

In the Matter of
ROSEBURG FOREST PRODUCTS CO.,

Case No. 25-99

February 11, 2000

SYNOPSIS

Where the Agency failed to establish by a preponderance of the evidence that Complainant, who took OFLA leave, was discharged because she took OFLA leave, the commissioner dismissed the complaint and specific charges. ORS 659.470 to 659.494; ORS 659.103(1)(e); OAR 839-009-0320.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 2 and 3, 1999, in the conference room of the Bureau of Labor and Industries, located at 165 E. 7th, Suite 220, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency. Complainant Yvette Sandusky was present throughout the hearing and was not represented by counsel. Respondent was represented by Caroline M. Carey and Eve L. Logsdon, of the law firm Barran Liebman LLP. Prior to the hearing, Respondent was also represented by Nelson D. Atkin, II, of Barran Liebman, LLP. Hank Snow, Respondent's Director of Industrial Relations, was present throughout the hearing to assist Respondent's case, as permitted by OAR 839-050-0110(3).

The Agency called as witnesses, in addition to Complainant: Timothy A. Sandusky, Complainant's husband; Melissa Levin, Respondent's employee; Roger Bissonnette, Business Agent for the Western Council of Industrial Workers Local 2949; and Hank Snow, Respondent's Vice President of Human Resources.

Respondent called as witnesses: Dale E. Ingram, Safety and Personnel Manager for Respondent's Plant #4 in Riddle; Hank Snow; and Complainant.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-20 (submitted or generated prior to hearing) and X-21 to X-26 (documents submitted or generated on or after the day of hearing);
- b) Agency exhibits A-1 through A-10, A-12 (submitted or generated prior to hearing), A-13 and A-14 (documents submitted on the day of hearing);
- c) Respondent exhibits R-3 and R-4 (submitted or generated prior to hearing), R-6 through R-14, and R-16 (documents submitted on the day of hearing);
- d) Nine joint exhibits submitted by the Agency and Respondent prior to hearing, numbered AR-1 through AR-9.

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

FINDINGS OF FACT – PROCEDURAL

- 1) On August 17, 1998, Complainant filed a verified complaint with CRD alleging that she was the victim of the unlawful employment practices of Respondent based on Respondent's termination of Complainant on May 22, 1998. After investigation and review, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations regarding Respondent's discharge of Complainant.
- 2) On January 29, 1999, the Agency submitted to the forum Specific Charges alleging that Respondent discriminated against Complainant by discharging her in retaliation for using the Oregon Family Leave Act ("OFLA"). The Agency also requested a hearing.

3) On February 22, 1999, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth May 11, 1999, in Roseburg, Oregon, as the time and place of the hearing in this matter; b) a notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On March 10, 1999, Respondent, through counsel, filed an answer to the Specific Charges. In addition to its admissions and denials, Respondent alleged the following affirmative defenses:

- (a) Failure to state a claim;
- (b) Respondent's good faith attempt to follow guidelines provided in the federal Family Medical Leave Act ("FMLA");
- (c) Respondent was required to follow its collective bargaining agreement with regard to terms and conditions for all subject employees, including Complainant;
- (d) OFLA contemplates the controlling nature of a collective bargaining agreement;
- (e) BOLI's request for mental suffering damages is barred in whole or in part because there is no evidence Complainant experienced any mental suffering.

5) On April 1, 1999, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and any damages calculations (for the Agency only). The forum ordered the participants to submit case summaries by April 30, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

6) Pursuant to the ALJ's motion, and with the concurrence of the Agency and Respondent's counsel, the hearing was reset for May 12, 1999.

7) On April 29, 1999, Respondent and the Agency jointly filed cross-motions for summary judgment, accompanied by a motion requesting that the issue of Respondent's liability be determined based upon the participants' enclosed Joint Stipulation of Facts and the pleadings, with both sides being given an opportunity to submit written argument on how the law applies to the facts of the case.

8) On April 29, 1999, the ALJ held a pre-hearing conference with Mr. Gerstenfeld and Mr. Atkin. At the conclusion of the conference, the ALJ made an oral ruling granting the participants' joint motion that the issue of Respondent's liability be determined based on the participants' Joint Stipulation of Facts and the pleadings, with both sides being given an opportunity to submit written argument on how the law applies to the facts of the case. At the same time, the ALJ canceled the hearing set for May 12, 1999; canceled the April 1, 1999, case summary order; and ruled that written argument on how the law applies to the facts was due June 1, 1999.

9) On May 3, 1999, the forum issued a written ruling confirming its oral rulings of April 29, 1999. The forum also requested clarification regarding Joint Stipulation of Fact #20.

10) On May 28, 1999, the Agency filed a Statement of Policy in response to the forum's May 3, 1999, ruling.

11) On May 28, 1999, Respondent filed its Brief in response to the forum's May 3, 1999, ruling.

12) On June 4, 1999, the Agency responded to the forum's May 3, 1999, request for a clarification of Joint Stipulation of Fact #20. The Agency indicated that

Joint Stipulation of Fact #20 should read “Complainant’s request for reinstatement * * *” instead of “Respondent’s request for reinstatement * * *.”

13) On June 22, 1999, the forum issued an order denying the Agency’s and Respondent’s joint cross-motions for summary judgment.

14) On July 1, the ALJ held a pre-hearing conference with Mr. Gerstenfeld and Mr. Atkin to determine a mutually convenient time for rescheduling the hearing. As a result of the conference, the hearing was rescheduled to begin September 2, 1999, in Eugene, Oregon. On July 2, 1999, the ALJ issued an amended notice of hearing reflecting the new date and location.

15) On August 9, 1999, the forum issued an amended discovery order for case summaries in which the participants were required to submit case summaries containing the elements set out in the forum’s April 1, 1999, order by August 20, 1999.

16) On August 10, 1999, Respondent filed a motion asking to take the deposition of Complainant, stating that absent a deposition, Respondent would be unable to effectively determine if the Agency’s request for \$27,6570 in back wages and \$20,000 for mental suffering and reinstatement on behalf of Complainant was appropriate. The Agency did not object.

17) On August 16, 1999, the forum granted Respondent’s motion requesting to take Complainant’s deposition.

18) On August 16, 1999, the Agency filed its case summary. In the same document, the Agency moved to amend the request for damages in the Specific Charges to seek “\$35,297.99 plus full restoration of credits in the Lumber Employers & Western Council of Industrial Workers Pension Plan, from May 19, 1998, through the date Complainant is reinstated” instead of the “\$27,560 sought in the Specific Charges.” The Agency represented that the amendment was based on recently obtained evidence

concerning Complainant's pay rate at the date of her termination and pay increases called for under the terms of a collective bargaining agreement ("CBA"). The Agency additionally sought to amend the Agency's request for damages to clarify that "the reinstatement sought is with full seniority as though there had been no interruption in Complainant's employment from May 19, 1999, through the date of her reinstatement."

19) On August 20, 1999, Respondent filed its case summary.

20) On September 1, 1999, Respondent sent a motion to dismiss the Agency's claim for damages for mental suffering to the ALJ and the Agency case presenter, via facsimile. In support of the motion, Respondent enclosed a portion of Complainant's deposition transcript. Respondent's motion contended 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. Respondent also asked that Complainant's medical records be provided to Respondent if the Agency's request for mental suffering damages was not withdrawn or dismissed. On the same date, Respondent also filed the motion by mailing it first class to the Hearings Unit.

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

22) Prior to opening statements, the ALJ granted the Agency's motion to amend the Specific Charges, stating that Respondent's denial of the new allegations in the amendment was presumed. Respondent did not object.

23) Prior to opening statements, the ALJ denied Respondent's motion to dismiss the Agency's claim for mental suffering damages. The ALJ informed the participants that his denial was based on the following:

(a) 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;

(b) 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; and

(c) Respondent had almost six months since filing its answer to move for a discovery order for the sought after medical records, but had not done so as of the date of the hearing.

This ruling is confirmed.

24) Prior to opening statements, Respondent moved for a discovery order requiring the Agency to produce Complainant's medical records that the Agency had not yet provided, consisting of handwritten notes from her counselor, John DeSmet. The Agency objected on the basis of timeliness and privilege. Respondent indicated the documents were sought in order to determine if they revealed other contemporaneous stresses in Complainant's life that might affect her potential mental suffering damages. Respondent and the Agency agreed that Respondent made an informal discovery request after Complainant's deposition on August 26, 1999, that the Agency had obtained the requested documents, and that most of them had already been provided to Respondent. The ALJ granted Respondent's motion, ruling that under the circumstances, the requirement of a "full and fair inquiry" under ORS 183.415 was controlling. The ALJ also noted that any claim of privilege Complainant may have had under OEC 504 (Psychotherapist-patient privilege) or OEC 504-4 (Clinical social worker-client privilege) was waived by the Agency's claim for mental suffering on her behalf. The ALJ ruled that he would conduct an *in camera* review of the sought-after

documents at the lunch break, and issue a protective order covering any documents that were released to Respondent. The ALJ ruled he would only release records created within a two year period prior to Complainant's discharge that contained information showing another potential cause for Complainant's post-discharge mental suffering.

25) After an *in camera* inspection of the medical records provided by the Agency, the ALJ released several pages of Complainant's medical records, some of which contained partial redactions, to Respondent at 2 p.m. on September 2, 1999, subject to a Protective Order. The records consisted of handwritten notes made by John L. De Smet, LCSW, during his counseling sessions with Complainant in fall 1997, regarding Complainant's conditions of depression, panic disorder, and post traumatic stress disorder, and a clinical note by A. Gordon Lui, M.D., dated 1/4/97, regarding Complainant's consultation with him over tobacco addiction and anxiety and the treatment he prescribed for those conditions. Thirty-three additional pages of records were not released to Respondent, but were sealed and placed in the official hearings file in the event of appellate review on the issue of the appropriate scope of discovery. The Protective Order issued by the ALJ contained the following restrictions:

- (a) Only three copies would be made, with one provided to Respondent's counsel;
- (b) None of the participants were to discuss or disclose any of the protected information or documents with non-participants outside of the hearings room;
- (c) The forum would maintain and seal these documents in the official hearings file separately from documents subject to public disclosure under the Oregon Public Records law;
- (d) The originals of any documents provided to Respondent and any copies made by Respondent to work from would be returned to the Agency after the hearing;

(e) When there was testimony in the hearing concerning these documents, all spectators except Hank Snow, Respondent's designated representative, would be asked to leave.

Copies of the medical records released to Respondent were provided to the Agency case presenter for inspection before releasing them to Respondent. After the medical records were released to Respondent, Respondent's counsel asked for and was given time to review the records before the hearing was continued.

26) Prior to opening statements, Respondent moved to amend its answer to include the affirmative defense that Complainant failed to mitigate her back pay damages. The Agency objected on the grounds that failure to mitigate was an affirmative defense that is waived if not raised in a responsive pleading, and Respondent had not raised it in its answer. The ALJ reserved ruling on the motion for the proposed order and ruled that Respondent would be allowed to present evidence regarding Complainant's alleged failure to mitigate. The ALJ also granted the Agency a continuing objection to any evidence elicited on this issue. Respondent's motion is granted for reasons stated in the Opinion.

27) The ALJ issued a proposed order on November 16, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance.

28) On November 22, 1999, the Agency filed a motion for an extension of time in which to file exceptions, citing the case presenter's hearings schedule and pre-scheduled vacation plans as a basis for the extension.

29) On November 22, 1999, the ALJ granted the Agency's motion and extended the Agency's time for filing exceptions to December 10, 1999.

30) On December 10, 1999, the Agency filed exceptions to the proposed order.

31) On December 27, 1999, Respondent filed a response to the Agency's exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation that owned and operated wood products manufacturing facilities, including Plywood Plant #4 in Douglas County, Oregon, and was an employer in this state who employed 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which Complainant took her family leave or in the year immediately preceding the year in which Complainant took her family leave.

2) Complainant was hired by Respondent on or about May 11, 1996, at Respondent's Plywood Plant #4 in Douglas County, Oregon.

3) When hired, Complainant was a vacation relief skoog/raimann machine operator, eventually moving to a regular full-time position as a skoog/raimann operator, where she remained throughout the rest of her employment with Respondent.

4) During her employment with Respondent, Complainant was a member of Local 2949 of the Western Council of Industrial Workers.

5) Respondent discharged Complainant in 1997 for absenteeism and attendance problems. Complainant contested her discharge through second and third step grievance proceedings and was reinstated.

6) At all times material herein, Respondent maintained a health and welfare trust fund (the "fund") for the benefit of employees who miss more than three days of work due to non-occupational accidents or illness. In order to collect from the fund, a one-page form had to be completed. The top third was completed by the employee, the bottom third by the employee's attending physician, and the middle third by Respondent. In 1997, the fund paid benefits of \$250 per week. At the time of Complainant's discharge, Respondent was paying \$2.45 per hour into the fund for each

employee covered by the collective bargaining agreement during medical leaves of absence.

7) On August 28, 1997, Complainant completed Respondent's form for requesting health and welfare benefits from the fund based on "Depression/anxiety attacks." Complainant indicated on the form that her "last date at work before disability" was "7-29-97." Complainant's attending physician completed the "Attending Physician's" part of the form on August 29, 1997, and Respondent's representative signed it on October 15, 1997, indicating that Complainant's "last date of work before disability" was "7-28-97" and "Date returned to work after disability" was "8-9-97."

8) In November 1997, Complainant received a check in the net amount of \$211.08 for time loss benefits related to her application for health and welfare benefits for the period of August 1, 1997, through August 8, 1997.

9) On March 31, 1998, Complainant suffered a blackout (syncople episode) at work. Complainant's supervisor, Dennis Cunningham, removed her from the work floor and told her not to come back to work until she had a doctor's release.

10) On March 31, 1998, Complainant was seen by Dr. James Hoyne, DO, an osteopathic physician, regarding her syncople episode.

11) On April 3, 1998, Complainant was seen by Dr. James Falk, DO, who examined Complainant and scheduled tests to discover the reason for the syncople episode. Dr. Falk removed Complainant from work based on her syncople episode "until further notice."

12) On or about April 3, 1998, Respondent received a doctor's note removing Complainant from work until further notice. There was no light duty reference in the note.

13) On April 6, 1998, Respondent granted Complainant a leave of absence, beginning April 4, 1998, through May 3, 1998, after her physician removed her from work until further notice due to syncope episodes that interfered with her ability to perform the essential job functions of her position.

14) Complainant worked an average of 25 or more hours per week during the 180 days immediately proceeding March 31, 1998.

15) On April 9, 1998, Complainant accepted a job with Safeway in Roseburg as a courtesy clerk and began work shortly thereafter. The job involved working with shopping carts and grocery bags in Safeway's parking lot. There was no heavy machinery involved in Complainant's job at Safeway.

16) On or about April 10, 1998, Complainant discussed her Safeway position with her treating physician, who released her for light duty work and authorized her to accept that position.

17) Subsequent to Complainant's syncope episode, Respondent provided Complainant with an application form for health and welfare benefits. Complainant took the form to Dr. Falk, who completed and signed it on April 17, 1998, noting that Complainant had been "continuously disabled" from April 3 through April 10, 1998, and that Complainant was "still unable to do regular job at mill. Found new job no * * * heavy machinery." Complainant did not submit this form to Respondent, and Respondent had no knowledge of it at any time during Complainant's employment or during the subsequent grievance process after she was discharged.

18) While employed at Safeway, Complainant earned \$6.00 per hour. She earned \$267.24 in gross wages. Her last day of work was on or about April 22, 1998. She stopped work at Safeway when she began experiencing lightheadedness again and Dr. Falk told her she should not be doing any work.

19) Complainant did not request or discuss the possibility of light duty work with Respondent before accepting the position at Safeway or at any time during her leave of absence.

20) On or about April 20, 1998, Respondent received a medical certification from Complainant's doctor stating that she could no longer drive and was unable to work around dangerous places or dangerous machinery. This information was provided on Respondent's form entitled "The Family and Medical Leave Act of 1993 – Certification of Health Provider." Respondent had requested this medical verification. Respondent did not ever request nor require any other medical verification regarding Complainant's serious health condition or its impact on her ability to work for Respondent.

21) On or about May 1, 1998, Respondent received additional medical documentation removing Complainant from work indefinitely.

22) Respondent did not ever request nor require Complainant to obtain the opinion of another health care provider regarding her serious medical condition or its impact on her ability to work for Respondent.

23) On May 6, 1998, Respondent extended Complainant's leave of absence an additional 30 days, beginning May 4, 1998, and ending June 3, 1998.

24) On or about May 8, 1998, Dr. Falk approved Complainant's return to work without restrictions, effective May 9, 1998.

25) During Complainant's leave of absence, Respondent continued to contribute \$2.45 per hour, on Complainant's behalf, to its health and welfare trust fund. Respondent also held Complainant's job open for her by not filling her job permanently with another employee.

26) On May 9, 1998, Complainant reported to work, requested reinstatement, and was reinstated to her former position as skoog/raimann operator that same day.

27) After Complainant returned to work, Dale Ingram, Respondent's safety and personnel manager at Plywood Plant #4 since 1990, was told by one of Respondent's employees that Complainant had worked elsewhere during her leave of absence.

28) Ingram investigated the allegation regarding Complainant working elsewhere while on leave of absence and was informed by the store manager at Safeway that Complainant worked about two weeks at Safeway and resigned when she was no longer able to drive. The medical certification stating that Complainant was no longer able to drive was dated 4/20/98.

29) Based on the results of this investigation, Ingram discharged Complainant on May 20, 1998, based upon her having worked for another employer, without the express prior approval of Respondent, while on medical leave of absence from Respondent. Ingram cited Complainant's medical leave in an internal memorandum dated May 19, 1998, explaining the reason for Complainant's discharge as a historical fact supporting the discharge.

30) At all relevant times, Complainant's employment with Respondent was subject to the terms of a collective bargaining agreement ("CBA") between Respondent and the Western Council of Industrial Workers Local Union No. 2949 (June 1, 1996-June 1, 2000). The agreement prohibited employees from working for another employer while on a leave of absence without the express prior approval of the Respondent. This prohibition extended only to employees on a leave of absence. Prior CBAs contained the same provision. Local 2949 gives all of its members a copy of the contract book containing the CBA.

31) Complainant grieved her termination through the grievance procedure established in the CBA. This process involved two steps of review. Complainant's request for reinstatement was denied at each step of the grievance process. After the final meeting in the grievance process, Local 2949 took no action on behalf of Complainant.

32) Ingram believes it is unfair when any employee takes advantage of a policy set up by Respondent for the benefit of its employees, and believes that is what Complainant did when she worked at another job while on her leave of absence without obtaining Respondent's permission, during which time Respondent continued to make contributions to the health and welfare trust fund on her behalf, as well as hold her job open.

33) Complainant was paid the gross hourly wage of \$13.145 at the time she was discharged by Respondent.

34) Had Complainant not been discharged on May 20, 1998, she would have earned \$35,297.99 in gross wages and vacation pay while working for Respondent through August 31, 1999.

35) After Complainant was discharged, Complainant sought work through a temporary employment agency. Complainant was asked to provide the agency with additional documentation, either her driver's license or social security identification, but didn't return to the agency with the requested documentation and isn't sure why she didn't return. Complainant looked through the Roseburg News Review six days a week, 45 minutes a day, for work. She made a few phone calls to unspecified employers, but got no response. She called in response to an ad for a maid service, but got no response. After she worked at Wildwood Nursery in March 1999,¹ she twice applied for work at the Purple Parrot, a restaurant or bar that paid \$7 or \$7.50 per hour. She made

two applications for work at Fred Meyer. While she worked at Fred Meyer in the summer of 1999,² she applied for a job at Ray's Food Place. Sometime in 1999, she applied for work at DR Lumber in Riddle by signing their "sign in sheet" every day, except for Saturday and Sunday for "a week or two."

36) Complainant collected \$8,075 in unemployment compensation benefits in 1998 after her discharge from Respondent.

37) Subsequent to her discharge from Respondent, Complainant's employment has consisted of the following:

(a) Avon (salesperson): starting in July 1998, earning approximately \$1500 between July 1998 and the date of the hearing. Complainant sold Avon before she worked for Respondent, but quit selling Avon when she went to work for Respondent.

(b) Mary Kay Cosmetics (salesperson): starting in fall 1998. Complainant spent \$360 on a sales kit and things she needed for herself. There was no evidence as to the amount of net profit she earned, if any.

(c) Wildwood Nursery from March 16-31, 1999, earning a total of \$322.00 in gross wages (46 hours of work at \$7.00 per hour). Complainant quit because she didn't enjoy working outside due to extreme weather conditions at the time and a sinus infection and headaches she experienced as a consequence.

(d) Fred Meyer in May, June, and July 1999, where she earned a total of \$1,571.67 in gross wages, earning \$6.63 per hour.

38) There are 11 other lumber and plywood mills in the Roseburg area that employ 80-300 employees. Some of them have considerable turnover. New employees at those mills earn \$6.50 to \$7.00 per hour, which is considerably less than what Respondent pays entry-level employees. Two of those mills have skoog operator positions.

39) Complainant became very upset and cried when Ingram discharged her. She was shocked and very angry. She felt defeated, hurt, and embarrassed. Three months earlier, she had just married her husband, Tim Sandusky, who also worked at Respondent's Plywood Plant #4. Complainant was concerned about what his reaction

would be, now that he had to be the sole support of Complainant and her two children. Between the time Complainant returned to work after her syncope episode and her discharge, her stress level was a “4” on a scale of “1-10”, with a “10” being the highest. After her discharge, her stress level rose to an “8” and stayed there for a month before returning to a “4” again.

40) Complainant also suffered embarrassment at the time of her termination based on her perception that “everyone” at Respondent was talking about her being fired because she was trying to steal from Respondent. This perception, in turn, was based on a single conversation her husband had with a co-worker, who told him she heard Complainant was terminated for trying to steal from Respondent.

41) Complainant and her husband have experienced financial stress since her discharge due to her reduced income. Although they had disagreements and arguments about family finances before her discharge, those disagreements and arguments have increased in number since her discharge. Complainant has experienced stress as a result of being primarily dependent on her husband for income. Since Complainant’s discharge, she and her husband have had to severely curtail expenses for family entertainment. They have also had to spend less money than Complainant wanted for school clothes for Complainant’s children.

42) Complainant has suffered from panic attacks since 1995. She still experiences them, but has been able to control them since her discharge from Respondent’s employ. Complainant experienced depression and anxiety in August 1997, for which she sought counseling from John De Smet, LCSW.³ De Smet diagnosed her as suffering from major depression, recurrent, and panic disorder, as well as post traumatic stress disorder. Complainant has not sought counseling for any conditions arising out of her discharge from Respondent’s employ.

43) On March 16, 1998, Ingram discharged Tracy Gunn, a core grader employed at Respondent's Plywood Plant #4. Ingram discharged Gunn after learning that Gunn had been working at a bowling alley during the same period of time that he was on an authorized leave of absence from his job with Respondent, ostensibly to spend time helping his wife cope with grief over her father's death and recent funeral. Gunn filed a union grievance over his discharge. A step two grievance meeting was held, at the conclusion of which Gunn's discharge was upheld. Local 2949 took no further action with regard to Gunn's discharge.

44) In 1997, Gunn took one week of OFLA leave and was not discharged.

45) With the exception of Complainant and Tracy Gunn, Respondent has reinstated its other employees who have taken FMLA/OFLA leave while employed at Plywood Plant #4.

46) Tim Sandusky, Roger Bissonette, Dale Ingram, and Hank Snow were credible witnesses.

47) Complainant's testimony was credible regarding the immediate circumstances that caused her to utilize OFLA, and the immediate circumstances of her discharge and subsequent grievance procedure. The forum also found her testimony concerning her mental suffering, and her mitigation efforts credible. However, Complainant's testimony in other areas was suspect. Based on the examples that follow, the forum has only credited the remainder of Complainant's testimony where it is corroborated by other credible evidence. First, the issue of her memory. Although she testified "I'm terrible with dates," her memory lapses on cross-examination on at least three issues potentially damaging to her case were too convenient for the forum to ignore. For example, she testified she couldn't recall what Exhibit AR-4 was, despite the fact that it was a joint exhibit consisting of a partially completed (but not submitted to

Respondent) application for health and welfare benefits that her physician completed on April 17, 1998, indicating she had found “a new job.”⁴ She was also unable to recall the date she was hired at Safeway, the date she quit, or whether she told Safeway about her leave of absence from Respondent. Exhibit AR-3 contains a typed and handwritten notes from Dr. Falk that are similar in content and refer to Complainant’s release to return to work on May 8, 1998. The handwritten note is undated and the typed note is dated May 22, 1998. When asked if she had asked Dr. Falk to write the letter after her discharge, Complainant again was unable to recall. Finally, her testimony in two areas was untrue. First, Complainant testified that she received approximately \$4700 in unemployment benefits after her discharge, yet her 1998 tax return unequivocally showed that she received \$8075 in that period of time. Second, she testified that she never got any money based on her 1997 application for health and welfare trust fund benefits and didn’t know if she had even submitted it to Respondent, whereas credible evidence provided by the trust fund showed she had submitted the application and received benefits.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was an Oregon employer that utilized the personal services of 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in 1997 and 1998.

2) Complainant was employed by Respondent at Plywood Plant #4 on a full-time basis from May 11, 1996, until her discharge on May 20, 1998, and worked an average of 25 or more hours per week during the 180 days immediately preceding March 31, 1998. Complainant’s job as a skoog/raimann operator involved work around heavy machinery.

3) On March 31, 1998, Complainant suffered a blackout (syncople episode) at work and was instructed not to return to work until she obtained a doctor’s release.

Between March 31, 1998, and May 9, 1998, Complainant's health condition related to her blackout rendered her unable to work in dangerous places or around dangerous or heavy machinery, an essential function of her regular position as a skoog/raimann operator.

4) On April 6, 1998, Complainant submitted an application for OFLA leave to Respondent and was granted OFLA leave beginning April 4, 1998, through May 3, 1998.

5) On April 9, 1998, Complainant was hired as a courtesy clerk at Safeway. She began work shortly thereafter and worked until on or about April 22, 1998. Her duties as a courtesy clerk did not involve working in dangerous places or around heavy or dangerous machinery.

6) During her employment with Respondent, Complainant was a member of Local 2949 of the Western Council of Industrial Workers. As a result, her employment with Respondent was subject to the terms of a collective bargaining agreement between Respondent and the Western Council of Industrial Workers Local Union No. 2949 (June 1, 1996-June 1, 2000). The agreement prohibited employees from working for another employer while on a leave of absence without the express prior approval of the Respondent. This prohibition extended only to employees on a leave of absence.

7) Complainant did not inform Respondent that she had accepted a job at Safeway until the May 20, 1998, meeting at which she was discharged.

8) On May 6, 1998, Respondent extended Complainant's leave of absence an additional 30 days, beginning May 4, 1998.

9) Complainant was released to return to work without restrictions effective May 9, 1998.

10) On May 9, 1998, Complainant reported to work, requested reinstatement, and was reinstated to her former position as skoog/raimann operator that same day.

11) After Complainant returned to work, Respondent learned through another employee that Complainant had worked at Safeway during her leave of absence.

12) On May 20, 1998, Respondent discharged Complainant for violating the collective bargaining agreement by working at Safeway without obtaining Respondent's permission while on a leave of absence.

13) On March 16, 1998, Respondent discharged Tracy Gunn, a core grader employed at Plywood Plant #4, after Respondent learned he had been working at a bowling alley while off on an authorized leave of absence from Respondent, ostensibly to spend time helping his wife cope with grief over her father's death. In August 1997, Gunn took OFLA leave for five days and was not discharged.

14) With the exception of Complainant and Gunn, Respondent has reinstated its other employees who have taken FMLA/OFLA leave while employed at Plywood Plant #4.

15) Between the date of her discharge and August 31, 1999, Complainant lost \$31,904.32 in gross wages and vacation benefits that she would have earned, had she not been discharged by Respondent.⁵

16) Complainant experienced substantial mental suffering as a result of her discharge from Respondent's employ.

CONCLUSIONS OF LAW

1) The Oregon family leave laws apply to "covered employers," which are defined as:

"employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks 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."

Respondent was a “covered employer.” ORS 659.470(1); ORS 659.472(1).

2) The actions and motivations of Ingram, Respondent’s safety and personnel manager at Plywood Plant #4, are properly imputed to Respondent.

3) ORS 659.474(1) provides that “[a]ll employees of a covered employer are eligible to take leave for one of the purposes specified in ORS 659.476(1)(b) to (d)” except in circumstances not applicable here. Complainant was an eligible employee.

4) ORS 659.492 (1) and (2) provide:

“(1) “A covered employer who denies family leave to an eligible employee in the manner required by ORS 659.470 to 659.494 commits an unlawful employment practice.

“(2) Any employee claiming to be aggrieved by a violation of ORS 659.470 to 659.494 may file a complaint with the Commissioner of the Bureau of Labor and Industries in the manner provided by ORS 659.040. The Commissioner of the Bureau of Labor and Industries shall enforce the provisions of ORS 659.470 to 659.494 in the manner provided in ORS 659.010 to 659.110 for the enforcement of other unlawful employment practices.”

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.492(2); ORS 659.010 *et seq.*

5) ORS 659.476 specifies the purposes for which OFLA leave may be taken:

“(1) Family leave under ORS 659.470 to 659.494 may be taken by an eligible employee for any of the following purposes:

“* * * * *

“(c) To recover from or seek treatment for a serious health condition of the employee that renders the employee unable to perform at least one of the essential functions of the employee’s regular position.”

ORS 659.470(6) defines the term “serious health condition” as follows:

“(6) ‘Serious health condition’ means:

“(a) An illness, injury, impairment or physical or mental condition that requires inpatient care in a hospital, hospice or residential medical care facility;

“(b) An illness, disease or condition that in the medical judgment of the treating health care provider poses an imminent danger of death, is terminal in prognosis with a reasonable possibility of death in the near future, or requires constant care; or

“(c) Any period of disability due to pregnancy, or period of absence for prenatal care.”

ORS 659.494(2) provides:

“ORS 659.470 to 659.494 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Family and Medical Leave Act of 1993. Family leave taken under ORS 659.470 to 659.494 must be taken concurrently with any leave taken under the federal Family and Medical Leave Act of 1993.”

The Agency has interpreted these statutes and rules as follows:

“Under OFLA, a Serious Health Condition includes:

“1. an illness, injury, impairment, or physical or mental condition that requires inpatient care (ORS 659.470(6)(a));

“2. an illness, injury, impairment, or physical or mental condition that poses imminent danger of death or is terminal with a reasonable possibility of death (ORS 659.470(6)(b));

“3. an illness, injury, impairment, or physical or mental condition that requires constant care (ORS 659.470(6)(b)). Constant care means care wherever performed (OAR 839-009-0210(10)), including:

“a. care in a health care facility (OAR 839-009-0210(10));

“b. home care administered by health care professionals (OAR 839-009-0210(10)); or

“c. 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. (FMLA)

“i. includes ‘self-care,’ i.e. person taking care of themselves (BOLI interpretation)

“ii. excludes colds, flu, earaches, upset stomach, minor ulcer, headache (except migraine), routine eye or dental care (FMLA);

“4. any period of disability due to pregnancy, or period of absence for prenatal care. (ORS 659.470(6)(c));

“5. a chronic condition (like asthma, diabetes and epilepsy) 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 (OAR 839 Div. 009 App. B);

“6. a permanent longterm condition under continuing treatment (like Alzheimers, stroke), which:

“a. requires in-patient or constant care; or

“b. poses imminent danger of death.

“(OAR 839 Div. 009 App. B)”⁶

ORS 659.470(5) defines “health care provider,” in pertinent part, as follows:

“‘Health care provider’ means the person who is primarily responsible for providing health care to an eligible employee * * *, and who is a physician licensed to practice medicine and surgery, including a doctor of osteopathy * * *.”

Complainant’s syncope episode was a “serious health condition” for purposes of OFLA that rendered her unable to work for more than three consecutive calendar days, for which she received two or more treatments by a doctor of osteopathy, a “health care provider,” and that rendered her unable to perform at least one of the essential functions of her regular position.

6) ORS 659.103(1)(e) provides:

“(1) In accordance with any applicable provision of ORS 183.310 to 183.550, the Commissioner of the Bureau of Labor and Industries may adopt reasonable rules:

“* * * * *

“(e) Establishing rules covering any other matter required to carry out the purpose of ORS 659.010 to 659.110 and 659.400 to 659.545.”

OAR 839-009-0320(2) provides:

“It is an unlawful employment practice for an employer to retaliate or in any way discriminate against an employee with respect to hire, tenure or any term or condition of employment because the employee has inquired about family leave, submitted a request for family leave or invoked any provision of the Oregon Family Leave Act.”

In discharging Complainant, Respondent did not retaliate or in any way discriminate against Complainant with respect to hire, tenure or any term or condition of employment because Complainant inquired about family leave, submitted a request for family leave or invoked any provision of the Oregon Family Leave Act.

7) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and the complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

INTRODUCTION

The Agency alleges that Complainant took OFLA leave, and that Respondent reinstated Complainant following her OFLA leave, only to later discharge her for accepting another job while on OFLA leave. The Agency contends Complainant's discharge was caused by her OFLA leave, in that she would not have been discharged if she had taken the same job while not utilizing OFLA leave. The Agency seeks back pay and mental suffering damages to compensate Complainant for Respondent's alleged unlawful employment practice.

In response, Respondent contends that Complainant was discharged based on a legitimate, non-discriminatory reason ("LNDR"), i.e. her acceptance of another job, without Respondent's prior permission, while on a leave of absence, in violation of Respondent's collective bargaining agreement. Respondent also contends that it was entitled to rely on and did rely on FMLA and the collective bargaining agreement in discharging Complainant, that Complainant failed to mitigate her back pay loss, and that any mental suffering she experienced was primarily caused by other sources.

PRIMA FACIE CASE

The Agency's 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. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 161 (1st Cir. 1998); *Morgan v. Hilti, Inc.*, 108 F.3d 1319 (10th Cir. 1997).⁷

The first element of the Agency's prima facie case is established by undisputed facts. Complainant, who had worked an average of 25 or more hours per week during the 180 days immediately preceding March 31, 1998, suffered from a serious health condition, a blackout that occurred at work, that required constant care. As a result, Complainant took a leave of absence from Respondent, her OFLA covered employer, from on or about March 31, 1998, through on or about May 9, 1998.

The second element likewise is established by an undisputed fact, namely, that Respondent discharged Complainant on or about May 20, 1998.

The third element, causal connection, is the primary subject of dispute in this case and is analyzed at length in the next section.

CAUSAL CONNECTION

OFLA regulates two separate, 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 ORS 659.476, and job protection during that leave. Second, OFLA, through OAR 839-009-0320, prohibits retaliation or discrimination against any employee based on inquiry about or use of OFLA. This distinction is important because the analysis of whether or not unlawful discrimination occurred is different in each area.

The "entitlement" portion of OFLA is unequivocal as to what constitutes an unlawful employment practice. An unlawful employment practice occurs when a "covered employer * * * denies family leave to an eligible employee in the manner required by ORS 659.470 to 659.494." ORS 659.492(1). With limited exceptions,⁸ a violation occurs at the moment a covered employer denies an eligible employee any

entitlement specifically set out in ORS 659.470 to 659.494. Essentially, ORS 659.492(1) is a strict liability statute. No motive or intent need be proven; the mere fact that the entitlement was denied, absent an applicable affirmative defense, constitutes a violation.

OAR 839-009-320, on the other hand, 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.⁹ 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.

OAR 839-005-0010(2) sets out the two ways that causal connection can be established in a case alleging unlawful discrimination under ORS chapter 659:

“(a) Specific Intent Test: the Respondent knowingly and purposefully discriminates against an individual because of that individual's membership in a protected class. Unless the Respondent can show that an exception to the law allows its action, the Respondent has unlawfully discriminated.

“(b) Different or Unequal Treatment Test: the Respondent treats members of a protected class differently than others who are not members of the protected class. When the Respondent makes this differentiation because of the individual's protected class and not because of legitimate, non-discriminatory factors, unlawful discrimination exists.”

The Agency's contention that Respondent committed a per se violation of OFLA by discharging Complainant in a manner that is neither specifically permitted nor prohibited by OFLA attempts to graft the strict liability standard imposed in “entitlement” cases onto a retaliation case that requires proof of discriminatory motive or intent. This argument lacks merit.

A. Specific Intent

Specific intent is generally established by direct evidence of a respondent's discriminatory motivation. Respondent's internal memorandum that cites Complainant's medical leave in connection with her termination creates an inference that Complainant's medical leave was a motivating factor in Respondent's decision to terminate Complainant. Ingram's testimony 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, gives rise to the same inference. However, in the face of Respondent's LNDR and the forum's finding that Complainant's medical leave was mentioned in the memorandum to provide historical context, not cause,¹⁰ that evidence is insufficient to establish specific intent. This evidence is also insufficient to establish that Complainant's use of OFLA played "a substantial role" in her discharge, triggering a "mixed motive" analysis under OAR 839-005-015.¹¹ Consequently, the forum moves on to a different treatment analysis.

B. Different Treatment

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." *OAR 839-005-0010(5)*.

The Agency contends that Complainant would not have been discharged if she had not been on OFLA leave when she took the job at Safeway. In rebuttal, Respondent provided an LNDR by producing clear and reasonably specific admissible evidence¹² that the collective bargaining agreement requires 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.

At this point, the Agency can still prevail by proving that Respondent's LNDR was a pretext for discrimination. The Agency's burden of showing pretext merges with the ultimate burden of persuading the forum that Complainant was the victim of intentional discrimination.¹³ 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.¹⁴ Respondent's treatment of other members of Complainant's protected class, i.e. employees who took OFLA leave, is also relevant in a different treatment analysis.¹⁵

In this case, the appropriate comparators are other employees who took leaves of absence of any kind. The forum arrives at this conclusion based on the participants' joint stipulation that the CBA provision in question contained a blanket prohibition of "employees [from] working for another employer while on a leave of absence without the express prior approval of the Respondent." Therefore, the key question before the forum is how Respondent treated other employees on leaves of absence of any kind. A review of the findings of fact provides a decisive answer.

Complainant was employed at Respondent's Plywood Plant #4. Employees at that plant regularly take OFLA and are reinstated to their former positions. Only one

other person, Tracy Gunn, has taken another job without obtaining Respondent's prior permission while on an "authorized" leave of absence.¹⁶ Gunn was fired when Respondent discovered he had taken another job. Complainant was reinstated after taking OFLA leave, then fired, like Gunn, as soon as Respondent discovered that she had worked at Safeway while on OFLA leave. In sum, the evidence shows that employees who take OFLA leave, including Complainant, have been reinstated to their former positions after taking leave, and that employees who work at other jobs while on leave, without obtaining Respondent's prior permission, are discharged. Far from showing pretext, this evidence validates Respondent's LNDR.

CONCLUSION

Under either the Specific Intent or Different Treatment tests, the Agency has not met its burden of proof in showing that Complainant was subjected to retaliation or discrimination because she took OFLA leave.¹⁷

AMENDMENTS AND OBJECTIONS AT HEARING

At hearing, Respondent moved to amend its answer to include the affirmative defense that Complainant failed to mitigate her back pay damages. The Agency objected on the grounds that this affirmative defense must be pleaded and proved, and Respondent had waived it by not raising it in the answer. The ALJ reserved ruling on the motion to the proposed order and allowed Respondent to present evidence on this issue, subject to the Agency's continuing objection.

In support of its objection, the Agency cited *In the Matter of Peggy's Café*, 7 BOLI 281 (1989). In that case, the forum held that evidence concerning wages actually earned by Complainant during the period of time for which she sought back wages "is in the nature of an affirmative defense, which is the Respondent's burden to plead and prove." *Id.*, at 288. The issue in this case is Complainant's diligence or lack thereof in

seeking alternative work, not what she earned in the work she actually obtained through her successful mitigation effort. Consequently, *Peggy's* is inapplicable to this case.

In 1991, the Oregon Court of Appeals addressed this issue in *Marcoulier v. Umsted*, 105 Or App 260 (1991). The issue in *Marcoulier* was whether the trial court had erred in excluding evidence that the plaintiffs had failed to mitigate their damages “because of its conclusion that appellants were required to and had not pleaded mitigation of damages or avoidance of consequences as an affirmative defense.” *Id.*, at 262. The Court held that failure to mitigate damages need not be affirmatively alleged, and that “evidence that plaintiff could reasonably have avoided all or part of the damages is admissible under a general denial.” *Id.*, at 264, citing *Zimmerman v. Ausland*, 266 Or 427, 513 P2d 1167 (1973); *Blair v. United Finance Company*, 235 Or 89, 383 P2d 72, 91 (1963).

Based on *Marcoulier*, the forum concludes that 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. Since Respondent would be entitled to present evidence on the issue of failure to mitigate regardless of the amendment, the Agency is not prejudiced by granting Respondent’s motion to amend at hearing. Respondent’s motion to amend the answer to include the affirmative defense of failure to mitigate back pay damages is granted. *OAR 839-050-0140(2)(b)*. Given the forum’s holding, whether or not Respondent proved that Complainant actually failed to mitigate her back pay loss is moot.

RESPONDENT’S AFFIRMATIVE DEFENSES

Respondent raised two additional affirmative defenses: (1) Based on the silence of OFLA, Respondent was entitled to rely on 29 C.F.R. § 825.312(h) in FMLA that specifically permits Respondent’s action; and (2) that Respondent was required to

follow the provisions of its collective bargaining agreement in discharging Complainant. Based on its determination that the Agency must prove a causal connection in this case and has not done so, the forum need not and does not reach either of these issues.¹⁸

EXCEPTIONS

The Agency filed a number of exceptions to the Proposed Order regarding the Findings of Fact. In response to those exceptions, the forum has modified the caption, changed Findings of Fact – The Merits ## 3, 12 and 13, Ultimate Findings of Fact ##5 and 7, and deleted footnote 1 (containing a reference to the number of hours Complainant worked at Safeway).

The Agency also filed two more lengthy exceptions. The first was to Proposed Finding of Fact – Procedural #24 and its conclusion that “any claim of privilege Complainant may have had under OEC 504 (Psychotherapist-patient privilege) or OEC 504-4 (Clinical social worker-client privilege) was waived by the Agency’s claim for mental suffering on her behalf.” The second was to the ALJ’s conclusions as to causation and the standard of proof applied by the ALJ.

A. Waiver of Privilege under OEC 504 or OEC 504-4.

In its exceptions, the Agency repeated its objection at hearing to the forum’s order that it turn over to Respondent, subject to a preliminary *in camera* review by the ALJ, medical records related to the diagnosis and treatment of Complainant’s mental or emotional condition.¹⁹ The Agency argued that the forum was required to give effect to the psychotherapist-patient and clinical social worker-client privileges set out in OEC 504 and OEC 504-4, respectively, correctly noting that the forum must give effect to privileges recognized by law. *ORS 183.450(1)*. The specific medical records consisted of handwritten notes made by John L. De Smet, LCSW, during his counseling sessions with Complainant in the fall of 1997 for the conditions of depression, panic disorder, and

post traumatic stress disorder, and a clinical note made by A. Gordon Lui, M.D., dated 1/4/97, regarding Complainant's consultation with him over tobacco addiction and anxiety and the treatment he prescribed for those conditions. These medical records were offered into evidence by Respondent and received as Exhibit R-13.

OEC 504 provides, in pertinent part:

"(1) As used in this section, unless the context requires otherwise:

"(c) "Psychotherapist" means a person who is:

"(A) Licensed, registered, certified or otherwise authorized under the laws of any state to engage in the diagnosis or treatment of a mental or emotional condition; or

"(B) Reasonably believed by the patient so to be, while so engaged.

"(2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient's mental or emotional condition among the patient, the patient's psychotherapist or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

"* * * * *

"(4) The following is a nonexclusive list of limits on the privilege granted by this section.

"* * * * *

"(b) There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient:

"(A) In any proceeding in which the patient relies upon the condition as an element of the party's claim or defense."

OEC 504-4 provides, in pertinent part:

"A clinical social worker licensed by the State Board of Clinical Social Workers shall not be examined in a civil or criminal court proceeding as to any communication given the clinical social worker by a client in the course of noninvestigatory professional activity when such communication was given to enable the licensed clinical social worker to aid the client, except:

"[Five exceptions are listed, none of which apply in this case.]"

In this case, the subject medical records were created by a licensed clinical social worker ("LCSW"), De Smet, and a medical physician, Lui.

Lui is an M.D. His report, though brief, deals specifically with Complainant's "tobacco addiction" and "anxiety," for which he prescribed medication and suggested counseling. Because Complainant specifically consulted him about her emotional condition, and he treated her for that condition, the forum infers that Complainant "reasonably believed" Lui was a "psychotherapist" under the definition contained in OEC 504(1)(c)(A). Consequently, the Complainant is entitled to OEC 504's psychotherapist-patient privilege regarding Lui's clinical note unless an exception applies. In this case, the exception contained in OEC 504(4)(b)(A) applies. The mental and emotional condition of Complainant became "an element of [the Agency's] claim" on Complainant's behalf the moment the Specific Charges, which sought \$20,000 in damages "for mental suffering," were served on Respondent. At that point, Lui's clinical note became discoverable.²⁰

De Smet's handwritten notes require a slightly more complex analysis. Standing alone, OEC 504-4 appears to provide an ironclad privilege to De Smet's notes under the facts of this case. In brief, De Smet is an LSCW as defined in OEC 504-4, and none of the five specifically enumerated exceptions in that evidentiary rule apply to the facts of this case. However, this is not the end of the inquiry. The Legislative Commentary that accompanies OEC 504 states, with regard to the definition of "psychotherapist" in paragraph (1)(c):

"The rule defines "psychotherapist" as a person authorized or thought to be authorized by the patient to engage in, while in fact engaged in, the diagnosis or treatment of a mental or emotional condition. The definition is broad enough to include not only psychiatrists and psychologists but other professionals who treat mental and emotional conditions. In appropriate circumstances such persons may be medical doctors, nurses or clinical social workers. The definition seeks to avoid needless refined distinctions concerning what is and what is not the practice of psychiatry."²¹

In this case, the contents of Exhibit A-12 clearly establish that De Smet was engaged in “the diagnosis or treatment of [Complainant’s] mental or emotional condition.”²² Complainant’s testimony established that she voluntarily authorized De Smet to diagnose or treat her mental or emotional conditions. As a consequence, even though De Smet’s notes may be privileged under OEC 504-4, they are not privileged under OEC 504(4)(b)(A) based on the same reasoning applied by the forum to Lui’s clinical note. The Agency’s exception on this point is overruled.

B. Causation and Standard of Proof.

In its exceptions, the Agency argues that three pieces of evidence -- Article XII, Paragraphs A and B, of the CBA, the actual circumstances of Gunn’s discharge, and statements of Chris York, a management representative at Complainant’s grievance process – demonstrate that Respondent’s proffered LNDR is pretextual. The forum disagrees for reasons already stated in the proposed opinion. The forum points out once more that Paragraphs A and B of the CBA were not separately analyzed because the forum accepted and has relied upon the participants’ joint stipulation that the CBA prohibited “employees [from] working for another employer while on a leave of absence without the express prior approval of the Respondent.”²³ There is no evidence that Complainant sought or obtained prior approval; in fact, the evidence is that Complainant did not.

The Agency also argues that the forum applied the incorrect standard of proof in the proposed order, contending that the test should be whether “the underlying basis of Complainant’s leave was a substantial factor in her termination.” This is incorrect. If the evidence proved that Respondent’s LNDR and Complainant’s protected class status were both causative factors in Respondent’s discharge of Complainant, then the forum

would apply the “mixed motive” test and decide if Complainant’s protected class status “played a substantial role in the Respondent’s action at the time the action was taken.”²⁴

In this case, it is true that Complainant would not have been discharged, had she not taken OFLA leave. However, her membership in a protected class, that of individuals utilizing OFLA leave, is not enough. There must also be a causal connection between her membership in the protected class and Respondent’s action.²⁵ Complainant’s protected class was not a causative factor in Respondent’s discharge of Complainant. The Agency’s exception is overruled.

ORDER

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

¹ See Finding of Fact – The Merits #37, *infra*

² *Id.*

³ See Finding of Fact – The Merits #7, *supra*.

⁴ See Finding of Fact – The Merits #17, *supra*.

⁵ In arriving at this figure, the forum subtracts \$1500 for Avon earnings, \$322 for Wildwood earnings, and \$1571.67 for Fred Meyer earnings. Although Complainant spent \$360 on business expenses related to Mary Kay, her Mary Kay earnings were indeterminate and the forum has not deducted those expenses because she provided no evidence of her earnings. Complainant’s unemployment earnings of \$8,075 have not been subtracted, based on the forum’s prior rulings that unemployment earnings are not deductible from an award of back pay. See, e.g., *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61, 84 (1992).

⁶ See *In the Matter of Centennial School District*, 18 BOLI 176, 191, 193 (1999), *appeal pending*.

⁷ This forum has previously taken guidance from federal court decisions interpreting federal laws analogous to Oregon law. *In the Matter of Wing Fong*, 16 BOLI 280, 292 (1998). As this is a case of first impression, the forum adopts the federal courts' formulation of a prima facie case of retaliation under the Family Medical Leave Act (FMLA) as its standard for OFLA retaliation cases.

⁸ See, e.g., ORS 659.484(3) (employer can require employee to provide certification from health care provider on ability to work and require employee to report periodically on employee's status during leave); OAR 839-009-0270 (reinstatement to "former" position not required if the position has in fact been eliminated; employer's obligations under OFLA cease if employee gives unequivocal notice of intent not to return to work).

⁹ Cf. *Ledesma v. Freightliner Corp.*, 97 Or App 379, 382-83 (1989) (Plaintiff alleged he was terminated in retaliation for utilizing the workers' compensation system in violation of ORS 659.410 based on his termination while off work on time loss. In discussing the necessity of a causal connection between plaintiff's termination and his use of the workers' compensation system, the court stated: "The facts show that plaintiff worked for defendant and that he was fired after he had applied for workers' compensation benefits. Apparently, according to plaintiff, all he need show to recover under ORS 659.410 is that he filed a workers' compensation claim and that he was discharged sometime thereafter. That is not the law." See also OAR 839-005-0010(1)(d) which contains the Agency's generic description of a prima facie case and describes the necessity for proof of a causal connection as "proof [that] Respondent's [adverse] action was taken *because of* the Complainant's protected class." (emphasis added)

¹⁰ See Finding of Fact – The Merits #29, *supra*.

¹¹ OAR 839-005-0015 specifically provides:

"Frequently, the evidence indicates that several factors contribute to causing the Respondent's action, of which only one factor is the Complainant's protected class. The Division will apply the mixed motive analysis to determine whether the Complainant's protected class membership played so substantial a part in the Respondent's action to be said to have 'caused' that action. Under this analysis,

the Complainant's protected class membership does not have to be the sole cause of the Respondent's action but must have played a substantial role in the Respondent's action at the time the action was taken. A Respondent must prove that it would have made the same decision even if it had not taken Complainant's protected class into account."

¹² See *In the Matter of Clackamas County Collection Bureau*, 12 BOLI 129, 139 (1994). See also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981) (In order to successfully rebut the plaintiff's prima facie case in a disparate treatment case, the defendant must "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.")

¹³ *Burdine*, 450 U.S. at 256.

¹⁴ See *In the Matter of Howard Lee*, 13 BOLI 281, 290-91 (1994); *Clackamas County*, 12 BOLI at 138-40.

¹⁵ See, e.g., *Lee*, 13 BOLI at 291-92 (In a case in where a female alleged Respondent hit and pushed her because of her sex, the forum considered evidence that five other female employees were not hit or pushed by Respondent in arriving at the conclusion that the respondent did not discriminate against complainant because of her sex.)

¹⁶ The evidence did not establish whether or not Gunn was on OFLA or FMLA leave, merely that he was on an "authorized" leave to help his wife while she grieved for her father who had just died.

¹⁷ See *In the Matter of Wing Fong*, 16 BOLI 280, 289 (1998) (The Agency has the burden of proving unlawful discrimination.)

¹⁸ The forum notes that an employer is prohibited from having a leave policy, whether part of a collective bargaining agreement or as part of a personnel policy, that contravenes a right expressly granted by OFLA or the administrative rules interpreting OFLA.

¹⁹ See Findings of Fact – Procedural ## 24 and 25, *supra*.

²⁰ The Legislative Commentary to OEC 504(4)(b) further explains that “An exception applies whenever the mental or emotional condition of the patient is put in issue.” See LAIRD C. KIRKPATRICK, OREGON EVIDENCE (3d ed. 1996), at 239.

²¹ *Id.*, at 238.

²² Exhibit A-12 is a letter from De Smet to Respondent, dated September 22, 1997. In that letter, De Smet states, in pertinent part: “I have been seeing Yvette [Complainant] since last month. I have assessed her as suffering from Major Depression, Recurrent, and a severe anxiety disorder, which is called Panic Disorder, without Agoraphobia. Yvette also suffers from Post Traumatic Stress Disorder * * *.” This excerpt clearly qualifies as a “diagnosis” of Complainant’s mental and emotional condition.

²³ See Finding of Fact – The Merits #30, *supra*.

²⁴ See fn 11, *supra*.

²⁵ See fn 9, *supra*.