

In the Matter of

ROBB WOCHNICK dba Sports Warehouse

Case No. 79-02

Final Order of Commissioner Dan Gardner

Issued August 31, 2004

SYNOPSIS

Where Respondent, a sole proprietor, employed Complainant, a female, subjected her to unwelcome conduct of a sexual nature, ignored her complaints about the conduct, including that of non-employees, and refused to take appropriate corrective action, the forum found Respondent liable for Complainant's resulting mental suffering and awarded her damages totaling \$40,000. *Former* ORS 659.030(1)(b). The forum further found that by subjecting Complainant to unwelcome sexual conduct and ignoring her complaints about the conduct, Respondent intentionally created intolerable working conditions because of Complainant's sex and that her subsequent resignation was a constructive discharge, in violation of *former* ORS 659.030(1)(a). Finally, the forum found that Respondent retaliated against Complainant by forcing her constructive discharge because she opposed his unlawful employment practices, in violation of *former* ORS 659.030(1)(f). In addition to the mental suffering damages, the forum awarded Complainant \$1,200 in lost wages. *Former* ORS 659.030(1)(a) & (b), *former* ORS 659.030(1)(f), *former* OAR 839-005-0030(1)(a) & (b), *former* OAR 839-005-0030(3), *former* OAR 839-005-0030(7).

The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 May 13-15, 2003, in the WW Gregg Hearing Room of the Bureau of Labor and Industries located at 800 NE Oregon Street, Portland, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Lisa Sims ("Complainant") was present throughout the hearing and was not represented by counsel. Thomas L. La Follett, Attorney at Law, represented Robb Wochnick ("Respondent"), who was present throughout the hearing.

The Agency called as witnesses: Lisa Sims, Complainant; Tracy Madsen (telephonic), former Respondent employee; Brett Robinson, MD (telephonic), Complainant's physician; and Donald Sims, Complainant's husband.

Respondent called as witnesses: Robb Wochnick, Respondent; Dave Cruz (telephonic), Respondent's business associate; Bud Ranson, Jr. (telephonic), one of Respondent's customers; Melissa Bishop (telephonic), former Respondent employee; and Diana Anderson, Respondent's former bookkeeper.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-14(b);
- b) Agency exhibits A-1, A-2a, A-2d, A-2j, A-2l, A-2o, A-2p (submitted prior to hearing); and A-3, A-4, A-5 (submitted during hearing);
- c) Respondent exhibit R-1 (submitted prior to 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, as amended herein.

FINDINGS OF FACT – PROCEDURAL

1) On or about July 31, 2001, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of the unlawful employment practices of Respondent. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations of the complaint.

2) On March 19, 2003, the Agency submitted Formal Charges to the forum alleging Respondent discriminated against Complainant by directing unwelcome physical and/or verbal conduct of a sexual nature at Complainant because of her gender that was sufficiently severe or pervasive to have the purpose or effect of

creating a hostile, intimidating, or offensive working environment for Complainant, in violation of *former* ORS 659.030(1)(b). The Agency also alleged that Complainant was compelled to quit her employment due to the intolerable working conditions created by Respondent, in violation of *former* ORS 659.030(1)(a). The Agency further alleged that Respondent retaliated against Complainant because she opposed his unlawful employment practices, in violation of *former* ORS 659.030(1)(f). The Agency requested a hearing.

3) On March 20, 2003, the forum served Formal Charges on Respondent that were accompanied by the following: a) a Notice of Hearing setting forth May 13, 2003, in Portland, 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 24, 2003, the Agency moved to amend the Formal Charges by interlineation to correctly spell Complainant's name wherever it appeared in the Formal Charges and to designate Complainant's correct address. Respondent filed no objection to the motion and on April 2, 2003, the forum granted the Agency's motion.

5) On April 8, 2003, Respondent, through counsel, timely filed an answer to the Formal Charges.

6) On April 8, 2003, 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 brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any

damage calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by May 2, 2003, and notified them of the possible sanctions for failure to comply with the case summary order.

7) The Agency and Respondent timely filed case summaries.

8) On May 7, 2003, the Agency filed a supplemental case summary.

9) On May 12, 2003, the Hearings Unit received Respondent's request for a postponement of the hearing. The forum subsequently denied the motion because it was untimely.

10) On May 13, 2003, the forum issued a Protective Order governing the disclosure of medical information submitted in the Agency's case summary.

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

12) During the hearing, the participants stipulated that junk e-mail is a recognized problem common to most Internet users and that junk e-mail includes unsolicited advertisements, including pornography.

13) During the hearing, the ALJ requested and received information related to unsolicited bulk e-mail from Laura A. Heymann, Assistant General Counsel, America Online, Inc. ("AOL"), by facsimile transmission. The ALJ provided the participants with copies of the documents Heymann provided.

14) During the hearing, the Agency offered exhibits A-2j (Tracy Madsen Investigative Interview) and A-3 (Brett Robinson, MD, response to Agency inquiry). Respondent objected to both exhibits on relevance grounds and the ALJ reserved ruling on Respondent's objections until the proposed order. The ALJ subsequently found both

exhibits relevant and admitted both pursuant to OAR 839-050-0260(9). For those reasons, Respondent's objections to the exhibits are overruled.

15) The participants presented their closing arguments on May 23, 2003, and the record closed on the same date.

16) The ALJ issued a proposed order on June 28, 2004, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency and Respondent timely filed exceptions which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Robb Wochnick ("Respondent") was a sole proprietor operating a sports memorabilia mail order business in Oregon under the assumed business name of Sports Warehouse, and was an employer utilizing the personal services of one or more persons.

2) In January 2000, Respondent hired Complainant, a female, to perform office work for his mail order business located in Wilsonville, Oregon. Respondent was Complainant's only supervisor.

3) After two or three months, Complainant began working full time for Respondent. Her pay rate was \$12.50 per hour.

4) Respondent considered Complainant the "office manager" and her duties included answering the telephone, taking telephone orders, filling out company invoices, taking digital photographs of Respondent's sports memorabilia ("product"), editing the photographs, and assisting in listing "eBay" auction items. Her work time was primarily spent at a computer terminal or photographing product. Complainant, Respondent and the other employees wore casual clothing to work, including jeans and tee shirts. During the summer, they sometimes wore shorts and tank tops.

5) Respondent's product included vintage jerseys, hats, cleats, trading cards, bats, balls, mitts, autographs, and other sports memorabilia for sale to collectors. Photos of the items were electronically transmitted through eBay, Respondent's online website, and displayed in a mail order catalogue that Respondent periodically distributed. Most of Respondent's business derived from the eBay auctions and was conducted by e-mail or telephone. Walk-in traffic was rare, but customers often set up appointments to view particular items or ask questions about the origin of specific product.

6) Initially, Respondent's business was located in a warehouse in Wilsonville. Complainant worked in a small room off a hallway that contained two desks and two computer terminals that she shared with Tracy Madsen, a part time co-worker. A smaller room, attached by an open doorway, served as the shipping area and contained a desk and computer terminal. Further down the hallway, Respondent worked in a room that had a door and opened into a warehouse where the product was stored. A fourth computer terminal was located in the warehouse. The entire office space was approximately 16' x 32' and the warehouse area was approximately twice the size of the office space. All four computer terminals were located next to a telephone. Everyone used the terminal at the shipping desk. Although Complainant usually worked on the same computer, she and others, including Respondent, used more than one computer depending upon the task at hand.

7) Respondent also employed a part time bookkeeper, Diana Anderson, who worked every other Monday, "as needed." Respondent's son, Brian, was employed full time elsewhere during regular business hours, but he and his wife Kirsten sometimes performed computer work for Respondent. Occasionally, Brian helped prepare product for shipping, but not often and not on Fridays.

8) America Online (“AOL”) was Respondent’s Internet service provider. As part of its service, AOL permitted Respondent to select up to five “screen names” for use on his account. Respondent used the screen name “sportswhe” for all of his customer and sales transactions. He used other screen names, such as “robbietheox,” “refferforlife,” and “ashleyg,” for storing photographs of merchandise, as well as for personal transactions. Complainant and Madsen used the “sportswhe” screen name while performing their job duties. Complainant only used the other account names when she had to “load photos” or had to “get on the Internet fast.” Respondent’s son and daughter-in-law used the screen name “farwestsports” when performing work for Respondent.

9) As part of his mail order business, Respondent received voluminous e-mails. A “huge amount” was not business related, but consisted of “junk mail,” *i.e.*, unsolicited advertisements, including pornography. Even Respondent’s business e-mail address, “sportswhe,” received a substantial amount of junk mail. Junk mail is a recognized problem common to most Internet users.

10) Usually, the pornographic junk e-mail could be identified by the subject line that appeared in the “mailbox” and deleted without viewing the content. One time, Madsen opened an e-mail without reading the title and found the content to be “clearly pornographic” and she immediately deleted it. Thereafter, she checked the subject lines of incoming e-mail more carefully and if the origin of a particular e-mail was suspicious she sought clarification from Respondent or Complainant. Most of the time, she quickly identified those e-mails that were not business related because the titles, such as “Hot Chicks,” were obvious. On at least two occasions, Respondent downloaded “obscene pictures” because the subject line was innocuous.

11) Complainant was offended by the volume of unsolicited pornographic e-mail and the graphic nature of the subject lines. The e-mails she found particularly odious included titles such as "Hot Teenage Anal Sex" and "Hot Pussy." Although she deleted the offending e-mails immediately, she found it upsetting to deal with them while trying to perform her job duties.

12) Complainant and Madsen complained to Respondent about the amount of offensive "junk mail" they received on their computers. He initially responded by saying "What do you want me to do about it?" in a manner that suggested to Complainant he was not interested in an answer to his question. After Respondent moved his business to Canby, Oregon, the amount of junk mail increased.ⁱ Beginning in February through May 2001, Complainant and Madsen regularly forwarded the offending e-mails to Respondent to illustrate the volume and type they received daily. Ultimately, he left it up to Complainant to resolve the offensive junk mail problem.

13) AOL provided a "mail blocking" service designed to block specific e-mails, but Complainant believed it was not a practical option because it was time intensive for a mail order business to designate which ones to block and she was told that junk mail addresses can be readily changed. To "find a fix for the problem," Complainant contacted the "website Internet company" that had previously provided assistance with Respondent's website. The company representative told her that pornographic junk mail could be reduced or avoided by either not visiting websites that attracted objectionable e-mails or by deleting the offending e-mails. At this point, Complainant believed that Respondent regularly accessed pornographic websites and that he was the reason for the influx of objectionable junk mail. She also believed that if he stopped accessing those websites the pornographic junk mail would stop.

14) Several times during her employment, Complainant arrived at her work station in the morning to find a page from an adult website depicting adult sexual activity on her computer screen. When she moved her computer mouse to disengage the screen saver, images of nude men and women engaged in sexual acts, “women with women,” or male and female genitalia appeared on her monitor. She believed Respondent was using her computer regularly after work hours and on weekends to access pornographic websites and that he intentionally left sexually explicit images on the screen for her to view when she arrived at work in the mornings. Respondent often worked late into the evening and early morning hours and frequently worked on weekends. Complainant was the first person to arrive at work and she often found the sexually explicit images on her computer screen on Monday mornings.

15) Complainant was reluctant to express her disapproval to Respondent because she thought he would deny everything. One afternoon, Madsen came in and moved the computer mouse at a work station and a pornographic image appeared. She “jumped back and shrieked and said, what in the hell is this?” Complainant took a look and said “oh, that happens all the time.” Madsen said, “That is not cool – that should not be happening.” After some discussion, they agreed Complainant should talk to Respondent about the offensive images. Complainant confronted Respondent and he denied responsibility for the website images and claimed he was unsure of how “it started” or how “to stop it.” The images continued to appear on Complainant’s computer monitor and, at some point, Complainant complained again to Respondent. He speculated that his son, Brian, might be responsible for accessing the pornographic websites. Complainant did not believe Brian was responsible based on her observations that he was rarely present in the workplace and never “lingered” when he was there because he had a young family awaiting him at home each evening, and

because she had never heard Brian tell “off-color” jokes. Complainant perceived Brian as a respectful person.

16) In January 2001, Respondent moved his business to Canby, Oregon. The business relocated to an older house with a basement, main floor, and upstairs loft. Complainant and Madsen worked in the living/dining room area and Respondent’s office was in one of two bedrooms. Shipping preparation took place in the other bedroom and the product inventory was stored in the basement. Three of the computers were in the living/dining room and the fourth was in the shipping room. Respondent did not have a computer terminal in his office because he preferred a laptop that he could take with him when he traveled. A washer and dryer were located in the bathroom and were used occasionally.

17) Complainant considered the Canby move an improvement of the physical location. The facility was more spacious with greater distance between desks and everyone had “individual spaces.” Even with the added space, however, everyone worked in close proximity, passing each other in the hallway and exchanging paperwork. After the move, Complainant purchased a 17 inch computer monitor for her work station because it was larger than the others at the work site. Madsen and Respondent often used Complainant’s larger monitor and she used Madsen’s work station or the “shipping station” when hers was in use. Even when Complainant was not using her computer terminal, other computers were readily available for use most of the time.

18) After the Canby move, Complainant experienced an increase in the number of times she arrived at work to find sexually explicit images on her computer screen. Respondent often used her work station because he liked the larger monitor and she believed he was continuing to use it after hours and on weekends to access

pornographic websites and deliberately leave sexually explicit images on her computer screen. Each time she came to work and found an offensive image on her computer screen, Complainant felt “instant disgust.” She continually asked herself, “is this really happening” and “why is this happening to me?”

19) Throughout her employment, Respondent regularly approached Complainant from behind without warning and “caressed” her shoulders and back. She did not perceive the touching as a “good guy pat on the back.” She responded by either “pulling away” or “turning around to get away from him.” Madsen observed Respondent “massaging” Complainant’s shoulders several times and perceived it as a “here, I’m going to help you relax kind of thing.” Madsen also observed that Complainant always appeared to be offended by the touching and “squirmed away” or “made a face” that indicated she was “not cool” with Respondent’s conduct toward her. Complainant also remarked to Madsen that she “hated it” when Respondent touched her. Despite her apparent resistance to his touching, he continued to sneak up on her throughout her employment and subject her to unwanted physical contact.

20) On one occasion, Complainant handed Respondent some paperwork and he “rubbed” her hand in a caressing motion and stared into her eyes in a manner she found offensive. To avoid further physical contact with Respondent, Complainant began placing the paperwork on his desk rather than hand it to him directly. Madsen did not observe Respondent touching Complainant’s hand, but Complainant complained to her about the touching soon after it happened.

21) After the move to Canby, Complainant told Respondent she was bringing some personal items from home to photograph for sale on the eBay online auction, which was one of the benefits Respondent provided his employees. She brought in bags of clothes and stored them upstairs in the loft. She later discovered that someone

had rifled through the bags and had separated the lingerie, which had been at the bottom of one bag, from the rest of the clothes. She asked her co-workers if they had gone through the bags and they said they had not, but that she should take the bags home. She later found her “small lacy teddy” in the washing machine and it had been washed. She perceived the incident as sexually motivated and particularly directed toward her. She did not confront Respondent, but immediately removed the bags of clothes without photographing them as a means of eliminating the opportunity for future incidents.

22) Several times, Complainant arrived at work to discover that someone had opened the bottom drawer of her desk at work, unzipped her bag of personal products and rifled through the contents. The bag was kept in a drawer she used exclusively for her “personal stuff, munchies, and purse.” She never offered and no one ever asked to use the contents of her personal products bag which remained zipped when it was in the drawer.

23) Throughout Complainant’s employment, Respondent repeatedly told sexually explicit jokes to Complainant and Madsen. His jokes were always particularly derogatory toward women and related to sexual conduct and women’s anatomy. He usually told the jokes to both when they were together “in a group environment,” would laugh, and then leave the room. Madsen was “not particularly offended,” but is “always surprised when someone is blatantly inappropriate. It seems like such an unwise thing to do or to be.” Madsen did not laugh at the jokes and either turned away or kept her head down at her desk and kept on working. Complainant was offended by the jokes. Although she never said anything directly to Respondent, she would turn to Madsen and say: “Can you believe he said that?” Complainant and Madsen would remark to each

other that it was inappropriate to tell such jokes, particularly in an office with an all woman work force.

24) At some point during her employment, Complainant started taking medication that caused her breasts to become larger and fuller. About that time, one of Respondent's regular customers, Bud Ranson, Jr., became friendlier with Complainant. Ranson called periodically to schedule appointments with Respondent to look at specific equipment. Respondent was not always there when Ranson came in and Complainant was required to show him the equipment he was interested in purchasing. Ranson used those opportunities to ask Complainant out for lunch or dinner and she always declined. She was "extremely uncomfortable" with his manner which included staring at her breasts and "leering" at her. At one point, he asked her if Respondent was keeping her from accepting his dinner invitations and Complainant, mindful that he was a customer, quipped that it was her husband who might have a problem with his invitations. One day when Respondent was not present, Ranson came in to look at a baseball bat and Complainant asked him to leave when she felt he was "excessively leering" at her. Later, she told Respondent that she did not want to be left alone with Ranson again because he "continually leers" and "stares at [her] breasts." Respondent replied, "What's wrong with that?" He later accommodated Complainant's request that he be present whenever Ranson was there and Complainant had no further problems with Ranson. Complainant did not flirt with Ranson or give him any encouragement. She found him "distasteful."

25) On or about May 4, 2001, Complainant went in to work to install software that Respondent planned to use in the business. When she arrived, she found a pornographic website page on her computer screen. A large photograph on the page depicted a nude female performing oral sex on a nude male. The "sign on screen" at

the top of the page showed that “robbietheox” was the last screen name to log on the computer. Complainant also noticed her keyboard was askew and there was a suspicious substance on her desk that she believed was semen. She observed a used tea towel on the floor and an impression in the substance that appeared to be a man’s handprint. She “grabbed some antiseptic wipes” from her desk and immediately began to clean her desk. She was “disgusted,” “angry,” and felt “icky.” Her husband, who had accompanied her to the worksite, came through the door as she was cleaning her desk and observed the website page on her computer screen. She told him for the first time about the previous pornographic images that had regularly appeared on her screen. She did not tell him she had been removing what she thought was semen from her desk until two weeks later. They discussed how to stop the use of her workstation for sexual entertainment and decided she should immediately implement a “screensaver password.” Complainant activated the password through “a standard Windows application.” Afterward, she was the only one with access to the computer at her workstation. After this incident, Complainant realized that “this was really happening” and she decided to update her resume and begin a job search.

26) When Complainant returned to work the following Monday, May 7, 2001, she found two yellow post-it notes written by Respondent on her computer. “Why is there a screensaver?” was written on one and “There shouldn’t be a screensaver on this computer!” was written on the other. About the same time she discovered the notes, an advertisement for a dating service “popped up” on the computer screen. The ad depicted voluptuous women, scantily dressed. Complainant showed the ad to Madsen, who agreed they should print the ad and show it to Respondent as an example of the material to which they were regularly exposed. Respondent was angry when he arrived at work, and when Complainant showed him the printout he told her he “did not care,”

that the equipment was his, and that he needed access to all of his computers. Complainant told him that “if that crap is going to be accessed at this terminal then I am going to put a stop to it.” She also told him the presence of pornographic images in the workplace was sexual harassment and if he could guarantee that “it would stop,” she would remove the password. Respondent continued to say that it was his equipment and business and she needed to remove the password. His face began to turn red and he would not say that he would stop the adult website access, so Complainant said, “I quit.” She believed the screensaver password she implemented was the only way to limit the offensive material on her computer screen. She also believed that Respondent was not going to stop accessing pornography from her workstation. Respondent was at all times free to use one of the other computers when Complainant was not at her workstation because the other computers were also available most of the time.

27) May 7, 2001, was Complainant’s last day of work.

28) During her employment, Complainant developed a rash and suffered from anxiety, “depression,” sleep disturbances, including nightmares, and “panic attacks.” She missed work frequently due to the rash and anxiety. Her doctor prescribed Xanax, which she took only when having a panic attack. She attributed some of her anxiety to financial stressors and personal problems she experienced prior to and while in Respondent’s employ. The other symptoms began when her work environment began to deteriorate in or around November 2000. She thought about the above-described work incidents more often than any other circumstance in her life. She was distressed about “having to intentionally avoid certain situations” and her work situation was “always on [her] mind.” Complainant’s anxiety and stress were exacerbated by her continued exposure to Respondent’s sexual conduct in the workplace.

29) The day she left Respondent's employ, Complainant applied for unemployment benefits. She told the Employment Department representative why she quit her job and the representative suggested she take her information to the Bureau of Labor and Industries.

30) Complainant's physical and emotional well being improved almost immediately after she quit her employment. The rash disappeared. She stopped having nightmares and panic attacks. She was able to quit her anxiety medication. On June 13, 2001, she accepted a position at Xerox Corporation. Her pay started at \$14 per hour and she received a raise soon thereafter. Complainant uses e-mails and websites in her new job and the junk mail is 100 per cent controlled. She receives "no surprises" when she uses her computer. Complainant has become familiar with the terminology used by her new employer's "IT Department" and has a better understanding of the technology available to prevent mass amounts of junk mail from entering the workplace.

31) Complainant was a credible witness. She was very composed, but her demeanor did not mask the distress she associated with her experiences while in Respondent's employ. She had a clear recollection of key events and her testimony was sincere and unembellished. She was not impeached in any way and the forum credits her testimony in its entirety.

32) Madsen's testimony was credible in every respect. She exhibited no bias toward or against Respondent or Complainant. Although she acknowledged that Respondent's conduct did not affect her to the same degree as Complainant, she was unequivocal about the nature of the conduct she observed, its impact on Complainant, and that much of it appeared to be directed primarily toward Complainant. Madsen was not impeached in any way and the forum credits her testimony in its entirety.

33) Sims, Complainant's husband, was a credible witness. Despite a natural bias, Sims testified only to his personal knowledge and observations without any discernible embellishment. The forum credits his testimony in its entirety.

34) Dr. Robinson's testimony was credible. He readily acknowledged that he had no independent recollection of Complainant's office visits and that he relied primarily on his contemporaneous notes. His answers were reflective and he took care not to speculate about what Complainant told him during her office visits. The forum credits his testimony in its entirety.

35) Respondent's testimony was internally inconsistent, self serving, and except for his admissions to certain key facts, generally unbelievable. For example, he admitted during cross examination that he accessed "adult" websites that he defined as sites for "those over 21 years old, and legal," from his home computer. Later in his testimony, he denied accessing pornography from home. To reconcile the discrepancy, he claimed he was referring to "entrepreneurial and business websites" when he said he had accessed adult websites from home and that he regarded business websites as "adult" websites. However, given the text and context of the query on cross-examination, the forum does not believe that Respondent's first thought upon hearing the words "adult website" was of an entrepreneurial website. Rather, the forum infers Respondent understood the question pertained to pornographic websites and that his answer was a statement against interest he later wished to retract. The forum concludes, therefore, that Respondent's affirmation that he accessed adult websites from home was, in fact, an admission that he accessed pornographic websites from his home computer.

Additionally, Respondent testified unequivocally that Complainant wore "normal dress" to work that included shorts or pants, tops, and "a dress a couple of times."

Later, after acknowledging that Complainant advised him that Ranson caused her discomfort by staring at her breasts, Respondent insinuated that she encouraged Ranson's conduct by wearing "skimpy, suggestive clothing." His latter testimony apparently anticipated, albeit belatedly, Ranson's assertion that Complainant's attire was risqué and invited his stares.ⁱⁱ The forum, however, finds Respondent's first assessment of Complainant's work apparel more convincing because it was spontaneous and comports with other credible evidence in the record.

Finally, the forum finds Respondent's "contemporaneous" notes about Complainant's "work" activities suspicious, at best. They consist of an odd assortment of entries that range from one that does not pertain to Complainant at all to many others that appear specifically designed to limit potential damages. Although Respondent contends the entries reflect noteworthy work related events, few are related to Complainant's work activities and all are innocuous compared to the events Respondent acknowledges occurred, yet neglected to record. For instance, Respondent testified that he became aware of Complainant's concerns about pornographic e-mails when she and Madsen started forwarding the offensive e-mails to him from February 2001 through May 2001. He also acknowledged that Complainant complained about pornographic images on her computer screen during a March 2001 staff meeting, after which he purportedly instructed her to contact AOL and told her he would pay whatever necessary to correct the problem. Despite their significance, Respondent did not document those events. Moreover, he did not document Complainant's complaints about Ranson or any concerns he purportedly had regarding her attire or conduct with customers. The forum concludes the notes were created in anticipation of litigation and are not trustworthy.

Based on Respondent's admissions, the forum accepts as fact that Complainant complained often and directly to him about receiving offensive e-mails and at least twice about the appearance of pornographic websites on her computer, that he frequently used Complainant's workstation in the evening and on weekends, that he had previously accessed adult websites, that he often told "off-color" jokes in the workplace, and that he regularly used chat rooms and conversed with a "buddy" nicknamed "Q Cups" as Complainant and others alleged. Other than Respondent's admissions, the forum has not credited Respondent's testimony unless it was corroborated by other credible evidence or was a statement against interest.

36) Ranson's telephonic testimony was not credible. He embellished his career as an "actor" which brought into question the reliability of his testimony as a whole. His statements seemed scripted, even acted, and the forum gave no credence to his claims that Complainant "flirted" with him, invited him to "hang out at the river," or told him she did not wear underwear. Moreover, his claim that he told Respondent she was trying to "hustle" him and he did not want to be left alone with her was ludicrous given his earlier statement that, "to be honest," he "looked twice" at Complainant because she was "heavily breasted" and he thought to himself, "whoa!" His statement that her clothing was "risqué" was contrary to more credible evidence in the record, including Respondent's admission that Complainant dressed in "normal" casual attire. Notwithstanding his evasive demeanor and his bias as Respondent's friend, Ranson's outrageous statements were not supported by a scintilla of evidence and the forum disregarded his testimony in its entirety.

37) Dave Cruz's testimony was not wholly credible. His bias as Respondent's long time business associate was evident by his half hearted attempt to portray Complainant as a "tease." Essentially, he testified that he and Complainant had regular

business contact and sometimes “flirted with each other over the phone.” He stated that he asked her what she looked like and she had unsuccessfully attempted to send him a photograph via computer. However, he acknowledged that she told him she was married and the forum inferred from his demeanor and the context of his testimony that he was more interested in flirting with her than she with him. The forum gave Cruz’s testimony little, if any, weight.

38) Anderson’s testimony was defensive and influenced by her long-term friendship and current work relationship with Respondent. Moreover, her opportunity to observe daily workplace activities was limited because she worked as Respondent’s bookkeeper every other Monday as needed. Although she downplayed the significance of Complainant’s complaints, Anderson was aware that Complainant was offended by “derogatory, explicit e-mail and instant messages” and the sexually explicit images that periodically appeared on her computer screen. Additionally, Anderson was present when Complainant quit her employment, observed that she was upset, and heard her tell Respondent that he was “causing sexual harassment” by refusing to deal with Complainant’s complaints. The forum credited Anderson’s testimony where it was consistent with or corroborated by other credible testimony.

39) Bishop’s close friendship and prior, long-term business relationship with Respondent influenced her objectivity. She portrayed Respondent as a flawless employer who never told off-color jokes or viewed pornographic websites in her presence. According to Bishop, Respondent was always kind and fair with her and she relied on his judgment even when making personal decisions. However, in light of other credible evidence that Respondent indulged in accessing adult websites, and, by his own admission, told off-color jokes in the workplace, the forum finds Bishop’s character assessment somewhat exaggerated. Additionally, she moved to Ireland before

Complainant was hired and therefore had no personal knowledge of Complainant's working conditions while in Respondent's employ. The forum has given Bishop's testimony little, if any, weight.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent conducted a business in Oregon using the assumed business name of Sports Warehouse and was an employer utilizing the personal services of one or more persons.

2) Between January 2000 and May 7, 2001, Respondent subjected Complainant to a course of conduct that was sexual in nature, directed toward her because of her gender, and included unsolicited shoulder massages and hand stroking, sexually explicit jokes that degraded women, and Respondent's use of Complainant's workstation to access pornography for sexual gratification.

3) Respondent repeatedly and intentionally left Complainant's computer screen so that Complainant was unavoidably exposed to pornography against her will and disallowed Complainant's reasonable measures to cease his behavior.

4) Respondent's conduct was offensive and unwelcome to Complainant, which she communicated to Respondent by her words and actions.

5) Between January 2000 and May 7, 2001, Complainant complained repeatedly to Respondent about the barrage of unsolicited pornographic e-mails she received daily from outside the workplace and requested that it stop. Respondent took no action to reduce or eliminate the incoming pornographic e-mails.

6) Between January 2000 and May 7, 2001, Complainant complained to Respondent that one of his regular customers made her uncomfortable in the workplace by "leering" at her and staring at her breasts and she requested that Respondent be present when Complainant waited on the customer. Respondent complied with Complainant's request.

7) Respondent's course of conduct, including his failure to stop the daily influx of pornographic e-mail in the workplace, was sufficiently severe or pervasive to alter the conditions of Complainant's employment and create a hostile, intimidating, and offensive work environment.

8) The continued harassment based on Complainant's gender caused her emotional distress, characterized by a rash, anxiety, and heightened "depression" that extended over a six month period.

9) Complainant attempted to reduce or eliminate the appearance of pornographic websites on her computer screen by placing a password on her computer that only she could access. Complainant told Respondent she would remove the password when he remedied the pornography problem. Respondent communicated to her his unwillingness to change the status quo and insisted that she remove the password. Complainant reasonably believed she had no other choice but to quit her employment and on May 7, 2001, she quit.

10) Complainant suffered a loss of income and mental distress as a result of her forced termination.

11) Complainant found replacement employment with Xerox Corporation on June 13, 2001.

12) Complainant's lost income totaled \$1,200.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was an employer subject to the provisions of *former* ORS 659.010 to ORS 659.110. ORS 659A.872.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. *Former* ORS 659.492(2); *former* ORS 659.010 to 659.110; ORS 659A.780; ORS 659A.850(2) and ORS 659A.850(4).

3) By subjecting Complainant to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe or pervasive to alter her work conditions and create a hostile, intimidating, and offensive work environment, Respondent discriminated against Complainant on the basis of sex, contrary to the provisions of *former* OAR 839-005-0030(1)(a) & (b) and in violation of *former* ORS 659.030(1)(b).

4) By failing to take immediate and appropriate corrective action when he knew Complainant was offended by the volume and sexual content of daily incoming e-mails, Respondent subjected Complainant to unwelcome sexual harassment contrary to the provisions of *former* OAR 839-005-0030(1)(a) & (b) and in violation of *former* ORS 659.030(1)(b), and is liable for the harassment even though it was committed by non-employees. *Former* OAR 839-005-0030.

5) By intentionally creating and maintaining discriminatory working conditions based on Complainant's gender that were so intolerable Complainant was compelled to leave her employment, Respondent constructively discharged Complainant and committed an unlawful employment practice in violation of *former* ORS 659.020(1)(a) and *former* OAR 839-005-0035.

6) By forcing Complainant's constructive discharge through a pattern of sexually offensive conduct despite Complainant's requests that it cease and by thwarting her attempt at self-help, Respondent retaliated against Complainant in violation of *former* ORS 659.030(1)(f).

OPINION

The Agency alleges Respondent unlawfully discriminated against Complainant because of her gender by subjecting her to unwelcome sexual conduct that was implicitly a condition of her employment and sufficiently severe or pervasive to have the effect of creating a hostile work environment. The Agency further alleges that

Respondent intentionally created or maintained working conditions so intolerable that Complainant was forced to quit her employment. Additionally, the Agency alleges that Respondent's reaction to Complainant's requests that the unwelcome sexual conduct cease constitutes retaliatory discrimination against Complainant because she opposed Respondent's unlawful employment practices. The Agency seeks a judgment of \$1,200 for Complainant's loss of income and \$40,000 in mental suffering damages against Respondent.

Under *former* OAR 839-005-0030(3), "[a]n employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer." In this case, Respondent, as a sole proprietor and Complainant's employer, is strictly liable for any unwelcome sexual conduct he personally directed toward Complainant because of her gender that was implicitly a condition of her employment or that resulted in a hostile, intimidating or offensive work environment. He is also liable for any work place harassment Complainant was subjected to by non-employees if he knew or should have known of the conduct and failed to take immediate and appropriate corrective action. *Former* OAR 839-005-0030(7).

SEXUAL HARASSMENT

Former ORS 659.030(1) stated, in pertinent part:

"For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:

"(a) For an employer, because of an individual's * * * sex * * * to refuse to hire or employ or to bar or discharge from employment such individual.
* * *

"(b) For an employer, because of an individual's * * * sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Former OAR 839-005-0030(1) provided:

“Sexual harassment is unlawful discrimination on the basis of gender and includes the following types of conduct:

“(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual’s gender, and

“(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

“(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual.

“(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of * * * creating a hostile, intimidating or offensive working environment.”

In order to prevail on its claim that Respondent sexually harassed Complainant, the Agency must present evidence to show: (1) Respondent was an employer subject to former ORS 659.010 to 659.110; (2) Respondent employed Complainant; (3) Complainant is female; (4) Respondent made unwelcome sexual advances, requests for sexual favors, or engaged in unwelcome conduct of a sexual nature directed toward Complainant because of her gender; (5) the unwelcome conduct was made an implicit term or condition of Complainant’s employment or was so severe or sufficiently pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) Complainant was harmed by the unwelcome conduct. See *In the Matter of Western Stations Co.*, 18 BOLI 107, 119 (1999). The first three elements are undisputed. The remaining issues are addressed as follows:

1. Unwelcome Sexual Conduct Based on Gender

Respondent’s Conduct

Based on Complainant’s credible testimony, which was corroborated by other credible evidence, the forum has accepted as fact that Respondent regularly approached Complainant from behind and caressed her neck and shoulders in a manner that caused her extreme discomfort, stroked her hand in a sexual manner on at

least one occasion, and repeatedly told her and another female employee sexually explicit jokes that were degrading to women. The forum has also accepted as fact that Respondent used Complainant's workstation on several occasions to access pornographic websites on her computer for sexual gratification and purposely left behind evidence of his activities, including sexually explicit images on her computer screen and apparent semen traces on her desk. Respondent's general denial that he touched Complainant or that he accessed pornographic websites for sexual stimulation during regular work hours flies in the face of the credible, disinterested testimony to the contrary. Moreover, despite his assertion that other employees, including his son, had access to the computers and could have logged on to adult websites, credible evidence establishes that his female employees had no interest in viewing pornography in the workplace and were, in fact, repelled by its presence. Furthermore, there is no evidence whatsoever that Respondent's son accessed pornographic websites at his father's business.

On the other hand, Respondent acknowledged that he often used Complainant's work station, frequently worked late into the night and on weekends during her employment, accessed adult websites and chat rooms during that time, and told sexually explicit jokes to Complainant and others during work hours. Respondent's admissions, Complainant's credible testimony, and Madsen's observations sufficiently demonstrate that Respondent engaged in sexual conduct directed toward Complainant because of her gender.

Finally, the key element to any sexual harassment claim is whether the alleged conduct was unwelcome. *In the Matter of Barbara Bridges*, 25 BOLI _ (2003). A preponderance of credible evidence established that Complainant neither welcomed nor invited Respondent's sexual conduct. Madsen credibly testified that Complainant stated

several times that she “hated it” when Respondent touched her and was noticeably distressed whenever he massaged her neck and shoulders without invitation. Madsen also credibly testified that Complainant openly expressed her disgust whenever Respondent recited his offensive jokes to both of them and that she and Complainant signaled their disinterest by words or body language. Moreover, credible evidence shows Complainant was outspoken to Madsen and others, including Respondent, about the appearance of sexually explicit website images on her computer screen and was frustrated by her inability to stop its recurrence. The Agency has established by a preponderance of credible evidence that Complainant did not welcome Respondent’s conduct and the forum finds there is no conceivable way Respondent could have believed otherwise.

Non-employee Conduct

(Unsolicited Pornographic E-mails)

The Agency has established that Complainant and her co-workers were subjected to a daily barrage of sexually explicit e-mail that was unwelcome and sufficiently pervasive to alter Complainant’s working conditions and create a hostile working environment. As Complainant’s employer, Respondent had an obligation to take prompt remedial action to eliminate harassment even where the offensive conduct was by others he did not employ. *Former OAR 839-005-0030(7)*. While that rule has historically applied to customers and vendors, the forum finds that in workplaces where employees have the ability to send and receive e-mail at will, employers have a duty to determine what steps can be taken to stop offensive e-mail that generates from outside the workplace. While evidence in this case shows that current technology does not provide a fail-safe mechanism for filtering out or blocking all unwanted junk e-mail, an

employer's principal obligation is to use whatever current technology is available to block patently inappropriate e-mail and reduce the volume of offensive junk mail.

Respondent's assertion that he had no control over the volume or type of e-mail messages Complainant and her co-workers were subjected to daily was contradicted by credible evidence showing that AOL had blocking mechanisms in place that could have reduced the volume of unsolicited junk mail, particularly patently offensive e-mail. There is no evidence that Respondent explored those options or that he took any other proactive measures to cure the problem. Instead, he relied on Complainant's attempts to resolve the issue to justify his own inaction. Beyond Respondent's testimony, which the forum does not accept, there is no evidence that Respondent instructed Complainant to contact the necessary resources or offered to bear the expense of any required technology to correct the influx of offensive e-mails. Indeed, the mere purchase of another large computer monitor and Respondent's refraining from use of Complainant's computer at all would have alleviated much of the problem. Moreover, even if he had specifically delegated the task to her, the burden was not on Complainant to "fix" the pornographic e-mail problem. Respondent received ongoing complaints from Complainant and Madsen about extremely offensive e-mail messages that triggered *his* duty to take immediate corrective action. Since his employees' essential job duties involved continued exposure to e-mail messaging, including an inordinate amount of sexually explicit messages that deeply offended them, he had an obligation to do whatever was within the realm of possibility to reduce or eliminate that exposure. The forum finds that Respondent did not exercise reasonable care in preventing or reducing the influx of pornographic e-mails and he is therefore liable for Complainant's continued exposure to harassing materials.

(Ranson's Conduct)

Respondent acknowledged that Complainant told him she was offended by customer Ranson's conduct toward her that included excessive "leering" and staring at her breasts. On the other hand, Complainant testified that Respondent ultimately complied with her request that he be present when Ranson was in the workplace conducting business. Based on Complainant's testimony that she had no problems with Ranson thereafter, the forum infers that Respondent's action effectively ended the harassment. The forum concludes that Respondent took sufficient remedial action in response to Complainant's complaint and is not liable for the harassment caused by Ranson.

2. Hostile, Intimidating, or Offensive Work Environment

The standard for evaluating whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in the Complainant's particular circumstances. *Former OAR 839-005-0030(2)*.

In making that determination, the forum looks at the totality of the circumstances, *i.e.*, the frequency of the conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *See Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 302, 309-10 (1998). In this case, a preponderance of credible evidence shows that Respondent engaged in a pattern of verbal and physical conduct that, when viewed as a whole, permeated the workplace with more than a modicum of hostility and intimidation toward women in general and Complainant in particular.

First, Respondent regularly told sexually explicit jokes that cannot be characterized as isolated instances of social banter. The jokes were frequent,

particularly targeted at women as sexual objects, and directly affronted Complainant's sensibilities. Even Madsen, who claimed she was not particularly offended, turned away and kept her head down when Respondent repeated his jokes that she characterized as degrading to women and inappropriate for the workplace. Complainant and Madsen were the only employees present and a captive audience to Respondent's conduct that occurred often and in relatively close quarters. Since neither ever encouraged his conduct and, in fact, discouraged it by their words and actions, the forum infers that Respondent intended their discomfort.

Additionally, Respondent demonstrated a disregard for Complainant's personal boundaries by regularly approaching her from behind and massaging or caressing her shoulders and back unexpectedly and without her permission. Despite her clear discomfort with his touching, obvious even to Madsen, he continued to sneak up on her throughout her employment and subject her to unwanted physical contact. His continued resistance to her obvious cues further demonstrates his apparent intent to cause her particular discomfort.

Along with Respondent's overt conduct, Complainant was subjected to a more insidious form of harassment that continued over a six month period and ultimately led to her resignation. Despite Respondent's denial and disingenuous attempt to divert blame to his son, the totality of credible evidence establishes that he regularly used Complainant's work station in the evenings and on weekends to access pornographic websites and purposely left behind graphic sexual images for her to discover. The recurring nature of his conduct, *i.e.*, leaving sexual images on Complainant's computer screen, negates the possibility that his failure to log out of the websites was inadvertent. The forum finds that Respondent's use of Complainant's work station for sexual gratification, as evidenced by the offensive images left on the computer and

Complainant's discovery of semen on her desk, was sufficiently severe so as to seriously affect Complainant's working conditions.

Finally, the forum has already determined that Complainant was exposed to a daily barrage of sexually explicit e-mail that was unwelcome and sufficiently pervasive to alter Complainant's working conditions and create a hostile working environment. Additionally, evidence shows and the forum finds that Respondent's resistance to taking corrective action was part of an overall pattern of sexual conduct that Respondent imposed on his employees, particularly Complainant.

Complainant was not required to be constantly on guard against Respondent's unexpected and unwanted touching and his stealthy use of her workstation for prurient purposes, and she certainly was not required to acquiesce to the sustained appearance of sexually explicit materials, that particularly objectified women, in her workplace for the privilege of being allowed to work and make a living. The forum concludes that Respondent engaged in a pattern of offensive conduct that particularly demeaned women and that, from the perspective of a reasonable person in Complainant's circumstances, it was sufficiently pervasive so as to create a hostile and intimidating working environment.

CONSTRUCTIVE DISCHARGE

Respondent is liable for a constructive discharge if it is established that he (1) intentionally created or maintained discriminatory working conditions related to Complainant's gender that were (2) so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them, (3) Respondent desired to cause Complainant to leave her employment as a result, or knew or should have known that Complainant was certain, or substantially certain, to leave her

employment as a result of the working conditions, and (4) Complainant left her employment as a result of the working conditions. *Former OAR 839-005-0035.*

In this case, the forum has already found that Respondent engaged in a course of conduct constituting a continuing pattern of sexual harassment directed toward Complainant that she rejected either by words or body language. Credible evidence established that when Complainant quit her employment following a particularly egregious incident involving Respondent and her computer station, she reasonably believed that Respondent had no intention of stopping his offensive conduct or of eliminating the causes of the hostile and intimidating work environment to which she was subjected, despite his knowledge that it caused her distress. The forum finds that a reasonable person in Complainant's position would have resigned under those circumstances. Given the circumstances in this case, the forum has no difficulty imputing knowledge to Respondent of the substantial certainty that Complainant would quit her employment once she realized her efforts to stop the ongoing harassment were futile.

RETALIATION

Former ORS 659.030 stated, in pertinent part:

“For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:

“ * * * * *

“(f) For any employer * * * to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by this section * * *.”

In order to establish a prima facie case of retaliation, the Agency is required to prove that (1) Complainant opposed an unlawful employment practice; (2) Respondent made an employment decision that adversely affected Complainant; and (3) there is a

causal connection between Complainant's opposition and Respondent's adverse employment action.

Complainant's Opposition to Unlawful Employment Practice

Former ORS 659.030(1)(b) forbids an employer to discriminate against an employee based upon gender. The forum has found that Respondent engaged in a course of unwelcome sexual conduct against Complainant based on her gender that created a hostile and offensive working environment, constituting an unlawful employment practice. The Agency has established by a preponderance of credible evidence that Complainant opposed that conduct on numerous occasions when she requested that Respondent eliminate the presence of pornographic e-mails and images in the workplace and when she told him she was not comfortable waiting on a customer who "leered" at her breasts and asked her out on dates despite her continued rejection.

Respondent's Adverse Employment Decision

The Agency established that Respondent forced Complainant's constructive discharge by continuing a pattern of offensive conduct, despite Complainant's requests that he cease the conduct, and by thwarting her attempt at self-help. For the purposes of *former* ORS 659.030(1)(f), a constructive discharge is the legal equivalent of an actual discharge and by forcing the constructive discharge, Respondent made an employment decision that adversely affected Complainant.

Causal Connection

Finally, the Agency has established a causal connection between Complainant's opposition to Respondent's unlawful conduct and her constructive discharge. Credible evidence shows that Complainant quit as a direct result of Respondent's actions that signaled to Complainant the sexual harassment would not only continue, but any further attempts on her part to stop or limit the scope of the harassment would be futile. The

forum concludes that, by forcing Complainant's constructive discharge, Respondent retaliated against Complainant for having opposed sexual harassment, constituting an unlawful employment practice, in violation of *former* ORS 659.030(1)(f).

DAMAGES

Back Pay

It is well established in this forum that the purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. *In the Matter of H. R. Satterfield*, 22 BOLI 198, 210 (2001).

In this case, Complainant suffered lost wages from May 7 until June 13, 2001, as a result of her constructive discharge. She accepted a position at Xerox Corporation only five weeks after her constructive discharge at a higher pay rate than the \$12.50 per hour she earned while in Respondent's employ. Her prompt acceptance of replacement employment establishes that she mitigated her damages and is entitled to compensation for the interim period she was unemployed.

The Agency seeks \$1,200 as payment in lost wages. Undisputed evidence shows Complainant was working full time for Respondent when she quit and, although there is no evidence establishing the precise number of hours she worked each week, the forum finds she would have earned *at least* \$1,200 as a full time employee between May 7 and June 13, 2001, but for her constructive discharge.ⁱⁱⁱ Respondent owes Complainant \$1,200 for the wages she lost due to the unlawful employment practices found herein.

Mental Suffering

In determining a mental suffering award, the commissioner considers the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct.

In the Matter of James Breslin, 16 BOLI 200, 219 (1997), *aff'd without opinion*, *Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999). The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999).

Based on Complainant's credible testimony, the forum finds she suffered significant emotional distress as a direct result of Respondent's unlawful employment practices. Her disgust with Respondent's conduct and her anxiety about its continued escalation increased when she realized his offensive behavior was focused more consistently on her. As a result, she experienced rashes, "panic attacks," and occasional nightmares that caused her to lose sleep. She reported these symptoms to her physician, who placed her on medication for anxiety and recommended counseling for home and work-related stress. Although, her physician's notes reflect that she gave him more details about personal stressors, *i.e.*, "living with her husband's nephew who had been abused," and some "agitation" due to her premature menopause, than about the stress she experienced at work, her testimony that she saw no value in describing the details of her work related stress to her physician was believable and consistent with her stoic demeanor during the hearing. Moreover, she explained that she had been living with the nephew for three years prior and had not experienced "itching and hives all that time," and that her issue with the premature menopause concerned only the discomfort associated with her increased breast size. She also readily acknowledged that she had experienced financial distress before and during her employment, but that her financial worries made her less equipped to leave her employment to obtain relief from Respondent's conduct.

Respondent is not liable for distress caused by Complainant's personal circumstances, her unrelated medical problems, or her prior financial difficulties. However, this forum has consistently held that "employers must take employees as they find them." *In the Matter of Entrada Lodge, Inc.*, 20 BOLI 189, 188 (2000), citing *In the Matter of Loyal Order of Moose*, 13 BOLI 1, 12-13 (1994); *In the Matter of Allied Computerized Credit & Collections*, 9 BOLI 206, 217-18 (1991). In this case, Complainant's credible testimony established that her stress level was significantly exacerbated by the hostile work environment Respondent created and maintained for over at least six months during her employment, that the additional stress was considerable, and that it manifested in physical symptoms that she had not experienced before or after her employment. The forum concludes that \$40,000 is appropriate compensation for the suffering caused by Respondent's unlawful employment practice.

AGENCY'S EXCEPTIONS

The Agency suggested certain language be interposed in the findings of fact and ultimate findings of fact for clarification. Accordingly, the forum has supplemented the factual findings where appropriate.

RESPONDENT'S EXCEPTIONS

A. Factual Findings and Conclusions of Law

Respondent's substituted factual findings and conclusions of law, and proposed "corrections" to the existing factual findings are based either on facts not in evidence or are reliant upon substantially different credibility findings than those established in the proposed order. This forum has previously held that an administrative law judge's ("ALJ") credibility findings are accorded substantial deference by the forum and, absent compelling reasons for rejecting such findings, they are not disturbed. *In the Matter of Staff, Inc.*, 16 BOLI 97, 117 (1997). While Respondent expresses a different

perspective on certain credibility findings, he has not proffered convincing reasons for disturbing them. Indeed, the record shows that certain witnesses the ALJ deemed credible were not impeached in any way during the hearing and Respondent's attempt to do so now, based on purported facts which are not in the record, is inappropriate. The forum concludes that the factual findings, including the ALJ's credibility findings, are based on the evidence in the record and are supported by a preponderance of that evidence; therefore, Respondent's exceptions as to the factual findings and conclusions of law are DENIED.

B. Opinion

Respondent's exception to the proposed opinion merely recites certain elements of the applicable law governing sexual harassment, constructive discharge, retaliation, and mental suffering damages and asserts that Respondent's conduct did not meet those elements. Respondent essentially reiterates his arguments at hearing which are controverted by the record as a whole. The opinion adequately addresses the issues framed by the pleadings. Respondent's exception to the proposed opinion is without merit and is therefore DENIED.

C. Due Process

Respondent asserts that his federal and state Due Process rights were denied because the proposed order was issued 13 months after the contested case hearing which "is an unreasonable delay and it has severely hampered Respondent's ability to respond to these unfounded allegations." Respondent further claims that "there is no transcript of the proceedings available to assist Respondent in responding to the allegations and alleged factual statements contained in the Proposed Order."

Neither the Administrative Procedures Act nor the Division 50 Contested Case Hearing Rules imposes a time limit for issuing proposed or final orders in contested

cases. Moreover, prior to the hearing in this matter, Respondent was given notice of the matters asserted by the Agency and of his opportunity for a hearing. At the hearing, Respondent was represented by counsel and was afforded ample opportunity to respond to each and every allegation. Based on the record herein, the forum found the allegations were not “unfounded” as Respondent asserts; instead, the record supports Complainant’s allegations by a preponderance of the evidence. Respondent does not contend and the record does not show that he contacted the Bureau of Labor and Industries and inquired about the status of the proposed order or requested a copy of the audio record. The forum therefore concludes that Respondent has no basis for a constitutional claim and his request for a dismissal of this case on those grounds is DENIED.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent’s violation of *former* ORS 659.030(1)(a)(b) & (f), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Robb Wochnick** 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 Lisa Sims in the amount of:**
- 2) ONE THOUSAND TWO HUNDRED DOLLARS (\$1,200), less lawful deductions, representing income lost by Lisa Sims between May 7 and June 13, 2001, as a result of Respondent’s unlawful practices found herein; plus,
- 3) Interest at the legal rate from June 14, 2001, on the sum of \$1,200 until paid; plus,
- 4) FORTY THOUSAND DOLLARS (\$40,000), representing compensatory damages for mental distress Lisa Sims suffered as a result of Respondent’s unlawful practice found herein; plus,

- 5) Interest at the legal rate on the sum of \$40,000 from the date of the Final Order until Respondent complies herein; and,
- 6) Cease and desist from discriminating against any employee based upon the employee's gender.

ⁱ See *infra* Finding of Fact 18 – The Merits.

ⁱⁱ See *infra* Finding of Fact 36 – The Merits.

ⁱⁱⁱ \$1,200 divided by Complainant's hourly rate of \$12.50 amounts to 96 hours worked in a 5 week period which is an average of about 19 hours per week. The forum infers from the record that Complainant worked closer to a 40 hour work week. The Agency, however, did not amend its charging document at hearing and the forum is precluded from awarding more than the Agency sought in its pleading.