

In the Matter of

WAL-MART STORES EAST, INC. dba Wal-Mart

Case No. 16-00

Final Order of the Commissioner Jack Roberts

Issued July 13, 2001

SYNOPSIS

Where the Agency failed to establish by a preponderance of the evidence that Complainant, a married woman dating an unmarried male co-worker, had been subjected to harassment because of her marital status and the marital status of the co-worker with whom she associated, or that Respondent discharged Complainant because of her marital status and the marital status of the co-worker with whom she associated, the Commissioner dismissed the complaint and specific charges. ORS 659.030(1)(a) and (b); OAR 839-007-0550.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 12 and 13, 2000, at the Medford office of the Bureau of Labor and Industries, located at 700 East Main, Suite 105, Medford, Oregon.

David K. Gerstenfeld, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Cathleen Ann Sliger ("Complainant") was present throughout the hearing and was not represented by counsel. David G. Hosenpud, Attorney at Law, represented Wal-Mart Stores East, Inc. ("Respondent"). Tom Cornehlson, Respondent's district manager, was present throughout the hearing as Respondent's corporate representative.

In addition to Complainant, the Agency called as witnesses: Kim Powell, a Respondent store customer; Respondent's Medford store manager Michael Daulton; Respondent's district manager Tom Cornehlson; Respondent's former assistant store

manager Blaine Woodard; current store employees: Nancy Mahan, Johanna Johnson, Rebecca Medina; former store employees: Hope Meek and Matthew Medina; Judy Ann Frazier, Complainant's mother; Beverly Smith, an adjudicator for the Oregon State Employment Department (by telephone); and, Peter Martindale, a BOLI civil rights investigator.

Respondent called as witnesses: Respondent's Medford store manager Michael Daulton; Respondent's district manager Tom Cornehlisen; Respondent's former assistant store manager Blaine Woodard; and, current store employees: Ray Volkers, June Keith, Lorena Miller, and Sally Montgomery.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-35;
- b) Agency exhibits A-1, A-3, A-5, A-6 through A-9, and A-30 (stipulation of the participants) and A-2, A-4, A-10 through A-24, and A-26 through A-40 (submitted at hearing);
- c) Respondent exhibits R-8, R-9, R-42 through R-44, and R-46 (stipulation of the participants) and R-1 through R-7, R-10 through R-41, and R-45 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 February 13, 1998, 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 based on Respondent's termination of Complainant on November 2, 1997. After investigation and review, the CRD issued a

Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations regarding Respondent's discharge of Complainant.

2) On November 22, 1999, the Agency submitted to the forum specific charges alleging Respondent discriminated against Complainant by discharging her based on her marital status and marital status of the person with whom she associated, in violation of ORS 659.030(1)(a) and ORS 659.029. The Agency also requested a hearing.

3) On November 29, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth March 14, 2000, in Medford, 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 December 29, 1999, Respondent, through counsel, filed a timely answer to the specific charges.

5) On January 21, 2000, 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 damages calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by March 3, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On January 31, 2000, the Agency filed a motion requesting partial summary judgment as to Respondent's First Affirmative Defense that "Complainant was an at-will employee and could be terminated at any time and for any reason."

7) On February 3, 2000, BOLI Legal Policy Advisor Marcia Ohlemiller notified Respondent of Division 50 rule changes and provided Respondent a copy of the amended Contested Case Hearing Rules, OAR 839 Division 50, which were effective January 27, 2000.

8) On February 9, 2000, Respondent filed an amended answer to the specific charges withdrawing its First Affirmative Defense and included its "first request for production." The Agency subsequently withdrew its motion for partial summary judgment.

9) On February 14, 2000, the Agency moved for a discovery order requesting that Respondent produce 18 categories of documents.

10) On February 17, 2000, Respondent moved to postpone the hearing based on its need to complete discovery and coordinate out of state witness testimony. The Agency did not object to a postponement. Accordingly, the ALJ granted the motion and the hearing was reset to commence on June 13, 2000.

11) On February 25, 2000, Respondent filed a response to the Agency's motion for discovery order indicating it had already produced documents responsive to some of the categories of requested documents and that there were no relevant documents responsive to other categories. Respondent had specific objections to three categories of the requested documents.

12) On February 29, 2000, the ALJ conducted a prehearing conference with Respondent's counsel and the Agency case presenter regarding the Agency's motion for discovery order. At the conclusion of the conference, after narrowing the scope of

the Agency's request, the ALJ ordered Respondent to provide to the Agency three categories of documents that included records showing other Respondent employees in Oregon who have been disciplined for creating a "hostile work environment," "for spreading rumors and lies," and those disciplined in any manner between June 1, 1995, and June 1, 1998. The ALJ issued an interim order on March 1, 2000, summarizing the previous day's oral ruling.

13) On March 3, 2000, the ALJ amended the interim order ruling on the Agency's motion for discovery order to conform to OAR 839-050-0200(1) that requires the ALJ to notify participants of the possible sanction, pursuant to OAR 839-050-0200(11), for failure to provide the discovery ordered.

14) On May 12, 2000, in response to the Agency's May 9, 2000, letter requesting clarification of the case summary filing deadline, the ALJ issued a case summary order extending the deadline for filing case summaries to June 1, 2000.

15) Respondent and the Agency filed timely case summaries on May 30 and June 1, 2000, respectively. On June 5, 2000, Respondent filed an amended case summary. On June 7, 2000, Respondent filed a second amended case summary that included an additional exhibit.

16) On June 8, 2000, the Agency copied the Hearings Unit with a letter from the Agency case presenter to Respondent's counsel requesting that Respondent make available for cross-examination the "document preparers" of certain exhibits submitted with Respondent's case summary.

17) On June 9, 2000, Respondent copied the Hearings Unit with a letter dated June 8, 2000, directed to the Agency case presenter, opposing the Agency's request that Respondent make available for cross-examination 27 different witnesses whose

signatures appear on documents Respondent submitted as exhibits in its case summary.

18) On June 8, 2000, the Agency case presenter notified the ALJ and Respondent, in writing, of his grandmother's serious health condition and stated, in part: "Because of this, I may be asking for an emergency postponement of the hearing currently scheduled to begin next Tuesday." On June 9, 2000, Respondent copied the Hearings Unit with a letter dated June 8, 2000, directed to the Agency case presenter stating, in part: "I am sorry to hear about your grandmother's serious medical condition. If you intend to ask for a postponement of the hearing scheduled for June 13, 2000, please let me know as soon as possible. I have relevant witnesses who were part of the decision making management group flying in to Oregon from different parts of the country. * * *"

19) On June 9, 2000, the ALJ contacted the Agency case presenter and Respondent's counsel, separately, to schedule a prehearing conference regarding the likelihood of postponement. The same day, pursuant to OAR 839-050-0310, the ALJ issued an interim order memorializing his separate oral communications.

20) On June 9, 2000, the ALJ conducted a prehearing conference with Respondent's counsel and the Agency case presenter to discuss postponement of the hearing based on the serious medical condition of the case presenter's grandmother. As a result of the prehearing conference, the ALJ issued an interim order rescheduling the hearing to begin on December 12, 2000.

21) On November 22, 2000, the Agency filed a supplemental case summary.

22) On November 27, 2000, the Agency filed a second supplemental case summary.

23) On December 5, 2000, the ALJ assigned was changed from Alan McCullough to Linda Lohr.

24) 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.

25) On March 16, 2001, the ALJ issued a proposed order and notified the participants they were entitled to file exceptions to the proposed order. After receiving an extension of time to file its exceptions, the Agency filed timely exceptions which are addressed in the opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Wal-Mart Stores East, Inc. was a foreign corporation operating retail establishments under the assumed business name Wal-Mart (“Respondent”), and was an Oregon employer utilizing the personal services of one or more persons.

2) At all times material herein, Complainant was a married female.

3) Respondent employed Complainant as a cashier on or about May 7, 1997. She was an hourly employee in Respondent’s Medford, Oregon, store (“Medford store”) and earned \$6.24 per hour. Complainant worked initially as a seasonal employee in the Medford store’s garden center until the season ended, sometime in August or September, when she was transferred to a sales cashier position for a short time and then to the cosmetics department.

4) Sometime in July 1997, Complainant began dating Chris Bagg, an unmarried male co-worker, who worked as an hourly employee in the Medford store’s garden center. It was common knowledge among Complainant’s co-workers that she and Bagg were dating.

5) Sometime after Complainant began dating Bagg, Respondent's personnel manager, Lorene Miller, observed Complainant and Bagg quickly letting go of each other's hands as Miller approached them. Complainant and Bagg were grinning and Miller said: "Hey, hey, hey, I saw that. That's a married woman, you know." Complainant responded, "Not for long. I'm almost divorced," whereby Miller quipped: "Being almost divorced is like being almost pregnant, you're not until you are."

6) As personnel manager, Miller was an hourly employee whose primary responsibilities were preparing payroll, hiring employees, and processing workers' compensation claims. She did not have authority to fire or discipline employees. Although her comments to Complainant were made in jest, she believes "adulterous relationships are morally inappropriate" and expressed that sentiment once during a casual conversation with Respondent's assistant store manager, Blaine Woodard. Her comment to Woodard was not made in reference to Complainant or Bagg.

7) Complainant lived intermittently with her husband, Sean Sliger, during her employment with Respondent. On or about July 3, 1997, Complainant obtained a temporary restraining order ("TRO") against Sliger because he was abusive and she feared for her safety. She had experienced ongoing domestic problems and the TRO was one of many she filed throughout her nine-year marriage to Sliger. She discussed her marital troubles and the resultant TRO with some of her co-workers and Woodard.

8) Woodard spoke with Sliger once in person and had two telephone conversations with him. During each conversation, Sliger used profanity and accused Woodard of allowing Complainant and Bagg's relationship to continue. Woodard advised Sliger that anything that happened off the store's premises was not Woodard's business.

9) Store personnel, particularly Woodard, were very supportive of Complainant after the TRO issued and made efforts to protect Complainant from Sliger while she was at the Medford store.

10) Sometime during her employment with Respondent, Complainant filed a written complaint that co-worker Gary Bass sexually harassed her by making inappropriate comments. Six other female employees also complained, at least verbally, that Bass made inappropriate comments in the workplace. Respondent immediately conducted an investigation and Bass admitted verbally harassing the female employees. After the investigation, Respondent terminated Bass on September 21, 1997, for "serious harassment" and "inappropriate conduct."

11) During the Bass investigation, store manager Michael Daulton interviewed Complainant and Bass. Based on comments made by Bass and Complainant about Chris Bagg, Daulton asked Complainant if she was dating Bagg.

12) Respondent's fraternization policy, published in Respondent's corporate employee handbook and in effect at times material, stated in part:

"The intent of this policy is to support the Company's commitment to provide all Associates a workplace free of sexual misconduct or behaviors that hinder our objective to serve our Customers and to maintain a safe and productive workplace. It is also intended to ensure that Associates are not improperly disadvantaged because of a romantic relationship between a Supervisor and another Associate.

"Wal-Mart Associates are expected to conduct themselves in a manner that promotes respect, trust, safety, and efficiency in the workplace. It is against Company policy for a Supervisor to become romantically involved with an Associate he or she supervises or with an Associate whose terms and conditions of employment he or she may have the ability to influence. Romantic relationships between a member of the facility's Management team and a Vendor's Associate that work within the same facility are also prohibited. Associates who violate this policy will be subject to immediate termination."

13) Respondent's policy does not forbid romantic relationships between hourly, non-supervisory associates.

14) Respondent's policy does forbid socializing among the employees during work hours, including romantic displays of affection, irrespective of the marital status of the employees.

15) While employed with Respondent, Complainant had read the corporate employee handbook and was aware of the fraternization policies contained therein.

16) Respondent's harassment policy, published in the corporate employee's handbook and in effect at times material, stated in pertinent part:

"Harassment/inappropriate conduct is defined broadly and includes but is not limited to: welcome or unwelcome conduct which causes fear or intimidation, creates an offensive or hostile work environment, or interferes with an Associate's work performance.

" * * * * *

"Gossiping or spreading rumors or lies about other Associates can also create a hostile environment by interfering with an individual's job performance.

" * * * * *

"If the conduct complained of was harassment/inappropriate conduct, appropriate disciplinary action will be taken. Such action may range from coaching to immediate termination. * * * "

At all times material, Complainant was aware of the harassment policy and knew employees could be terminated for gossiping or spreading rumors or lies about other employees.

17) Between February 1996 and October 1997, Respondent terminated at least 26 employees in Oregon for violations of company policies including, but not limited to: sexual harassment, creating a hostile work environment by use of foul language in front of customers, inappropriate and unacceptable conduct in the workplace, fraternization between a manager and an hourly employee, public display of romantic behavior, and offensive language toward other employees. In January 1997, Respondent terminated an Oregon employee for "starting rumors and creating problems between other associates in the workplace."

18) Sometime in October 1997, a rumor began circulating in the workplace that store manager Michael Daulton and an hourly non-supervisory employee, Sally Montgomery, were seen kissing and hugging in the store's parking lot on or about October 7, 1997. At all times material, Daulton and Montgomery were married, but not to each other.

19) Throughout October 1997, store employee Chris Bagg told numerous co-workers, including Complainant, that he was in the store's parking lot smoking a cigarette when he observed Daulton and Montgomery kissing. Many of those co-workers repeated to others what Bagg related to them about Daulton and Montgomery.

20) During the same time period, another store employee, Hope Meek, told at least two co-workers, including Complainant, some version of having seen Daulton and Montgomery with their "arms on each other" in the parking lot while Meek was waiting for her husband to finish his shift at the store.

21) During October 1997, Complainant repeated what she was told by Bagg and Meek to at least one other co-worker, Johanna Johnson, who also heard Complainant discussing the rumor with others in the workplace. Complainant also discussed the parking lot incident with store customer, Kim Manbeck.

22) Around October 11, 1997, store employee Nancy Mahan told Daulton that "June" of the garden center told her five employees had seen Daulton and Montgomery kissing in the parking lot. Daulton appeared to Mahan to be "shocked and hurt" at the information. Daulton immediately told his wife what he had been told about the rumor. He was upset and concerned about the damage that type of rumor could cause to his family and career. He reported his concerns to Respondent's district manager Tom Cornehlson, denied a romantic relationship with Montgomery, and requested an investigation into the matter.

23) About the same time, Cornehlson received an undated letter, signed: "Hattie Joens, that is pronounced Gins, everyone gets it wrong." The writer said she was an offended customer who saw Daulton and Montgomery "last Tuesday at approximately 7:30 p.m. * * * engaging in some very heavy kissing and petting." The writer claimed there were four or five other store employees who witnessed the incident. She concluded by stating she would "continue to be a Wal-Mart customer for many years to come if the good Lord permits this old lady to live." Cornehlson was unable to verify the letter writer's name.

24) On October 25, 1997, Cornehlson went to the Medford store to interview employees about their knowledge of the alleged kissing incident. Numerous employees were interviewed, including Complainant. Blaine Woodard was present during most of the interviews, including Complainant's. Before the meeting, Woodard had previously obtained written statements from some of the employees who had been told about the alleged incident by co-workers. Only Bagg and Meek could be identified as employees who purportedly witnessed Daulton and Montgomery kissing in the parking lot. Cornehlson, accompanied by Woodard, first interviewed Bagg and Meek to determine the validity of the comments being made about Daulton and Montgomery.

25) During the interview, Bagg denied actually observing Daulton and Montgomery kissing or embracing and told Cornehlson that Meek "saw what happened." Meek claimed to be unsure of what she saw because of the angle from which she was making her observation and told Woodard and Cornehlson she saw Daulton and Montgomery "touching" and "assumed" the two were kissing.

26) Based on Daulton's denial and the results of the Bagg and Meek interviews, Cornehlson and Woodard determined there was no evidence to substantiate the rumor and focused the remaining investigation on squelching the rumor. All

employees interviewed, including Complainant, were asked what they knew and who told them. All were told to stop spreading the rumor, including Complainant.

27) During her interview, neither Cornehlisen nor Woodard asked Complainant about her relationship with Bagg. Complainant was only asked what she knew about the alleged kissing incident and how she knew it. She was told there would be consequences for anyone who continued to spread the rumor. All of the employees interviewed were told the same thing.

28) Sometime during the investigation, Complainant reported to Woodard she had overheard store employee, Ray Volkens, discussing the rumor with five or six other employees in the break room. Woodard interviewed Volkens and the other employees and found no evidence to support Complainant's allegation.

29) On or about October 26, 1997, seven employees submitted written statements, two unsigned, implicating Complainant, Bagg, and Meek in continuing to discuss the rumor about Daulton and Montgomery in the Medford store on October 26.

30) In an unsigned statement dated October 26, 1997, the writer stated:

"Sunday afternoon. Today when I came to work there was a "Buzz" about the associates. I had been off for a couple of days and wondered what was going on. While on my lunch hour I asked Linda Reed what was going on – she very politely responded that she 'couldn't talk about it!' I respected that and dropped the conversation. I went into the break room, where Hope Meek, Bonnie (Toys), Shannon [illegible last name], and Cathleen (Cosmetics) were located. Bonnie & Hope were having a conversation. Bonnie was reassuring [*sic*] Hope that something was not her fault. Hope replied that she didn't want to be the one to tell on him. Him who, I wondered, but didn't ask. Shannon sat quietly & did not include herself in the conversation. Bonnie left.

"Hope looked upset. I asked Hope if she was O.K. She said 'You don't know what's going on, do you?' I replied no, but was hoping someone would tell me. Hope replied 'I don't want to be the one to tell you. Cathleen, you tell her!' Cathleen whispered in my ear that we might be getting a new store manager. I shrugged my shoulders, not knowing what to say. She then whispered to me that Mike was caught making out with Sally.

"I was shocked. I took Cathleen out into the hall and asked her if she was serious or just kidding. I thought it was a joke. She said that Hope was sitting in her car waiting for Ken and saw Mike and Sally kissing. She also said that Chris in garden center had watched Mike and Sally kissing in the parking lot. She said that Mike was trying to fire Chris because of that. She mentioned that Cornehlson told Mike to resign or be fired and Sally was fired already. Hope then came out and repeated the story. At the end of my break my friend in electronics asked me what was going on – Between the 2 of us we decided this information was too damaging and we wouldn't discuss it any further."

31) Another statement dated October 26, 1997, and signed "Toni cashier," read: "I heard it from Hope [and] Kathleen bits and pieces about what they saw and what happened [illegible] they were kissing, making out in the parking lot. That is all I heard."

32) A statement dated October 26, 1997, signed Martin Garcia read:

"Chris from garden came up to me in McDonald's & basically said that he saw Mike & Sally kissing in parking lot & that is why Tom C. was here yesterday. He also said that Tom had Hope demonstrate what she had [seen] and at the time Hope was walking by and said that is what happened and expressed concern about loosing [sic] her job. I told her that if Tom asked her then she had nothing to worry about."

33) A statement dated October 26, 1997, "From Stockman Shane" read:

"I heard from cashier Krystal at about 4:15 p.m. on Sunday October 26 that she heard that Mike and Sally had an affair out in the parking lot about 3 weeks ago."

34) A statement dated "10/26" and unsigned read:

"To whom it may concern – I was approached by an associate tonight and was told some things I shouldn't know or want to know.

"I was told Sally was fired and Mike was on his way out too. The cameras captured everything – she didn't exactly say what 'everything' was – and there were 5 witnesses.

"This was told to me by Terry in shoes."

35) A statement dated October 26, 1997, signed "Cashier Linda," read:

"I was told on the 25th by cashier Hope that she was called into the office to talk to Tom C. It was about seeing Mgr. Mike and Sally in the parking lot doing you know what (making out) and that it was on camera.

"I told her to not say anything to anyone else, she did the right thing by telling what she saw. She has spoken to me at least 4 times today. I know she has told cashier Tony and Tony came to me about this also. Hope said that there were other people that Tom C. called into the office."

36) A statement dated October 26, 1997, signed "Krystal [illegible last name] read:

"I called Hope at her register to find out if everything was O.K. because I saw that yesterday she was pulled into the office with Blaine. She told me that it didn't have anything to do with her. She then told me that it had to do with Mike. Then she told me to come to her register and she would tell me. It took me about 10 min. to get over their [sic]. The first thing she said was just 'Mike and Sally' I asked her what about them and she said that Mgt. wanted to know about something she had seen. Basically, she was waiting for her husband one night about 3 weeks ago and that she saw Mike and Sally, she didn't elaborate as to what she saw. But she did say that she didn't even tell her husband so she didn't know how anyone knew unless the security cameras saw her standing outside the same time whatever happened. Then the conversation ended because I had a customer at my register."

37) Based on their employee interviews and the written statements cited in Findings of Fact – the Merits, numbered 30 through 36, Cornehlisen and Woodard concluded Bagg and Complainant continued to spread the same rumor about Daulton and Montgomery after they were told to stop. Cornehlisen and Woodard believed the two conspired to perpetrate and perpetuate the rumor and were more culpable than Meek, who Cornehlisen believed had been "duped" by Complainant and Bagg.

38) On November 2, 1997, Cornehlisen terminated Complainant and Bagg for "violation of company policy" and "creating a hostile work environment" by continuing to spread the rumor about Daulton and Montgomery. Meek was not disciplined or terminated for her part in perpetuating the rumor.

39) During Complainant's exit interview, Cornehlisen told Complainant she was being terminated because she and Bagg had continued to spread the rumor about Daulton and Montgomery despite being told to stop. Complainant signed the exit interview form on November 2, 1997.

40) Beverly Smith, an unemployment insurance adjudicator for the Oregon State Employment Department in Medford, Oregon, was assigned to administer Complainant's claim for unemployment benefits filed after Respondent terminated her employment. On November 19, 1997, Smith interviewed Complainant by telephone about the termination of her employment and the events preceding the termination. Smith documented Complainant's statement on her computer at the same time Complainant related her story. The statement in its entirety says:

"I got a call from a coworker, Hope. She told me she had witnessed managers in the parking lot embracing. She didn't say who [sic]. I told her that Chris (my boyfriend) had seen the same thing. She was upset. I went to work and was in the breakroom and support mgr. Ray was in there and some other associates were talking about Mike and Sally in the parking lot. Someone asked Ray if he knew about the rumor and he said, which one? There are at least 6 rumors flying around this place. They said, you know, Mike and Sally. He said we are supposed to keep that one hush hush. Then he proceeded to sit down and talk about it quietly to one of the associates. Several hrs later he asked people to sign statements about what they had heard. I didn't feel that was right since he had participated in it. I told my manager, Blaine. He said I should talk w/Mike, the store mgr. I didn't feel that was right since he was the one people were talking about. Everyone in the store was talking about it. On 10/29 the district mgr, Tom came in and wanted to talk with me about what I knew. I told him. I told everything I knew. He asked where Chris (my boyfriend and coworker) fit in. I said he saw the same thing. I told him that Hope had called me. He asked me about Chris and I told him that Chris had been at my house when Hope called. He asked whether my divorce was finalized. I told him not yet. He clearly didn't think it was right I was dating Chris before my divorce was finalized. He wanted to know if we were intimate. I told him I didn't feel it was any of his business.

"Later, Blaine who is a mgr. told me that mgmt didn't agree with the fact that I was still legally married and dating. He said that they were going to blame Chris and myself for the rumors and would probably be fired. That's why when they fired me I wasn't surprised. Tom told me that I was let go for telling a lie about a manager gossiping. They couldn't find that it had happened so I created a hostile work environment.

"I never had any warning other than what Blaine told me was going to happen to me. I have called corporate office, spoke with Jane. She told me that it was Wal-Mart managers who created a hostile work environment by making people fear for their jobs and they were going to

look into it and see that something gets done. I have filed a discrimination suit. They didn't even pay us for two weeks after escorting us out."

41) For several reasons, the forum finds Complainant's testimony on the material allegations not credible. On key points, her testimony was internally inconsistent, contradicted by other more credible testimony or by her prior statements to the Agency and other entities, and, in some instances, logically incredible. For example, she testified unequivocally that Hope Meek called her late one evening and was very upset because she had witnessed Daulton and Montgomery kissing in the parking lot. She further stated Bagg was present when Meek called and had related having observed the same details as Meek. On cross-examination she reiterated positively that Meek "described what she had seen and named names." When Respondent's counsel pointed out to her that she had told Agency investigator Martindale in a March 1998 interview that Meek did not give her details or name names, Complainant claimed confusion and, after reviewing her statement, said she couldn't recall making that statement to the investigator. She went on to claim, consistent with her statement to investigator Martindale, that Bagg had not discussed the alleged parking lot incident with her on the evening Meek called. She became "confused" again when Respondent's counsel pointed out that her testimony was now at odds with her earlier direct testimony that Bagg had given her details that evening about his purported observations in the parking lot. Neither version about what she was told by Bagg or Meek is consistent with the statement she gave during her interview with the Employment Department's adjudicator, Beverly Smith: "I got a call from a co-worker, Hope. She told me she had witnessed managers in the parking lot embracing. She didn't say who [*sic*]. I told her that Chris, my boyfriend, had seen the same thing." She explained the discrepancies in her testimony by stating "there are details and there are detail details." She further explained she had received the "detail details" from Kim

Manbeck who had come into the store after finishing an ice cream cone at McDonald's and had just witnessed the kissing incident. None of the versions, however, are independently corroborated by Meek. Meek's only testimony about a conversation with Complainant was that she believed Complainant had asked her "on the phone" about the alleged parking lot incident. Although there was opportunity to do so, Meek did not testify about who initiated the call, when it took place, or what she told Complainant in response to her inquiry.

42) In addition, Complainant's story changed significantly over time. In her initial complaint filed with the Agency, the only harassing comment she attributed to district manager, Tom Cornehlson, was an alleged question about whether her relationship with Bagg went beyond Bagg providing her with a ride home. In the Agency's Specific Charges, however, the only harassing comment attributed to Cornehlson was a question to Complainant about whether her divorce was final and if it was appropriate for her to be dating Bagg while still legally married. During her testimony, however, Complainant testified that during the interview with Cornehlson she was questioned about her sexual relationship with Bagg and that he justified his inquiry by telling her that an intimate relationship with Bagg "reflected poorly on Wal-Mart's family values" because she was a married woman. She also stated she said nothing in response to Cornehlson's alleged questioning. She told Beverly Smith of the Employment Department, however, that when Cornehlson asked if she were intimate with Bagg she told him it was none of his business. For reasons stated elsewhere herein, Woodard and Cornehlson's testimony that Cornehlson did not ask Complainant any questions about Bagg during the October 25 interview or any other time was more credible and the forum did not believe Complainant's shifting and contradictory allegations about Cornehlson's alleged comments or questions.

43) Regarding her termination, Complainant testified Cornehlson and Woodard gave her no reasons for her termination and that during the exit interview she was confused about what was happening and did not understand the papers they had asked her to sign. In her statement to Beverly Smith, however, she stated she wasn't surprised she was fired because Blaine Woodard had told her beforehand she and Bagg would probably be fired because "they were going to blame Chris and myself for the rumors * * *." She also told Smith that Cornehlson told her she was being let go "for telling a lie about a manager gossiping. They couldn't find that it had happened so I created a hostile work environment." There was no testimony from Complainant that Woodard had told her beforehand she was going to be blamed for the rumors and probably fired.

44) Complainant's testimony regarding her mental suffering was exaggerated, internally inconsistent, and, for the most part, not believable. For example, she testified to having to rely solely on her family for food before she received food stamps and that her family and friends were "constantly bringing food" and other necessities. Later, she testified her young children, ages three and four years old, had no food to eat for a month before she received food stamps. When pressed on cross-examination, she emphatically stated her children did not eat for one month and that she was too proud to ask her family for anything because they had their own financial problems. Her unbelievable and self-serving testimony in this regard was characteristic of her testimony as a whole.

45) Finally, Complainant provided testimony that cast doubt on her ability to recollect anything pertaining to her claims. Explaining her inability to recall anything she told the Agency investigator in 1998, particularly when it conflicted with her direct testimony, Complainant stated: "I can't remember topics of conversation from last night

at work much less 1998.” For the reasons stated herein, the forum did not believe Complainant’s testimony unless it was corroborated by other credible testimony.

46) Blaine Woodard was the most credible witness with knowledge of material facts. He has not worked for Respondent since November 1997 and his testimony reflected no bias toward his former employer. He showed no animosity toward Complainant and Complainant herself acknowledged he was always kind and supportive of her during her employment with Respondent. Woodard’s testimony was straightforward with no embellishment. He was confident regarding the events that had taken place but readily admitted he could not recall exact dates on which certain events occurred. The forum relied entirely on Woodard’s testimony regarding the rumor investigation, Respondent’s reasons for terminating Complainant, and every other material fact for which he had knowledge.

47) Tom Cornehlson’s testimony was, in some respects, unreliable because of his inability to recollect certain material events and inconsistencies with other credible testimony. He had a faulty memory due, in part, to his brief role in the investigation and Complainant’s termination and his reliance primarily on Blaine Woodard to obtain witness statements and coordinate interviews. In addition, he did not take notes during all of the interviews and those he did take were selective and sparse and he was unable to satisfactorily recall the substance of those interviews. He denied a friendship with Daulton even though Daulton testified credibly that he considered Cornehlson his friend at the time the rumor started. He claimed to have interviewed Sally Montgomery though she credibly testified she was never interviewed by anyone. He has worked for Respondent for 25 years and his bias was demonstrated when he was reluctant to make any statement that would reflect poorly on Respondent or the harassment investigation he conducted with Woodard. His testimony that he did not ask

Complainant questions about her relationship with Bagg during his interviews was credible, however, and bolstered by Woodard's credible testimony. The forum has accepted Cornehlisen's testimony only where it was inherently credible or corroborated by credible testimony or inference.

48) Kim Powell's testimony was not credible.ⁱ Powell acknowledged she was the author of the letter sent to District Manager Tom Cornehlisen and signed "Hattie Joens." She claimed she wrote the letter as a result of a phone call from a store employee who said, "You're not going to believe what is going on." She testified that after the phone call she decided to write the letter to "squelch everything that was going on so that no would lose [his or her] job." She claimed to have lied about her name and age in the letter because she was a regular store customer, knew Montgomery well and "absolutely love[d] her," and thought if she sent the letter "anonymously" it would help restore order to the workplace. Powell also claimed she witnessed the alleged kissing incident in the parking lot on a Tuesday around 7:30 p.m. while finishing an ice cream cone from McDonald's. She claimed that immediately afterward she went inside the store and told Bagg and other employees about her purported observation. Powell's story was puzzling and illogical and her motives questionable. As a result, the forum has discredited her statements in the "Hattie Joens" letter and her testimony that she observed Daulton and Montgomery romantically involved in the parking lot.

49) Hope Meek's testimony was not wholly credible. Although she appeared straightforward and direct, her testimony was internally inconsistent and, in the end, did not substantiate the workplace rumor that was circulating in the Medford store. She initially insisted she told no one about her observation in the parking lot until she was called in for an interview with Cornehlisen. Her later testimony was that she had talked

to three others before she was called in to talk to Cornehlisen – Complainant, Matthew Medina, and Rebecca Medina. When testifying about her purported observation she was vague and stated she saw only “their arms on each other.” She had the opportunity to go into detail about what she observed. Because she did not, the forum concludes she either did not see anything or she did not accurately testify about what she did see. Moreover, evidence suggests Meek was not even in the parking lot at the time of the alleged incident. Meek testified she was waiting for her husband’s shift to end when she saw Daulton and Montgomery about 7:30 in the evening. She also testified she usually waited for her husband because they had only one car and lived an hour away from the store, but that the longest she ever waited was two or three hours maximum. Meek’s time card for that day, however, shows she clocked out at 2:10 p.m. Her husband’s time card shows he clocked out at 8:27 p.m. that day. By her testimony, she had already been waiting for over five hours by the time she observed Daulton and Montgomery and still had another hour to wait before her husband clocked out. The forum, consequently, has given little weight to Meek’s testimony and none to her testimony regarding her observation in the parking lot.

50) Michael Daulton’s testimony was generally credible. He answered all questions in a straightforward manner with no embellishment. Although he still works for Respondent, Daulton did not appear to slant his testimony to either favor or harm either Respondent or Complainant. He readily acknowledged he considered Cornehlisen a friend who was influential in Respondent’s decision to make Daulton the store manager. He also acknowledged asking Complainant about her relationship with Bagg as a result of her comments about Bagg during the Bass sexual harassment investigation. The forum has credited his testimony in its entirety.

51) Lorene Miller's testimony was generally credible. Though her initial written statements to Respondent in preparation for litigation were substantially the same as her testimony, she acknowledged she initially omitted her comment about how being "almost divorced is like being almost pregnant" from the earlier written statements. She voluntarily acknowledged that comment on direct examination, however, and testified candidly that she held a strong opinion regarding adulterous relationships. Her characterization of her encounter with Complainant and Bagg was more believable than Complainant's version and the forum relied on her testimony to determine whether the comment was related to Complainant's marital status.

52) The testimony of Nancy Mahan, Johanna Johnson, Rebecca Medina, Matthew Medina, Judy Frazier, Ray Volkers, and Peter Martindale was credible. Even given individual biases, for instance, Frazier was Complainant's mother, the testimony of each appeared to be honestly conveyed as to what he or she had perceived at the time relevant events occurred.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Wal-Mart Stores East was a foreign corporation operating retail establishments under the assumed business name of Wal-Mart, and engaged the personal services of one or more persons in the state of Oregon.

2) At all times material, Respondent employed Complainant at the Wal-Mart store located in Medford, Oregon.

3) At all times material, Complainant was a married female.

4) At all times material, Complainant was dating an unmarried male co-worker.

5) At all times material, Respondent had in place a written policy prohibiting supervisory employees from becoming romantically involved with non-supervisory employees. Respondent's policy did not prohibit romantic relationships between non-

supervisory employees. Respondent's policy prohibited inappropriate conduct in the workplace, romantic or otherwise, irrespective of job title and marital status

6) At all times material, Respondent had in place a written policy prohibiting harassment in the workplace, including gossiping or spreading rumors about other co-workers, that would create an offensive or hostile work environment.

7) Complainant was not harassed because of her marital status or the marital status of the co-worker she was dating.

8) Respondent discharged Complainant on November 2, 1997, because she created a hostile work environment by continuing to gossip and spread rumors about two other employees after she was told to stop, in violation of Respondent's written policy.

CONCLUSIONS OF LAW

1) At all material times, Respondent Wal-Mart Stores East dba Wal-Mart was an employer subject to the provisions of ORS 659.010 to ORS 659.110.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659.022; ORS 659.040; ORS 659.050.

3) The actions, inaction, statements and motivations of Tom Cornehlson, Blaine Woodard, and Michael Daulton described herein are properly imputed to Respondent.

4) ORS 659.030(1) states, in pertinent part:

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

" * * * * *

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

Former OAR 839-05-010(3) stated:

“Harassment on the basis of protected class is an unlawful employment practice if the employer knew or should have known both of the harassment and that it was unwelcome. Unwelcome conduct of a verbal or physical nature relating to employee’s protected class is unlawful when such conduct is directed toward an individual because of the individual’s protected class and

- (a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment; or
- (b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- (c) Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.
- (d) The standard for determining harassment will be what a reasonable person would conclude if placed in the circumstances of the person alleging harassment.
- (e) In cases of sexual harassment see also OAR 839-07-550(4).”

Current OAR 839-005-0010(4) states, in pertinent part:

“Harassment in employment based on an individual’s protected class is a type of intentional unlawful discrimination. In cases of alleged unlawful sexual harassment see OAR 839-005-0030.

“(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when substantial evidence of the elements of intentional discrimination, as described in section (1) of this rule, is shown and:

“(A) Such conduct is sufficiently severe or pervasive to have the purpose of effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment[.] * * *

“(a) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.”

“ * * * * *

“(f) Harassment by Coworkers or Agents: An employer is liable for harassment by the employer’s employees or agents who do not have immediate or successively higher authority over the complaining individual when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.”

Respondent did not subject Complainant to discriminatory treatment in terms and conditions of her employment because of her marital status and the marital status of the co-worker with whom she associated and did not violate ORS 659.030(1)(b).

5) ORS 659.030(1) states, 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 * * * marital status, * * * to * * * discharge from employment such individual. * * *”

Respondent did not discharge Complainant due to her marital status and the marital status of the co-worker with whom she associated and did not violate ORS 659.030(1)(a).

6) Under ORS 659.060(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

In its Specific Charges, the Agency alleged “Complainant’s superiors at Respondent” harassed Complainant about her relationship with a single male co-worker because of her status as a married woman and his status as an unmarried man. The Agency characterized certain comments made by personnel manager Lorene Miller, an assistant manager from the garden center, store manager Michael Daulton, and district manager Tom Cornehlson, as harassment so severe and pervasive as to subject Complainant to a hostile, intimidating and offensive work environment. Additionally, the Agency alleged Respondent terminated Complainant’s employment based on her marital status and the marital status of the co-worker she was dating. The evidence in the record does not support the Agency’s allegations.

HOSTILE ENVIRONMENT

With one exception, the forum finds the alleged comments were not directed toward Complainant because of her marital status. The comment that was arguably related to her marital status was not severe or pervasive enough to create a hostile, intimidating, or offensive work environment as a matter of law.

LORENE MILLER'S ALLEGED COMMENT

Undisputed evidence shows that during a brief casual encounter with Bagg and Complainant, Miller remarked to Bagg that Complainant "is a married woman, you know," and to Complainant that "being almost divorced is like being almost pregnant, you're not until you are." Miller was an hourly employee with some low-level management duties and was in no position to affect Complainant's employment status with Respondent.

OAR 839-005-0010(4)(f) addresses harassment by co-workers and provides:

"An employer is liable for harassment by the employer's employees or agents who do not have immediate or successively higher authority over the complaining individual when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action."

There is no credible evidence that Miller's comment to Bagg and Complainant was made for any reason other than in jest during a chance meeting. While Complainant may have perceived the comment as moralistic censure, it was not severe enough that she felt compelled to tell anyone about it nor did she file a complaint even though she was aware of and had previously made use of Respondent's harassment procedures. There were no witnesses to the comment and there is no evidence Miller continued to make remarks about or pass judgment on Complainant's relationship with Bagg. The forum concludes that, although Miller's comment was related to

Complainant's protected class, it was not severe or pervasive enough to create a hostile, intimidating, and offensive work environment.

ASSISTANT MANAGER'S ALLEGED COMMENT

Complainant testified that, "Sherry," an assistant manager in the Medford store's garden center, told her that as long as her boyfriend worked there Complainant could not be transferred back to the garden center. Complainant also testified that, at a later date, Sherry asked Complainant to work in the garden center during another employee's lunch hour and reminded her "there are cameras back there and you are working" and then admonished Complainant and Bagg to "behave themselves." Even if the forum believes Complainant's uncorroborated testimony that Sherry, a purported supervisor with temporary immediate or successively higher authority over Complainant, made the comments, the Agency produced no evidence showing the comments were made because of the marital status of Bagg and Complainant. Considering Respondent's policy prohibiting romantic conduct in the workplace, irrespective of an employee's marital status, the forum concludes the purported comments do not create an inference they were directed toward Complainant because of her marital status and the marital status of the co-worker she was admittedly dating.

STORE MANAGER MICHAEL DAULTON'S ALLEGED COMMENT

Complainant testified that during an interview related to a sexual harassment investigation involving Complainant and another employee, Daulton started to ask her if she was dating Bagg and then said, "Never mind, I don't want to go there." Daulton acknowledged asking Complainant if she was dating Bagg, but testified credibly that his query had nothing to do with Complainant's marital status or that of Bagg's. There is no discriminatory animus inherent in Daulton's comment and the Agency produced no evidence whatsoever showing his comment to Complainant was motivated by a

perception that she was engaging in an adulterous relationship. The forum has concluded, therefore, that Daulton's comment was not related to Complainant's or Bagg's marital status.

DISTRICT MANAGER TOM CORNEHLSSEN'S ALLEGED COMMENTS

Credible evidence in the record supports Cornehlssen's testimony that at no time did he inquire or make any comments about Complainant's relationship with Bagg. Blaine Woodard was present each time Cornehlssen interviewed Complainant and he credibly and emphatically testified the discussions were entirely professional and devoid of any mention of Complainant's relationship with Bagg. Moreover, even without Woodard's credible testimony, the forum found Complainant's shifting and contradictory allegations that Cornehlssen asked her discriminatory questions self-serving and unbelievable. The burden of proof rests with the Agency and it did not carry that burden. The forum cannot hold Respondent liable for comments attributed to Cornehlssen that he did not make.

TERMINATION

In order to prevail, the Agency must show by a preponderance of the credible evidence that Complainant's protected class, her marital status, was the reason for her termination. The Agency, at all times, has the burden of proving Complainant was terminated for unlawful reasons. The Agency's theory is that but for Complainant's marital status, as it related to her relationship with an unmarried male co-worker, she would not have been terminated. To support its theory, the Agency relied on the alleged comments made by Respondent's management as demonstrating a corporate culture that is intolerant of any perceived adulterous relationships in the workplace. In essence, the Agency argues that Respondent's intolerance for adulterous relationships

was the motive for terminating Complainant and the effect was discrimination on the basis of marital status.

The Agency presented no evidence, however, that Complainant would not have been fired for violating the company's harassment policy had she been unmarried and having a romantic relationship with the same co-worker. As noted elsewhere in this opinion, the alleged comments made to her, with one exception, analyzed individually or collectively, do not reveal a discriminatory motive. The one exception proved to be an isolated observation by someone who had no authority over Complainant and was not involved in any way with the decision to terminate Complainant. There is no direct or circumstantial evidence to substantiate the Agency's theory.

The Agency argued, alternatively, Respondent's reason for terminating Complainant was a pretext for the discriminatory reason because Respondent knew Hope Meek had violated the same harassment policy as Complainant and did not terminate her. To establish a case of different or unequal treatment, OAR 839-005-0010 provides, in pertinent part:

"There must be substantial evidence that the complainant was harmed by an action of the respondent under circumstances that make it appear that the respondent treated the complainant differently than comparably situated individuals who were not members of the complainant's protected class. * * *"

Though she was treated differently, evidence shows Meek was a member of Complainant's protected class and, therefore, not a proper comparator. Moreover, Respondent articulated a believable reason, right or wrong, why Meek was not terminated for violating company policy. Woodard testified credibly that a pattern emerged during the investigation that made it obvious to management Complainant and Bagg were the principals responsible for perpetuating the rumor and Meek appeared less culpable. Complainant's pattern of inconsistent and exaggerated testimony during hearing only served to bolster Woodard's statements. The Agency did not prove by a

preponderance of the evidence that Complainant would not have been terminated for violating Respondent's harassment policy had she been unmarried and dating an unmarried co-worker. The forum concludes, therefore, Complainant's marital status played no role in her termination and Respondent did not violate the provisions of ORS 659.030(1)(a).

EXCEPTIONS

The Agency excepts to the introductory portion of the proposed order, several factual findings, certain credibility findings, and the opinion as it pertains to the forum's analysis of the individual elements comprising a hostile work environment and the forum's conclusion that Complainant's termination was not based on her protected class. In response to the Agency's exceptions, the introductory portion of the order has been modified to correctly list Respondent's witnesses. All other exceptions are addressed below.

A. Findings of Fact – The Merits

Finding of Fact – 7: There is no credible evidence to support the Agency's contention that Complainant discussed her marital troubles or TRO with any supervisors other than Blaine Woodard. The Agency's exception is denied.

Finding of Fact – 10: This finding of fact has been modified to more accurately reflect Woodard's testimony that "a half dozen" female employees complained about Bass and that he was uncertain whether anyone other than Complainant filed a formal complaint.

B. Credibility Findings

The Agency's exceptions to the ALJ's credibility findings, although extensive, are without merit. Not only is each credibility finding supported by substantial evidence in the record, but the ultimate facts found in this matter rely principally on the testimony of

the one witness whose credibility the Agency does not question, Blaine Woodard. The Agency's exceptions to the credibility findings are denied.

C. Opinion

1. Hostile Work Environment

The Agency asserts the forum erroneously analyzed each comment alleged to comprise a hostile work environment discretely and without considering the context of each in the aggregate. As such, the Agency posits, the forum reached the wrong conclusion as to whether the comments constituted a hostile work environment. To the contrary, each comment was evaluated to determine first whether the comment was related to Complainant's marital status and, if so, whether the comment was severe or pervasive enough to create a hostile work environment. Only one comment was found to be related to Complainant's protected class and, thus, subject to the "severe or pervasive" analysis. Because the other comments, evaluated singly and in context with each other, did not meet the threshold criterion of being related to Complainant's marital status, it was not necessary to take them into account when determining whether the one comment created a hostile work environment. The Agency's analysis of each comment relies on facts not in evidence, misstatements of the facts in evidence, and on testimony the forum has found not credible. The Agency's exception on this issue is denied.

2. Termination Based on Marital Status

The Agency's exception to the forum's conclusion regarding Complainant's termination cites three issues that the Agency asserts affect the credibility of Respondent's reason for terminating Complainant: (1) Respondent's failure to investigate the truth of the rumor circulated in the workplace in violation of its own policies, (2) Respondent's failure to terminate another employee who circulated the

rumor, and (3) Respondent's denial that Complainant's relationship with employee Bagg was a factor in its decision to terminate Complainant. As to the first issue, the Agency's assertion that "there were allegations of inappropriate fraternization between Daulton and Montgomery" that Respondent did not investigate is not supported by evidence in the record. In fact, evidence shows no one ever complained to management about Daulton and Montgomery. The investigation that took place began with Daulton's complaint to management that false rumors were being circulated in the workplace about him. After investigating Daulton's complaint, including interviewing two purported eyewitnesses who did not affirm that Daulton and Montgomery were "kissing and hugging" in the parking lot, Respondent found no justification for the rumors. Evidence in the record supports that conclusion. Second, the Agency asserts the forum erred by not determining Complainant was treated differently than employee Meek based on Complainant's marital status. While acknowledging that both claimed the same marital status, the Agency distinguishes Complainant's situation by asserting that "Meek was not having a relationship with someone other than her husband so was not in the same position as Complainant." There is no evidence in the record to support that statement and, even if true, its relevance is dubious. The Agency has alleged Respondent treated Complainant differently because she is married and a person she associated with in a social context is not. The burden is on the Agency to prove its allegation and it has not done so. Finally, Respondent acknowledged that it believed Complainant and Bagg had conspired to spread false rumors about Daulton and Montgomery and both were terminated on that basis. While the evidence does show, and Respondent does not deny, that Complainant's social relationship with Bagg influenced Respondent's belief the two were acting in concert when spreading the rumors, it does not establish that

each one's particular marital status played any role in Respondent's decision to terminate them.

ORDER

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

ⁱ On cross-examination, Powell admitted that at times material to this proceeding she was known as Kim Manbeck.