

In the Matter of
CHARLES EDWARD MINOR

Case No. 96-09

Final Order of Commissioner Brad Avakian

Issued March 31, 2010

SYNOPSIS

The Agency established by a preponderance of credible evidence that Respondent, a male, subjected Complainant, a female, to offensive and unwelcome sexual conduct that created a hostile and intimidating work environment, in violation of ORS 659A.030(1)(b), then constructively discharged Complainant in violation of ORS 659A.030(1)(a). The forum awarded Complainant \$50,000 for emotional and mental suffering damages. ORS 659A.030; OAR 839-005-0030; OAR 839-005-0035.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 9-10, 2010, at the Eugene office of the Bureau of Labor and Industries office located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick A. Plaza, an employee of the Agency. Complainant Stephanie Head was present throughout the hearing and was not represented by counsel. Respondent Charles Edward Minor ("Respondent") represented himself and was present throughout the hearing.

The Agency called the following witnesses: Complainant; Eric Yates, senior investigator, BOLI Civil Rights Division; Michelle Boyd, Complainant's co-worker; Amy Anderson, Complainant's friend; Eric Pardee, City of Springfield police officer; and Respondent Charles Edward Minor;

Respondent called himself as a witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-15 (submitted or generated prior to hearing); and
- b) Agency exhibits A-1 through A-14 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, 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 May 27, 2008, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent Charles Minor dba Phoenix Espresso. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued a Notice of Substantial Evidence Determination on October 16, 2008.

2) On September 1, 2009, the Agency issued Formal Charges alleging that:

(a) Respondent unlawfully discriminated against Complainant based on her sex through his words and actions by creating a workplace environment that was hostile, intimidating, or offensive to Complainant, in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b) and (2);

(b) Respondent constructively discharged Complainant based on her gender in violation of ORS 659A.030(1)(a) and OAR 839-005-0035 by intentionally creating or intentionally maintaining discriminatory working conditions related to Complainant's gender and physically assaulting her, thereby creating working conditions so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them.

The Formal Charges sought lost wages, "in an amount to be proven at hearing," and "at least \$50,000" in damages for "emotional, mental, and physical suffering."

3) On September 28, 2009, Respondent filed a hand-written answer to the Formal Charges.

4) On October 5, 2009, the Agency filed a motion for default based on Respondent's purported failure to file a complete answer to the allegations in the Formal Charges and failure to request a hearing in the answer that Respondent did file.

5) On October 12, 2009, the Agency moved to withdraw its motion for default and the ALJ granted the Agency's motion.

6) On October 21, 2009, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and a brief statement of the elements of the claim and any damage calculations (for the Agency only). The forum ordered the participants to submit case summaries by January 29, 2010, and notified them of the possible sanctions for failure to comply with the case summary order. The ALJ also enclosed a form designed to assist respondents who are not represented by an attorney in filing a summary.

7) On January 19, 2010, the Agency moved to amend the Formal Charges to correctly identify the location of Respondent's business as 3650 Main Street in Springfield, Oregon, as admitted by Respondent in his answer to the Formal Charges. The ALJ orally granted the Agency's motion in his opening statement at the hearing.

8) On January 29, 2010, the Agency filed a case summary. Respondent did not file a case summary.

9) On February 4, 2010, the Agency filed a motion in which it asked the forum to take judicial notice of ORS 135.335 and 135.345 pertaining to pleadings in criminal matters, and that judgment following entry of a no contest plea is a conviction of

the offense to which the plea is entered. The ALJ orally granted the Agency's motion in his opening statement at the hearing.

10) At the start of the hearing, the ALJ orally 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.

11) At hearing, Respondent and the Agency stipulated that Complainant worked 12 hours for Respondent for which she was not paid.

12) On March 8, 2010, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Charles Edward Minor owned and operated Phoenix Espresso, a drive-through coffee cart located at 3650 Main Street in Springfield, Oregon. Respondent, a man in his late 50s, has three bachelor degrees and a masters degree.

2) On August 11, 2007, Complainant, a female, applied for work with Respondent as a barista at Phoenix Espresso after Alyssa Furlong, a female friend of hers and an employee of Respondent, told her that Respondent was looking to hire someone. Respondent interviewed and hired her and agreed to pay her \$8 per hour, plus tips. Respondent also told Complainant that he would not pay her until she had been trained "to his methods."

3) Complainant was 21 years old when Respondent hired her. Her previous work experience consisted of doing part time child care for some friends during the previous three years.

4) Complainant began working for Respondent on the same day she applied for work and worked a little more than two hours that day.

5) Complainant worked three hours a day for Respondent on August 12, 13, and 14, 2007. Respondent considered her to be in training on August 11-14 and did not pay her for any of the 11 total hours she worked on those days. Respondent also took half of an estimated \$40 in total tips that Complainant received on those days.

6) On August 15, 2007, Complainant had to have all four of her wisdom teeth extracted. Her recovery was complicated because all four teeth were impacted and she developed a dry socket during her recovery. As a consequence, she did not return to work until August 27.

7) Complainant's mouth was still very tender on August 27. From August 27 to August 30, Complainant worked the following hours: August 27 - 4 hours; August 28 - 4 hours; August 29 - 4 hours; August 30 - 5 hours.

8) During Complainant's employment, Respondent engaged in the following conduct:

- Telling Complainant he had hired Alyssa because of her "juicy boobs" and he liked girls with bigger chests.
- Telling Complainant she could wear low cut shirts and hang out more at the window to expose her cleavage to customers and she would make more tips.
- Talking to Complainant about an attractive woman who was a customer and saying he would like to take her to the opera and then "wreck her," a statement Complainant interpreted as meaning that Respondent wanted to take the woman to the opera and then have sex with her.
- After she observed wasps in Respondent's coffee cart, Complainant told Respondent that she was allergic to bee stings and carried an epinephrine shot in her purse. Respondent told her "I would put a long needle in your thigh" and that he would be glad to give her "mouth to mouth," at the same time winking and raising his eyebrows. Respondent repeated later "I can give you mouth to mouth."
- Respondent asked Complainant for a hug after his mother died on August 28. After that, she felt she could not leave work until she had given him a hug. If she did not hug Respondent before she left work for the day, he would tell her "hey, get back here and give me a hug." Respondent's hugs were "full frontal."

- On one occasion, Complainant spilled some coffee beans on the floor. When she bent to pick them up, Respondent, who was watching her, told her “you like bending over, don’t you.”

9) Respondent’s comments to Complainant that she could wear low cut shirts and lean out the windows to expose her cleavage to customers to get more tips made Complainant feel “scared” and “embarrassed,” as Complainant has been “kind of embarrassed of the shape of my body for a long time and for someone to claim I could use it as a tool like that was disgusting and it put me on edge.”

10) Respondent’s comment to Complainant about “bending over” made Complainant feel “awful,” “disgusting,” “sickened,” and “scared that I was alone in there with him.”

11) Complainant mostly worked by herself or with Respondent, although Furlong helped train her. Respondent’s conduct described in Finding of Fact #8 – The Merits occurred when Complainant and Respondent were alone together. Some of Respondent’s comments described in Finding of Fact #8 – The Merits were made when Complainant was talking on her cell phone to her friend Amy Anderson and were overheard by Anderson.

12) Complainant felt that Respondent was always staring at her and assessing her appearance, which made her feel “disgusting.”

13) Complainant complained to her good friend Amy Anderson about Respondent’s conduct.

14) Complainant did not complain to Respondent about his behavior because she was afraid she would lose her job.

15) Respondent also told Furlong that she should hang more at the window and show more cleavage and she would make more tips, and Furlong told this to Complainant.

16) Michelle Boyd, another young woman, also worked for Respondent as a barista during Complainant's employment with Respondent. When she worked with Respondent, he would make hand gestures about female customer's bodies and wanting to take them home. On multiple occasions, Respondent told her that she could wear a low-cut shirt and act flirtatious like the baristas at Dutch Boy, another drive-through coffee cart, and that would help business. Boyd felt that Respondent "stared" at her chest, which made her feel uncomfortable. Respondent regularly asked Boyd for a hug and almost always did so at the end of her shift, sometimes pursuing her in the parking lot while Boyd was walking to her car.

17) On August 30, 2007, Respondent hit Complainant on the head with his fist when she forgot to empty the "portafilter." Complainant turned and told Respondent not to hit her. Respondent made a remark like "Oh yeah, does that hurt?" and hit her again on her head with his fist as she was walking away from him.

18) Complainant's teeth hit together the first time that Respondent hit her. Her teeth were not completely healed from her surgery and it was very painful for her. The second time he hit her was also very painful, and she began crying. She worked for another hour, finished her shift, got paid and left in tears. Respondent did not pay her for her last hour of work, but paid her in full in cash for the other 12 hours of work she had performed from August 27-August 30.

19) When Complainant left work, she telephoned her good friend Amy Anderson while crying, hyperventilating, and barely able to talk. Complainant told Anderson that Respondent had hit her on the head and that she was concerned for her safety. Anderson advised Complainant to call the police, then come to Anderson's house.

20) After talking with Anderson, Complainant called her father, who also advised her to report the incident to the police and said he would meet her at the police station. Complainant went to the Springfield police station, where she met her father and reported the incident to the police at 3:00 p.m. on August 30, 2007, and filed an incident report in which she alleged that Respondent had physically harassed her. Afterwards, she went to Anderson's house. When she arrived at Andersen's house, Complainant was very shaken up and had "large red bags under her eyes," her face was "splotchy," and she was still crying.

21) On August 30, 2007, Springfield Police officer Eric Pardee interviewed Complainant. Pardee took notes during the interview that summarized Complainant's statements. His notes included the following observations:

"Head told me that her employer, Charles Minor, had hit her while she was at work. Minor owns Phoenix Espresso, where Head recently began working for him. Head said that Minor became upset about the way she had been making a drink, and he hit her on the top of her head while she was facing away from him. The blow caused Head's teeth to clank together, and she said it was painful. After being hit, Head immediately said, 'Ouch, hurt! Don't do that again.' Minor responded by saying either, 'Oh, you think that hurt? or that hurts huh?' and he hit her a second time on the top of her head. Head said both blows hurt, and she thought Minor had struck her with a closed fist. Head remained at work to finish her shift, which lasted about another hour. Head reported the incident to Police after speaking with her parents. Head gave me a set of her business keys to Phoenix Espresso and asked that I return them to Minor."

22) During the interview, Complainant also told Pardee that Respondent had told her that she should expose her breasts more and that she should show more cleavage and act more flirtatious towards the clientele to increase sales. Complainant told Pardee that she wanted no further contact with Respondent and to tell him that did not want him to contact her "in any way, shape or form in the future" and to tell him that she was quitting her job.

23) Complainant quit her job because she did not feel safe working with Respondent.

24) After interviewing Complainant, Pardee visited Respondent at Phoenix Espresso. Pardee summarized his visit to Respondent in notes he made later that day that included the following observations:

“I told Minor that I was there to speak with him about what had occurred between he and Head today. I read Minor Miranda Warning, asked him if he understood each of his rights, and he said, ‘Yes.’ Minor told me there hadn’t been any problems between himself and Head today. I informed Minor of the complaint Head had made. I asked Minor if he had hit Head today, and Minor said, ‘Not that I recall.’ I told Minor of the specific statements Head had reported that were spoken by herself and Minor during the incident. Minor told me he didn’t say anything like Head was reporting. I again asked Minor if he had struck Head twice in the head and Minor said, ‘I’m not saying that it didn’t happen, but I don’t remember it. I might have bopped her on the head, but it wasn’t with any malice.’”

25) Pardee then arrested Minor and took him to the Lane County Jail. The next day, Respondent’s case was docketed in the Springfield Municipal Court, with a note that Respondent was accused of a violation of the crime of “HARASSMENT” under ORS 166.065 (a)(A).ⁱ On December 12, 2007, Respondent entered into a Diversion Agreement that was signed by himself, the Springfield City prosecutor, and the Springfield Municipal Court Judge. In the Agreement, Respondent pled “no contest” to the harassment charges brought by Complainant. As part of the Agreement, Respondent agreed “not to contest that Stephanie Head would say and testify that I did harass and annoy or alarm Stephanie Head by touching her head with intent in the City of Springfield on 8\30\07.” Respondent also agreed not have any contact with Complainant and to pay the Court \$542 in fees and fines.

26) After being hit by Respondent, Complainant quit looking for work and turned into a “recluse” for the next 1½ months. Her attitude towards strangers changed. When she was at Anderson’s house and people she didn’t know came into the house,

Complainant became “very jumpy.” Complainant was always “scared” and became “anxious about everything.” When Anderson has asked Complainant go with her to look for work, Complainant declined, saying that she did not want to be involved with another employer “that’s going to disrespect her personal space.” Before working for Respondent, Complainant and Anderson used to go out together, but at the time of the hearing Complainant still did not want to work or “go out” and “has turned into a little bit of an anxiety box.”

27) Complainant sought counseling at Lane Community College after leaving Respondent’s employment for the anxiety she had because of her experience working for Respondent. She attended four counseling sessions, once a week for four weeks.

28) Complainant has turned in a few resumes since she left Respondent’s employment, but has not seriously sought work. Complainant fears that she may be exposed to the same behavior again.

29) Complainant attended fall term at Lane Community College in 2007. To get to one of her classes, she had to walk past the school cafeteria that had a coffee stand. Because of her experience with Respondent, the smell of the coffee made her feel as though she was going to vomit, so to avoid the smell she began walking around the outside of the building to get to the elevator.

30) One evening after she quit Respondent’s employment, Complainant thought she saw Respondent’s vehicle following her, so she drove past her driveway. This frightened her.

31) Complainant still does not like driving past Respondent’s coffee booth and having to be in Respondent’s presence at the hearing made her very nervous. Complainant still gets anxious when she sees cars that look like Respondent’s. Complainant still gets nervous when she sees people who remind her of Respondent or

when she hears people talk like Respondent. Complainant still has nightmares about Respondent.

CREDIBILITY FINDINGS

32) Amy Anderson had a clear recollection of events and answered questions in a forthright manner. She was not impeached during cross-examination and the forum has credited her testimony in its entirety.

33) Eric Yates is an experienced investigator who is employed with BOLI's Civil Rights Division. Except for authenticating documents, his testimony consisted of reading typed interview notes taken or documents received in the course of his investigation, as he had no independent recollection of his interviews or the contents of those documents. The forum has credited his testimony in its entirety.

34) Eric Pardee had been a police officer with the Springfield Police Department for 8½ years at the time of the hearing and was the officer who arrested Respondent in response to Complainant's complaint of physical harassment. He had an independent recollection of the incident, testified in a forthright manner without referring to his notes, and was not impeached in any manner on cross-examination. The forum has filed credited his testimony in its entirety.

35) Michelle Boyd responded in a forthright manner to questions on direct and cross examination. She had a clear recollection of relevant events and was not impeached on cross examination. The forum has credited her testimony in its entirety.

36) Complainant had a clear recollection of events. Her testimony during direct examination and cross examination was specific, internally consistent, and consistent with earlier statements made to the Springfield police and to the Civil Rights Division. She was not impeached during cross examination. The forum has credited her testimony in its entirety.

37) Charles Minor was not a credible witness for several reasons.

First, he testified in an evasive manner. A prime example was his testimony concerning the Agency's allegation that he hit Complainant on the head. At the hearing, he testified "I don't believe I did" and "I don't recall," but never outright denied hitting her. He was similarly evasive when Pardee interviewed him on August 30, 2007, stating "I'm not saying that it didn't happen, but I don't remember it. I might have bopped her on the head, but it wasn't with any malice."

Second, some of his testimony was improbable. For example, his testimony that he did not recall entering into a Diversion Agreement with the Springfield Municipal Court or paying any money pursuant to that Agreement. He also testified that he was not even aware there was a Diversion Agreement until the week before the hearing. Even if that testimony was believed, it would demonstrate that Minor had such a poor memory that none of his testimony regarding the events during Complainant's employment could be relied upon.

Third, Respondent's answer was inconsistent with his testimony. In his answer, he denied that Complainant started work on August 11, that Complainant's last day of work was August 30, 2007, and that Complainant was at work on August 30, 2007. At the hearing, he ultimately admitted that she worked those dates and that she was at work on August 30, 2007.

Fourth, his testimony was contradicted by more credible evidence in the record. Respondent testified that Furlong and Boyd told him that Complainant was not getting the job done. In contrast, Boyd credibly testified that she never complained to Respondent about Complainant's work performance and that she had never worked with Complainant.

Fifth, Respondent produced a purple spiral bound notebook with the name “Stefanie” handwritten on the cover that he claimed contained Complainant’s handwriting and showed the hours and dates she had worked, with the last date of week showing as August 12, 2007. However, Complainant credibly denied that the handwriting was hers, pointing out that she never spelled her name as “Stefanie,” and Boyd credibly testified that the notebook showed the hours worked by another employee named “Stefanie” who worked for Respondent immediately prior to Complainant.ⁱⁱ

Based on all of the above, the forum has only credited Respondent’s testimony when it was corroborated by other credible evidence in the record.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent, Charles Edward Minor owned and operated Phoenix Espresso, a drive-through coffee cart located at 3650 Main Street in Springfield, Oregon.

2) On August 11, 2007, Complainant applied for work with Respondent as a barista and was hired at the wage rate of \$8 per hour. She began work that same day, working two hours, then worked three hours each day on August 12, 13, and 14.

3) Respondent did not pay Complainant for any of the hours that she worked on August 11-14 and also took half of an estimated \$40 in total tips that Complainant received on those days.

4) On August 15, 2007, Complainant had to have all four of her wisdom teeth extracted, and she did not return to work until August 27.

5) From August 27 to August 30, 2007, Complainant worked the following hours: August 27 - 4 hours; August 28 - 4 hours; August 29 - 4 hours; August 30 - 5 hours.

6) During Complainant's employment, Respondent engaged in the following conduct:

- Telling Complainant he had hired her friend Alyssa because of her "juicy boobs" and he liked girls with bigger chests.
- Telling Complainant she could wear low cut shirts and hang out more at the window to expose her cleavage to customers and she would make more tips.
- Talking to Complainant about an attractive woman who was a customer and saying he would like to take her to the opera and then "wreck her," a statement Complainant interpreted as meaning that Respondent wanted to take the woman to the opera and then have sex with her.
- After she observed wasps in the Respondent's coffee cart, Complainant told Respondent that she was allergic to bee stings and carried an epinephrine shot in her purse, Respondent told her "I would put him a long needle in your thigh" and he would be glad to give her "mouth to mouth," at the same time winking and raising his eyebrows. Respondent repeated later "I can give you mouth to mouth."
- Respondent asked Complainant for a hug after his mother died on August 28. After that, she felt she could not leave work until she had given him a hug. If she did not hug Respondent before she left work for the day, he would tell her "hey, get back here and give me a hug." Respondent's hugs were "full frontal."
- On one occasion, Complainant spilled some coffee beans on the floor. When she bent to pick them up, Respondent, who was watching her, told her "you like bending over, don't you."

7) Respondent's conduct made Complainant feel "scared," "embarrassed," "awful," "disgusting," "sickened," and "scared that I was alone in there with him."

8) On August 30, 2007, Respondent hit Complainant on the head with his fist when she forgot to empty the "portafilter." After Complainant objected, hit her again on her head with his fist as she was walking away from him. Respondent's blows caused Complainant considerable pain. She worked for another hour, finished her shift, got paid and left in tears.

9) Respondent did not pay Complainant for her last hour of work, but paid her in full in cash for the other 12 hours of work she had performed from August 27-August 30.

10) Complainant was extremely upset when she left work on August 30. Acting on the advice of her friend Anderson and her father, Complainant went to the Springfield Police and filed an incident report in which she alleged that Respondent had physically harassed her.

11) Complainant quit her job because she did not feel safe while working with Respondent.

12) As a result of Complainant's report, Respondent was arrested and taken to the Lane County Jail. On December 12, 2007, Respondent entered into a Diversion Agreement in which he pled "no contest" to the harassment charges brought by Complainant.

13) During her employment with Respondent and from the time she quit Respondent's employment until the time of hearing, Complainant experienced substantial emotional, mental, and physical suffering as a result of Respondent's conduct described in Findings Fact ## 8 and 17 – The Merits.

14) Complainant has not looked for work since she quit working for Respondent.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Charles Edward Minor was an employer who used the personal services of Complainant, his employee, reserving the right to control the means by which Complainant's services were performed. ORS 659A.001(4).

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

3) Respondent subjected Complainant to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe to alter her

working conditions and create a hostile, intimidating, and offensive work environment. By doing so, Respondent committed an unlawful employment practice based on Complainant's sex in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b) and (2).

4) Respondent constructively discharged Complainant, committing an unlawful employment practice in violation of ORS 659A.030(1)(a) and OAR 839-005-0035.

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

OPINION

The Agency alleges that Respondent sexually harassed and constructively discharged Complainant. The Agency seeks \$96 in back pay and at least \$50,000 in damages for emotional suffering.

SEXUAL HARASSMENT

To establish sexual harassment, the Agency is required to prove the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Respondent engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) Complainant was harmed by the unwelcome conduct. *In the*

Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 210 (2007). See also OAR 839-005-0030.

A. Respondent was an employer and employed Complainant.

There is no dispute that Respondent, a male, was an employer and sole proprietor subject to ORS 659A.001 to 659A.030 who employed Complainant, a female, during all times material.

B. Respondent engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex.

Complainant's credible testimony established that Respondent engaged in numerous instances of unwelcome verbal and physical conduct directed at Complainant because of her sex. They are set out in detail in Finding of Fact #8 – The Merits. This testimony is further supported by Boyd's credible testimony that Respondent also engaged in sexual conduct directed at her. The forum concludes that the conduct was unwelcome based on Complainant's credible testimony that it made her "scared," "embarrassed," "awful," "disgusting," "sickened," and "scared that I was alone in there with him," because of her complaints to Anderson and the Springfield Police about the conduct, and because she ultimately quit her job because of the conduct. The forum concludes that the unwelcome conduct was due to Complainant's sex because of Respondent's implied and direct references to sexual behavior, e.g. telling Complainant he had hired her friend Alyssa because of her "juicy boobs" and telling Complainant that she "like[d] bending over."

C. Respondent's unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive working environment.

The standard for determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the

objective standpoint of a reasonable person in Complainant's particular circumstances. *Gordy's at 212*; OAR 839-005-0030(2).

In making that determination, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *Id.*

Nature of the conduct and its context – Complainant was 21 years old when employed by Respondent, working at her first job other than child care for friends. In contrast, Respondent was a man in his late 50s with several college degrees, Complainant's boss, and the owner of the business.

Frequency – All of the unwelcome conduct occurred on a daily basis within an eight day period of employment spanning from August 11 to August 30, 2007, during which Complainant worked a total of 28 hours.

Severity – The actionable conduct included “full-frontal”ⁱⁱⁱ hugs from Respondent that Respondent insisted upon; suggestions that Complainant lean out the window and expose more cleavage; telling Complainant he had hired her friend Alyssa because of her “juicy boobs” and he liked girls with bigger chests; talking to Complainant about an attractive woman who was a customer and saying he would like to take her to the opera and then “wreck her,” a statement Complainant interpreted as meaning that Respondent wanted to take the woman to the opera and then have sex with her; telling Complainant, if she was stunned by a wasp that he “would put a long needle in [her] thigh” and would be glad to give her “mouth to mouth,” at the same time winking and raising his eyebrows, then repeating the “mouth to mouth” comment; and telling Complainant, when she bent over, “you like bending over, don't you.” The severity of this conduct

was intensified by the fact that all of it occurred when Respondent and Complainant were working alone together.

Physically threatening or humiliating – Complainant credibly testified that the conduct made her feel “scared,” “embarrassed,” “awful,” “disgusting,” “sickened,” and “scared that I was alone in there with him,” and that she quit because she did not feel safe in Respondent’s presence.

Unreasonable interference with Complainant’s work performance – Complainant’s reactions to Respondent’s actionable conduct, culminating in her quitting her job, demonstrate that Respondent’s conduct unreasonably interfered with her job performance.

Based on the above, the forum concludes that Respondent’s actionable conduct was sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment from the objective standpoint of a reasonable person in Complainant’s particular circumstances, and that the conduct created a hostile, intimidating or offensive working environment for Complainant.

D. Complainant was harmed by Respondent’s sexual harassment.

At the time the harassment occurred, Complainant experienced the emotions of being “scared,” “embarrassed,” “awful,” “disgusting,” “sickened,” and “scared that I was alone in there with him.” This fulfills the “harm” element of the Agency’s prima facie case.

E. Conclusion.

The Agency proved the elements of its prima facie case by a preponderance of the evidence and the forum concludes that Respondent sexually harassed Complainant in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b) and (2).

CONSTRUCTIVE DISCHARGE

In a case alleging constructive discharge based on hostile work environment, the Agency must prove that Respondent: (1) intentionally created or maintained discriminatory working conditions related to Complainant's gender that were (2) so intolerable that a reasonable person in Complainant's circumstances would resign because of them, (3) Respondent desired to cause Complainant to leave his employment as a result, or knew or should have known Complainant was certain, or substantially certain, to leave his employment as a result of the working conditions, and (4) Complainant left Respondent's employment as a result of the working conditions. *In the Matter of Robb Wochnick*, 25 BOLI 265, 287 (2004). See also OAR 839-005-0035. The forum has consistently held that if an employer imposes objectively intolerable working conditions, *i.e.* that a reasonable person in Complainant's position would have resigned under those conditions, then the employee's resignation is a constructive discharge. *Gordy's* at 213.

In this case, Complainant was subjected to sexual conduct by Respondent throughout her brief employment that made her afraid to be alone with him. On her last day of work, Respondent hit her on the head twice in succession with his fist, the second time over her objection, and causing her serious pain. Although Respondent claimed not to recall hitting Complainant, the forum takes judicial notice of ORS 135.335 and 135.345 pertaining to pleadings in criminal matters, which provide that Respondent's no contest plea to Complainant's harassment charges is "conviction of the offense to which the plea is entered." Despite Complainant's pain, she worked another hour to finish her shift before going to the Springfield Police Department to file a report. While making her report, she gave Officer Pardee her work keys and asked him to return them to Respondent and to tell Respondent that she quit and wanted no

further contact with him. At the same time, she also complained of Respondent's sexual conduct during her employment, indicating that in her mind it was linked to Respondent's fisticuff. Her stated reason for quitting was her fear for her safety, a fear Respondent had already generated because of his previous sexual conduct towards Complainant. The forum views Respondent's use of his fists on Complainant as the last link in the chain of Respondent's continuing conduct throughout Complainant's brief employment that made her fear for her safety. Under these circumstances, the forum finds that Respondent's fisticuff is inextricably linked to his previous objectionable sexual conduct, that Respondent imposed objectively intolerable working conditions that he should have known would have caused Complainant to resign and would have caused a reasonable person in Complainant's position to resign, and that Complainant resigned because of those conditions, constituting a constructive discharge in violation of ORS 659A.030(1)(a) and OAR 839-005-0035.

DAMAGES

A. Back pay.

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *In the Matter of Executive Transport, Inc.*, 17 BOLI 81, 96 (1998). The purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. ORS 659A.850(4)(b). The awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *See, e.g., In the Matter of Trees, Inc.*, 28 BOLI 218, 251 (2007). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *In the Matter of Rogue Valley Fire Protection*, 26 BOLI 172, 184 (2005).

The Agency stated during its closing argument that it was only seeking back pay for the 12 hours Complainant worked on August 11-14 and August 30 for which she was not paid. As stated above, a back pay award is calculated to make a complainant whole for injuries suffered as a result of the discrimination. Here, there is no evidence that Respondent's failure to pay Complainant for those hours was in any way related to unlawful discrimination.

B. Emotional, mental, and physical suffering.

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Trees, Inc.*, at 218. It also considers the type and duration of the mental distress and the vulnerability of the complainant. *In the Matter of State Adjustment, Inc.*, 23 BOLI 19, 32-33 (2002), *amended* 230 BOLI 67 (2002). With regard to the particular sensitivity of a complainant, respondents must take complainants "as they find them." *Trees, Inc.* at 218.

The Agency established the emotional, mental, and physical suffering experienced by Complainant as a result of Respondent's unlawful conduct through the credible testimony of Complainant and her friend Amy Anderson. From August 11-14, and August 27-30, 2007, Complainant was subjected to a variety of types of verbal and physical sexual harassment by Respondent, culminating in her constructive discharge on August 30, 2007, after Respondent hit her on the head with his fist. The harassment itself, while ongoing, made her feel "scared" and "embarrassed," "awful," "disgusting," "sickened," "scared that I was alone in there with him," and "on edge." When Respondent hit her on the head, she was still recovering from major dental surgery and

the blows caused her serious physical pain. Her reaction was to finish her shift, then call her friend Anderson and her father, both of whom advised her to file a report with the police. Anderson credibly testified that Complainant was crying, hyperventilating, and barely able to talk when Complainant called her, and that Complainant was very shaken up, had “large red bags under her eyes,” her face was “splotchy,” and she was still crying when she arrived at Anderson’s house after making the police report.

Complainant was only 21 years old when she worked for respondent and her only prior work experience was part time child care for friends. After she quit working for Respondent, Complainant quit looking for work altogether because of her anxiety about encountering a similar situation with a new employer and turned into a “recluse” for the next 1½ months. Her attitude towards strangers changed and she became “anxious about everything” and nervous around strangers.

Complainant attended fall term at Lane Community College in 2007. She sought counseling there for the anxiety she had because of her experience working for Respondent and attended four counseling sessions, once a week for four weeks. To get to one of her classes, she had to walk past the school cafeteria that had a coffee stand. Because of her experience with Respondent, the smell of the coffee made her feel as though she was going to vomit, so to avoid the smell she began walking around the outside of the building to get to the elevator.

On one occasion after she quit Respondent’s employment, Complainant became nervous because she thought Respondent’s car was following her. She still gets anxious when she sees cars that look like Respondent’s, when she sees people who remind her of Respondent, and when she hears people talk like Respondent. She still does not like driving past Respondent’s coffee booth. Having to be in Respondent’s presence at the hearing made her very nervous. Her good friend Anderson credibly

testified that Complainant “has turned into a little bit of an anxiety box” since working for Respondent. Finally, she still has nightmares about Respondent.

In its Formal Charges, the Agency asked for damages for Complainant’s emotional, mental, and physical suffering “in the amount of at least \$50,000.” Under the facts and circumstances of this case, the forum finds that \$50,000 is an appropriate award to compensate Complainant for the emotional, mental, and physical suffering she experienced as a result of Respondent’s unlawful employment practices.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent’s violations of ORS 659A.030(1)(a) and ORS 659A.030(1)(b), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Charles Edward Minor** to:

Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant Stephanie Head** in the amount of:

- 1) FIFTY THOUSAND DOLLARS (\$50,000), representing compensatory damages for emotional, mental, and physical distress Stephanie Head suffered as a result of Respondent’s unlawful practices found herein; plus,
- 2) Interest at the legal rate on the sum of \$50,000 from the date of the Final Order until Respondent complies herein; and,
- 3) Cease and desist from discriminating against any employee based upon the employee’s gender.

ⁱ The complaint specifically alleged that “on August 30, 2007,” Respondent “unlawfully and intentionally,” “at or near 3650 Main Street within the corporate limits of the City of Springfield” “harass[ed] Stephanie A. Head, by subjecting Stephanie A. Head to offensive physical contact by hitting her on the head twice.”

ⁱⁱ On the cover of the note was the handwritten name “Stefanie.” Complainant testified that she has never spelled her name that way.

ⁱⁱⁱ Complainant used these words to describe the hugs that Respondent insisted upon, contrasting them with “side hugs.”