

**In the Matter of**

**EMERALD STEEL FABRICATORS, INC.,**

**Case No. 30-05**

**Final Order of Commissioner Dan Gardner**

**Issued September 16, 2005**

**SYNOPSIS**

Complainant, a disabled person, used medical marijuana to reduce the symptoms of debilitating medical conditions caused by Complainant's mental and physical impairments. Complainant requested reasonable accommodation for these limitations. Respondent failed to reasonably accommodate Complainant by not engaging in a meaningful interactive process with him to determine if his limitations could be reasonably accommodated and by not providing him with reasonable accommodation that was available in violation of ORS 659A.112(2)(e). Respondent also denied an employment opportunity to Complainant based on Respondent's need to make reasonable accommodation to Complainant's physical and mental impairments in violation of ORS 659A.112(2)(f). Respondent did not discharge Complainant because he was a disabled person in violation of ORS 659A.112(1). Respondent did not utilize standards, criteria or methods of administration that have the effect of discrimination on the basis of disability in violation of ORS 659A.112(2)(c). Respondent did not use qualification standards, employment tests or other selection criteria that screen out or tend to screen out a disabled person or a class of disabled persons in violation of ORS 659A.112(2)(g). Complainant was awarded \$8,013.50 in back pay and \$20,000 in damages for emotional distress. ORS 659A.112(1), ORS 659A.112(2)(c), ORS 659A.112(2)(e), ORS 659A.112(2)(f), ORS 659A.112(2)(g).

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 24, 2005, at the Bureau's office located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Complainant Anthony

Scevers was present throughout the hearing and was not represented by counsel. Terence J. Hammons, attorney at law, represented Respondent. Donald Mathews, Respondent's owner, was present throughout the hearing for the purpose of assisting Respondent's counsel in the presentation of Respondent's case.

The Agency called the following witnesses: Anthony Scevers, Complainant; Stella Eller, Complainant's mother; John Eller, Complainant's stepfather; Kelly White, Complainant's supervisor while Complainant worked at Respondent's facility; Elizabeth Price, Human Resources Director for Peterson Pacific; and Dr. Grant Higginson (telephonic), Public Health Officer for the state of Oregon.

Respondent called the following witnesses: Donald Mathews, Respondent's owner; Patricia Edwards, sales associate for Staffing Services; and Kelly White.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-42 (submitted or generated prior to hearing) and exhibit X-43 (submitted at hearing);
- b) Agency exhibits A-1 through A-12, A-14 (submitted prior to hearing), and A-16 (submitted at hearing);
- c) Respondent exhibits R-1 through R-9 (submitted prior to hearing) and R-10 (submitted at hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

- 1) On or about May 15, 2003, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that he was the victim of the unlawful

employment practices of Respondent. The Division found substantial evidence of said practices on the part of Respondent.

2) On July 26, 2004, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by denying him employment and discharging him because of his disability in violation of ORS 659A.112(1) and ORS 659A.112(2)(c) & (g) and by failing to reasonably accommodate his disability in violation of ORS 659A.112(2)(e) & (f). The Agency sought damages of “[l]ost wages, including but not limited to, lost benefits and out-of-pocket expenses in an amount to be proven at hearing and estimated to be \$20,000” and “for mental, emotional and physical suffering in the amount of \$25,000.”

3) On July 26, 2004, the forum served the Formal Charges on Respondent, accompanied by the following: a) a Notice of Hearing setting forth November 16, 2004, in Eugene, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency’s administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On August 2, 2004, Respondent, through counsel, filed a motion 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.

5) On August 11, 2004, the Agency moved for a protective order regarding Complainant’s “medical, psychological, counseling, and therapy records.” The Agency further requested that

“to the extent necessary to protect confidential information from public disclosure that the proposed order and final order be issued in duplicate with one copy having the confidential information redacted and the other copy containing the redacted information but clearly marked confidential, not subject to public disclosure or other appropriate wording.”

6) On August 26, 2004, the ALJ issued an interim order denying Respondent’s motions to dismiss and to strike. The ALJ concluded that Respondent was not constitutionally entitled to a jury trial, citing *Cornelison v. Seabold*, 254 Or 401, 404-05 (1969) for the proposition that a party is constitutionally entitled to a jury trial only “in the classes of cases wherein the right was customary at the time the constitution was adopted.” The ALJ relied on *Williams v. Joyce*, 4 Or App 482, 501 (1971), *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253 (1979), and *City of Portland v. Bureau of Labor and Industries*, 61 Or App 182, 193 (1982) in support of the conclusion that the Commissioner has the authority to award damages in an administrative hearing. Finally, the ALJ relied in the Commissioner’s holding in *In the Matter of Alpine Meadows Landscape Maintenance, LLC*, 19 BOLI 191, 118-220 (2000) as the basis for rejecting Respondent’s equal protection argument.

7) On September 3, 2004, the ALJ issued an interim order granting the Agency’s motion for a protective order regarding the use and disposition of Complainant’s medical, psychological, counseling and therapy records contained in the case summaries and any testimony at hearing related to medical or psychological history, counseling or therapy he received, and testimony related to his medical,

psychological, counseling and therapy records. The ALJ postponed ruling on the Agency's request for two separate proposed orders and final orders. That request is hereby **DENIED**. That ruling is confirmed.

8) On September 9, 2004, Respondent, through counsel, filed an answer to the Formal Charges.

9) On October 7, 2004, Respondent filed a motion to postpone the hearing because Respondent's attorney had a previously set trial anticipated to begin on November 1 and last for at least two weeks. The Agency did not object and the ALJ granted Respondent's motion, rescheduling the hearing to begin on January 24, 2005.

10) On December 23, 2004, the Agency filed a motion for a discovery order to require Respondent to produce relevant documents that had been sought on an informal basis and not provided and an order to compel Respondent to respond to interrogatories sent to Respondent on November 18, 2004.

11) On January 3, 2005, the ALJ granted the Agency's motions. The ALJ issued an interim order requiring Respondent to provide the sought after documents to the Agency case presenter and respond to the interrogatories no later than January 10, 2005.

12) At the outset of the hearing, the ALJ advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) The ALJ issued a proposed order on March 24, 2005, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent filed exceptions that are discussed in the Opinion section of this Final Order.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material, Respondent Emerald Steel Fabricators, Inc. was an Oregon employer involved in the manufacturing of steel products and employed six or more employees.

2) Complainant was born in 1973. In 1992, he joined the U.S. Army. While in the Army, he began experiencing emotional problems. In August 1994, an Army psychiatrist examined Complainant and diagnosed his problems as “correlates of anxiety and stress.” The Army psychiatrist recommended that Complainant be discharged from the Army as “the quickest and most effective way to relieve this stress and anxiety.” Complainant was honorably discharged from the Army shortly thereafter based on the psychiatrist’s recommendation.

3) Between 1994 and 1999, Complainant recurrently experienced depression, anxiety, and nausea. During that time, he took Buspar, Wellbutrin, and Amitriptyline. He began smoking marijuana in the late 1990s to lessen his nausea.

4) Between 1996 and 2003, Complainant experienced ongoing depression, sleep disorder, anxiety, nausea, vomiting, severe stomach cramps, and panic attacks. Notes in his medical records indicate that his nausea, stomach cramps, and vomiting were associated with his anxiety and panic attacks. He consulted with a number of physicians and a number of drugs were prescribed at different times to treat his symptoms, including Buspar, Wellbutrin, Prozac, Zoloft, Xanax, Klonopin, Amitriptyline, Promethazine, Phenergan, and Paxil. In the late 1990s, Complainant began using marijuana and found that it gave him more relief from his nausea than the prescription drugs.

5) From 2000 to 2003, Complainant had trouble eating. He was frequently nauseous, vomited a lot and couldn’t keep anything down. He lost weight at times and got very little sleep.

6) In April 2002, Complainant consulted with Dr. Phillip Leveque, a licensed Oregon physician, about obtaining an Oregon Medical Marijuana (“OMM”) card.

7) In order to obtain an OMM card, an individual must satisfy three primary requirements. First, the individual must provide personal information, including photo identification and their physician’s address. Second, pay a \$55 fee for a new application or renewal, unless the individual is “financially handicapped,” in which case the fee is \$20. Third, provide a written statement by the individual’s attending physician confirming: (1) that the applicant has one of the debilitating medical conditions that are listed in the Oregon Medical Marijuana Act (“OMMA”), and (2) that the attending physician believes that the patient may benefit from the use of medical marijuana.

8) Dr. Leveque recommended that Complainant administer medical marijuana by “inhalation,” with a frequency of “5-7” times per day. He noted in the “Attending Physician’s Statement” required by the OMM program that Complainant had the following debilitating medical conditions: “severe nausea and vomiting” and “chronic cramps,” adding that “Cannabis gives good relief.” Dr. Leveque also completed a document entitled “Reiveiw [sic] of Patient Medical Records” in which he indicated that Complainant’s previous physician had documented Complainant’s “chronic cramps N & V.”

9) The Oregon Health Division issued OMM card number 09812 to Complainant on June 11, 2002. Complainant renewed his card when it expired on June 11, 2003. Complainant did not renew it when it expired in 2004 because he could not afford to see the doctor and pay the fees for the card.

10) Complainant worked as a lathe and grinder operator from September 1994 to June 1995. Complainant worked as a drill press operator and CNC machinist for Rosen from 1995 to 2001, The work he performed involved “setup, operate CNC

milling machines, lathes, manual mills and lathes; make parts to complex blueprints with high tolerance work.” Rosen laid off Complainant due to lack of work.

11) In 2003, Respondent used Staffing Services, Inc. (“SSI”), a temporary employment agency located in Eugene, Oregon, to screen and refer workers to Respondent.

12) In 2003, Respondent’s agreement with SSI included a stipulation that all prospective workers referred to Respondent were to undergo a drug screen by SSI before starting work at Respondent’s facility. SSI itself had a written drug testing policy that stated, in pertinent part:

“To help ensure a safe and healthful working environment, job applicants and employees may be asked to provide body substance samples (such as urine and/or blood) to determine the illicit or illegal use of drugs and alcohol. Refusal to submit to drug testing may result in disciplinary action, up to and including termination of employment. “

13) On January 13, 2003, Complainant filled out an employment application at SSI.

14) Sometime in the following week, SSI referred Complainant to an interview at Respondent’s shop for a position as drill press operator. At that time, Complainant was working at Shamrock Steel, a fabrication shop, where his duties included operating the burn table and big drill and general shop help.

15) SSI did not ask Complainant to take a drug test before referring him to Respondent’s workplace or at any time during Complainant’s employment with Respondent. Edwards, SSI’s sales associate, did not tell Complainant about SSI’s requirement for a drug test.

16) Complainant went to Respondent’s shop and was interviewed by Kelly White, Respondent’s machine shop foreman. White offered employment to Complainant, who accepted. During the interview, White told Complainant that at the

end of 90 days Respondent required prospective permanent employees to take a pre-employment drug screen before they could be hired as permanent employees.

17) Respondent's policy when hiring temporary employees referred by SSI is to use them a minimum of three months. After that, they are evaluated as to whether they will be needed any further. If Respondent decides there is enough work to justify hiring them, they are required to undergo a comprehensive drug screen at a local hospital. The purpose of the drug screen is to test for the presence of illegal drugs.

18) Respondent has a written drug policy that is printed on its "Conditional Job Offer" form, a form that is shown to prospective employees at the time Respondent makes them a conditional job offer. In pertinent part, it reads:

"Emerald Steel Fabricators, Inc. is committed to providing a safe and drug-free workplace. Reporting for work under the influence of alcohol or controlled or illegal drugs is strictly prohibited. While on Emerald Steel premises or during working hours, no employee may use, possess, distribute, sell, or be under the influence of alcohol, controlled or illegal drugs, or any other substance that may impair job performance or pose a hazard to the safety and welfare of the employee or other individuals."

Complainant was never shown a copy of that policy.

19) Complainant did not tell anyone at SSI or Respondent when he applied for work that he had an OMM card because he was afraid he wouldn't be hired.

20) Complainant reported to work at Respondent's facility on January 23, 2003, about a week after his interview. Neither White nor anyone else working at Respondent's asked Complainant at that time or any other time to take a drug test or if he had taken a drug test at SSI.

21) Respondent hired Complainant because of increased orders from Peterson Pacific, a logging equipment manufacturer whose orders comprised "90-95%" of the work done in Respondent's machine shop.

22) Complainant's basic work schedule at Respondent's was 7 a.m. – 4:30 p.m., Monday through Friday. His starting wage was \$10 per hour. Complainant averaged five hours of overtime work per week.

23) White was Complainant's immediate supervisor throughout his employment with Respondent and told Complainant when to report to work and what work to perform.

24) During Complainant's employment at Respondent, SSI's interactions with Complainant were limited to delivering paychecks to Respondent once a week for distribution of wages to Complainant and other temporary employees SSI referred to Respondent.

25) Respondent employed two temporary employees referred by SSI – Bill Chance and George McGeorge -- during Complainant's first week of employment with Respondent. Chance and McGeorge were paid \$8 per hour. McGeorge began work at Respondent on December 23, 2002, as a helper/clean-up person in Respondent's machine shop.<sup>i</sup>

26) While Complainant worked at Respondent's facility, SSI issued his paychecks. His paychecks were initially based on a \$10 per hour wage rate. In turn, SSI billed Respondent \$14.50 for every straight time hour that Complainant worked.

27) During Complainant's employment, Respondent had 20-25 fulltime employees.

28) Complainant was hired to operate a drill press in Respondent's machine shop and Complainant performed that job while employed by Respondent.

29) Complainant showed up for work on time and performed his work satisfactorily. White never disciplined Complainant and never talked to him about his attitude or any work related issues.

30) On two occasions, Complainant told White that he liked his job and wanted to keep it.

31) White gave Complainant a \$1 per hour raise on March 1, 2003, raising his pay to \$11 per hour. White's general policy is to give temporary employees a raise three to four weeks after hire if their work is satisfactory.

32) Complainant continued to experience nausea and severe stomach cramps while in Respondent's employ, usually in the morning but sometimes throughout the day.

33) Complainant used medical marijuana one to three times per day while employed by Respondent. It gave him partial relief from his nausea and stomach cramps. He never used medical marijuana at work or on Respondent's property. The number of times he used it depended on his symptoms that day.

34) While Complainant was employed with Respondent, there were eight employees in the machine shop, including Complainant and White. All eight employees could operate the drill press. Complainant, Larry Groesbeck and Chris Quest were the primary drill press operators during Complainant's employ. The other employees operated a lathe (manual and CNC) and did millwork (CNC).

35) On March 6, 2003, Complainant told White that he needed to let him know about his "medical problem" to see if it affected his chances of being hired as a regular employee. Complainant told White he had an OMM card. White asked Complainant if he had tried other medication for his medical problem. Complainant said he had, but medical marijuana worked best for him. Complainant told White he was hoping to be hired as a regular employee by Respondent, that he needed White to be aware of his medical problem, and that he hoped this information would not get him fired. Complainant did not identify his specific medical problem, but showed White his OMM

card and the paperwork completed by Dr. Leveque<sup>ii</sup> as part of Complainant's application for his OMM card. White told Complainant he did not know the answer, but he would talk it over with his boss.

36) Prior to Complainant's disclosure of his use of medical marijuana, White did not suspect that Complainant used marijuana or any other drug.

37) White met with Mathews and told him that Complainant had an OMM card, that Complainant used medical marijuana for a medical condition, and that Complainant wanted to know if Respondent was going to hire him as a regular employee. In response to Mathews's inquiry, White told Mathews that Complainant said it was the only drug he could take that alleviated his medical problem. White also told Mathews that Complainant was doing a reasonably good job. Mathews and White discussed whether Complainant would be hired and decided there was no need to keep Complainant on fulltime or hire him as a regular employee.<sup>iii</sup>

38) From the time Complainant told White about his OMM card until Complainant's termination, neither Mathews nor White asked Complainant if there was anything Respondent could do to help Complainant with his medical problem or made any additional inquiry about Complainant's medical problem.

39) On March 13, 2003, Complainant told White that he needed to move to a different residence and needed to know if Respondent was going to hire him. White told Complainant he wasn't needed to work for Respondent anymore.

40) Respondent employed eight other temporary employees referred by SSI during Complainant's employment with Respondent. Five worked in Respondent's fabrication shop as welders or painters. Two worked as "Helper/Clean-up" in Respondent's machine shop. There is no evidence as to the duties performed by Bill Chance, the eighth temporary employee. At the time of Complainant's discharge,

Chance, who was paid \$8 per hour, was the only temporary employee working in the machine shop.

41) On March 25, 2003, Respondent hired Russ Williams as a temporary helper in the machine shop. On April 2, 2003, Respondent hired Joseph Jordan as a temporary helper in the machine shop. On April 21, 2003, Respondent hired Wade Risley as a temporary CNC lathe operator in the machine shop. Between June 1 and June 30, 2003, Respondent hired five temporary employees in the fabrication shop. Williams, Jordan, and Risley were still employed in Respondent's machine shop on June 30, 2003.<sup>iv</sup> There is no evidence as to how long Williams, Jordan, and Risley continued to be employed by Respondent or as to their wage rate.

42) After Complainant's discharge, Respondent did not hire any temporary employees to operate the drill press in the machine shop. Instead, other permanent employees in Respondent's machine shop operated the drill press. Respondent has not hired any permanent, fulltime employees since Complainant's discharge.

43) Peterson Pacific had a substantial slowdown in work in June 2003.

44) Complainant had been optimistic and excited about his job with Respondent. He felt distraught and depressed when he was terminated and experienced heightened anxiety and sleep disturbance because of his discharge. These feelings were "pretty severe" for three weeks, at which time Complainant's anxiety, depression, and sleeplessness returned to their normal levels.

45) Complainant had to borrow money to keep his rental place after his discharge. Complainant collected unemployment benefits and was still collecting unemployment benefits at the time of the hearing.

46) Complainant was depressed and pessimistic and had a lot of negative feelings before going to work for Respondent. He had financial troubles before he

started work for Respondent and continued to experience financial troubles after his discharge from Respondent's employment.

47) Respondent referred Complainant back to SSI after discharging him. Complainant went to SSI, where Edwards told Complainant she would find other employment for him. Thereafter, Complainant called SSI every morning until September 10, 2003, when Edwards referred Complainant to a labor job at Rosboro that involved stacking lumber and sweeping up sawdust and veneer chunks. That job was a temporary job on graveyard shift (11 p.m. to 7 a.m.) that paid \$13.77 per hour. Complainant worked one hour, then left because of pain in his low back.

48) After Respondent discharged him, Complainant asked about work at Shamrock and was told no jobs were available. Complainant also looked for work with other employers.

49) On or about November 1, 2003, Complainant started work for Chrome World as a CNC machinist. Complainant was paid \$14 per hour. He worked Monday through Friday and started on swing shift before being transferred to day shift. He worked for approximately one month, earning \$3,095.75 in gross wages. He was fired on December 1, 2003. He was upset and distressed over being fired.

50) Kelly White, Patricia Edwards, Elizabeth Price, and Grant Higginson were credible witnesses and the forum has credited their testimony in its entirety.

51) Don Mathews gave credible testimony at the hearing, but his sworn answers relating to Respondent's reasons for discharging Complainant that he made in response to the Agency's interrogatories were not credible, for reasons explained in the Opinion. Mathews's testimony at hearing was believed when it was corroborated by other credible testimony, but the forum has not believed the statements he made in his

response to the Agency's interrogatories regarding the reasons for Complainant's discharge.

52) Stella Eller was a credible witness. Her testimony about Complainant's medical and emotional state and behavior, both before and after Respondent's employment, was candid and consistent with Complainant's medical records. Her testimony has been credited in its entirety.

53) John Eller, Complainant's stepfather, testified primarily about his observations of Complainant's medical problems and Complainant's reaction to being discharged by Respondent. His testimony regarding Complainant's post-discharge emotional distress corroborated the testimony of Complainant and Stella Eller, his wife and Complainant's mother. However, his testimony was somewhat exaggerated. For example, he described Complainant as being "devastated" at being terminated, adding that "[Complainant] worried himself sick" over it, and further testified that Complainant "frantically" began looking for other work. Neither Complainant nor Stella Eller, who was in a better position to observe Complainant's emotional distress than her husband, described Complainant's emotional distress in such dramatic terms. Consequently, the forum has only credited his testimony regarding Complainant's emotional distress when it was corroborated by the credible testimony of Stella Eller and Complainant.

54) Complainant was extremely soft spoken, difficult to hear, and did not make eye contact with anyone present at the hearing. He expressed no emotion whatsoever in his testimony or demeanor, even when testifying about his emotional distress. With two exceptions, his testimony was internally consistent and consistent with prior statements concerning the issues in the hearing. First, Complainant told the Agency's investigator that he had not used marijuana before the medical marijuana program, whereas he testified at hearing that he used marijuana for six years before obtaining his

OMM card, a fact he also previously reported to at least two physicians. Second, Complainant testified that he reported his OMM card to White about two to three weeks after he was hired, then later testified he reported his card to White one week prior to his discharge. Since Complainant worked seven consecutive weeks (January 23 – March 15, 2003), this creates an inconsistency of three to four weeks. Because Respondent does not dispute the “one week prior” reporting date, the forum has concluded that that Complainant first reported his OMM card to White one week prior to his discharge. The forum has credited all of Complainant’s testimony except for these two inconsistencies.

### **ULTIMATE FINDINGS OF FACT**

1) At all times material, Respondent Emerald Steel Fabricators, Inc. was an Oregon employer involved in the manufacturing of steel products and employed six or more employees, including Complainant.

2) From 1992 until the time of hearing, Complainant has continually suffered from an anxiety disorder, panic attacks, nausea, vomiting, and severe stomach cramps that have substantially limited his ability to eat.

3) The Oregon Health Division issued OMM card number 09812 to Complainant on June 11, 2002, with an expiration date of June 11, 2003, based on the recommendation of a licensed physician.

4) On January 23, 2003, Respondent employed Complainant as a drill press operator.

5) Complainant worked an average of 45 hours per week while employed by Respondent. His starting wage was \$10 per hour. His work was satisfactory and he was given a raise to \$11 per hour on March 1, 2003.

6) Complainant used medical marijuana one to three times per day while employed by Respondent. He never used medical marijuana at work or on

Respondent's property. Before March 6, 2003, his supervisor did not suspect that Complainant used marijuana or any other drug.

7) On March 6, 2003, Complainant told White, his supervisor, that he had an OMM card and used medical marijuana for a medical problem. Complainant showed White the paperwork completed by Dr. Leveque as part of Complainant's application for his OMM card. White asked Complainant if he had tried any other medications to deal with his medical problem.

8) White met with Mathews, Respondent's owner, and told him that Complainant had an OMM card and that Complainant used medical marijuana for a medical condition.

9) From the time Complainant told White about his OMM card until Complainant's discharge, neither Mathews nor White asked Complainant if there was anything Respondent could do to help Complainant with his medical problem or made any additional inquiry about Complainant's medical problem.

10) On March 13, 2003, White discharged Complainant.

11) There was work available for Complainant in Respondent's machine shop through June 30, 2003.

12) Respondent could have reasonably accommodated Complainant.

13) Respondent did not show that providing Complainant with reasonable accommodation would have imposed an undue hardship on the operation of Respondent's business.

14) Respondent did not discharge Complainant because he is a disabled person.

15) Complainant experienced substantial emotional distress for three weeks as a result of his discharge from Respondent's employment.

## **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659A.100 to ORS 659A.139.

2) The actions, inactions, statements, and motivations of Donald Mathews and Kelly White are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659A.800 to ORS 659A.865.

4) At all times material herein, Complainant was a “disabled person” as defined by ORS 659A.100(1)(a).

5) Complainant requested reasonable accommodation for his physical and mental limitations. Respondent violated ORS 659A.112(2)(e) by failing to engage in a meaningful interactive process with Complainant to determine if his limitations could be reasonable accommodated and by not providing him with reasonable accommodation that was available.

6) Respondent violated ORS 659A.112(2)(f) by denying employment opportunities to Complainant based on Respondent’s need to make reasonable accommodation to Complainant’s physical and mental impairments.

7) Respondent did not discharge Complainant because of his disability in violation of ORS 659A.112(1).

8) Respondent did not apply standards, criteria or methods of administration to Complainant that had the effect of discrimination based on Complainant’s disability and did not violate ORS 659A.112(2)(c).

9) Respondent did not apply qualification standards to Complainant that screened him out or tended to screen him out because he was a disabled person and did not violate ORS 659A.112(2)(g).

10) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages resulting from Respondent's unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

### **OPINION**

#### **RESPONDENT WAS COMPLAINANT'S EMPLOYER**

In its answer, Respondent raised the defense that SSI, not Respondent, was Complainant's employer. "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. ORS 659A.001(9). An employer must employ "six or more persons" to be subject to the provisions of ORS chapter 659A.100 to ORS 659A.145. ORS 659A.109.

It is undisputed that SSI was a temporary employment service that hired Complainant and referred him to Respondent, who employed six or more persons, for an interview. SSI paid Complainant's wages, billing Respondent for the amount of Complainant's wages, plus a premium. While Complainant performed work for Respondent, his work was supervised and controlled by Respondent, as were the terms and conditions of his employment. SSI's only appearance at Respondent's workplace while Complainant worked there was to deliver weekly paychecks for Complainant and SSI's other employees. Based on these facts, the forum concludes that Respondent was Complainant's employer.<sup>v</sup>

## **COMPLAINANT IS A “DISABLED PERSON”**

The Agency has alleged that Respondent unlawfully discriminated against Complainant in violation of ORS 659A.112(1), ORS 659A.112(2)(c), ORS 659A.112(2)(e), ORS 659A.112(2)(f), and ORS 659A.112(2)(g). To be protected by those statutes, a Complainant must be a “disabled person.” 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.” ORS 659A.100(1)(a)

### **A. Complainant has mental and physical impairments.**

OAR 839-006-0205(10) defines “physical or mental impairment” as:

“any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”

Undisputed testimony by Complainant and his mother and Complainant’s medical records established that Complainant has suffered from a number of physiological disorders or conditions and mental or psychological disorders for at least 10 years. Among the conditions and disorders are nausea, severe stomach cramps, and vomiting, which affect the digestive system; anxiety, depression, and panic attacks, which are emotional illnesses; and sleep disorder. Complainant’s medical records indicate that his nausea and vomiting have been associated with his anxiety and panic attacks. Complainant’s medical records also confirm that Dr. Leveque recommended medical marijuana for him to treat his chronic nausea, stomach cramps, and vomiting. The forum concludes 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).

**B. Complainant's physical and mental impairments substantially limit one or more of Complainant's major life activities.**

ORS 659A.100(2)(a) provides that “[m]ajor life activity includes but is not limited to, self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property. OAR 839-006-0205(6)(a) further provides that “[e]xamples of specific major life activities include, but are not limited to, walking, sitting, standing, lifting, reaching, speaking, interacting with others, seeing, hearing, breathing, learning, sleeping, performing manual tasks, reproduction and working.” Complainant’s medical records documented that Complainant’s anxiety and panic attacks trigger his nausea, stomach cramps, and vomiting, which in turn make it difficult or impossible for him to eat,<sup>vi</sup> and that Complainant’s sleep disorder causes problems with his sleep. In contrast, 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.

ORS 659A.100(2)(d) states that “[s]ubstantially limits” means:

“(A) The impairment renders the individual unable to perform a major life activity that the average person in the general population can perform; or

“(B) The impairment significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.”

OAR 839-006-0212 provides additional guidance in determining whether a person is substantially limited. It states:

“(1) The following factors should be considered in determining whether a person with an impairment is substantially limited in a major life activity:

“(a) The nature and severity of the impairment;

“(b) The length of time an impairment persists or is expected to persist; and

“(c) The permanent or expected long-term effect resulting from the impairment.

“(2) The determination of whether a person is substantially limited in a major life activity must be made on a case-by-case basis.”

The medical evidence presented was insufficient for the forum to determine the specific nature and severity of sleep disorder Complainant suffers from,<sup>vii</sup> the extent to which his sleeping has been affected and how consistently it has been affected, how long it is expected to persist, and the resultant permanent or expected long-term effect. Consequently, the forum cannot conclude that Complainant is “substantially limited” in his sleeping.<sup>viii</sup> In contrast, there was substantial evidence that Complainant’s anxiety, panic attacks, nausea, stomach cramps, and vomiting are chronic ongoing conditions that have chronically impaired his ability to eat for at least 10 years. This is a substantial restriction in the manner in which Complainant has been able to eat as compared to the manner under which the average person in the general population eats. There is no evidence that these conditions are likely to go away. The forum concludes that Complainant is substantially limited in the major life activity of eating.

## **RESPONDENT’S AFFIRMATIVE DEFENSES**

Respondent raised four affirmative defenses in its answer that were rejected in a similar medical marijuana case decided by the Oregon Court of Appeals after Respondent filed its answer. See *Washburn v. Columbia Forest Products, Inc.*, 197 App 104, 104 P3d 609 (2005). Those affirmative defenses include the following:

“Oregon’s Medical Marijuana Law does not require employers to accommodate the use of medical marijuana in the workplace or to accommodate off-duty use of medical marijuana in such a fashion that the employee would or could still be affected by such usage while on duty.

“Respondent is not required to accommodate medical marijuana users by permitting them to work in safety-sensitive positions that would or could endanger the safety of themselves, co-workers or the public.

“Respondent is free to require that employees behave in conformance with the Federal Drug-Free Workplace Act of 1988. ORS 659A.127(4). The protections of that Act do not apply to someone illegally using drugs, and marijuana is an illegal drug under Federal Law.

“Oregon law prescribes that ORS 659A.112 be construed to the extent possible in a manner that is consistent with any similar provisions of the Federal Americans with Disabilities Act of 1990, as amended. ORS 659A.139. That Act does not permit the use of marijuana because marijuana is an illegal drug under Federal Law.”

At hearing, Respondent conceded that *Washburn*, as it stood at the time of hearing, would result in these four affirmative defenses being denied as a matter of law and did not present any evidence in support of them.

## **RESPONDENT DISCHARGED COMPLAINANT BASED ON HIS USE OF MEDICAL MARIJUANA**

At hearing, Respondent argued that Complainant was discharged because he “ducked” SSI’s drug test, and that this constitutes a legitimate, nondiscriminatory reason (“LNDR”) for Complainant’s discharge. Respondent provided no evidence at hearing to show that Respondent discharged Complainant for this reason. In fact, there was no evidence to establish that Respondent was aware that Complainant had not taken a drug test at SSI at the time Mathews and White made their decision to discharge Complainant. The following two statements by Mathews in Respondent’s responses to the Agency’s interrogatory #8 are the only evidence in the record in support of Respondent’s argument.

“Emerald Steel Fabricators did not discharge Mr. Scevers because he suffers from stomach problems. His temporary employment ended because, by his own admission, he could not pass a drug test and comply with our drug policy. If Mr. Scevers had undergone the initial drug screen per our agreement with Staffing Services, Inc. and had failed to pass, or if he had disclosed his marijuana use, he would not have been placed on a work assignment at Emerald Steel.”

“We believe that Anthony Scevers intentionally misrepresented his eligibility for a temporary work assignment at Emerald Steel Fabricators by failing to disclose his marijuana use and not completing the pre-placement drug screen at Staffing Services.”

There is no evidence Complainant stated he could not pass a drug test or that he was even aware of Respondent’s drug policy, as that policy was not provided to employees until a conditional job offer was made to them, and Respondent never made a conditional job offer to Complainant. Furthermore, Mathews’s statements do not specify that Complainant was discharged for this perceived misrepresentation, only that Respondent believed Complainant had made a misrepresentation.

Although White told Complainant during his initial interview that Respondent required prospective permanent employees to take a pre-employment drug screen before they could be hired as permanent employees, there is no evidence that Complainant was ever asked about drug use by anyone at SSI or Respondent prior to his disclosure of his OMM card to White. Complainant credibly testified that he did not tell anyone at SSI or Respondent when he applied for work that he had an OMM card because he feared he wouldn’t be hired if he disclosed this information. Although the evidence was undisputed that Respondent’s agreement with SSI required SSI to drug test all employees, there was no evidence that either SSI or Respondent asked Complainant to take a drug test or that Complainant took any deliberate action to evade taking a drug test.

To sum up the relevant facts, on March 6, 2003, Complainant told White that he used medical marijuana for a medical problem and showed him Dr. Leveque’s written statement that Complainant had the debilitating medical conditions of “severe nausea,” “vomiting,” and “chronic cramps.” Complainant said he hoped to be hired as a regular employee by Respondent and needed White to be aware of his medical problem, and that he hoped this information would not get him fired. Up to that time, Complainant’s

work was satisfactory, Respondent had no problems with his work, and White had no suspicions that Complainant was using marijuana or any other drug. White then told Mathews that Complainant had an OMM card, that Complainant used medical marijuana for a medical condition and said medical marijuana was the only drug he could take that alleviated his medical problem, that Complainant hoped to be hired as a permanent employee, and that Complainant was doing a reasonably good job. Mathews and White discussed whether Complainant would be hired and decided there was no need to keep Complainant on full time or hire him as a regular employee. When White next talked to Complainant about employment with Respondent, he told Complainant that his services were no longer needed.

In addition to Respondent's failed LNDR argument, Respondent argued alternatively that work had slowed down and Complainant's services were no longer needed. This argument is undercut by credible evidence that Respondent hired three more temporary employees through SSI to work in its machine shop within five weeks of Complainant's discharge to perform work that Complainant had the skills to perform and these employees continued to work until at least June 30, 2003.<sup>ix</sup>

The foregoing evidence points overwhelmingly to one conclusion – Respondent discharged Complainant solely because he disclosed his use of medical marijuana. There is no credible evidence that Respondent relied on any other factor in its decision to discharge Complainant.

Respondent's discharge of Complainant based on his use of medical marijuana is not a *per se* violation of ORS 659A.112(1). In pertinent part, ORS 659A.112(1) provides: "It is an unlawful employment practice for any employer to \* \* \* discharge from employment \* \* \* because an otherwise qualified person is a disabled person." Mathews and White were both aware that Complainant used medical marijuana for his

medical problems, and Complainant gave Dr. Leveque's note to White. However, there is no evidence to show either that Mathews was even aware of Complainant's specific medical problems or of any intent on White's part to discharge Complainant because of those medical problems. Rather, all the evidence points to the fact that Respondent discharged Complainant solely because he used medical marijuana, not because of his physical or mental impairments that qualify him as a "disabled person" under ORS 659A.100(1)(a). This is not a violation of the discharge prohibition in ORS 659A.112(1).

Although the forum has concluded that Respondent did not violate ORS 659A.112(1) by discharging Complainant, this conclusion does 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.

## **REASONABLE ACCOMMODATION**

ORS 659A.112(2) provides in part that "[a]n employer violates subsection (1) of this section if the employer does any of the following:"

"(e) The employer does not make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled person who is a job applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.

"(f) The employer denies employment opportunities to a job applicant or employee who is an otherwise qualified disabled person, if the denial is based on the need of the employer to make reasonable accommodation to the physical or mental impairments of the employee or applicant."

The Agency alleged that Respondent violated subsection (2)(e) by failing "to make reasonable accommodation or to engage in interactive dialog regarding reasonable accommodations for the known physical or mental limitations of

Complainant.” ORS 659A.139 provides that “ORS 659A.112 to 659A.139 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act, as amended.” 42 U.S.C. § 12112(b)(5)(A) of the Americans with Disabilities Act (“ADA”) is similar to ORS 659A.112(2)(e) and the forum relies in part on federal case law interpreting this provision in the forum’s interpretation and application of ORS 659A.112(2)(e).

The Agency further alleged that Respondent violated subsection (2)(f) by its “denial of employment to Complainant \* \* \* based on Respondent’s need to make reasonable accommodation for Complainant’s known physical or mental impairments.”

**A. Complainant was entitled to reasonable accommodation under ORS 659A.112(2)(e).**

Reasonable accommodation is required under ORS 659A.112(2)(e) & (f) when an employee is “an otherwise qualified disabled employee.” The forum has already determined that Complainant is a “disabled” person. ORS 659A.115 provides that “[f]or the purposes of ORS 659A.112, a disabled person is otherwise qualified for a position if the person, with or without reasonable accommodation, can perform the essential functions of the position.” “Essential functions” are the “fundamental duties of a position a disabled person holds or desires.” OAR 839-006-0205(4).

The “position” in this case was drill press operator in Respondent’s machine shop, the position that Complainant was initially hired to perform and sought to continue performing. It is undisputed that Complainant performed all the duties of this position in a satisfactory manner during his employment with Respondent, making him an “otherwise qualified disabled person.”

An employer’s duty to reasonably accommodate an employee or job applicant is triggered when an employee or applicant requests accommodation or when the employer recognizes the need for accommodation. *Stamper v. Salem-Keizer School*

*District*, 195 Or App 291, 97 P3d 680 (2004), citing *Barnett v. U.S. Air, Inc.*, 228 F3d 1105 (9<sup>th</sup> Cir. 2000), *vac'd on other grounds sub nom U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S.Ct 1516, 152 L.Ed.2d 589 (2002).

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.”<sup>x</sup> In this case, 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. Under Oregon law, this constituted a request for reasonable accommodation.

**B. Respondent violated ORS 659A.112(2)(e) by failing to engage in a meaningful interactive process with Complainant.**

The Agency alleges that Respondent’s failure to engage in an “interactive dialog” with Complainant regarding his need for accommodation was a *per se* violation of ORS 659A.112(2)(e). Although neither ORS chapter 659A nor BOLI’s administrative rules specifically mention or require an “interactive dialog” as part of an employer’s duty to reasonable accommodate a disabled person, the Oregon Court of Appeals provided guidance on this issue in *Stamper*.

In *Stamper*, a teacher alleged discrimination based on the school district’s failure to reasonably accommodate his disability under the Americans with Disabilities Act (“ADA”) and ORS 659.112. One of the issues before the court was plaintiff’s allegation that the school district unreasonably refused to engage in a meaningful interactive process concerning how his disability might be accommodated. The court noted that neither Oregon law nor BOLI administrative rules specifically require an “interactive process,” then stated that the Ninth Circuit Court of Appeals<sup>xi</sup> and other federal courts

have held that the ADA's reasonable accommodation provisions require employers to engage in a meaningful interactive process with employees who have a disability and seek an accommodation. *Stamper* at 297. The court did not specifically discuss whether Respondent's several offers of accommodation to Complainant constituted engagement in a "meaningful interactive process," but impliedly held that ORS 659A.112 requires an employer to engage in a meaningful interactive process with an employee who seeks accommodation for a disability. This forum adopts the same standard.

In this case, Complainant used medical marijuana as a physician recommended, legal palliative measure for his disability. He was in the same position as any other person with a disability who has to take prescribed medication on a regular basis to cope with their disability. He disclosed his use of medical marijuana to White, his supervisor, because he hoped to obtain permanent employment with Respondent and knew that Respondent required prospective employees to pass a drug test. At the time he disclosed his use of medical marijuana to White, he also disclosed his disability by showing White documentation that he used medical marijuana for the debilitating medical conditions of severe nausea, vomiting, and chronic cramps. At this point of disclosure, Respondent became legally obligated to engage in a meaningful interactive process with Complainant to see if reasonable accommodation was possible. This did not happen. Instead, Respondent's sole inquiry before discharging Complainant was whether Complainant had tried any medication other than marijuana for his medical conditions. Respondent's failure to engage in a meaningful interactive process to determine if Complainant's disability could be reasonably accommodated constitutes a violation of ORS 659A.112(2)(e).

In its exceptions, Respondent implies that the interactive process would have been fruitless because no reasonable accommodation was possible. As discussed below, the Agency presented evidence that reasonable accommodation was possible. In addition, Respondent misses a critical point. 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.

**C. Respondent violated ORS 659A.112(2)(e) by failing to reasonably accommodate Complainant.**

In the context of this case, “reasonable accommodation” is a change in working conditions made for an “otherwise qualified disabled employee” so that the employee can perform the essential functions of the job. Although the steps that an employer must take to make “reasonable accommodation” are not specifically set out in ORS chapter 659A, ORS 659A.118(1) provides some examples of actions an employer may take that constitute reasonable accommodation. Those include:

“(a) Making existing facilities used by employees readily accessible to and usable by disabled persons.

“(b) Job restructuring, part-time or modified work schedules or reassignment to a vacant position.

“(c) Acquisition or modification of equipment or devices.

“(d) Appropriate adjustment or modification of examinations, training materials or policies.

“(e) The provision of qualified readers or interpreters.”

The administrative rules promulgated by BOLI interpreting Oregon’s employment disability laws further define “reasonable accommodation” to mean “modifications or adjustments:”

“(a) To a job application process that enable a qualified disabled applicant to be considered for the position;

“(b) To the work environment, or to the manner or circumstances under which a position is customarily performed, that enable a qualified, disabled person to perform the position's essential functions; or

“(c) That enable a covered entity's disabled employee to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated, non-disabled employees.”

OAR 839-006-0205(11). OAR 839-006-0206 also provides examples of reasonable accommodation, but these are of little help, as they merely parrot the examples set out in ORS 659A.118.

Respondent argues in its exceptions that the Agency presented no evidence that there was any reasonable accommodation available for Complainant. Respondent is in error. First, the Agency established through the testimony of White and Complainant that Complainant performed his job duties satisfactorily for seven weeks without any accommodation whatsoever. This establishes that the accommodation of simply allowing Complainant to continue his employment was available. Respondent's defense to this accommodation was to demonstrate that it posed an “undue hardship on the operation of [its] business[.]” ORS 659A.112(2)(e). Respondent presented no evidence in support of that defense. Second, the forum draws 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.<sup>xii</sup> The primary concern raised by Respondent at hearing was whether Complainant was using illegal drugs that would have been detected through Respondent's or SSI's drug tests. One way of satisfying Respondent's concern and reasonably accommodating Complainant would have been to require Complainant to take SSI's standard drug test that SSI usually conducted on employees referred to Respondent. If SSI's test showed no illegal drugs other than marijuana, which Complainant was authorized to use under Oregon law, Respondent could allow 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. This accommodation fits within the scope of "appropriate adjustment or modification of examinations" in ORS 659A.118(1)(d) and "modifications or adjustments" to "a job application process that enable a qualified disabled applicant to be considered for the position" in OAR 839-006-0205(11)(a) and would have also applied to Respondent's potential consideration of Complainant as a permanent employee. Again, Respondent provided no evidence that this procedure would have caused an "undue hardship" to Respondent's business.

In conclusion, Respondent violated ORS 659A.112(2)(e) by failing to make reasonable accommodation to Complainant's known physical or mental limitations.

**D. Respondent violated ORS 659A.112(2)(f) by denying Complainant employment opportunities based on Respondent's need to make reasonable accommodation to Complainant's physical and mental impairments.**

Complainant disclosed his use of medical marijuana and related disability to White 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. At that point, 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<sup>xiii</sup> except when used under the provisions of the OMMA, automatically disqualified applicants from employment with Respondent. It is undisputed that Complainant's work was satisfactory up to the point of his discharge, and that Respondent had actually given him a raise. White, Complainant's supervisor, testified that Complainant's use of marijuana did not affect Complainant's work in an observable manner. Instead of engaging in an interactive process with Complainant to determine if reasonable accommodation was possible, Respondent inquired only

whether Complainant had tried any other medications for his disability, then discharged him because he used medical marijuana.

In this case, “employment opportunities” included both Complainant’s temporary employment and the possibility of permanent employment with Respondent. Credible evidence in the record shows that a temporary employment opportunity was available for Complainant through at least June 30, 2003. There is no reliable evidence to show whether Complainant would have been hired as a permanent employee.

Respondent admits, and the forum has concluded, that 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. Since Respondent was unwilling to employ someone who used marijuana, 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, unwilling to meet this need, summarily terminated Complainant’s temporary employment opportunity and violated ORS 659A.112(2)(e).

### **RESPONDENT DID NOT VIOLATE ORS 659A.112(2)(C) OR ORS 659A.112(2)(G)**

The Agency also alleged in its Formal Charges that Respondent violated ORS 659A.112(2)(c) and ORS 659A.112(2)(g). Those two subsections provide that “[A]n employer violates subsection (1) of this section if the employer does any of the following:

“(c) The employer utilizes standards, criteria or methods of administration that have the effect of discrimination on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control.”

“(g) The employer uses qualification standards, employment tests or other selection criteria that screen out or tend to screen out a disabled person or a class of disabled persons unless the standard, test or other selection criterion, as used by the employer, is shown to be job-related for the position in question and is consistent with business necessity.”

The Agency contends 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 contends that Respondent violated ORS 659A.112(2)(g) in that “[a]cting on the apparent assumptions detailed [in the previous sentence] amounts 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 \* \* \*.”

The Agency’s allegation is based on the Agency’s theory that Respondent acted on certain assumptions when it took actions towards Complainant that resulted in Complainant’s discharge, and that those assumptions were “standards, criteria or methods of administration” or “qualification standards, employment tests or other selection criteria.” There is no credible evidence in the record to 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.<sup>xiv</sup> Without proof that Respondent’s discharge of Complainant was based on these assumptions, the Agency cannot prevail in its allegations that Respondent violated ORS 659A.112(2)(c) and ORS 659A.112(2)(g).

## **DAMAGES**

In its Formal Charges, the Agency sought \$20,000 in lost wages and \$30,000 for emotional distress. The forum awards 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). Damages are not predicated solely on Respondent's failure to engage in a meaningful interactive process with Complainant in violation of ORS 659A.112(2)(3).<sup>xv</sup>

### **A. Lost Wages.**

The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful discrimination. See, e.g., *In the Matter of Southern Oregon Subway, Inc.*, 25 BOLI 218, 242 (2004). Where 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). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. See, e.g., *In the Matter of Servend International, Inc.*, 21 BOLI 1, 30 (2000), *aff'd without opinion*, *Servend International, Inc. v. Bureau of Labor and Industries*, 183 Or App 533, 53 P3d 471 (2002).

Respondent's records established that, at the time of Complainant's discharge, he worked an average of 45 hours per week at the wage rate of \$11 per hour and \$16.50 per hour for overtime. He was a temporary employee who had been referred by SSI, with the hope, but no promise, of permanent employment. Up to the time of his

discharge, his work had been satisfactory, and he had received one pay raise. There was no evidence that Respondent would have terminated his employment on March 13, 2003, had Complainant not disclosed his use of medical marijuana. From the date of Complainant's discharge to June 30, 2003, Respondent hired three more persons through SSI to work in Respondent's machine shop, and all three were still working as of June 30, 2003. Respondent has hired no permanent employees in its machine shop since Complainant's discharge.

Complainant credibly testified that he actively looked for work after his discharge and that he did not find comparable work until on or about November 1, 2003. There was credible evidence that Respondent experienced a slowdown in the machine shop beginning in June 2003 and no evidence presented as to how long the three temporary employees referred by SSI after Complainant's discharge continued to work after June 30, 2003, if at all. The forum declines to speculate as to how long Complainant might have continued to work after June 30, 2003, had he not been discharged, and awards him back pay from March 14 through June 30, 2003. Calculated at \$522.50 per week (40 hours at \$11 per hour; 5 hours at \$16.50 per hour), Complainant would have earned an additional \$8,013.50, had he not been discharged. Complainant earned no other income during that time period to offset that award.

**B. Emotional Distress.**

In determining damages for emotional distress, the commissioner considers a number of things, including the type of discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. The amount awarded depends on the facts presented by each complainant. *In the Matter of Northwest Pizza, Inc.*, 25 BOLI 79, 89 (2004). A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for emotional distress damages. *Id.*

The Agency relied on the testimony of Complainant, his mother, and his stepfather to establish emotional distress damages. The forum found Complainant and his mother to be credible witnesses as to the type and extent of Complainant's emotional distress and relies on their testimony to formulate a damage award.

The Agency established that Complainant experienced significantly heightened levels of anxiety, depression, and sleeplessness for three weeks after his discharge, at which time his anxiety, depression, and sleeplessness returned to their normal levels. These are all types of emotional distress for which the Commissioner has previously awarded damages. *See, e.g., In the Matter of Northwest Pizza, Inc.*, 25 BOLI 79, 90 (2004); *In the Matter of Alpine Meadows Landscape*, 19 BOLI 191, 216 (2000). 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. *See In the Matter of Magno-Humphries*, 25 BOLI 175, 199 (2004); *In the Matter of Entrada Lodge, Inc., amended final order on remand*, 24 BOLI 126, 154 (2003). The Agency also established that Complainant experienced financial troubles as a result of his discharge. However, the Agency did not establish that those troubles caused him any more distress than the continual financial troubles he had experienced since obtaining his OMM card. Consequently, the forum does not consider Complainant's financial difficulties in calculating emotional distress damages.

The forum bases its award of emotional distress damages on Complainant's significantly heightened levels of anxiety, depression, and sleeplessness for three weeks after his discharge. Because of Complainant's neutral demeanor, almost complete lack of eye contact, and total absence of expression during his testimony, as well as his prior and subsequent history of depression and anxiety, it was difficult to assess his level of emotional distress during those three weeks.

In its Formal Charges, the Agency asked the forum to award \$25,000 in emotional distress damages to Complainant. The forum finds that figure to be excessive. Although awards of emotional distress damages are dependent on the facts presented in each case, the forum also strives for consistency with cases presenting similar issues and facts. Here, the forum finds that *Entrada*, a case heard in 2000, presented similar facts to support an emotional distress award. *Entrada* was an OFLA case in which the Complainant was not restored to her pre-OFLA leave position. Complainant was already experiencing considerable stress and acute financial distress at the time Respondent failed to restore her. For three weeks after Respondent failed to restore her, Complainant experienced a heightened stress level that manifested itself in frequent tears, worry, fright, and additional financial distress. The Commissioner awarded \$15,000 in emotional distress damages. Based on the similarities between *Entrada* and this case and the fact that *Entrada* is five years old, the forum finds that \$20,000 is an appropriate award of emotional distress damages.

## **RESPONDENT'S EXCEPTIONS**

### **A. Exception 1.**

Respondent's first exception disputes the ALJ's characterization that the *Washburn* decision cited in the Proposed Opinion has rendered four of Respondent's affirmative defenses "moot." Because that case is currently on appeal, Respondent is correct. However, until such time as the Supreme Court reverses the Court of Appeals' decision, this forum is bound by the Court of Appeals' decision. The language in the section in the Opinion discussing Respondent's affirmative defenses has been modified to correctly characterize the status of Respondent's four affirmative defenses.

**B. Exception 2.**

Respondent excepted to the ALJ's conclusion in the Proposed Opinion that "[t]here is no evidence Complainant stated \* \* \* that he was even aware of Respondent's drug policy." Respondent correctly points out that the ALJ concluded in Proposed Finding of Fact 1[6] – The Merits that White told Complainant that Respondent "required prospective employees to take a pre-employment drug screen before they could be hired as permanent employees." These two statements are not mutually exclusive. Respondent's drug policy and the requirement of a pre-employment drug screen are two different things. As stated in the Proposed Opinion and also stated in Proposed Finding of Fact 18 – The Merits, which Respondent did not contest in exceptions, Complainant was never shown a copy of Respondent's drug policy. Respondent's exception is overruled.

**C. Exception 3.**

Respondent excepted to the ALJ's statement in the Proposed Opinion that "Respondent violated ORS 659A.112(2)(e) by failing to make reasonable accommodation for [Complainant] [.]". Respondent argued that "[c]omplainant introduced no evidence that there was any reasonable accommodation available for him. \* \* \* Complainant made no showing that there was any fashion in which is [sic] use of medical marijuana could have been accommodated at this job position." Respondent is mistaken. Undisputed evidence that Complainant's job performance prior to his discharge was satisfactory and inferences that can reasonably be drawn by evidence in the record establish the possibility that Respondent could reasonably accommodate Complainant. This is explained in more detail in the Opinion, which has been modified to address Respondent's exception.

**D. Exception 4.**

Respondent excepted to the ALJ's statements in two different sections of the Proposed Opinion that Complainant would not have failed a drug screening test. In response, the forum has deleted the first statement and modified the second.

**E. Exception 5.**

Respondent excepted to the proposed award of \$20,000 for emotional distress damages. ORS 659A.850(4) authorizes the commissioner to issue an Order requiring a respondent to “[p]erform an act \* \* \* reasonably calculated to carry out the purposes of this chapter, 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 \* \* \*.” ORS 659A.103(1) states that “[i]t is the public policy of Oregon to guarantee disabled persons the fullest possible participation in the social and economic life of the state [and] to engage in remunerative employment \* \* \* without discrimination.” ORS 659A.103(2) states that “[t]he right to otherwise lawful employment without discrimination because of disability where the reasonable demands of the position do not require such a distinction \* \* \* [is] hereby recognized and declared to be the rights of all the people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights[.]” The \$20,000 award recommended in the Proposed Order is consistent with the purposes set out in ORS 659A.103. It is supported by substantial evidence in the form of credible testimony by Complainant, his mother, and his stepfather and is an appropriate exercise of the commissioner’s discretion. Respondent’s exception is overruled.

**RESPONDENT’S SUPPLEMENTAL EXCEPTION**

In a supplemental exception, Respondent asked that the forum consider *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), a medical marijuana case decided after the

Proposed Order was issued. Respondent argued that *Raich* supported Respondent's fourth and fifth affirmative defenses. In *Raich*, the U. S. Supreme Court held that Congress has the authority to prohibit the wholly local cultivation of marijuana even if it was used for wholly medicinal purposes pursuant to California law. According to the Oregon Attorney General, *Raich* does not invalidate the OMMA nor require that Oregon repeal the OMMA, and does not oblige Oregon to follow the federal Controlled Substances Act, 21 USC § 801 *et seq.*<sup>xvi</sup> Accordingly, *Gonzales* does not affect the outcome of this case.

### ORDER

NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of Respondent's violations of ORS 659A.112(2)(e) and ORS 659A.112(2)(f), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Emerald Steel Fabricators, Inc.** to:

- 1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for Complainant Anthony L. Scevers in the amount of:
  - a) EIGHT THOUSAND THIRTEEN DOLLARS AND FIFTY CENTS (\$8,013.50), less appropriate lawful deductions, representing wages lost by Anthony L. Scevers between March 13, 2003, and June 30, 2003, as a result of Respondent's unlawful practices found herein, plus interest at the legal rate on that sum from July 1, 2003, until paid, plus
  - b) TWENTY THOUSAND DOLLARS (\$20,000), representing compensatory damages for emotional distress, plus interest on that sum at the legal rate from the date of the Final Order until paid.
- 2) Cease and desist from discriminating against any employee or prospective employee based upon the employee's disability.

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<sup>i</sup> No evidence was offered to show Chance's job duties or the area in which he worked.

<sup>ii</sup> See Finding of Fact 8 – The Merits, *supra*.

<sup>iii</sup> White's specific testimony in this regard was:

Q. "Whose decision was it to terminate Mr. Scevers?"

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A. “Don and I both discussed it. He [Complainant] had asked for a decision and we did not see a need to keep him on fulltime or hire him and he needed to know whether or not that was going to happen.”

<sup>iv</sup> The forum infers that Williams, Jordan, and Risley were still working for Respondent as of June 30, 2003, based on Mathews’s sworn responses to the Agency’s interrogatories in which the Agency asked for “a list of all employees that were laid off during the time period November 1, 2002, through June 30, 2003.” Williams, Jordan, and Risley were not listed in Respondent’s answer.

<sup>v</sup> See also *In the Matter of Servend International, Inc.*, 21 BOLI 1 (2000), *aff’d without opinion*, *Servend International, Inc. v. Bureau of Labor and Industries*, 183 Or App 533, 53 P3d 471 (2002) (respondent and temporary employment service who referred all temporary employees to respondent were found to be joint employers of complainant under similar circumstances).

<sup>vi</sup> See *Fraser v. Goodale*, 342 F3d 1032, 1039 (9<sup>th</sup> Cir. 2003), *cert. den.* 541 U.S. 937, 124 S.Ct. 1663, 158 L.Ed.2d 358 (2004) (under the ADA, “eating is a major life activity”).

<sup>vii</sup> Complainant’s medical records showed that his sleep problems ranged from sleeping too much to sleeping too little.

<sup>viii</sup> *Fraser, supra*, at 1040 (fact that an impairment causes a person to suffer “some limit” does not mean that the person suffers a “substantial limit”).

<sup>ix</sup> See Findings of Fact 10, 41 – The Merits, *supra*.

<sup>x</sup> See, e.g., *Schmidt v. Safeway, Inc.*, 864 F. Supp 991, 997 (D. Or. 1994) (“the [ADA] does not require the plaintiff to speak any magic words before he is subject to its protections.”)

<sup>xi</sup> See *Barnett v. U.S. Air, Inc.*, 228 F3d 1105 (9<sup>th</sup> Cir. 2000), *vac’d on other grounds sub nom U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S.Ct 1516, 152 L.Ed.2d 589 (2002).

<sup>xii</sup> See *In the Matter of Labor Ready Northwest, Inc.*, 23 BOLI 156, 202 (2002), *appeal pending* (“[P]roof includes both facts and inferences.”)

<sup>xiii</sup> ORS 475.992(4) makes persons “in unlawful possession of less than one avoirdupois ounce of the dried leaves, stems and flowers of the plant Cannabis family Moraceae” guilty of a “violation” and subject to a fine or “not less than \$500 and not more than \$1,000.”

<sup>xiv</sup> In response to the Agency’s interrogatory, Mathews stated that “[Complainant’s] temporary employment ended because, by his own admission, he could not pass a drug test \* \* \*.” The forum has not concluded that Respondent assumed Complainant could not pass a drug test because it did not believe Complainant made that admission to Respondent.

<sup>xv</sup> See *Barnett, supra*, at 1116 (“[E]mployers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible.”)

<sup>xvi</sup> Chief Counsel for Oregon Department of Justice, June 17, 2005, letter of advice to Susan M. Allan, Public Health Director, Department of Human Services.