

In the Matter of

STIMSON LUMBER COMPANY

Case No. 75-03

Final Order of Commissioner Dan Gardner

Issued January 19, 2005

SYNOPSIS

The forum granted Respondent's motion to dismiss, holding that the Agency failed to adhere to its policy that allows a complainant's intake questionnaire to serve as a timely filed perfected complaint only when it contains all of the required information for a complaint as set forth in ORS 659A.820, except for the complainant's verified signature, and only when the Agency receives the questionnaire so close to the last jurisdictional filing date that it is unable to draft a perfected complaint and complete the usual filing process within the required time frame. Additionally, the forum held that Complainant's intake questionnaire, submitted on September 11, 2002, did not allege sufficient facts to support the OSHA complaint he subsequently filed on January 7, 2003, 126 days after the alleged OSHA violation. Accordingly, the forum concluded that Complainant's complaint was not timely filed in accordance with ORS 654.062(5)(b) and dismissed the Agency's formal charges. ORS 654.062(5)(a) & (b); ORS 659A.820.

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 January 27-30, 2004, in Suite 200 of the Oregon Adult and Family Services offices located at 450 Marine Drive, Astoria, Oregon, and on February 2, 2004, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Jeffrey C. Burgess, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Derick Degraffenreid ("Complainant") was present throughout the hearing and was not represented by counsel. Attorneys Victor J. Kisch and Dennis Westlind represented Stimson Lumber Company ("Respondent").

Dennis Tracey was present throughout the hearing as Respondent's corporate representative.

In addition to Complainant, the Agency called as witnesses: Stan Penrose, Deputy Chief Electrical Inspector, Oregon Building Codes Division; John Powell, Chief Electrical Inspector, Oregon Building Codes Division; Robert Gellatly, Respondent employee; Daniel Fowler, Respondent employee; Tim Fowler, Respondent employee; and Heather Degraffenreid, Complainant's wife.

Respondent called as witnesses: Russell Crape, Respondent employee; Toby Stanley, Respondent's Plant Manager; Scott Westlund, Respondent's Operations Superintendent; Dennis Tracey, Respondent's Human Resources Manager; Dan Sweeney, Respondent's Vice President of Human Resources and Risk Management; Bob Banchemo, Respondent's Western Operations Manager; Bill Dyer, Respondent employee; Jeff Webber, Respondent's Manufacturing Vice President; and Robert Guillory, former Respondent employee.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-29 (generated prior to, during, or after hearing);
- b) Agency exhibits A-1 through A-4, A-12 through A-14, A-22, and A-23 (submitted prior to hearing);
- c) Respondent exhibits R-2 through R-4, R-6 through R-8, R-14 through R-22, R-24, R-25, R-27 through R-31, R-33 through R-35, R-38, R-39, R-42, R-45 through R-47, R-50 through R-57 (submitted prior to hearing), and R-58 (submitted after hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, hereby make the following

Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT - PROCEDURAL

1) On September 11, 2002, the Agency received an Employment Discrimination Questionnaire that Complainant filled out in his own handwriting. On page two, the questionnaire notes: "If any of the words or questions are hard to understand, call the intake office nearest you for help [telephone numbers for the Portland and Eugene office were provided at this point]. * * * When you are finished, please return the questionnaire in the enclosed envelope. (Note: this is not an official complaint, completing a questionnaire is a preliminary step.)" Following the statement, "I believe that I was discriminated against because of the following," the questionnaire lists the following options to designate: "race, color, sex, religion, national origin, disability, injured worker status, age, opposition to health and/or safety hazard, or other." Next to the option "other" Complainant wrote, "Whistleblower law/Reporting criminal activity." Complainant wrote that the "earliest" and "most recent" date he was discriminated against was September 3, 2002. Where asked to describe "the harm or employment action" about which he was filing his complaint, Complainant wrote:

"On or around the first part of August 2002, I informed the production foreman Scott Westlund that there was none [sic] licensed personnel performing electrical work without a license. I informed him that I got the info from the chief electrical inspector for the State of Oregon. He then called Bob Banchemo, Manager of the Western operations, who first said that the state did know what we were doing and it was ok. The next day changed his statement to that they know we were not in compliance. After getting this change of info Stimson Management put a bid up for day shift electrician which I have held for over 2 yrs. I asked why my job was in the newspaper and they said they were just seeing what was available in our local area, but wouldn't comment about why my position was on the line. I called the chief electrical inspector back and asked him if there was a law that Oregon had that said a journeyman license had to be on day shift and he said NO. They later informed me on 9-3-02 that I would be moved to swing shift because they hired another electrician."

In response to the question, "Why do you think this happened to you," Complainant stated:

"Because I blew the whistle on what was going on and if you do this you loose [sic] the [privilege] of being on day shift and are moved to nights. Any licence [sic] can be on night shift, not just mine. We have a contract and seniority rules and the company is blaintantly [sic] breaking the contract just like Oregon State law."

When asked the reason Respondent gave him for the action about which he was complaining, Complainant responded:

"They said they wanted the most qualified person on days. I explained to them that he cannot do any more with his license than I can, and I have over 13 yr. of on the job training, 10 yrs as a millwright, 2 yrs + as an electrician, he is new, who's more qualified?"

When asked to give examples of how he was treated differently and/or harassed based on his protected class, Complainant wrote:

"I am a contract negotiator for our newly formed union at this plant, and a [sic] active committee member. I hold a LME electrical license, I have over 13 yrs of OJT in maintenance, [and] I am a member of the apprenticeship committee. Basically, as long as I kept my mouth shut and allowed them to break the law I would keep my day shift position, but the way things were going someone was going to get hurt, killed, or burn the mill down."

On page 4, it states: "Fill in the following page(s) if you are making an injured worker or OSHA complaint." On the questionnaire's last page, it states: "**FOR OSHA COMPLAINTS ONLY**" and lists the following questions:

"Were you retaliated against because you reported a health and/or safety problem? Yes or No

"If yes, please fill in this section.

"Brief job description

"What was the health/safety hazard?

"Did you report it? Yes or No

"If yes, what was the date you reported it, to whom did you report, and what was that person's job title?

"Was Oregon OSHA involved?

"Did you notify Oregon OSHA? Yes or No

"If yes, what date?

"How did your employer know that you made the complaint to OSHA?

"What action was taken by Oregon OSHA, and when?

"Did the employer display an Occupational Health and Safety Poster where you worked?

"What did the employer do to retaliate?

"RETURN THE QUESTIONNAIRE IN THE ENVELOPE PROVIDED

"IF YOU HAVE ADDITIONAL DOCUMENTATION, PLEASE SAVE IT FOR THE INVESTIGATOR"

Complainant did not respond to any of the questions pertaining to OSHA based complaints. On the questionnaire's first page, written in the section designated for "office use only," is the notation "WB" in the space below the word "basis" and handwritten at the top is "12/05" and "ST-EM-WB-021205-11978."

2) On December 5, 2002, Complainant filed a verified complaint, Case # ST-EM-WB-021205-11978, with the Agency's Civil Rights Division ("CRD") alleging he was the victim of the unlawful employment practices of Respondent based on "whistleblowing" under ORS 659A.230.

3) On December 30, 2002, Agency investigator Martindale spoke with Respondent's human resources manager and informed him that there existed the "possibility of [an] OSHA based complaint" in addition to the whistleblowing charge.

4) On January 7, 2003, the Agency received Complainant's signed and notarized complaint alleging he was the victim of the unlawful employment practices of Respondent based on his "reporting a safety and health hazard in the workplace" in violation of ORS 654.062. On the same date, the Agency received Complainant's signed and notarized statement that said in pertinent part: "I verify that the attached Questionnaire is a true copy of what I submitted to the [BOLI] on September 11, 2002. The Questionnaire fully and accurately states the facts related to this complaint of unlawful practices." The "attached Questionnaire" is identical to the original

Employment Discrimination Questionnaire dated September 11, 2002, except that the "12/05" notation on the first page of the original questionnaire is crossed out and replaced with "01/07" and the original case number is blocked out and replaced with "Case # OS-EM-OS-020911-10046." Also, on the first page, in the section designated for "office use only," the abbreviation "WB" is blocked out and replaced with "OS" in the space below the word "basis." The abbreviation "OS" also replaces the blocked out "ST" notation in the space below the word "contract."

5) In his December 5, 2002, verified whistleblower complaint, Case # ST-EM-WB-021205-11978, Complainant alleged, in pertinent part:

"1. I began working for Respondent on June 13, 1989. My position title is Electrician.

"2. In August 2002 I told Scott Westlund, the Production Foreman, that John Powell, the Chief Electrical Inspector, from the Oregon Building Codes, that it is illegal to have non-licensed personnel perform electrical work without a license. Mr. Westlund then called Bob Banchemo the Manager of the Western Operations. Mr. Banchemo was aware that it was illegal because in the past he had mentioned that the state was aware of it and it was okay.

"3. Respondent retaliated against me by placing a bid for my day shift position in the newspaper. I asked Respondent for a reason why my job was in the newspaper. I was told they were just seeing what was available in the local area, but would not comment on why my position was on the line.

"4. On September 3, 2002, Respondent informed me that I was being transferred to the swing shift, which was a less desirable shift.

"5. I believe Respondent discriminated against me by transferring me to a different shift based on my whistleblowing."

6) In his January 7, 2003, verified complaint based on opposition to safety and health hazards, Case # OS-EM-OS-020911-10046, Complainant alleged, in pertinent part:

"1. I began working for Respondent on June 13, 1989. My position title is Electrician.

"2. In August 2002 I reported a safety and health hazard in the workplace to Production Foreman, Scott Westlund, the use of non-

licensed personnel to perform electrical work. This has led to two fires the night before. I later told him that John Powell, the Chief Electrical Inspector, from the Oregon Building Codes, had confirmed to me that it is illegal to have non-licensed personnel perform electrical work. I was afraid that an employee would get severely injured or even killed. I was [the] only one that was licensed to do electrical work.

“3. Mr. Westlund called and reported my complaint to Bob Banchemo, the Manager of the Western Operations. Mr. Banchemo was aware that it was illegal because in the past he had mentioned that the state was aware of it and it was okay.

“4. Respondent retaliated against me for reporting the safety and health hazard by posting my day shift electrician for bid and then advertising in the newspaper. I asked Respondent’s managers why and was told only that they were just seeing what was available in the local area.

“5. On September 3, 2002, Respondent informed me that I was being transferred to the swing shift, which was a less desirable shift.

7) On March 10, 2003, Agency investigator Martindale issued a “Complaint

Dismissal Memo” that stated:

“Complainant alleges that Respondent unlawfully discriminated against him in retaliation for his whistleblowing activities in that Respondent transferred him from his day shift position to a comparable but less desirable swing shift position. Complainant’s alleged whistleblowing actions consist of having contacted the chief electrical inspector at the State Building Codes Division in order to clarify the regulations governing the duties which can be performed by two different grades of licensed electricians. Complainant informed Respondent that they were out of compliance, but he did not initiate a complaint with that agency.¹ His actions did not constitute whistleblowing, as provided in ORS 659A.230. I am therefore submitting this charge for administrative dismissal.

“In the course of being interviewed in the investigation, Complainant articulated an OSHA basis for the same set of allegations. An OSHA charge was drafted and is currently under investigation.”

8) By letter dated March 19, 2003, the Agency notified Complainant that his whistleblower complaint, Case # ST-EM-WB-021205-11978, was dismissed because “[t]he Division did not find sufficient evidence to continue [its] investigation.” In the same letter, Complainant was notified of his right to file a civil suit within 90 days of the mailing date of the letter based on the allegations in his complaint.

9) By letter dated March 19, 2003, the Agency notified Respondent that, after investigation and review, it had determined there was substantial evidence supporting the allegations in Complainant's complaint, Case # OS-EM-OS-020911-10046, and issued a Notice of Substantial Evidence Determination.

10) On November 4, 2003, the Agency submitted Formal Charges to the forum alleging Respondent discriminated against Complainant by retaliating against him for reporting a health and safety concern, in violation of ORS 654.062(5)(a). The Agency also requested a hearing.

11) On November 4, 2003, the forum served the Formal Charges on Respondent together with the following: a) a Notice of Hearing setting forth January 6, 2004, in Astoria, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule pertaining to responsive pleadings.

12) On November 21, 2003, Respondent, through counsel, timely filed an answer to the formal charges denying the allegations of unlawful employment practices and affirmatively alleging that (1) the claim is preempted by federal law because it involves the interpretation or application of a collective bargaining agreement; (2) the exclusive remedy for the claim is the grievance procedure set forth in the parties' collective bargaining agreement; (3) Complainant failed to exhaust the grievance procedure prior to bringing his claim to the Agency; (4) the claim is barred because it was released and waived by Complainant as part of a negotiated settlement agreement; (5) the Agency has not alleged sufficient facts upon which to state a claim; (6) Complainant did not report a safety or health hazard by claiming unlicensed personnel

were performing electrical work and Respondent had no prior knowledge of a safety or health hazard; (7) Respondent's actions were the result of legitimate, nondiscriminatory and non-retaliatory reasons; (8) Complainant's claim is barred by the applicable statute of limitations; (9) Complainant's reinstatement to his former shift will create a hardship on Respondent and may violate the collective bargaining agreement; (10) Complainant cannot show by a preponderance of evidence that "but for" a legitimate complaint of a safety concern he would not have been transferred to a different shift and cannot show that Respondent acted in bad faith or with a bad motive by returning Complainant to the swing shift; (11) Complainant engaged in misconduct that constitutes after-acquired evidence and mitigates his damages, if any; and (12) Complainant failed to present sufficient facts to support an award of damages based on emotional distress.

13) On November 25, 2003, Respondent moved for a postponement of the hearing. The Agency did not object and the forum granted Respondent's motion on November 26, 2003. The hearing was rescheduled for January 27, 2004.

14) On December 9, 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 the case summaries by January 15, 2004, and notified them of the possible sanctions for failure to comply with the case summary order.

15) On December 22, 2003, Respondent filed a Motion to Dismiss or for Summary Judgment on numerous grounds and requested oral argument on the motion. On December 24, 2003, Respondent filed a Supplemental Affidavit of Daniel J.

Sweeney in Support of Stimson Lumber Company's Motion to Dismiss or for Summary Judgment. On December 29, 2003, the Agency requested an extension of time to respond to Respondent's motion. The forum granted the Agency's request and on January 12, 2004, the Agency timely submitted its response to Respondent's motion by and through its counsel, Assistant Attorney General Stephanie S. Andrus.

16) Respondent and the Agency timely filed case summaries on January 16, 2004.

17) On January 21, 2004, Respondent submitted corrected exhibits to replace two of the exhibits in its case summary.

18) On January 22, 2004, the Agency filed a supplemental case summary.

19) 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.

20) At the start of hearing, the ALJ addressed the issues raised in Respondent's Motion to Dismiss or for Summary Judgment and the Agency's response. Following a summary analysis of the issues, the ALJ denied Respondent's motions.

21) At the start of hearing, the Agency moved the forum to take judicial notice of OAR 918-282-0000, *et seq.*, a copy of which was attached to the Agency's motion. Respondent did not object to the motion and the forum took notice of the administrative rules pertaining to the licensing of electricians in Oregon.

22) At the conclusion of hearing on February 2, 2004, the ALJ ordered the Agency to submit Complainant's medical and marriage counseling records for the ALJ's *in camera* inspection by February 9, 2004.ⁱⁱ The ALJ also ordered the Agency to submit a statement of its policy to verify its position that Complainant's intake questionnaire satisfied the Agency's complaint policy.

23) The Agency timely submitted the medical and marriage counseling records. On February 9, 2004, after *in camera* review, the ALJ issued a protective order governing the classification, acquisition, and use of the records and subsequently released all of them to Respondent.

24) On February 9, 2004, the Agency submitted an "Affidavit of Amy Klare as Statement of Agency Policy," accompanied by a copy of the Agency's policy set forth in the "Civil Rights Operations Manual," a copy of OAR 839-003-0025 (Filing a Complaint), and a copy of 29 CFR § 1977.15 – Filing of complaint for discrimination.

25) On February 12, 2004, Respondent moved to admit the marriage counseling records which were marked as Exhibit R-58. The Agency did not object to the motion and Exhibit R-58 was admitted into the record.

26) During the hearing, the ALJ ordered the participants to submit written closing arguments to the forum and to each other no later than 5 p.m. on February 17, 2004. The ALJ ordered the Agency to submit its written rebuttal, if any, by noon on February 18, 2004.

27) The Agency and Respondent timely submitted written closing arguments and rebuttal. In its closing argument, Respondent renewed its motion to dismiss on the ground that Complainant did not file a verified complaint against Respondent within 30 days of the alleged retaliation. Respondent based its renewal on the Agency's February 9, 2004, submission of its Statement of Agency Policy, which Respondent contended demonstrates the Agency did not comply with its policy to accept questionnaires as complaints for timely filing purposes. Respondent's motion to dismiss is **GRANTED** for reasons stated in the Opinion section of this Final Order.

28) On February 20, 2004, the ALJ reopened the evidentiary portion of the contested case record and ordered the Agency and Respondent to submit additional documentation pertaining to the disposition of Complainant's whistleblower complaint.

29) On February 26, 2004, the Agency timely submitted the Affidavit of Peter Martindale which included copies of a Memorandum, Complaint Dismissal Memo, and documentation establishing the ultimate disposition of Complainant's whistleblower complaint.

30) The record closed on February 26, 2004.

31) On July 8, 2004, the Agency submitted notice to the forum of a change in Complainant's employment status and stated that Complainant's separation from employment "affects the prayer for relief in that it would no longer be appropriate for the Forum to reinstate Complainant to the day shift electrician position." The Agency advised that "in all other respects, the Agency seeks the relief requested in the Formal Charges."

32) The ALJ issued a proposed order on August 6, 2004, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent did not file exceptions. The Agency timely filed exceptions which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At material times, Respondent was a corporation engaged in the production of wood products and utilized the personal services of one or more persons in Oregon.

2) In June 1989, Respondent employed Complainant as a millwright at its Clatskanie plant.

3) From 1991 until 1999, Respondent employed a full time journeyman electrician who worked the day shift at the Clatskanie plant. After extensive advertising,

Respondent hired a new journeyman electrician who left Respondent's employ for a better paying position in or around February 2000. Respondent's search for another replacement was unsuccessful. Respondent's then plant manager, Bob Banchemo, decided to assign some electrical work to Complainant, who was studying for his limited maintenance electrician ("LME") license. Effective May 23, 2000, Complainant was temporarily assigned to a day shift position to perform electrical work within the scope of his training. Banchemo gave Complainant a letter, which he read and initialed, that stated in pertinent part:

"You will be assigned to electrical work and earn \$17.74 per hour until you are notified to the contrary or until the Company hires a journeyman electrician. Once your temporary assignment is concluded, you will return to work as a millwright at \$16.82 an hour. At this point, we expect your temporary assignment to last about six months."

On June 1, 2000, Complainant attained his LME license.

4) Robert Gellatly, Complainant's co-worker and millwright on the swing shift, also was studying to obtain his LME license. After assigning Complainant to the day shift, Banchemo assigned Gellatly to perform electrical work on the swing shift, anticipating he would pass the required test for the LME license. Gellatly tested for the LME license in or around June 2000, 2001, and 2002. He failed the test each time, but continued to perform limited maintenance electrician work on the swing shift.

5) In August 2002, Complainant contacted Oregon's Chief Electrical Inspector John Powell four times about licensing issues. He asked Powell if one electrical license covered the day and swing shifts at Respondent's plant. Powell told him that Respondent needed a licensed electrician on both shifts. At that time, Complainant was the only one licensed to perform electrical work in a limited capacity at the plant and he was concerned about Gellatly's status. His purpose for calling Powell was to make sure he was "speaking intelligently" about "building codes" – he "wanted to make sure that what [he] was saying [to Respondent] was correct." His inquiry focused

on how “to get the training” and “whether it was recognized by the state.” Also, he was “researching” to see if “we could be in more compliance” and still “give Robert [Gellatly] time to get his license.”

6) On or about August 9, 2002, Complainant told production manager Scott Westlund that Respondent was not in compliance with electrical licensing laws. Complainant noted that Gellatly was not currently licensed. Westlund, who had begun his position in February 2002 and was not familiar with Gellatly’s job duties, contacted Banchemo, who was not aware at that time that Gellatly had failed his third attempt to obtain a LME license. On or about August 12, 2002, Banchemo discussed Gellatly’s status with facility manager, Toby Stanley, and they decided to renew the search for a journeyman electrician. They discussed the impact on existing personnel and Stanley was particularly concerned about repercussions in the plant, but both agreed that Respondent needed an on-site electrician who could perform all levels of electrical work. Within a few days after Complainant spoke with Westlund, Respondent began advertising for a journeyman electrician.

7) In late August 2002, Complainant contacted Deputy Chief Electrical Inspector Stan Penrose who advised him that “a person without [an electrical] license is authorized to change light bulbs and fuses.”

8) On or about September 3, 2002, Respondent hired a journeyman electrician to work the day shift and returned Complainant to his millwright position on the swing shift where he continued to perform LME duties.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was a corporation that utilized the personal services of one or more persons in Oregon.

2) In June 1989, Respondent employed Complainant as a millwright.

3) In May 2000, Respondent temporarily assigned Complainant to a day shift position to perform electrical work as a licensed maintenance electrician until notified to the contrary or Respondent hired a journeyman electrician.

4) On or about September 3, 2002, Respondent hired a journeyman electrician to work the day shift and returned Complainant to his millwright position, which included continuing LME duties, on the swing shift.

5) On September 11, 2002, Complainant submitted an Intake Questionnaire ("Questionnaire") to the Agency that alleged he was discriminated against on September 3, 2002, because he "blew the whistle" on Respondent's activities and for "reporting criminal activities" to Respondent's management.

6) On December 5, 2002, Complainant filed a verified complaint with the Agency that alleged a violation of whistleblower law, ORS 659A.230, based on the facts alleged in the Questionnaire, dated September 11, 2002.

7) On or about January 7, 2003, Complainant filed a new complaint with the Agency, signed and notarized on January 3, 2003, that alleged discrimination in violation of ORS 654.062 based on new facts that were not alleged in the September 11, 2002, Questionnaire.

8) After investigation and review, the Agency notified Respondent by letter dated March 19, 2003, that it had determined there was substantial evidence supporting the allegations in Complainant's second complaint, Case # OS-EM-OS-020911-10046, and issued a Notice of Substantial Evidence Determination finding substantial evidence of discrimination on the part of Respondent.

9) Complainant did not allege in his intake questionnaire or in his first verified complaint that he told Respondent or anyone else that Respondent's use of unlicensed

personnel to perform electrical work resulted in two fires that occurred the night before he “reported a safety and health hazard to the production foreman.”

10) There is insufficient evidence to conclude that the Civil Rights Division was unable to process a division-drafted complaint based on an ORS 654.062 violation within the 30-day filing period set forth in ORS 654.062.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an Oregon employer as defined in ORS 659A.001 and ORS 654.005(5).

2) On January 7, 2003, Complainant filed a verified complaint with the Bureau of Labor and Industries alleging he was discriminated against on September 3, 2002, in violation of ORS chapter 654. Complainant’s complaint was not timely filed pursuant to ORS 654.062(5)(b), and the Commissioner of the Bureau of Labor and Industries does not have jurisdiction of the persons and of the subject matter herein related to the alleged violation of ORS 654.062. ORS 654.062(5)(a)&(b); ORS 659A.820.

3) Under ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

RESPONDENT’S MOTION TO DISMISS

A participant in a BOLI contested case hearing is entitled to a dismissal of the case if the participant demonstrates that BOLI lacks jurisdiction over the subject matter of the claim. OAR 839-050-0150(1)(a). In its answer and renewed motion to dismiss, Respondent alleged that the forum lacks subject matter jurisdiction because Complainant did not file a verified complaint alleging retaliation for reporting a health and safety violation within 30 days of the alleged retaliation as required by statute.

ORS 654.062(5)(b), states, in pertinent part:

“Any employee * * * who believes that the employee has been * * * discriminated against * * * by any person in violation of this subsection may, within 30 days after the employee has reasonable cause to believe that such a violation has occurred, file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659A.820. Upon receipt of such complaint the commissioner shall process the complaint and case under the procedures, policies and remedies established by ORS chapter 659A and the policies established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices * * * under ORS 659A.030 (1)(f).”

For the purpose of ORS chapter 659A, a “complaint” means:

“a written, verified statement signed by the complainant or the complainant's attorney that:

“(a) Gives the name and address of the complainant and the respondent;

“(b) Identifies the protected class basis of the complaint;

“(c) Describes the actions complained of, including:

“(A) The date(s) of occurrence;

“(B) What the action was and how it harmed the complainant; and

“(C) The causal connection between the complainant's protected class and the alleged harm.”

OAR 839-003-0005(4).

In response, the Agency cited its policy to accept an intake questionnaire as a complaint for purposes of meeting filing deadlines, including the 30-day statute of limitations in ORS 654.062(5)(b), as justification for the verified complaint Complainant filed four months after the alleged retaliatory act.ⁱⁱⁱ The Agency provided the forum with a copy of its policy and a supplemental affidavit from the Civil Rights Division Administrator who cited several agency cases establishing this forum's position that “the filing of a questionnaire within the 30 day period satisfies the statute of limitations.” Quoting from the Agency's policy, Respondent argues the policy is only applicable when “the division receives a questionnaire so close to the last jurisdictional filing date that it

is unable to draft a perfected complaint and complete the usual filing process within the required time frame.” Respondent contends the policy does not apply to this case because the Agency produced no evidence of circumstances that frustrated the Agency’s ability to produce a division-drafted complaint within the 30-day filing period. Additionally, Respondent asserts that Complainant’s intake questionnaire does not set forth the statutory basis of the complaint, as the policy requires.

The Agency’s policy, which was incorporated into the “Civil Rights Operations Manual” and revised March 1, 2002, states:

“If a complainant submits a questionnaire to the division within the statutory time frame for filing a complaint of discrimination, the division may elect to accept the questionnaire as a timely filed complaint when:

“1. The questionnaire contains all the required information for a complaint pursuant to ORS 659A.820, except the complainant’s verified signature; and

“2. The division was unable to process a division-drafted complaint within one year^{iv} from the date of the alleged violation.”

As background information, the Agency describes two occasional circumstances that generated the policy. One is where, as Respondent pointed out, the questionnaire is filed so close to the last jurisdictional filing date that the Agency is unable to draft a perfected complaint and complete the usual filing process within the required time period. The other is where a timely filed questionnaire is not perfected within the jurisdictional filing period due to “division processing error.”

The Agency’s policy reflects this forum’s longstanding precedent that a complainant alleging a chapter 654 violation should not be penalized for technical defects related to agency bureaucracy if the complainant has timely contacted the agency and filled out a complaint form setting forth the particulars of the complaint. See *In the Matter of Acco Contractors, Inc.*, 1 BOLI 260, 261 (1980); *In the Matter of Day Trucking, Inc.*, 2 BOLI 83, 91 (1981).^v See also OAR 839-003-0025(5). Respondent

does not contend the Agency's policy is invalid, but rather that it does not apply to this case. Consequently, the only issues here are whether the Agency properly applied its policy and whether the intake questionnaire sets forth sufficient facts to support a chapter 654 violation.

1. The Agency's policy was not properly applied in this case.

The Agency did not assert and there is no evidence that it was unable to process a division-drafted complaint based on Complainant's intake questionnaire within the required time period. In fact, based on specific information derived from the questionnaire, the Agency drafted a complaint within three months of Complainant's allegation that Respondent violated ORS 659A.230 (Whistleblower Law), which was within the one year statute of limitations for discrimination complaints filed under ORS chapter 659A.

The record as a whole shows Complainant did not raise any issue pertaining to an ORS chapter 654 ("OSHA") violation until on or about December 30, 2002, which was 118 days after the alleged OSHA violation occurred. Thus, the only apparent reason the Agency was unable to timely process a perfected complaint based on an alleged OSHA violation is that Complainant did not raise the issue until well after the 30-day filing period expired. Moreover, the agency investigator's notes and "Dismissal Memo" reveal that the Agency did not rely upon the intake questionnaire as evidence of an OSHA violation, but rather upon Complainant's statements made "in the course of being interviewed in the investigation." The investigator did not document the "possibility of OSHA based charges" until December 30, 2002, and, absent any contrary evidence, the forum infers that the "possibility" of an OSHA violation did not arise until on or about that date. Notably, Complainant filed a "division drafted" verified complaint alleging a "new basis" of discrimination within eight days after he made statements to

the investigator that suggested a possible OSHA violation. Those facts in no way invoke the equitable principles upon which the Agency's policy is based.

Agency precedent recognizes that the relatively short 30-day filing period weighs in favor of a liberal construction of the definition of "complaint," which gives the Agency discretion to "elect to accept the questionnaire as a timely filed complaint." However, the Agency's policy and precedent contemplate that the complainant has timely submitted an intake questionnaire alleging an OSHA violation and that the Agency was unable to timely perfect the complaint for technical reasons. Those conditions have not been established in this case.

2. Complainant's intake questionnaire failed to sufficiently allege a violation of ORS chapter 654.

The Agency argues that the last phrase in the last sentence Complainant wrote in his intake questionnaire, *i.e.*, "the way thing[s] were going someone was going to get hurt, killed or burn the mill down," invokes an OSHA violation for timely filing purposes.^{vi} However, the forum finds Respondent's argument to the contrary more persuasive for several reasons.

First, as Respondent points out, Complainant's words, when viewed in context, at best appear as an afterthought and as justification for having "blown the whistle" on Respondent for engaging in what Complainant perceived as "criminal activity." He otherwise made no assertion that he reported a safety or health hazard, or that he told anyone he feared someone would be hurt, killed, or burn down the mill. Overall, Complainant's responses to the specific questions in the Questionnaire provided no reasonable basis for an OSHA based complaint. In fact, when confronted with several options, including a section denoted as "opposition to health and/or safety hazard," Complainant chose the section designated "other" by writing the words: "Whistleblower law/Reporting criminal activities."

Additionally, despite the questionnaire's instructions stating: "Fill in the following page(s) if you are making an * * * OSHA complaint," Complainant left the page entitled "FOR OSHA COMPLAINTS ONLY" blank. The questions on that page included, but were not limited to:

"Were you retaliated against because you reported a health/safety problem?"

"What was the health/safety hazard?"

"Did you report it?"

"If yes, what was the date you reported it, to whom did you report, and what was that person's job title?"

Although the Agency minimizes the significance of Complainant's "failure to check a particular box" and urges the forum to consider "substance" over "form," the forum finds that the Questionnaire clearly asked for information required to support an OSHA violation. The forum further finds that Complainant's failure to answer the Questionnaire's substantive questions transcends "form" and denotes that his intent at the time was to file something other than an OSHA based complaint. Despite his status as an uncounseled layperson, Complainant was reasonably articulate and specifically and unequivocally alleged a whistleblower violation that resulted in a division-drafted complaint alleging a violation of ORS 659A.230, which was subsequently dismissed because the Agency "did not find sufficient evidence to continue [the] investigation."

Several months later and only after Complainant alluded to a possible violation during the waning whistleblower investigation, the Agency drafted a new complaint alleging an OSHA violation. The Agency correlated the new allegation to Complainant's Questionnaire in order to avoid the untimely filing issue and now contends the statute of limitations was tolled. This argument is undone by the Agency's own rules.

OAR 839-003-0040 provides:

"(1) The division may amend a complaint to correct technical defects. The division may do this on its own initiative or at the complainant's request

(with the division's agreement) any time prior to the issuance of Specific Charges. Examples of technical defects include: clerical errors, additions or deletions, name and address corrections, and statute citation errors.

“(2) A complaint may be amended to add a protected class *only if the addition is supported by facts already alleged. New facts may not be added. If new facts are alleged, the complainant must file a new complaint meeting the standards provided in OAR 839-003-0005(4).*

“(3) Amended complaints will be verified and signed by the complainant or the complainant's attorney.

“(4) The division will send a copy of the amended complaint to the complainant and the respondent.” (emphasis added)

If, as the Agency contends, the facts in the Questionnaire were sufficient to support an OSHA violation and serve as a timely filed complaint under its policy, the Agency could and should have amended the whistleblower complaint to add the additional protected class. Under the rules, the only time a complainant is required to file a new complaint is when the allegations in the original complaint do not support an additional protected class. In this case, Complainant was required to file a new complaint because his original complaint did not contain the necessary “particulars” to support an OSHA violation. Consequently, the forum finds that Complainant’s second complaint, filed on January 7, 2003, was not supported by facts in the Questionnaire dated September 11, 2002, and therefore was not timely filed.

The Agency’s rules provide that “[i]f extenuating circumstances exist, the division may extend the 30-day period as provided in 29 CFR Part 15(d)(3).” OAR 839-003-0025(5)(b)(D). As the Agency’s affidavit points out, the federal citation in the rule is incomplete. The applicable federal regulation, followed by the correct citation, provides, in pertinent part:

“(2) A major purpose of the 30-day period in this provision is to allow the Secretary to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 30 days of an alleged violation will ordinarily be presumed to be untimely.

“(3) However, there may be circumstances which would justify tolling of the 30-day period on recognized equitable principles or because of

strongly extenuating circumstances, e.g., where the employer has concealed, or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. * * * In the absence of circumstances justifying a tolling of the 30-day period, untimely complaints will not be processed.”

29 CFR § 1977.15(d).

The Agency has not alleged and the forum has not found that there were “strongly extenuating circumstances” that warranted extending the statutory filing period in this case. In fact, the record shows that Complainant more likely than not raised the OSHA issue when he realized his whistleblower complaint was failing and the Agency, in presumptive good faith, attempted to accommodate Complainant by invoking its policy, albeit in a misguided manner, rather than by extending the filing period in the absence of the requisite “strongly extenuating” reasons.

The Agency’s discretion to decide which questionnaires to accept as a timely filed complaint is not unrestrained. The Agency’s actions still remain subject to judicial scrutiny for arbitrary and abusive exercise of discretion. Thus, the Agency is obliged to interpret and administer the 30-day filing requirement in a consistent and predictable manner that will provide guidance to participants in administrative proceedings and promote stability in the law. In fact, the Agency’s policy naturally ensures those objectives by prescribing the circumstances under which it will elect to substitute a questionnaire for a verified complaint for timely filing purposes. The policy, consistent with this forum’s precedent, provides a mechanism for achieving justice for those complainants who timely file a complaint through a questionnaire, but are hindered from filing a division drafted complaint by circumstances outside their control. In this case, the Agency knew Complainant’s new allegation did not arise from his intake questionnaire because it required Complainant to file a new complaint alleging facts sufficient to support an OSHA violation. Despite this knowledge, the Agency invoked the policy in an attempt to avoid the statute of limitations issue. The Agency did not

adhere to its policy when it elected to deem Complainant's intake questionnaire as an OSHA complaint for timely filing purposes and the forum concludes that Complainant did not timely file his complaint pursuant to ORS 654.062(5)(b).

Complainant's complaint is therefore barred by the statute of limitations as a matter of law. Accordingly, the Agency's formal charges and Complainant's complaint are hereby dismissed.

AGENCY'S EXCEPTIONS

The Agency requests reconsideration of the proposed order, contending (1) Complainant's statements in the intake questionnaire "set forth the essence of an OSHA violation * * * [because] [h]aving unlicensed personnel performing electrical work is inherently unsafe," and (2) the Agency's failure to "process the intake questionnaire as an OSHA retaliation complaint * * * is apparently a division processing error." Those contentions are not supported by the facts or law in this case.

First, Complainant plainly alleged he was discriminated against for "reporting criminal activity" under a whistleblower theory. Criminal activity and workplace safety concerns are discrete issues governed by completely different statutory schemes. Thus, disclosure of criminal activity under ORS 659A.230 is not the same as a complaint about workplace safety and health hazards under ORS 654.062. By any reading of the intake questionnaire, the crux of Complainant's claim was his express *belief* that Respondent discriminated against him because he alerted management that it was engaging in illegal activity by allowing unlicensed workers to perform electrical work in violation of Oregon law.

While it is generally true that complainants are "unschooled in the law" and their allegations are normally liberally construed, BOLI's intake questionnaire form is manifestly calculated to elicit the full scope of a complainant's claims, artfully stated or

not. The questionnaire includes a detailed section specifically designed for OSHA based complaints which significantly reduces the possibility of a complainant's mistaken omission of that claim. In this case, by opting not to address the substantive questions in that section, Complainant implied that he had no intention of pursuing an OSHA based complaint at the time he submitted his intake questionnaire. Indeed, his allegations were specific and his intent clear enough that agency personnel, who *are* schooled in discrimination law, timely drafted a verified complaint based on a whistleblower theory under ORS 659A.230. From the record, the forum finds no reasonable basis to conclude that the agency person who drafted the verified complaint neglected to record the full scope of Complainant's theory of the case.

Second, the forum does not agree with the Agency's assertion that merely permitting unlicensed personnel to perform electrical work is "inherently unsafe." While an electrical license may serve as verification the holder has the training and skills to perform electrical work, the lack of one does not automatically denote an inability to safely perform the work.^{vii} The Oregon Occupational Safety & Health Division ("OR-OSHA"), through its Standards & Technical Resources Section, addressed this issue in a letter of interpretation issued September 15, 1998, in response to an inquiry from John B. Curtin, HMSC/OPEU Steward, of the Hatfield Marine Science Center in Newport, Oregon.^{viii} In pertinent part, the letter states:

"This letter is in response to your August 24th letter to Ron Havenkost in which you ask if there are any OR-OSHA standards prohibiting the assignment of electrical work to unlicensed workers. The answer is "No." While the Building Codes Division of Department of Consumer & Business Services does require certain tasks to be performed by licensed electricians, OR-OSHA's focus is on making sure that workers are adequately trained and qualified to safely perform the work assigned to them.

"All employers are required by OAR 437-001-0760(1)(a) to properly instruct and supervise their workers in the safe operation of any machinery, tools, equipment, processes or practices which they are

authorized to use or apply. Since supervisors are employer representatives, the requirements are the same for them. If a standard is violated, then any citation that is issued by OR-OSHA will be issued to the company. Employees (including supervisors) may not be cited under the Oregon Safe Employment Act. Division 2, Subdivision S, 1910.333 requires that workers performing electrical work be adequately trained and qualified for the tasks assigned to them. To be qualified, according to 1910.399, a person must be familiar with the construction and operation of the equipment and the hazards involved. While in some cases training may be similar to, or even identical to that required for licensing, OR-OSHA's focus is on the safe performance of work rather than certification or licensing."^{ix}

In this case, Complainant did not allege at any time and there is no evidence that Respondent permitted untrained, unqualified, or inexperienced workers to perform electrical work. Rather, Complainant's focus and intent was on Respondent's alleged failure to follow statutory licensing requirements, which is a discrete issue that does not necessarily imply hazardous or unsafe working conditions. The forum finds that Complainant's specific allegations that Respondent illegally allowed unlicensed personnel to perform electrical work, together with his failure to address substantive questions regarding unsafe work conditions, fall short of placing the Agency on notice of an OSHA based complaint.

Finally, a complaint's fundamental purpose is to provide notice of a complainant's claims to the named respondent. See ORS 659A.820(4) ("The commissioner shall notify the person against whom a complaint is made within 30 days of the filing of the complaint. The notice shall include the date, place and circumstances of the alleged unlawful employment practice.").

Notably, Respondent's first notice of Complainant's OSHA based complaint was on or after January 7, 2003.^x The Agency argues that the January 7 complaint was "entirely superfluous" because Complainant's intake questionnaire "*is* the complaint" for filing purposes. The Agency misses the point. The first complaint of record is Complainant's whistleblower complaint which derived from and supplanted the intake

questionnaire. While an intake questionnaire constitutes the *agency's* notice of a complainant's claims, it is up to whoever drafts the perfected complaint to accurately set forth a complainant's theory of the case and notify the named respondent of the claims within the statutory time period. Under the Agency's policy, the content of the intake questionnaire only becomes pertinent for filing purposes when the perfected complaint is filed late or is deficient due to technical defects or agency error. Otherwise, the questionnaire is irrelevant. Where an additional protected class is added, the perfected complaint - not the questionnaire - must be amended in order to provide the respondent with proper notice of the additional claim. However, the amendment to add a protected class must be supported by facts already alleged. If new facts are alleged, a new complaint must be filed in accordance with OAR 839-003-0005(4). OAR 839-003-0040. In this case, Complainant alleged facts in his second complaint that he did not allege in his first complaint (or in the questionnaire), *i.e.*, that Respondent's use of unlicensed personnel to perform electrical work caused two fires that occurred the night before he reported a safety and health hazard to the production foreman. For that reason, the January 7 complaint was hardly superfluous; it was Respondent's first and only notice of those new facts and the additional protected class. The Agency has not established in any way that Complainant's first perfected complaint was untimely filed or failed to encompass the full scope of the allegations Complainant set forth in the intake questionnaire. Instead, a preponderance of credible evidence establishes that the Agency's first inkling of an OSHA based complaint was on or about December 30, 2002, 118 days after the alleged violation occurred and well after the statute of limitations had expired.

The Agency's retrospective observation that it should have recognized the OSHA possibility earlier is not supported by the evidence and, in any event, is not a "division

processing error.” The Agency treated Complainant’s intake questionnaire as a whistleblower complaint because it was a whistleblower complaint. The Agency was not required to unilaterally expand Complainant’s claims beyond the scope of his intention - it was only required to accurately set forth his factual allegations in the perfected complaint. The Agency did so in this case. The Agency’s exceptions are DENIED.

ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the complaint and the formal charges filed against Respondent Stimson Lumber Company are hereby dismissed according to the provisions of ORS 659A.850.

ⁱ The forum notes that Complainant was *not* required to initiate a complaint with the Building Codes Division to come under the protection of ORS 659A.230. See OAR 839-010-0110.

ⁱⁱ During the hearing, Complainant and his wife waived their privilege by consenting to the disclosure of the marriage counseling records and Complainant waived his privilege regarding the medical records.

ⁱⁱⁱ The Agency asserted the verified complaint, filed on January 7, 2003, related back to the intake questionnaire submitted on September 11, 2002.

^{iv} ORS 659A.820(1) makes an exception for complaints filed pursuant to ORS 654.062(5), which are processed “under the procedures, policies and remedies established by ORS chapter 659A,” but are subject to a 30 day filing period.

^v *Overruled, in part, In the Matter of Western Medical Systems, Inc.*, 8 BOLI 108 (1989), for reasons not pertinent to this case.

^{vi} The Agency’s additional assertion that the forum “has already recognized that the questionnaire set forth the necessary allegations concerning the reporting of a safety hazard in the workplace” is not accurate. At hearing, the forum denied Respondent’s alternative motion for summary judgment based on a preliminary finding that the above-quoted phrase raised a genuine issue of material fact about whether the questionnaire invoked ORS chapter 654 provisions for the purpose of applying the Agency’s policy, which had not been provided to the forum at that time.

^{vii} In fact, Oregon’s Electrical Safety Law sets forth numerous exemptions to the licensing requirement that apparently allow certain unlicensed persons with adequate training, experience, or knowledge to perform a broad range of electrical work. See ORS 479.540. See *also* OAR 918-282-0000(3).

^{viii} OR-OSHA (Letters of Interpretation) (last updated: Tuesday, 17-Aug-2004 15:25:57 PDT)
<http://www.cbs.state.or.us/external/osha/interps/subject.htm>.

^{ix} Although the Agency has statutory authority to process OSHA based discrimination complaints, it does not have the power to fix standards or prescribe the regulations governing workplace health and safety. Therefore, OR-OSHA's interpretation of its own rules and standards, while not binding on this forum, is helpful where, as in this case, the issue involves examining the "essence of an OSHA violation." However, the forum also notes that the Agency is not required to establish that a complainant opposed conditions that actually violated an OSHA statute or rule. The Agency only need prove that a complainant was retaliated against for expressing safety concerns "under or related to" ORS chapter 654. Thus, had Complainant alleged in his first perfected complaint that he *told* Respondent, based on his good faith belief, that he feared someone would be hurt or killed as a result of having unlicensed personnel perform electrical work, he would have adequately stated a claim under the statute.

^x Evidence shows the Agency investigator advised Respondent's human resources manager of the "possibility" of an OSHA based complaint in late December 2002, but Respondent did not receive the required 30 day notice until on or after January 7, 2003, when Complainant filed a verified complaint.