of the business; its location; the lapse in time between the previous operation and the new operation; the work force employed; the product or service that is provided; and the machinery, equipment, or methods of production used. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 250 (1991).***

❑ When a corporation operated the same business in the same location under an assumed name used by the individual owner, and there was no evidence of any personnel or equipment change and no time lapse between the individual operation and the corporate operation, the commissioner found that the corporation was a successor employer. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 250 (1991).***

❑ A motion for summary judgment is not proper for resolving the issue of successorship in interest because such a determination is necessarily factual in nature. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 242 (1991).***

❑ The test for determining whether or not an employer is considered a "successor" is an individualized determination, linked to the similarities between the predecessor and successor entities. The elements to consider are the similarities of: the name or identity of the business; its location; the lapse in time between the previous operation and the new operation; the work force employed; the product or service that is provided; and the machinery, equipment, or methods of production used. ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 77 (1990).***

❑ The test for determining whether or not an employer is considered a "successor" is whether it conducts essentially the same business as the predecessor. The elements to look for include: the name or identity of the business; its location; the lapse in time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision. When the sole owner and president of a dissolved corporation continued operation of the same business after the dissolution, was named in the charging document, as a party, and failed to pay wages earned both before and after the dissolution, the owner was liable for all unpaid wages. ***----- In the Matter of Palomino Café and Lounge, Inc., 8 BOLI 32, 43-44 (1989).***

❑ The general rule in discrimination cases under federal law regarding successor liability holds the

successor entity liable for the acts of the predecessor unless such a holding would be manifestly unjust to the succeeding entity; whether acknowledged or not, the successor has benefited from the predecessor's unlawful act. ***----- In the Matter of Palomino Café and Lounge, Inc., 8 BOLI 32, 43 (1989).***

❑ When a corporate respondent was in an "involuntarily dissolved" status and the individual respondents, who were the owners and operators of the restaurant business continued operating the same business at the same location with the same work force and under the same name, the commissioner held that the individual respondents were operating as a company-proprietorship and succeeded to the corporation's liability. ***----- In the Matter of Palomino Café and Lounge, Inc., 8 BOLI 32, 42 (1989).***

❑ The actions, inactions, knowledge and motivation of individual respondents, the owners and operators of respondent's restaurant, were imputed to their principal, the corporate respondent. The liability thereby created was assumed by the individual respondents when they became successor operators in place of the involuntarily dissolved corporate respondent. ***----- In the Matter of Palomino Café and Lounge, Inc., 8 BOLI 32, 41 (1989).***

❑ When one respondent sexually harassed two complainants at his café and, after times material, sold his interest in the café to the other respondent, the commissioner held that the actions, inactions, and knowledge of the selling respondent, a company-owner, operator, and agent of the café with the buying respondent, were properly imputed to the buying respondent. ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 16 (1989).***

❑ The test for determining whether or not an employer is considered a "successor" is whether it conducts essentially the same business as the predecessor. The elements to look for include: the name or identity of the business; its location; the lapse in time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 268 (1987).***

Overruled on the limited issue of including reimbursable expenses in wages used to calculate a civil penalty, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

73.14 --- Supervisor

❑ When respondent's manager, in firing complainant, treated him as if he had HIV infection when he did not, the manager aided, abetted, and compelled the corporate respondent's violation of ORS 659.425(1)(c) and was liable with the corporation for complainant's damages. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 143 (1995).***

❑ When female complainants were subjected to unwelcome sexual conduct by their employer's manager, the commissioner found that the manager aided and abetted the employer's unlawful practice and ordered financial remedy for each complainant against both the manager and the employer. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 11, 13-14 (1994).***

❑ The president and owner of the charged corporation's stock and the corporate director who also served as a salesperson for the corporation were found to have aided and abetted the charged corporation. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 277 (1985).***

❑ When the agency alleged that respondent's manager aided, abetted or incited the doing of an act forbidden by ORS chapter 659, the manager was named individually as a respondent, together with the respondent business. ***----- In the Matter of Oregon Rural Opportunities, 2 BOLI 8, 9, 12 (1980).***

73.15 --- Temporary Employment Agencies

❑ When it was undisputed that SSI, a temporary employment service, hired complainant and referred him to respondent for an interview; that SSI paid complainant's wages, billing respondent for the amount of complainant's wages, plus a premium; that complainant's work for respondent was supervised and controlled by respondent, as were his terms and conditions of employment; and that SSI's only appearance at respondent's workplace while complainant worked there was to deliver weekly paychecks for complainant and SSI's other employees; the forum concluded that respondent was complainant's employer. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 262 (2006)***

Appeal pending.

❑ Respondent and a temporary employment service that referred all temporary employees to respondent were found to be joint employers of complainant. ***----- In the Matter of Servend International,, Inc., 21 BOLI 1, 7, 18 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

73.16 --- Trusts

❑ When the forum found the respondent employer and respondent union liable for agreeing during collective bargaining to a discriminatory benefits plan that was implemented, the forum found that the respondent union trust was not liable, as its actions in merely purchasing the agreed plan and enforcing the respondent employer's obligation to pay thereunder was passive. The trust had no role in negotiating the plan. ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 104 (1983).***

❑ A union trust was held to be a person within the meaning of ORS 659.010 and was properly named as a respondent. ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 89 (1983).***

❑ When an employer and a union-employer trust of which employer was a member jointly provided a disability insurance policy that excluded pregnancy from the weekly income disability benefits, each was held to have aided, abetted, compelled or coerced the doing of an act forbidden under ORS 659.010 to 659.110. The commissioner interpreted the phrase in ORS 659.030(1)(e) "whether an employer or an employee" to be exemplary rather than restrictive and concluded it was applicable to the respondent trust. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 190 (1981).***

❑ When a union-employer trust established by collective bargaining to pay premiums of insurance policies for disability, medical and dental benefits for employees provided a disability policy that excluded pregnancy from the weekly income benefits for disability, the trust was jointly liable for an unlawful employment practice based on sex in violation of ORS 659.030. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 188-89 (1981).***

❑ When the agency's investigation of the administrative complaint against an employer made it appear that an additional person should be named as a respondent to the allegation of discrimination in benefits due to pregnancy, the union-employer trust established by collective bargaining, of which the employer was a member, was added as a respondent. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 188 (1981).***

73.17 --- Other

❑ When one respondent, an independent contractor hired by a respondent lounge to provide a security guard to check patrons' age identification, instructed and directed his employee to discriminate against black persons seeking admission to the lounge because of their race and color, the commissioner found that the independent contractor violated ORS 659.037. ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 27 (1975).***

❑ When an employee of an independent contractor, a security company, was employed as a security guard to check age identification at the door of a lounge, and the employee performed that job in a manner as to deny admission to as many black persons and as many mixed racial groups as possible because of their race and color, the commissioner found that the employee violated ORS 659.010(14). ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 27 (1975).***

❑ When an employer and a union-employer trust of which employer was a member jointly provided a disability insurance policy that excluded pregnancy from the weekly income disability benefits, each was held to have aided, abetted, compelled or coerced the doing of an act forbidden under ORS 659.010 to 659.110. The commissioner interpreted the phrase in ORS 659.030(1)(e) "whether an employer or an employee" to be exemplary rather than restrictive and concluded it was applicable to the respondent trust. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 190 (1981).***

❑ When a union-employer trust established by collective bargaining to pay premiums of insurance policies for disability, medical and dental benefits for employees provided a disability policy that excluded pregnancy from the weekly income benefits for disability, the trust was jointly liable for an unlawful employment practice based on sex in violation of ORS 659.030. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 188-89 (1981).***

❑ Every person, whether acting in a personal capacity or as a corporate agent who commits an unlawful practice as defined in ORS 659.010(14), is personally liable for such unlawful practices. ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 27 (1975).***

74.0 RESPONDENTS' LIABILITY FOR ACTS OF OTHERS

74.1 --- Agent

❑ The actions, inactions, knowledge and motivations of respondent's regional manager and complainant's immediate supervisor were imputed to respondent, a state agency. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 103 (1992).***

❑ The actions, inactions, knowledge and motivations of respondent's maintenance manager, district superintendent, director of support services, and accounting supervisor were imputed to respondent. ***----- In the Matter of West Linn School District, 3 JT, 10 BOLI 45, 46, 61 (1991).***

❑ Complainant was unlawfully discharged by respondent's employee, who represented that he had authority to fire complainant. Respondent raised the defense that that employee did not have such authority or, if he did, he was acting outside the scope of his employment. The commissioner inferred that the employee had the power to discharge complainant because of the employee's assertion of the authority, his exercise of that authority, respondent's subsequent failure to put complainant back to work, and respondent's misrepresentation of a form that complainant signed, which said that she voluntarily quit. Even if respondent had shown that the employee did not have the authority to discharge complainant, the commissioner held that respondent would nonetheless be liable in these circumstances for the reason that it subsequently ratified the employee's action. Respondent was fully informed of the circumstances of complainant's purported discovery and of the employee's assertion to do so. Rather than repudiate the employee's action, respondent gave effect to and ratified the discharge by refusing to schedule complainant for work and by obtaining her signature on a voluntary quit form by deception. ***----- In the Matter of Franko Oil Company, 8 BOLI 279, 288-89 (1990).***

❑ Persons who have violated ORS 659.033(1)(b), either personally or through agents, are jointly and severally liable for damages awarded to the complainant. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 245, 247 (1990).***

❑ Property management corporations are liable for the acts of their agents – resident apartment managers and owner/directors – that violate ORS 659.033(1)(b). ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 245, 247 (1990).***

❑ In finding respondent responsible for its manager's harassment and its consequences, the forum did not suggest that the offensive activity was specifically authorized by respondent as part of the job. Rather, the activity and behavior described were so inextricably intertwined with the manager's legitimate duties as to make it impossible to separate out those actions that might be characterized as outside the scope of his employment. ***----- In the Matter of Colonial Motor Inn, 8 BOLI 45, 55 (1989).***

❑ An employer is liable for the acts of its agents and supervisory employees. When respondent, a corporate motel, employed a resident manager, the manager's sexual harassment of complainant was properly imputed to the corporation. ***----- In the Matter of Colonial Motor Inn, 8 BOLI 45, 53-54 (1989).***

❑ The actions, inactions, knowledge and motivation of individual respondents, the owners and operators of respondent's restaurant, were imputed to their principal, the corporate respondent. The liability thereby created was assumed by the individual respondents when they became successor operators in place of the involuntarily dissolved corporate respondent. ***----- In the Matter of Palomino Café and Lounge, Inc., 8 BOLI 32, 41 (1989).***

❑ In a religious discrimination case, the commissioner found that the "actions, inactions, and knowledge" of respondent's store and meat department managers, who were employees or agents of respondent, to be properly imputed to respondent. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 239 (1988).***

❑ The words, actions and inactions, and the motivations therefore, of respondent's supervisor and bookkeeper were imputed to respondent, a real estate company. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 270 (1985).***

❑ The words, actions and inactions, and the motivations of respondent's corporate directors were imputed to the charged corporation. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 309-10 (1985).***

❑ In a case involving complainant's opposition to a safety and health hazard, the actions and motivations of the employer's agent, including the labor relations representative, were imputed to the employer. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 251 (1983).***

❑ The actions of respondents' agents, a warehouse floor manager, equipment operator, and program coordinator, were imputed to respondent. ***----- In the Matter of State of Oregon, Department of General Services, 3 BOLI 46, 47, 51 (1982).***

❑ When the respondent owner of a public accommodate used the services of a security guard employed by a security company, respondent was held responsible for the guard's actions when the guard worked under respondent's direction supervision and carried out respondent's discriminatory practices as directed. ***----- In the Matter of Joseph Gaudry, 3 BOLI 32, 36-37 (1982).***

❑ The actions and motives of the manager and assistant manager of respondent's restaurant were imputed to respondent. ***----- In the Matter of International Kings Table, Inc., 3 BOLI 29, 30-31 (1982).***

❑ The actions and motivations for the actions of respondent's personnel committee and board of directors were imputed to respondent, a nonprofit Oregon corporation engaged in operating residential care facilities for the rehabilitation of children committed by the courts to the custody of the State of Oregon Children's Services Division. ***----- In the Matter of Lane County Youth Care Center, Inc., 2 BOLI 246, 248, 252 (1982).***

❑ The actions and motivations for the actions of respondent's signalman foreman were imputed to respondent. ***----- In the Matter of Union Pacific Railroad Company, 3 BOLI 234, 236 (1982).***

❑ The actions and motivations for the actions of respondent's administrator, deputy administrator, and complainant's supervisor were imputed to respondent. ***----- In the Matter of State of Oregon, Employment Division, 2 BOLI 228, 232 (1982).***

❑ The actions and motivations for the actions of an officer of the employer corporation were imputed to the corporation. ***----- In the Matter of Day Trucking, Inc., 2 BOLI 83, 88 (1981).***

❑ The actions and motivations for the actions of respondent's corporate board of directors, its sole shareholder and president, and its employee store manager were imputed to the corporate respondent. ***----- In the Matter of Doyle's Shoes, Inc., 1 BOLI 295, 299 (1980).***

❑ Respondent was held responsible for the actions of its manager who unlawfully failed to reinstate an injured worker. ***----- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 269 (1980).***

> Reversed on the ground that statutes did not specify failure to reinstate as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980).

❑ When the respondent owner of a supper club used the services of a security guard who was employed by a separate employer, but worked under respondent's direct supervision and carried out respondent's discriminatory practices, as directed, in a place of public accommodation, the commissioner held the respondent responsible for the guard's actions and liable for any acts of the agent committed within the scope and course of the agency. ***----- In the Matter of Joseph Gaudry, 1 BOLI 235, 238-39 (1982).***

> Affirmed in part, reversed and remanded as to posting in other establishments by respondent, *Gaudry v. Bureau of Labor and Industries,* 48 Or App 589, 617 P2d 668 (1980).

❑ When respondent directed Pinkerton's Inc., a security company, not to fill security positions at

respondent's business with females, Pinkerton's refusal to place a female complainant with respondent was imputed to respondent. ***----- In the Matter of Bend Millworks Company, 1 BOLI 214, 216 (1979).***

❑ The discriminatory action of a search committee of Southern Oregon College, ratified in writing by a college dean, was imputed to the State of Oregon as employer through the Oregon State Board of Higher Education, which operated the college. ***----- In the Matter of Southern Oregon College, 1 BOLI 55, 58, 61 (1976).***

❑ When respondent, a restaurant and lounge, hired a security company to supply a guard to check patron's age identification, and the guard discriminated against black persons because of their race and color, the commissioner found that the security company and the guard acted on behalf of the place of public accommodation and that the lounge, the security company, and the guard were each jointly and severally liable for the damages found to have been suffered by three complainants. ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 27 (1975).***

❑ When respondent, a restaurant and lounge, hired a security company to supply a guard to check patron's age identification, and the guard discriminated against black persons by placing admission restrictions on them, respondent was held liable for the violations of ORS 659.010(14) "engaged in by any person or persons acting on its behalf whether such person or persons be employees, independent contractors or employees of independent contractors." ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 27 (1975).***

74.2 --- Coworker

❑ A respondent employer is liable for sexual harassment by a co-worker if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action. ***----- In the Matter of Wing Fong, 16 BOLI 280, 290 (1998).***

❑ An employer is liable for harm caused to an employee when the employee is subjected to a co-worker's unwelcome, sexually-oriented physical and verbal conduct because of her sex and the employer knew or should have known of the conduct and took no action to correct or eliminate it. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 93-94 (1996).***

> Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 301, 954 P2d 804 (1998).

❑ When a female complainant repeatedly reported the unwelcome, pervasive, sexually oriented physical and verbal conduct of a male co-worker towards her to her supervisor, and respondent employer took no action to correct, modify, or prevent the unwelcome behavior, respondent was liable for complainant's severe and long-lasting emotional distress. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 92-94 (1996).***

> Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 301, 954 P2d 804 (1998).

❑ The commissioner adopted EEOC guidelines in regard to employer liability for racial harassment in the workplace: (1) an employer is strictly liable for the actions of its agent and supervisory employees; and (2) an employer is liable for nonsupervisory employees when the employer knew or should have known of their harassing activity unless the employer took immediate and corrective action. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

74.3 --- Legal Representative

❑ The forum rejected respondent's argument that it was not liable for complainant's discharge because its corporate attorney, who made the decision to discharge complainant, lacked a retaliatory motive. The forum held that the unlawful motivations and actions of respondent's manager, who recommended complainant's discharge, were properly imputed to respondent. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 128 (2002).***

74.4 --- Partner

❑ When two respondents were company-owners and operators of a café in which one of the respondents sexually harassed two complainants, both respondents were held to have violated ORS 659.030(1)(a) and (b). ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 16-17 (1989).***

❑ When one respondent sexually harassed two complainants at his café and, after times material, sold his interest in the café to the other respondent, the commissioner held that the actions, inactions, and knowledge of the selling respondent, a company-owner, operator, and agent of the café with the buying respondent, were properly imputed to the buying respondent. ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 16 (1989).***

74.5 --- Supervisor

❑ The forum rejected respondent's argument that it was not liable for complainant's discharge because its corporate attorney, who made the decision to discharge complainant, lacked a retaliatory motive. The forum held that the unlawful motivations and actions of respondent's manager, who recommended complainant's discharge, were properly imputed to respondent. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 128 (2002).***

❑ When harassment is committed by the complainant's supervisor, but no tangible employment action is taken as a result, the employer may be liable if it knew or should have known of the harassment. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 150 (1999)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ If an employer had actual knowledge of harassment by a complainant's supervisor, its only defense is that it took immediate and appropriate corrective action. ***-----*** In ***the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 149 (1999)***.

> Affirmed without opinion, *Burks v.*

Murrayhill Thriftway, Inc. and Bureau of Labor and Industries, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ A low-level supervisor's knowledge of harassment, standing alone, did not establish that the employer had actual knowledge of the harassment. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 150 (1999)***.

Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ There is a presumption that an employer "should have known of" harassment by a supervisor of a subordinate employee. The employer can overcome that presumption by proving both elements of a two-pronged affirmative defense. The employer must prove both that: 1) it exercised reasonable care to prevent and correct promptly any harassing behavior; and 2) the complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 150-51 (2000)***.

Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ To establish a prima facie case of hostile environment harassment by a supervisor of a worker who applied for benefits or invoked or utilized the workers' compensation procedures, the agency must prove that: (1) respondent is an employer of six or more persons; (2) respondent employed complainant; (3) complainant was a worker who applied for benefits or invoked or utilized the worker's compensation procedures; (4) respondent's supervisory employee engaged in unwelcome verbal or physical conduct directed at complainant because of his protected class; (5) the conduct had the purpose or effect of creating an objectively intimidating, hostile, or offensive working environment; (6) respondent knew or should have known of the conduct; and (7) complainant was harmed by the conduct. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 72 (1999)***. *See also In the matter of LTM, Incorporated, 17 BOLI 226, 238 (1998); In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 9-10 (1998), affirmed without opinion, Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries, 160 Or App 700, 981 P2d 402 (1999).*

❑ When complainant, a black man, was regularly called racially derogatory names by his white supervisor and occasionally called his supervisor a "white honkey," the forum held that complainant's limited comments failed to establish that the supervisor's conduct was not unwelcome, noting that the inherent imbalance of power between an employer and an employee tends to make it difficult for an employee to counter an employee's inappropriate remarks without fear of damaging the employee's employment status. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 253 (1995).***

❑ In a racial discrimination case, the commissioner held it was well settled that employers are liable for the discriminatory acts of supervisors toward other employees. ***----- In the Matter of Auto Quencher, 13 BOLI 14, 23 (1994).***

❑ When respondent excepted to being held liable in the proposed order for the racial comments of his manager, arguing that the agency's evidence consisted of hearsay from friends of complainant, the commissioner found that the manager admitted the substance of his remarks to the investigator and at hearing, that respondent acknowledged that the manager had repeated similar language to him, that all versions of the words used conveyed the message of racial inferiority, and that it was well settled that employers were liable for the discriminatory acts of supervisors toward other employees. ***----- In the Matter of Auto Quencher, 13 BOLI 14, 23 (1994).***

❑ When respondent argued that he had no record of racial complaints, had no knowledge of his manager's bias; questioned complainant's testimony that he had never been called "nigger" before; and received no complaint personally from the victim; the commissioner found that employers could take no comfort from an employee's choice not to report a supervisor's discriminatory speech before seeking legal redress under the law. ***----- In the Matter of Auto Quencher, 13 BOLI 14, 23 (1994).***

❑ Respondent's white manager told his sister-in-law that a black complainant's supposed lack of progress was due to blacks having smaller brains than whites and she reported the statement to complainant. Respondent argued that the manager's remarks were not only unauthorized but took place outside of working hours, away from the work site, and outside complainant's presence. The commissioner found that "time and place do not necessarily control whether there is an offense when there is an ongoing employment relationship" because a complainant's subsequent knowledge of such offensive statements by a supervisor might contribute to an offensive work environment experience by complainant. ***----- In the Matter of Auto Quencher, 13 BOLI 14, 22 (1994).***

❑ When a black male complainant informed respondent employer's management of his discomfort resulting from repeated insulting and demeaning comments by his supervisors regarding himself and other members of his race that created a negative racial atmosphere, the commissioner held respondent responsible for complainant's resulting discomfort and humiliation. ***----- In the Matter of Northwest Fitness Supply Company, 12 BOLI 246, 261-62 (1994).***

❑ An employer is strictly liable for the acts of its supervisory employee when those acts constitute sexual harassment. The employer cannot insulate itself by claiming ignorance. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 184 (1992).***

Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ When respondent's supervisory employee offered to change complainant's work schedule in exchange for

sexual cooperation and had the apparent authority to change the schedule, the forum found this was a form of quid pro quo sexual harassment, in violation of ORS 659.030(1)(b). ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 196 (1992).***

> Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993)..

❑ An employer is strictly liable for a supervisor's sexual harassment of an employee even when the company's enterprise involves mobile worksites and forecloses the employer from day-to-day oversight of its supervisory personnel. ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 78 (1990).***

❑ When an employee's supervisor makes unwelcome sexual overtures off the job, it may still create an intimidating, hostile, and offensive work environment for which the employer will be held strictly liable. ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 78 (1990).***

❑ Under OAR 839-07-555(1), an employer is strictly liable for its acts and those of its agents and supervisory employees when those acts constitute sexual harassment. ***----- In the Matter of Colonial Motor Inn, 8 BOLI 45, 55-56 (1989).***

❑ The commissioner adopted EEOC guidelines in regard to employer liability for racial harassment in the workplace: (1) an employer is strictly liable for the actions of its agent and supervisory employees; and (2) an employer is liable for nonsupervisory employees when the employer knew or should have known of their harassing activity unless the employer took immediate and corrective action. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ In a national origin and religious discrimination case, an employer will be held liable for the acts of a supervisor that constitute harassment, whether or not the employer had knowledge of those actions. A supervisor is defined as any person who exercises direct supervisory authority to hire and discharge, or to effectively recommend hiring and discharge. ***----- In the Matter of Deana Miller, 6 BOLI 12, 28 (1986).***

❑ A respondent employer's manager denied the request of complainant, a Catholic, to have Sunday off to attend mass. The employer accommodated complainant after learning of her request. The forum determined that, since there was no evidence to establish that the manager was a supervisor for whose actions the employer would be liable, and since the employer, upon learning of the request, accommodated complainant, there was no discrimination. The forum indicated that an employer would be liable, even when the employer had no knowledge, for the acts of a supervisor who could hire or discharge complainant or who could effectively recommend hiring or discharge. ***----- In the Matter of Deana Miller, 6 BOLI 12, 28 (1986).***

❑ The forum imputed the words, actions, inactions, and motivations of respondent's supervisory employees to respondent. ***----- In the Matter of KBOY Radio Station, 5 BOLI 94, 116-17 (1986).***

❑ Respondent was held liable for the actions of his supervisor, who had the authority to terminate employees he supervised, and who discharged complainant for his opposition to a safety hazard. An employer cannot escape legal responsibility for a discriminatory termination by a supervisor by claiming that the action violated the employer's procedures or policies. ***----- In the Matter of 3 Son Loggers, Inc., 5 BOLI 65, 80 (1986).***

❑ The words, actions and inactions, and the motivations of respondent's supervisor and bookkeeper were imputed to respondent, a real estate company. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 270 (1985).***

❑ The actions of a supervisor are properly imputed to the employer in a race harassment case. ORS 659.010(6) 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 * * *." ***----- In the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 130-31 (1982).***

> Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ Respondent contended he was not responsible for his supervisor's racial harassment of complainant because he took action to correct the situation and because the supervisor was not authorized to hire, fire, discipline, or promote complainant or to recommend such actions. The forum found this argument unsuccessful for two reasons: (1) the supervisor could in fact discipline complainant and the evidence made it clear that he would have been consulted for recommendations regarding complainant's performance; and (2) the forum had previously adopted federal law holding that an employer/respondent "is responsible for the acts of its supervisory employees, with respect to racial harassment on the job, regarding of whether the acts complained of were forbidden by the employer and regardless of whether the employer knew or should have known of the occurrence." The forum determined that respondent was "strictly liable" for the acts of his supervisor and "had the duty to take whatever action necessary, up to and including firing" the supervisor to insure complainant a "work atmosphere free of racial discrimination." ***-----*** In ***the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 130 (1982).***

> Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ An employer is responsible for the acts of supervisory employees with respect to racial harassment on the job, regardless of whether the specific acts complained of were forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. ***----- In the Matter of Kirsten Corporation, 2 BOLI 257, 262 (1982).***

❑ The actions and motivations for the actions of respondent's administrator, deputy administrator, and

complainant's supervisor were imputed to respondent. ***--- In the Matter of State of Oregon, Employment Division, 2 BOLI 228, 232 (1982).***

❑ When respondent's general manager acted within his authority in refusing reinstatement to a recovered injured worker, his action was imputed to respondent. ***--- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 271 (1980).***

> Reversed on the ground that statutes did not specify failure to reinstate as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980).

❑ When respondent's foreman had the authority to hire and fire employees, respondent was responsible for the foreman's discriminatory discharge of complainant. ***--- In the Matter of Acco Contractors, Inc., 1 BOLI 260, 264 (1980).***

❑ When a supervisor who interviewed applicants for hire rejected a qualified male in favor of a female applicant for impermissible reasons related to his sex, the employer was responsible for the discriminatory conduct of its agent, the supervisor. ***----- In the Matter of Marion County, 1 BOLI 159, 162 (1978).***

❑ Racially discriminatory actions toward complainant by respondent's employees who could and did direct complainant's performance of his assigned duties were imputed to respondent. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 90 (1978).***

> Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).
>
> Order on remand, 1 BOLI 179 (1979).

❑ When a black complainant was subjected to repeated offensive racial remarks and attitudes by his supervisors, respondent employer had an affirmative legal duty to provide complainant with a racially neutral work environment, was obliged to prevent its supervisory agents from subjecting complainant to racial abuse and harassment, and should have taken active steps to maintain a racially neutral work environment. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 90 (1978).***

> Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).
>
> Order on remand, 1 BOLI 179 (1979).

74.6 --- Other

❑ When complainant told respondent that she was offended by a customer's conduct toward her that included excessive "leering" and staring at her breasts, but the evidence showed that respondent ultimately complied with her request that he be present when the customer was in the workplace conducting business and complainant had no problems with the customer thereafter, the forum inferred that respondent's action effectively ended the harassment and respondent took sufficient remedial action in response to complainant's complaint and was therefore not liable for the customer's harassment. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 285 (2004).***

❑ As complainant's employer, respondent had an obligation to take prompt remedial action to eliminate harassment even where the offensive conduct was by others he did not employ. In workplaces where employees have the ability to send and receive e-mail at will, employers have a duty to determine what steps can be taken to stop offensive e-mail that generates from outside the workplace. An employer's principal obligation is to use whatever current technology is available to block patently inappropriate e-mail and reduce the volume of offensive junk mail. When respondent asserted he had no control over the volume or type of e-mail messages complainant and her co-workers were subjected to daily, but credible evidence showed that AOL had blocking mechanisms in place that could have reduced the volume of unsolicited, sexually explicit and offensive junk mail and there was no evidence that respondent explored those options or that he took any other proactive measures to cure the problem, respondent was held liable for complainant's continued exposure to harassing materials. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 284 (2004).***

❑ An employer can be held liable for harassment by a non-employee, such as a customer, if the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action. There is no presumption that an employer "should have known" that this type of harassment was occurring. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 153 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ The actions, inactions, knowledge and motivation of individual respondents, the owners and operators of respondent's restaurant, were imputed to their principal, the corporate respondent. The liability thereby created was assumed by the individual respondents when they became successor operators in place of the involuntarily dissolved corporate respondent. ***----- In the Matter of Palomino Café and Lounge, Inc., 8 BOLI 32, 41 (1989).***

❑ The words, actions and inactions, and the motivations therefore, of respondent's corporate directors were imputed to the charged corporation. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 309-10 (1985).***

❑ When the respondent owner of a public accommodate used the services of a security guard employed by a security company, respondent was held responsible for the guard's actions when the guard worked under respondent's direction supervision and carried out, as directed, respondent's discriminatory

practices. ***----- In the Matter of Joseph Gaudry, 3 BOLI 32, 36-37 (1982).***

❑ The actions and motivations for the actions of care facilities for the rehabilitation of children committed by the courts to the custody of the State of Oregon Children's Services Division. ***----- In the Matter of Lane County Youth Care Center, Inc., 2 BOLI 246, 248, 262 (1982).***

❑ The actions and motivations for the actions of an officer of the employer corporation were imputed to the corporation charged. ***----- In the Matter of Day Trucking, Inc., 2 BOLI 83, 88 (1981).***

❑ The actions and motivations for the actions of respondent's corporate board of directors, its sole shareholder and president, and its employee store manager were imputed to the corporate respondent. ***----- In the Matter of Doyle's Shoes, Inc., 1 BOLI 295, 299 (1980).***

❑ The actions of the superintendent and Board of Education were imputed to respondent, the county education district. ***----- In the Matter of Polk County E.S.D., 1 BOLI 280, 287 (1980).***

> Affirmed without opinion, *Donaldson v. Polk County ESD,* 50 Or App 611, 625 P2d 1390 (1981).

❑ When the respondent owner of a supper club used the services of a security guard who was employed by a separate employer, but worked under respondent's direct supervision and carried out, as directed, respondent's discriminatory practices in a place of public accommodation, the commissioner held the respondent responsible for the guard's actions and liable for any acts of the agent committed within the scope and course of the agency. ***----- In the Matter of Joseph Gaudry, 1 BOLI 235, 238-39 (1982).***

> Affirmed in part, reversed and remanded as to posting in other establishments by respondent, *Gaudry v. Bureau of Labor and Industries,* 48 Or App 589, 617 P2d 668 (1980).

❑ When respondent directed Pinkerton's Inc., a security company, not to fill security positions at respondent's business with females, Pinkerton's refusal to place a female complainant with respondent was imputed to respondent. ***----- In the Matter of Bend Millworks Company, 1 BOLI 214, 216 (1979).***

❑ When respondent, a restaurant and lounge, hired a security company to supply a guard to check patron's age identification, and the guard discriminated against black persons and racially mixed groups by placing admission restrictions on them, respondent was held liable for the violations of ORS 659.010(14) "engaged in by any person or persons acting on its behalf whether such person or persons be employees, independent contractors or employees of independent contractors." ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 27 (1975).***

75.0 CONTINUING VIOLATION

❑ When the agency established a continuing violation of ORS 659.030(1)(b) that extended over a 21-month period, the complainant was eligible for an award of damages encompassing that entire time. The test for determining if the unlawful violations were of a "continuing" nature was whether they were shown to be "a series of related acts against a single individual that were discriminatory." ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 253-54 (1995).***

❑ When the agency established a continuing violation of ORS 659.030(1)(b) by showing that respondent sexually harassed complainant throughout her six-month period of employment, complainant was eligible for an award of damages encompassing the entire duration of her employment with respondent. ***----- In the Matter of Kenneth Williams, 14 BOLI 16, 25-26 (1995).***

❑ When there is an ongoing, continuous series of discriminatory acts, they may be challenged in their entirety so long as one of those discriminatory acts falls within the limitations period. Whether discriminatory acts are "continuing" can be shown by "demonstrating a series of related acts against a single individual." ***----- In the Matter of Kenneth Williams, 14 BOLI 16, 25 (1995).***

VIII. DEFENSES TO CHARGES OF DISCRIMINATION

80.0 AFFIRMATIVE ACTION

81.0 BONA FIDE SENIORITY SYSTEM

❑ When both black and white workers were affected by a reduction in force from 39 to 18 workers over a three year period caused by computerization, and all were laid off in inverse seniority order except one white employee who was temporarily assigned based on her applicable experience, and the black complainant had informed the employer that she would be leaving her job within a year, the commissioner found that complainant's layoff was not based on her race and was not retaliation for filing an unlawful employment practice complaint. ***----- In the Matter of Blue Cross of Oregon, 1 BOLI 272, 275 (1980).***

82.0 BONA FIDE EMPLOYEE BENEFIT PLAN

❑ For an employer to have age-based reductions in employee benefit plans when those reductions are justified by significant cost considerations, the employer may be exempt from the Age Discrimination in Employment Act (ADEA) if it meets the following criteria: (1) the plan must be a plan covered by the exemption scheme that provides employees with fringe benefits; (2) the plan must be "bona fide," that is, it exists and provides substantial benefits to employees; (3) any disparity in benefits on the basis of age must be provided for in the employee's plan; and (4) the plan must not be a subterfuge to evade the purpose of the ADEA. ***----- In the Matter of City of Portland, 6 BOLI 101, 111 (1987).***

❑ When the facts alleged by petitioner established that

petitioner, in implementing a benefit plan that paid a higher benefit to older employees who elected a cash option, had no intent to evade the purpose of either the ADEA or ORS chapter 659 and when the age-based differences did not go beyond the age-related cost justifications, a factor petitioner did not control, the benefit plan was not a subterfuge as that term is used in ORS 659.028. A subterfuge envisions an intent to evade a statutory requirement: "in ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. In the context of this statute, subterfuge must be given its ordinary meaning and we must assume Congress intended it in that sense." The forum determined that the terms "subterfuge" and "evade" as used in ORS 659.028 involve an element of intent to evade and together are construed to mean a "plan, scheme of some intentional act to circumvent, escape or thwart the purpose of the prohibitions against age discrimination contained in ORS chapter 659." ***----- In the Matter of City of Portland, 6 BOLI 101, 111 (1987).***

❑ The ADEA benefit plan exception has the same purpose as that which appears in ORS 659.028 – "to permit employers to shape employee benefit plans which are significantly affected by age in a way that accounts for costs that increase because of age." As set forth in CFR 860.120(a)(1), the legislative history of this exemption indicates that its purpose is to "permit age based reductions in employee benefit plans when such reductions are justified by significant cost considerations." The Oregon legislature has shown a clear intent to copy the federal ADEA provisions in enacting ORS 659.028. ***----- In the Matter of City of Portland, 6 BOLI 101, 110-11 (1987).***

❑ Petitioner asked whether it was unlawful under ORS 659.010 to 659.110, and specifically 659.028 and 659.030(1), for petitioner to pay a higher benefit to older employees electing to receive a cash option or alternative benefit, instead of a defined level of group term life insurance coverage, than the benefit paid to younger employees electing the same option. The forum determined there would be no violation of law, based only on the precise facts presented, as the plan was "not a subterfuge to evade the purpose" of the law under ORS 659.038. ***----- In the Matter of City of Portland, 6 BOLI 101, 104-05 (1987).***

❑ The term "bona fide," as used to describe an employee benefit program, means "good faith." Even when a plan is entered into in good faith and is therefore bona fide, the plan can lose that status when its principals learn the plan is discriminatory and continue to implement the plan. ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 101-02 (1983).***

83.0 BONA FIDE OCCUPATIONAL REQUIREMENT

83.1 --- Generally

❑ Respondent asserted, as a bona fide occupational requirement pursuant to ORS 659.030(1)(a), that complainant's discharge was justified because of her alleged laziness, failure to do her side work, arguing with other waitresses, and till shortages. The commissioner stated: "A BFOR is an exception that provides that a discriminatory practice or policy is not an unlawful employment practice in those instances when an individual's protected class, sex for example, is a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business. For example, a BFOR might arise when an employer takes adverse action or excludes a female based on a rule that no females may work in a warehouse because the job involves lifting 100 pounds. That employer would have to show that all or substantially all females would be unable to safely and efficiently perform the job, that is, lift 100 pounds, if the employer is to successfully establish that sex is a BFOR. What respondents here attempted to establish was that there were legitimate, nondiscriminatory reasons for firing complainant." ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 18-19 (1989).***

❑ A BFOR analysis should be performed with reference to the facts of each case. The party asserting a BFOR defense has the burden of proving the defense by a preponderance of the evidence. ***----- In the Matter of Lane County Youth Care Center, Inc., 2 BOLI 246, 254 (1982).***

❑ The burden of proof to establish that a requirement is necessary to the normal operation of the employer's business is on the employer, not upon the commissioner, the complainant, or the attorney general. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ The bona fide occupational qualification exception in the state law, like the federal law, must be interpreted narrowly to prevent the exception from swallowing and emasculating the rule. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ Whatever criteria are used by the employer, there must be a demonstrable relationship to successful performance on the job for which the criteria are used. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ Oregon civil rights law, like Title VII of the Civil

Rights Act of 1964, proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation, regarding of the motive of cannot be shown to be related to job performance, the practice is prohibited. ***----- In the Matter of School District No. 1, 1 BOLI 1, 16 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ In evaluating the rules and policies of school districts under Oregon's civil rights statutes, it is not enough that such rules and policies may appear neutral and reasonable on their face, operate equally against all persons, or are convenient. In the areas of race, religion, color, national origin, sex and age, such rules and regulations must treat the individual employee as an individual and not on any characteristic generally attributed to the group or class sought to be protected by the civil rights laws. The only exception is when the employer can establish that its requirement or practices for a particular job amount to a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business. The test is business necessity, not business convenience. ***----- In the Matter of School District No. 1, 1 BOLI 1, 15-16 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

83.2 --- Age

❑ When respondents alleged a bona fide occupational requirement regarding complainant's age as a defense to his discharge, the commissioner granted the agency's motion to strike that defense because no discrimination based on age 18 or older was alleged in the specific charges, and respondents merely asserted what could be a legitimate, nondiscriminatory reason. ***----- In the Matter of Rose Manor Inn, 11 BOLI 281, 283 (1993).***

❑ The City of Portland maintained a sex-segregated police force until 1973 and an unjustifiable age maximum of 30 for the position of police officer until April 1974. In 1974, one female complainant was finally appointed as a police officer, and a second had already secured other employment by that time. The commissioner rejected the City's argument that the agency had failed to prove either that complainant was qualified in 1971, when she first applied, because it was respondent's own unlawful standard that prevented complainants from conclusively demonstrating that they were qualified in 1971. ***----- In the Matter of City of Portland, 2 BOLI 41, 50-51 (1980).***

❑ Respondent alleged an age limit for the hiring of firefighters was a bona fide occupational requirement the motive to discriminate. The touchstone is business necessity. If the employment practice operates to exclude any person within the protected class and reasonably necessary to respondent's business. The commissioner determined that, while hiring physically fit firefighters was necessary to the essence of the city's business, there was no factual basis for believing that all or substantially all individuals who had passed the age limit would be unable to perform safely and efficiently, and that it would not be impossible or highly impractical to screen applicants on an individual basis to determine physical qualification. The commissioner noted that the solvency of respondent's disability or retirement fund was not a legitimate consideration in determining a BFOR. ***----- In the Matter of City of Portland, 2 BOLI 21, 27-28 (1980).***

❑ When respondent refused to hire persons past their 36th birthday for the position of firefighter dispatcher, the commissioner rejected respondent's BFOR defense of necessity based on safety when respondent: (1) offered no evidence to show it had a "rational and scientific basis for believing that the eliminate of its maximum age limit would increase the likelihood of injury to the public"; (2) failed to show "a rational basis for believing that all or substantially all persons past age 36 are unable to perform dispatching duties in a safe and efficient manner"; and (3) failed to prove that it was "impractical or impossible for the Fire District to deal with applicants over 36, or any age, on an individualized basis." ***----- In the Matter of Clackamas County Fire District No. 1, 1 BOLI 244, 258-59 (1980).***

Affirmed, *Clackamas Fire Protection Dist. No. 1 v. Oregon Bureau of Labor and Industries*, 50 Or App 337, 624 P2d 141, rev den 291 Or 9, 631 P2d 340 (1981).

❑ When respondent attempted to justify its failure to consider a 63-year-old complainant on the basis of his limited availability for service before the regular retirement age of 65, respondent failed to produce evidence that the time complainant had available before reaching 65 was not adequate to perform the duties required. ***----- In the Matter of Southern Oregon College, 1 BOLI 55, 60 (1976).***

83.3 --- Sex

❑ On the hearings referee's own motion, the purported affirmative defense of bona fide occupational requirement was removed from consideration as a defense to the agency's allegation of unequal pay based on sex. ***----- In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 22-23 (1991).***

❑ When respondent, a restaurant owner who had a policy of hiring only male busboys and only female waiters, argued that it was common in the local area to have sex segregated waiter/busboy work forces, the forum determined that such allegations, even if proven, do not establish a BFOR based on sex. ***----- In the Matter of Love's Woodpit Barbeque Restaurant, 3 BOLI 18, 28 (1982).***

❑ Complainant filed a complaint alleging he had been discriminated against in employment because of his sex. Respondent, a corporation providing residential care

facilities for juveniles committed by the courts, had implemented a policy that required a female groupworker to accompany a male groupworker on overnight shifts in the girls' home. No such restriction was enforced against groupworkers of either sex in respondent's boy's home. Respondent's reason for the policy was the fear of accusations of invasions of privacy and sexual misconduct. The forum found that respondent had failed to justify this unlawful employment practice as a BFOR by failing to prove the elements of that defense: (1) that the policy was reasonably necessary to the rehabilitative essence of the normal operation of the business in all the care facilities, as the policy was not enforced in the boys' facility; (2) that all or substantially all males could not perform the job alone; and (3) that respondent explored acceptable alternatives to the policy that would reasonably accomplish the same business purpose with a less discriminatory impact on employees. ***----- In the Matter of Lane County Youth Care Center, Inc., 2 BOLI 246, 247-56 (1982).***

❑ Respondent, a corporation providing residential care facilities to children committed by the courts to the custody of the State of Oregon Children's Services Division, had a policy of requiring female groupworkers to accompany male groupworkers during the overnight shifts in respondent's girls home. The forum found it was relevant that the Lane County Children Services Division, which referred all of respondent's clientele to respondent, had not recommended the policy. Respondent failed to justify this policy on the basis of protection of privacy or fear of accusations of sexual misconduct. ***----- In the Matter of Lane County Youth Care Center, Inc., 2 BOLI 246, 255-56 (1982).***

❑ The City of Portland maintained a sex-segregated police force until 1973 and an unjustifiable age maximum of 30 for the position of police officer until April 1974. In 1974, one female complainant was finally appointed as a police officer, and a second had already secured other employment by that time. The commissioner rejected the City's argument that the agency had failed to prove either that complainant was qualified in 1971, when she first applied because it was respondent's own unlawful standard that prevented complainants from conclusively demonstrating that they were qualified in 1971. ***----- In the Matter of City of Portland, 2 BOLI 41, 50-51 (1980).***

❑ When the City of Portland had a minimum height requirement of 5'9" for the position of police officer, the commissioner found that the requirement did not constitute a bona fide occupational requirement when there was no factual basis for believing that all or substantially all individuals under 5'9" would be unable to perform the job of police officer safely and efficiently or that screening applicants on an individual basis would be impossible or highly impractical. ***----- In the Matter of City of Portland, 2 BOLI 41, 48 (1980).***

❑ When respondent, a car rental agency, had a policy of hiring attractive females because 80% of its customers were male and would prefer dealing with attractive young women, the commissioner determined that this policy did not "rise to the imperative status of a business necessity" and could not constitute a BFOR. ***--- In the Matter of Todd Investments, Inc., 2 BOLI 5, 8 (1980).***

❑ When respondent attempted to justify its preference for female salespersons, the presence of a single successful male salesperson was enough to negate the purported bona fide occupational requirement defense. ***----- In the Matter of Westland Investment Company, 2 BOLI 1, 4 (1980).***

❑ When respondent defended its admitted policy of no female security guards on the basis of safety, particularly as to the possibility of physical or sexual assault due to the poor lighting conditions, the commissioner followed *School District No. 1 v. Nilsen,* 271 Or 461, 534 P2d 1135 (1975), and established the following criteria: (1) The claimed BFOR must be reasonably necessary to the essence of the business; (2) The claimed BFOR will be less stringently scrutinized if it is necessary to prevent great danger to a large number of people; (3)(a) There must be a factual basis for believing that all, or substantially all, individuals in the class discriminated against would be unable to perform the job, or (b) There must be a showing that it would be impossible or impractical to screen applicants on an individual basis. ***--- In the Matter of Bend Millworks Company, 1 BOLI 214, 219-20 (1979).***

❑ When respondent defended its admitted policy of no female security guards on the basis of safety, particularly as to the possibility of physical or sexual assault due to the poor lighting conditions, the commissioner followed *School District No. 1 v. Nilsen,* 271 Or 461, 534 P2d 1135 (1975), and found: (1) There was no showing that women would be less effective than men in protecting a wood products business; (2) While any inability to perform due to gender might endanger property, there was no endangerment to a large number of people; (3)(a) There was no evidence that women had been sexually attacked, nor that women with sufficient training would be unable to perform the job, and (b) There was no contention that it would be impossible or impractical for the security service to screen applicants on an individual basis. ***----- In the Matter of Bend Millworks Company, 1 BOLI 214, 219-20 (1979).***

❑ When respondent defended its discriminatory policy on the basis of an alleged bona fide occupational requirement, the commissioner followed *School District No. 1 v. Nilsen,* 271 Or 461, 534 P2d 1135 (1975), construing the defense "fairly, by giving it usual, normal, and evenhanded application," in determining whether the employer had carried its burden of establishing, by a preponderance, that an otherwise discriminatory act was permitted because of a bona fide occupational requirement. ***----- In the Matter of Bend Millworks Company, 1 BOLI 214, 218-19 (1979).***

❑ Respondent bears the burden of establishing, by a preponderance, that an otherwise discriminatory act was allowable because of a bona fide occupational requirement. ***----- In the Matter of Bend Millworks Company, 1 BOLI 214, 219 (1979).***

❑ When a female complainant worked temporarily and successfully as a clerk messenger but was not hired to permanently fill the position because respondent's

manager believed she could not lift heavy boxes, a part of the job, the commissioner found that respondent discriminated against complainant because of sex when the decision not to hire complainant was based on a "speculative presumption that a female of small physical size would be unable to perform lifting tasks without the actual testing of complainant's ability." ***----- In the Matter of City/County Computer Center, 1 BOLI 197, 200 (1979).***

❑ When respondent's height requirements for the position of flight attendant were between 5'2" and 5'9" for females and between 5'7" and 6'2" for males, the disparity in employment opportunities was sufficient to establish a case of sex discrimination in violation of ORS 659.030 in that the standards were not facially neutral, but based on gender, and the 5'11" female complainant was denied employment on the basis of sex. ***----- In the Matter of Eastern Air Lines, Inc., 1 BOLI 193, 196 (1979).***

❑ When respondent's height requirements for the position of flight attendant were between 5'2" and 5'9" for females and between 5'7" and 6'2" for males, the respondent could not demonstration that the disparity was a bona fide occupational requirement reasonably necessary to the normal operation of its business since it employed males of the same height as the 5'11" female complainant. ***----- In the Matter of Eastern Air Lines, Inc., 1 BOLI 193, 196 (1979).***

❑ Respondent's failure to allow use of accumulated sick leave for pregnancy disability was sex discrimination in violation of ORS 659.030(1) when respondent employer could not show that such a policy was the result of a bona fide occupational requirement reasonably necessary to the normal operation of its business. ***----- In the Matter of School District Union High 7J, 1 BOLI 163, 170 (1979).***

❑ Respondent violated ORS 659.030 by printing and circulating publications that expressed limitations, specifications and discrimination in employment as to sex that were not based upon a bona fide occupational qualification. ***----- In the Matter of School District No. 1, 1 BOLI 1, 19-20 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ In a sex-pregnancy case, the forum construed the exception of bona fide occupational requirement reasonably necessary to the normal operation of the employer's business to be of extremely limited application in order to carry out the purpose and policy of ORS 659.010 to ORS 659.110 in eliminating both the practice and effects of discrimination in employment based on sex. To do otherwise would allow an employer who normally discriminates to continue that discrimination and defeat the purpose of the law. ***----- In the Matter of School District No. 1, 1 BOLI 1, 13 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ When a school district policy required all pregnant probationary teachers to resign, no matter what the circumstances of the teacher's individual case, the forum found the requirement arbitrary, only for the convenience of the district, and not a business necessity. The district failed to produce clear and convincing evidence that the uniform policy was a bona fide occupational requirement reasonably necessary to the normal operation of the district's business. ***----- In the Matter of School District No. 1, 1 BOLI 1, 12 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

83.4 --- Other

84.0 COLLECTIVE BARGAINING AGREEMENTS

❑ When respondent, a ship building and repair company, assigned complainant, a deaf welder, to its ship rather than to a ship because of safety concerns; when on one occasion, complainant was sent by the union hall to work for respondent, and respondent only had enough work in its shop to keep its foremen and leadpersons busy; and when respondent had a collective bargaining agreement that provided that "it is not the intention of [respondent] to use leadpersons or foremen to replace journeymen regarding their production assignments," the forum found that to replace a foreman or a leadperson in the shop with complainant and send that person to a ship to work as a journeyman welder would violate the terms of the agreement, and would have imposed an undue hardship on respondent. Respondent was not required to accommodate complainant by transferring a leadperson or foreman out of the shop to a ship. ***----- In the Matter of WS, Inc., 13 BOLI 64, 88 (1994).***

❑ When complainant applied for a truck driver job and respondent refused to hire him after a medical assessment found that he had a degenerative back condition and was at "present risk of probable incapacitation," the commissioner found that a preponderance of the evidence supported respondent's assessment. When no reasonable accommodation of complainant's physical impairment was possible due to the requirements of a valid collective bargaining agreement, including requirements governing and defining job descriptions, seniority, and job bidding, the commissioner found that respondent did not violate ORS 659.425 by refusing to hire complainant. ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 168, 172-73 (1990).***

❑ When there is a valid collective bargaining

agreement, the disciplinary provisions must be given effect in determining whether an employer took reasonable action in dealing with the perpetrator of harassment. However, such an agreement does not operate to pre-empt to enforcement of the civil rights laws. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 39 (1987).***

❑ When respondent took appropriate corrective action slightly over four months from the initial incident charged by the agency to the termination of the suspected culprit, the forum found that this was reasonable in light of the obligations of the collective bargaining agreement. The commissioner reasoned it would have done little to stop the harassment and much to foster it, had the wrong party been terminated. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 41 (1987).***

❑ When respondent is bound by and its employees covered by the terms of a collective bargaining agreement, that agreement may set boundaries upon respondent's authority to act. Civil rights laws often come into conflict with other individual rights, and the forum must consider the interfacing of the civil rights laws and the rights and obligations under a collective bargaining agreement. The law is clear and the commissioner found that an individual employee cannot waive or bargain away civil rights guaranteed by statute or the state or federal constitution, nor can a union representing the employee usurp and bargain away those rights in the collective bargaining process. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 39 (1987).***

❑ When complainant argued that respondent employer's benefit plan was discriminatory, respondent contended it was lawful because it was pursuant to a collective bargaining agreement. The forum determined that an individual employee cannot waive or prospectively bargain away civil rights guaranteed by statute or by the state or federal constitution, nor can a union representing the employee usurp and bargain away those rights in the collective bargaining process. ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 91 (1983).***

❑ When respondent employer was a member of a union-employer trust fund established by collective bargaining to pay premiums of insurance policies for disability, medical and dental benefits for employees, the exclusion of pregnancy from the weekly income benefits for disability was an unlawful employment practice based on sex in violation of ORS 659.030 for which the employer was jointly liable. The commissioner specifically found that the trust agreement did not preclude the employer from providing benefits in addition to those provided through the trust. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 190 (1981).***

85.0 CORRECTIVE ACTION AND PREVENTIVE MEASURES

❑ When complainant told respondent that she was offended by a customer's conduct toward her that included excessive "leering" and staring at her breasts, but the evidence showed that respondent ultimately complied with her request that he be present when the customer was in the workplace conducting business and complainant had no problems with the customer thereafter, the forum inferred that respondent's action effectively ended the harassment and respondent took sufficient remedial action in response to complainant's complaint and was therefore not liable for the customer's harassment. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 285 (2004).***

❑ As complainant's employer, respondent had an obligation to take prompt remedial action to eliminate harassment even where the offensive conduct was by others he did not employ. In workplaces where employees have the ability to send and receive e-mail at will, employers have a duty to determine what steps can be taken to stop offensive e-mail that generates from outside the workplace. An employer's principal obligation is to use whatever current technology is available to block patently inappropriate e-mail and reduce the volume of offensive junk mail. When respondent asserted he had no control over the volume or type of e-mail messages complainant and her co-workers were subjected to daily, but credible evidence showed that AOL had blocking mechanisms in place that could have reduced the volume of unsolicited, sexually explicit and offensive junk mail and there was no evidence that respondent explored those options or that he took any other proactive measures to cure the problem, respondent was held liable for complainant's continued exposure to harassing materials. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 284 (2004).***

❑ There is a presumption that an employer "should have known of" harassment by a supervisor of a subordinate employee. The employer can overcome that presumption by proving both elements of a two-pronged affirmative defense. The employer must prove both that: 1) it exercised reasonable care to prevent and correct promptly any harassing behavior; and 2) the complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 150-51 (2000).***

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ An employee might reasonably believe that utilization of a harassment complaint procedure would be futile if other harassed employees had filed complaints on which no action had been taken or if harassment was so pervasive in the workplace that it suggested tacit approval by the employer. ***-----*** In ***the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 152, fn. 10 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ The employer proved that it exercised reasonable care to prevent and correct promptly a supervisor's harassing behavior when it had an effective harassment

policy that provided a viable means for a harassed individual to bring harassment to the employer's attention. The effectiveness of the policy was demonstrated by the fact that the complainant employee was discharged as the result of harassment complaints filed against him. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 151-52 (2000).***

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ The employer proved that the complainant employee unreasonably failed to utilize the employer's complaint procedure. The employee was aware of the procedure, he was not discouraged from filing a complaint, and there was no reason for him to believe that a complaint would be futile. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 152 (2000).***

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ Respondent, a place of public accommodation, was liable for an act of discrimination committed by one of its employees despite the fact that it trained its employees to treat all customers equally without regard to race. ***----- In the Matter of Westwind Group of Oregon, 17 BOLI 46, 52 (1998)***.

❑ Although an employer's solicitation of suggestions from the victim of harassment tends to show good faith on the employer's part, the commissioner found that it is not a defense to liability. The victim of harassment does not have the obligation to ensure a working environment free from harassment, as that burden falls on the employer. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 44 (1987).***

❑ Although the commissioner found that other possible corrective steps could have been taken, the law does not require an employer to take every action imaginable, but rather all steps that were both "feasible and reasonable" as determined by the facts existing at the time. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 44 (1987).***

❑ Considering the nature of the workplace and the type of accepted conduct, the commissioner found it was reasonable for respondent to not offer race sensitivity training. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 43 (1987).***

❑ When the forum questioned respondent in regard to remedial steps other than those taken by respondent, the commissioner found that respondent did not fall short of its obligation by failing to take such actions as: (1) Posting notices condemning harassment and prohibiting intimidation of there employees. As respondent took steps to enforce that policy, the commissioner found it was reasonable for respondent to not have posted other similar notices; (2) Posting a notice of the termination of the suspected harasser. Posting such a notice, whether or not the suspect was identified by name, may have made respondent vulnerable to an action for libel and slander or defamation. Given the legal concerns and vocal atmosphere of respondent's warehouse, the commissioner found that respondent's failure to post a notice was reasonable. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 42-43 (1987).***

❑ When respondent took appropriate corrective action slightly over four months from the initial incident charged by the agency to the termination of the suspected culprit, the forum found that this was reasonable in light of the obligations of the collective bargaining agreement. The commissioner reasoned it would have done little to stop the harassment and much to foster it, had the wrong party been terminated. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 41 (1987).***

❑ The forum considered the possibility of whether respondent should have used employees in an attempt to apprehend the harasser. The forum found this would have not have been feasible or reasonable under the following circumstances: (1) the incidents were not repeated in kind before that time; and (2) respondent had insufficient employees to spare for such surveillance. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 41 (1987).***

❑ The forum found it was reasonable for the respondent to consider the following factors in fashioning a plan or taking steps to correct a situation of racial harassment: (1) collective bargaining agreement; (2) the work environment; (3) resources available to the employer; (4) the likely result of the specific corrective action; and (5) the rights of other employees***. ----- In the Matter of United Grocers, Inc., 7 BOLI 1, 40 (1987).***

❑ Respondent may consider the likely result of specific corrective action as a factor in fashioning a corrective action plan. This fact depends on respondent's knowledge of the work force, considering in participate the general reaction of the work force to certain types of disciplinary measures, and the general opinion of complainant. An element of this factor is complainant's personality to the extent that it affects how employees would react to corrective action involving complainant. However, the commissioner does not consider complainant's personality a defense to harassment. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 40 (1987).***

❑ When there is a valid collective bargaining agreement, the disciplinary provisions must be given effect in determining whether an employer took reasonable action in dealing with the perpetrator of harassment. However, such an agreement does not operate to pre-empt to enforcement of the civil rights laws. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 39 (1987).***

❑ When the agency established a pattern of racial harassment in the workplace, the commissioner used court rulings, EEOC decisions, and agency policy to determine the sufficiency of respondent's response to the situation and asked the question – Whether the employer took all measures both feasible and reasonable to combat the offensive conduct and maintain an atmosphere free of racial intimidation and insult? ***----- In the Matter of United Grocers, Inc., 7***

BOLI 1, 39 (1987).

❑ This forum follows the position adopted by the EEOC and the federal courts – an employer has an affirmative duty to maintain a working environment free complaints and deal appropriately with the offending personnel. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ When racial harassment has been alleged, the commissioner determines what constitutes immediate and corrective action using the following considerations suggested by the EEOC: (1) what actions were taken; (2) when was it taken; (3) whether the action taken fully remedied the conduct without adversely affecting the term or conditions of complainant's employment; and (4) whether the employer had a policy and took steps to implement the policy. The commissioner also recognized the courts' consistent views in considering whether an employer took immediate and corrective action: (1) company policy against harassment and active enforcement of that policy; (2) disciplinary action against the perpetrator; (3) sensitivity training; (4) a formal mechanism to deal with grievances; and (5) investigation. The commissioner found that a mere announcement of a policy against harassment and promise to discipline or discharge any employee who fails to conform is not sufficient to relieve an employer of liability. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 35 (1987).***

❑ Respondent employer's manager denied the request of complainant, a Catholic, to have Sunday off to attend mass. Respondent accommodated complainant after being made aware of her request. The forum determined that, since there was no evidence to establish that the manager was a supervisor for whose actions respondent would be liable, and since respondent, upon knowledge of the request, accommodated complainant, there was no discrimination. The forum indicated that an employer would be liable, even when the employer had no knowledge, for the acts of a supervisor who could hire or discharge complainant or who could effectively recommend hiring or discharge. ***----- In the Matter of Deana Miller, 6 BOLI 12, 28 (1986).***

❑ When complainant advised respondent he was being harassed because of his national origin, it was respondent's duty to alleviate the discriminatory behavior of its employees. Respondent was obligated to take additional action to resolve the problem besides merely talking to the employees. Respondent took inadequate action to correct the employee harassment of complainant and was liable under ORS 659.030(1)(b). ***----- In the Matter of Clackamas County, 3 BOLI 164, 169 (1981).***

❑ When complainant alleged she had been racially harassed by her co-workers, the forum determined that the "single admonition" by respondent of one co-worker was insufficient, by itself, to constitute appropriate corrective action. ***----- In the Matter of Roderick Enterprises, Inc., 2 BOLI 14, 20 (1980).***

86.0 ESTOPPEL (*see also* Ch. VII, sec. 18.1)

❑ An equitable estoppel may exist when one party (1) has made a false representation; (2) the false representation is made with knowledge of the facts; (3) the other party is ignorant of the truth; (4) the false representation is made with the intention that it should be relied upon by the other party; and (5) the other party is induced to act upon it to that party's detriment. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 162 (1993).*** *See also In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 104 (1992).*

❑ Acceptance of an unlawful wage scale does not estop an employee's claim for unlawful compensation. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 163 (1993).***

❑ When the commissioner granted the agency's motion to strike an equitable estoppel defense, the commissioner held that her decisional ability was not limited to non-equity matters. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 165 (1993).***

❑ There can be no estoppel if the reliance is not coupled with a right to rely, and there is no such right when a party has knowledge to the contrary of the fact or representation allegedly relied upon. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 105-06 (1992).***

❑ No estoppel is created by silence unless there is a legal duty to speak, and such duty does not arise unless the party against whom the estoppel is urged knew or should have known that a failure to speak would probably mislead the other party to act to its own detriment. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 105 (1992).***

❑ Respondent, a state agency, argued that the agency should be estopped to enforce the parental leave law against it because the agency was a party to the same collective bargaining agreement as respondent, and the agency failed to notify to executive department of any concerns the agency had with the contract article on parental leave during collective bargaining. The forum found that the facts established clear notice from the agency to the executive department that the rule regarding an employee's right to use accrued leave is valid, and any ambiguity on the issue disappeared when the agency issued *In the Matter of Portland General Electric,* 7 BOLI 253 (1988). ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 105 (1992).***

❑ When respondent raised as an affirmative defense that complainant signed a Satisfaction of Final Order that operated to extinguish respondent's obligation to complainant, the commissioner rejected the defense because complainant was not a party to the case, but was a witness for the agency in an enforcement action. ***----- In the Matter of City of Portland – Civil Service Board (Second Addendum to Order), 6 BOLI 203, 211 (1987).***

❑ Respondent alleged that the state was estopped

from prosecuting specific charges when it had relied on an Attorney General opinion based on EEOC Guidelines held invalid by the U.S. Court of Appeals. The forum dismissed the argument, stating that the opinion was based on more than those guidelines. Moreover, federal law is instructive rather than binding on this forum and the state can grant greater protection against discrimination. ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 99-100 (1983).***

❑ Respondent argued that the state was estopped to enforce its position, alleging the state had previously maintained and argued a different position in court. The forum found that the two positions that respondent referred to were factually different and not inconsistent. The forum also noted that estoppel only protects those who materially change their position in reliance on another's acts or representations and that respondent had not alleged such reliance. ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 98-99 (1983).***

87.0 EXHAUSTION/ELECTION OF REMEDIES (*see also* 64.0)

❑ When respondent moved to dismiss the specific charges based on failure to exhaust administrative remedies, the forum denied the motion, stating that the doctrine of exhaustion relates to entry into the court system and has no relevant to a contested case proceeding. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

❑ When respondent, an interstate trucking company, alleged coverage by the Federal Highway Administration and that complainants had failed to exhaust remedies provided by federal law, the forum determined those remedies to be cumulative rather than exclusive and complainants' failure to exhaust such remedies did not preclude pursuit of state remedies under ORS 659. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 108 (1982).***

> Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

❑ When respondent employer-union trust defended a complaint of sex discrimination in benefits due to pregnancy on the basis that complainant had not followed its claim procedure providing for a Board hearing and eventual arbitration, the commissioner found that the rule set forth in *Alexander v. Gardner-Denver Co.,* 415 US 36, 94 SCt 1011 (1974), relating to Title VII, the federal counterpart to ORS chapter 659, applied and that complainant could pursue her statutory remedy without first exhausting other remedies. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 191 (1981).***

❑ In cases brought under the provisions of ORS chapter 659, the commissioner's enforcement of civil rights statutes are not subject to federal preemption through the National Labor Relations Act and a civil rights complainant alleging race discrimination in employment had no duty to exhaust the grievance procedure in an existing collective bargaining agreement. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 92-93 (1978).***

> Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).
>
> Order on remand, 1 BOLI 179 (1979).

❑ In a civil rights case, the forum denied respondent's motion to dismiss based on the alleged failure of BOLI to undertake reasonable conciliation efforts and complainant's failure to exhaust the grievance procedure established by the collective bargaining agreement in attempting to resolve his complaint, determining that exhaustion procedures were not applicable to cases brought under ORS chapter 659. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 92-93 (1978).***

> Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).
>
> Order on remand, 1 BOLI 179 (1979).

88.0 FAILURE TO MITIGATE

❑ A complainant in an employment discrimination case who seeks back pay is required to mitigate damages by using "reasonable diligence in finding other suitable employment." ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 30 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ When the forum determines that a back pay award is appropriate, a respondent bears the burden of proving that a complainant failed to mitigate his or her damages. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 30 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ To meet the burden of proving that a complainant failed to mitigate his or her damages, a respondent must prove that the complainant failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 30-31 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ The forum concluded that complainant's refusal of her joint employer's temporary good faith job offer at $8.00 for performing unskilled clerical work constituted

failure to use reasonable care and diligence in seeking employment, as well as proof that a job was available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified. Respondent satisfied its burden of proving that

> *International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Failure to mitigate back pay loss does not have to be specifically pleaded by a respondent as a prerequisite to presenting evidence on that issue. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 32 (2000)***.

❑ In this forum, it is incumbent on a respondent to establish any failure to mitigate damages. ***----- In the Matter of Body Imaging, Inc., 16 BOLI 163, 186 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998).***

> Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000).

89.0 INDEPENDENT CONTRACTOR

❑ In determining whether an employer/employee relationship exists, several factors must be considered and all of the factors are determinative of the key consideration, which is whether respondent had the right to detail how complainant performed his work or whether complainant was allowed to use his own work methods with respondent having no right to control, except as to the ultimate result. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 183 (1982).***

❑ The "right to control" generally refers to the right of an employer to interfere with the manner and method of accomplishing a particular result. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 184 (1982).***

❑ While compensation by commission is generally evidence of independent contractor status, it is not conclusive. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 185 (1982).***

❑ When respondent's termination letter to complainant indicated not only a right to terminate his "employment," but also included a detailed analysis and critique of complainant's "manner and method" of doing his work, including a criticism of his alleged "short tours," which indicated a degree of supervision incompatible with an independent contractor relationship, the forum concluded that respondent employed complainant. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 184 (1982).***

❑ Other factors indicative of an employer/employee relationship are: (1) whether respondent retained complainant for an indefinite period of time; (2) whether complainant could employ workers to perform, or help perform, his work for respondent; (3) whether complainant could perform work for others while working for respondent; (4) whether respondent or complainant furnished the equipment and materials used by complainant to perform the work; and (5) whether respondent or complainant determined the particular hours complainant worked. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 184 (1982).***

❑ When the manner of complainant's discharge indicated conclusively that respondent reserved the right to terminate complainant's service whenever it chose to do so without regard to the final result of the work and without liability for breach of contract and such right to discharge is a significant factor in evaluating the employment relationship, the forum concluded that the record as a whole supported the conclusion that respondent was an employer for the purposes of [*former*] ORS 659.010(6). ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 185 (1982).***

❑ When respondent argued that an at-will, on-call driver was not an employee subject to discharge, lawful or unlawful, the commissioner ruled that repeated assignments of casual work to an individual who is one of several on an on-call list "constitutes an ongoing albeit intermittent employment relationship" and the employer's discontinuance of that relationship is a discharge for the purposes of ORS chapter 659 and related statutes. ***----- In the Matter of Lebanon Public Schools, 11 BOLI 294, 306 (1993).***

> Affirmed without opinion, *Brigham v. Bureau of Labor and Industries,* 129 Or App 304, 79 P2d 245 (1994).

90.0 LACHES (*see also* Ch. IX, sec. 11.2)

❑ Respondent contended that the commissioner was without jurisdiction because the agency had failed to timely issue an administrative determination and specific charges. The commissioner found that the agency had issued its administrative determination timely and also determined that five months between issuance of the administrative determination and the specific charges was not a "prolonged delay," particularly when respondents sought reconsideration of the administrative determination and offered no evidence of prejudice attributable to the time lapse. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 249 (1991).***

❑ When respondent raises the affirmative defense of laches, respondent must prove: (1) there was an unreasonable delay by the agency; (2) the agency had full knowledge of facts that would have allowed it to avoid the unreasonable delay; and (3) the unreasonable delay resulted in such prejudice to respondent that it would be inequitable to afford the relief sought by the agency. Respondent did not prove this defense when: (1) it did not establish when conciliation failed, in order to show that an unreasonable time had passed; (2) the record did not establish that the agency had full knowledge of facts that would have allowed it to avoid the unreasonable delay; and (3) there was no evidence

or argument of how substantial any prejudice was, due to the unavailability of witnesses. ***----- In the Matter of Tim's Top Shop, 6 BOLI 166, 184-86 (1987).***

❑ Respondent filed a motion to dismiss, alleging that the agency was barred by laches from proceeding on a complaint. Respondent stated that more than three years had elapsed between the filing of the complaint and the issuance of the initial and amended administrative determinations and three and one-half years had elapsed between the filing of the complaint and the issuance of specific charges, and this constituted "undue and unwarranted delay," placing respondent at a disadvantage in defending the case and causing unreasonable expense in locating crucial out-of-state witnesses. The forum denied the motion, stating the respondent has the burden of demonstrating the elements of the defense of laches. "The established rule is, in fact, that the plaintiff against whom the defense is asserted must have had full knowledge of all facts during the period of delay, and 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." When respondent did not need to produce any additional evidence to respond to the amended administrative determination than was required for the initial administrative determination, there was no evidence that out-of-state witnesses would have been in state, had the hearing been held sooner, and there was no showing of prejudice. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 240-41 (1985).***

❑ Respondent moved to dismiss the specific charges on the grounds of laches, alleging that one of its witnesses could not fully recall the events and motives of the employment decision in question. The forum denied the motion. Laches requires a showing of actual prejudice. While such prejudice may be shown by the unavailability of witnesses or crucial documentary evidence as a result of the delay, respondent failed to meet the burden of establishing such prejudice when the witness did recall the incidents and was able to testify at hearing. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 66 (1982).***

❑ Respondent moved to dismiss the specific charges on the basis that BOLI had failed to make a prompt investigation of the charges, and that such delay was discriminatory, burdensome, and retaliatory against respondent. The forum denied the motion to on the grounds that respondent had failed to demonstrate how the alleged delay had adversely affected his ability to respond to the charges. ***----- In the Matter of Jeffrey Brady, 2 BOLI 58 (1980).***

Reversed and remanded on other grounds, *Brady v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982), order on remand, 4 BOLI 211 (1984).

❑ Respondent sought dismissal through the affirmative defense of laches, citing in particular the time between the filing of the complaints and the agency's administrative determination of substantial evidence and that this passage of time contributed to the unavailability of a key witness. The commissioner found that another witness who testified, together with documentary evidence written by the missing witness, negated any prejudice, and that respondent made no showing to establish its efforts to locate the missing witness***. ----- In the Matter of City of Portland, 2 BOLI 41, 53 (1980).***

❑ When the record did not show the particular areas in which respondent was prejudiced, and respondent stipulated to the admission of statements from its employees taken five months after the occurrence at issue, the forum denied respondent's motion to dismiss based on laches, made at hearing 27 months after the occurrence at issue. ***----- In the Matter of LeeBo Line Construction, Inc., 1 BOLI 210, 211 (1979).***

❑ A hearing was held 43 months after the filing of a discrimination complaint with the agency, and 44 months after the offense alleged. When all relevant documents and witnesses were available and there was no showing that a specific document or witness was prejudicially unavailable, the commissioner denied respondent's motion to strike the agency's specific charges for lack of timeliness, stating that such a motion could not be allowed based merely on the passage of time. ***----- In the Matter of Marion County, 1 BOLI 159, 162 (1978).***

91.0 LACK OF JURISDICTION (*see also* Ch. I, sec. 1.0)

❑ Respondent moved to dismiss the specific charges on the ground that complainant would have worked in California, not Oregon. The ALJ denied the motion because respondent hired complainant in Oregon and paid workers' compensation insurance and unemployment insurance for complainant in Oregon. Under those circumstances, respondent was an Oregon employer. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 192 (2000).***

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ The commissioner's jurisdiction to find liability and to assess or award damages for emotional distress does not violate respondents' right to trial by jury as guaranteed by the Oregon constitution. The Oregon court of appeals has concluded that such awards carry out the commissioner's statutory duty to "eliminate the effects of any unlawful practice found." ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 287-88 (1996).***

❑ When the commissioner had contracted with the City of Portland to enforce the City's civil rights ordinances using the same procedures and remedies as in cases filed under ORS chapter 659, the commissioner heard and determined liability on an allegation of unlawful discharge based on complainant's sexual orientation. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 134 (1995).***

❑ Respondent contended that the commissioner was without jurisdiction because the agency had failed to timely issue an administrative determination and specific charges. The commissioner found that the agency had issued its administrative determination timely and also determined that five months between issuance of the administrative determination and the specific charges was not a "prolonged delay," particularly when

respondents sought reconsideration of the administrative determination and offered no evidence of prejudice attributable to the time lapse. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 249 (1991).***

❑ The forum acquires jurisdiction when an individual respondent makes an appearance at the hearing and voluntarily submits himself to the jurisdiction of the forum, even when proper service has not been made or attempted on the individual. ***----- In the Matter of Allied Computerized Credit & Coll., Inc., 9 BOLI 206, 214-15 (1991).***

❑ When an employee or prospective employee opposes an employer's unsafe practices by filing complaints and instituting proceedings against the employer, who then discharges or refuses to hire that complaint, the commissioner has jurisdiction over the persons and subject matter related to alleged ORS 654.062 violations. ***----- In the Matter of Arkad Enterprises, Inc., 8 BOLI 263, 275 (1990).***

> Affirmed, *Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991).

❑ Respondent moved to dismiss the case, alleging that the agency lacked jurisdiction based on Article I, section 17, and Article VII, section 3 of the Oregon Constitution. The hearings referee initially declined to declare invalid the presumptively valid legislative scheme underlying the agency's contested case proceedings in discrimination cases. The commissioner noted that "this Forum and the courts have previously ruled on the cited constitutional issue adversely to the respondents' position" and denied the motion to dismiss. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 180 (1989).***

❑ When respondent raised as an affirmative defense that complainant signed a Satisfaction of Final Order that operated to extinguish respondent's obligation to complainant, the commissioner rejected the defense because complainant was not a party to the case, but was a witness for the agency in an enforcement action. ***----- In the Matter of City of Portland – Civil Service Board (Second Addendum to Order), 6 BOLI 203, 211 (1987).***

❑ Respondent, a public employer, moved to dismiss the specific charges on the grounds that the commissioner had no jurisdiction over the subject matter, alleging that ORS 659.026, which made it an unlawful employment practice for a public employer to discriminate on the basis of age, states that the procedure for an appeal of such decisions does not apply when another statute exists that provides for such administrative review, and that ORS chapter 240 provided for such review. The commissioner denied the motion, noting that ORS chapter 240 was limited to the areas of suspension, reduction, demotion or dismissal. Since complainant alleged that respondent had unlawfully failed to promote her, ORS 659.026 was applicable, rather than ORS chapter 240. ***----- In the Matter of State of Oregon, Department of Human Resources, 3 BOLI 89, 90-91 (1982).***

92.0 LEGITIMATE NONDISCRIMINATORY REASON/PRETEXT

❑ To overcome respondent's stated reason for terminating complainant, the agency must establish by a preponderance of evidence that respondent's reason is not worthy of belief. In an OFLA case, the agency did not meet that burden when respondent's stated reason for terminating complainant was supported by undisputed facts and nothing in the record demonstrated that respondent's reasons for terminating complainant were a pretext for discrimination. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 304-05 (2007).***

❑ Respondent required that complainant, who had invoked the provisions of OFLA, sign respondent's break policy, then terminated her because she refused to sign, but did not terminate another employee who had not invoked a right under the OFLA provisions and did not sign the break policy. The forum drew an inference that respondent treated complainant differently than her counterpart because complainant engaged in a protected activity, and not because of respondent's proffered legitimate, nondiscriminatory reason that complainant had not signed the break policy. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 241 (2004).***

❑ When complainant was singled out for using offensive language and was respondent's only TLE employee to lose his job for that reason alone, and when respondent did not follow its own disciplinary procedure with regard to complainant's termination, the forum concluded that respondent's reason for terminating complainant was a pretext for discrimination and respondent terminated him because he used the workers compensation provisions. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 62-63 (2002).***

❑ When respondent's legitimate nondiscriminatory reasons for discharging complainant lacked meaningful support in the record, the forum concluded they were a pretext for discrimination. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 187 (1982).***

❑ When complainant received no criticism for his failure to attend respondent's social functions nor was it alleged that such activities were a job requirement and when a "PR revolt" alluded to in respondent's termination letter was not caused by any misconduct on complainant's part, respondent's stated ground for discharge was found to be spurious and pretextual. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 186 (1982).***

❑ It is not a prerequisite to statutory protection against discrimination that a complainant be a superior, error-free worker. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 131 (2002).***

❑ Under the different treatment test, the agency's burden of proving that complainant's utilization of OFLA was the reason for respondent's alleged unlawful action can be met as follows. The complainant begins this process [of proof] by showing harm because of an action of the respondent which makes it appear that the respondent treated complainant differently than comparably situated individuals who were not members

of the complainant's protected class. The respondent must then rebut this showing. If the respondent fails to rebut this showing, the Division will conclude that substantial evidence of unlawful discrimination exists. If the respondent does rebut the showing, the [c]omplainant may then show that the respondent's reasons are a pretext for discrimination. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 29-30 (2000)***.

❑ When respondent provided an legitimate, nondiscriminatory reason by producing clear and reasonably specific admissible evidence that its collective bargaining agreement required employees who take any kind of leave of absence to obtain prior permission from respondent before taking a job elsewhere while on their leave, that complainant was discharged based on that policy, and that the policy is uniformly applied to all employees on leave of absence for any reason, the forum stated that the agency could still prevail by proving that respondent's legitimate, nondiscriminatory reason was a pretext for discrimination. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 30 (2000)***.

❑ The agency's burden of showing pretext merges with the ultimate burden of persuading the forum that complainant was the victim of intentional discrimination. Pretext may be established through credible evidence that similarly situated employees (comparators) outside of the complainant's protected class received favored treatment or did not receive the same adverse treatment. Respondent's treatment of other members of Complainant's protected class, *i.e.* employees who took OFLA leave, was also relevant in a different treatment analysis. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 30 (2000)***.

❑ When there was direct evidence that respondents discriminated against complainant on the basis of age, but respondents argued that their decision not to hire complainant was based on legitimate, nondiscriminatory reasons, the forum stated that if any of the reasons were credible, it would "apply a 'mixed motive' analysis, in which the burden of proof rests on [r]espondents to prove that the same hiring decision would have been made even if complainant's age had not been taken into account." In this case, the forum found the proffered legitimate, nondiscriminatory reasons not to be credible. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 209-11 (2000)***.

❑ The agency proved that respondents violated ORS 659.030(1)(b) by establishing that respondents reduced complainant's work hours and would not have done so, but for the fact that she was pregnant, despite respondents' protestation that they reduced complainant's hours for a legitimate nondiscriminatory reason. The forum disbelieved respondents' claim that they reduced claimant's hours because of her poor work performance because the evidence established that respondents offered complainant work in one of their other businesses, which they believed was a more suitable environment for a pregnant employee. If complainant had been such a poor employee, respondents would not have offered her the other job. ***--- In the Matter of Bob G. Mitchell, 19 BOLI 162, 186 (2000)***.

❑ When the respondent successfully presents evidence that it took action against a complainant for a legitimate, nondiscriminatory reason, the agency still may prevail by proving that the proffered justification was a pretext for discrimination. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 134 (2000)***.

❑ The agency overcame respondent's proffered legitimate, nondiscriminatory reason by proving that respondent only gave verbal warnings to several other employees who engaged in the same behavior for which complainant purportedly was discharged. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 135 (2000)***.

❑ In a discharge case, respondent produced evidence that numerous employees other than complainant had filed workers' compensation claims. Those employees were properly considered comparators in the forum's causation analysis. However, there was no evidence concerning the circumstances of these employees' employment, whether any of them had violated respondent's knife policy (the violation of which purportedly was the basis for complainant's discharge), and, if so, whether they were injured as a result of that violation. Consequently, the forum gave evidence regarding these employees less weight than it gave evidence concerning five other employees who were shown to have violated respondent's knife policy in the same manner as complainant. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 136 (2000)***.

❑ When respondent alleged that it had a legitimate, nondiscriminatory reason for firing complainant -- that she repeatedly violated respondent's rules -- and credible evidence did not support that reason, the forum found that respondent's legitimate, nondiscriminatory reason was a pretext intended to hide respondent's discriminatory motivation. ***----- In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 270 (1998)***.

❑ Discipline may not be motivated, wholly or in part, by discriminatory intent, even if a complainant is not a perfect employee. When complainant's poor job performance was caused by respondents' own discriminatory acts, respondent cannot rely on that poor performance as a basis for disciplining complainant. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 190-91 (1998)***.

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ Respondents argued that they had not discriminated against complainant, claiming complainant was promoted during the period that respondents were allegedly treating her as disabled. That argument was defeated by facts showing that respondents did not favor this promotion, sanctioned the removal of complainant's driving duties during the same time period, made negative comments about complainant's employability and performance, and placed her on probation. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 181***

(1998).

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ Complainants consulted an attorney about an individual respondent's unwelcome sexual touching and comments. After learning they had consulted an attorney, respondent angrily advised complainants that he knew "two little girls that aren't going to have a job tomorrow" and fired one of them, reportedly because she refused to serve customers. The commissioner found that the individual respondent's reason for the discharge was "clearly pretext" and that the discharge was in retaliation for complainant's resistance to the offensive actions. The commissioner held that respondent corporation violated ORS 659.030(1)(f) and the individual respondent violated ORS 659.030(g). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 133-36, 138 (1997).***

❑ Complainant, a cocktail waitress, claimed that respondent's manager discharged her because she was pregnant. The commissioner found no violation of ORS 659.030(1)(a) when the evidence showed that the manager laid off complainant and attempted to call her back to work, but complainant never returned his calls, the manager credibly testified that complainant's pregnancy had nothing to do with the layoff, and there was no persuasive evidence that this reason was pretextual. ***----- In the Matter of Benn Enterprises, Inc., 16 BOLI 69, 78 (1997).***

❑ When respondent presented persuasive evidence that the decision to terminate complainant had been made for cause, one week before an OR-OSHA inspection triggered the belief that complainant had made a safety complaint, and the agency failed to show that respondent's reason was pretextual or that complainant's protected class status played a motivating role in the discharge or the timing of the discharge, the commissioner found no violation of ORS 654.062(5) as alleged. ***----- In the Matter of Industrial Carbide Tooling, Inc., 15 BOLI 33, 47 (1996).***

❑ Complainant failed to show that respondent's asserted legitimate, nondiscriminatory reasons were a pretext for discrimination when no evidence suggested that respondent was motivated by a discriminatory motive; no evidence showed that respondent treated or spoke of women in a demeaning fashion or treated women less favorably than male employees with regard to compensation, promotional opportunities, access to pay advances, loans, free long distance calls, transportation, and encouragement to further themselves; and evidence showed that complainant was promoted and given four pay raises, was allowed to receive personal calls from her children, and received pay advances. The agency failed to prove by a preponderance of the evidence that complainant's protected class membership was the reason for the respondent's alleged unlawful action or that respondent committed an unlawful employment practice. ***----- In the Matter of Howard Lee, 13 BOLI 281, 291 (1994).***

❑ When respondent asserted that is used an objective standard of an "unintended act" vs. a "premeditated" act in evaluating whether an employee's non-work activity during work hours was "abuse of company time" or "theft of company time," but that standard was subject to the subjective evaluation by complainant's supervisors, who considered complainant's national origin when they discharged complainant for "theft of time," the commissioner found that complainant's national origin was the cause of his discharge. ***----- In the Matter of Yellow Freight System, Inc., 13 BOLI 201, 215-18 (1994).***

❑ Respondent excepted to a finding in a proposed order that its stated reason for complainant's termination was pretextual, arguing that "[t]he ultimate burden of proof always remains with the complainant. Complainant did not sufficiently demonstrate that [the] proffered reason for termination was not a true reason * * * and that sex discrimination was." The commissioner agreed that "the burden of proving unlawful discrimination remains with the agency. Oregon courts have rejected any burden shifting," but noted that "[h]ere, the agency adduced evidence which, if believed, showed a prohibited motive on the part of [r]espondent's manager." The commissioner observed that "[W]here an employer's adverse employment action against an employee is accompanied by words or acts which clearly demonstrate the employer's prohibited bias, both the prima facie case and evidence that employer's proffered alternative reasons are pretextual are satisfied. ***----- In the Matter of Motel 6, 13 BOLI 175, 185-86 (1994).***

❑ When respondent was charged with discharging a married black male complainant because of the race of a married white female co-worker with whom he became romantically involved, the forum found that their mutual discharge was for disruptive behavior on store premises during business hours and that neither of their respective races was a factor. The forum dismissed the specific charges as to the discharge. ***----- In the Matter of Northwest Fitness Supply Company, 12 BOLI 246, 261-62 (1994).***

❑ In a racial discrimination case, the agency introduced evidence that complainant's supervisor once used the term "jigaboo" to refer to a Native American, and that respondent's owner was overheard referring to "darkies." The forum found that the single reference to "jigaboo" and the single reference to "darkies" were not persuasive that respondent was more likely motivated by a discriminatory motive than by the credible, nondiscriminatory reasons given for discharging complainant. The agency did not prove by a preponderance of the evidence that respondent's reasons for the discharge were pretextual. ***----- In the Matter of Clackamas County Collection Bureau, Inc., 12 BOLI 129, 140 (1994).***

❑ When respondent produced clear and reasonably specific evidence that it acted upon legitimate, nondiscriminatory reasons when it discharged a black employee and not a similarly situated white employee and the agency was given a full and fair opportunity to show that those reasons were a pretext for discrimination but failed to show pretext, the forum found

that respondent did not violate ORS 659.030(1)(a). ***----- In the Matter of Clackamas County Collection Bureau, Inc., 12 BOLI 129, 139-40 (1994).***

❑ The commissioner found that complainant, a compensably injured worker, failed to report to work after advising respondent of her medical release to regular duty, and concluded that respondent did not discharge her in retaliation for using the workers' compensation system. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 58 (1993).***

❑ When respondents alleged a bona fide occupational requirement regarding complainant's age as a defense to his discharge, the commissioner granted the agency's motion to strike that defense because no discrimination based on age 18 or older was alleged in the specific charges, and respondents merely asserted what could be a legitimate, nondiscriminatory reason. ***----- In the Matter of Rose Manor Inn, 11 BOLI 281, 283 (1993).***

❑ When respondents presented credible evidence that they did not rent a vacant apartment to a black applicant because the manager's wife thought the apartment would be rented by a couple who were inspecting it, and the agency's evidence offered to show that respondents' reason was pretextual was unpersuasive, the commissioner held that respondents did not violate ORS 659.033(1)(a). ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 212 (1993).***

❑ When respondent discharged complainant because he had a bad attitude and damaged an auto part while removing it, respondent did not discharge complainant because he claimed workers' compensation benefits and did not violate ORS 659.410. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 178, 180 (1993).***

❑ When respondent presented persuasive evidence of a legitimate, nondiscriminatory reason for discharging complainant, and the agency failed to show that respondent's reason was pretextual or that complainant's protected class played a key role in the discharge, the commissioner found no violation of ORS 659.410 as alleged. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 179-80 (1993).***

❑ When a female complainant was paid a lower salary than her male predecessor and successor because of her sex, the commissioner found that respondents' defenses of substandard performance and that complainant could achieve equivalent pay at an hourly rate by increasing the number of hours worked were pretexts for discrimination. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 162 (1993).***

❑ It is not a prerequisite to statutory protection against discrimination that a complainant be a superior, error-free worker. If a worker has performance deficiencies, those should be dealt with as they arise and not as an afterthought as a defense to a charge of unlawful practice. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 82 (1992).***

❑ When respondent discharged complainant, a roofing crane operator, after he refused to load a roof with roofing materials because of his reasonable fear of high voltage power lines near the roof, the forum found respondent's claim that it discharged complainant because he failed to call in to be pretextual. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 78 (1992).***

❑ When respondent asserted it terminated an HIV positive complainant for his unexcused absence from work for three days following a 30 day leave of absence, the forum found that the agency failed to prove that respondent's asserted reason was pretextual, and that respondent did not violate ORS 659.425. ***----- In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 43-44 (1992).***

❑ When complainant, an injured worker who had applied for workers' compensation benefits, took a company vehicle after working hours, got drunk and totaled the vehicle, and several days later came late to work appearing hung over, unshaven, disheveled, and smelling of alcohol, the commissioner found that respondent discharged complainant because he wrecked the vehicle while drunk and came to work late and unfit, not because he had applied for workers' compensation benefits. ***----- In the Matter of Chem-Ray Company, 10 BOLI 163, 172 (1992).***

❑ An employer may discipline for cause and not violate statutory discrimination provisions, but the employer may not impose discipline if the motivation is discrimination prohibited by statute. Such discipline is not "for cause." ***----- In the Matter of West Linn School District, 3 JT, 10 BOLI 45, 63 (1991).***

❑ When a respondent employer alleged, in defense of sexual harassment charges, that complainant was predisposed to perceive sexual behavior when none occurred and had initiated the proceeding as retaliation for respondent's prosecution of her for drunken driving, and the only evidence revealed an unpursued rape accusation over five years prior to employment and a driving conviction over seven years prior to employment, the commissioner found those occurrences too remote in time to be persuasive as defenses. ***----- In the Matter of William Kirby, 9 BOLI 258, 280 (1991).***

❑ When a female complainant was paid differently than males doing the same work and was fired when she told respondent's corporate president that her pay scale was wrong, and respondent's pre-hearing assertions about her poor performance were found to be unsupported and pretextual, the commissioner held that the discharge was in retaliation for opposing respondent's practice of discriminatory compensation. ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 230-31 (1991).***

❑ Respondent paid a majority of its probationary female employees the probationary rate based on union scale and paid the majority of its probationary male employees the full union scale. Respondent suggested that the differential was due to differences in departments or the potential for tips. The commissioner found those reasons to be pretexts for discrimination in compensation against complainant based on her sex, in violation of ORS 659.030(1)(b). ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 227, 229-30 (1991).***

❑ Complainant made a complaint to Accident

Prevision Division, which inspected respondent's business and fined respondent $1125. Complainant was fired the day after the fine was imposed and the commissioner found that he was fired in violation of ORS 654.062(5) based upon his voicing safety and health concerns and causing an Accident Prevision Division inspection. The commissioner held that respondent's stated reasons for firing complainant, involving low productivity, were pretextual. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 124-27 (1990).***

Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

❑ Complainant, a pregnant salesperson, was discharged for alleged lack of acceptable sales production. The commissioner found that respondent's reason was pretextual when two of the managers who participated in the decision to discharge her "were influenced" in their evaluation by knowledge of her pregnancy. The forum found that respondent's managers thought that complainant's pregnancy would make her performance worse or prevent it from improving, "an impermissible standard." Respondent violated ORS 659.030(1)(a.) ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 65 (1990).***

❑ When the agency presented evidence that permitted an inference of discrimination based on race/color, respondent had the burden of presenting some legitimate, nondiscriminatory reason for discharging complainant. ***----- In the Matter of Franko Oil Company, 8 BOLI 279, 290 (1990).***

❑ When respondent asserted that complainant was an "at-will" employee who could be discharged without notice, the commissioner held that "[t]he employment 'at-will- concept is premised upon the idea that an employer and employee are both free to terminate the employment relationship at any time and for any cause, unless expressly prohibited by contract or statute, or unless the termination constitutes a 'socially undesirable motive,' that is, the tort of wrongful discharge. * * * Here, complainant is a member of a class of people protected by a statute that expressly prohibits the termination of an employment contract based on an employee's protected class." ***----- In the Matter of Franko Oil Company, 8 BOLI 279, 290 (1990).***

❑ Respondents defended an AIDS disability case by asserting that they were unaware of complainant's impairment and that they discharged her because of her inadequate performance. The commissioner rejected respondents' evidence "as either not credible or not known at the time" of the discharge and found that respondents discharged complainant because they learned she was HIV infected. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 171-73 (1989).***

❑ In an AIDS disability case, Respondents asserted an affirmative defense that complainant "never intended to continue her employment with the employer." The commissioner found that respondents made little or no attempt to present evidence to establish the defense, and doubted that, even if proved, the defense would form any defense to the charges. "[T]he meaning of the allegation escapes the forum, unless it is intended to negate or reduce any wage loss from a prohibited discharge. Certainly there was no evidence that the job was considered by the complainant to be a temporary job." ***----- In the Matter of Casa Toltec, 8 BOLI 149, 172 (1989).***

❑ In an AIDS disability case, Respondents asserted an affirmative defense that "denied discrimination on the basis of disability, but asserted that if disability was the reason for termination, the termination was actually based on the complainant's background." The commissioner found that the pleading's intent may have been to set up a justification for what might be discrimination, but the wording was too vague for a decision. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 172 (1989).***

❑ In an AIDS disability case, Respondents asserted an affirmative defense that complainant "made misrepresentations in her employment application." The commissioner found that, while some of the information in her application was inaccurate, "there was no claim or evidence that the employer relied on this information at hire, or that an experience or education minimum was sought. Therefore, any false information was in no way material." ***----- In the Matter of Casa Toltec, 8 BOLI 149, 171-72 (1989).***

❑ In an AIDS disability case, Respondents asserted an affirmative defense "that the complainant breached a duty to her employer not to conduct herself with such impropriety that she brings disrepute upon the employer or upon the business in which the employer is engaged." The commissioner found that respondents made little or no attempt to present evidence to establish the defense and doubted that, even if proved, the defense would form any defense to the charges. "If the pleading means the revelation of the complainant's infection, it is far off the mark." ***----- In the Matter of Casa Toltec, 8 BOLI 149, 171 (1989).***

❑ In an AIDS disability case, Respondents asserted an affirmative defense that complainant "breached a duty of loyalty to the employer." The commissioner found that respondents made little or no attempt to present evidence to establish the defense, and doubted that, even if proved, the defense would form any defense to the charges. The commissioner was "unable to fathom any connection between the testimony and documents produced, on the one hand, and the accusation of handicap discrimination on the other." ***----- In the Matter of Casa Toltec, 8 BOLI 149, 171 (1989).***

❑ When respondent's reasons for discharging complainant – performance deficiencies involving illness, slowness, and "stacking orders" – were found to be "after the fact rationalizations," the commissioner held that the reasons were "pretextual and an attempt to avoid liability for a discriminatory discharge based on sex/pregnancy." ***----- In the Matter of Baker Truck Corral, Inc., 8 BOLI 118, 133, 137 (1989).***

❑ Respondent asserted, as a bona fide occupational requirement pursuant to ORS 659.030(1)(a), that complainant's discharge was justified because of her alleged laziness, failure to do her side work, arguing with

other waitresses, and till shortages. The commissioner stated: "A BFOR is an exception that provides that a discriminatory practice or policy is not an unlawful employment practice in those instances When an individual's protected class, sex for example, is a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business. For example, a BFOR might arise when an employer takes adverse action or excludes a female based on a rule that no females may work in a warehouse because the job involves lifting 100 pounds. That employer would have to show that all or substantially all females would be unable to safely and efficiently perform the job, that is, lift 100 pounds, if the employer is to successfully establish that sex is a BFOR. What respondents here attempted to establish was that there were legitimate, nondiscriminatory reasons for firing complainant." ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 18-19 (1989).***

❑ When respondent claimed that complainant was terminated because of unsafe practices and misrepresenting his prior work experience, not his injured worker status, the commissioner found that complainant's termination would not have occurred but for his injury and invocation of the workers' compensation procedures. Respondent knew that complainant was unsafe and inexperienced in his work, yet took no disciplinary action until complainant's on-the-job injury. ***----- In the Matter of Ed's Mufflers Unlimited, Inc., 7 BOLI 215, 225 (1988).***

Affirmed without opinion, *Ed's Mufflers Unlimited, Inc. v. Bureau of Labor and Industries,* 95 Or App 220, 769 P2d 808 (1989).

❑ When credible evidence supported respondent's reasons for terminating complainant – that complainant could not get along with co-workers and effectively violated her work limitations, thereby hurting employee morale – the commissioner found respondent had just cause for terminating complainant and did not unlawfully discriminate against her, even though the closeness in time between respondent's decision to terminate complainant and her inability to obtain a full work release made respondent's action seem like an unlawful employment practice. ***----- In the Matter of Jake's Truck Stop, 7 BOLI 199, 213-14 (1988).***

❑ When respondent's defense in a disability case was that at all times it acted upon the advice of its doctor, *i.e.* that it acted in good faith or on reasonable grounds, the commissioner held that that defense would go only to the propriety of a sanction or remedy. ***----- In the Matter of Oregon State Correctional Institution, 7 BOLI 161, 194 (1988).***

Reversed and remanded, *Oregon State Correctional Institution v. Bureau of Labor and Industries,* 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

Order on remand, 9 BOLI 7, 33-34 (1990).

❑ When complainant alleged she had been denied housing in a mobile home park based on her race, color, or national origin, the forum determined that the agency had failed to show that the respondent owner of a mobile home park had given pretextual reasons for rejecting complainant when the evidence established that the owner had, at the first meeting with complainant and thereafter, voiced concerns regarding complainant's children and financial situation and that the owner's investigation of complainant's finances was being hindered by her realtor. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 164 (1987).***

Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

❑ When respondent alleged that complainant left her employment as a result of his criticism of her job performance rather than because of harassment based on her national origin, the forum stated that the law will not allow a respondent to use complainant's poor job performance as an excuse for or as a defense to a respondent's unlawful conduct. ***----- In the Matter of Deana Miller, 6 BOLI 12, 24 (1986).***

❑ An employer does not violate ORS 659.415 by refusing to reinstate an injured worker when the worker is terminated for just cause before the demand for reinstatement. An employer can rely on information discovered between the time of a worker's injury and the time of the worker's demand for reinstatement to terminate the worker for just cause. The forum cited the Oregon Supreme Court: "In *Shaw*, we recognized the general rule that in absence of a contract or statute to the contrary, an employer may discharge an employee at any time for any cause. 297 Or at 254. However, we also noted alleging that ORS 659.415 constitutes a statutory exception to the general rule. However, this does not mean that the employer may never lawfully refuse to reinstate an employee who makes a demand for reinstatement pursuant to ORS 659.415(1). As we recognized in *Vaughn v. Pacific Northwest Bell Telephone*, that statute requires reinstatement unless the employer had just cause to discharge the employee * * *. ***----- In the Matter of KBOY Radio Station, 5 BOLI 94, 120-21 (1986).***

❑ Complainant suffered an on-the-job injury and filed a claim for workers' compensation and was discharged before her demand for reinstatement. The forum determined that respondent did not violate ORS 659.415 by refusing to reinstate complainant because she had been terminated for just cause -- her unsatisfactory work performance. ***----- In the Matter of KBOY Radio Station, 5 BOLI 94, 120-21 (1986).***

❑ When complainant was injured on May 16, filed a claim for workers' compensation on May 23, the employer offered complainant light duty work on May 27, the forum found that complainant's discharge in July 1980 was not because complainant had applied for or utilized the procedures provided in the workers' compensation law, but was for just cause based on evidence that established complainant had indicated his injury was not work-related as claimed and other employees testified that complainant had made numerous comments regarding the race and national origin of other employees that had caused problems in the workplace. ***----- In the Matter of Willamette Electric***

Products Company, Inc., 5 BOLI 32, 45-46 (1985).

❑ Complainant, an injured worker, was terminated and later denied reinstatement for the nondiscriminatory reason that he had an unacceptable record of absenteeism, not because he sustained a compensable injury. ***----- In the Matter of Pacific Convalescent Foundation, Inc., 4 BOLI 174, 185 (1984).***

❑ When respondent articulated a legitimate, nondiscriminatory reason for its practices, but the evidence showed the reason was pretextual, the commissioner held that respondent had failed to rebut an inference of discrimination and that respondent had discriminated against complainant in compensation because of sex, in violation of ORS 659.030. ***----- In the Matter of City of Roseburg, 4 BOLI 105, 152 (1984).***

> Affirmed, *Bureau of Labor and Industries v. City of Roseburg*, 75 Or App 306, 706 P2d 956 (1985), rev den 300 Or 545, 715 P2d 92 (1986).

❑ Complainant, who sustained a compensable injury on-the-job while in respondent's employ, alleged that respondent had refused to reinstate him in violation of ORS 659.415. The forum found respondent had not violated the statute, but had denied reinstatement for separate, non-discriminatory reasons of complainant's excessive absenteeism and his failure to report to work promptly after his doctor's release. The forum noted that respondent had attempted to "scare" employees by saying that injured employees would lose their jobs, but determined that the evidence supported respondent's defense. Complainant began working for respondent on September 22, 1979 and missed nine days of work between that date and October 17, 1979, the date he was injured. He failed to adequately inform respondent of his absences and other employees were required to fill in for complainant. ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 213-15 (1982).***

❑ In an injured worker case, the agency does not have to prove that the employee was terminated or denied reinstatement because 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, an employer has the burden of proving by a preponderance of the evidence that termination or denial of the right to reinstatement was for a separate, nondiscriminatory reason. ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 213 (1982).***

❑ When a respondent claimed that its discharge of a probationary employee was not an uncommon practice and gave complainant a reason other than pregnancy for her discharge, the commissioner found that respondent's statements met respondent's burden of setting forth nondiscriminatory reasons for complainant's discharge. When the agency presented unrebutted evidence that complainant did not receive any criticism of her job performance before discharge; respondent stated reasons that were of a nonspecific nature when compared with another discharged employee's record that was offered as evidence; and complainant was discharged the day after she told respondent she was pregnant; the commissioner found that respondent's explanation was not credible and respondent would not have discharged complainant, had she not been pregnant, and that she was discharged because of her sex and pregnancy. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 200, 202 (1982).***

❑ Respondent defended against charges that complainant was not hired as a waiter because of her sex on the grounds that complainant had not been hired as a waiter because she did not use the "proper means" of application. The forum rejected this defense because respondent was aware that complainant had made an oral request for the position on several occasions and respondent refused complainant's request without mentioning that the form of application was important. ***----- In the Matter of The Riverhouse of Bend, 3 BOLI 171, 176 (1982).***

❑ The owner of a restaurant maintained a discriminatory policy of hiring only males to wait on tables in the evening. The commissioner nevertheless found that a female complainant busperson was denied a promotion to evening waiter because of her poor qualifications and would not have been hired as a waiter even if respondent had not maintained the policy. Complainant had a poor table-side manner, attitude and personality problems, was often sloppy and unkempt in violation of policy, was not reliable, and had lied about being ill. The commissioner stated that "[r]espondent] 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 [r]espondent's discretion." ***----- In the Matter of The Riverhouse of Bend, 3 BOLI 171, 177-79 (1982).***

❑ When respondent paid complainant, a female, less money than was paid to her male predecessor and successor, the commissioner rejected respondent's defense that its economic circumstances had changed between complainant's departure and the hiring of her successor because a period of only two weeks had elapsed and respondent had paid her predecessor the same wage as her successor. ***----- In the Matter of C & V, Inc., 3 BOLI 152, 161 (1982).***

❑ A black complainant with absentee and tardiness problems tendered her resignation, attempted to withdraw it, and was discharged for cause before respondent could act on her request for withdrawal. The commissioner found that complainant's allegation that white employees with absentee and tardiness problems were allowed to withdraw their resignations was moot. ***----- In the Matter of Fred N. Bay News Company, 3 BOLI 149, 151-52 (1982).***

❑ When complainant alleged she was discharged because of her sex, the forum stated that the burden of proof was on complainant to show that respondent had discriminated against her. The forum found that complainant was "unable to rebut the showing by respondent that she was discharged for a legitimate, nondiscriminatory reason, that is, falsifying time records." ***----- In the Matter of Lynn Edwards, 3 BOLI***

134, 137 (1982).

❑ When respondent, the owner of a restaurant in which complainant worked as a waitress, told complainant he had heard rumors that the two of them were "having an affair" and that her clothing was suggestive and offensive to customers, complainant alleged she had been discharged because of her sex. The forum found that respondent discharged complainant for the legitimate, nondiscriminatory reason of falsifying her time records when the evidence showed that complainant's manager had discussed, two weeks before her discharge, the importance of keeping accurate time records and there was a discrepancy between complainant's actual departure times and complainant's time cards. ***----- In the Matter of Lynn Edwards, 3 BOLI 134, 136-37 (1982).***

❑ Complainant, who had 27 on-the-job accidents, four of which were compensated through the State Accident Insurance Fund, applied for a position with respondent after being laid off for budgetary reasons. The forum found that respondent's refusal to hire complainant was not because complainant had invoked or utilized workers' compensation benefits, but because of complainant's lack of promotion potential, his difficulty in operating sophisticated equipment, and his lack of supervisory experience. ***----- In the Matter of City of Coos Bay, 3 BOLI 85, 88 (1982).***

❑ When a 61-year-old complainant applied with two younger applicants for the position of equipment operator in the purchasing division, the forum found that respondent's selection of another applicant did not result in discrimination against complainant on the basis of age when the evidence showed complainant had scored lower on tests and the successful applicant was chosen for his greater interests and sales ability. ***----- In the Matter of State of Oregon, Department of General Services, 3 BOLI 46, 48-52 (1982).***

❑ When 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). ***----- In the Matter of Horst Mager Specialty Restaurants, Inc., 3 BOLI 39, 43-44 (1982).***

❑ Respondent selected complainant, whom he knew was pregnant, for discharge during a period of declining business. The forum accepted respondent's reason for termination -- that he believed complainant would be a temporary employee – as a legitimate, nondiscriminatory reason when the evidence showed that, before announcing her pregnancy, complainant had stated she was seeking other employment and would only be working "a short time" for respondent. ***----- In the Matter of International Kings Table, Inc., 3 BOLI 29, 30-31 (1982).***

❑ Complainant, a black woman, filed a complaint alleging that she had been racially harassed when her supervisor referred to her, after an argument, as a "nigger," and that she was terminated because of her race when she was discharged after an argument with her white supervisor. When the term "nigger" was used on only one isolated occasion and the employer took immediate corrective action, the forum found that complainant was not harassed. The forum found that complainant was not discharged because of her race when she violated a direct order of her supervisor in divulging the contents of the foreman's conversation with complainant to complainant's supervisor, which precipitated the argument. ***----- In the Matter of Kirsten Corporation, 2 BOLI 257, 260 (1982).***

❑ When respondent claimed to have discharged complainant for failure to follow grooming policies by not trimming his sideburns three days after his return from a compensable injury, complainant had worn the sideburns at work for three years prior to his injury without being disciplined, and others with sideburns were not disciplined, and respondent deliberately frustrated his filing for and obtaining workers' compensation benefits, the commissioner found that respondent's reason was pretextual and that respondent had violated ORS 659.410. ***----- In the Matter of Barker Motors, Inc., 2 BOLI 169, 176-78 (1981).***

❑ When complainant had to repeatedly request a workers' compensation claim form after respondent's general manager sent complainant to respondent's group health insurer for injury-related expenses, the insurer denied the claim because it was incurred at work, and respondent then caused its workers' compensation carrier to initially deny the claim by questioning the validity of the injury because of a late report and an alleged history of back problems, the commissioner found that respondent had violated ORS 659.410 in that respondent's real reason for the subsequent discharge of complainant was his application for workers' compensation benefits. ***----- In the Matter of Barker Motors, Inc., 2 BOLI 169, 176-77 (1981).***

❑ Proof that respondent had not fired another employee with a $40,000 workers' compensation claim did not offset proof that respondent intentionally thwarted complainant's filing for workers' compensation benefits and the pretextual reason for his discharge. ***----- In the Matter of Barker Motors, Inc., 2 BOLI 169, 176 (1981).***

❑ When complainant's fused knee was known to respondent at hire, complainant was subsequently absent from work due to a compensable injury and during his absence failed to comply with the respondent's written weekly call-in rule, his discharge for not calling in was not due to a physical handicap. ***----- In the Matter of Chase Bag Company, 2 BOLI 159, 162 163 (1981).***

❑ When complainant's prior back injury and resulting partial disability were not considered by the persons making the hiring decision, complainant's physical handicap did not play a role in her rejection for the position of police dispatcher. ***----- In the Matter of the City of Chiloquin, 2 BOLI 151, 157 (1981).***

❑ 53-year-old and 55-year-old complainants were among four salespersons, including one 35 years old, who were discharged during an economically-based reduction in staff. When respondent articulated several unrebutted, legitimate, nondiscriminatory reasons for the selection of each, and two of the remaining salespersons

were 48 years old, the commissioner declined to find that the business necessity defense was pretextual. ***----- In the Matter of Mutual Wholesale Drug Company, 2 BOLI 63, 68, 71 (1981).***

❑ Once the agency established its prima facie case of age discrimination, the burden of going forward with the evidence shifted to respondent. Respondent then had to provide substantial evidence of legitimate, nondiscriminatory reasons for its actions, in this case for the discharge of the complaining members of a protected class. ***----- In the Matter of Mutual Wholesale Drug Company, 2 BOLI 63, 68 (1981).***

❑ Complainant, a black woman, alleged she had been discharged because of her race. The evidence established that she was subjected to comments by co-workers regarding her race and white male friend, to false accusation of rule violations, to constant reporting to supervisors of infractions, and to extra assignments by a particular supervisor. The commissioner determined that a nursing home has special responsibilities as trustee of a patient's well being and found that complainant had been lawfully discharged for patient abuse and violation of rules after a written warning. ***----- In the Matter of Roderick Enterprises, Inc., 2 BOLI 14, 20 (1980).***

❑ When workers complained to the city administrator and later, through their representative, notified the Accident Prevision Division of health and safety problems concerning their work on the city's sewers, the commissioner found there was an insufficient causal connection between the complaints and a subsequent layoff to establish a violation of ORS 654.062(5). There was an insufficient showing that respondent knew that the Accident Prevision Division inspection, which resulted in the finding of a serious violation, was the result of an employee complaint. The cause of the layoff was respondent's frustration and anger at discovering that an order had not been transmitted to the workers to not enter the sewer until the unsafe conditions had been corrected. The commissioner found that the motivating factor and immediate cause of the layoff was the respondent's anger and frustration at its continuing problems with not the complaints, but the violations themselves. The layoff was perhaps an arbitrary or capricious response to anger and frustration, but it was not a reprisal for an employee complaint and therefore not illegal under ORS 654.062(5)(a). ***----- In the Matter of City of North Bend, 1 BOLI 230, 234-35 (1980).***

❑ When respondent alleged other reasons for complainant's discharge, the commissioner found that the "fact that respondent may have had several reasons for firing him is not a defense if the opposition to a safety hazard played any part in the decision to fire the complainant." ***----- In the Matter of LeeBo Line Construction, Inc., 1 BOLI 210, 214 (1979).***

❑ A black complainant alleged that an apartment manager violated a rent agreement honored by the previous manager, made racial remarks to her, and evicted her because of her race. When complainant's witnesses known to be present during the relevant events were not called at hearing or deposed and complainant's testimony was internally inconsistent, the commissioner found that the eviction was for refusal to pay rent. ***----- In the Matter of Scott Paskett, 1 BOLI 190, 192-93 (1979).***

❑ When the commissioner found that complainant, a native of Ceylon, was discharged due to his accented English and that the employer's allegation of unsatisfactory performance was pretextual, complainant's "foreign accent" was related to his national origin and was thus an unlawful basis for termination. ***----- In the Matter of Midas Muffler Shops, 1 BOLI 111, 118 (1976).***

❑ When respondents offered legitimate, nondiscriminatory reasons for their refusal to hire and employ complainant and it was not established that the reasons offered were pretextual and a subterfuge for discrimination because of sex, the evidence did not show a failure to hire based on sex. ***----- In the Matter of Pacific Paper Box Co., Inc., 1 BOLI 95, 99 (1978).***

❑ Complainant, a black man, was hired by respondent, a business depot, to perform custodial and baggage handling duties. After 3½ years, he sought and was denied promotion to a ticket agent position. Respondent asserted that complainant was denied the promotion because he was not qualified for the position and because he had not been a satisfactory employee in his custodial/baggage position, all reasons that the commissioner found were pretextual. The commissioner also found that white custodial/baggage handlers were promoted to ticket agent positions, and that during a period of 23 years respondent had employed only four black persons, none of whom were promoted. The commissioner concluded that complainant was denied the promotion because of his race and color, in violation of ORS 659.030(1). ***----- In the Matter of N. H. Kneisel, Inc., 1 BOLI 28, 30-36 (1976).***

Compliance amended, 1 BOLI 51 (1976).

93.0 PRECLUSION (*see also* Ch. IX, sec. 11.1)

93.1 --- Claim Preclusion

93.2 --- Issue Preclusion

94.0 PREEMPTION BY FEDERAL LAW

❑ Complainant alleged that the benefits plan provided by respondent, reached through collective bargaining, was discriminatory. Respondent contended that the National Labor Relations Act protected the terms of the agreement from contrary provisions under state law. The forum determined that the U.S. Supreme Court has held that collective bargaining "activity and conduct" is protected. However, the court stated in the *San Diego* case that it would not "find withdrawal from the States of power to regulate when the activity regulated was a merely peripheral concern of the Labor Management Relations Act * * * or when the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act." ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 93-96 (1983).***

❑ When complainant alleged that respondent's benefit

plan was discriminatory, respondent argued that action by the state was preempted by ERISA. The forum found no merit to this defense, citing *Gast v. State ex. rel Stevenson*, 36 Or App 441 (1978), in which the court stated: "The subject matter of ERISA does not compel the conclusion that Congress intended to preempt states in regulating such things as pregnancy benefits * * * there is no suggestion in the statute that Congress intended to regulate the substance of health and welfare benefits." ***----- In the Matter of Portland Electric & Plumbing Company, 4 BOLI 82, 97 (1983).***

❑ Respondent, an interstate transportation company, argued that application of ORS 659 to respondent placed an undue burden on interstate commerce, in violation of the commerce clause of the U.S. Constitution. The forum determined that there had been no showing that state regulation in this area discriminates against those engaged in interstate commerce or undermines required uniformity or that respondent was being held to a state standard higher, or in conflict, with a federal standard. Federal legislation in the area of interstate transportation does not preempt state regulation as embodied in ORS 659. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 108 (1982).***

Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

❑ Respondent, an employer, was a member of a union-employer trust that provided a disability insurance policy excluding pregnancy from the weekly income disability benefits and argued that both the National Labor Relations Act and the Taft-Hartley Act prohibited it from paying benefits as an inducement to refrain from union activities. The commissioner held that neither were applicable and that, in order not to discriminate because of pregnancy, the employer was required to supplement the benefits provided by the trust. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 190 (1981).***

❑ In cases brought under the provisions of ORS chapter 659, the commissioner's enforcement of civil rights statutes are not subject to federal preemption through the National Labor Relations Act and a civil rights complainant alleging race discrimination in employment had no duty to exhaust the grievance procedure in an existing collective bargaining agreement. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 92-93 (1978).***

Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).

Order on remand, 1 BOLI 179 (1979).

95.0 STATUTE OF LIMITATIONS (*see also* Ch. I, sec. 5.0)

❑ Complainant's OSHA complaint was barred by the statute of limitations when his complaint was filed 118 days after his discharge and his intake questionnaire, which was filed within 30 days of his discharge, failed to sufficiently allege a violation of ORS chapter 654. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 158, 168 (2005).***

❑ When the agency established a continuing violation of ORS 659.030(1)(b) that extended over a 21-month period, the complainant was eligible for an award of damages encompassing that entire time. The test for determining if the unlawful violations were of a "continuing" nature was whether they were shown to be "a series of related acts against a single individual that were discriminatory." ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 253-54 (1995).***

❑ When there is an ongoing, continuous series of discriminatory acts, they may be challenged in their entirety so long as one of those discriminatory acts falls within the limitations period. Whether discriminatory acts are "continuing" can be shown by "demonstrating a series of related acts against a single individual." ***----- In the Matter of Kenneth Williams, 14 BOLI 16, 25 (1995).***

❑ Respondent contended that the commissioner lacked jurisdiction because the agency had failed to issue an administrative determination and specific charges within one year of complainant's filing the administrative complaint. The commissioner found that the agency had issued its administrative determination timely and that there was no statutory requirement as to when the specific charges must be issued. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240***, ***249-50 (1991).***

❑ Respondent moved to dismiss the specific charges and the complaint on the grounds that the complaint was filed on April 14, 1978, more than one year after the alleged discriminatory act. The forum denied the motion because ORS 659.040(1), which was amended to impose the one-year limitation, did not become effective until October 4, 1977. The intent of the legislature that the one year limitation apply only to causes of action occurring on or after the effective date was clear. Testimony indicated that the new statute of limitation was not intended to extinguish a pre-existing cause of action, but to treat the existing cases as they had been previously treated. A pre-amendment right of action would not be affected by passage of the new specific statute of limitations and could be maintained thereafter. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 64-65 (1982).***

96.0 UNCONSTITUTIONALITY (*see also* Ch. I, sec. 29.0)

❑ Respondent filed a motion to dismiss the portion of the formal charges seeking damages on complainant's behalf. In part, it was based on the assertion that the Oregon Constitution, specifically Article I § 17 and Amended Article VII § 3, entitled respondent to a jury trial and that the present statutory scheme that allows a complainant to make a unilateral election to pursue his or her case in a contested case hearing under the commissioner's jurisdiction or to file a civil suit in circuit court, which would give respondent the option of a jury

trial, presents an "equal protection issue" under Article I § 20 of the Oregon Constitution because of its arbitrary nature. The forum rejected respondent's motion, concluding that respondent was not constitutionally entitled to a jury trial. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 244-45 (2006)***

Appeal pending.

❑ Respondent argued that the statutory scheme of ORS Ch. 659, which provides different sets of remedies depending on whether a complainant chooses to file a civil suit or utilize BOLI's administrative hearing process, violated Article I, section 20 of the Oregon Constitution. The forum rejected respondent's defense because the challenged statutory scheme did not discriminate against a true class, because it was not impermissibly based on persons' immutable characteristics, and because it was rationally based. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 218-20 (2000).***

❑ The commissioner may award damages to compensate a complainant for mental suffering caused by a respondent's unlawful employment practice. Such damages would not be available in a circuit court action involving the same allegations. The statutory scheme that results in these differing remedies does not violate Article I, section 20, of the Oregon Constitution. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 219-20 (2000)***.

❑ The court of appeals has considered and rejected the argument that the commissioner's award of damages is unconstitutional because it violates the employer's right to a jury trial guaranteed by Article I, section 17, and Article VII, section 3 of the Oregon Constitution. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 214 (fn) (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ The commissioner's jurisdiction to find liability and to assess or award damages for emotional distress does not violate respondents' right to trial by jury as guaranteed by the Oregon constitution. The Oregon court of appeals has concluded that such awards carry out the commissioner's statutory duty to "eliminate the effects of any unlawful practice found." ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 287-88 (1996).***

❑ The commissioner held that the application of ORS 659.030 to respondent's conduct that constituted religious harassment did not violate Article 1, sections 2 and 3 of the Oregon Constitution. Although the statute names "religion" as an employee's protected class, the object of the statute is not to burden the exercise of employers' religious conduct. The purpose of the statute is to "encourage the fullest utilization of available manpower by removing artificial standards of race, religion, color, sex, marital status, national origin or age as a barrier to employment of the inhabitants of this state; to ensure human dignity of all people within this state, and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of discrimination of any kind based on race, religion, color, sex, marital status, or national origin." The statute applies equally to all employers and is not specifically directed at employers' religious practices. It does not attempt to regulate religious beliefs or to single out any particular religious belief for adverse treatment. It is a concededly constitutional statute, and a general regulation, neutral toward religion on its face and in its policy. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 120-21 (1992).***

Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Application of ORS 659.030 in a religious harassment case does not violate Article 1, section 8 of the Oregon Constitution. The statute does not focus on the content or substance of speech or writing, and it is valid on its face. However, speech is implicated by this application. The commissioner found that ORS 659.030 was not overbroad as applied. It regulates only employers' unwelcome advances or verbal or physical conduct that has the purpose or effect of creating an intimidating, hostile or offensive work environment. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 123 (1992).***

Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ The constitutional right to speak, write, or print freely, guaranteed in Article 1, section 8, was not meant to immunize words that result in unlawful employment harassment, including religious, racial, sexual, age, and national origin harassment. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 123 (1992).***

Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Proselytizing is an act that may be regulated. Neither ORS 659.030 nor the application of it in a religious harassment case seeks to ban proselytizing. Prohibiting or regulating the free exercise of religion is not the object of the antidiscrimination law. Although respondent's religious beliefs were incidentally affected by the application of the statute, a generally applicable and otherwise valid provision, the First Amendment has not been offended. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 123-25 (1992).***

Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ When First Amendment freedom of speech protection are involved, and in some cases involving free exercise of religion, courts have followed a three step analysis to determine whether a constitutional exemption

from the application of a statute is required: (1) Whether the statute imposes a burden upon the free exercise of those rights; (2) If so, whether the imposition of that burden is justified by a compelling government interest; and (3) Whether the questioned statute is the least restrictive means to achieve the state's goals. In this case, ORS 659.030 imposed a burden on respondent's free exercise of his religious beliefs. The state has a compelling interest in eliminating discrimination in employment, and Oregon's compelling interest permits no exemption to respondent. When respondent entered into the economic arena and began trafficking in the marketplace, he subjected himself to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 125-26 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Employers and employees enjoy First Amendment rights. However, not all statements made by them are protected. The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. The focus of ORS 659.030 is not on the content of respondent's speech. Oregon has a compelling interest in enforcing its laws that prohibit harassment and discrimination based upon the protected classes listed in ORS chapter 659. When those laws are applied to restrict an employer's on-the-job proselytizing that results in religious harassment, such restrictions imposed by the law serve a significant governmental interest. Alternative forums exist for expression of respondent's protected speech. The law does not prohibit his proselytizing outside the workplace, nor does it prohibit it in the workplace if it does not have the purpose or effect of creating an intimidating, hostile or offensive work environment. As applied in this case, ORS 659.030 did not unnecessarily limit or violate respondent's First Amendment free speech rights. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 127-29 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ The award of emotional distress damages by the commissioner under ORS chapter 659 is constitutional under the Fourteenth Amendment to the Federal Constitution and under Article 1, Sections 10 and 16 of the Constitution of the state of Oregon. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 190 (1991).***

❑ Respondent moved to dismiss the case, alleging that the agency lacked jurisdiction based on Article I, section 17, and Article VII, section 3 of the Oregon Constitution. The hearings referee initially declined to declare invalid the presumptively valid legislative scheme underlying the agency's contested case proceedings in discrimination cases. The commissioner noted that "this Forum and the courts have previously ruled on the cited constitutional issue adversely to the respondents' position" and denied the motion to dismiss. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 180 (1989).***

❑ ORS 659.037 must be read to balance the guarantee of free speech in Article 1, Section 8 of the Oregon Constitution and the interest of the State of Oregon in eliminating discrimination in places of public accommodation. When respondent displayed a sign on the door of his tavern that read "VIVA APARTHEID" in close proximity to a sign essentially stating "NO SERVICE – NO NIGGERS," the forum found the sign violated ORS 659.037. While the sign may be protected political speech in another context, the facts of this case dictate otherwise. The forum cited *New York Times v. Sullivan,* 379 US 254 (1964) and *Garrison v. Louisiana,* 379 US 64 (1964) for the principle that, while political speech is accorded the utmost deference, it is not "completely unfettered." ***----- In the Matter of The Pub, 6 BOLI 270, 281 (1987).***

❑ Respondent argued that the application of ORS 659.030(1)(a) to theories of constructive discharge and religious harassment would be "unconstitutionally vague, broad and overreaching" and would violate respondent's "constitutional right to exercise their religion, and express free thought." The forum found no merit in the argument, finding that the guarantee of religious freedom contained in the First Amendment to the U.S. Constitution is identical to that of the Oregon Constitution and provides for the freedom to believe and to act. However, the right to religious freedom is not beyond reasonable limitations. The evidence established that respondent's proselytizing about his religion was not required by his religion, but was a matter of personal zeal. In *U.S. Bank of Portland v. Snodgrass,* 202 Or 530 (194), the Oregon Supreme Court determined that the right to religious expression shall be protected "unless it is found that the fanatical and unrestrained enthusiasm of its followers results in acts offensive to the positive law." The forum stated that a state may restrain the expression of religious beliefs in order to protect a legitimate state interest, and the public policy enouncing discrimination in ORS 659.020 is such an interest. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 278-81 (1985).***

❑ Respondent, an interstate transportation company, argued that application of ORS 659 to respondent placed an undue burden on interstate commerce, in violation of the commerce clause of the U.S. Constitution. The forum determined that there had been no showing that state regulation in this area discriminates against those engaged in interstate commerce or undermines required uniformity or that respondent was being held to a state standard higher, or in conflict, with a federal standard. Federal legislation in the area of interstate transportation does not preempt state regulation as embodied in ORS 659. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 108 (1982).***

Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

❑ When respondent alleged that ORS 659.030 was unconstitutional as to a local government because it infringed on the right of the local electorate to govern its own city, the commissioner determined that the statute did not intrude on a local community's freedom to choose its own political form, but was clearly intended to prevail over contrary local provisions regarding a substantive social objective of the state. ***----- In the Matter of City of Portland, 2 BOLI 21, 25-27 (1980).***

Order on reconsideration, 2 BOLI 71 (1981), reversed, *Civil Service Board of the City of Portland v. Bureau of Labor and Industries*, 61 Or App 70, 655 P2d 1080 (1982), reversed and final order reinstated, 298 Or 307, 692 P2d 569 (1984).

❑ Respondent moved to dismiss specific charges on the grounds that ORS chapter 659 violates the constitutional guarantees of equal protection because it gives complainant the option of proceeding in civil court but does not give respondent the same option. The commissioner denied the motion, stating it was beyond the forum's discretion to determine the constitutionality of legislative enactments. ***----- In the Matter of Doyle's Shoes, Inc., 1 BOLI 295 (1980).***

❑ Respondent asserted, as an affirmative defense, that the commissioner lacked authority to award damages to complainant for humiliation and mental distress in an employment discrimination case and that such an award, without a jury trial, was unconstitutional. The forum ruled that such an award was contemplated by the legislature and was proper under prior rulings in *Williams v. Joyce,* 4 Or App 482 (1971) and *School District No. 1 v. Nilsen,* 271 Or 641 (1975). ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 93 (1978).***

Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).

Order on remand, 1 BOLI 179 (1979).

❑ With or without a specific statute preventing discrimination based upon sex, several tribunals have held the conduct of school boards to be arbitrary and unconstitutional when pregnant probationary teachers and other female employees were either not granted maternity leaves or were forced to resign. The civil rights laws of Oregon are not more permissive than the 14th Amendment in this field. ***----- In the Matter of School District No. 1, 1 BOLI 1, 18 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

97.0 UNDUE HARDSHIP TO ACCOMMODATE

97.1 --- Disability (*see also* 21.3.7)

❑ In a medical marijuana discharge case, respondent's defense to the agency's allegation that respondent failed to reasonably accommodate complainant was to prove "undue hardship." Respondent presented no evidence that continuing complainant's employment would have caused an "undue hardship" to respondent's business. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 273-74 (2006)***

Appeal pending.

❑ The burden of proving inability to accommodate is on the employer. In determining whether an accommodation is reasonable, one of the factors the forum considers is the effect of the potential accommodation on the duties and/or responsibilities of other employees. However, this forum will examine the totality of the circumstances surrounding the potential accommodation to determine whether it is reasonable. ***----- In the Matter of James Breslin, 16 BOLI 200, 215 (1997).***

Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ Accommodation was required unless it imposed an undue hardship on respondent. One factor to consider in making this accommodation is the effect of the potential accommodation on safety. ***----- In the Matter of WS, Inc., 13 BOLI 64, 86 (1994).***

❑ When respondent, a ship building and repair company, assigned complainant, a deaf welder, to its shop rather than to a ship because of safety concerns; when on one occasion, complainant was sent by the union hall to work for respondent, and respondent only had enough work in its shop to keep its foremen and leadpersons busy; and when respondent had a collective bargaining agreement that provided that "it is not the intention of [respondent] to use leadpersons or foremen to replace journeymen regarding their production assignments," the forum found that to replace a foreman or a leadperson in the shop with complainant and send that person to a ship to work as a journeyman welder would violate the terms of the agreement, and would have imposed an undue hardship on respondent. Respondent was not required to accommodate complainant by transferring a leadperson or foreman out of the shop to a ship. ***----- In the Matter of WS, Inc., 13 BOLI 64, 88 (1994).***

❑ When granting a leave of absence to an employee does not impose an undue hardship on the employer, granting a leave so an employee with a disability may seek treatment for the disability is a form of reasonable accommodation. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 252-53 (1991).***

❑ If complainant's alcoholism had required repeated and prolonged periods of absence for treatment, at some point those absences would have become an undue hardship for respondent. A respondent's duty to

reasonably accommodate complainant's disability is not unlimited. The factors that bear on what is reasonable in the way of accommodation are set out in OAR 839-06-245(2). ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 253-54 (1991).***

97.2 --- Religion (*see also* 29.1.4)

❑ Once the employer has made more than a negligible effort to accommodate an employee and that effort is viewed by the employee as inadequate, the question becomes whether the further accommodation requested would constitute "undue hardship." An accommodation that would impose more than *de minimus* costs in higher wages or lost efficiency constitutes an undue hardship. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 241-42 (1988).***

❑ When complainant's absence from the meat department of respondent's grocery store on a Saturday caused the meat case to be insufficiently stocked for Saturday, the store's busiest day, and Sunday, and when lost profits and lost efficiency resulted, the commissioner found that "such losses constitute more than *de minimus* costs, and imposed an undue hardship on respondent." ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 242 (1988).***

❑ When complainant, a Seventh-day Adventist, offered to work overtime hours in respondent's meat department on Fridays, or to work Saturday nights or Sundays instead of his regular Saturday shift, and respondent was able to show that each of the suggested times would cost it higher wages (in premium pay or overtime), lost profits, and lost efficiency, the commissioner found that such costs would be more than *de minimus,* and therefore would impose an undue hardship on respondent. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 242-43 (1988).***

❑ When complainant, a newly converted Seventh-day Adventist, was discharged for failing to work his scheduled shift on a Saturday, the commissioner noted that this forum has previously followed federal case law in resolving a matter of an alleged unlawful employment practice based upon religion. The forum stated that an employer has an affirmative duty to make reasonable accommodation for religious observances of sincere beliefs among its employees to the extent that such accommodation does not cause undue hardship in the conduct of the employer's business. In this case, respondent was able to show that to reasonably accommodate complainant would cause undue hardship in the conduct of its business, and thus did not violate ORS 659.030(1)(a). ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 239 (1988).***

❑ Complainant, a signalman on a railroad crew, was discharged after he advised respondent that he could not work on Saturday because he was a Seventh-day Adventist whose Sabbath was observed from sundown on Friday to sundown on Saturday. The forum found the discharge violated ORS 659.030 when there was no evidence to suggest that accommodation of complainant's religious beliefs would have created an undue hardship on the respondent. ***-----*** In ***the Matter of Union Pacific Railroad Company, 3 BOLI 234, 238-39 (1982).***

❑ While noting that federal court decisions are merely instructive and not binding on the agency, the forum cited *Trans World Airlines v. Hardison,* 442 U.S. 63 (1977) for the proposition that an employer has an affirmative duty to make reasonable accommodation for religious observances of sincere believers among its employees to the extent that such accommodation does not cause undue hardship in the conduct of the employer's business. ***----- In the Matter of Union Pacific Railroad Company, 3 BOLI 234, 237 (1982).***

98.0 OTHER

❑ Based on the common-law "scope of employment" test, respondent argued that it was not liable for the conduct of its supervisor who was alleged to have harassed the complainant in an OFLA case because the supervisor engaged in the conduct on her own initiative, without respondent's knowledge, and away from respondent's workplace. The forum held that respondent's argument did not apply to the agency's harassment allegations. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 251 (2005).***

❑ Respondent argued that its supervisor was not acting within the "scope of her employment" when she constructively denied family leave to complainant by calling her and visiting her at home on her own initiative, without respondent's knowledge, and away from respondent's workplace. The forum agreed that it must find that respondent's supervisor was acting within the scope of her employment for respondent to be liable for its actual and constructive denial of complainant's family leave and the supervisor's retaliatory behavior, and that under the doctrine of *respondeat superior*, three requirements must be met to conclude that an employee was acting within the course and scope of employment: (1) whether the act occurred substantially within the time and space limits authorized by the employment; (2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and (3) whether the act is of a kind which the employee was hired to perform. When the supervisor was complainant's immediate supervisor; respondent, a truck stop with a restaurant, was open for business 24 hours a day, seven days per week; the supervisor was responsible for respondent's kitchen 24 hours a day, seven days a week and controlled the work schedule of the entire kitchen staff; the supervisor was responsible for respondent's kitchen operations; the supervisor had the authority to fire members of the kitchen staff; the supervisor's visits with complainant during complainant's family leave were directed at getting complainant to return to work and she threatened complainant's job if complainant did not return to work, the forum found that the supervisor's conduct was within the scope of her employment. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 251-52 (2005).***

❑ The doctrine of unclean hands can be used as a defense in an agency proceeding if it is based on alleged misconduct of the commissioner or his staff. The defense is not available in a contested case proceeding before the agency when the alleged misconduct was committed by the complainant because the complainant

is not a party to the proceeding. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 217-18 (2000)***.

❑ The doctrine of unclean hands applies only in equitable proceedings, not in actions at law. In the context of BOLI civil rights proceedings, the doctrine may be invoked as a defense to any equitable remedy that the agency seeks, but may not be invoked as a defense to a claim for monetary damages. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 217 (2000)***.

❑ Respondent's affirmative defense of "unclean hands," which was based on the assertions that complainant falsely asserted that respondent would evict him if he did not take his medications and that complainant falsely represented to his attorney that respondent would evict him if he did not take his medications, was rejected because of the forum's finding that respondent did make those threats. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 94 (1999)***

❑ When respondent contended that it was not common knowledge that epilepsy can require a certain amount of sleep and that he had good reason to doubt complainant's medical claims because complainant had previously worked graveyard shifts, the forum held that these arguments raised no defense. An employer has an affirmative duty to accommodate an employee's physical impairment and cannot rely on ignorance or doubts about the nature or legitimacy of the impairment as the basis for denying accommodation. ***----- In the Matter of James Breslin, 16 BOLI 200, 214-15 (1997).***

> Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ An employer is strictly liable for the acts of its supervisory employee when those acts constitute sexual harassment. The employer cannot insulate itself by claiming ignorance. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 184 (1992).***

> Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ Respondent contended that the commissioner lacked jurisdiction because the agency had failed to issue an administrative determination and specific charges within one year of complainant's filing the administrative complaint. The commissioner found that the agency had issued its administrative determination timely and that there was no statutory requirement as to when the specific charges must be issued. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240***, ***249-50 (1991).***

❑ It is not a defense that an employee fails to leave employment immediately after experiencing sexual harassment. A victim of sexual harassment is often incapable of taking action for a period of time. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 215 (1991).***

❑ An employer's ignorance of the law is not a defense to its failure to comply with the requirements of the law. ***----- In the Matter of St. Vincent de Paul Salvage Bureau, 8 BOLI 293, 299 (1990).***

❑ In an AIDS disability case, Respondents asserted an affirmative defense that complainant "never intended to continue her employment with the employer." The commissioner found that respondents made little or no attempt to present evidence to establish the defense, and doubted that, even if proved, it would form any defense to the charges. "[T]he meaning of the allegation escapes the forum, unless it is intended to negate or reduce any wage loss from a prohibited discharge. Certainly there was no evidence that the job was considered by the complainant to be a temporary job." ***----- In the Matter of Casa Toltec, 8 BOLI 149, 172 (1989).***

❑ In an AIDS disability case, Respondents asserted an affirmative defense that "denied discrimination on the basis of disability, but asserted that if disability was the reason for termination, the termination was actually based on the complainant's background." The commissioner found that the pleading's intent may have been to set up a justification for what might be discrimination, but the wording was too vague for a decision. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 172 (1989).***

❑ In an AIDS disability case, Respondents asserted an affirmative defense that complainant "made misrepresentations in her employment application." The commissioner found that, while some of the information in her application was inaccurate, "there was no claim or evidence that the employer relied on this information at hire, or that an experience or education minimum was sought. Therefore, any false information was in no way material." ***----- In the Matter of Casa Toltec, 8 BOLI 149, 171-72 (1989).***

❑ In an AIDS disability case, Respondents asserted an affirmative defense "that the complainant breached a duty to her employer not to conduct herself with such impropriety that she brings disrepute upon the employer or upon the business in which the employer is engaged." The commissioner found that respondents made little or no attempt to present evidence to establish the defense and doubted that, even if proved, the defense would form any defense to the charges. "If the pleading means the revelation of the complainant's infection, it is far off the mark." ***----- In the Matter of Casa Toltec, 8 BOLI 149, 171 (1989).***

❑ In an AIDS disability case, Respondents asserted an affirmative defense that complainant "breached a duty of loyalty to the employer." The commissioner found that respondents made little or no attempt to present evidence to establish the defense, and doubted that, even if proved, the defense would form any defense to the charges. The commissioner was "unable to fathom any connection between the testimony and documents produced, on the one hand, and the accusation of handicap discrimination on the other." ***----- In the Matter of Casa Toltec, 8 BOLI 149, 171 (1989).***

❑ Pursuant to OAR 839-05-020(2), an employer can justify the adverse impact that results from a seemingly

neutral employment standard applied to all employees by showing that the policy or standard is a business necessity, unless another standard or policy with less adverse impact would work as well. ***----- In the Matter of City of Portland, 6 BOLI 101, 106 (1987).***

❑ Good intent or the absence of discriminatory intent does not redeem employment procedures or testing ***District No. 1, 1 BOLI 1, 17 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

IX. REMEDIES

100.0 ATTORNEY FEES

❑ The forum granted agency's motion to strike respondent's request for attorney's fees because no provision in Oregon law allows an award of attorney fees to respondent when a complainant of the Bureau of Labor and Industries has filed specific charges against a respondent. ***----- In the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 125 (1982).***

Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ The forum awarded complainant $150 in attorney's fees. ***----- In the Matter of School District No. 1, 1 BOLI 1, 18-19 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

101.0 BACK PAY

101.1 --- Purpose

❑ Back pay awards are intended to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful discrimination. The awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 251 (2007).*** *See also In the Matter of H.R. Satterfield, 22 BOLI 198, 210 (2001); In the Matter of Servend International, Inc., 21 BOLI 1, 30 (2000), affirmed without opinion, Servend International, Inc. v. Bureau of Labor and Industries, 183 Or App 533, 53 P3d 471 (2001); In the Matter of RJ's All American Restaurant, 12 BOLI 24, 31 (1993); In the Matter of C. Vogar'd Amezcua, 11 BOLI 197, 204 (1993); In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 217 (1991); In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 66 (1990); In the Matter of Lee's Cafe, 8 BOLI 1, 20 (1989); In the Matter of K-Mart Corporation, 3 BOLI 194, 202 (1982).*

❑ This forum has consistently held that the purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 213 (2007).***

Appeal pending.

See also In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 277 (2006), appeal pending; In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 184 (2005); In the Matter of Cleopatra's, Inc., 26 BOLI 125, 135 (2005); In the Matter of Robb Wochnick, 25 BOLI 265, 288 (2004); In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 242 (2004); In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 198 (2004), affirmed without opinion, Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007); In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 88 (2004); In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 65 (2003); In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 132 (2002); In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 136 (2000); In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 136 (2000); In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 90 (1993); In the Matter of Sierra Vista Care Center, 9 BOLI 281, 282-83, 285-86 (1991), affirmed, Colson v. Bureau of Labor and Industries, 113 Or App 106, 831 P2d 706 (1992).

❑ The commissioner has authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. When the complainant was constructively discharged on the basis of her sex, that remedy properly included an award of back pay. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 96 (1998)***.

❑ A back pay award is calculated to make a complainant whole for injury caused by unlawful discrimination. ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 66 (1990).***

❑ The purpose of back pay is to help accomplish the statutory goal of eliminating the effects of unlawful discrimination by monetarily compensating the victim of the discrimination in the same manner she or he would have been compensated, had there been no discrimination, so that the victim will neither suffer loss nor receive a windfall. ***----- In the Matter of Oregon State Correctional Institution, 7 BOLI 161, 194 (1988).***

Reversed and remanded, *Oregon State*

Correctional Institution v. Bureau of Labor and Industries, 98 Or App 548, 780 P2d 743, rev den 308 Or 660, 784 P2d 1101 (1989).

Order on remand, 9 BOLI 7, 33-34 (1990).

❑ When an employer is found to have committed an unlawful employment practice, the commissioner may order the employer to pay the complainant back pay, including benefits, as a remedy. The purpose is to make complainants whole for injuries suffered because of unlawful employment discrimination. ***----- In the Matter of City of Portland, 6 BOLI 203, 210 (1987).***

❑ The purpose of a back pay award is to eliminate the loss in compensation a complainant has suffered because of a respondent's unlawful practice. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 310 (1985).***

❑ The purpose of back pay is to make the complainant whole for the monetary injuries 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 effect of not having had use of the back pay since it accrued. ***----- In the Matter of C & V, Inc., 3 BOLI 152, 163 (1982).*** *See also In the Matter of City of Portland, 2 BOLI 110, 142 (1981), reversed on back pay, affirmed on retaliation, City of Portland v. Bureau of Labor and Industries, 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).*

❑ In determining the period of time covered by complainant's back pay, the commissioner was guided by ORS 659.022(2), which states that the purpose of ORS chapter 659 is to provide "an adequate remedy for persons aggrieved by * * * acts of discrimination * * *." ***----- In the Matter of City of Portland, 2 BOLI 110, 142 (1981).***

Reversed on back pay, affirmed on retaliation, *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

101.2 --- Calculation

101.2.1 --- Generally

❑ The agency proved that complainant's demotion resulted in a $3.24 per hour decrease in his pay, including a $6.48 decrease in overtime pay, beginning October 6, 2003. The agency also proved that as a result of the demotion, complainant lost $1,542 in wages from October 6 through December 2003, and $1,464.60 in wages from January 1 through February 28, 2004. The agency's back pay calculation took into account that complainant received time loss benefits after he suffered a compensable injury on February 28, 2004, and thereafter was found to be permanently disabled from performing his job duties as a tree trimmer. Prior to February 28, 2004, complainant would have earned an additional $3,007.08 but for respondent's retaliatory demotion. The forum concluded that respondent owed complainant lost wages totaling $3,007.08 for the wages he lost due to respondent's unlawful employment practices. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 251 (2007).***

❑ The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. When a complainant is constructively discharged on the basis of sex, that remedy properly includes an award of back pay. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 213 (2007).***

Appeal pending.

❑ The forum awarded complainant $10,200 for the wages she lost due to respondent's unlawful employment practice, the amount she would have earned approximately $10,200 between January 4 and August 1, 2003, the date she obtained replacement employment. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 214 (2007).***

Appeal pending.

❑ When a respondent commits an unlawful employment practice by discharging a complainant, the forum is authorized to award the complainant back pay for the hours the employee would have worked absent the discrimination. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 277 (2006).***

Appeal pending.

See also In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 184 (2005).

❑ A complainant's right to back wages is cut off when he or she obtains replacement employment for a similar duration and with similar hours and hourly wages as respondent's job. ***----- In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 184 (2005).*** *See also In the Matter of Cleopatra's, Inc., 26 BOLI 125, 135 (2005); In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 198 (2004), affirmed without opinion, Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007); In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 88 (2004); In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 132 (2002); In the Matter of H.R. Satterfield, 22 BOLI 198, 210-11 (2001).*

❑ When complainant suffered lost wages from May 7 until June 13, 2001, as a result of her constructive discharge and accepted a position at Xerox Corporation only five weeks after her constructive discharge at a higher pay rate than the $12.50 per hour she earned while in respondent's employ, her prompt acceptance of replacement employment establishes that she mitigated her damages and was entitled to compensation for the interim period she was unemployed. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 288 (2004).***

❑ The agency sought $1,200 as payment in lost wages and undisputed evidence showed complainant was working full time for respondent when she quit. Although there was no evidence establishing the precise

number of hours she worked each week, the forum found she would have earned at least $1,200 as a full time employee between May 7 and June 13, 2001, but for her constructive discharge, and awarded complainant $1,200 for the wages she lost. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 288 (2004).***

❑ The forum concluded that, had complainant not taken OFLA leave in May 2001, she would have continued working 40 to 45 hours per week, earning at least $400 per week as respondent's manager for the duration of her employment. The forum calculated complainant's back pay from the date of her termination until the date of hearing and awarded her $28,590.29 in back pay. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 242 (2004).***

❑ When a respondent commits an unlawful employment practice by discharging a complainant, the forum is authorized to award the complainant back pay for the hours the employee would have worked, absent the discrimination. ***----- In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 88 (2004).*** *See also In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 132 (2002).*

❑ The forum found that had complainant been restored to her pre-family leave employment advantages after she asked to come back to work, she would have worked the 43.75 hours worked by another worker because respondent would have had no need to hire the other worker and complainant wanted to work as many hours as she could and respondent did not use the other worker after complainant returned to work and scheduled complainant for all the hours not worked by two of complainant's co-workers. After multiplying 43.75 by $6.00 per hour, the forum concluded that complainant was owed $262.50 in back wages. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 126 (2003).***

❑ Complainant earned $7.80 per hour and averaged 38 hours per week prior to his compensable injury. After he was fully released with a 50 pound lifting restriction by his doctor, he was temporarily employed for a brief period prior to the hearing and his uncontroverted testimony showed he diligently sought work. After deducting complainant's interim earnings, the forum's calculations showed that complainant would have earned $30,696 in gross wages but for his termination. At hearing, the agency declined to calculate complainant's back pay based on the evidence at hearing and did not move to amend its charging document to conform to that evidence. The forum therefore awarded complainant $25,000 in gross back wages, the amount sought in the agency's pleading. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 65-66 (2003).***

❑ When evidence showed complainant lost earnings for a three and one half month period as a result of respondent's unlawful conduct, representing two weeks complainant was unemployed and 90 days necessary to adapt his skills to his new position, the forum determined that complainant was owed $3,570 by multiplying his average monthly earnings of $1,020 by 3.5 months. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 181-82 (1982).***

❑ Complainant earned $10.40 per hour and was working 40 hours per week at the time of his discharge. As of September 19, 1999, his employment status changed from that of a temporary employee to a probationary, permanent fulltime employee. His entitlement to back pay began on October 19, 1999, the date of his suspension. The agency established that complainant began searching for replacement work on October 25, 1999, and exercised reasonable diligence in his job search by applying for work that he was qualified for at a number of different businesses up to May 2000. In May 2000, he obtained employment and was paid $7.50 per hour until his layoff on July 28, 2000, working 20-25 hours per week to begin with, and later working 40 hours per week. Later in that year, he obtained temporary, short-term work and earned another $160 through self-employment by cutting up deer. He then worked from February or March 2001 until shortly before the hearing, when he was laid off. He worked 40 hours per week and earned wages ranging from $7.00 to $8.00 per hour. At the time of the hearing, he had not yet obtained work similar to respondent's employment in duration and hourly wage and was awarded back wages extending from October 19, 1999, to November 6, 2001, the date the hearing commenced, less interim earnings of $13,748.93, for a total of $30,763.03. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 132 (2002).***

❑ When complainant earned $7.45 per hour and worked an average of 72 hours every two weeks at the time of her suspension, was unemployed for nine weeks following her suspension, and diligently sought work during those nine weeks, the forum awarded her $2,413.80 in gross back wages ($7.45 per hour x nine weeks x 36 hours = $2,413.80). ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 132 (2002).***

❑ In hiring cases, back pay awards are determined by the pay received by the hired comparator during the relevant time period, less mitigation. ***----- In the Matter of H.R. Satterfield, 22 BOLI 198, 210 (2001).***

❑ In a hiring case when complainant would have been hired but for respondent's retaliatory motive, no one was ever hired for the position complainant applied for and there was no testimony indicating a date certain that complainant would have started work in the position. The forum determined that complainant's back pay award should start on the date that respondent stopped considering other candidates and that back pay should be calculated at the rate of $6.50 per hour for a 40-hour workweek, the rate and hours submitted with respondent's job order to the Employment Department. ***----- In the Matter of H.R. Satterfield, 22 BOLI 198, 210-11 (2001).***

❑ When a respondent commits an unlawful employment practice under ORS chapter 659 by discharging a complainant, the forum is authorized to award the complainant back pay, absent unusual circumstances. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 30 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Back pay awards in cases involving an unlawful failure to hire typically consist of the wages or salary earned by the comparator or person who was hired during the relevant time period, less mitigation. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 214 (2000)***.

❑ In a failure to hire case, the forum calculated back pay damages based on the wages complainant would have earned had he been hired for the job from the date on which he would have started work until the day on which he obtained alternative employment paying at least as much as respondents would have paid him, less other wages he earned during that period. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 214 (2000)***.

❑ The forum may award back pay damages in an unlawful failure to hire case even when those damages cannot be calculated with precision. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 215 n. 42 (2000)***.

❑ When a respondent unlawfully discriminates against an employee by reducing the employee's hours, the forum may award back pay for the hours the employee would have worked, absent the discrimination. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 188 (2000)***.

❑ When a respondent commits an unlawful employment practice by discharging a complainant, the forum is authorized to award the complainant back pay unless the complainant, because of unusual circumstances, suffers no loss of wages or benefits. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 136 (2000)***.

❑ When complainant was working half time and was discharged during an OFLA leave after taking only 240 of the 480 hours to which he was entitled, but the agency did not seek lost wages after the date complainant's OFLA leave expired, the forum awarded back pay equal to the wages that complainant would have earned during the remainder of his OFLA leave. ***----- In the Matter of Centennial School District, 18 BOLI 176, 194-95 (1999)***.

Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

❑ Complainant was awarded back wages from the date of complainant's discharge until 17 months later, when his meaningful job search ended. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 77 (1999)***.

❑ Respondents were held liable for complainant's lost wages and tips from the date they fired her until the date on which she would have voluntarily left their employment. ***----- In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 273 (1998)***.

❑ The forum calculated that complainant lost $2098.13 in wages based on her unlawful discharge, but reduced that amount by two cents to comport with the amount claimed in the specific charges, as amended by motion at hearing. ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 208 (1998)***.

❑ The forum awarded complainant lost wages equal to the amount she would have earned, had she not been laid off. The forum based its calculation on complainant's credible evidence. ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 208 (1998)***.

❑ When respondent had denied complainant's demand for reinstatement, the forum based its calculation of back wages on the wages earned by another worker who was employed in complainant's former position. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 43 (1998)***.

Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ The period for measuring back pay damages ends when a complainant obtains a job with comparable or higher pay, and it does not resume when he voluntarily quits the new job. ***----- In the Matter of James Breslin, 16 BOLI 200, 218 (1997).***

Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ Complainant's lost back wages were calculated at her regular hourly rate of pay, plus tips, between the time of her unlawful discharge and the date of hearing, less interim earnings. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 131-32 (1997).***

❑ When complainant was unable to seek replacement employment after an unlawful discharge because of an on-the-job injury and was drawing time loss compensation, the effects of respondents' unlawful practice did not include lost wages. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 148 (1995).***

❑ When respondent presented evidence about complainant's position and the "usual" allocation of hours for positions throughout respondent's company, but was not specific as to the location where complainant worked and there was evidence that complainant worked a 40 hour, five day week, the commissioner computed complainant's wage loss on the basis of 40 hours per week. ***----- In the Matter of Motel 6, 13 BOLI 175, 187 (1994).***

❑ When complainant was unlawfully discharged from a part-time job that paid $4.75 per hour, plus tips averaging $120 per week, and found replacement employment with similar hours and hourly wage, but no tips, the commissioner awarded $1200 in lost wages for the ten months she was deprived of the tip income in the alternative employment. ***----- In the Matter of Short Stop Cafe, 12 BOLI 201, 205, 208 (1994).***

❑ When complainant was discriminated against in compensation because of her sex, the commissioner

awarded her back wages equal to the difference between what she actually earned and what she would have earned, had she received the same salary as her predecessor. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 159, 165 (1993).***

❑ When respondent constructively discharged complainant after discriminating against her in compensation because of her sex, the commissioner awarded her $3,435 in back pay for the difference between her actual earnings following the discharge, and $8,754 in back pay that represented the differential for what she would have earned, had she been properly paid. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 161, 165 (1993).***

❑ Continued eligibility for ongoing unemployment benefits requires that the claimant actively seek work. When complainant testified about a job search and drawing unemployment compensation, and respondent failed to affirmatively show the availability of suitable employment for which complainant might have applied, the forum held that respondent did not prove that complainant failed to mitigate his damages. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 83 (1992).***

❑ When complainant was demoted and transferred to a different work location because he reported a health violation to OR-OSHA, the commissioner ordered respondent to reinstate complainant to his former job, to pay his lost wages due to a lower wage rate in the lower job, plus interest on his lost wages, and to pay to complainant's Public Employee's Retirement System account the amount requested by the bargaining agreement, plus interest on the amounts that said sums would have earned in the PERS account as if no reduction had been made. ***----- In the Matter of West Linn School District, 3 JT, 10 BOLI 45, 64-65 (1991).***

❑ An employer is liable for any wage loss to a discharged employee that is attributable to an unlawful employment practice. ***----- In the Matter of Lee Schamp, 10 BOLI 1, 18 (1991).***

❑ When complainant was unlawfully discharged after she worked two different positions at different wage rates and was underpaid in each due to her sex, the commissioner calculated her actual differential of underpayment in each job to arrive at her on-the-job loss. The commissioner calculated the back wage loss over the subsequent period of unemployment by multiplying the average hours per week she had worked by the number of weeks unemployed and then multiplied the total by the average weekly percentage of hours she had worked in each position. The respective products were then multiplied by the correct hourly rate for each job, and the two products were added together. ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 231-32 (1991).***

❑ When the agency's specific charges alleged a wage loss of $6,000, and this figure was the only one respondent had notice of before defaulting, the complainant's recovery was limited to that, even if evidence at hearing and resulting calculations showed a higher figure. Pre-order interest may be calculated for those portions of the lost wages that should have been paid, but for the unlawful discharge, up to that limit. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 204 (1991).***

Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ When an employer has discharged an employee for an unlawful, discriminatory reason, the employer is liable for any ensuing wage loss until the employee obtains subsequent employment paying at least as much as the position lost. ***----- In the Matter of City of Umatilla, 9 BOLI 91, 105 (1990).***

Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ Wage loss caused by an unlawful employment practice is recoverable to compensate a complainant for what she would have received, but for a respondent's unlawful discrimination. The award is calculated to make a complainant whole for injury caused by unlawful discrimination. When a complainant excludes herself from the job market, other than for the reason of accepting alternative employment, she fails to mitigate her loss for the period of that exclusion. Thus, complainant was not awarded back pay during a period of maternity leave with a subsequent employer that paid less than respondent or during a month when she did not seek employment. ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 66 (1990).***

❑ When a complainant has been discriminatorily rejected from employment, the complainant is not entitled to back pay if respondent proves that complainant would have been let go if considered further during the probationary period. This defense is one of admission and avoidance. Since respondent's illegal conduct is the reason that it can never be determined with certainty whether complainant would have been retained, respondent must prove this defense by a preponderance of the evidence. ***----- In the Matter of Oregon State Correctional Institution, 9 BOLI 7, 42 (1990).***

❑ When the agency requested back pay damages of $8,442, and evidence about such damages came in without objection, was uncontroverted, and required no speculation in order to compute the amount of back wages, the commissioner found the agency's calculation was erroneous and said: "The hearings referee has the right and duty to conduct a fair and full inquiry and create a complete record. Where errors are detected, the Hearings Referee is empowered to cause them to be corrected. This is especially true when there are arithmetic errors or other similar computation oversights. * * * Therefore, the hearings referee, and certainly the commissioner, are authorized to compute this complainant's back wages in accordance with the evidence received at hearing." ***----- In the Matter of Franko Oil Company, 8 BOLI 279, 291 (1990).***

❑ When the duties of a position require the exercise of the same skill, effort and responsibility, and the only distinction between current or past incumbents is their

sex, there is a disparity in pay attributable to sex, and the measure of the damage is the difference between what the complainant was paid and what she should have been paid, absent the discriminatory standard. ***----- In the Matter of Courtesy Express, Inc., 8 BOLI 139, 148 (1989).***

❑ Back pay awards are initially computed based on the employee's total earnings, before any deductions or offsets. The commissioner allowed respondent to take any appropriate legal deductions from the back pay award, as provided in ORS 652.610. ***----- In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 117 (1989).***

❑ When a respondent sells or closes the business and could not thereafter have offered employment or reinstatement after the date of sale or closure, back pay ends on the date of sale or closure. ***----- In the Matter of Associated Oil Company, 6 BOLI 240, 256 (1987).***

❑ When an employer is found to have committed an unlawful employment practice, the commissioner may order the employer to pay the complainant back pay, including benefits, as a remedy. ***----- In the Matter of City of Portland, 6 BOLI 203, 210 (1987).***

❑ When complainant testified that he could not estimate the number of overtime hours he worked and testified that the number of hours he worked varied, the forum determined that it could not rely on one time card as indicative of complainant's hours. ***----- In the Matter of 3 Son Loggers, Inc., 5 BOLI 65, 81 (1986).***

❑ Respondent and the agency, through counsel, agreed that any back pay damages would be based on compensation figures submitted with written closing arguments. ***----- In the Matter of City of Salem, 4 BOLI 1, 2 (1983).***

❑ In determining complainant's back pay – the wages she would have earned, had she been employed as a beautician – the forum relied on the average daily wage of other beauticians working for respondent. ***----- In the Matter of Lucille's Hair Care, 3 BOLI 286, 297 (1983).***

> Modified as to wage loss and interest, *Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest, *Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).
>
> Order on remand, 5 BOLI 13, 29 (1985).

❑ Complainant's back pay was the amount he would have earned, had he remained in his position, as shown by the employee who replaced him, plus benefits he would have received that included health and welfare, dental, vacation, and travel. Pension pay was not included, as complainant would not have received those amounts in pay or benefits. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

❑ The purpose of back pay is to make the complainant whole for the monetary injuries 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 effect of not having had use of the back pay since it accrued. ***----- In the Matter of C & V, Inc., 3 BOLI 152, 163 (1982).*** *See also In the Matter of City of Portland, 2 BOLI 110, 142 (1981),* reversed on back pay, affirmed on retaliation*, City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

❑ When respondent discriminated against a female complainant by paying her less than her male predecessor, she was awarded back pay equaling the difference between what complainant actually earned and what she would have earned, including overtime, had respondent paid her as he did her male predecessor. ***----- In the Matter of C & V, Inc., 3 BOLI 152, 161-63 (1982).***

❑ When respondent destroyed complainant's wage records and those of her predecessor, the comparator in the case, and complainant could not testify with any certainty as to how much overtime she worked, the forum awarded overtime wages for which complainant could produce documentation, stating that to award more would be "speculative and unfair to respondent." ***----- In the Matter of C & V, Inc., 3 BOLI 152, 159 (1982).***

❑ When the agency and respondent stipulated to the amount of damages to be paid to complainant, should liability be found in a final order, the forum was precluded from considering any damages that may have accrued after the date of the hearing. ***----- In the Matter of City of Cannon Beach, 3 BOLI 115, 123 (1982).***

❑ When respondent was found to have discriminated against complainant, a female corrections officer, by selecting a male officer for promotion to lieutenant, back pay damages were computed based on the minimum starting salary for that position, plus all non-discretionary raises, as well as the seniority and fringe benefits complainant would have earned, had she been appointed on the day the male officer was selected. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 71 (1982).***

❑ When respondent was found to have discriminated against complainant on the basis of her sex, respondent was ordered to meet with the assistant attorney general who represented the agency to determine the exact amount of back pay owed to complainant and to deliver a check to the agency in that amount, together with interest. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 71-72 (1982).***

❑ When a complainant employed as a commission salesperson found another commission sales job in the same industry after his unlawful discharge by respondent, the commissioner found that the proper measure of damages was the difference between what he would have earned, based on his most recent annual earnings before discharge, and what he earned on the new job. ***----- In the Matter of Barker Motors, Inc., 2 BOLI 169, 178 (1981).***

❑ When respondent cited ORS 659.121(1) in support of its position that a complainant's back pay remedy was limited to two years, the commissioner found that the subsection applied only to the circuit court and that ORS

659.121(4) stated the legislature's intent that "This section shall not be construed to limit or alter in any way the authority or power of the commissioner." In determining the period of time covered by complainant's back pay, the commissioner was instead guided by ORS 659.022(2), which states that the purpose of ORS chapter 659 is to provide "an adequate remedy for persons aggrieved by * * * acts of discrimination * * *." ***----- In the Matter of City of Portland, 2 BOLI 110, 142 (1981).***

Reversed on back pay, affirmed on retaliation, *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

❑ When respondent retroactively appointed complainant to a firefighter position and petitioned for clarification of the commissioner's final order, the commissioner, by addendum to the original final order, specifically enumerated the effect of the order on the complainant's pay, including interim automatic wage increases, vacation, sick leave, pension eligibility and seniority, and suggested that respondent use the addendum as guidance in dealing with other persons who "are in fact situated similarly to complainant." ***----- In the Matter of City of Portland, 2 BOLI 71, 72-73 (1981).***

Reversed, *Civil Service Board of the City of Portland v. Bureau of Labor and Industries,* 61 Or App 70, 655 P2d 1080 (1982), reversed, final order reinstated, 298 Or 307, 692 P2d 569 (1984).

❑ Before hearing, the agency and respondent stipulated to the amount of back pay owed to complainant, should respondent be found liable. ***----- In the Matter of City/County Computer Center, 1 BOLI 197, 198 (1979).***

❑ When complainant was unlawfully rejected for hire as an appliance salesperson due to his physical handicap, the commissioner based lost wage computation on the average earnings of appliance salespersons for the wage loss period in the store involved, less complainant's actual earnings during that period. ***----- In the Matter of Montgomery Ward and Company, Inc., 1 BOLI 62, 66-67 (1976).***

Reversed, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, reversed and remanded, 280 Or 163, 570 P2d 76 (1977).

Order on remand 1 BOLI 100 (1978).

❑ When respondent failed to consider a 63-year-old complainant for hire due to his age and complainant was awarded $2500 for mental suffering, an award of back pay was not appropriate because the applicant subsequently selected was found to be more qualified and complainant would not have been hired for the position even if given thorough and fair consideration. ***----- In the Matter of Southern Oregon College, 1 BOLI 55, 60-61 (1976).***

101.2.2 --- Deductions

❑ The forum deducted interim earnings from complainant's back pay award. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 242 (2004).***

❑ Back pay awards are initially computed based on the employee's total earnings, before any deductions or offsets. The commissioner allowed respondent to take any appropriate legal deductions from the back pay award, as provided in ORS 652.610. ***----- In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 117 (1989).***

❑ The commissioner allowed the subtraction of "any appropriate legal deductions" from the back pay award. ***----- In the Matter of Sierra Tile Manufacturing, Inc., 1 BOLI 291, 294 (1980).***

101.2.3 --- Duration

❑ The agency proved that complainant's demotion resulted in a $3.24 per hour decrease in his pay, including a $6.48 decrease in overtime pay, beginning October 6, 2003. The agency also proved that as a result of the demotion, complainant lost $1,542 in wages from October 6 through December 2003, and $1,464.60 in wages from January 1 through February 28, 2004. The agency's back pay calculation took into account that complainant received time loss benefits after he suffered a compensable injury on February 28, 2004, and thereafter was found to be permanently disabled from performing his job duties as a tree trimmer. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 251 (2007).***

❑ The agency established that complainant lost wages from January 4 until on or about August 1, 2003, because she was constructively discharged based on her gender. Credible evidence showed complainant used reasonable diligence seeking employment while receiving unemployment benefits and that she found employment at Pozzi Windows in or around the end of July 2003 with similar hours and duration, and at a higher pay rate than the $8.50 per hour she earned while in respondent's employ. Although she voluntarily quit two days after she began her new employment, she was only entitled to back wages for the interim period she was unemployed before she accepted the Pozzi Windows job. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 213-14 (2007).***

Appeal pending.

❑ When complainant was discharged in March 2003, and other temporary employees were hired to perform work that complainant could have performed, but there was no evidence how long those employees continued to work after June 30, 2003, the forum declined to speculate as to how long complainant might have continued to work after June 30, 2003, had he not been discharged, and awarded him back pay from his date of discharge through June 30, 2003. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 277 (2006).***

Appeal pending.

❑ Complainant, who was discharged on May 8, 2003, was working eight hours per day, 40 hours per week at the wage rate of $28.84 per hour, for total average earnings of $230.72 per day and $1153.60 per week. His employment was expected to continue until the end of August 2003. He credibly testified that he sought work until July 3, 2003, when he was hired as a sprinkler fitter at another company, where he continued to work until one month prior to the hearing. He was paid $23.50 per hour by his new employer and worked 40 hours a week. Because complainant earned less at his new job, the forum calculated his lost wages from May 9 until August 31, 2003, but cut off his lost wages as of August 31, 2003, because there was no evidence as to how long respondent's work would have continued past that date. The forum awarded complainant $10,749.60 in back wages. ***----- In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 184 (2005).***

❑ A complainant's right to back wages is cut off when he or she obtains replacement employment for a similar duration and with similar hours and hourly wages as respondent's job. ***----- In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 184 (2005).*** *See also In the Matter of Cleopatra's, Inc., 26 BOLI 125, 135 (2005); In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 198 (2004), affirmed without opinion, Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007); In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 88 (2004); In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 132 (2002); In the Matter of H.R. Satterfield, 22 BOLI 198, 210-11 (2001).*

❑ When there was no evidence that complainant's hours and earnings from her replacement employment were not comparable to the hours she worked and hourly wages she earned during her employment with respondent, the forum calculated complainant's lost wages from the date of her termination until the date she obtained replacement employment. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 198 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007);

❑ At the time of hearing, complainant had not yet obtained work similar to respondent's employment in duration and hourly wage. The forum awarded him back wages extending from the date he was discharged until the date the hearing commenced, less interim earnings. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 133 (2002).***

❑ Complainant's back wages were cut off when she obtained replacement fulltime work that paid wages equal to or greater than those she earned while employed by respondent. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 132 (2002).***

❑ In an unlawful failure to hire case, a respondent's back pay liability may end at the time the respondent discovers facts that would have caused it not to hire the complainant, had it known of those facts at the time it decided not to hire the complainant for impermissible reasons. This doctrine did not bar back pay damages when the respondent did not learn of the pertinent facts until after the date on which the complainant's back pay damages were cut off for other reasons. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 216 (2000)***.

❑ In a case involving unlawful discharge on the basis of pregnancy, the forum awarded back pay damages from the date of unlawful discharge until the date the complainant would have chosen to stop working. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 189 (2000)***.

❑ The date when complainant became self-employed was the cut-off date for calculation of back wages. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 43 (1998)***.

> Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ Complainant was awarded one months' back pay when the testimony concerning the length of his unemployment after his discharge was inexact, but the forum believed it was sufficiently reliable to conclude that complainant had been unemployed for about a month. ***----- In the Matter of James Breslin, 16 BOLI 200, 218 (1997).***

> Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ Complainant's lost back wages were calculated at her regular hourly rate of pay, plus tips, between the time of her unlawful discharge and the date of hearing, less interim earnings. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 131-32 (1997).***

❑ Complainant's right to back pay was cut off when she accepted a job with the same hourly rate of pay, but higher tips than she earned with respondent. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 131 (1997).***

❑ When complainant, age 67, expected to work for two additional years as an apartment manager at the time respondent discharged her, the commissioner ordered respondent to pay her two years' lost wages and rental and utility expenses. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 292 (1997).***

❑ The duration of a back pay award extends only up to the date of the hearing. ***----- In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 125 (1995).***

> Affirmed without opinion, *Earth Science Technology, Inc. v. Bureau of Labor and Industries*, 141 Or App 439, 917 P2d 1077 (1996).

❑ When complainant was constructively discharged and did not actively seek work until a month later, and

nine weeks later removed herself from the job market when she began work as a volunteer caregiver, the commissioner awarded back pay for the nine week period that complainant actively sought work. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 8, 13 (1994).***

❑ Complainant was unlawfully discharged from a part-time job paying $4.75 per hour, plus tips averaging $120 per week, and subsequently found replacement employment with similar hours and hourly wage but no tips. The commissioner awarded $1200 in lost wages for the ten months she was deprived of the tip income in the alternative employment. ***----- In the Matter of Short Stop Cafe, 12 BOLI 201, 205, 208 (1994).***

❑ When complainant took a new job one week after she was unlawfully discharged, but the new job produced diminished wages because of fewer hours, a lower hourly rate of pay, and no tips, the forum measured complainant's back pay from the date of discharge until the day of hearing. ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 84-85 (1993).***

❑ When respondent denied complainant's request to use accrued sick leave during approximately three weeks of complainant's six week parental leave, and complainant took those three weeks of the leave unpaid, the forum awarded complainant back wages in the value of the three weeks of accrued sick leave denied him and ordered respondent to deduct sufficient hours to offset the value of the back wages awarded from his accrued sick leave. ***----- In the Matter of Douglas County, 11 BOLI 1, 3, 7-8 (1992).***

❑ When complainant, a waitress, was constructively discharged due to her supervisor's sexual harassment, the forum awarded complainant back pay that represented wages and tips complainant lost between the date of the discharge and the date she was employed by another employer for the same pay and hours. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 193 (1992).***

Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ Complainant's right to back wages was cut off when she refused to accept a job that was substantially equivalent employment to her job with respondent. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 282-83, 298 (1991).***

Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ The period for measuring back pay terminates when a complainant obtains a job with comparable or higher pay and does not resume when the complainant voluntarily quits the new job. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 217 (1991).***

❑ When complainant lost wages for a significant time after his unlawful discharge and worked in temporary jobs at a lower rate than what respondent had paid, the commissioner found that complainant's claim for lost wages continued until he obtained employment that equaled or surpassed his wage at the time of discharge in earnings. The commissioner deducted complainant's interim earnings from what complainant would have earned, but for the unlawful discharge. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 204 (1991).***

Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ When an injured worker was discharged, then filed a workers' compensation claim, was paid for time loss, and had surgery for carpal tunnel syndrome and a recovery period from the surgery, the commissioner awarded back pay beginning on the date complainant was able to resume work following his surgery. ***----- In the Matter of Community First Building Maintenance, 9 BOLI 1, 4-5 (1990).***

❑ The commissioner did not compute back wages beyond the period that was sought in the pleadings when testimony regarding earnings was uncontroverted, but no amendment was made to increase the amount of back wages sought. ***----- In the Matter of Baker Truck Corral, 8 BOLI 118, 138 (1989).***

❑ When complainant had been employed by respondent as a waitress earning $3.35 per hour, plus an average of $15 per day in tips, and working 16.5 hours per week, then took a job after her discharge at a bakery that paid $3.35 per hour for an average of 16 hours per week, the commissioner held that the bakery job was not equivalent to her job with respondent because there were no tips and fewer hours at the bakery. Consequently, the bakery job did not cut off the period of measuring her back wages, but her earnings at the bakery were set off against the back pay award. ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 21 (1989).***

❑ Before her unlawful discharge, complainant had been employed by respondent as a waitress earning $3.35 per hour, plus an average of $15 per day in tips, and working 16.5 hours per week. After her discharge, she took a job at a restaurant where she earned $3.35 per hour, plus $20-$40 per day in tips and worked full-time. The commissioner held that the new job was superior to her job with respondents and it cut off the period for measuring her back pay. ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 21 (1989).***

❑ Before her unlawful discharge, complainant had been employed by respondent as a waitress earning $3.35 per hour, plus tips, and worked fewer than 30 hours per week. After her discharge, she found employment that paid $3.35 per hour, plus tips, and where she worked 30 hours per week. The commissioner held that the subsequent job was the equivalent of or superior to her job at respondents' café with respect to hours and wages. In addition, complainant found another job that paid $4.37 per hour for up to 20 hours per week. Complainant voluntarily quit both subsequent jobs. The commissioner held that the "period for measuring back pay terminates when a complainant obtains a job with comparable or higher pay, and it does not resume when the complainant

voluntarily quits the new job." ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 21 (1989).***

❑ When respondent denied complainant the use of accrued sick leave during the period of his parental leave, causing complainant to shorten his leave and take part of the leave unpaid, the commissioner ordered respondent to pay complainant $5,861, the value of the nine weeks and two days of accrued sick leave that should have been paid to complainant in connection with his parental leave. The commissioner also ordered respondent to deduct a total of 376 hours from complainant's accrued leave. ***----- In the Matter of Portland General Electric Company, 7 BOLI 253, 272 (1988).***

Affirmed, *Portland General Electric Company v. Bureau of Labor and Industries, 116* Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

❑ Complainant's back wages ceased to accrue when she accepted a permanent job in which she earned the same or more compensation than she would have earned, had she continued working for respondent. ***----- In the Matter of Richard Niquette, 5 BOLI 53, 59 (1986).***

❑ When complainant obtained permanent full-time work where he earned wages equivalent to what he would have earned, had respondent not discharged him, the employment was considered substantially similar work and the forum determined that complainant's back pay award accrual had ceased. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 310 (1985).***

❑ When complainant was unlawfully demoted from an office supervisor job, and that job was then given to another person due to an office reorganization, the commissioner could not conclude that complainant would have held the office supervisor job after the reorganization. As a result, complainant's back pay damages based on the office supervisor's wage rate ended on the reorganization date, and back wages were thereafter based on a shift supervisor's wage rate. ***----- In the Matter of City of Salem, 4 BOLI 1, 46-47 (1983).***

❑ When the forum found that complainant, a records supervisor for a city, was unlawfully demoted, back pay damages ceased to accrue on the day when the city and county merged records keeping functions, as it was no longer clear that complainant would have been in that position. ***----- In the Matter of City of Salem, 4 BOLI 1, 46 (1983).***

❑ The forum did not award back pay for the time when complainant was unable to work for a limited time due an injury. ***----- In the Matter of Lucille's Hair Care, 3 BOLI 286, 298, 301 (1983).***

Modified as to wage loss and interest, *Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest, *Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).

Order on remand, 5 BOLI 13, 30-31 (1985).

❑ When respondent unlawfully refused to hire complainant, the damages were the wages complainant would have earned, had he been hired on the day he was rejected, plus the differential between his actual earnings and what he would have earned with respondent until he either obtained employment that paid the same or more than respondent's job or until he was unavailable for work. ***----- In the Matter of Pacific Motor Trucking Company, 3 BOLI 100, 115 (1982).***

Affirmed, *Pacific Motor Trucking Company v. Bureau of Labor and Industries,* 64 Or App 361, 668 P2d 446, rev den 295 Or 773, 670 P2d 1036 (1983).

❑ Respondent was found to have discriminated against complainant, a female corrections officer, by selecting a male officer for promotion to lieutenant. Respondent subsequently scheduled an exam for another lieutenant position, and complainant chose to take vacation during the week of the exam. The forum determined that complainant's choice to take vacation during the week of the exam, without attempting to reschedule her vacation, constituted a failure to exercise reasonable diligence to mitigate her damages, and cut off her back pay damages on the day she should have taken the exam. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 70 (1982).***

❑ Respondent unlawfully refused to hire complainant, a busboy, to a waiter's position because of his sex on March 26, 1978. Complainant was terminated from his busboy position on May 17, 1978. The forum determined that back pay began to accrue on March 26, 1978, the date of respondent's refusal. When complainant obtained employment for 10 days after respondent unlawfully discharged him, but began working a set number of hours per week at a set hourly wage that totaled more than he would have earned with respondent, the forum determined that his back pay accrual ended at when his new job started. ***----- In the Matter of Love's Woodpit Barbeque Restaurant, 3 BOLI 18, 25-26 (1982).***

❑ Complainant was unlawfully discharged on Saturday because of his religion. The commissioner awarded back pay for only one day when the evidence established that, before the issue of religion arose, respondent had already decided to discharge complainant on Sunday because of his poor work performance. ***----- In the Matter of Union Pacific Railroad Company, 3 BOLI 234, 239 (1982).***

❑ When respondent cited ORS 659.121(1) in support of its position that a complainant's back pay remedy was limited to two years, the commissioner found that the subsection applied only to the circuit court and that ORS 659.121(4) stating the legislature's intent that "This section shall not be construed to limit or alter in any way the authority or power of the commissioner." In determining the period of time covered by complainant's back pay, the commissioner was instead guided by ORS 659.022(2), which states that the purpose of ORS chapter 659 is to provide "an adequate remedy for

persons aggrieved by * * * acts of discrimination * * *." ***----- In the Matter of City of Portland, 2 BOLI 110, 142 (1981).***

Reversed on back pay, affirmed on retaliation, *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

❑ When the commissioner found that a female complainant was paid less than male comparators exercising substantially similar skill, effort and responsibility in performing the same duties, the differential in gross earnings while the disparity continued – a period of 65 months – was used to calculate wage loss damages. ***----- In the Matter of City of Portland, 2 BOLI 110, 142-44 (1981).***

Reversed on back pay, affirmed on retaliation, *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

❑ The commissioner found that complainant was due the wage differential between dispatcher and police officer from the date she was unlawfully denied the officer position due to her sex to the date she found alternate employment with pay that matched or exceeded the officer pay, but reduced the award by the value of her pay for the seven weeks between when she voluntarily quit the dispatcher position and the date she obtained the alternate employment. ***----- In the Matter of City of Dallas, 2 BOLI 93, 109-10 (1981).***

❑ When respondent established that available work was such that complainant would have been laid off at the end of the month instead of the 24th, back pay was limited to the four day notice period contained in the collective bargaining agreement that the supervisor had ignored because of the manner of complainant's safety complaint. ***----- In the Matter of Oregon Metallurgical Corporation, 2 BOLI 73, 81-82 (1981).***

❑ When respondent failed to hire complainant because of her sex, her back pay was calculated by multiplying the weekly salary of the position by the 22 weeks during which complainant attempted to obtain employment with respondent. ***----- In the Matter of Jeffrey Brady, 2 BOLI 58, 61 (1984).***

Reversed and remanded for clarification of finding of sex discrimination, *Brady, DMD v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982).

Amended order on remand, 4 BOLI 211, 215 (1984) (damages calculated at 22 work days, the period that the record verified were offered to and rejected by a male former employee following his layoff).

❑ When respondent unlawfully excluded complainant from fair consideration for a position due to complainant's race and color and failed to hire complainant, the commissioner awarded back pay in the amount complainant would have earned in respondent's employ from the date of exclusion until complainant obtained other employment 18 weeks later. ***----- In the Matter of Sierra Tile Manufacturing, Inc., 1 BOLI 291, 293 (1980).***

❑ When respondent was found to have committed an unlawful employment practice by failing to reinstate an injured worker, complainant's back pay was measured from the date a position that complainant could have filled opened until the date complainant returned to school. ***----- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 269 (1980).***

Reversed on the ground that statutes did not specify failure to reinstatement as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980).

❑ When complainant was unhappy with his job, was unable to continue the required work due to an injury, and would have quit within two weeks even if not unlawfully terminated, he was awarded two weeks back pay based on his average workweek and rate of pay. ***----- In the Matter of Acco Contractors, Inc., 1 BOLI 260, 2663 (1980).***

❑ When respondent discharged complainant on June 29, 1977, because complainant opposed a safety hazard, complainant was awarded back pay from July 5, 1977, the day APD inspected the site, until the day the project ended. ***----- In the Matter of Frontier Construction Company, 1 BOLI 224, 230 (1979).***

❑ When a female complainant was denied a job due to her sex, respondent was ordered to pay the differential between her actual earnings and "pay attributable to a person who would have worked * * * in the position" from the date of her rejection until she found permanent employment. ***----- In the Matter of Healthways Food Center, 1 BOLI 205, 206 (1979).***

101.2.4 --- Duty to Mitigate

❑ Respondent's pecuniary interest in most of the business community in La Pine, a small town with barely 20,000 residents, lent credence to complainant's testimony that she had difficulty finding a job for over seven months after her constructive discharge. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 216 (2007).***

Appeal pending.

❑ A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 277 (2006),*** *appeal pending. See also In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 184 (2005); See also In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 88 (2004); In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 65 (2003); In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 132 (2002); In the Matter of Servend International, Inc., 21 BOLI 1, 30 (2000),*

affirmed without opinion, Servend International, inc. v. Bureau of Labor and Industries, 183 Or App 533, 53 P3d 471 (2002); In the Matter of ARG Enterprises, 19 BOLI 116, 136 (1999).

❑ Through complainant's credible testimony, The agency proved that complainant mitigated his damages by actively seeking work after his discharge. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 277 (2006)***

Appeal pending.

❑ Complainant mitigated her damages by diligently seeking employment and obtaining equivalent employment on June 1, 2003, that exceeded her pay rate with respondent. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 135 (2005).***

❑ When the forum deems a back pay award appropriate, the respondent has the burden of proving the complainant failed to mitigate his or her damages. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 65 (2003).*** *See also In the Matter of Servend International, Inc., 21 BOLI 1, 30 (2000), affirmed without opinion, Servend International, inc. v. Bureau of Labor and Industries, 183 Or App 533, 53 P3d 471 (2002); In the Matter of RJ's All American Restaurant, 12 BOLI 14, 32-32 (1993); Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 217 (1991); In the Matter of Lee's Cafe, 8 BOLI 1, 4 (1989); In the Matter of City of Portland, 2 BOLI 41, 42 (1980).*

❑ To meet its burden of proof, a respondent must prove the complainant "failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified." ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 65 (2003).***

❑ Complainant mitigated her back pay damages by finding subsequent equivalent employment two months after respondent refused to hire her. ***----- In the Matter of H.R. Satterfield, 22 BOLI 198, 210 (2001).***

❑ The forum concluded that complainant's refusal of her joint employer's temporary good faith job offer at $8 per hour for performing unskilled clerical work constituted failure to use reasonable care and diligence in seeking employment, as well as proof that a job was available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified. Respondent satisfied its burden of proving that complainant failed to mitigate her back pay loss, and complainant was not awarded any damages for back pay. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 31 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Complainant's delay of two weeks in seeking alternative employment did not constitute a failure to mitigate damages when the respondents did not prove that complainant was offered other employment and declined it. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 215 (2000)***.

❑ A complainant in an employment discrimination case who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. Failure to exercise reasonably diligence does not necessarily negate an entitlement to back pay, but may reduce a back pay award if the respondent proves that the complainant failed to mitigate. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 136 (2000)***.

❑ When the forum determines that a back pay award may be appropriate, a respondent bears the burden of proving that a complainant failed to mitigate his or her damages. To meet this burden a respondent must prove that the complainant failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 136-37 (2000)***.

❑ Respondent met its burden of proving that complainant did not exercise reasonable diligence in seeking other suitable employment by establishing that complainant's job search was limited to looking through newspaper ads, and that complainant did not follow up by contacting prospective employers, although there were a number of ads for jobs he was qualified for that fit his school schedule and numerous other advertised jobs that he was qualified to perform and that may have met his job requirements, had he bothered to inquire. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 137-38 (2000)***.

❑ When complainant had been employed by respondent as a dishwasher and respondent proved, through the presence of numerous help wanted ads and expert testimony, that complainant should have been able to find work as a dishwasher within one week after his discharge, the forum limited complainant's back pay award to one week's lost wages even though complainant remained unemployed for a longer period of time. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 139 (2000)***.

❑ When a complainant limits his job search to a scrutiny of help wanted ads in the local newspaper, and those ads list suitable jobs that match the complainant's qualifications, but the complainant makes no further inquiry into those jobs, the forum will not require a respondent to prove the dates those jobs were filled, their specific wage rates, and specific shift when the respondent has already met its burden of proof of showing that the complainant failed to mitigate his back pay damages. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 139 (2000)***.

❑ When respondent alleged that complainant failed to mitigate his back pay loss because he did not clarify his medical leave status after prospective employers told him they could not hire him so long as he remained on medical leave from respondent, the forum held that respondent was responsible for any lack of clarification on complainant's part based on respondent's lack of understanding of workers' compensation and disability

law that resulted in complainant being placed on an ill-defined leave status that rendered him unemployable. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 81 (1999)***.

❑ In this forum, it is incumbent on a respondent to establish any failure to mitigate damages. ***----- In the Matter of Body Imaging, Inc., 16 BOLI 163, 186 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998).***

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000).

See also In the Matter of Tyree Oil, Inc., 17 BOLI 26, 43 (1998), reversed, Tyree Oil, Inc. v. Bureau of Labor and Industries, 168 Or App 278 (2000).

❑ Complainant's failure to apply for jobs located nearly 100 miles away from his home did not constitute a failure to mitigate damages. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 45 (1998).***

Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ When complainant was constructively discharged and did not actively seek work until a month later, and nine weeks later removed herself from the job market when she began work as a volunteer caregiver, the commissioner awarded back pay for the nine week period that complainant actively sought work. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 8, 13 (1994).***

❑ After a constructive discharge by respondent, complainant consistently sought other employment, used an employment agency and want ads in the newspaper, and found two new jobs six weeks later. The forum found that complainant made an adequate search for work and awarded lost wages between the date of the discharge and the date she accepted the new jobs. ***----- In the Matter of RJ's All American Restaurant, 12 BOLI 24, 31-32 (1993).***

❑ Continued eligibility for unemployment benefits requires that the claimant actively seek work. When complainant testified about a job search and drawing unemployment compensation and respondent failed to affirmatively show the availability of suitable employment for which complainant might have applied, the forum held that respondent failed to prove that complainant failed to mitigate his damages. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 83 (1992)***.

❑ In mitigating a wage loss, a complainant is entitled to seek an equivalent position with another employer. There is no requirement that he go into business for himself. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 62 (1992).***

❑ Complainant's refusal to accept a job that was substantially equivalent to the job she lost with respondent ended the period for measuring lost wages. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 298 (1991).***

Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ When a complainant made applications at two nursing homes and a foster care home during two months, the commissioner held that her "job seeking efforts were adequate." ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 297 (1991).***

Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ When respondent sought to have an inference drawn that complainant did not mitigate her damages because she did not produce certain documents related to her employment search after her termination in response to a subpoena *duces tecum*, the forum denied the motion for sanctions. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 284-85 (1991).***

Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ When a complainant excludes herself from the job market, other than for the reason of accepting alternative employment, she fails to mitigate her loss for the period of that exclusion. Thus, complainant was not awarded back pay during a period of maternity leave with a subsequent employer that paid less than respondent or during a month when she did not seek employment. ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 66 (1990).***

❑ The commissioner did not award back pay in an AIDS disability case when the evidence showed that complainant applied for only one job between May 19 and October 27, 1987, when she was no longer employable because of her disease. The commissioner stated: "The forum does not and cannot speculate on whether the positive influence of employment might have prolonged the complainant's employability any more than it does or can speculate on the possibility that properly documented future performance deficiencies might have reduced the length of employment. Without some evidence that her emotional state precluded a diligent effort to secure employment, an established failure to mitigate reduces or eliminates a claim for wage loss." ***----- In the Matter of Casa Toltec, 8 BOLI 149, 174 (1989).***

❑ When complainant worked for respondents' café and evidence showed that she did not seek restaurant work after her discharge, the commissioner held that "that fact alone does not establish that she failed to mitigate her damages. Alternative equivalent employment does not have to be in the same occupation. Absent specialized training or a great deal of experience in a field, any alternative job with equivalent wages and benefits should be sought." ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 21 (1989).***

❑ When complainant did not seek alternative employment for two months after she was discharged from respondents' café, the commissioner held that she

was not entitled to back pay for that period because she voluntarily excluded herself from the job market, thus failing to mitigate her damages. ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 20-21 (1989).***

❑ When complainant voluntarily quit a job that provided him with superior benefits to those he would have received, had he been employed by respondent; his reason for quitting was merely complainant's belief that respondent would hire him at some indefinite future time; and he failed to seek or obtain alternative employment with equivalent benefits; complainant's loss of benefits was a loss he might reasonably have avoided. Complainant failed to mitigate his damages by: (1) the willful conduct of voluntarily quitting alternative, equivalent employment without good cause; and (2) his failure to exercise reasonable diligence in his efforts to obtain other employment that provided benefits equivalent to those he voluntarily lost. Accordingly, respondent was relieved of its liability for complainant's loss of vacation leave. ***----- In the Matter of City of Portland, 6 BOLI 203, 210-11 (1987).***

❑ The deduction from a back pay award of amounts that could have been earned by the exercise of reasonable diligence has its roots in a principle of contract law that is usually, though improperly, called the duty to mitigate damages. This principle of law, properly referred to as the avoidable consequences rule, denies a complainant a recovery for harm he or she might reasonably have avoided. In other words, it relieves the employer of liability for any losses that complainant could have reasonably avoided. ***----- In the Matter of City of Portland, 6 BOLI 203, 210 (1987).***

❑ Respondent has the burden to elicit evidence to prove mitigation. When respondent took no steps to elicit this evidence by taking action such as asking complainant to produce tax records or income, the forum determined that there was no evidence to establish that respondent took reasonable steps to meet that burden. When complainant testified he had worked during the period between termination and the hearing, the forum used the minimum number of hours to reduce complainant's damages and resolved ambiguities against respondent. ***----- In the Matter of 3 Son Loggers, Inc., 5 BOLI 65, 81 (1986).***

❑ When complainant voluntarily left a job she obtained after being denied hire by respondent due to a change in ownership, and complainant thereafter failed to apply for available work in the field in which she was qualified, the forum determined that these actions constituted a failure to exercise reasonable diligence to mitigate back pay damages during that time period. ***----- In the Matter of Lucille's Hair Care, 3 BOLI 286, 302 (1983).***

> Modified as to wage loss and interest, *Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest, *Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).
>
> Order on remand, 5 BOLI 13, 30-31 (1985).

❑ In all matters brought under ORS 659.030, respondent has the burden of establishing facts mitigating the damages to be awarded to a complainant. A complainant is probably the only and certainly the best source of evidence of mitigation efforts. When a complainant is totally unresponsive to respondent's questions concerning mitigation and could reasonably be expected to be able to supply such information, the forum must infer that the answers, if given, would not have furthered complainant's claim. ***----- In the Matter of Lucille's Hair Care, 3 BOLI 286, 302 (1983).***

> Modified as to wage loss and interest, *Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest, *Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).
>
> Order on remand, 5 BOLI 13, 29 (1985).

❑ When respondent argued that no evidence was presented to establish that complainant, who obtained employment 10 days after respondent unlawfully discharged him, properly mitigated his back pay damages, the forum held that complainant's speed in obtaining alternative employment established that he did properly mitigate his damages. In any case, it is the burden of respondent, not the agency, to demonstrate that complainant has failed to mitigate his damages. ***----- In the Matter of Love's Woodpit Barbeque Restaurant, 3 BOLI 18, 26 (1982).***

❑ Respondent has burden of proving that complainant failed to use reasonable care and diligence in seeking employment and that jobs were available, that complainant could have discovered with reasonable diligence, and for which complainant was qualified. ***----- In the Matter of Veneer Services, Inc., 2 BOLI 179, 186 (1981).***

> Affirmed without opinion, *Veneer Services, Inc. v. Bureau of Labor and Industries,* 58 Or App 76, 648 P2d 426 (1982).

❑ The commissioner found that complainant was due the wage differential between dispatcher and police officer from the date she was unlawfully denied the officer position due to her sex to the date she found alternate employment with pay that matched or exceeded the officer pay, but reduced the award by the value of her pay for the seven weeks between when she voluntarily quit the dispatcher position and the date of the alternate employment. ***----- In the Matter of City of Dallas, 2 BOLI 93, 109-10 (1981).***

101.2.5 --- Raises

❑ When respondent was found to have discriminated against complainant, a female corrections officer, by selecting a male officer for promotion to lieutenant, back pay damages were computed based on the minimum starting salary for that position, plus all non-discretionary raises, as well as the seniority and fringe benefits complainant would have earned, had she been appointed on the day the male officer was selected. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 71 (1982).***

❑ When respondent retroactively appointed

complainant to a firefighter position and petitioned for clarification of the commissioner's final order, the commissioner, by addendum to the original final order, specifically enumerated the effect of the order on the complainant's pay, including interim automatic wage increases, vacation, sick leave, pension eligibility and seniority, and suggested that respondent use the addendum as guidance in dealing with other persons who "are in fact situated similarly to complainant." ***----- In the Matter of City of Portland, 2 BOLI 71, 72-73 (1981).***

Reversed, *Civil Service Board of the City of Portland v. Bureau of Labor and Industries,* 61 Or App 70, 655 P2d 1080 (1982), reversed, final order reinstated, 298 Or 307, 692 P2d 569 (1984).

❑ When respondent discriminated in hiring on the basis of age, each complainant was awarded back pay in an amount representing the difference between actual income and the starting salary of the position sought, plus incremental increases he would have earned in the position, until his actual income exceeded that which he would have earned with respondent. ***----- In the Matter of Clackamas County Fire District No. 1, 1 BOLI 244, 251-52 (1980).***

Affirmed, *Clackamas Fire Protection Dist. No. 1 v. Oregon Bureau of Labor and Industries*, 50 Or App 337, 624 P2d 141, rev den 291 Or 9, 631 P2d 340 (1981).

101.2.6 --- Setoff

❑ It is well established in this forum that unemployment benefits received by a complainant are not deducted from a back pay award, and the forum is not required to consider complainant's unemployment benefits when determining the lost wage amount. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 216 (2007).***

Appeal pending.

See also In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 273 (1998); In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 84 (1992); In the Matter of German Auto Parts, Inc., 9 BOLI 110, 129-31 (1990); affirmed, German Auto Parts, Inc. v. Bureau of Labor and Industries, 111 Or App 522, 826 P2d 1026 (1992); In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 116 (1989); In the Matter of Peggy's Café, 7 BOLI 281, 288 (1989); In the Matter of Dillard Hass Contractor, Inc., 7 BOLI 244, 252 (1988); In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 67 (1987), affirmed, Metco Manufacturing, Inc. v. Bureau of Labor and Industries, 93 Or App 317, 761 P2d 1362 (1988).

❑ The amount of money the complainant earned from other employment was deducted from the amount of back pay the respondent owed him. ***---- In the Matter of Barrett Business Services, Inc., 20* BOLI 189, *214-15 (2000).***

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ When complainant's post discharge earnings at the YWCA were from part-time employment performed outside her regular workings hours and the evidence showed she would have earned the same amount, even if she had remained employed by respondent, the forum did not reduce her back pay award by the amount of her YWCA earnings. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 187 (1998)***.

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ When complainant's earnings after her constructive discharge were from part-time employment performed outside her regular working hours and she would have earned the same amount even if she had remained employed by respondent, the commissioner held that her part-time earnings did not reduce the wage loss caused by her constructive discharge. ***----- In the Matter of Body Imaging, Inc., 16 BOLI 163, 185 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998).***

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000).

❑ When respondents who were alleged to be successors in interest agreed to pay complainant $2,900 in exchange for having the claims against them dismissed with prejudice and having complainant execute a general release, with the agency being entitled to judgment against them if the $2,900 was not paid to complainant in a reasonable period of time, the forum subtracted the $2,900 as an offset from complainant's gross damage award of $21,257.50. The forum relied on the holding in *Dee v. Pomeroy,* 109 Or App 114, 120-21 (1991) for the proposition that an injured party who settles a tort claim with a joint tort-feasor before trial and proceeds against the remaining defendant is entitled, upon prevailing, to a judgment for the difference between the settlement and the actual damages. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 17 (1996).***

❑ Complainant testified to having some odd jobs and yard work after his discharge from a part-time job with respondents, but there was no evidence of the amounts earned or of whether those jobs occupied the same time of day as his former position, and the commissioner did not deduct the unproved interim earnings from his back pay award. ***----- In the Matter of Rose Manor Inn, 11 BOLI 281, 283 (1993).***

❑ When complainant received $1530 in back wages as a result of his grievance for his discharge under the collective bargaining agreement and also earned wages from other employers after his discharge, the commissioner reduced complainant's award for lost wages by the $1530 and the interim earnings. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 82-83 (1992).***

❑ In determining back pay awards, the equitable principle of setoff applies. Interim earnings or amounts

earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. This principle of law denies a complainant a recovery for harm that he or she might reasonably have avoided. In other words, it relieves the respondent of liability for any losses that the complainant could reasonably have avoided. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 217 (1991).*** *See also In the Matter of Lee's Cafe, 8 BOLI 1, 20 (1989).*

❑ Interim earnings may be deducted from what complainant would have earned, but for the unlawful discharge. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 204 (1991).***

> Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ Respondent argued that unemployment benefits should be offset to prevent a potential windfall to the complainant. The commissioner held that that position was expressly rejected in *Seibel v. Liberty Homes, Inc.,* 305 Or 362, 752 P2d 291 (1988) in the following language: "whether to save or recapture those [social benefit] costs is properly an issue between the provider of the benefits and its beneficiaries. Absence of a recoupment provision does not help the employer who causes the cost by improperly terminating the employee's regular source of compensation." ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 131 (1990).***

> Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

❑ It is not the public policy of the State of Oregon to encourage or reward the weighing of the costs and benefits of discrimination. BOLI is charged with eliminating and preventing discrimination in employment. To allow private employers to offset unemployment compensation benefits in cases of employment discrimination would encourage and subsidize their unlawful practices. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 131 (1990).***

> Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

❑ Interim earnings that do not equal the earnings received from the job complainant lost because of discrimination are deductible from what the employee would have made, but for the discrimination. ***----- In the Matter of City of Umatilla, 9 BOLI 91, 105 (1990).***

> Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ Back pay awards are initially computed based on the employee's total earnings, before any deductions or offsets. The commissioner allowed respondent to take any appropriate legal deductions from the back pay award, as provided in ORS 652.610. ***----- In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 117 (1989).***

❑ When respondent sought to introduce evidence about complainant's claim for unemployment benefits, seeking to offset a portion of the benefits because they were unlawfully obtained, the commissioner upheld the agency's objection. The commissioner found that eligibility for unemployment benefits was a determination made by the Employment Division under its rules that was not subject to collateral attack in this forum, that a proper showing of ineligibility for unemployment benefits could be made in this forum only by evidence of a final determination of the Employment Division to that effect, and that respondent's avenue for obtaining such a determination was before the Employment Division, not before the commissioner. ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 50 (1990).***

❑ Respondent argued that complainant's back pay should be reduced by the amount he received in unemployment compensation, contending that complainant would get "double pay." The forum held that unemployment benefits received by a successful complainant in a discrimination case are not offsets against a back pay award. The commissioner found that "those unemployment 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." The commissioner found allowing employers to offset unemployment compensation benefits in employment discrimination cases would encourage and subsidize their unlawful practices, whereas the Bureau is charged with eliminating and preventing discrimination in employment. ***----- In the Matter of St. Vincent de Paul Salvage Bureau, 8 BOLI 293, 302-03 (1990).***

❑ When complainant had a second job at the same time as her job with respondent, and respondent failed to show that any wages that complainant earned at the second job after respondent fired her would not have been earned, had she not been discharged, the commissioner held that any wages earned at the second job would not reduce her back pay award. ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 21 (1989).***

❑ When complainant had been employed by respondent as a waitress earning $3.35 per hour, plus an average of $15 per day in tips, and working 16.5 hours per week, then took a job after her discharge at a bakery that paid $3.35 per hour for an average of 16 hours per week, the commissioner held that the bakery job was not equivalent to her job with respondent because there were no tips and fewer hours at the bakery. Consequently, the bakery job did not cut off the period of measuring her back wages, but her earnings at the bakery were set off against the back pay award. ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 21 (1989).***

❑ When complainant was out of work for three weeks between her discharge and her new job and worked two days for a Safeway store in those three weeks, the commissioner found no evidence to show that she worked during hours which would require any income from that job to be treated as a set off against her lost wages. Such evidence is in the nature of an affirmative defense, which is the respondent's burden to plead and prove. By defaulting, respondent waived her right to

present that defense. ***----- In the Matter of Peggy's Café, 7 BOLI 281, 288 (1989).***

❑ When an employer is found to have committed an unlawful employment practice, the commissioner may order the employer to pay the complainant back pay, including benefits, as a remedy. The purpose is to make complainants whole for injuries suffered because of unlawful employment discrimination. The general rule is that the compensation shall be equal to the injury. Accordingly, the equitable principle of set-off applies. This principle is codified in federal law and provides: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." In this case, vacation leave benefits that complainant accrued and either used or was compensated for while employed by UOHSC were properly applied as a set-off against the vacation leave credit for which respondent was liable. ***----- In the Matter of City of Portland, 6 BOLI 203, 210 (1987).***

❑ When respondent retaliated against complainant, the forum did not deduct welfare or unemployment benefits received by complainant from the back wages owed to her, stating it has long observed a policy similar to the collateral source rule – benefits received by an injured party from a source wholly independent of the wrongdoer need not be deducted from the damages owed to the injured party. ***----- In the Matter of Richard Niquette, 5 BOLI 63 (1986).***

❑ Unemployment benefits are intended to provide a means a living for an unemployed worker, not to compensate for an employer's wrongdoing. Therefore, the commissioner found that Oregon's unemployment benefits are collateral to a back pay award and need not be deducted from such an award. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 203 (1982).***

❑ Non-taxable CETA funds are not deducted from a complainant's back wages because they were created only to provide a substitute income from public funds and not intended to be a source for paying damages to a worker due to a respondent's discriminatory practices. ***----- In the Matter of Rich Manufacturing Company, 3 BOLI 137, 144 (1982).***

> Affirmed without opinion, *Rich Manufacturing Company v. Bureau of Labor and Industries,* 64 Or App 855, 669 P2d 843 (1983).

❑ The forum adopted the Oregon Supreme Court's reasoning in *McPherson v. Employment Division,* 285 Or 541 (1979), stating: "Oregon law does not require the commissioner of the Bureau of Labor and Industries to deduct 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." **-----** In ***the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 129 (1982).***

> Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ Oregon law does not require the commissioner to deduct unemployment compensation from a damage award of back pay. Unemployment insurance 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 unlawful employment practice. ***----- In the Matter of Spear Beverage Company, 2 BOLI 240, 245-46 (1982).***

❑ Amounts that a complainant earns from temporary employment while seeking permanent employment must be deducted from the damage award. ***----- In the Matter of Veneer Services, Inc., 2 BOLI 179, 186 (1981).***

> Affirmed without opinion, *Veneer Services, Inc. v. Bureau of Labor and Industries,* 58 Or App 76, 648 P2d 426 (1982).

❑ Unemployment compensation benefits received by a complainant after his discharge for making a safety complaint were offset from a back pay damages award. ***----- In the Matter of Day Trucking, Inc., 2 BOLI 83, 93 (1981).***

> Overruled, *In the Matter of Spear Beverage Company, 2 BOLI 240, 245-46 (1982),* and subsequent cases, and specifically in *In the Matter of Western Medical Systems*, Inc., 8 BOLI 108, 116 (1989), on the issue of offsetting unemployment compensation from a back pay damage award.

❑ When complainant was not hired because of his race and was unemployed for 18 weeks thereafter, the commissioner offset the unemployment compensation he received during that period from a back pay damage award. ***----- In the Matter of Sierra Tile Manufacturing, Inc., 1 BOLI 291, 293-94 (1980).***

> Overruled, *In the Matter of Spear Beverage Company, 2 BOLI 240, 245-46 (1982),* and subsequent cases, and specifically in *In the Matter of Western Medical Systems*, Inc., 8 BOLI 108, 116 (1989), on the issue of offsetting unemployment compensation from a back pay damage award.

❑ When complainant was unlawfully rejected for hire as an appliance salesperson due to his physical handicap, the commissioner based lost wage computation on the average earnings of appliance salespersons for the wage loss period in the store involved, less complainant's actual earnings during that period. ***----- In the Matter of Montgomery Ward and Company, Inc., 1 BOLI 62, 66-67 (1976).***

> Reversed, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, reversed and remanded, 280 Or 163, 570 P2d 76 (1977).

Order on remand 1 BOLI 100 (1978).

101.2.7 --- Tips

❑ Complainant's lost back wages were calculated at her regular hourly rate of pay, plus tips, between the time of her unlawful discharge and the date of hearing, less interim earnings. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 131-32 (1997).***

❑ When complainant was unlawfully discharged from a part-time job that paid $4.75 per hour, plus tips averaging $120 per month, and found replacement employment with similar hours and hourly wage, but no tips, the commissioner awarded $1200 in lost wages for the ten months she was deprived of the tip income in the alternative employment. ***----- In the Matter of Short Stop Cafe, 12 BOLI 201, 205, 208 (1994).***

❑ When complainant, a waitress, was constructively discharged due to her supervisor's sexual harassment, the forum awarded complainant back pay that represented wages and tips complainant lost between the date of the discharge and the date she was employed by another employer for the same pay and hours. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 193 (1992).***

Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ When complainant had been employed by respondent as a waitress earning $3.35 per hour, plus an average of $15 per day in tips, and working 16.5 hours per week, then took a job after her discharge at a bakery that paid $3.35 per hour for an average of 16 hours per week, the commissioner held that the bakery job was not equivalent to her job with respondent because there were no tips and fewer hours at the bakery. Consequently, the bakery job did not cut off the period of measuring her back wages, but her earnings at the bakery were set off against the back pay award. ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 21 (1989).***

❑ When complainant testified at hearing that she earned between $5 and $10 a day in tips, but did not report those earnings on her income tax form for that year, the forum accepted her testimony as a fact since her testimony on other issues was corroborated by documentary evidence, it is common knowledge that waiters earn tips, and respondent forfeited his opportunity to challenge this element by his failure to appear at the hearing. The forum accepted the figure of $7.50, the average of the two figures, as complainant's daily tip income and used that figure to calculate her back pay award. ***----- In the Matter of Richard Niquette, 5 BOLI 53, 62-63 (1986).***

❑ When complainant's tip income could not be computed with absolute precision, the forum determined that difficulty in computing the amount of back pay should not be confused with the right of recovery and does not constitute grounds for denying such compensation. Although any attempt to reconstruct may be difficult, the forum will make its best effort to fashion fair redress at no undue expense to the employer. While it was difficult to determine tip income because it varies from week to week, damages may be awarded even though they cannot be computed with precision. It is sufficient that the forum determines the amount of back pay "as a matter of just and reasonable inference." When complainant was unlawfully denied a position as a waiter in respondent's restaurant, the forum accepted the testimony of a waiter and complainant regarding the number of hours worked each week by waiters at respondent's restaurant and the hourly wage and average tips earned on each shift as evidence of the wages and tips complainant would have earned, had he been hired. ***----- In the Matter of Love's Woodpit Barbeque Restaurant, 3 BOLI 18, 25-26 (1982).***

102.0 BACK BENEFITS

102.1 --- Insurance

❑ Complainant's claim for reimbursement of the amount she expended to reinstate her health insurance failed because she did not establish that she otherwise was entitled to company-provided insurance benefits but for her unlawful discharge. While respondent was liable to employees for any employee contributions that were paid but not used for health insurance coverage, it was not liable for the amount complainant was required to expend to voluntarily reinstate her health insurance. Complainant was only entitled to recover the $186 that she contributed to the premiums after respondent cancelled the coverage, and respondent reimbursed her for that amount before her discharge. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 135 (2005).***

❑ Benefits lost include, but are not limited to, out of pocket expenses for health insurance premiums the complainant incurs as a result of the respondent's unlawful employment practices. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 135 (2005).*** *See also In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 198 (2004), affirmed without opinion, Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).*

❑ The forum awarded complainant $2,585.31, in addition to a back pay award of $22,400, to compensate her for the sums she spent on insurance premiums that would have been available for complainant's use but for Respondent's denial of OFLA leave. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 198 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007);

❑ The forum awarded complainant $135 for one month's unreimbursed medical insurance premium incurred after her constructive discharge. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 175, 191 (1998)***.

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or

App 54 (2000).

❑ The forum awarded complainant $140 for dental expenses incurred after her unlawful discharge that would have been covered by respondent's dental insurance policy, had she not been discharged. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 175-76, 191 (1998)***.

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ Complainant's back pay was the amount he would have earned, had he remained in his position, as shown by the employee who replaced him, plus benefits he would have received that included health and welfare, dental, vacation, and travel. Pension pay was not included, as complainant would not have received those amounts in pay or benefits. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

❑ Out of pocket expenses related to health insurance premiums incurred may be recoverable when alleged by complainant. ***----- In the Matter of the Treplex, Inc., 2 BOLI 221, 227 (1982).***

❑ When respondent paid health insurance premiums for married male employees, including dependent coverage, but did not furnish health insurance for female employees unless their spouse was uninsured, the commissioner awarded the amount of medical expense such insurance would have covered, but for respondent's discriminatory policy, to a female complainant. ***----- In the Matter of West Coast Truck Lines, 2 BOLI 192, 210, 220 (1981).***

Affirmed without opinion, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983).

❑ When a disability policy provided jointly by respondent employer and a union-employer trust excluded pregnancy from the weekly income disability benefits and provided for waiver of premium during payment of other disabilities, the commissioner found that the measure of complainant's damages included the weekly benefits she was denied, as well as three months' self-paid premiums. ***----- In the Matter of Arden-Mayfair, Inc., 2 BOLI 187, 188-89, 191-92 (1981).***

102.2 --- Retirement Plan

❑ Pension contributions lost are also lost earnings. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 187 (1998)***.

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ When complainant was demoted and transferred to a different work location because he reported a health violation to OR-OSHA, the commissioner ordered respondent to reinstate complainant to his former job, to pay his lost wages due to a lower wage rate in the lower job, plus interest on his lost wages, and to pay to complainant's Public Employee's Retirement System account the amount requested by the bargaining agreement, plus interest on the amounts that said sums would have earned in the PERS account as if no reduction had been made. ***----- In the Matter of West Linn School District, 3 JT, 10 BOLI 45, 64-65 (1991).***

❑ When respondent unlawfully terminated complainant, respondent was ordered to reinstate complainant's accounts in respondent's pension and profit sharing plans at the levels and places in the vesting schedule they would have attained, had she been participating therein, including contributions that would have been made by respondent on complainant's behalf. ***----- In the Matter of Mini-Mart Food Stores, Inc., 3 BOLI 262, 286 (1983).***

❑ Complainant's back pay was the amount he would have earned, had he remained in his position, as shown by the employee who replaced him, plus benefits he would have received that included health and welfare, dental, vacation, and travel. Pension pay was not included, as complainant would not have received those amounts in pay or benefits. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

❑ When respondent retroactively appointed complainant to a firefighter position and petitioned for clarification of the commissioner's final order, the commissioner, by addendum to the original final order, specifically enumerated the effect of the order on the complainant's pay, including interim automatic wage increases, vacation, sick leave, pension eligibility and seniority, and suggested that respondent use the addendum as guidance in dealing with other persons who "are in fact situated similarly to complainant." ***----- In the Matter of City of Portland, 2 BOLI 71, 72-73 (1981).***

Reversed, *Civil Service Board of the City of Portland v. Bureau of Labor and Industries,* 61 Or App 70, 655 P2d 1080 (1982), reversed, final order reinstated, 298 Or 307, 692 P2d 569 (1984).

❑ When a female complainant intended to remain employed for at least 10 years, but was unlawfully discharged at 8½ years because of her sex and objections to unequal pay, she was awarded pension rights as if she had completed 10 years at the rate of pay of her male comparator. ***----- In the Matter of Terminal Ice and Cold Storage Company, Inc., 1 BOLI 151, 158 (1978).***

102.3 --- Vacation

❑ When an employer is found to have committed an unlawful employment practice, the commissioner may order the employer to pay the complainant back pay, including benefits, as a remedy. The purpose is to make complainants whole for injuries suffered because of unlawful employment discrimination. The general rule is that the compensation shall be equal to the injury. Accordingly, the equitable principle of set-off applies. This principle is codified in federal law and provides: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against

shall operate to reduce the back pay otherwise allowable." In this case, vacation leave benefits that complainant accrued and either used or was compensated for while employed by UOHSC were properly applied as a set-off against the vacation leave credit for which respondent was liable. ***----- In the Matter of City of Portland, 6 BOLI 203, 210 (1987).***

❑ When respondent retroactively appointed complainant to a firefighter position and petitioned for clarification of the commissioner's final order, the commissioner, by addendum to the original final order, specifically enumerated the effect of the order on the complainant's pay, including interim automatic wage increases, vacation, sick leave, pension eligibility and seniority, and suggested that respondent use the addendum as guidance in dealing with other persons who "are in fact situated similarly to complainant." ***----- In the Matter of City of Portland, 2 BOLI 71, 72-73 (1981).***

Reversed, *Civil Service Board of the City of Portland v. Bureau of Labor and Industries,* 61 Or App 70, 655 P2d 1080 (1982), reversed, final order reinstated, 298 Or 307, 692 P2d 569 (1984).

102.4 --- Other

❑ When complainant credibly testified that while employed he regularly enjoyed the use of an employee discount card, and When the participants stipulated that complainant made purchases totaling $1,503.30 using his employee discount card over an eight month period and that he saved an average of $21.50 per month on household items during his employment, the forum found the employee discount card was a fringe benefit that complainant lost as a result of respondent's unlawful employment practices. The forum concluded that complainant would have saved $623.50 had he continued in respondent's employ and awarded that amount as benefits lost. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 65 (2003).***

❑ When complainant, age 67, expected to work for two additional years as an apartment manager at the time respondent discharged her, the commissioner ordered respondent to pay her two years' lost wages and rental and utility expenses. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 292 (1997).***

❑ Complainant sought and was denied the use of sick leave benefits for parental leave. In order to eliminate the effects of an unlawful employment practice, the commissioner found that the measure of economic damage was the value of the amount of sick leave requested, less the value of paid leave actually taken, together with the simultaneous crediting and debiting of the appropriate benefit accounts. To the extent it is inconsistent with this order, the commissioner overruled *In the Matter of In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92 (1992).* ***----- In the Matter of Alaska Airlines, Inc., 13 BOLI 47, 55 (1994).***

Affirmed without opinion, *Alaska Airlines, Inc. v. Bureau of Labor and Industries*, 137 Or App 350, 904 P2d 660 (1995), rev den 322 Or 644, 912 P2d 375 (1996).

❑ When respondent denied complainant's request to use accrued sick leave during approximately three weeks of complainant's six week parental leave, and complainant took those three weeks of the leave unpaid, the forum awarded complainant back wages in the value of the three weeks of accrued sick leave denied him and ordered respondent to deduct sufficient hours to offset the value of the back wages awarded from his accrued sick leave. ***----- In the Matter of Douglas County, 11 BOLI 1, 3, 7-8 (1992).***

❑ When respondent unlawfully terminated complainant, respondent was ordered to reinstate complainant's accounts in respondent's pension and profit sharing plans at the levels and places in the vesting schedule they would have attained, had she been participating therein, including contributions that would have been made by respondent on complainant's behalf. ***----- In the Matter of Mini-Mart Food Stores, Inc., 3 BOLI 262, 286 (1983).***

❑ Complainant's back pay was the amount he would have earned, had he remained in his position, as shown by the employee who replaced him, plus benefits he would have received that included health and welfare, dental, vacation, and travel. Pension pay was not included, as complainant would not have received those amounts in pay or benefits. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

❑ When respondent was found to have discriminated against complainant, a female corrections officer, by selecting a male officer for promotion to lieutenant, back pay damages were computed based on the minimum starting salary for that position, plus all non-discretionary raises, as well as the seniority and fringe benefits complainant would have earned, had she been appointed on the day the male officer was selected. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 71 (1982).***

❑ When respondent had a policy of paid sick leave, respondent was ordered to pay complainant for sick leave denied to her as part of the back pay award. ***----- In the Matter of Polk County E.S.D., 1 BOLI 280, 288 (1980).***

Affirmed without opinion, *Donaldson v. Polk County ESD,* 50 Or App 611, 625 P2d 1390 (1981).

103.0 CEASE AND DESIST ORDERS (*see also* 2.1)

103.1 --- Generally

❑ The commissioner of BOLI is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 97 (2001).***

❑ A cease and desist order was of particular significance when respondent's practices concerning inquiries regarding job applicant's disabilities and ability to perform functions that were not job-related, at the time of complainant's application for employment with respondent, violated ORS 659.436 and 659.447(1) with respect to every job applicant, and ORS 659.436(2)(c)

and (g) with respect to every disabled job applicant. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 97 (2001).***

❑ After hearing, the commissioner is authorized by ORS 659.010 and 659.060 to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. Such effects include any economic respondent non-economic damage suffered by a complainant because of the practice. The statutes and rules on which a contested case proceeding is based provide for redress of the complainant's grievance through administrative procedures. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 213-14 (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ When complainant was demoted and transferred to a different work location because he reported a health violation to OR-OSHA, the commissioner ordered respondent to reinstate complainant to his former job, to pay his lost wages due to a lower wage rate in the lower job, plus interest on his lost wages, and to pay to complainant's Public Employee's Retirement System account the amount requested by the bargaining agreement, plus interest on the amounts that said sums would have earned in the PERS account as if no reduction had been made. ***----- In the Matter of West Linn School District, 3 JT, 10 BOLI 45, 64-65 (1991).***

❑ Pursuant to ORS 659.060 and by the terms of ORS 659.010, the commissioner has the authority to issue an appropriate cease and desist order requiring respondent to refrain from any action that would jeopardize the rights of those persons protected by ORS 659.400 to 659.435 or to perform any act or series of acts reasonably calculated to carry out the purposes of these statutes. The commissioner has the authority to eliminate the effects of the unlawful practices and protect the rights of others similarly situated. ***----- In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 65 (1987).***

Affirmed, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

❑ When an employer is found to have committed an unlawful employment practice, the commissioner may order the employer to pay the complainant back pay, including benefits, as a remedy. ***----- In the Matter of City of Portland, 6 BOLI 203, 210 (1987).***

❑ When respondent argued that the commissioner did not have the authority to award money damages for a violation of ORS 659.415, the commissioner stated that the authority under ORS 659.060(3) to issue a cease and desist order described in ORS 659.060(3) was incorporated into ORS 659.435 and was therefore applicable to enforce the rights described in ORS 659.415. ***----- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 270 (1980).***

Reversed on the ground that statutes did not specify failure to reinstate as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries*, 49 Or App 245, 619 P2d 663 (1980).

❑ Discrimination based on race, religion, color, national origin, sex or age is inherently class discrimination even though individual rights are involved. Class remedies are authorized although only one individual has filed a complaint. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17-18 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ When respondent school district required a pregnant probationary teacher to resign because of pregnancy, the commissioner ordered respondent to establish a liaison with the agency to aid in the implementation of the remedies required, and ordered wide-ranging class remedies to protect others similarly situated to complainant. ***----- In the Matter of School District No. 1, 1 BOLI 1, 21-24 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ When a respondent has been found to have engaged in an unlawful practice, the commissioner is required to issue an appropriate cease and desist order. An appropriate cease and desist order must: (a) take into account the subject matter; (b) take into account the need to supervise compliance; (c) eliminate the effects of any unlawful practice found; (d) protect the rights of the complainant; (e) protect the rights of other similarly situated persons; and (f) carry out the purpose of ORS 659.010 to 659.110. Those purpose are: (1) to encourage the fullest utilization of available manpower by removing arbitrary standards; (2) to insure human dignity; (3) to protect health, safety and morals of all people from consequences of intergroup hostility, tensions and practices of any kind; and (4) to provide an adequate remedy for persons aggrieved by the acts of discrimination involved. ***----- In the Matter of School District No. 1, 1 BOLI 1, 18-19 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

103.2 --- Cessation of Unlawful Practice

❑ In an OFLA case, the commissioner ordered respondent to cease and desist from denying family leave to any employee who was entitled to take family leave under the provisions of OFLA and to cease and desist from retaliating against any employee based upon

the employee's use OFLA. ***----- In the Matter of Gordy's Truck Stop, 26 BOLI 234, 254 (2005).***

❑ In a public accommodation disability case, the commissioner ordered respondent to cease and desist from making any distinction, discrimination, or restriction against any customer or patron because the individual is a disabled person. ***----- In the Matter of C. C. Slaughters Ltd., 26 BOLI 186, 197 (2005).***

❑ In an OSEA case, the commissioner ordered respondent to cease and desist from discriminating against any employee based upon the employee's opposition to any practice forbidden under or related to the Oregon Safe Employment Act. ***----- In the Matter of Rogue Valley Fire Protection, LLC, 26 BOLI 172, 186 (2005).***

❑ In a whistleblower case, the commissioner ordered respondent to cease and desist from discriminating against any employee in tenure of employment based upon the employee having reported in good faith criminal activity under the provisions of ORS 659A.230. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 136 (2005).***

❑ In a sex harassment case, the commissioner ordered respondent to cease and desist from discriminating against any employee because of the employee's gender. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 292 (2004).*** *See also In the Matter of State Adjustment, Inc., 23 BOLI 19, 34 (2002), amended at 23 BOLI 67 (2002).*

❑ In an OFLA case, the commissioner ordered respondent to cease and desist from discriminating against any employee in tenure of employment based upon the employee having invoked or utilized Oregon Family Leave Act provisions. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 217,244 (2004).*** *See also In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 200 (2004), affirmed without opinion, Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).*

❑ In an injured worker retaliation case, the commissioner ordered respondent to cease and desist from discriminating against any employee based upon the employee's application for benefits or invocation or utilization of the procedures provided for in ORS chapter 656k. ***----- In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 90 (2004).***

❑ In an OFLA case, the commissioner ordered respondent to cease and desist from discriminating against any employee because of the employee's use of the Oregon Family Leave Act. ***----- In the Matter of Entrada Lodge, Inc., 24 BOLI 125 (2003).***

❑ In an injured worker retaliation case, the commissioner ordered respondent to cease and desist from discriminating against any employee based upon the employee's having filed for benefits or invoked or utilized Oregon's workers' compensation laws. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 68 (2002).***

❑ When the commissioner found that respondent had discharged two complainants in a whistleblower case, the commissioner ordered respondent to cease and desist from discriminating against any employee based upon the employee's good faith reporting of criminal activity by any person. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 135 (2002).***

❑ When respondent's practices concerning inquiries regarding job applicant's disabilities and ability to perform functions that were not job-related violated ORS 659.436 and 659.447(1) with respect to every job applicant, and ORS 659.436(2)(c) and (g) with respect to every disabled job applicant, the forum crafted a cease and desist order designed to constrain respondent from these practices in the future. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 97-98 (2001).***

❑ In a disability case, the forum crafted a cease and desist order designed to constrain respondent from its unlawful practices that prohibited respondent from: a) making inquiries of any job applicant as to whether the applicant is a disabled person; b) making inquiries of any job applicant as to the nature or severity of any disability of the applicant; c) making inquiries of any disabled job applicant as to the applicant's ability to perform functions that are not job-related; and d) for the purposes of ORS 659.447 and 659.448, regarding any applicant as an employee until such time as such applicant is given a job assignment with a particular client. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 97-98 (2001).***

❑ In a retaliation case, the commissioner ordered respondent to cease and desist from discriminating against any employee based upon opposition to any practices forbidden by ORS 659.030. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 36 (2000).***

> Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ In a disability case, the commissioner ordered respondent to cease and desist from discriminating against any employee based upon the employee's disability and cease and desist from requiring a medical examination or health certificate at the employee's expense as a condition of continued employment. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 218 (2000).***

> Affirmed, *Barrett Business Services, Inc. v. Bureau of Labor and Industries,* 173 Or App 444, 21 p3d 1116 (2001).

❑ In an age discrimination case, the commissioner ordered respondent to cease and desist from discriminating against any applicant for employment based upon the employee's age. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 223 (2000).***

❑ In an injured worker retaliation case, the commissioner ordered respondent to cease and desist from discriminating against any employee based on the

employee's utilization or invocation of ORS chapter 656. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 142 (2000).***

❑ In a housing disability case, the commissioner ordered respondent to cease and desist from making restrictions against any resident because of that resident's disabilities. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 97 (1999).***

❑ In a housing disability case, the commissioner ordered respondent to post in a conspicuous place in a shared living area copies of the current versions of the Residents' Bill of Rights printed in at least 12 point type, to be replaced with the new rules whenever those rules might be amended, together with a notice that any person who believes that he or she has been discriminated against may notify the Bureau of Labor and Industries. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 97 (1999).***

❑ In an injured worker retaliation and disability case, the commissioner ordered respondent to cease and desist from discriminating against any employee in terms and conditions and tenure of employment based upon the employee's having filed for benefits of invoked or utilized the Oregon workers' compensation law, or upon the employee's disability, and cease and desist from requiring a medical examination or health certificate at the employee's expense as a condition of continued employment. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 82 (1999).***

❑ In an injured worker retaliation case, the commissioner ordered respondent to (1) cease and desist from discriminating against any current or future employee because the employee has applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656 or ORS 659.400 to 659.460 or has given testimony under the provisions of such sections; and (2) post in a conspicuous place on the premises of respondent's facility, a copy of ORS 659.410(1), together with a notice that anybody who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries. ***----- In the Matter of LTM, Incorporated, 17 BOLI 226, 240-41 (1998).***

❑ In an OSHA retaliation case, the commissioner ordered respondent to (1) cease and desist from discriminating against any employee because that employee has reported or opposed unsafe practices in the work place; and (2) post in a conspicuous place on the premises of respondent's facility, a copy of ORS 654.062, together with a notice that anybody who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries. ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 212 91998).***

❑ In a disability case, the commissioner ordered respondent to cease and desist from discriminating against any employee based upon the employee's status as a disabled person. ***----- In the Matter of Body Imaging, Inc., 17 BOLI 162, 191 (1998).***

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ In a sex harassment case, the commissioner ordered respondent to cease and desist from discriminating against any employee based on the employee's sex. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 97 (1998).***

❑ In an injured worker retaliation case, the commissioner ordered respondent to cease and desist from discriminating against any current or future employee because the employee has applied for benefits or invoked or utilized Oregon's workers' compensation procedures. ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 14 (1998).***

Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

❑ In a race/public accommodation case, the commissioner ordered respondent to cease and desist from engaging in practices that discourage or deny persons the full and equal accommodations, advantages, facilities, and privileges of public accommodation by discriminating or imposing distinctions and restrictions based upon race. ***----- In the Matter of Westwind Group of Oregon, Inc., 17 BOLI 46, 54 (1998).***

❑ When respondent refused to hire complainant because of his disability of deafness, the commissioner ordered respondent to adopt a non-discriminatory written policy and practice regarding employees and applicants with disabilities and the employer's duty to reasonably accommodate those employees and applicants. The content of the policy was to be preapproved by the Civil Rights Division. ***----- In the Matter of WS, Inc., 13 BOLI 64, 93 (1994).***

❑ When respondent discharged complainant because she was pregnant, the commissioner ordered respondent to "Develop for and disseminate to all Oregon employees a written pregnancy policy consistent with Oregon statutes regarding pregnancy, childbirth and related medical conditions or occurrences." ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 67 (1990).***

❑ When respondent was found to have racially oriented signs in violation of ORS 659.037 and 30.670, the commissioner issued a cease and desist order requiring respondent to remove all such signs and to refrain from the "display of any sign, photograph or physical object that communicates a distinction based on race." Respondent was further required to post a readable copy of ORS 30.670 and 659.045 and a notice indicating that anyone who believes they have been discriminated against at respondent's premises should notify the agency. ***----- In the Matter of The Pub, 6 BOLI 270, 287 (1987).***

❑ When respondent was found to have discriminated against complainant for filing a complaint with the Civil Rights Division, respondent was ordered to cease and desist discriminating on that basis. ***----- In the Matter of***

City of Salem, 4 BOLI 1, 47 (1983).

❑ Respondents, the owners of a restaurant, were found to have maintained a discriminatory policy of hiring only male evening waiters. The forum ordered respondent to do the following: (1) cease and desist from discriminating on the basis of sex in hiring and promotions; (2) within 60 days, submit a plan to the commissioner 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"; and (3) within one year, submit evidence of the implementation of said policy change, including a list of applicants and copies of advertisements. ***----- In the Matter of The Riverhouse of Bend, 3 BOLI 171, 180 (1982).***

❑ When respondent was found to have discriminated against complainant based on national origin, the forum ordered respondent to cease and desist from discriminating against its employees based on national origin, race, and color. ***----- In the Matter of Clackamas County, 3 BOLI 164, 171 (1981).***

❑ When respondent was found to have racially harassed complainant, the forum ordered respondent to cease and desist from discriminating based on race or color. ***----- In the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 134 (1982).***

> Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ The forum ordered respondent to cease and desist from discriminating in compensation against any employee based on sex when respondent was found to have discriminated against complainant based on sex when complainant was paid less as a department head than male department heads for a job in which complainant performed substantially equal work, requiring substantially equal skill, effort, and responsibility. ***-----*** In ***the Matter of City of Cannon Beach, 3 BOLI 115, 123 (1982).***

❑ When respondent was found to have discriminated against complainant in violation of ORS 659.030(1)(d) because complainant filed a complaint of discrimination, the forum ordered respondent to cease and desist from discriminating on that basis. ***----- In the Matter of Boost Program, 3 BOLI 72, 84 (1982).***

❑ When respondent was found to have a discriminatory policy of not permitting female employees the work with male prisoners, the forum ordered respondent to cease and desist from discriminating against employees based on sex. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 72 (1982).***

❑ Respondent was found to have discriminated against a female complainant based on her sex by advising her that the advertised position for which she sought to apply was a "man's job" and that it would do "no good" to apply. Although the forum did not award monetary damages, it issued an order directing respondent to cease and desist from discriminating based on sex in all aspects of its employment practices. ***----- In the Matter of McCoy Oil Company, 3 BOLI 9, 15 (1982).***

❑ When respondent was found to have discharged complainant because he applied for workers' compensation benefits and the evidence established that respondent's supervisor had stated that such claims were resulting in high costs to respondent and that others would be discharged for filing claims, the forum ordered respondent to cease and desist from discharging any employee because that employee had applied for workers' compensation benefits or invoked or utilized the procedures provided in ORS 656.001 to 656.794 and ORS 656.802 to 656.824. ***----- In the Matter of Spear Beverage Company, 2 BOLI 240, 241, 246 (1982).***

❑ When respondent was found to have racially harassed complainant, the forum ordered respondent to cease and desist from any action or inaction that might allow racial harassment to occur in an employment setting over which respondent had control. ***----- In the Matter of Roderick Enterprises, Inc., 2 BOLI 14, 21 (1980).***

❑ When respondent was found in violation of ORS 659.030 because of its preference of hiring females, the commissioner ordered respondent to take whatever steps were necessary to insure that potential applicants for the position of salesperson were not discouraged from applying by an sex-related standard that did not constitute a bona fide occupational requirement. ***----- In the Matter of Westland Investment Company, 2 BOLI 1, 5 (1980).***

❑ When respondent unlawfully refused to hire complainant because of his race, the forum ordered respondent to cease and desist from "barring persons from employment on the basis of their race and color." ***----- In the Matter of Sierra Tile Manufacturing, Inc., 1 BOLI 291, 294 (1980).***

❑ Based on its violation of ORS 659.415, respondent was ordered to take all appropriate steps to reinstate compensably injured workers in accordance with that statute. ***----- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 272 (1980).***

> Reversed on the ground that statutes did not specify failure to reinstatement as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980).

❑ When respondent's policy of not hiring dispatcher applicants who had passed their 36th birthday was found unlawful, the forum enjoined respondent from setting and using any maximum age limit for employment as a dispatcher and was encouraged to pursue an alternative means of selecting potential employees. ***----- In the Matter of Clackamas County Fire District No. 1, 1 BOLI 244, 259 (1980).***

> Affirmed, *Clackamas Fire Protection Dist. No. 1 v. Oregon Bureau of Labor and Industries*, 50 Or App 337, 624 P2d 141, rev den 291 Or 9, 631 P2d 340 (1981).

❑ When respondent was found to have discriminated against complainant on the basis of race by refusing her entry to a place of public accommodation, the commissioner ordered respondent to post a copy of ORS 30.670, 659.045(1), and 659.010(14) for 90 days with a notice that any person who believes they have been discriminated against should notify to Bureau of Labor and Industries. The notice was to be posted in every separate establishment maintained by respondent in Oregon in a location within or outside each establishment accessible to and frequented by each and every person seeking admission and each and every employee or agent who regulates admission. ***----- In the Matter of Joseph Gaudry, 1 BOLI 235, 243 (1980).***

Affirmed in part, reversed and remanded as to posting in other establishments by respondent, *Gaudry v. Bureau of Labor and Industries,* 48 Or App 589, 617 P2d 668 (1980).

❑ When respondent discharged complainant because he opposed a safety hazard, the commissioner ordered respondent to take whatever steps were necessary to "insure workers opposing safety hazards in the future shall not have their rights to work in any way prejudiced by such opposition." ***----- In the Matter of Frontier Construction Company, 1 BOLI 224, 230 (1979).***

❑ When respondent was found to have maintained a discriminatory height requirement policy, the forum ordered respondent to cease and desist from the use of gender-based height standards not justified by the existence of a BFOR reasonably necessary to the normal operation of respondent's business. ***----- In the Matter of Eastern Air Lines, Inc., 1 BOLI 193, 197 (1979).***

❑ When respondents violated ORS 659.030(1), the commissioner enjoined them "from engaging in any of the acts or practices hereinafter described * * *: (a) Printing or circulating or causing to be printed or circulated any statement, advertisement or publication, or to use any form of application or to make any inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination, unless based on a bona fide occupational qualification; (b) Aiding, abetting, inciting, compelling or coercing the doing of any of the acts forbidden under ORS 659.010 to 659.110, or to attempt to do so; (c) Limiting, segregating, or classifying respondents' employees in any way which would deprive or tend to deprive them of equality in the terms, conditions, privileges, and opportunities of their employment because of race and color; (d) Engaging in any acts or practices which perpetuate or tend to perpetuate the discriminatory effects of practices which in the past may have had the effect of discriminating against individuals because of their race and color." ***----- In the Matter of N. H. Kneisel, Inc., 1 BOLI 28, 39-40 (1976).***

Compliance amended, 1 BOLI 51 (1976).

❑ In a public accommodation case, the commissioner required respondent, a restaurant/lounge, to "formalize and deliver to each corporate employee, officer, agent, and person acting on behalf of said corporation, a policy, setting forth in sufficient detail as to render it unambiguous, whereby identification checking and all other services and functions offered and performed on the Club premises shall henceforth be without regard to and without disparate effect upon persons because of their race and color; a certified copy of such formal policy shall, within fifteen days of the date of a final order, be delivered to the Commissioner of Labor or such other person as he shall designate to accept it." ***----- In the Matter of Nehia, Inc., 1 BOLI 24 (Exhibit "A") (1975).***

❑ When three respondents – a lounge, a security company that provided a guard to check age identification at the lounge, and the guard – violated ORS 659.010(14) and/or ORS 659.037, the commissioner enjoined the respondents, "their agents, officers, employees and successors in interest and all persons in active concert or participation with any of them * * * from engaging in any of the unlawful practices found hereinabove, which practices have the purpose and/or effect of discriminating against persons because of their race and color or because of the race and color of any other person with whom they associate." ***----- In the Matter of Nehia, Inc., 1 BOLI 24 (1975).***

❑ When respondent required a pregnant probationary teacher to resign because of her pregnancy, the commissioner enjoined respondent, its board, agents, officers, employees, successors, and others from engaging in any acts or practices that had the purpose or effect of discriminating against an individual because of sex, including printing and circulating certain statements, discriminating against a person who opposed an unlawful practice based on sex, aiding or abetting any unlawful practice, limiting or classifying any employee in any way that would deprive the person of equality in the terms, privileges and opportunities of employment, and engaging in any acts that perpetuate the discriminatory effects of past discriminatory practices based on sex. ***----- In the Matter of School District No. 1, 1 BOLI 1, 20-21 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

104.0 CORRECTION OF RECORDS

❑ Complainant sought and was denied the use of sick leave benefits for parental leave. In order to eliminate the effects of an unlawful employment practice, the commissioner found that the measure of economic damage was the value of the amount of sick leave requested, less the value of paid leave actually taken, together with the simultaneous crediting and debiting of the appropriate benefit accounts. To the extent it was inconsistent with this order, the commissioner overruled *In the Matter of In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92 (1992).* ***----- In the Matter of Alaska Airlines, Inc., 13 BOLI 47, 55 (1994).***

Affirmed without opinion*, Alaska Airlines,*

Inc. v. Bureau of Labor and Industries, 137 Or App 350, 904 P2d 660 (1995), rev den 322 Or 644, 912 P2d 375 (1996).

❑ When respondent denied complainant's request to use accrued sick leave during approximately three weeks of complainant's six week parental leave, and complainant took those three weeks of the leave unpaid, the forum awarded complainant back wages in the value of the three weeks of accrued sick leave denied him and ordered respondent to deduct sufficient hours to offset the value of the back wages awarded from his accrued sick leave. ***----- In the Matter of Douglas County, 11 BOLI 1, 3, 7-8 (1992).***

❑ When respondent denied complainant the use of accrued sick leave during the period of his parental leave because use of accrued leave for that purpose contradicted respondent's employment policies, and complainant used accrued vacation leave during his parental leave so that the entire leave was paid, the commissioner ordered respondent to deduct 172 hours from complainant's accrued sick leave and to add 172 hours to his accrued vacation leave. ***----- In the Matter of Washington County, 10 BOLI 147, 155 (1992).***

❑ When respondent denied complainant the use of accrued sick leave during the period of his parental leave, causing complainant to shorten his leave and take part of the leave unpaid, the commissioner ordered respondent to pay complainant $5,861, the value of the nine weeks and two days of accrued sick leave that should have been paid to complainant in connection with his parental leave. The commissioner also ordered respondent to deduct a total of 376 hours from complainant's accrued leave. ***----- In the Matter of Portland General Electric Company, 7 BOLI 253, 272 (1988).***

Affirmed, *Portland General Electric Company v. Bureau of Labor and Industries, 116* Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

❑ When complainant was demoted and transferred to a different work location because he reported a health violation to OR-OSHA, the commissioner ordered respondent to reinstate complainant his former job and to place a copy of the final order in his personnel file. ***---- In the Matter of West Linn School District, 3 JT, 10 BOLI 45, 65 (1991).***

❑ Complainant received job references from respondent that referred to his discharge as insubordination. The forum determined that it was respondent's unlawful employment practice that led to complainant's bad attitude and that complainant was not discharged for his attitude alone, but rather for his objection to respondent's discriminatory practices as they applied to him. The forum ordered respondent to purge and expunge complainant's employment record of statements and documents indicating that complainant was terminated for insubordination and to respond to all future requests for job references with a good faith and factually accurate appraisal of complainant's performance and to indicate complainant was terminated due to his objection to a sexually discriminatory policy implemented by respondent in violation of ORS 659.030(1)(d). ***----- In the Matter of Lane County Youth Care Center, Inc., 2 BOLI 246, 253, 257 (1982).***

❑ When respondent was found to have discriminated against complainant based on his race, the commissioner ordered respondent to make a copy of the commissioner's final order a permanent part of complainant's personnel file, and to furnish a copy to anyone making inquiries concerning complainant's employment or performance with respondent. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 94 (1978).***

Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).

Order on remand, 1 BOLI 179 (1979).

105.0 EXPENSES

❑ The evidence introduced at hearing showed complainant paid $22 for a commercial pesticide applicator recertification course in December 2003, after his unlawful demotion, and $145 for his certified arborist recertification in 2005. His testimony that he paid $145 for his certified arborist recertification in 2004 was not refuted. Also, his testimony that he paid $50 in 2004 and $50 in 2005 to renew his commercial pesticide applicator license was not refuted. However, the agency presented no evidence that showed complainant's expenses were directly attributable to the unlawful employment practice found, *i.e.*, complainant's demotion. Absent evidence showing that respondent's actions caused complainant to incur those out of pocket expenses, the forum concluded that complainant's expenses were not recoverable from respondent. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 252 (2007).***

❑ This forum has consistently held that economic loss that is directly attributable to an unlawful practice is recoverable from a respondent as a means to eliminate the effects of any unlawful practice found, including actual expenses. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 251 (2007).*** *See also In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 242 (2004).*

❑ The agency sought to recover the amount of debt complainant happened to incur while employed with respondent that complainant had difficulty paying off after her discharge. The forum declined to order that respondent reimburse complainant for these expenses because the evidence did not show that respondent's actions caused complainant to incur those debts. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 242-43 (2004).***

❑ The forum awarded complainant the travel expenses he incurred in obtaining alternative employment after respondent discriminated against him. ***---- In the Matter of Barrett Business Services, Inc., 20* BOLI 189, *215 (2000).***

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or

App 444 (2001).

❑ Economic loss to a complainant that is directly attributable to an unlawful employment practice may be recovered from respondents as a means to eliminate the effects of any unlawful practice found. This includes actual expenses and mental suffering damages from unlawful practices involving real property under ORS

❑ The commissioner awarded one month's rent differential when evidence showed that apartments comparable in size and cost to complainant's apartment were unavailable when complainant was evicted and complainant stopped her search for a comparable apartment after she found a new, more costly apartment. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 250 (1990).***

❑ When complainant, the owner of a mobile home in respondent's mobile home park, attempted to sell his mobile home for 10 months after respondent's discriminatory actions caused a pending sale to fail, complainant was awarded $2,281.31 in expenses connected with the maintenance and marketing of his home and $500 that represented the difference between what complainant sold the mobile home for and what the original buyer who was refused by respondent would have paid for it. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 165 (1987).***

Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

❑ When respondent, the owner of a mobile home park, prohibited complainant from purchasing a mobile home in the park, the agency requested damages reflecting the different between what complainant would have paid for the mobile home and what complainant paid for a permanent structure home that he purchased instead. However, the agency presented no evidence regarding comparable available housing, mobile or permanent, from which a calculation could be made. The forum denied the requested award, stating that the mobile home was in no way comparable to the permanent structure. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 165 (1987).***

Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

❑ When complainant incurred mileage expenses from driving to find new employment, the commissioner awarded complainant a total of $1,578.10 for mileage, representing the IRS business mileage allowance of $.17 per mile for 9,283 miles. ***----- In the Matter of Day Trucking, Inc., 2 BOLI 83, 87-88 (1981).***

❑ Complainant stated that he expended approximately $4 per meal for 42 meals while traveling during his search for employment and claimed he made 80 long distance calls at $.70 per call, but the agency offered no records, such as receipts and phone bills, to support complainant's statements. The commissioner found that complainant was not entitled to reimbursement based on a failure to offer specific proof to support his claim. ***----- In the Matter of Day Trucking, Inc., 2 BOLI 83, 87-88***

659.033. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 250 (1990).***

❑ The actual expense of moving is recoverable when the move was caused by an unlawful act involving real property under ORS 659.033. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 250 (1990).***

(1981).

❑ When complainant would have quit even if he not been unlawfully terminated, the commissioner refused any award for expenses incurred in complainant's relocation and search for employment. ***----- In the Matter of Acco Contractors, Inc., 1 BOLI 260, 265 (1980).***

❑ When respondent unlawfully discriminated against complainant based on her sex, respondent was ordered to reimburse complainant for out-of-pocket expenses incurrent related to her relocation to obtain work, including air fare, moving van, and motel accommodations. ***----- In the Matter of Bend Millworks Company, 1 BOLI 214, 216 (1979).***

❑ When an unlawfully discharged complainant incurred expense for the services of an employment agency in obtaining subsequent employment, the employment agency's fee was included in the final order as an item of economic remedy owed to complainant by respondent. ***----- In the Matter of Midas Muffler Shops, 1 BOLI 111, 118-19, 121 (1978).***

106.0 FRONT PAY

❑ When complainant, age 67, expected to work for two additional years as an apartment manager at the time respondent discharged her, the commissioner ordered respondent to pay her two years' lost wages and rental and utility expenses. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 292 (1997).***

❑ Complainant was not entitled to reinstatement or front pay when he obtained alternate employment and then voluntarily left that employment. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 310 (1985).***

❑ Front pay represents the continued accrual of damages after the record of the case closes. Front pay is calculated on the same general basis as back pay. While such calculate must necessarily be less exact, it cannot be purely speculative. To limit the speculative nature of an award, the forum decided that front pay should cease upon reinstatement or a date certain. The forum must use evidence on the record to determine what complainant's actual future earnings would be, had respondent continued to employ her, assuming she used reasonable diligence in finding employment. This calculation is based on the salary of persons performing complainant's job, including bonuses, and is reduced by any actual earnings of complainant. ***----- In the Matter of Mini-Mart Food Stores, Inc., 3 BOLI 262, 283-84 (1983).***

❑ When respondent discriminated in hiring on the basis of age, each complainant was awarded back pay in an amount representing the difference between actual income and the starting salary of the position sought,

plus incremental increases he would have earned in the position, until his actual income exceeded that which he would have earned with respondent. ***----- In the Matter of Clackamas County Fire District No. 1, 1 BOLI 244, 251-52 (1980).***

Affirmed, *Clackamas Fire Protection Dist. No. 1 v. Oregon Bureau of Labor and Industries*, 50 Or App 337, 624 P2d 141, rev den 291 Or 9, 631 P2d 340 (1981).

❑ When respondent was ordered to offer the next available position to complainant as part of the remedy for respondent's unlawful employment practice, respondent was also liable for any wage loss, computed in the same manner as back wages, for the period between the date of the final order and the date respondent offered complainant the next available position. ***----- In the Matter of Montgomery Ward and Company, Inc., 1 BOLI 62, 68 (1976).***

Reversed, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, reversed and remanded, 280 Or 163, 570 P2d 76 (1977).

Order on remand 1 BOLI 100 (1978).

Affirmed as modified (removing general damages as unsupported), *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979).

107.0 INTEREST

❑ The forum denied respondent's exception that there was no legal basis for computing accrued interest on complainant's wage loss. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 216 (2007).***

Appeal pending.

❑ Based on respondent's exception, the final order revised the administrative law judge's proposed order that assessed interest on the entire amount of lost wages from the commencement of the period in which wages were lost to award lost wages with interest calculated beginning the first date of the hearing. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 244 (2004).***

❑ When complainant was demoted and transferred to a different work location because he reported a health violation to OR-OSHA, the commissioner ordered respondent to reinstate complainant to his former job, to pay his lost wages due to a lower wage rate in the lower job, plus interest on his lost wages, and to pay to complainant's Public Employee's Retirement System account the amount requested by the bargaining agreement, plus interest on the amounts that said sums would have earned in the PERS account as if no reduction had been made. ***----- In the Matter of West Linn School District, 3 JT, 10 BOLI 45, 64-65 (1991).***

❑ When respondent tendered the full amount of complainant's wage loss, interest thereon to the date of payment, and the amount recommended for mental distress damages in the hearings referee's proposed order prior to the final order, the commissioner's final order confirmed the proposed awards and acknowledged that payment and interest ceased to accrue as of the date of payment. ***----- In the Matter of William Kirby, 9 BOLI 258, 261, 281 (1991).***

❑ When the agency's specific charges alleged a wage loss of $6,000, and this figure was the only one respondent had notice of before defaulting, the complainant's recovery was limited to that, even if evidence at hearing and resulting calculations showed a higher figure. Pre-order interest may be calculated for those portions of the lost wages that should have been paid, but for the unlawful discharge, up to that limit. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 204 (1991).***

❑ When evidence shows earnings on an annual basis, prehearing interest can only accrue on them after they are indisputably due, that is, at the end of the annual period. ***----- In the Matter of City of Umatilla, 9 BOLI 91, 105 (1990).***

Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ When there was no evidence of pay periods or paydays, the commissioner awarded prejudgment interest on the net amount of complainant's back pay from the date that the total amount would have been paid. ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 66 (1990).***

❑ When no evidence was produced concerning the frequency of paydays from which to compute interest on each paycheck due from respondent, interest on back pay was computed to run from the end of the under-employed period – when complainant found employment equivalent to his employment with respondent. ***----- In the Matter of Community First Building Maintenance, 9 BOLI 1, 5 (1990).***

❑ The commissioner's practice in civil rights cases is to compute and compound interest annually at the legal rate on an award of lost wages, from the date of respondent's unlawful practice to the date respondent pays the award. In *Ogden v. Bureau of Labor and Industries,* 299 Or 98 (1985), the Oregon Supreme Court determined that interest may only be assessed on those lost wages that have actually accrued as of the start of each computation period. ***----- In the Matter of Lucille's Hair Care, 5 BOLI 13, 30-31 (1985).***

Order on remand of *In the Matter of Lucille's Hair Care,* 3 BOLI 286, which was modified as to wage loss and interest in *Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest, *Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).

❑ The purpose of back pay is to make the complainant whole for the monetary injuries 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 effect of not having had use of the back pay since it accrued. ***----- In the Matter of C & V, Inc., 3 BOLI 152, 163 (1982).*** *See also In the Matter*

of City of Portland, 2 BOLI 110, 142 (1981), reversed on back pay, affirmed on retaliation, City of Portland v. Bureau of Labor and Industries, 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

❑ When the agency and respondent stipulated to the amount of damages to be paid to complainant if liability was established, the forum accepted the stipulation, but awarded interest on the back pay award to the date respondent paid the total owed. ***----- In the Matter of City of Cannon Beach, 3 BOLI 115, 123 (1982).***

❑ When respondent was found to have discriminated against complainant on the basis of her sex, respondent was ordered to meet with the assistant attorney general who represented the agency to determine the exact amount of back pay owed to complainant and to deliver a check to the agency in that amount, together with interest. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 71-72 (1982).***

108.0 MENTAL SUFFERING DAMAGES

108.1 --- Generally

❑ In determining a mental suffering award, the commissioner considers the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. Moreover, respondents must take complainants as they find them. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 252 (2007).***

❑ In determining a mental suffering award, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 214 (2007).***

Appeal pending.

See also In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 195-96 (2004), affirmed without opinion, Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ The fact that complainant suffered from the same symptoms at a reduced level prior to his discharge is not a bar to an award of damages, but the forum must consider that fact in calculating an appropriate award. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 278 (2006)***

Appeal pending.

❑ In determining mental distress awards, the commissioner considers a number of things, including the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct. Awards for mental suffering damages depend on the facts presented by each complainant. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 278 (2006),*** *appeal pending. See also In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 252-53 (2005). See also In the Matter of C. C. Slaughter's, Ltd., 26 BOLI 186, 196 (2005); In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 185 (2005); In the Matter of Cleopatra's, Inc., 26 BOLI 125, 136 (2005).*

❑ The agency established complainant's emotional distress damages through the credible testimony of complainant, his mother and stepfather. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 278 (2006)***

Appeal pending.

❑ A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 278 (2006)****, appeal pending. See also In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 252-53 (2005); In the Matter of Cleopatra's, Inc., 26 BOLI 125, 136 (2005); In the Matter of Robb Wochnick, 25 BOLI 265, 289 (2004); In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 243 (2004); In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 199 (2004), affirmed without opinion, Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007);; In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 89 (2004); In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 153 (2003); In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 66 (2002); In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 133 (2002); In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 96 (2001), affirmed*, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001); *In the Matter of Servend International, 21 BOLI 1, 31-32 (2000), affirmed without opinion, Servend International, Inc. v. Bureau of Labor and Industries, 183 Or App 533, 53 P3d 471 (2002); In the Matter of Entrada Lodge, 20 BOLI 229, 253 (2000), amended 20 BOLI 229 (2000), reversed and remanded for reconsideration, 184 Or App 315, 56 P3d 444 92002, amended final order on remand, 24 BOLI 125 (2003); In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 215 (2000), affirmed'*, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001); *In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 77 (1999); In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 13 (1998), affirmed without opinion, Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries, 160 Or App 700, 981 P2d 402 (1999).*

❑ The agency relied primarily on complainant's credible testimony to show the extent of his emotional distress. ***----- In the Matter of C. C. Slaughter's, Ltd., 26 BOLI 186, 196 (2005).***

❑ The agency established complainant's emotional distress damages through the credible testimony of complainant and his wife. ***----- In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 185 (2005).***

❑ The forum has consistently held that financial insecurity and anxiety caused by a respondent's

unlawful practices is compensable. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 136 (2005).*** *See also In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 243 (2004); In the Matter of Katari, Inc., 16 BOLI 149, 161 (1997), affirmed without opinion, Katari, Inc. v. Bureau of Labor and Industries, 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).*

❑ The specter and uncertainties of unemployment are also compensable when attributable to an unlawful practice. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 136 (2005).*** *See also In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 126, 154 (2003); In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 66 (2002), In the Matter of Tyree Oil, Inc., 17 BOLI 26, 244 (1998), reversed, Tyree Oil, Inc. v. Bureau of Labor and Industries, 168 Or App 278 (2000)..*

❑ Employers are not liable for distress caused by a complainant's personal circumstances, her unrelated medical problems, or her prior financial difficulties. However, this forum has consistently held that "employers must take employees as they find them." ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 290 (2004).***

❑ The amount of mental suffering damages awarded depends on the facts presented by each complainant. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 289 (2004).*** *See also In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 89 (2004); In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 215 (2000); affirmed, Barrett Business Services v. Bureau of Labor and Industries, 173 Or App 444 (2001); In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999); *In the Matter of Central Oregon Building Supply, Inc.*, *17 BOLI 1, 13 (1998), affirmed without opinion, 160 Or App 700, 981 P2d 402 (1999).*

❑ While the forum may also consider the mental suffering damages awarded in previous years to determine the amount of damages, the amount of the award depends on the facts presented by each complainant. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 66 (2002).***

❑ An award for pain and suffering should not be allowed on the basis of a complainant's financial difficulties subsequent to a dismissal by respondent if the cause of the difficulties occurred before the dismissal. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 188 (1982).***

❑ Although respondent was not responsible for complainant's distress caused by her lack of earnings during her family leave, the forum has previously held that "employers must take employees as they find them." ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 126, 154 (2003).***

❑ This forum has continuously held that mental suffering awards reflect the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, the type and duration of the mental distress, and vulnerability of the victim. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 32-33 (2002), amended 23 BOLI 67 (2002).***

❑ Awards for mental suffering are fact driven and limited to those damages that are a direct result of a respondent's unlawful practice. ***----- In the Matter of H.R. Satterfield, 22 BOLI 198, 211 (2001).***

❑ Awards for mental suffering damages depend on the facts presented by each complainant. A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 96 (2001).*** *See also In the Matter of Servend International, 21 BOLI 1, 32 (2000), affirmed without opinion, Servend International, Inc. v. Bureau of Labor and Industries, 183 Or App 533, 53 P3d 471 (2002; In the Matter of Entrada Lodge, 20 BOLI 229, 253 (2000), reversed and remanded for reconsideration, Entrada Lodge v. Bureau of Labor and Industries, 184 Or App 315, P3d 444 (2002), final order on remand 24 BOLI 125 (2003); In the Matter of Barrett Business Services, 20 BOLI 189, 215 (2000), affirmed Barrett Business Services v. Bureau of Labor and Industries*, *173 Or App 444 (2001).*

❑ Respondent moved to dismiss the agency's claim for mental suffering damages, contending that complainant's deposition testimony established that she had not suffered any emotional distress as a result of her termination; that she only sought reinstatement as a remedy; that she was concurrently suffering emotional distress from a source unrelated to her termination; and that the agency had failed to provide respondent with complainant's medical records showing treatment for prior mental conditions. The ALJ denied the motion because complainant's failure to seek medical treatment for her mental suffering; the fact that she may have concurrently experienced mental suffering arising from a different source; and her confusion about any entitlement to mental suffering damages did not negate the agency's claim for mental suffering damages; and it was not clear from the deposition transcript excerpts submitted by respondent that complainant did not experience any mental suffering based on the alleged discriminatory termination. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 12-13 (2000)***.

❑ The commissioner may award damages to compensate a complainant for mental suffering caused by a respondent's unlawful employment practice. Such damages would not be available in a circuit court action involving the same allegations. The statutory scheme that results in these differing remedies does not violate Article I, section 20, of the Oregon Constitution. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 219-20 (2000)***.

❑ When respondents' unlawful employment practice caused complainant to suffer emotional distress in addition to distress he was already experiencing because of other events, the ALJ awarded an amount of damages calculated to compensate complainant only for the mental suffering caused by respondents' unlawful acts. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 216 (2000)***.

❑ In determining mental damage awards, the commissioner considers the type of discriminatory

conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused. The forum may also review the mental suffering damages it has awarded in civil rights cases over the past few years. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 189 (2000)***. *See also In the Matter of Dennis Murphy Family Trust*, *19 BOLI 69, 91 (1999).*

❑ In determining damages for mental suffering, the commissioner considers the type of discriminatory conduct, the duration, severity, frequency and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused. The forum also will consider whether other factors in the complainant's life, unrelated to respondent's unlawful practice, may have contributed to any distress the complainant suffered. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 139-40 (2000)***.

❑ Although awards in prior cases serve as examples of the types of mental suffering damage awards that are within the commissioner's discretion, because mental suffering damages are purely compensatory, the amount awarded in any given case is completely dependent upon the facts proved. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 139-40 (2000)***.

❑ When the complainant unreasonably failed to mitigate back pay damages by seeking new employment, the forum considered the fact that he could have reduced the mental suffering associated with his post-discharge financial difficulties by exercising reasonable care and diligence to find another job. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 141 (2000)***.

❑ In a civil rights case in which the agency alleged that respondent's unlawful employment practices caused complainant to experience mental suffering, when the agency had refused to make complainant's medical and psychological records available to respondent, the ALJ ordered the agency to provide the records for an *in camera* inspection. The ALJ also granted the agency's motion for a protective order regarding all documents released to respondent's counsel. After reviewing the records *in camera*, the ALJ released complainant's medical records to respondent, subject to a protective order. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 119 (2000)***.

❑ The forum rejected respondent's invitation to rely on cases from other jurisdictions to determine the appropriate magnitude of an award for mental suffering resulting from illegal discrimination in housing. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 96-97 (1999).***

❑ When respondent objected that it was improper for the forum to award $25,000 in mental suffering damages based solely on the testimony of complainant and his wife, the forum held that the testimony of a single credible witness is sufficient to prove any element of a claim, including damages. ***----- In the Matter of Centennial School District, 18 BOLI 176, 198 (1999)***.

Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

❑ The commissioner is authorized to award compensatory damages, including damages for mental suffering, as a means reasonably calculated to eliminate the effects of any unlawful practice found. ***----- In the Matter of LTM, Incorporated, 17 BOLI 226, 239 (1998)***. *See also In the Matter of Body Imaging, P.C.,* 17 BOLI 162, 189 (1998), *affirmed in part, reversed in part, Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries, 166 Or App 54 (2000).*

❑ In determining the amount of damages, the commissioner considers the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused. ***----- In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 273-74 (1998)***. *See also In the Matter of LTM, Incorporated, 17 BOLI 226, 239 (1998); In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 208 (1998).*

❑ Because mental distress damages are purely compensatory, the amount awarded in any given case is completely dependent upon the facts proved. Two individuals subjected to the same unlawful employment practice might suffer mentally to very different degrees, depending on their ages, prior experiences in the workplace, emotional vulnerability, and other factors. ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 210 (1998)***.

❑ The forum denied respondent's exception that the forum was not entitled to find that complainant suffered depression and anger as a result of her unlawful discharge because the agency did not present medical evidence supporting the claim of mental suffering. A lack of medical consultation or a failure to seek counseling goes to the severity of mental suffering, not necessarily to its existence. ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 210 (1998)***.

❑ In determining mental distress awards, the commissioner considers the type of discriminatory conduct; the duration, severity, frequency, and pervasiveness of that conduct; the type, effects, and duration of the mental distress caused; and the complainant's vulnerability due to such factors as age and work experience. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 44 (1998)***.

Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

See also In the Matter of James Breslin, 16 BOLI 200, 219 (1997); affirmed without opinion, Breslin v. Bureau of Labor and Industries, 158 Or App 247, 972 P2d 1234 (1999).

❑ A failure to seek counseling goes to the severity of mental suffering, not necessarily to its existence. ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 13 (1998)***.

Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d

402 (1999).

❑ It is well settled that the commissioner may award compensatory damages for mental suffering as an administrative remedy under ORS chapter 659. ***----- In the Matter of Body Imaging, Inc., 16 BOLI 163, 186 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998).***

Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000).

❑ When an individual is discriminated against because of her immutable characteristics, such as her sex or race, the forum recognizes and may infer that she has suffered some diminution of her human dignity. ***----- In the Matter of Katari, Inc., 16 BOLI 149, 161 (1997).***

Affirmed without opinion, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).

❑ The stress inherent in litigation does not form a basis for an award of mental distress damages. ***----- In the Matter of Katari, Inc., 16 BOLI 149, 160 (1997).***

Affirmed without opinion, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).

❑ The lack of medical consultation or a failure to seek counseling goes to the severity of mental suffering, not necessarily to its existence. ***----- In the Matter of Katari, Inc., 16 BOLI 149, 161 (1997).***

Affirmed without opinion, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).

See also In the Matter of Portland General Electric Company, 7 BOLI 253, 256 (1988), affirmed, Portland General Electric Company v. Bureau of Labor and Industries, 116 Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

❑ Remedies available under ORS 659.060(3) in the commissioner's administrative forum have not always run parallel to remedies available in circuit court under ORS 659.121(1). For instance, compensatory damages for mental suffering are recoverable under ORS 659.060(3). Compensatory damages for mental suffering, in contrast, are not available under ORS 659.121(1). Under ORS 659.010(2), the commissioner has authority to fashion a remedy adequate to eliminate the effects of any unlawful practice found and to protect the rights of other persons similarly situated to the person harmed. The loss of wages through loss of employment, as well as mental suffering, can be an effect of discrimination attributable to an employer, although perpetrated by a victim's company-employee, manager, or a non-employee customer. The commissioner awarded both back pay and mental suffering damages against respondent corporation for violations of ORS 659.030(1)(a), (b), and (f), and against an individual respondent, who was the corporation's owner and president, for violations of ORS 659.030(1)(g). ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 139-40 (1997).***

❑ The youth and inexperience of a victim of unlawful employment practices are factors to consider in fashioning a remedy for mental distress. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 140 (1997).***

❑ In determining mental distress awards, the commissioner considers the type of discriminatory conduct; the duration, severity, frequency, and pervasiveness of that conduct; and the type, effects, and duration of the mental distress caused. Also considered is a complainant's vulnerability due to such factors as age and work experience. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 27 (1997).*** *See also In the Matter of Pzazz Hair Designs, 9 BOLI 240, 256-57 (1991).*

❑ The forum may award compensation when respondent's adverse employment decision is the primary reason for complainant's mental suffering. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 214 (fn) (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ While a complainant's failure to seek medical treatment may be one element in evaluating the severity of the effects of a discriminatory practice, it is not necessarily an indicator of whether or not the practice occurred. Medical evidence of the physical or psychological effects of an employer's behavior is not essential to finding that those effects resulted from a respondent's actions when there is credible testimony regarding the result of those actions. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 224 (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ Damages for mental suffering caused by discriminatory employment practices are actual damages for actual harm and are not punitive in nature. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 224 (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ Mental distress awards reflect the type of discriminatory conduct; the duration, severity, frequency, and pervasiveness of that conduct; the type, and duration of the mental distress, and the vulnerability of the victim. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 225 (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ The commissioner's jurisdiction to find liability and

to assess or award damages for emotional distress does not violate respondents' right to trial by jury as guaranteed by the Oregon constitution. The Oregon court of appeals has concluded that such awards carry out the commissioner's statutory duty to "eliminate the effects of any unlawful practice found." ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 287-88 (1996).***

❑ Mental suffering awards are actual compensation for actual harm and there must be evidence to support any award. ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 289 (1996).***

❑ When the agency established a continuing violation of ORS 659.030(1)(b) that extended over a 21-month period, the complainant was eligible for an award of damages encompassing that entire time. The test for determining if the unlawful violations were of a "continuing" nature was whether they were shown to be "a series of related acts against a single individual that were discriminatory." ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 253-54 (1995).***

❑ When complainant's distress resulting from respondent's sexual harassment was further aggravated because of financial circumstances that made it virtually impossible for her to quit, the commissioner held that complainant may be compensated for the aggravated distress that resulted when the stress brought on by her financial circumstances was magnified by the stress caused by respondent's sexual harassment, stating that "respondents must take complainants as they find them." ***----- In the Matter of Kenneth Williams, 14 BOLI 16, 26 (1995).*** *See also In the Matter of Loyal Order of Moose, 13 BOLI 1, 12-13 (1994).*

❑ Respondent argued that a $15,000 mental distress award in the proposed order was excessive in view of evidence of other stressful factors in complainant's life after her discharge. The commissioner found that respondents must take complainants as they find them, that this respondent's action "was deliberate and severe and resulted in lasting distress to a young mother," and that "evidence that the claimed upset is traceable to the unlawful practice will support an award in the fact of less persuasive evidence" of other factors. ***----- In the Matter of Motel 6, 13 BOLI 175, 186-87 (1994).***

❑ The anxiety and uncertainty connected with loss of employment income is compensable. The specter and uncertainties of unemployment are also compensable when attributable to an unlawful practice. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 147 (1995).*** *See also In the Matter of WS, Inc., 13 BOLI 64, 91 (1994).*

❑ When an adverse employment decision causes complainant mental suffering, this forum may award compensation. ***----- In the Matter of Alaska Airlines, Inc., 13 BOLI 47, 55 (1994).***

> Affirmed without opinion, *Alaska Airlines, Inc. v. Bureau of Labor and Industries*, 137 Or App 350, 904 P2d 660 (1995), rev den 322 Or 644, 912 P2d 375 (1996).

❑ Awards for mental suffering depend on the facts presented by each complainant. ***----- In the Matter of RJ's All American Restaurant, 12 BOLI 24, 32 (1993).*** *See also In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 217-18 (1991).*

❑ When the specific charges gave respondents notice of the amount claimed for mental distress and of the general nature of the mental suffering alleged, the commissioner denied respondents' motion to strike or make more definite the mental suffering allegations, noting that the claim could have been clarified through deposition or other discovery. ***----- In the Matter of Rose Manor Inn, 11 BOLI 281, 283 (1993).***

❑ When complainant refused to testify on cross-examine about matters related to his alleged mental suffering, the hearings referee decided not to strike his direct testimony on the issue, but drew an adverse inference from his refusal to testify. ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 208 (1993).***

❑ The commissioner may award compensatory damages for mental suffering as an administrative remedy under the Oregon civil rights law. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 129 (1992).***

> Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ When respondent argued that discriminatory termination alone is insufficient to support an award for mental distress, the commissioner held that the demonstrated effects of a discriminatory termination support such an award. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 303 (1991).***

> Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ When complainant's termination was sudden, it was reasonable to infer that she was emotionally shocked by its suddenness. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 298 (1991).***

> Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ The commissioner rejected respondent's argument that the emotional distress damages sought in the specific charges should be pleaded as intentional infliction of severe emotional distress as required by *Sheets v. Knight,* 308 Or 220, 779 P2d 1000 (1989), stating that appellate cases have established the commissioner's authority to award compensatory damages. ***----- In the Matter of William Kirby, 9 BOLI 258, 277 (fn), 279 (1991).***

❑ The commissioner reduced the hearings referee's recommended mental distress award, finding that some relevant testimony did not distinguish between complainant's non-compensable distress due to the "normal" stressful environment of the workplace and the compensable distress suffered because of respondent's discriminatory conduct, that duration and frequency were not significant, and that while serious, the discriminatory

conduct was not pervasive. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 256-57 (1991).***

❑ The trauma of a sudden and unexpected termination, coupled with the anxiety and uncertainty connected with loss of employment income, is compensable. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 257 (1991).***

❑ Awards for mental suffering depend on the facts presented by each complainant. Respondents must take complainants as they find them. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 217-18 (1991****). See also In the Matter of Courtesy Express, Inc., 8 BOLI 139, 148 (1989; In the Matter of Lee's Cafe, 8 BOLI 1, 21 (1989); In the Matter of Courtesy Express, Inc., 8 BOLI 139, 148 (1989); In the Matter of Lee's Cafe, 8 BOLI 1, 21 (1989).*

❑ The anxiety and uncertainty connected with loss of employment income are compensable. The effect of an unexpected termination and the resulting specter of unemployment and its uncertainties are also compensable when attributable to an unlawful practice. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 204 (1991).***

Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

See also In the Matter of German Auto Parts, Inc., 9 BOLI 110, 112 (1990), affirmed, German Auto Parts, Inc. v. Bureau of Labor and Industries, 111 Or App 522, 826 P2d 1026 (1992).

❑ When respondent moved to dismiss the agency's claim for mental suffering damages because there was no evidence, other than complainant's testimony, of harm or damage to her such as trauma necessitating professional counseling or medical consultation or treatment, the commissioner denied the motion, stating that the complainant's "testimony as to the effect of respondent's offensive conduct, if believed, was sufficient. Any consequent need for medical treatment or counseling service goes to the severity of the damage caused by such conduct and not to whether the damage occurred." ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 174-75 (1991).***

❑ ORS 659.010(2) authorizes the commissioner to "eliminate the effects of an unlawful practice found." Emotional distress damages will lie in a case of unlawful practice when emotional distress is established by a preponderance of the evidence. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 190 (1991).***

❑ An award of emotional distress damages by the commissioner under ORS chapter 659 is constitutional. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 190 (1991).***

❑ The inconvenience and frustration caused by filing an administrative complaint and participating in the complaint process is experienced by all litigants and is not compensable. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 132 (1990).***

Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

❑ The commissioner is authorized to award damages for mental distress when the evidence shows that a complainant has suffered humiliation, distress, and embarrassment due to a respondent's unlawful practice. ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 66 (1990).***

❑ It is well established in this forum that economic loss to a complainant that is directly attributable to an unlawful practice may be recovered from respondents as a means to eliminate the effects of any unlawful practice found. This includes actual expenses and mental suffering damages from unlawful practices involving real property under ORS 659.033. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 250 (1990).***

❑ Embarrassment or discomfort caused by a contested case hearing is not compensable. The forum must limit its award for mental distress to the direct result of the respondent's unlawful practice. ***----- In the Matter of Baker Truck Corral, 8 BOLI 118, 39 (1989).***

❑ Respondent moved to strike a claim in the specific charges for mental suffering damages on the grounds that, under ORS 654.062(5) and its federal counterpart, as well as Title VII and ORS chapter 659, general damages are not recoverable. The commissioner held that it is "well settled that the commissioner may award compensatory damages for mental suffering as an administrative remedy under the Oregon civil rights law. The legislative history of ORS 659.121 does not show any intention to abrogate the previously existing powers of the commissioner. In *Holien,* the Supreme Court concluded that the 1977 legislation did not eliminate or reduce existing administrative remedies. Thus, respondent's reliance on Holien is misplaced. The Supreme Court has specifically recognized the commissioner's power to award mental suffering damages under Oregon civil rights law." ***----- In the Matter of Harry Markwell, 8 BOLI 80, 82 (1989).***

❑ A mental suffering award may be based on economic stress that caused fear and anxiety. ***----- In the Matter of Peggy's Café, 7 BOLI 281, 288 (1989).***

❑ When respondent's adverse employment decision is the primary reason for complainant's mental suffering, this forum may award compensation, even though other factors may contribute to complainant's discomfort. ***----- In the Matter of Portland General Electric Company, 7 BOLI 253, 271 (1988).***

Affirmed, *Portland General Electric Company v. Bureau of Labor and Industries, 116* Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

❑ When a complainant sought damages for mental suffering that was due, in part, to the attitude of co-workers about the concept of a father using parental leave and opposing the wishes of the employer by filing a complaint, the commissioner found that this stressor was not compensable because the co-workers were not

acting as respondent's agents in their criticism and the discomfort of litigating the issue is shared by all complainants. ***----- In the Matter of Portland General Electric Company, 7 BOLI 253, 271 (1988).***

Affirmed, *Portland General Electric Company v. Bureau of Labor and Industries, 116* Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

❑ The commissioner awarded damages for humiliation and mental suffering for actual harm in a case brought pursuant to the Handicapped Person Civil Rights Act, ORS 659.400 *et seq,* and found that such damages were not a penalty for unlawful discrimination. ***----- In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 68 (1987).***

Affirmed, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

❑ When complainant had a concurrent workers' compensation claim and for injuries due to respondent's discriminatory actions, pursuant to ORS 656.018(a), the commissioner found that the facts therein fell under the exception to the exclusivity provision for injury "proximately caused by willful and unprovoked aggression." The commissioner found that when a complainant has suffered injuries of humiliation, loss of esteem, and insult to integrity or embarrassment resulting from discrimination, these can be compensated by an award of damages from this forum. The commissioner found that there is no double recovery in these matters and will compensate complainant whether or not he or she has received payment on a stress claim through workers' compensation. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 5-6 (1987).***

❑ When respondent objected to evidence involving complainant's mental suffering on the grounds that complainant had a pending claim with the Workers' Compensation Department for stress suffered as a result of the alleged harassment, also the basis for the specific charges, the forum overruled the objection. OAR 839-30-060 governs responsive pleadings and provides that the "failure of a party to raise an affirmative defense in the answer shall be deemed a waiver of such defense. Relying upon ORCP 19(b) that affirmative defenses include "payment * * * and any other matter constituting an avoidance," the commissioner found that respondent had filed to raise an affirmative defense in the answer to the charges and, pursuant to OAR 839-30-060, that defense was waived. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 4-5 (1987).***

❑ Although the forum found that complainant, a black male, was refused a job based on lack of qualifications rather than race, the forum nevertheless determined that respondent "unlawfully failed to provide complainant a racially neutral work environment." Thus, even though complainant could not recover damages for lost income because he was not qualified for the position, he could be awarded damages for pain and humiliation suffered because of the discriminatory work environment. ***-----*** In ***the Matter of Union Pacific Railroad Company, 3 BOLI 180, 187 (1982).***

❑ Respondent asserted, as an affirmative defense, that the commissioner lacked authority to award damages to complainant for humiliation and mental distress in an employment discrimination case and that such an award, without a jury trial, was unconstitutional. The forum ruled that such an award was contemplated by the Legislature and was proper under prior rulings in *Williams v. Joyce,* 4 Or App 482 (1971) and *School District No. 1 v. Nilsen,* 271 Or 641 (1975). ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 93 (1978).***

Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).

Order on remand, 1 BOLI 179 (1979).

❑ Respondent asserted that, in an employment discrimination case, the commissioner lacked the authority in 1978 to award damages to complainant for humiliation and mental distress occurring in 1972 because the legislature had created ORS 659.095 and 659.121 in 1977, which retroactively removed any such authority the commissioner may previously have had. The commissioner ruled that no such retroactive effect was contemplated. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 93-94 (1978).***

Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).

Order on remand, 1 BOLI 179 (1979).

❑ The commissioner is authorized to make awards of compensatory damages against any respondent for mental or emotional distress caused by humiliation, frustration, anxiety, tension, and nervousness suffered as an effect of an unlawful practice. ***----- In the Matter of School District No. 1, 1 BOLI 1, 19 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

108.2 --- Basis of Discrimination

108.2.1 --- Age

❑ The forum awarded $12,500 in mental suffering damages to a complainant who experienced shock, anger, stomach upset, depression, and sleeping problems after he learned that respondents would not hire him because of his age. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 216 (2000)***.

❑ Complainant, age 67 and disabled, was shocked, humiliated, and hurt by her unlawful termination based on her age and disability and suffered ongoing emotional distress from her inability to take care of her financial

obligations and to obtain other employment. The commissioner awarded her $30,000 to compensate her for her emotional distress. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 289, 292 (1997).***

❑ In an age discrimination case, the forum did not make an award for mental suffering when complainant alleged pain, humiliation, suffering, and loss of human dignity as a result of respondent's wrongful employment practice, but substantial evidence did not support the claim. ***----- In the Matter of the Treplex, Inc., 2 BOLI 221, 227 (1982).***

❑ When respondent failed to consider hiring a 63-year-old complainant because of his age, and complainant suffered considerable mental anguish and became depressed as a result of being considered too old, the commissioner awarded $2500 for humiliation, frustration, mental anguish, and suffering. ***----- In the Matter of Southern Oregon College, 1 BOLI 55, 61 (1976).***

108.2.2 --- Disability

❑ The forum awarded $25,000 to complainant based on credible evidence that he experienced significantly heightened levels of anxiety, depression, and sleeplessness for three weeks after his unlawful discharge, at which time his anxiety, depression, and sleeplessness returned to their normal levels. The agency also established that complainant experienced financial troubles as a result of his discharge. However, because the agency did not establish that those troubles caused him any more distress than the continual financial troubles he had experienced for some time before he was hired by respondent, the forum did not consider complainant's financial difficulties in calculating emotional distress damages. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 278-79 (2006)***

Appeal pending.

❑ The forum awarded complainant lost wages and emotional distress damages based on respondent's failure to reasonably accommodate complainant, in violation of ORS 659A.112(2)(e), and respondent's denial of employment opportunities to complainant based on its need to make reasonable accommodation to complainant, in violation of ORS 659A.112(2)(f). The forum also stated that it did not predicate damages solely on respondent's failure to engage in a meaningful interactive process with complainant, in violation of ORS 659A.112(2)(3). ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 276 (2006)***

Appeal pending.

❑ Complainant was embarrassed, shaken, and upset by respondent's refusal to let him stay in respondent's club on June 12, 2002, because of his Parkinson's disease. He felt like the incident had created a scene, that he had been on public display in front of 30 patrons, and thought other patrons might think he was a drunk. After he went home, he thought a lot that night about the way he was treated. He had trouble sleeping that night and the next couple of nights. It upset him enough that he talked to a number of people about the incident over the next two days. Complainant felt even worse after he left respondent's club on June 14, 2002, because this was the second time he had been told to leave and because respondent's manager refused to look at the medical documentation he had instructed complainant to obtain. He was upset and stressed and felt that he had been on public display again, this time in front of 60 patrons. He had trouble sleeping, began to think more about how Parkinson's had negatively impacted his social life, and felt even more self conscious about his appearance. After complainant resumed his Wednesday night visits to respondent's club, he always looked to see if the same manager was working, felt very self conscious about his appearance, and tended to stay in one spot so he wouldn't be seen moving around. In addition, respondent's refusal to let complainant remain in its club on June 12 and June 14, 2002, made complainant very apprehensive about shopping in new places, and particularly about visiting new bars, in that he was afraid he would be stopped again and accused of being drunk because of his Parkinson's. The commissioner awarded $25,000 in damages for emotional distress. ***----- In the Matter of C. C. Slaughter's, Ltd., 26 BOLI 186, 196-97 (2005).***

❑ Complainant was asked to complete two forms that made unlawful inquiries concerning whether she had a disability and, if so, the nature and severity of it. At the time complainant was asked to complete the forms, she believed they made unlawful inquiries. Complainant refused to complete and sign respondent's medical history form and was told she couldn't be hired unless she completed and signed it. This made her very upset, and she became more upset about respondent's behavior as the day went on, perceiving it as an indicator that she would not be able to get work as a medical transcriptionist in the Bend area where she lived. She was upset for at least two more days after that over Respondent's behavior. The forum awarded her $15,000 in mental suffering damages. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 96-97 (2001).***

❑ The forum awarded $20,000 damages for mental suffering when respondent barred or refused to hire complainant on the basis of a perceived disability. The evidence showed: complainant was very upset when respondent told him he could not perform the type of work he had done for 14 years; complainant was very concerned about finding work because he recently had purchased a home; and complainant was devastated by having to move himself and part of his family to Alaska to find work, leaving his older children in Oregon. ***---- In the Matter of Barrett Business Services, Inc., 20* BOLI 189, *215(2000).***

Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ Discrimination against disabled persons in housing is particularly insidious and devastating because it undermines the disabled individual's ability to function with dignity and humanity, and as independently as possible. Although the discriminatory episode may last only a few moments, its effects may be felt for long

periods of time, as the victim continues to suffer fear and anger, or modifies his or her behavior as a result of the discrimination. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 91-92 (1999)***.

❑ When complainant felt threatened by respondent's unlawful eviction threat; did not want to move out of respondent's care facility because he was settled in;, had obvious strong feelings about being threatened with eviction; altered his behavior as a result of the illegal threat; and suffered a loss of dignity; but there was no evidence that complainant's distress was long-lasting, the forum awarded $10,000 damages for mental suffering. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 90-92 (1999)***.

❑ The agency argued that complainant should be awarded additional compensation because he suffered adverse side effects from taking medication that he would not have taken, absent respondent's unlawful eviction threat. The forum rejected that argument both because no evidence in the record established the length of time during which complainant took the medications under duress and because the objective medical testimony established that he benefited from taking the medications. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 92 (1999)***.

❑ Complainant suffered embarrassment, insult, anger and shame on a frequent basis from harassment that was ongoing from September 1994 until April 1995. After complainant was discharged, the emotional impact of the manner of his separation from active employment caused him to feel betrayed, totally frustrated, depressed, and extreme self-doubt from the time of his discharge up to the hearing two years later. The forum awarded complainant $30,000 for mental suffering damages. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 77 (1999)***.

❑ The forum awarded complainant $10,000 in mental suffering damages to compensate him for eight months of on-the-job harassment and $20,000 in mental suffering damages to compensate him for mental distress caused by his discharge. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 79 (1999)***.

❑ The forum awarded complainant $30,000 in mental suffering damages when the evidence showed that complainant was embarrassed, hurt, upset, humiliated, nervous, anxious, suffered a loss of confidence and self-esteem, dreaded coming to work, felt intimidated and physically threatened by respondent, was sometimes in tears from confrontations with him, felt stripped of personal dignity and respect, suffered stomach upset and her physician found an acute anxiety reaction due to stress, all as a result of respondents' unlawful employment practices. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 189 (1998)***.

> Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ Respondent refused to accommodate complainant's disability of epilepsy and constructive discharged him. Complainant was angry, shaken, upset, "pushed out and betrayed" by respondent, feared the loss of his dislocated worker benefits and his resulting ability to complete his education, had to move his family, and quarreled with his wife after his discharge. The commissioner awarded complainant $30,000 to compensate him for his mental distress. ***----- In the Matter of James Breslin, 16 BOLI 200, 219 (1997).***

> Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ Complainant's duties were reduced and she was constructively discharged based on respondent's perception that she had multiple sclerosis. As a result, she suffered hurt, embarrassment, upset, humiliation, nervousness and anxiety; her confidence and self-esteem were shaken and she dreaded coming to work; she felt stripped of personal dignity and respect; and she suffered stomach upset and an acute anxiety reaction due to stress as a result of her discharge. The commissioner awarded her $30,000 to compensate her for mental distress. ***----- In the Matter of Body Imaging, Inc., 16 BOLI 163, 186 (1997), withdrawn for reconsideration, order on reconsideration, 17 BOLI 162 (1998).***

> Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54, 999 P2d 475 (2000).

❑ Complainant, age 67 and disabled, was shocked, humiliated, and hurt by her unlawful termination based on her age and disability and suffered ongoing emotional distress from her inability to take care of her financial obligations and to obtain other employment. The commissioner awarded her $30,000 to compensate her for her emotional distress. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 289, 292 (1997).***

❑ When complainant was suddenly and unexpectedly discharged because of the perceived disability of HIV infection, and the discharge caused extreme and prolonged emotional distress, including shock, humiliation, anger, confusion, anxiety, depression, fear, frustration, sleeplessness, and loss of appetite, the commissioner awarded him $30,000 for mental suffering. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 147-48 (1995).***

❑ Respondent did not hire complainant because of his deafness. As a result, complainant became very upset and angry, lost sleep, had upset stomachs and headaches, lost his temper, and argued with his wife and children, which was uncharacteristic of him. This upset lasted up to the time of hearing. Respondent's failure to hire complainant caused his family to suffer financial distress, requiring complainant to get food from a food bank at Christmas time, and jeopardized his health insurance at a time when his daughter needed an operation. The forum awarded complainant $20,000 to help compensate him for his mental suffering caused by respondent's unlawful discrimination. ***----- In the Matter of WS, Inc., 13 BOLI 64, 90-91 (1994).***

❑ In an AIDS disability case, when respondent

discharged complainant one day after she revealed on television that she had the HIV infection, the commissioner awarded complainant $2,500 in mental suffering damages for her "loss of appetite, depression, and disturbed sleep," and the "shock, disappointment and disturbance generated by the discharge." ***----- In the Matter of Casa Toltec, 8 BOLI 149, 174-75 (1989).***

❑ The commissioner awarded damages for humiliation and mental suffering for actual harm in a case brought pursuant to the Handicapped Person Civil Rights Act, ORS 659.400 *et seq,* and found that such damages were not a penalty for unlawful discrimination. ***----- In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 68 (1987).***

Affirmed, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

108.2.3 --- Injured Worker

❑ When complainant's credible testimony established that she suffered depression, sleep loss, and an inability to breast feed her child, causing additional stress, and worried about how she would support her family financially, the forum awarded complainant $30,000 in emotional distress damages. ***----- In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 90 (2004).***

❑ The forum awarded $7,500 in mental suffering damages when complainant's credible testimony established that he suffered some financial strain, was upset and depressed, and experienced difficulty finding work as a result of his termination, but failed to show any specific or lasting effects of the financial strain or depression he suffered. ***----- In the Matter of Wal-Mart Stores, Inc., 24 BOLI 37, 66-67 (2002).***

❑ The commissioner awarded complainant $12,500 damages to compensate him for the financial stress, upset, humiliation, and feelings of degradation he suffered as a result of respondent's unlawful employment practice. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 141 (2000)***.

❑ Complainant suffered embarrassment, insult, anger and shame on a frequent basis from harassment that was ongoing from September 1994 until April 1995. After complainant was discharged, the emotional impact of the manner of his separation from active employment caused him to feel betrayed, totally frustrated, depressed, and to experience extreme self-doubt from the time of his discharge up to the hearing two years later. The forum awarded complainant $30,000 for mental suffering damages. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 77 (1999)***.

❑ The forum awarded complainant $10,000 in mental suffering damages to compensate him for eight months of on-the-job harassment and $20,000 in mental suffering damages to compensate him for mental distress caused by his discharge. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 79 (1999)***.

❑ When complainant experienced ten days of harassment, during which time his supervisor discouraged him from filing for time-loss benefits, made three belittling remarks towards complainant related to his workers' compensation claim, and instructed him to drive a truck, an activity outside his work limitations, the forum awarded complainant $5,000 for mental suffering damages. ***----- In the Matter of LTM, Incorporated, 17 BOLI 226, 240 (1998)***.

❑ When respondent failed to reinstate an injured worker to his former position, the forum awarded $10,000 in damages for mental suffering to the complainant, who had suffered distress from financial hardship caused by his unemployment, his difficulty in finding other work, and his impaired self-esteem. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 44 (1998).***

Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ The forum awarded $25,000 damages for mental suffering to a harassed injured worker who suffered more than two years of anger and depression, low self-esteem, increases in smoking and drinking, and changes in his behavior at home. ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 14 (1998)***.

Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

❑ Respondent's termination of complainant's employment caused complainant to become depressed and to lose confidence and self-esteem. Complainant saw a counselor for a few months who recommended work as a way to relieve depression, and complainant's mental condition improved after returning to work to the point when she believed she no longer needed counseling. The commissioner recognized that an award of damages was intended to compensate for mental distress caused by respondent's unlawful termination, and since this was not a case of protracted harassment, the commissioner awarded $2,000 for mental suffering. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 298 (1991).***

Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ The commissioner awarded $1,000 for mental distress damages to complainant, an injured worker who was not reinstated to his former job, suffered financial distress, prolonged unemployment, apathy, and a loss of wages that affected his ability to pay his bills, including his rent, and had to move out of his home. ***----- In the Matter of St. Vincent de Paul Salvage Bureau, 8 BOLI 293, 304 (1990).***

❑ When complainant suffered from worry and sleep loss as a result of the loss of employment with respondent, and his income dropped from over $500 per week to $137 per week that he received in unemployment compensation, the commissioner awarded complainant $2,000 for his mental distress. ***----- In the Matter of Dillard Hass Contractor, Inc., 7 BOLI 244, 248, 252 (1988).***

❑ When complainant had a concurrent workers'

compensation claim and for injuries due to respondent's discriminatory actions, pursuant to ORS 656.018(a), the commissioner found that the facts therein fell under the exception to the exclusivity provision for injury "proximately caused by willful and unprovoked aggression." The commissioner found that when a complainant has suffered injuries of humiliation, loss of esteem, insult to integrity or embarrassment resulting from discrimination, these can be compensated by an award of damages from this forum. The commissioner found that there is no double recovery in these matters and will compensate complainant whether or not he or she has received payment on a stress claim through workers' compensation. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 5-6 (1987).***

❑ When respondent objected to evidence involving complainant's mental suffering on the grounds that complainant had a pending claim with the Workers' Compensation Department for stress suffered as a result of the alleged harassment, also the basis for the specific charges, the forum overruled the objection. OAR 839-30-060 governs responsive pleadings and provides that the "failure of a party to raise an affirmative defense in the answer shall be deemed a waiver of such defense. Relying upon ORCP 19(b) that affirmative defenses include "payment * * * and any other matter constituting an avoidance," the commissioner found that respondent had filed to raise an affirmative defense in the answer to the charges and, pursuant to OAR 839-30-060, that defense was waived. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 4-5 (1987).***

❑ When complainant experienced general worry that did not impair his activities or cause him to lose sleep over 12 days of unemployment following his unlawful discharge, the commissioner found that the brief duration of his unemployment, the lack of severity of its effect on his mental state, and the absence of manifestations of any negative mental reaction compelled the conclusion that his reaction was mild and could not be characterized as mental anguish for which any mental suffering damages could be awarded. ***----- In the Matter of Barker Motors, Inc., 2 BOLI 169, 178-79 (1981).***

108.2.4 --- Marital Status

108.2.5 --- National Origin

❑ Respondent discharged complainant because of his national origin. His discharge devastated him and the time following it was the most difficult time of his life, during which time he was nervous, upset, physically shaken, and anxious about the economic implications. The commissioner awarded him $10,000 in damages for mental distress. ***----- In the Matter of Yellow Freight System, Inc., 13 BOLI 201, 212, 218 (1994).***

❑ Respondent discriminated against complainant because of her national origin. The commissioner found that complainant had experienced emotional distress and mental anguish, evidenced by the fact that she was visibly upset and depressed, and awarded her $1,000 in damages for her mental distress. ***----- In the Matter of Deana Miller, 6 BOLI 12, 26 (1986).***

❑ The forum found that respondent discriminated against complainant because of his national origin and awarded complainant $2,500 for mental suffering when the evidence established that complainant was publicly humiliated and embarrassed, which affected his ability to sleep at night, causing tension that affected his family relationships. ***----- In the Matter of Clackamas County, 3 BOLI 164, 170 (1981).***

108.2.6 --- Opposition to Safety Hazard

❑ Based on the record and complainant's demeanor and testimony in particular, the forum found respondent's retaliatory action against complainant caused complainant to suffer significant emotional distress. Credible evidence established that complainant had been employed by Respondent for 18 years - since he was approximately 19 years old - and he was proud of his foreman position. He took his responsibilities as a union shop steward seriously. When he reported a perceived safety hazard to two supervisors and the union, he believed "it would be acted upon immediately" by respondent. Instead, his concerns were met with resistance from the supervisors, followed by an abrupt demotion to tree trimmer. His testimony that he was completely focused on the demotion and its cause and effects was bolstered by his wife's credible testimony that, given the circumstances of the demotion, complainant feared for his job and was upset to the point of distraction. This ultimately adversely affected his family life. He had less patience with his young children and appeared "distracted" and "distant" from the family because he was more "absorbed" and "focused" on the events surrounding the demotion. In his words, he "worried about it every day, every hour." His wife, whom the forum found to be a credible witness, observed this focus and that he was distraught and upset and suffered a diminished sense of self esteem after the demotion. Based on the evidence presented, the forum awarded complainant $30,000, the amount sought, as compensation for the suffering caused by respondent's unlawful employment practice in violation of ORS 654.062(5)(a). ***----- In the Matter of Trees, Inc., 28 BOLI 218, 252-53 (2007).***

❑ In its exception to the emotional distress damage award, respondent urged the forum to reduce or eliminate the award based on complainant's "unspeakably poor behavior" after he was demoted from his supervisory position. His behavior included accusing his supervisor of illegal conduct and contacting a customer about specific misconduct on respondent's part. While not condoning "retaliation" of any kind, the forum found complainant's actions, albeit impulsive, reflected his state of mind at that time. Rather than negating the emotional distress award, his unseemly actions illustrated his extreme angst at being demoted for reporting and investigating a safety concern that was an intrinsic part of his job. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 257 (2007).***

❑ Complainant credibly testified that his discharge caused him significant emotional and financial stress in his life for three months until he obtained subsequent work. Complainant had never been fired before, and this upset and embarrassed him. He had received extensive safety training as a union apprentice and was shocked at being fired "for trying to work safe." He was the sole

support of his family and had no income for four weeks after his discharge because respondent fired him and he had to contest the Employment Department's initial denial of his unemployment benefits. His wife testified that he talked constantly about how respondent had fired him, became more irritable the longer he was out of work, and had a hard time focusing on his family relationships. All of these circumstances constitute emotional distress that may be considered by the commissioner when determining an appropriate award of damages and the forum awarded him $5,000 in emotional distress damages, the amount plead by the agency in its formal charges. ***----- In the Matter of Rogue Valley Fire Protection, 26 BOLI 172, 185 (2005).***

❑ When complainant was laid off for seven weeks based on her well-founded opposition to severe health hazards and complainant became very angry, depressed, suffered from feelings of helplessness, and had to rely on charity to feed her children and to provide them with Christmas gifts, the forum awarded $10,000 to compensate complainant for her mental distress. ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 209 (1998)***.

❑ When complainant, a roofer, was fired after he refused to work on a roof without safety equipment and felt embarrassed and humiliated by being fired and depressed by the fact that he had given up other jobs to work for respondent, and suffered economic distress after being fired, the commissioner awarded complainant $2,000 in compensation for his mental distress. ***----- In the Matter of Rare Construction, Inc., 12 BOLI 1, 7, 10 (1993).***

❑ Complainant, a roofing crane operator, was discharged after he refused to load a roof due to his reasonable belief that the job was unsafe due to nearby high voltage power lines. The commissioner awarded complainant $2,500 for the economic dislocation, emotional distress and upset he suffered due to the discharge. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 83 (1992).***

❑ When complainant established "some economic stress" and repeated embarrassment from listing his discharge while seeking other employment, was subjected to threats of physical harm and police involvement, and broke up with his girlfriend due to his lack of employment, the commissioner awarded him $1,000 to compensate him for mental distress. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 204-05 (1991).***

Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ A complainant who was discharged based on his opposition to unsafe working conditions and demonstrated some mental suffering flowing from the discharge in the form of financial distress, prolonged unemployment and upset in finding subsequent work, moodiness, and adverse affect on his personal life and relationships was awarded $1,000 in compensatory damages for his mental distress. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 132 (1990).***

Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

❑ The commissioner may award general damages for mental suffering in a case alleging a violation of ORS 654.062(5). ***----- In the Matter of Harry Markwell, 8 BOLI 80, 82-83 (1989).***

❑ When complainant was discharged for opposing an unsafe place of employment, the commissioner awarded her $2,000 for the "anxiety and nervousness" she suffered due to the discharge and the stress of searching for a new job. ***----- In the Matter of Peggy's Café, 7 BOLI 281, 286, 289 (1989).***

❑ In an OSHA case involving two complainants, the commissioner awarded one complainant $2,500 in mental suffering damages based on evidence that he was hurt and suffered severe depression as a result of his unlawful discharge, had trouble sleeping and anxiety over his ability to make loan payments, and was diagnosed as having an ulcer. The other complainant testified that he suffered mentally and emotionally, that he was embarrassed and very upset, and that he believed that respondent had given him a poor recommendation to prospective employers, causing him to be unable to obtain employment for over a year. He became very depressed. As a result, the commissioner awarded $1,500 in mental suffering damages. ***----- In the Matter of Associated Oil Company, 6 BOLI 240, 247-48, 257 (1987).***

❑ Complainant, who was discharged because of his opposition to a health and safety hazard, was awarded $750 in mental suffering damages based on evidence that he was afraid he would not be able to pay his bills as a result of the loss of his job, felt attacked, was subjected to public embarrassment, abusive language, and saw a physician for help in coping with depression over his discharge. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 253 (1983).***

108.2.7 --- Opposition to Unlawful Practice

❑ The forum awarded complainant $40,000 in damages for mental distress based on her disgust with respondent's conduct and her anxiety about its continued escalation, rashes, panic attacks, and financial worries that made her less equipped to leave her employment to obtain relief from respondent's conduct. These symptoms were based on the hostile work environment created by respondent over a six month period and respondent's retaliatory constructive discharge of complainant. Complainant's testimony concerning her distress was supported by her physician's notes that indicated complainant had been placed on medication for anxiety and that counseling for home and work-related stress had been recommended. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 289-90 (2004).***

❑ When there was no credible evidence to support complainant's allegation in the specific charges that she suffered from "humiliation, embarrassment, distress, and impairment of personal dignity" due to the retaliation that

was based on her opposition to an unlawful practice, the forum declined to award any damages for complainant's alleged mental suffering. ***----- In the Matter of H.R. Satterfield, 22 BOLI 198, 211 (2001).***

❑ When complainant testified that she was upset over her discharge and felt it was unfair that she was fired, accurately perceiving that she had been fired because she complained about behavior that she reasonably believed to have been motivated by her race/color, and credibly testified that she felt upset about the discharge for a long time afterward and was still upset, to some degree, at the time of the hearing, the forum awarded her $20,000 in mental suffering damages. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 32 (2000).***

Affirmed without opinion, *Servend International, inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ When respondent threatened to discharge any employee who filed complaints with the state and issued a warning/probationary memo to complainant after she filed a sexual harassment charge, the commissioner awarded complainant $7,000 in compensatory damages for mental distress suffered as a result of the sexual harassment and employer threats. ***----- In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 81-82 (1990).***

❑ When the forum concluded that respondent had retaliated against complainant for her involvement in a civil rights proceeding in violation of ORS 659.030(1)(f), the forum awarded complainant $1,500 in damages for pain and anguish based on her testimony that she suffered mental distress and anxiety and had conveyed this to others in excess of a year while unable to secure new employment. ***----- In the Matter of Richard Niquette, 5 BOLI 53, 63-64 (1986).***

❑ Respondent took discriminatory action against complainant because of her opposition to practices forbidden by ORS 659.030, including harassment, verbal abuse and the imposition of burdensome requirements. Complainant testified that the effects of this treatment included difficulty sleeping, moodiness, and anxiety. While the evidence showed that factors other than respondent's conduct may have contributed to complainant's suffering, respondent's adverse employment decision was the primary reason for complainant's suffering. The forum awarded complainant $500 for her mental suffering. ***----- In the Matter of Boost Program, 3 BOLI 72, 83-84 (1982).***

❑ When complainant was found to be the victim of unlawful retaliation by respondent, the commissioner considered and accepted the unrebutted testimony and opinion of a psychiatrist who examined complainant shortly before the hearing in assessing mental suffering damages caused by the retaliation and awarded $15,000 for mental suffering. ***----- In the Matter of City of Portland, 2 BOLI 110, 144-45 (1981).***

Reversed on back pay, affirmed on retaliation, *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 656 P2d 353 (1982), also, 64 Or App 341, 668 P2d 433 (1983), Commissioner's Order reinstated, 298 Or 104, 690 P2d 475 (1984).

108.2.8 --- Race or Color

❑ When places of public accommodation discriminate on the basis of race, the commissioner considers three factors in determining an appropriate award of damages for mental suffering: (1) the particularly insidious and devastating nature of discrimination in public accommodation, which impairs a person's basic right to move about freely in society and to be recognized as a part of the community; (2) the extent of mental suffering; (3) that, although the duration of such discrimination may be brief, the extent and duration of the effects of the discrimination may be significant. ***----- In the Matter of Westwind Group of Oregon, 17 BOLI 46, 53 (1998)***.

❑ When a racially discriminatory episode lasted only a couple of minutes, but complainant remained upset for a long time thereafter, the commissioner inferred that complainant had suffered impaired human dignity and awarded her $15,000 in damages to compensate her for her mental distress. ***----- In the Matter of Westwind Group of Oregon, 17 BOLI 46, 53 (1998)***.

❑ A black complainant who was subjected to racial slurs and constructive discharged and experienced shock, anger, hurt, upset, humiliation, and financial hardship as a result was awarded $20,000 in damages for mental suffering. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 16-17 (1996).***

❑ When a black complainant was subjected to racial harassment on an almost daily basis over a 21 month period, then subjected him to an assault because of his race and color that left him unable to work for six to seven weeks, the commissioner awarded $30,000 to compensate complainant for the "intense and prolonged" mental suffering caused by respondent's unlawful conduct. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 2555-56 (1995).***

❑ When respondent 's white male manager used the words "black assed nigger" in speaking to and about a black complainant, and subsequently attributed complainant's supposed lack of progress to blacks having smaller brains than whites, the commissioner found that complainant had been "subjected to the ultimate pejorative for a Black man," was evaluated on the basis of "a vicious racial stereotype," and understandably experienced anger, upset, distrust, uncertainty, humiliation, and emotional distress. The commissioner awarded $15,000 to compensate complainant for the emotional distress caused by "the shocking and severe insults." ***----- In the Matter of Auto Quencher, 13 BOLI 14, 21-23 (1994).***

❑ One of respondent's managers implemented a shoplifting warning when black customers entered respondent's store, suggested that a black female employee was the black complainant's "sister," suggested to another that no blacks need be hired because respondent already employed complainant, and opposed scheduling a company picnic near the black community, and a second manager expressed distrust of complainant "and the other black guy." The

commissioner found that a negative racial atmosphere was created that made complainant feel insulted, devalued and demeaned, and awarded mental distress damages for the unlawful on-the-job treatment. ***----- In the Matter of Northwest Fitness Supply Company, 12 BOLI 246, 249-50, 259-62 (1994).***

❑ A black male complainant informed respondent's management of his discomfort caused by repeated insulting and demeaning racial comments by his supervisors regarding himself and other members of his race, but the offensive activity continued. The commissioner held that racial invective and disparagement directed at members of complainant's race were as offensive as if they were directed at him, and that respondent was responsible for the demonstrated and damaging racial attitudes of its managers and for failing to take immediate and appropriate corrective action. The commissioner awarded complainant $10,000 for mental distress. ***----- In the Matter of Northwest Fitness Supply Company, 12 BOLI 246, 261-62 (1994).***

❑ A 14-year-old black complainant on his first job was transferred from maid duties to sweeping the motel lot after the co-owner said, "Black boys don't clean rooms." Complainant became angry, frustrated, and distressed and resigned over what he perceived as a racially based atmosphere and diminution of his position. The commissioner considered his youth and inexperience in awarding $6,000 for mental suffering. ***----- In the Matter of Rose Manor Inn, 11 BOLI 281, 286-87, 292 (1993).***

❑ When a 14-year-old black complainant on his first job became angry, frustrated, and distressed and resigned over what he perceived as a racially based atmosphere and diminution of his position, and respondent excepted to the proposed mental suffering award of $6,000 based on a lesser amount having been approved in *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (1979), for a more egregious circumstance, the commissioner noted that the facts in *Fred Meyer* arose almost 20 years before those in the current case and stated: "Mental suffering awards are based on the effects of the unlawful act(s) translated into current dollars as a measure of damage. The *Fred Meyer* award would be woefully inadequate today." ***----- In the Matter of Rose Manor Inn, 11 BOLI 281, 293 (1993).***

❑ Complainant, a black woman, was racially harassed, discharged, and chased by respondent's employee from the convenience store where she worked, causing her to suffer severe and long lasting mental distress, including shame, embarrassment, depression, frustration, and impaired human dignity. The commissioner awarded her $15,000 to help compensate her for the mental distress she suffered. ***----- In the Matter of Franko Oil Company, 8 BOLI 279, 292 (1990).***

❑ Complainant testified that respondent's display of discriminatory signs caused her to be humiliated, embarrassed, and insulted her dignity, as well as leaving her reluctant to enter certain establishments. In addition, complainant stated she feared for her safety and had nightmares of respondent's retaliation. For these reasons, the forum awarded the amount of $5,000 as requested in the specific charges. ***----- In the Matter of The Pub, 6 BOLI 270, 286 (1987).***

❑ Complainant, the owner of a mobile home, was prevented by respondent, the owner of the mobile home park, from selling to a prospective buyer because of the buyer's race. The forum awarded complainant $2,000 for mental suffering as a result of respondent's discriminatory actions when the evidence showed that complainant was a person who abhorred racial discrimination and suffered long lasting and severe mental distress. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 158, 165 (1987).***

> Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

❑ In a housing case in which the evidence established that complainant suffered severe and long lasting mental distress as a direct result of respondent's actions in discouraging her tenancy, including degradation, loss of dignity, loneliness, and the loss of her closest friend, complainant was awarded $12,000. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 143, 165 (1987).***

> Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

❑ When the forum found that complainant, a black male, was refused a job based on lack of qualifications rather than race, the forum nevertheless determined that respondent "unlawfully failed to provide complainant a racially neutral work environment." Thus, even though complainant could not recover damages for lost income because he was not qualified for the position, he could be awarded damages for pain and humiliation suffered because of the discriminatory work environment. ***-----*** In ***the Matter of Union Pacific Railroad Company, 3 BOLI 234, 237-38 (1982).***

❑ When respondent discriminated against complainant because of his race, complainant was awarded $1,000 in damages for the mental anguish, pain and humiliation he suffered. The forum found that, although complainant did not seek psychiatric or other help, he was upset by respondent's conduct and that "mental suffering can be inferred from the occurrence of discrimination." ***-----*** In ***the Matter of Union Pacific Railroad Company, 3 BOLI 180, 187 (1982).***

❑ Complainant suffered humiliation and mental stress because of respondent's racial harassment, often crying at work. While there was no testimony indicating whether this suffering affected complainant's life away from the job or whether it continued after she left respondent's employ, she was found to be "generally damaged in the amount of $1,000." ***-----*** In ***the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 128-29 (1982).***

> Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ When respondent refused to admit two black female

complainants to his supper club because of their race, the forum awarded each complainant $2,500 in compensation for the mental suffering resulting from respondent's unlawful practices. The facts showed that both complainants suffered humiliation and anguish, were subjected to discrimination observed by others, and experienced real and tangible frustration and depression. For an extended time after the incident, complainants were reluctant to go to restaurants or other public places because of the public humiliation and anguish suffered at respondent's club. While testifying at hearing, some three years later, complainants were still visibly upset in recalling the events. ***----- In the Matter of Joseph Gaudry, 3 BOLI 32, 36, 38-39 (1982).***

❑ The commissioner inferred "as a matter of law" that complainant suffered humiliation and mental anguish as a result of racial harassment for a period of 10½ months by complainant's supervisor and co-workers and awarded complainant $400 for mental suffering damages. ***----- In the Matter of Roderick Enterprises, Inc., 2 BOLI 14, 20-21 (1980).***

❑ When "the record did not contain evidence sufficient to demonstrate suffering beyond the normal frustration incident to the administrative processing of a case of this type," the commissioner did not award damages for mental suffering to a complainant who was discriminated against because of race. ***----- In the Matter of Sierra Tile Manufacturing, Inc., 1 BOLI 291, 294 (1980).***

❑ In making a monetary award to a complainant who was denied admission to a place of public accommodation because of race, the commissioner focused on three points: (1) The battle against race discrimination has been at the front line of civil rights, and discrimination in public accommodation impairs a "person's basic right to move about freely in society and to be recognized thereby as a participate of his or her community." It is particularly "insidious and devastating"; (2) Suffering in such cases is usually mental rather than physical or financial, making it difficult to measure. However, to follow the mandate of the statute to "eliminate the effects" of discrimination, a compensatory award must be measured in terms of mental suffering; (3) Because such discrimination is particularly devastating, it is important to emphasize that the duration of the discrimination does not determine either the degree or duration of the effects of discrimination "and it is these effects which damages awarded are meant to compensate." The discriminatory episode lasted 25 minutes, followed by a weekend of anguish, and there was evidence of the "long term negative effect" of the discrimination on complainant's personal relationship. Complainant was awarded $2,500 as compensation for her severe mental suffering. ***----- In the Matter of Joseph Gaudry, 1 BOLI 235, 241-43 (1980).***

Affirmed in part, reversed and remanded as to posting in other establishments by respondent, *Gaudry v. Bureau of Labor and Industries,* 148 Or App 589, 617 P2d 668 (1980).

❑ When respondent racially harassed complainant and the evidence established that complainant suffered humiliation, distress, embarrassment, and anxiety, as well as a loss of self confidence that caused his job performance to suffer, complainant was awarded $4,000 as compensation for such suffering. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 94 (1978).***

Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).

Order on remand, 1 BOLI 179 (1979).

❑ When there was "an abundance of evidence concerning ridicule, embarrassment, and humiliation meted out to the complainant by the respondent," the commissioner found the situation particularly egregious because of complainant's youth (16), and concluded that an award for humiliation and mental distress was not only appropriate but was contemplated by the Legislature and awarded complainant $4,000. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 90, 94 (1978).***

Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).

Order on remand, 1 BOLI 179 (1979).

❑ When an employee was denied a promotion because of his race and color and was later discriminated against because he opposed the unlawful practice and filed a complaint with the Civil Rights Division, the commissioner awarded him $4,000 for his "humiliation, indignity, frustration, anxiety, tension, and nervousness" suffered as effects of the racially discriminatory activities of respondent. ***----- In the Matter of N.H. Kneisel, Inc., 1 BOLI 28, 38 (1976).***

Compliance amended, 1 BOLI 51 (1976).

❑ In a public accommodation case, two black male complainants and their female companions were denied admission to a restaurant because of complainants' race and color on two separate occasions. The commissioner awarded each complainant $2,000 for his frustration, mental anguish, humiliation, and embarrassment. ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 26, 28 (1975).***

❑ In a public accommodation case, when complainant, a black female, and her black companion were denied admission to a restaurant because of complainant's race and color, the commissioner awarded her $2,500 for her "humiliation, frustration, anxiety, nervousness, embarrassment, and mental anguish." ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 26, 28 (1975).***

108.2.9 --- Race, Religion, Color, Sex, National Origin, Marital Status or Age of Person with Whom Individual Associates

❑ When emotional distress experienced by complainant and his wife was a direct result of severe household budget problems, but there was ample

evidence that complainant's financial difficulties began long before his unlawful termination by respondent and did not occur as a direct result of respondent's unlawful conduct, the forum did not award any damages for pain and suffering. ***----- In the Matter of Recreational Properties, Inc., 24 BOLI 176, 187-88 (1982).***

❑ Complainant, who was evicted from her apartment because of the race of her cotenant, experienced mental suffering that manifested itself in a number of ways. She experienced loss of appetite, insomnia, tension between herself and her former cotenant, feeling mad and sick inside, anger, upset, and was sick with worry and emotionally upset. She had difficulty performing her job duties and was tense and upset to the extent that she was unable to work due to worry and trying to find other housing and, when she did find it, she suffered continued economic worry due to increased expense. This anger, upset, and worry continued well after the initial eviction notice. The commissioner awarded $5,000 for mental distress damages. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 250 (1990).***

❑ In a public accommodation case, two black male complainants and their female companions were denied admission to a restaurant because of complainants' race and color on two separate occasions. The commissioner awarded each complainant $2,000 for his frustration, mental anguish, humiliation, and embarrassment. ***----- In the Matter of Nehia, Inc., 1 BOLI 24, 26, 28 (1975).***

108.2.10 --- Religion

❑ Respondent's religious proselytizing caused complainant to feel "very uncomfortable, humiliated, out of place, embarrassed, and annoyed." It upset complainant and his family and caused them to hate churches and become upset whenever religion was discussed. Complainant was 20 years old and the job with respondent was his first job after completing a Job Corps program. The commissioner found that the effects of respondent's harassment were significant and ongoing and awarded complainant $3,000 to help compensate for the mental distress he suffered from the religious harassment by respondent. ***----- In the Matter of James Meltebeke, 10 BOLI 102, 130 (1992).***

Reversed and remanded, *Meltebeke v. Bureau of Labor and Industries,* 120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or 132, 903 P2d 351 (1995).

❑ Complainant was subjected to intense and constant religious harassment by her employer for 7½ months, resulting in steadily more severe mental anguish that caused negative physical and emotional effects and left complainant with an inability to feel or communicate a positive attitude about religion. The forum considered complainant's youth and inexperience in the workplace and awarded her $6,000 in compensation for pain and suffering. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 282 (1985).***

❑ When complainant alleged that respondent's actions in consistently proselytizing about his religion forced her to resign, the forum determined that the complainant's age and work experience should be considered in determining whether a reasonable person in complainant's place would have resigned employment. The forum cited *In the Matter of Fred Meyer, Inc.,* 1 BOLI 84 (1978) wherein the forum stated: "In this present case, as findings reflect, there is an abundance of evidence concerning ridicule, embarrassment, and humiliation meted out to the complainant by the respondent. This situation was particularly egregious in view of [the complainant's] youth. That a young man should encounter such an environment in his initial venture in the world of work is outrageous. In circumstances such as this an award for humiliation, mental distress, etc., is not only appropriate, but is indeed contemplated by the legislature of the State of Oregon." The forum also noted that the Court, in reviewing that final order, accepted the complainant's age and experience in the workplace in determining the effects of discrimination upon that particular person. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 276 (1985).***

108.2.11 --- Retaliation (*see* 108.2.7)

108.2.12 --- Sex

❑ Respondent's apparent omnipresence in the community validated complainant's perception that she was the "talk of the town," which contributed to the emotional distress she suffered as a result of respondent's unlawful practices. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 216 (2007).***

Appeal pending.

❑ Based on her credible testimony and the testimony of other credible witnesses who observed complainant following her constructive discharge, the forum found that complainant suffered emotional distress as a direct result of respondent's unlawful employment practice. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 214 (2007).***

Appeal pending.

❑ The forum awarded complainant $20,000 in damages to help offset the suffering caused by respondent's unlawful sexual harassment. Credible evidence shows she was shocked and humiliated by respondent's owner's overt sexual conduct and that she became distrustful and withdrew from her normal social contacts, contrary to her usually outgoing nature. The forum determined that the owner's behavior was tantamount to sexual abuse, that his status as respondent's owner gave complainant no choice but to leave her employment, and that this affected complainant financially and emotionally for at least six months after her constructive discharge. While relatively short lived, complainant's distress was caused by a particularly egregious form of sexual harassment perpetrated by the person who controlled her livelihood. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 214 (2007).***

Appeal pending.

❑ Based on complainant's credible testimony, the forum found she suffered significant emotional distress

as a direct result of respondent's unlawful employment practices. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 289-90 (2004).***

❑ The forum awarded complainant $40,000 in damages for mental distress based on her disgust with respondent's conduct and her anxiety about its continued escalation, rashes, panic attacks, and financial worries that made her less equipped to leave her employment to obtain relief from respondent's conduct. These symptoms were based on the hostile work environment created by respondent over a six month period and respondent's constructive discharge of complainant. Complainant's testimony concerning her distress was supported by her physician's notes that indicated complainant had been placed on medication for anxiety and that counseling for home and work-related stress had been recommended. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 289-90 (2004).***

❑ When respondent's offensive conduct was frequent and pervasive, but of relatively short duration, complainant obtained a job earning more money at the Holiday Inn Express within a short period of leaving her employment, and there was no evidence that she suffered any ill effects as a result of respondent's conduct thereafter, the forum found that $10,000 would serve to eliminate the effects of respondent's unlawful practice. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 32-33 (2002), amended 23 BOLI 67 (2002).***

❑ As a result of her continued exposure to respondent's sexual exploits and anti-female comments during her six months of employment, complainant found herself becoming increasingly suspicious of her fiancé's activities, attributing to him some of respondent's qualities, which affected the quality of their relationship. Additionally, complainant began to change her outward appearance by wearing baggy clothing and long dresses and skirts in order to go unnoticed because she was fearful that men would talk about her the way respondent talked about other women. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 32 (2002), amended 23 BOLI 67 (2002).***

❑ The forum awarded a complainant $7,500.00 to compensate her for mental suffering associated with the financial strain she experienced because of respondent's unlawful reduction of her work hours and constructive discharge, which were based on her pregnancy, when there was no evidence that complainant suffered lasting adverse effects from the financial strain. ***---- In the Matter of Bob G. Mitchell, 19 BOLI 162, 189 (2000)***.

❑ Respondent's sexually oriented language and behavior caused complainant to become upset and angry, to feel vulnerable, to suffer stress, to become emotionally shaky, and to be uneasy each day at work, and her emotional distress persisted for months. The forum awarded $20,000.00 damages for mental suffering. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 96 (1998)***.

❑ When complainant's hours were reduced because of her sex and she suffered financial insecurity and anxiety, upset, humiliation, distress, hurt, and embarrassment as a result, the commissioner awarded her $15,000 in damages for her mental distress. ***----- In the Matter of Katari, Inc., 16 BOLI 149, 161 (1997).***

Affirmed without opinion, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).

❑ Due to respondents' sexual harassment and discharge, complainant suffered severe mental distress up to the time of the hearing, characterized by damage to her self-esteem, insecurity, depression, anger, disgust, and feelings of being fearful, threatened, demeaned, belittled, embarrassed, ashamed, powerless, cheapened, unsafe, sick, and hurt. She also suffered painful financial strain, felt low, inadequate and hopeless, and experienced great stress on her marriage. The commissioner awarded her $30,000 for her mental suffering. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 134, 141 (1997).***

❑ Due to respondents' sexual harassment and retaliatory discharge, complainant suffered severe mental distress on the job and up to the time of hearing, characterized by fear, nervousness, anger, feeling "dirty," sick, fear that she would be fired, and not wanting to go to work any more. The discharge and reduced income damaged her self-esteem, and she was depressed, gained weight, and had trouble sleeping. The commissioner awarded her $30,000 for her mental suffering. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 134, 141 (1997).***

❑ Complainant suffered severe mental distress on the job and up to the time of hearing due to respondent's sexual harassment, characterized by feeling embarrassed, inferior, frightened, fearful, angry, and powerless. Complainant was 15 years old and on her first job with respondents and was subjected to touching, conversation, and suggestions of a sexual nature that made her feel afraid, upset, more judgmental, less outgoing, and less trusting of males. The commissioner awarded her $25,000 for her mental suffering. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 134, 141 (1997).***

❑ Complainant suffered harm over a two month period by way of extreme and ongoing mental suffering and emotional distress, characterized by tears, stomach aches, inability to sleep, and upset nerves due to sexual harassment by her supervisor. Those effects diminished once she quit the employment. The commissioner awarded her $20,000 to help eliminate the effects of the unlawful practice. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 223, 226 (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ When a female complainant was subjected to two months of verbal and physical sexual harassment by a male co-worker, the employer knew or should have known of the offensive behavior and took no action to correct or eliminate it, and the offensive behavior caused complainant to feel demeaned, humiliated, frustrated,

and helpless, with long-lasting distress and self-doubt, the forum awarded complainant $20,000 to compensate her for the mental distress. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 94 (1996).***

> Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 301, 954 P2d 804 (1998).

❑ In a sexual harassment case, the commissioner awarded complainant $20,000 in damages for emotional distress when respondent commented about and touched complainant's breasts and offered her money for sex and when, following respondent's actions, complainant did not want to be touched by her husband; she felt demeaned, embarrassed, humiliated, and very offended; her attitude deteriorated; and she was mean to her children. The award was not "wildly excessive" as respondent claimed, compared to the $200 awarded by the commissioner in *Williams v. Joyce,* 4 Or App 482, 479 P2d 513 (1971), a race discrimination case. Noting that the facts in this case arose 26 years after *Williams*, the commissioner stated that "mental suffering awards are actual compensation for actual harm, and * * * there must be evidence to support any award. Such evidence exists here. The proposed award is not excessive and is affirmed." ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 282-83 (1996).***

❑ Complainant worked in a bar and was sexually harassed by a customer during the entire period of her employment, which hurt, embarrassed, humiliated, and offended complainant, and made her afraid of being raped. Respondent's failure to take any corrective action caused complainant to feel devalued and to suffer stomach upset, stress, and insomnia. Her emotional upset continued after her employment ended, affected her subsequent employment and relationships, and made her suspicious of authority, unable to accept criticism, and in need of counseling. The forum awarded her $15,000 to compensate for her mental distress***. ----- In the Matter of Soapy's, Inc., 14 BOLI 86, 96 (1995).***

❑ When the agency established a continuing violation of ORS 659.030(1)(b) by showing that respondent sexually harassed complainant throughout her six-month period of employment, complainant was eligible for an award of damages encompassing the entire duration of her employment with respondent. ***----- In the Matter of Kenneth Williams, 14 BOLI 16, 25-26 (1995).***

❑ Respondent sexually harassed complainant on a daily basis throughout her six-month period of employment, and complainant's resulting emotional distress was aggravated by her financial circumstances that made it virtually impossible for her to quit. The forum found the duration, frequency, and severity of the harassment and the extent of her emotional distress to be substantial and awarded her $20,000 for her emotional distress. ***----- In the Matter of Kenneth Williams, 14 BOLI 16, 26 (1995).***

❑ Complainant, who was breast-feeding her newborn baby, experienced leakage of her breasts. In discharging her, respondent's manager commented that she had returned to work too soon after giving birth. This deeply offended, angered, and frustrated complainant, who stated "I felt violated as a mother and as a female." The commissioner noted that the anger and hurt persisted and awarded $15,000 to compensate complainant for her emotional distress. ***----- In the Matter of Motel 6, 13 BOLI 175, 181, 185 (1994).***

❑ Each of two female complainants was subjected to unwelcome touching and remarks from respondent's manager, who was their immediate supervisor. As a result, each suffered severe emotional distress. The commissioner awarded mental distress damages of $15,000 to each complainant. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 12-13 (1994).***

❑ When a female complainant suffered effects on her digestion and sleep, was reluctant to be touched, felt degraded and dirty, and was anger and upset as a result of her immediate supervisor's unwelcome parental leave and verbal sexual conduct, but there was other evidence of unconnected family stress, the commissioner nonetheless awarded $15,000 for the mental distress caused by the sexual harassment, stating that employers must take employees as they find them. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 12-13 (1994).***

❑ A female complainant who suffered anger, apprehension, upset, tears, depression, stress, isolation, and feelings of degradation as a result of her immediate supervisor's unwelcome physical and verbal sexual conduct was awarded $15,000 for the mental distress caused by the sexual harassment. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 10, 13 (1994).***

❑ Over a two day period, a respondent who was complainant's supervisor and sexually and romantically attracted to complainant made sexual advances to her in the form of repeated social invitations and, ultimately, demands; made comments of a sexual nature concerning complainant's relationship with her boyfriend; and characterized the boyfriend's presence at complainant's house as an obstacle to his own romantic designs. Complainant found respondent's overtures unwelcome and rejected them and respondent terminated complainant's employment because she refused to submit to his demands. Complainant was extremely upset by respondent's conduct on the night she was discharged, and was upset, and fearful of respondent for several months thereafter and, to some extent, up to the time of hearing. After he discharged complainant, respondent made repeated attempts to contact complainant at her new job, and complainant called the police on several occasions to protect her from him. Complainant lost sleep for several months after the discharge and felt uncomfortable establishing personal and professional relationships with her new employers. The forum awarded complainant $10,000 to compensate her for the mental suffering she experienced due to respondent's unlawful conduct. The forum considered only the events up to and surrounding complainant's discharge in determining the award of mental suffering. While exacerbating this suffering, the later episodes of respondent's conduct were found to be outside the scope of remedies available under ORS 659.030(1). ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 89-91 (1993).***

❑ Respondent sexually harassed complainant both physically and verbally, causing her to be constructively discharged and to have difficulty working around men. The commissioner considered complainant's age, 20, her small amount of work experience, the type of discrimination -- sexual harassment and constructive discharge, the short duration of the harassment --two days, the severity of the harassment, and the effects and duration of her mental suffering in awarding complainant $10,000 to compensate her for her mental suffering. ***----- In the Matter of RJ's All American Restaurant, 12 BOLI 24, 32 (1993).***

❑ Complainant suffered both quid pro quo and hostile environment sexual harassment, which caused her to be shocked and embarrassed, scared and jumpy at work; anger, humiliated, and very frustrated; lowered her self-esteem; made her feel uncomfortable, nervous, and confused working around older men; and made her suffer financial hardship after respondent unlawfully discharged her. The commissioner awarded complainant $10,000 to compensate for her mental distress. ***----- In the Matter of C. Vogar'd Amezcua, 11 BOLI 197, 205 (1993).***

❑ A complainant who was discriminated against in compensation because of her sex and experienced tears, anxiety, sleeplessness, stress, and a diminution of self-worth over her treatment by respondent that was traceable to the wage issue was awarded $7,500 for her emotional suffering. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 165 (1993).***

❑ Complainant was constructively discharged due to her supervisor's sexual harassment. As a result, she suffered nervousness and concern for her privacy and safety at home; embarrassment in front of co-workers and her son, difficulty and embarrassment in applying for employment following her discharge; anger and depression following her discharge; and impaired personal dignity. The forum awarded complainant $10,000 for her mental distress. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 198 (1992).***

Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

❑ When a female complainant was subjected to her employer's frequent, severe and pervasive sexual harassment that embarrassed, humiliated, and demeaned her, adversely affecting her work and causing her to quit, and she continued for many months to be upset by the experience and by the stress of resultant economic deprivation, the commissioner awarded $7,000 for mental suffering. ***----- In the Matter of Lee Schamp, 10 BOLI 1, 18 (1991).***

❑ Respondent's sexual harassment created intolerable working conditions, caused complainant to be constructively discharged, and resulted in severe mental and emotional distress. After the resignation, complainant's economic situation had an adverse effect on her emotional state. She contacted three helping agencies, but could not afford counseling, applied for food stamps, moved away from her town and friends, and was depressed because she had to call on her children for help. The commissioner held that all of complainant's mental suffering was attributable to respondent's unlawful employment practice and awarded her $6,000 to compensate her for the mental suffering. ***----- In the Matter of William Kirby, 9 BOLI 258, 273, 281 (1991).***

❑ A female complainant who suffered emotionally and physically from the unemployment and financial hardship resulting from being unexpectedly discharged when she opposed respondent's sexually discriminatory practice of paying probationary female employees at a lower rate than male probationary employees doing the same job was awarded $4,000 in compensatory damages for her resultant mental suffering. ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 232 (1991).***

❑ In a sexual harassment case, the commissioner awarded $15,000 for mental distress damages when a respondent employer exploited a young, inexperienced, disadvantaged youth and used the unequal balance of power between himself and the complainant to his advantage, and complainant suffered "embarrassment, distress, and renewed fear and stress" and acquired a revulsion to being around and working for men, and became uncomfortable when her boyfriend of many years touched her. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 217-18 (1991).***

❑ Complainant testified that respondent's sexually derogative comments made her fearful and angry; that they "negatively affected her self-esteem and self-image and adversely affected her ability to communicate with males"; she was "upset and felt degraded, devalued and humiliated"; she felt as if her gender, and not her efforts, was all that respondent evaluated; and those effects lasted several months. The commissioner awarded $3,500 in mental distress damages. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 188-89, 191 (1991).***

❑ Complainant experienced mental suffering due to the deliberate devaluation of her services and abilities, the failure to promote her, the assignment of demeaning duties, the sex-based denial of training, the allowance of a sexually demeaning work environment, and the resulting unemployment caused by a constructive discharge. The commissioner held the respondent directly liable and awarded the complainant $3,500 in compensatory damages for the mental distress she suffered. ***----- In the Matter of City of Umatilla, 9 BOLI 91, 106, 110 (1990).***

Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ When respondent threatened to discharge any employee who filed complaints with the state and issued a warning/probationary memo to complainant after she filed a sexual harassment charge, the commissioner awarded complainant $7,000 in compensatory damages for mental distress suffered as a result of the sexual harassment and employer threats. The public interest is furthered if employees come forward with complaints to report violations of the law without fear of retribution. ***-----***

In the Matter of G & T Flagging Service, Inc., 9 BOLI 67, 81-82 (1990).

❑ When the evidence was undisputed that complainant was "shocked, surprised, and upset by her termination," and was "disappointed, frustrated and depressed" and "embarrassed" to have to cancel previously arranged sales appointments and to have to tell family and friends that she had been terminated, and these effects were sudden and severe, the commissioner awarded complainant $3,500 to help compensate her for the effects she suffered as a direct result of the discharge. ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 59, 66 (1990).***

❑ In a proper case, with proof of emotional distress, unlawful disparity in pay based on sex will support an award for mental suffering, as will other adverse on-the-job treatment based on sex. ***----- In the Matter of Courtesy Express, Inc., 8 BOLI 139, 148 (1989).***

❑ The commissioner awarded $2,000 in mental suffering damages to a female complainant who worked as a dispatcher for a trucking business and was paid less than her male predecessor and her male successor based on her sex. She was often promised raises, but never received them and was talked down to and told that she was not as good as a male doing the same job, all because she was a woman. The disparity in her pay caused friction and argument at home. She felt embarrassed, degraded, and downgraded by the drivers because of the disparity in pay and the eroding of her position. ***----- In the Matter of Courtesy Express, Inc., 8 BOLI 139, 148 (1989).***

❑ In a sex/pregnancy discharge case, the commissioner awarded $3,000 to a complainant who testified to being upset, having a disrupted appetite, and feelings of humiliation and shame resulting from respondent's unlawful practice. ***----- In the Matter of Baker Truck Corral, 8 BOLI 118, 39 (1989).***

❑ Complainant was subjected to daily sexual harassment for nearly a year, and suffered fear, distrust, tension, stress, discomfort, irritability, elevated blood pressure, humiliation, and embarrassment as a result. Persistent phone calls from her harasser to her home affected her off-duty life and family. The commissioner awarded her $5,000 for her mental distress. ***----- In the Matter of Colonial Motor Inn, 8 BOLI 45, 56 (1989).***

❑ A complainant who was subjected to daily sexual harassment and suffered embarrassment, humiliation, and frustration, and felt ongoing concern about the possibility of having to deal with sexual harassment in subsequent work settings was awarded $3,500 for her mental distress. ***----- In the Matter of Palomino Café and Lounge, Inc., 8 BOLI 32, 38, 41 (1989).***

❑ Complainant, a waitress, was repeatedly subjected to sexual harassment and sexually offensive comments such as "eat me" in front of her customers. Respondent retaliated against complainant's rejection of his conduct by botching or delaying the preparation of her food orders, which affected the quality of her service to her customers and her tips. As a result, complainant suffered upset, nightmares, and developed a fear of working for men. The commissioner awarded her $3,000 for her "embarrassment and humiliation." ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 21-22 (1989).***

❑ Complainant, an 18-year-old waitress who had a history of sexual abuse at home, was sexually harassed continuously during a three day period of employment with respondent. Respondent's sexual harassment resurrected complainant's past sexual abuse in the form of nightmares and fear of men – including her doctor and fiancé; and these problems caused physical and mental suffering requiring doctors' care. The commissioner held that "although the degree of her difficulties was affected by the sexual abuse she suffered when she was younger, the harassment she suffered at [respondent's café] caused her to have increased and additional difficulties, for which respondents are directly liable." The commissioner awarded $6,000 for her mental distress. ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 22 (1989).***

❑ When complainant appeared to have "embellished" the extent of the emotional trauma she suffered as a consequence of respondent's sexual harassment, the forum found that she was in fact subjected to offensive, unwelcome physical and verbal sexual harassment by respondent. Complainant was upset and concerned enough about the harassment to complain to others about it and recorded the remarks and incidents showing the pattern of harassment in her diary. Complainant needed the work and was not free to leave at anytime. A witness also testified that complainant cried because of something respondent said to her. The commissioner found that complainant did suffer as a direct result of respondent's illegal behavior and was awarded $2,000 for mental distress. ***----- In the Matter of Stop Inn Drive In, 7 BOLI 97, 115 (1988).***

❑ When respondent discriminated because of sex by paying a female complainant less than her male predecessor and complainant testified that she suffered humiliation over a period of at least a year and a half as a result of respondent's actions, the forum found complainant was generally damaged in the amount of $2,000. The fact that complainant did not feel at the time of the incident that she was being treated differently did not lessen or mitigate the humiliation, anger, and frustration she suffered because of respondent's unlawful actions. ***----- In the Matter of C & V, Inc., 3 BOLI 152, 163 (1982).***

❑ The forum found complainant had been discharged because of her sex, and complainant testified that she was upset by her termination. However, the forum determined that there was insufficient evidence presented to demonstrate that complainant suffered pain, humiliation, or mental anguish as a result of her termination and made no award of general damages. ***----- In the Matter of Rich Manufacturing Company, 3 BOLI 137, 141 (1982).***

> Affirmed without opinion, *Rich Manufacturing Company v. Bureau of Labor and Industries,* 64 Or App 855, 669 P2d 843 (1983).

❑ Respondent failed to select complainant as a police officer because of her sex, and there was no evidence

that she suffered mental strain as a result. The commissioner declined to make any mental suffering award based on evidence of strain caused by voluntary attempts to do police work that was not part of her dispatcher position, or based on evidence of strain occasioned by her having filed a complaint with the agency. ***----- In the Matter of City of Dallas, 2 BOLI 93, 105 (1981).***

❑ The commissioner awarded $1,000 and $500 in mental suffering damages, respectively, to two female complainants who were not allowed to apply for the position of police officer based on sex and unlawful height and age requirements when each complainant suffered continual frustration in being prevented from pursuing a career for which she had prepared and had to accept temporarily funded positions to remain in police work, causing them to endure the "specter of unemployment." ***----- In the Matter of City of Portland, 2 BOLI 41, 56 (1980).***

❑ Respondent was found to have discriminated against complainant on the basis of sex. The commissioner awarded $300 for mental suffering when the evidence showed that complainant felt "anger and indignant at the inference of inferiority" but did not show that complainant was subjected to verbal abuse, direct ridicule, embarrassment, or public humiliation. The commissioner stated that case law indicates that damages are appropriate when a complainant suffers indignity due to the inference of inferiority based on complainant's protected class. ***----- In the Matter of Bend Millworks Company, 1 BOLI 214, 221-24 (1979).***

❑ A female complainant who was discharged based on her sex and in retaliation for questioning unequal pay experienced shock at being unexpectedly and unjustly unemployed, resulting in humiliation, embarrassment, and considerable mental distress. The commissioner awarded $1,000 for mental suffering damages. ***----- In the Matter of Terminal Ice and Cold Storage Company, Inc., 1 BOLI 151, 157-58 (1978).***

❑ Respondent required complainant, a pregnant probationary teacher, to resign because of her pregnancy. The forum found that she suffered humiliation, frustration, anxiety, and nervousness as a result of respondent's unlawful practice and awarded her $700 to eliminate these effects. ***----- In the Matter of School District No. 1, 1 BOLI 1, 14 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

108.2.13 --- Sexual Orientation (City Codes)

108.2.14 --- Violation of Leave Laws (*see* 127.2)

108.2.15 --- Whistleblower

❑ In a criminal whistleblower case, the forum awarded $25,000 in damages for emotional distress based on complainant's credible testimony that she was "mad, shocked, and surprised" that she was discharged for having reported respondent's unlawful activity, that she was not prepared to be unemployed and she was very "stressed and upset" until she found replacement employment. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 136 (2005).***

❑ The forum awarded $10,000 in emotional distress damages, the amount sought by the agency, based on complainant's credible testimony that, after his suspension and discharge, he worried, stopped paying his personal bills, experienced unstable moods, suffered loss of appetite, had "crummy" sleep, felt generally "crummy," considered leaving his wife, and argued with her a lot. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 134 (2002).***

❑ The forum awarded $5,000 in emotional distress damages, the amount sought by the agency, when complainant's credible testimony established that she experienced panic and serious stress between October 19 and December 20, 1999 as a direct result of her suspension and discharge from respondent's employment; she had nightmares about being thrown out of her house because she couldn't pay the bills and having to live in her car or on the streets; she slammed doors, broke some glassware; lost sleep; had difficulty concentrating; and had less energy than usual. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 133-34 (2002).***

❑ Respondent's president discharged complainant in violation of ORS 659.550(1) because he complained in good faith to the county health department about possible health hazards in respondent's restaurant. As a result, complainant experienced the trauma of a sudden and unexpected discriminatory termination and felt anger, shock, and reduced self-esteem, gained weight, had trouble sleeping, lost his temper with his wife and their children, became withdrawn and less assertive, and met with the anxiety, uncertainty, and financial hardship connected with the loss of employment. These effects lasted two to three months. The commissioner held that these types of mental distress are all compensable and awarded complainant $20,000 to help compensate him for the mental distress he suffered. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 27-28 (1997).***

❑ In a private whistleblower case, complainant experienced intense feelings of shock, hurt, anger, resentment, and devastation over his discharge, had resultant severe financial difficulties, and experienced headaches, stress, and loss of sleep. The forum awarded him $30,000 for his mental distress. ***----- In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 126 (1995).***

Affirmed without opinion, *Earth Science Technology, Inc. v. Bureau of Labor and Industries*, 141 Or App 439, 917 P2d 1077 (1996).

108.2.16 --- Other

❑ In a family relationship case, when a 17-year-old complainant was surprised, hurt, and felt betrayed by being discharged from a part-time job because of

respondent's dispute with complainant's mother, the commissioner awarded complainant $1,000 to compensate for her mental distress. ***----- In the Matter of Short Stop Cafe, 12 BOLI 201, 205, 208 (1994).***

109.0 POSTINGS

❑ When respondent unlawfully threatened to evict

❑ When complainant was discharged based on his opposition to unsafe working conditions, the commissioner ordered respondent to post on its premises a copy of ORS 654.001 to 654.295, and a separate copy of ORS 654.062, together with a notice that any person believing that an employee has been subjected to unsafe or unhealthy working conditions could contact OR-OSHA, and any person believing that an employee had been discriminated against for opposing an unsafe or unhealthy practice could contact the Oregon Bureau of Labor and Industries. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 133 (1990).***

> Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

❑ When respondent had racially oriented signs in violation of ORS 659.037 and 30.670, a cease and desist order was issued requiring respondent to remove all such signs and to refrain from the display of any sign, photograph or physical object that communicates a distinction on the basis of race. Respondent was further required to post a readable copy of ORS 30.670 and 659.045 and a notice indicating that anyone who believed they had been discriminated against at respondent's premises should notify the agency. ***----- In the Matter of The Pub, 6 BOLI 270, 287 (1987).***

❑ When respondent discriminated against complainant on the basis of race by refusing her entry to a place of public accommodation, the commissioner ordered respondent to post for 90 days a copy of ORS 30.670, 659.045(1), and 659.010(14), along with notice that any person who believed they had been discriminated against should notify the Bureau of Labor and Industries. The notice was to be posted in every separate establishment maintained by respondent in Oregon in a location within or outside each establishment accessible to and frequented by each and every person seeking admission and to each and every employee or agent who regulated admission. ***----- In the Matter of Joseph Gaudry, 1 BOLI 235, 243 (1980).***

> Affirmed in part, reversed and remanded as to posting in other establishments by respondent, *Gaudry v. Bureau of Labor and Industries,* 48 Or App 589, 617 P2d 668 (1980).

❑ A respondent employer who committed an unlawful employment practice by harassing a black complainant on the basis of race and was found liable for back wages and for damages for humiliation was ordered to place a copy of the commissioner's final order in complainant's personnel file and also ordered to post a copy of the final order in each of its business establishments in the state and to furnish summaries of the order, and access to the full text, to each of its employees. ***----- In the Matter of*** complainant unless he took certain medications, the commissioner ordered respondent to post copies of the Multnomah County regulations that gave residents the right to refuse medications, together with a notice of the right to file a claim with BOLI. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 97 (1999)***.

Fred Meyer, Inc., 1 BOLI 84, 94-95 (1978).

> Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).
>
> Order on remand, 1 BOLI 179 (1979).

❑ In a public accommodation case, the commissioner required respondent, a restaurant/lounge, to "post in the Club entrance-way, such that it can be visually perceived without effort, a poster or placard clearly informing the reader that the Club offers its foods and services to persons without regard to their race or color." ***----- In the Matter of Nehia, Inc., 1 BOLI 24 (Exhibit "A") (1975).***

110.0 REFERENCES

❑ In addition to damages, the agency sought "a favorable letter of reference from respondent" on complainant's behalf. Under ORS 659A 850(4)(a), the commissioner may issue an order requiring that respondent "[p]erform an act or series of acts designated in the order that are reasonably calculated to carry out the purposes of [ORS chapter 659A], to eliminate the effects of the unlawful practice that the respondent is found to have engaged in, and to protect the rights of the complainant and other persons similarly situated." The agency established no link between a favorable letter of reference and complainant's unlawful demotion. While the commissioner may award non-economic as well as economic damages, the damages sought must be attributable to the unlawful practice found. The agency neither alleged nor proffered any evidence that complainant was unlawfully terminated, and there was no evidence in the record that complainant ever voluntarily or involuntarily left his employment with respondent. The agency offered no evidence and made no argument to support complainant's request for a favorable reference letter as a means of redress for his unlawful demotion. Consequently, the forum concluded that a favorable reference letter was not reasonably calculated to eliminate the effects of the unlawful demotion and was outside the scope of non-economic remedies available to complainant. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 293 (2007).***

❑ When the agency requested that respondent, who unlawfully discharged complainant for his opposition to a safety hazard, be required to give complainant a "good reference," the forum found it would not be appropriate because there was persuasive evidence to indicate that, aside from the incident in question, respondent did not find complainant to be a "good" employee. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 310 (1985).***

❑ When the forum found that respondent had racially harassed complainant and the record established that

complainant had job performance problems, the forum ordered respondent to provide an employment reference indicating that complainant had worked for respondent. ***----*** In ***the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 130 (1982).***

Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ Complainant received job references from respondent that referred to his discharge for insubordination. The forum determined that it was respondent's unlawful employment practice that led to complainant's bad attitude and that complainant was not discharged for his attitude alone, but rather for his objection to respondent's discriminatory practices as applied to him. The forum ordered respondent to purge and expunge complainant's employment record of statements and documents indicating that complainant was terminated for insubordination; to respond to all future requests for job references with a good faith and factually accurate appraisal of complainant's performance; and to indicate complainant was terminated due to his objection to a sexually discriminatory policy implemented by respondent in violation of ORS 659.030(1)(d). ***----- In the Matter of Lane County Youth Care Center, Inc., 2 BOLI 246, 253, 257 (1982).***

❑ When respondent was found to have discriminated against complainant based on his race, the commissioner ordered respondent to make a copy of the commissioner's final order a permanent part of complainant's personnel file, and to furnish a copy to anyone making inquiries concerning complainant's employment or performance with respondent. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 94 (1978).***

Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).

Order on remand, 1 BOLI 179 (1979).

111.0 REINSTATEMENT

❑ As a remedy for respondent's failure to reinstate complainant pursuant to ORS 659.415, the forum ordered respondent "to reinstate Complainant to his former position of employment upon demand if the position exists and is available * * *. If the former position is not available, Respondent shall reinstate Complainant in any other existing position which is vacant and suitable." The forum ordered that this right to reinstatement would terminate seven days after complainant received the final order unless he demanded reinstatement during that period of time. ----- ***In the Matter of Tyree Oil, Inc., 17 BOLI 26, 44-45 (1998)***.

Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ When complainant was demoted and transferred to a different work location because he reported a health violation to OR-OSHA, the commissioner ordered respondent to reinstate him to his former position with all pay, benefits, privileges, and seniority as if he had continued in that position and classification from the date of the demotion. ***----- In the Matter of West Linn School District, 3 JT, 10 BOLI 45, 64 (1991).***

❑ Complainant was not entitled to reinstatement or front pay when he obtained alternate employment and then voluntarily left that employment. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 310 (1985).***

❑ When complainant was unlawfully demoted from an office supervisor job, and that job was then given to another person due to an office reorganization, the commissioner could not conclude that complainant would have held the office supervisor job after the reorganization. As a result, the commissioner denied complainant's request for reinstatement to the office supervisor job, but instead ordered that complainant be reinstated to a shift supervisor job that she was qualified for. ***----- In the Matter of City of Salem, 4 BOLI 1, 46-47 (1983).***

❑ When complainant drew workers' compensation for a knee injury at work, the commissioner found that the recovered injured worker's filing for unemployment and listing "quit" and "other" regarding his employment status with respondent did not extinguish respondent's duty to reinstate him upon demand after his release and that respondent unlawfully denied him an available position. ***----- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 269 (1980).***

Reversed on the ground that statutes did not specify failure to reinstatement as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980).

❑ The commissioner held that ORS 659.035 made available for enforcement of ORS 659.015 all of the procedural and substantive provisions of ORS 659.050 to 659.083, including hearing and cease and desist order authority, reasoning that to hold otherwise would make the reinstatement mandate of ORS 659.415, as it appeared in 1976, a nullity. ***----- In the Matter of Corvallis Disposal Company, 1 BOLI 266, 270 (1980).***

Reversed on the ground that statutes did not specify failure to reinstatement as an unlawful employment practice, *Corvallis Disposal Company v. Bureau of Labor and Industries,* 49 Or App 245, 619 P2d 663 (1980).

❑ When respondent refused to hire complainant as an appliance salesperson, respondent was ordered to pay back pay to complainant from the date of rejection to the date of the final order, less interim earnings; to offer the next available appliance salesperson position at the location; and to pay lost was from the date of the final order to the offer date of such position. ***----- In the Matter of Montgomery Ward and Company, Inc., 1 BOLI 62, 67-68 (1976).***

Reversed, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, reversed and remanded, 280 Or 163, 570 P2d 76 (1977).

Order on remand, 1 BOLI 100 (1978).

Affirmed as modified (removing general before the final order was issued, the forum ordered that the check for damages for both pecuniary losses and mental suffering be made payable to the Bureau of Labor and Industries, in trust for the complainant's personal representative. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 165 (1987).***

Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, 308 Or 199, 778 P2d 953 (1989).

X. OREGON FAMILY LEAVE ACT

115.0 UNLAWFUL ACTS

115.1 --- Denial of Leave

❑ Under the OFLA, it is an unlawful employment practice for an employer to deny an eligible employee leave to recover from or seek treatment for a serious health condition "in the manner required by ORS 659A.150 to 659A.186." ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 294 (2007).***

❑ OFLA regulates two distinct areas of employer behavior with regard to employee leaves of absence. First, OFLA establishes an entitlement providing that eligible employees working for covered employers are entitled to OFLA leave for the purposes set out in the statute, and job protection during that leave. Second, OFLA, through OAR 839-009-0320, prohibits retaliation or discrimination against any employee based on inquiry about the use of OFLA. This distinction is important because the analysis of whether or not unlawful practices occurred is different in each area. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 293 (2007).***

❑ Complainant took family leave to spend as much time as possible with her dying father and made it clear to respondent that she would return to work when her father died or 12 weeks had passed, whichever occurred first. While on family leave, she was entitled to spend this time with her father without any interference from respondent that disrupted her focus on her father. Instead, what she got was a series of unsolicited and unwelcome visits and calls from her supervisor that upset her and left her with an ongoing worry about whether she would lose her job if she continued to exercise her legal right to stay home with her father, causing an emotional disruption of her family leave. These calls and visits began during the first week of complainant's family leave and only ended after her father's death a month later. The forum concluded that the supervisor's ongoing interference with complainant's use and enjoyment of her family leave was contrary to the legislative goals expressed in OFLA and constituted a constructive denial of complainant's family leave in violation of ORS 659A.183. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 247-48 (2005).***

❑ When complainant was in fact allowed to take family leave and returned to work on March 5, 2002, only because she believed she would otherwise be fired, complainant's return to work was a coerced act, not a voluntary one. Her forced return, under pain of discharge, was an actual denial of her right to continue her family leave for 12 weeks or until her father died and an unlawful employment practice under ORS 659A.183. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 246-47 (2005).***

❑ When respondent allowed complainant to take only 240 hours of the 480 hours of OFLA leave to which he was entitled, then fired him because he would not return to a work schedule that his treating physician did not believe he was ready or able to do, this action violated ORS 659.478. ***----- In the Matter of Centennial School District, 18 BOLI 176, 194 (1999)***.

Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

115.2 --- Failure to Restore to Previous Position of Employment (*see* 125.0)

❑ The determination whether an employer has violated the reinstatement right of an employee under the OFLA requires a determination of the employment advantages that the employee would have enjoyed with the employer if she had not taken family leave. Those advantages must then be compared with the advantages that the employee actually enjoyed on her return to employment. If the employment advantages enjoyed by the employee on her return fall short of those that she would have enjoyed had she not taken family leave, then the employer has failed to restore the employee to her employment position as required by the OFLA. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 236 (2004).***

❑ Under the OFLA, eligible employees are entitled to take up to 12 weeks of leave each year and are guaranteed restoration to their employment position, if it still exists, after they have exercised their leave right. Employees are not entitled to any right, benefit or position of employment other than the rights, benefits and position that the employee would have been entitled to, had the employee not taken the family leave. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 236 (2004).***

❑ An employer's failure to restore an employee to the employee's pre-OFLA position creates a rebuttable presumption that the employer unlawfully refused to restore the employee to that position. If the position still exists and the employee would not have otherwise been

112.0 SURVIVAL OF DAMAGE AWARD

❑ In a housing case in which the complainant died damages as unsupported), *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979).

bumped or displaced if the employee had not taken leave, the employer rebuts the presumption "by proving that the employee asked not to be [restored] to his or her former position." ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 236 (2004).***

❑ Under the OFLA, it is an unlawful employment

Magno-Humphries, Inc., 25 BOLI 175, 192 (2004).

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ The determination of whether an employer has violated the restoration right of an employee under the OFLA requires a determination of the employment advantages the employee would have enjoyed with the employer had she not taken family leave. Those advantages must then be compared with those she enjoyed upon her return to employment. If the employment advantages enjoyed by the employee after her return to employment fall short of those she would have enjoyed, had she not taken family leave, then the employer has failed to restore the employee to her employment position as required by the OFLA. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 146 (2003).***

❑ When complainant had consistently worked between 12 and 27 percent of total available housekeeping hours, was considered a "fine" employee at the time she began her family/parental leave, and there was no credible evidence that her hours would have been cut, had she not taken family/parental leave, the forum found that complainant's "key employment advantage" she would have enjoyed, had she not taken family leave, was the opportunity to be offered some work hours during the period at issue. The forum concluded that the employment advantage enjoyed by complainant on her return from family leave fell short of what she would have enjoyed, had she not taken family leave, and that in failing to give or offer complainant any hours of work during the period at issue, respondent failed to restore complainant to the position she held when her leave commenced. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 148-49 (2003).***

❑ Once the agency has established the four elements of its prima facie case, there is a rebuttable presumption that respondent refused to give effect to complainant's entitlement to job restoration. No motive or intent need be proved. Respondent may negate that presumption by coming forward with evidence of one or more of the following: (1) the position of employment held by the employee when the leave commenced no longer existed when the employee attempted to return to work; and no available equivalent position existed; (2) the employee gave unequivocal notice of intent not to return to work; or (3) the employee would have been bumped or displaced if the employee had not taken leave. ***--- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 149 (2003).***

practice for an employer to deny an eligible employee leave to recover from or seek treatment for a serious health condition. Respondent summarily terminated her employment while she was out on OFLA qualified leave, denying complainant the right to seek treatment for or to recover from her serious medical condition, and the leave to which she was entitled. ***----- In the Matter of***

115.3 --- Harassment

❑ When complainant's supervisor was alleged to have harassed complainant while she was off work on family leave, all the alleged harassment occurred away from respondent's workplace, and complainant did not testify that the alleged harasser's prior conduct interfered with her work performance or created an intimidating, hostile, or offensive working environment when she returned to work or that she was harassed in any way when she returned to work, the forum found that the supervisor's conduct did not constitute unlawful harassment. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 245-46 (2005).***

115.3 --- Retaliation

❑ OFLA regulates two distinct areas of employer behavior with regard to employee leaves of absence. First, OFLA establishes an entitlement providing that eligible employees working for covered employers are entitled to OFLA leave for the purposes set out in the statute, and job protection during that leave. Second, OFLA, through OAR 839-009-0320, prohibits retaliation or discrimination against any employee based on inquiry about the use of OFLA. This distinction is important because the analysis of whether or not unlawful practices occurred is different in each area. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 293 (2007).***

❑ OFLA-based retaliation is an unlawful employment practice. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 246-47 (2005).***

❑ Complainant availed herself of a protected OFLA right when she requested and was granted family leave. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 249 (2005).***

❑ *Former* OAR 839-009-0320(2) prohibited respondent from retaliating against complainant with respect to "tenure or any other term or condition of employment." Although the visits to complainant's home by her supervisor not authorized by OFLA, they could not be considered a term and condition of employment or an adverse action against complainant's tenure of employment because the agency did not prove that complainant was required to put up with them in order to keep her job. However, when the supervisor required complainant to come to work for her full shift on March 5, 2002, on pain of losing her job, that was an adverse employment decision that constituted a term and condition of complainant's employment and directly affected her potential tenure of employment. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 249-50 (2005).***

❑ The forum found a direct causal connection between complainant's protected OFLA activity and her supervisor's action that forced complainant to return to

work before her family leave had expired. If complainant had not been on family leave status, she would have been working, and her supervisor would not have demanded that she return to work or be fired. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 250 (2005).***

--- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 192 (2004).

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

116.0 PRIMA FACIE CASE

116.1 --- Unlawful Denial of Leave

❑ To establish a prima facie case, the agency must show that: 1) respondent was a covered employer as defined in ORS 659A.153(1); 2) complainant was an eligible employee, *i.e.*, she was employed by a covered employer at least 180 calendar days immediately preceding the date her medical leave began; 3) complainant had a "serious health condition" as defined in OAR 839-009-0210(14)(e); 4) complainant used or would have used OFLA leave to recover from or seek treatment for her serious health condition; and 5) respondent did not allow complainant to use OFLA leave to which she was entitled in the manner required by ORS 659A.150 to 659A.186. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 294 (2007).***

❑ In order to prove respondent unlawfully denied family leave to complainant, the agency is required to prove the following elements: (1) respondent was a "covered" employer; (2) complainant was an "eligible" employee; (3) complainant's family member had a "serious health condition"; and (4) respondent denied family leave to complainant. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 246 (2005).***

❑ To establish a prima facie case, the agency was required to show that: 1) respondent was a covered employer as defined in former ORS 659.470(1) and former ORS 659.472; 2) complainant was an eligible employee, *i.e.*, she was employed by a covered employer at least 180 calendar days immediately preceding the date her medical leave began; 3) complainant had a "serious health condition" as defined in former and current OAR 839-009-0210(14)(d); 4) complainant used or would have used OFLA leave to recover from or seek treatment for her serious health condition; and 5) respondent did not allow complainant to utilize the full amount of OFLA leave to which complainant was entitled as specified in former ORS 659.478. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 192 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ Under OAR 839-009-0320(3), it is an unlawful employment practice for an employer to retaliate or in any way discriminate against any person with respect to hiring, tenure or any other term or condition of employment because the person has inquired about OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act. **--**

❑ To establish a prima facie case that an employer committed an unlawful employment practice by denying an employee OFLA leave which that employee was entitled to take to recover from or seek treatment for his or her own serious health condition, the agency must prove that: (1) the employer was a "covered employer" as defined in ORS 659.470(1) and ORS 659.472; (2) the employee was an "eligible employee" – *i.e.*, he or she was an employee of the covered employer; (3) the employee had a "serious health condition"; (4) the "serious health condition" rendered the employee "unable to perform at least one of the essential functions of the employee's regular position"; (5) the employee used or would have used the OFLA leave to recover from or seek treatment for the "serious health condition"; (6) the employer did not allow the employee to utilize the entire amount of OFLA leave to which he or she was entitled, as specified in ORS 659.478. ***----- In the Matter of Centennial School District, 18 BOLI 176, 192-93 (1999)***.

Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

116.2 --- Failure to Restore to Previous Position of Employment

❑ To establish a prima facie case that respondent committed an unlawful employment practice by failing to restore complainant to the position she held at the time her OFLA leave began, the agency must prove: (1) respondent was a covered employer; (2) complainant was an "eligible employee" for OFLA leave, *i.e.*, she was employed by a covered employer and worked for the employer an average of at least 25 hours per week for the 180 calendar days immediately preceding the date on which her OFLA began; (3) complainant took OFLA leave to seek treatment for or recover from a serious health condition; and (4) complainant attempted to return to work after taking OFLA leave and was denied or refused restoration to the position she held when the OFLA leave commenced. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 221, 235 (2004).***

❑ To establish a prima facie case that an employer committed an unlawful employment practice by failing to restore an employee to the position she held at the time she commenced her family leave, the agency must prove: (1) the employee was a "covered employer" as defined in *former* ORS 659.470(1) and *former* ORS 659.472; (2) the employee was an "eligible employee" for family/parental leave, *i.e.*, employed by a "covered employer" and worked for the employer at least 180 calendar days immediately preceding the date on which parental leave began; (3) the employee took up to 12 weeks of family/parental leave; and (4) the employee

attempted to return to work after taking family/parental leave and was denied or refused restoration to the position of employment held by the employee when the leave commenced. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 145 (2003).***

❑ Once the agency makes a prima facie case, there is a rebuttable presumption that respondent refused to give effect to complainant's entitlement to job restoration. No motive or intent need be proved. Respondent may rebut the presumption by coming forward with evidence that: (1) the position of employment held by the employee when the leave commenced no longer existed when the employee attempted to return to work and no available equivalent position existed; or (2) the employee gave unequivocal notice of intent not to return to work; or (3) the employee would have been bumped or displaced if the employee had not taken leave. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 149 (2003).***

❑ When respondent argued that complainant's position no longer existed when she returned from family/parental leave and that no equivalent available position existed based on the undisputed temporal nature of its housekeeping positions, the forum determined that no language in the OFLA provisions purports to restrict coverage to employers that have rigidly and uniquely identified "positions" in the sense that respondent's argument posited. The forum concluded that, when complainant was ready to return to work, respondent had hours of housekeeping work that were not being assigned to other workers and accordingly, at that time, respondent had at least one additional "position of employment" in existence. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 150-51 (2003).***

❑ Whether or not respondent failed to restore complainant to her employment position requires a determination of the employment advantages that complainant would have enjoyed with respondent had she not taken family leave, and a comparison of those advantages with the advantages that complainant actually enjoyed upon her return to employment. Consequently, the forum examined the number of hours complainant was scheduled to work, as there were no other benefits to complainant's job. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 147 (2003).***

❑ The forum determined that respondent failed to restore complainant to her employment position based on credible testimony from the complainant, corroborated by her calendar notes, that she attempted to return to work from her parental leave on September 24, 1998, and was not rescheduled for work until October 10, and respondent's time cards and credible testimony that employees who were hired after complainant went on leave worked 43.75 hours between September 24 and October 7, 1998, that complainant could have worked. ***--- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 147-49 (2003).***

❑ A covered employer is required to return an eligible employee to the position the employee held prior to commencing family leave if that position still exists, unless that employee somehow rejects that entitlement. The employee need not make an affirmative demand for restoration. ***--- In the Matter of The TJX Companies, Inc., 19 BOLI 97, 101 (1999).***

❑ To establish a prima facie case that an employer unlawfully denied restoration to an eligible employee, the agency must prove: (1) the employer was a "covered employer" as defined by statute; (2) the employee was an "eligible employee"; (3) the employee had a "serious health condition"; (4) the serious health condition rendered the employee unable to perform at least one of the essential functions of the employee's regular position; (5) the employee used OFLA leave to recover from or seek treatment for the serious health condition; and (6) when the employee return to work after taking OFLA leave, the employer refused to restore the employee to the employment position he or she held when the leave commenced. ***--- In the Matter of The TJX Companies, Inc., 19 BOLI 97, 112-13 (1999).***

116.3 --- Harassment

❑ In order to prevail in a harassment case, the agency was required to prove the following: (1) respondent was a "covered" employer under OFLA; (2) complainant was an "eligible" employee under OFLA who took family leave; (3) respondent, through its supervisor, subjected complainant to unwelcome verbal conduct related to her family leave; (4) the supervisor's conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with complainant's work performance or created an intimidating, hostile or offensive working environment for complainant; and (5) the supervisor's conduct harmed complainant. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 245 (2005).***

116.4 --- Retaliation

❑ To establish a prima facie case of retaliation or discrimination for purposes of OAR 839-009-0320, the agency must show that: 1) complainant invoked a protected right under the OFLA; 2) respondent made an employment decision that adversely affected complainant; and 3) there is a causal connection between complainant's protected OFLA activity and respondent's adverse action. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 299-300 (2007).***

❑ To prevail in an OFLA retaliation case, the agency must prove the following: (1) complainant availed herself of a protected right under OFLA; (2) respondent took an employment action that adversely affected complainant; and (3) there is a causal connection between complainant's protected OFLA activity and respondent's adverse employment action. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 249 (2005).***

❑ To establish a prima facie case of OFLA retaliation, the agency must show that: 1) complainant invoked a protected right under the OFLA; 2) respondent made an employment decision that adversely affected complainant; and 3) there is a causal connection between the complainant's protected OFLA activity and

respondent's adverse action. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 239 (2004).*** *See also In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 197 (2004), affirmed without opinion, Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007); In the Matter of Roseburg Forest Products Co.*, 20 BOLI 8, 26-27 (2000).

❑ A causal connection between a complainant's protected activity and respondent's adverse employment decision may be shown by either direct or circumstantial evidence. When there is no direct evidence that respondent terminated complainant because she invoked her right to be restored to the position she held when she commenced her OFLA leave, a prima facie case of retaliation may be established by circumstantial evidence raising an inference of retaliation. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 239 (2004).***

❑ Proof that respondent terminated complainant little more than a month after she returned to work following her OFLA leave was sufficient to raise an inference of retaliation that was supported by proof that respondent engaged in a pattern of retaliatory conduct immediately upon complainant's return to work that continued until complainant was terminated. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 239-40 (2004).***

❑ The agency proved that respondent retaliated against complainant in a number of ways based on her use of the OFLA. First, when she returned to work with a medical release and was told there were no hours for her to work. Second, after she complained, she was scheduled to work less than 20 hours per week for two weeks, in contrast to the 40 hours she had been working as a manager prior to her use of the OFLA. Third, after her lifting restriction was removed, her hours were further reduced and her pay was summarily changed from salary to hourly. Fourth, on her first day back on the job she was told to wear the purple uniform that non-managers wore and determined that someone else had assumed her managerial duties. Fifth, within one week of her return, complainant was given her first employee warning for alleged "substandard work." Finally, the agency proved that respondent's reasons for terminating complainant were untruthful. Those facts, coupled with the temporal proximity of her use of OFLA, created an inference sufficient to establish a causal nexus between complainant's protected activity, *i.e.*, invoking her right to be restored to the position she held when she began her OFLA leave and respondent's adverse employment termination of complainant shortly after she returned from OFLA leave. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 239-41 (2004).***

❑ OAR 839-009-320 requires proof of motive or intent. When an employee inquires about, submits a request for family leave, or invokes any provision of OFLA, he or she becomes a member of the protected class created by this rule and satisfies the first element of the agency's prima facie case. However, liability does not automatically follow when the employer takes an adverse action against an employee based on an action taken by that employee that bears a circumstantial relationship to that employee's protected class. Rather, the agency must prove a causal connection between the employee's protected class (in this case, someone who utilized OFLA) and the employer's adverse action. **--- *In the Matter of Roseburg Forest Products Co.*, 20 BOLI 8, 28 (2000).**

116.5 --- Discharge/Constructive Discharge

❑ When discriminatory conditions no longer existed at the time complainant made her decision to seek alternative employment or when she resigned, the agency failed to satisfy the second element of its prima facie case and the agency's claim of constructive discharge failed. **--- *In the Matter of Entrada Lodge, Inc., 20 BOLI 229, 253* (2000).**

Reversed and remanded for reconsideration, *Entrada Lodge v. Bureau of Labor and Industries,* 184 Or App 315, P3d 444 (2002), final order on remand 24 BOLI 125 (2003).

See also In the Matter of Bob G. Mitchell, 19 BOLI 162, 187 (2000).

120.0 DEFINITIONS

120.1 --- "Covered Employer"

❑ Former ORS 659.470(1) and former ORS 659.472 define "covered employers" as those "who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar work weeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken." Complainant's credible testimony that respondent employed over 100 workers while she was in respondent's employ, and credible testimony by the agency investigator that respondent confirmed it was subject to both FMLA and OFLA provisions established that respondent was a "covered employer." ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 192-93 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

120.2 --- "Eligible Employee"

❑ When evidence showed that complainant worked the requisite number of days preceding her leave, respondent did not dispute complainant's eligibility during the agency's investigation, and the agency investigator credibly testified that respondent's human resource manager confirmed that complainant was eligible for leave under OFLA, the forum found that complainant was an "eligible employee." ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 193 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of*

Labor and Industries, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ When respondent argued that complainant's position no longer existed when she returned from family/parental leave and that no equivalent available position existed based on the undisputed temporal nature of its housekeeping positions, the forum determined that no language in the OFLA provisions purports to restrict coverage to employers that have rigidly and uniquely identified "positions" in the sense that respondent's argument posited. The forum concluded that when complainant was ready to return to work, respondent had hours of housekeeping work that were not being assigned to other workers and accordingly, at that time, respondent had at least one additional "position of employment" in existence. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 150-51 (2003).***

❑ When complainant had worked for respondent for 180 days "immediately preceding" her leave, but only worked an average of 23 hours per week, two hours less than the minimum average of 25 hours per week required for eligibility for the purpose of taking a "serious health condition" leave due to her pregnancy related condition, she was still eligible for parental leave because parental leave requires only that the employee worked for the employer at least 180 calendar days immediately preceding the date on which her parental leave began. ***---- In the Matter of Entrada Lodge, Inc. amended final order on remand, 24 BOLI 125, 146 (2003)*.**

120.3 --- "Serious Health Condition"

❑ Respondent admitted complainant sometimes suffered from migraine headaches during her employment, that it approved and granted complainant's requests for intermittent OFLA leave based on her migraines, and that it never doubted the medical basis for the requested leave. Despite its answer denying complainant had a serious health condition, respondent did not refute in any way evidence at hearing that demonstrated complainant had chronic migraines that were episodic and for which she received periodic treatment. Consequently, the forum concluded complainant had a serious health condition for OFLA purposes. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 294-95 (2007).***

❑ The agency's witnesses credibly testified that complainant's father was diagnosed with terminal cancer in late November 2001, with a prognosis that he had six months to live. This constitutes a "serious health condition" under ORS 659A.150(6)(b). ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 246 (2005).***

❑ Former and current OAR 839-009-0210(14)(d) set forth three objective requirements that must be met before a complainant may be deemed to have had a "serious health condition." First, complainant must have had a period of incapacity during which she was unable to perform at least one essential job function. Second, her period of incapacity must have exceeded three consecutive calendar days. Third, she must have received two or more treatments by a health care provider or received one treatment that included a regimen of continuing care within the period of incapacity. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 193-94 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ Credible evidence that complainant suffered from ongoing stomach problems in September and October 2001 that rendered her unable to perform the essential functions of her job on three separate occasions and that complainant's physicians authorized her time loss for medical reasons established that complainant was incapacitated from performing any of her job functions on three separate occasions in September and October 2001. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 193-94 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ Credible evidence that complainant was absent from work for medical reasons during the periods covering September 11-14, October 2-5, and October 15-18, 2001, all of which exceeded three consecutive calendar days, and that complainant's physicians authorized her time loss from work each time, established that complainant's period of incapacity exceeded three consecutive calendar days. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 194 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ Credible evidence that complainant saw a physician for her stomach problems on or about September 13, 2001, and the physician's note stated that the "diagnosis (impression)" was "acute illness"; that complainant had an "upper GI study" on October 2, 2001, tested positive for "gastroesophageal reflux disease," and was placed on a regimen of medication and lifestyle changes after seeing a physician on October 5, 2001; and that on or about October 16, 2001, during another period of absence due to the same illness, complainant again saw her physician who documented a treatment plan that included "rest and prescribed medication" established that complainant received two or more treatments by a health care provider or received one treatment that included a regimen of continuing care within the period of incapacity. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 194 (2004).***

Affirmed without opinion, *Magno-*

Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ Complainant's depression that rendered him unable to work for more than three days and for which he sought ongoing treatment from a clinical psychologist and physician was a "serious health condition" under OFLA. ***----- In the Matter of Centennial School District, 18 BOLI 176, 193 (1999)***.

Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

❑ An agency policy statement submitted at hearing properly interpreted the statutory term "serious health condition" to include "an illness, injury, impairment, or physical or mental condition that requires constant care * * *, including * * * inability to work for more than three consecutive calendar days and 2 or more treatments by health care provider or one treatment plus continuing supervision by health care provider." ***----- In the Matter of Centennial School District, 18 BOLI 176, 193 (1999)***.

Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

121.0 PURPOSES FOR WHICH LEAVE MAY BE TAKEN

121.1 --- Caring for Family Member with Serious Health Condition

❑ The agency's witnesses credibly testified that complainant's father was diagnosed with terminal cancer in late November 2001, with a prognosis that he had six months to live. This constitutes a "serious health condition" under ORS 659A.150(6)(b) and is precisely the type of condition the statute was intended to encompass. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 246 (2005).***

❑ Complainant was entitled to use OFLA leave to provide care for his child who had pediculosis (head lice), a condition that requires home care because of its communicable nature and an Oregon administrative rule excluding children with pediculosis from school and daycare. ***----- In the Matter of NES Companies LP, 24 BOLI 68, 85 (2002).***

121.2 --- Sick Child Care

❑ When evidence showed complainant was entitled to use OFLA leave to provide care for his sick child, but violated respondent's written attendance policy by not calling in or showing up for work for three consecutive days, the forum concluded that respondent was entitled to discipline complainant for his failure to follow respondent's notice requirement. ***----- In the Matter of NES Companies LP, 24 BOLI 68, 86 (2002).***

❑ Respondent's discharge of two comparators for their failure to call in and for another's two unexcused absences demonstrated that respondent's written attendance policy was uniformly applied. ***----- In the Matter of NES Companies LP, 24 BOLI 68, 86 (2002).***

❑ When complainant's discharge came on the heels of a prior written final warning about his failure to call in or report to work during a one day non-OFLA related absence, the forum found further indication of respondent's consistent application of its attendance rules in taking disciplinary action. ***----- In the Matter of NES Companies LP, 24 BOLI 68, 86 (2002).***

❑ When complainant had actual knowledge of respondent's notice requirement and did not comply with the requirement, the forum concluded that respondent did not violate the OFLA by discharging complainant for his noncompliance with respondent's notice requirement. ***----- In the Matter of NES Companies LP, 24 BOLI 68, 88 (2002).***

121.3 --- Newly Born, Adopted, or Placed Child

121.4--- Recovering from or Seeking Treatment for Employee's Own Serious Health Condition

❑ Respondent admitted complainant sometimes suffered from migraine headaches during her employment, that it approved and granted complainant's requests for intermittent OFLA leave based on her migraines, and that it never doubted the medical basis for the requested leave. Despite its answer denying complainant had a serious health condition, respondent did not refute in any way evidence at hearing that demonstrated complainant had chronic migraines that were episodic and for which she received periodic treatment. Consequently, the forum concluded complainant had a serious health condition for OFLA purposes. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 294-95 (2007).***

❑ Complainant invoked and utilized OFLA provisions by asking respondent to designate her absences for migraine headaches as intermittent OFLA leave and by utilizing OFLA leave for those absences. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 300 (2007).***

❑ Complainant's ongoing stomach problems in September and October 2001 that were diagnosed as an "acute illness," specifically "gastroesophageal reflux disease," were a "serious health condition." ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 195 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

121.5 --- Inability to Perform Essential Job Function

❑ Complainant's inability to work at a particular job site left him unable to perform an essential job function when respondent required complainant to work at that

specific site. ***----- In the Matter of Centennial School District, 18 BOLI 176, 193-94, 197 (1999)***.

> Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

122.0 LENGTH OF LEAVE

122.1 --- Generally

❑ Under the OFLA, eligible employees are entitled to take up to 12 weeks of leave each year and are guaranteed restoration to their employment position, if it still exists, after they have exercised their leave right. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 236 (2004).***

❑ When there was no evidence that complainant had exhausted 12 weeks of OFLA leave at the time she was terminated, respondent denied complainant leave to which she was entitled by summarily terminating her employment while she was out on OFLA qualified leave. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 196 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007);

122.2 --- Use of Paid Leave

❑ Employers are not required to provide paid sick leave benefits. When they do, they can determine the parameters of its use, but only as long as the parameters do not interfere with or diminish an employee's OFLA rights and are equally and consistently applied to all employees invoking their sick leave benefits. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 306 (2007).***

❑ Respondent's sick leave policy required employees to either be at home, in a medical facility, or engaged in medically related activities while using sick leave. The policy was applicable to all uses of sick leave, including those related to OFLA covered conditions and on the job injuries. Respondent's sick leave benefits were conditioned upon its employees actually being incapacitated from performing their job duties for medical reasons. Additionally, respondent required employees on OFLA leave to exhaust their sick leave. The agency argued that respondent's sick leave policy was draconian and essentially placed complainant under "house arrest" but failed to address how the policy conflicts with OFLA provisions. OAR 839-009-0210 (14) defines a "serious health condition," as it most aptly pertains to complainant, as a condition "(e) [t]hat results in a period of incapacity or treatment for a chronic serious health condition that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity, such as asthma, diabetes or epilepsy." In this case, complainant's supervisor received a report from another employee that complainant attended a ball game while using sick leave and reminded her that she was obliged to follow respondent's sick leave policy. After complainant denied a second report from another employee that complainant was observed on the coast with a co-worker while on sick leave, respondent placed her on video surveillance. On December 17, 2002, one of the two dates for which the date and time of the videotaping was in the record, respondent's security department employee videotaped complainant eating in a fast food restaurant, Christmas shopping and picking up her child from school while on sick leave for migraines. Evidence showed respondent's supervisory personnel relied only on that particular videotape when it decided to terminate complainant. The agency argued that respondent's reliance on the videotape was "unreasonable" and that respondent was required to obtain clarification from complainant's health care provider about her condition on that day before making an employment decision adverse to complainant. Respondent argued that it was not required to seek medical clarification under the rule and, in any event, was not questioning whether complainant had suffered a migraine on that date. Respondent's stated issue with complainant was whether she was conforming to its sick leave policy by staying home during her incapacitation. Respondent's reasoning was that if complainant was able to eat out, shop and pick up her children from school, she was no longer incapacitated and was therefore able to work. Respondent's reasoning was not inconsistent with evidence in the record establishing that on days that complainant took sick leave because of migraines, she would only go to work if she recovered more than two hours prior to her scheduled shift because it took an hour to get ready for work and drive to her worksite. Here, there was sufficient evidence from which the forum could infer that complainant's incapacitation had ceased in time to allow her to ready herself for work and drive to her worksite. Consequently, absent evidence showing otherwise, the forum concluded that respondent did not apply its sick leave policy in complainant's case in a manner inconsistent with OFLA provisions. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 298-99 (2007).***

122.3 --- Teachers

123.0 NOTICE TO EMPLOYER

❑ Under former and current OAR 839-009-0250(1), an employee need not invoke OFLA by name in order to put an employer on notice that OFLA may have relevance to an employee's absence from work. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 195 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ Once an employee provides enough information to put the employer on notice that the employee may be in need of OFLA leave, the employer may request additional information, including medical verification, to determine that a requested leave qualifies for designation as OFLA leave. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 195 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ Complainant's absence from work for more than three days on three separate occasions, with notes from her physicians, written during each absence, indicating that she was unable to work for medical reasons, was sufficient reason to compel respondent to either count the absences as OFLA leave or to follow the procedures set forth in the rules to determine if complainant's absences were OFLA qualified and constituted sufficient compliance with OFLA's notice requirements. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 195-96 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

124.0 MEDICAL VERIFICATION

❑ A leave policy requiring an employee to provide medical verification after each OFLA related absence may run afoul of OFLA rules when, as in some cases of intermittent leave, absence occurs more frequently than every 30 days. Exceptions to the rule are when: (1) circumstances described in the previous medical verification have changed significantly; or (2) the employer receives information that casts doubt on the employee's stated reason for the absence. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 296 (2007).***

❑ The employer's right to seek additional medical verification based on either of the two exceptions to the 30 day rule is limited to the time period immediately following the change in circumstances or upon receipt of information indicating possible misuse of OFLA leave. An exception, once invoked, does not create a continuing right to disregard the 30 day rule after the medical verification based on the exception is acquired. An employer does not have carte blanche to continue seeking additional verification based on the same exception once the inquiry results in pertinent information. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 296 (2007).***

❑ The agency alleged that respondent constructively denied complainant OFLA leave by seeking additional medical verification in August and September 2002. When complainant's serious health condition of migraine headaches steadily worsened in July and August 2002 and the frequency of her absences increased significantly, the agency's administrative rule, OAR 839-009-0260(6)(a), did not limit respondent's ability to seek subsequent medical verification under those circumstances. Respondent's request for an additional doctor's note led to a renewed medical verification that substantiated complainant's need for intermittent leave on a more frequent basis. In the meantime, respondent was receiving reports that complainant was observed engaging in activities, such as attending ball games and going to the coast while using her sick leave. By the end of September 2002, complainant's supervisor had reminded her of the sick leave policy at least twice and placed her on video surveillance. Those circumstances also constitute an exception to the 30 day limitation on seeking subsequent medical verification. Based on all of those facts, the forum concluded that respondent's request for additional medical verification complied with OAR 839-009-0260(6) and respondent did not constructively deny complainant OFLA leave by seeking subsequent medical verification in August and September 2002. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 297-98 (2007).***

❑ The forum dismissed respondent's defense that complainant had not presented medical verification of her ability to return to work when it was undisputed that respondent never asked complainant to present such a release. ***--- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 151 (2003)***.

125.0 RESTORATION TO POSITION OF EMPLOYMENT

❑ Respondent's argument that complainant did not want to be restored to her position was overcome by a preponderance of credible evidence establishing that complainant was happy with her job, occasionally checked in on the store when she became mobile after her surgery, and immediately presented her medical release to respondent upon receiving the go ahead to return to work. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 236 (2004).***

❑ The determination whether an employer has violated the reinstatement right of an employee under the OFLA requires a determination of the employment advantages that the employee would have enjoyed with the employer if she had not taken family leave. Those advantages must then be compared with the advantages that the employee actually enjoyed on her return to employment. If the employment advantages enjoyed by the employee on her return fall short of those that she would have enjoyed had she not taken family leave, then the employer has failed to restore the employee to her employment position as required by the OFLA. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 237 (2004).***

❑ Under the OFLA, eligible employees are entitled to take up to 12 weeks of leave each year and are guaranteed restoration to their employment position, if it still exists, after they have exercised their leave right. Employees are not entitled to any right, benefit or position of employment other than the rights, benefits and position that the employee would have been entitled to, had the employee not taken the family leave. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 236 (2004).***

❑ An employer's failure to restore an employee to the employee's pre-OFLA position creates a rebuttable presumption that the employer unlawfully refused to restore the employee to that position. If the position still

exists and the employee would not have otherwise been bumped or displaced if the employee had not taken leave, the employer rebuts the presumption "by proving that the employee asked not to be [restored] to his or her former position. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 236 (2004).*** *See also In the Matter of The TJX Companies, Inc., 19 BOLI 97, 100-01, 113 (1999)*.

❑ To establish a prima facie case that an employer unlawfully denied restoration to an eligible employee, the agency must prove that: (1) The employer was a "covered employer"; (2) The employee was an "eligible employee" – i.e., he or she was an employee of the covered employer; (3) The employee had a "serious health condition"; (4) The "serious health condition rendered the employee unable to perform at least one of the essential functions of the employee's regular position"; (5) The employee used OFLA leave to recover from or seek treatment for the serious health condition; and (6) When the employee returned to work after taking OFLA leave, the employer refused to restore the employee to the employment position he or she held when the leave commenced. ***----- In the Matter of The TJX Companies, Inc., 19 BOLI 97, 100-01 (1999)***.

❑ Employers may hire workers to substitute for employees on OFLA leave so long as they still restore the employees to their former positions when they return from leave. ***----- In the Matter of The TJX Companies, Inc., 19 BOLI 97, 114 & n.5 (1999)***.

❑ ORS 659.484(1) does not state that covered employers always must restore eligible employees who have taken family leave to their prior positions when those positions still exist. Rather, the statute creates an entitlement for eligible employees who may choose whether or not they wish to be restored to their former jobs. Taken together, the statute and the regulation implementing it mean that a covered employer is required to return an eligible employee to the position the employee held prior to commencing family leave if that position still exists, unless the employee somehow rejects that entitlement. The employee need not make an affirmative demand for restoration. ***----- In the Matter of The TJX Companies, Inc., 19 BOLI 97, 100-01, 113 (1999)***.

❑ In an OFLA case in which the agency alleges that respondent unlawfully failed to restore an employee to the position the employee held prior to taking leave, the respondent may argue that the employee asked not to be restored to that position without pleading that fact as an affirmative defense. ***----- In the Matter of The TJX Companies, Inc., 19 BOLI 97, 102 (1999)***.

❑ The forum denied the agency's motion for partial summary judgment because a genuine issue of material fact existed regarding whether complainant requested that she not be restored to the job she held when her leave commenced. ***----- In the Matter of The TJX Companies, Inc., 19 BOLI 97, 101 (1999)***.

❑ When complainant returned from OFLA leave, she told respondent that she was not available to work the shifts required of the person in the position she had held prior to commencing leave. Under those circumstances, complainant constructively announced that she did not want to be restored to her former job, and respondent did not violate OFLA by failing to return her to that job. ***----- In the Matter of The TJX Companies, Inc., 19 BOLI 97, 114-15 (1999)***.

126.0 RETALIATION

❑ When complainant was terminated almost three months after respondent received letters from her inquiring about respondent's request for medical verification, the proximity in time was marginal as to being close enough to infer causation. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 307 (2007).***

❑ The Oregon Court of Appeals has held that when relying on "mere temporal proximity" between the protected action and the allegedly retaliatory employment decision to indirectly establish a causal connection, the "events must be 'very close' in time." ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 307 (2007).***

❑ In an OFLA retaliation case, the forum held that to overcome respondent's stated reason for terminating complainant, the agency must establish. by a preponderance of evidence. that respondent's reason is not worthy of belief. The agency did not meet that burden when respondent's stated reason for terminating complainant was supported by undisputed facts and nothing in the record demonstrated that respondent's reasons for terminating complainant were a pretext for discrimination. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 304-05 (2007).***

❑ The forum concluded that complainant was treated no more harshly than her co-workers who violated respondent's sick leave policy and/or engaged in dishonesty when respondent terminated other employees, some who used OFLA leave and some who didn't, in 2001 and 2003 for violation of the sick leave policy and dishonesty about their activities on the dates they were on sick leave, and the one employee who violated the sick leave policy but honestly disclosed his activities was not terminated. The agency presented no credible evidence that complainant was treated differently than her similarly situated co-workers. Not one witness, including complainant, gave any examples of employees who abused the sick leave policy with impunity. Complainant's statement that "more than half the employees abused the sick leave policy" was not substantiated by any other evidence. Although she testified that she observed a co-worker at the movies while he was on sick leave, she agreed that she did not tell respondent about her observation and that she did not know if respondent knew about the co-worker's activity on that day or whether her co-worker was ever disciplined for abusing the sick leave policy. A witness by a biased witness that a supervisor told him complainant was terminated because she "got too close to Boise as it pertained to her FMLA" was not supported by any other evidence in the record, and the forum found it to be untrue. Finally, complainant consistently used OFLA leave well over a year before respondent terminated her employment, which further undermined an inference of retaliatory motive. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 304 (2007).***

❑ When there was no evidence, direct or otherwise, of discriminatory intent on respondent's part; no evidence that management or other supervisory employees made any adverse statements about complainant's use of OFLA leave; no evidence that other similarly situated employees were not required to provide the same information or that respondent concocted the requirement to provide medical verification and applied it exclusively to complainant because she invoked OFLA provisions; and evidence showed that respondent's requirement was applied toward complainant's OFLA absences that were less than 30 days apart only after the frequency of her absences increased significantly; the forum concluded that respondent's medical verification requirement was not in retaliation because complainant invoked or used OFLA leave. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 301 (2007).***

❑ Although the forum found that respondent's enforcement of its attendance policy, being in its purpose and by its nature disciplinary and punitive, adversely affected complainant, there was no evidence that respondent singled out complainant for enforcement because of her use of OFLA leave. The agency contended that respondent began disciplining complainant for attendance only after she began using OFLA leave and that complainant was disciplined for conduct that she had engaged in previously without sanction. While factually correct, the agency's argument ignored the fact that respondent notified all of its employees of its intent to consistently enforce the attendance policy already in effect. Moreover, the notification occurred more than six months after complainant began using OFLA leave and even after the notification, complainant continued to engage in the conduct she had previously engaged in without sanction, despite her knowledge of respondent's intent to consistently enforce the attendance policy. Although she was counseled for attendance problems in April 2002, complainant was not disciplined until May 31, 2002, after her attendance points reached the designated number in respondent's attendance policy, and more than eight months after she requested OFLA leave. Respondent had a history of inconsistently enforcing its attendance policy and product auditors like complainant were previously allowed discretion in setting their own schedules, which certainly could have caused complainant confusion when respondent began consistently enforcing the attendance policy. However, such confusion could have applied to any of respondent's employees. Absent any evidence that the attendance policy was changed because complainant invoked or used OFLA leave or that the attendance policy was not enforced against other employees, the forum concluded there was no causal connection between complainant's invocation or use of OFLA and the application of respondent's attendance policy to complainant. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 302-03 (2007).***

❑ Complainant invoked and utilized OFLA provisions protecting her from retaliation by asking respondent to designate her absences for migraine headaches as intermittent OFLA leave and by utilizing OFLA leave for those absences. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 300 (2007).***

❑ By timely providing respondent with a medical release each time she was absent for more than three days and calling in each day while she was out in accordance with respondent's policies, complainant "invoked" her right to OFLA leave. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 197 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ Respondent's admitted discharge of complainant because she continued to miss work after she was given a "final" warning about her OFLA-related absenteeism constituted an adverse employment decision. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 197 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ When respondent knew that complainant's absences were related to her stomach ailment, a serious health condition; complainant complied with respondent's sick leave policies during her absences; and respondent terminated complainant because of those absences; the forum found that respondent's termination of complainant was causally connected to her OFLA-protected absences. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 197-98 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ In a retaliation case, a prima facie case consists of the following elements: (1) complainant availed herself of a protected right under OFLA; (2) respondent made an employment decision that adversely affected complainant; and (3) there is a causal connection between complainant's protected OFLA activity and respondent's adverse employment action. ***----- In the Matter of Roseburg Forest Products, 20 BOLI 1, 26-27 (2000).***

❑ OAR 839-009-320 requires proof of motive or intent. When an employee inquires about, submits a request for family leave, or invokes any provision of OFLA, he or she becomes a member of the protected class created by this rule and satisfies the first element of the agency's prima facie case. However, liability does not automatically follow when the employer takes an adverse action against an employee based on an action taken by that employee that bears a circumstantial relationship to that employee's protected class. Rather, the agency must prove a causal connection between the

employee's protected class (in this case, someone who utilized OFLA) and the employer's adverse action. **--- *In the Matter of Roseburg Forest Products Co.*, 20 BOLI 8, 28 (2000).**

❑ The forum concluded that respondent did not terminate complainant in retaliation for her use of OFLA leave when it failed to prove motive or intent on respondent's part. **--- *In the Matter of Roseburg Forest Products Co.*, 20 BOLI 8, 29-31 (2000).**

127.0 REMEDIES

127.1 --- Back Pay and Benefits

❑ It is well established in this forum that the purpose of back pay awards in employment discrimination is to compensate a complainant for the loss of wages the complainant would have received but for the respondent's unlawful employment practices. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 242 (2004).***

❑ The forum concluded that complainant would have continued working 40 to 45 hours, earning at least $400 per week as respondent's manager for the duration of her employment, had she not taken OFLA leave in May 2001. The forum calculated complainant's back pay from the date of her termination until the date of hearing and awarded her $28,590.29 in back pay. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 242 (2004).***

❑ The forum awarded complainant lost wages in the amount of $22,400, calculated at $8.75 per hour x 40 hours per week x 64 weeks. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 198 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ The forum awarded complainant $2,585.31, in addition to a back pay award of $22,400, to compensate her for the sums she spent on insurance premiums that would have been available for complainant's use but for Respondent's denial of OFLA leave. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 198 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ The forum awarded complainant $262.50 in back to compensate her for the wages she would have earned, had she been properly restored to her position of housekeeper after attempting to return to work. **--- *In the Matter of Entrada Lodge, Inc., 20 BOLI 229, 249-50* (2000).**

> Reversed and remanded for reconsideration, *Entrada Lodge v. Bureau of Labor and Industries,* 184 Or App 315, P3d 444 (2002), final order on remand 24 BOLI 125 (2003).

❑ When complainant was working halftime and was discharged during an OFLA leave after taking only 240 of the 480 hours to which he was entitled, but the agency did not seek lost wages after the date complainant's OFLA leave expired, the forum awarded back pay equal to the wages that complainant would have earned during the remainder of his OFLA leave. ***----- In the Matter of Centennial School District, 18 BOLI 176, 194-95 (1999)***.

> Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

127.2 --- Mental Suffering Damages (*see also* 108.0)

❑ Complainant and other agency witnesses credibly testified that complainant experienced substantial emotional upset during her family leave because of her supervisor's conduct and that complainant was extremely concerned about the loss of her job. She was the sole support of her two daughters and her job was critical to her. Complainant and her father had a close emotional bond and it was extremely important for her to spend the last days of her father's life in his company. At a time when complainant was already emotionally fragile, her supervisor's repeated visits, calls, and insensitive comments created a Hobson's choice for complainant – should she remain with her father and risk losing her job or return to work and miss some of the limited remaining time she had left with her father? Complainant returned to work for one day to avoid losing her job and still felt very sad and emotional about being away from her father's side on that day. Although there was no doubt complainant also experienced substantial emotional distress before and after her family leave because of her attachment to her father, his terminal illness, and his death, that did not detract from the emotional distress she experienced as a direct result of her supervisor's unlawful behavior. Under these circumstances, the forum awarded $30,000 in damages to compensate complainant for the mental suffering and emotional distress she experienced as a direct result of respondent's unlawful employment practices. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 252-54 (2005).***

❑ The forum merged respondent's separate "denial" and retaliation violations for purposes of assessing mental suffering damages because they were based on the same set of facts. ***----- In the Matter of Gordy's Truck Stop, LLC, 26 BOLI 234, 252-54 (2005).***

❑ The forum awarded $25,000 in mental suffering damages when complainant credibly testified that she was angry, upset, and tearful when she realized her hours were reduced and that she was no longer part of management, that she felt depressed due to respondent's unlawful actions for a short time, and that she experienced a longer term concern about the financial effects of the change in her employment was longer term. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 243 (2004).***

❑ The forum awarded complainant $18,000 in mental suffering damages based on significant emotional distress she suffered, consisting of the following elements: she was discharged despite her diligence and compliance with respondent's call-in policies and respondent's assurances that she was a "valuable" employee; she lost a job she had enjoyed and held for five years; she became so anxious and depressed as a result of her discharge that her physician referred her to a mental health specialist who determined that complainant's self-esteem was affected to the extent that "she was not able to socialize and had great difficulty thinking about applying and interviewing for other jobs" and "seemed to lose her self confidence and was no longer able to drive out of town, be away from home overnight, or do the things that she normally did to enjoy herself"; she continued to struggle with those issues 15 months after her discharge and was still visibly upset and confused about why she lost her job at the time of hearing; and she suffered mental distress as a result of losing her income. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 199 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ When complainant suffered from a lesser degree of depression prior to her discharge, the forum did not compensate her for emotional distress that was not attributable to respondent's unlawful employment practices. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 199 (2004).***

Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries*, 210 Or App 466, 151 P3d 960 (2007), rev den 342 Or 523, 156 P3d 69 (2007).

❑ The forum awarded $15,000 in mental suffering damages when complainant was already experiencing considerable stress at the time of respondent's violation, but suffered a "heightened stress level" that manifested in the form of complainant being very worried, scared, and crying all the time because respondent was not scheduling her for any work hours after her OFLA leave. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 126, 154 (2003).***

❑ Although respondent was not responsible for complainant's distress caused by her lack of earnings during her family leave, this forum has held that that "employers must take employees as they find them." ***---- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 154 (2003)***

❑ When complainant was discharged from a job he took pride in, lost the medical benefits that had allowed him to seek psychological treatment, lost the income from his job, and sunk deep into depression, which in turn caused significant personality changes and resulted in the significant deterioration of his relationships with his wife and children, the forum awarded him $25,000 in mental suffering damages for distress the forum characterized as "severe." ***----- In the Matter of Centennial School District, 18 BOLI 176, 195 (1999)***.

Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

❑ In a parental leave case, complainant was upset by the loss of a valuable opportunity for early bonding with his first child. The opportunity, once lost, was irretrievable. Although complainant did not testify to sleepless nights, visceral discomfort, or a need for medical attention, the forum awarded $2,500 to compensate for the sense of loss he experienced as a result of respondent's unlawful employment practice. ***---- In the Matter of Alaska Airlines, Inc., 13 BOLI 47, 55 (1994).***

Affirmed without opinion, *Alaska Airlines, Inc. v. Bureau of Labor and Industries*, 137 Or App 350, 904 P2d 660 (1995), rev den 322 Or 644, 912 P2d 375 (1996).

❑ When complainant suffered serious and long lasting emotional upset characterized by anger, moodiness, depression, frustration, and anxiety as a result of respondent's denial of the use of paid sick leave during parental leave and the shortening of his time with his new daughter, the forum held that no discriminatory animus need to proved and awarded $5,000 in mental suffering damages. Under ORS chapter 659, the commissioner is authorized to eliminate the effects of any unlawful practice found. The statute does not restrict this authority to certain types of discrimination, but rather speaks in terms of "any unlawful practice." If an employer's proscribed action deprives an employee of a right or benefit, the commissioner is authorized to eliminate the effects of the deprivation. When an adverse employment decision causes complainant mental suffering, the forum may award compensation. ***---- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 94, 100, 107 (1992).***

❑ When evidence would have shown, based on stipulated facts, that complainant experienced emotional distress as a result of respondent's refusal to allow complainant to use his accrued sick leave during the period of his parental leave, the forum awarded complainant $2,000 as compensation for his emotional distress. ***----- In the Matter of Douglas County, 11 BOLI 1, 3 (1992).***

❑ When complainant's mental suffering sprang from his general apprehension about taking parental leave, rather than from respondent's refusal to allow him to use his accrued sick leave, the commissioner found that complainant's mental suffering was not compensable because it was not caused by respondent's unlawful employment practice. ***----- In the Matter of Washington County, 10 BOLI 147, 151, 155 (1992).***

❑ Respondent denied complainant use of his accrued sick leave for his parental leave, which caused complainant to cut his leave short and left part of his leave unpaid. The commissioner found that complainant

suffered anger, frustration, and anxiety attributable to the denial of his use of accrued sick leave, marked by the necessary reduction in the length of time requested and the attendant increased economic tension during the unpaid portion of the leave. Such mental distress is compensable and the commissioner is authorized to eliminate such an effect. The commissioner awarded complainant $2,000 for the mental anguish and distress caused by respondent's unlawful employment practice. ***----- In the Matter of Portland General Electric Company, 7 BOLI 253, 271-72 (1988).***

Affirmed, *Portland General Electric Company v. Bureau of Labor and Industries, 116* Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

128.0 PREVIOUS OREGON LEAVE LAWS

128.1 --- Parental Leave Under *Former* ORS 659.360

❑ The entitlement to use accrued sick leave during parental leave is conditioned only on the prior accrual of such benefits. ***----- In the Matter of Alaska Airlines, Inc., 13 BOLI 57, 61 (1994); 13 BOLI 47, 53 (1994).***

Affirmed without opinion, *Alaska Airlines, Inc. v. Bureau of Labor and Industries*, 137 Or App 350, 904 P2d 660 (1995), rev den 322 Or 644, 912 P2d 375 (1996).

❑ To present a prima facie case of deprivation of the use of sick leave benefits in violation of ORS 659.360, the agency must establish the following elements: (1) At times material, the respondent was an employer in this state employing 25 or more employees; (2) At times material, the complainant was employed by respondent on a basis other than as a temporary or seasonal employee, and had been so employed for more than 90 days at the time of his parental leave request; (3) The complainant made a request for parental leave; (4) The period requested was within the interval between the anticipated birth of the employee's infant and the time the infant would reach 12 weeks of age; (5) The complainant requested the use of accrued sick leave benefits during the period of the parental leave; (6) The complainant had sufficient sick leave benefits accrued; (7) The complainant was denied the use of accrued sick leave benefits; and (8) The complainant was harmed because of the denial of use of accrued sick leave benefits during parental leave. ***----- In the Matter of Alaska Airlines, Inc., 13 BOLI 57, 61-62 (1994); 13 BOLI 47, 53 (1994).***

Affirmed without opinion, *Alaska Airlines, Inc. v. Bureau of Labor and Industries*, 137 Or App 350, 904 P2d 660 (1995), rev den 322 Or 644, 912 P2d 375 (1996).

❑ ORS 659.360 provides that it is an unlawful employment practice for an employer of 25 or more employees to refuse to grant the request of an employee, employed by the employer on a basis other than seasonal or temporary for over 90 days, for parental leave for all or part of the time between the birth of the employee's infant and the time the infant reaches 12 weeks of age. This statute also provides that the employee is entitled to utilize any accrued sick leave during parental leave. The entitlement to us accrued sick leave during parental leave is conditioned only upon the prior accrual of such benefits. ***----- In the Matter of Alaska Airlines, Inc., 13 BOLI 57, 61 (1994); 13 BOLI 47, 53 (1994).***

Affirmed without opinion, *Alaska Airlines, Inc. v. Bureau of Labor and Industries*, 137 Or App 350, 904 P2d 660 (1995), rev den 322 Or 644, 912 P2d 375 (1996).

❑ ORS 659.360 gives the employee/parent the unrestricted right to use accrued leave of any kind, including accrued paid sick leave, during the parental leave, regarding of collective bargaining provisions limiting the use of such leave to specific situations. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 108 (1992).***

❑ Respondent committed an unlawful employment practice, in violation of ORS 659.360, when it refused to allow complainant to use his accrued paid sick leave during parental leave. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92,101 (1992).***

❑ When complainant gave notice to respondent within seven days after the unanticipated date of taking custody of his adopted daughter, that notice was timely under ORS 659.360(5) and OAR 839-07-840(1). ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 108 (1992).***

❑ A parent's failure to give required timely notice does not eliminate the right to parental leave; it permits an employer to delay and/or reduce the parental leave period, provided that the employer gives notice of its intent to do so within seven days. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 108 (1992).***

❑ When respondent failed to give complainant timely notice of an intent to reduce or delay parental leave, respondent could not thereafter reduce the total length of complainant's parental leave. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 108 (1992).***

❑ When complainant used sick leave during the first week of parental leave due to his own illness and his wife's broken leg, respondent could count that leave and complainant's wife's six weeks of parental leave as portions of the allowable 12 weeks of parental leave. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 103 (1992).***

❑ When respondent denied complainant the use of accrued sick leave during his parental leave because use of accrued leave for that purpose was in contravention of respondent's employment policies, and complainant used accrued vacation leave during the parental leave, and part of complainant's leave was unpaid, the commissioner found that respondent violated ORS 659.030(1)(a) and (3). ***----- In the Matter of Douglas County, 11 BOLI 1, 7 (1992).***

❑ For the purpose of interpreting ORS 659.360 to

659.370 and OAR 839-07-800 to 839-07-085, the terms "accrued" and "accumulated" have the same meaning in reference to leave of any kind. ***----- In the Matter of Douglas County, 11 BOLI 1, 7 (1992).***

❑ When an employer denies any right or benefit that should be included with parental leave, even though the employee is actually granted time off work, the employer violates the parental leave law and denies an entitled employee parental leave within the meaning of the statute. The use of accrued sick leave is such a right. ***----- In the Matter of Douglas County, 11 BOLI 1, 7 (1992).***

❑ The intent of the unambiguous language of ORS 659.360(3) is restated in OAR 839-07-850 and gives the employee/parent the right to use accumulated leave of any kind during the parental leave. Subsection (3) does not restrict the employee's right to paid leave, but limits the employee's option to choose unpaid leave. This enables the employer to control the length and frequency of absence and the attendant disruption of the work force by reducing the likelihood that an employee could be gone for the parental leave period and later utilize accrued leave for an additional absence. The parental leave rules, and OAR 839-07-850 in particular, are valid, and the commissioner's interpretation of them, as described in *PGE*, is a reasonable one. ***----- In the Matter of Douglas County, 11 BOLI 1, 5-7 (1992).*** *See also In the Matter of Washington County, 10 BOLI 147, 153-54 (1992).*

❑ When respondent denied complainant the use of accrued sick leave during his parental leave because use of accrued leave for that purpose contravened respondent's employment policies, and complainant used accrued vacation leave during the parental leave so that the entire leave was paid, the commissioner found that respondent violated ORS 659.360(1)(a) and (3). ***----- In the Matter of Washington County, 10 BOLI 147, 152-155 (1992).***

❑ The commissioner found that the agency's administrative rules merely reflect the plain language of the statute in regard to the use of accrued sick leave as a part of parental leave, that the definition of sick leave therein does not limit or define its use, and that the intent of the language of ORS 659.360(3), restated in OAR 839-07-850, gives the employee/parent the right to use accumulated leave of any kind during the parental leave. ***----- In the Matter of Portland General Electric Company, 7 BOLI 253, 263-64 (1988).***

> Affirmed, *Portland General Electric Company v. Bureau of Labor and Industries, 116* Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

❑ The commissioner found that parental leave need not be paid unless specified by employer policy, individual contract, or collective bargaining agreement. ORS 659.360(6) merely reserves the ability to adjust benefits under the agreement in the future to the parties. It does not affect or delimit any other kind or type of leave or the use thereof in combination with authorized parental leave. ***----- In the Matter of Portland General Electric Company, 7 BOLI 253, 256 (1988).***

> Affirmed, *Portland General Electric Company v. Bureau of Labor and Industries, 116* Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

❑ In order to give the Parental Leave Law as a whole its intended effect, neither employer policy, individual employment contract, nor collective bargaining agreement govern the employee's statutory entitlement to utilize any accrued leave in conjunction with parental leave. ***----- In the Matter of Portland General Electric Company, 7 BOLI 253, 268 (1988).***

> Affirmed, *Portland General Electric Company v. Bureau of Labor and Industries, 116* Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

❑ The commissioner held that ORS 659.360(3) does not restrict the employee's right to paid leave, but limits the employee's option to choose unpaid leave. This enables the employer to control the length and frequency of absence and the attendant disruption of the work force by reducing the likelihood that an employee could be gone for the parental leave period and later utilize accrued leave for an additional absence. ***----- In the Matter of Portland General Electric Company, 7 BOLI 253, 256 (1988).***

> Affirmed, *Portland General Electric Company v. Bureau of Labor and Industries, 116* Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

129.0 INTERACTION WITH FEDERAL LEAVE LAWS (*see* 6.0)

XI. OTHER REQUIREMENTS

130.0 RECORD KEEPING

131.0 REQUIRED POSTINGS