In the Matter of

CYBER CENTER, INC., dba Cybercenter Sports Grill and GARY SPEAKS as Aider/Abettor

Case No. 29-11

Final Order of Commissioner Brad Avakian

Issued April 24, 2012

SYNOPSIS

The Agency established by a preponderance of the evidence that Respondent Cyber Center, Inc. ("CCI"), acting through its general manager, demoted Complainant, a pregnant woman, from her position as assistant night manager and cut her pay based on her sex/pregnancy, in violation of ORS 659A.030(1)(b). The Agency also proved that CCI fired Complainant based on her sex/pregnancy in violation of ORS 659A.030(1)(a) and that Respondent Gary Speaks, CCI's CEO and corporate vice president, aided and abetted CCI in Complainant's discharge, thereby violating ORS 659A.030(1)(g). The forum awarded Complainant $44.40 in back pay and $20,000.00 in emotional and mental suffering damages based on her demotion and pay cut, with CCI solely liable for those damages. The forum also awarded Complainant $12,172.00 in back pay and $120,000.00 in emotional and mental suffering damages based on her discharge, with CCI and Speaks jointly and severally liable for those damages. ORS 659A.029, ORS 659A.030(1)(a) & (b), ORS 659A.030(1)(g); OAR 839-005-0021, OAR 839-005-0026.

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 evidentiary portion of the hearing was held on January 24 and 25, 2012, at the Oregon Employment Department office located at 119 N. Oakdale Avenue, Medford, Oregon. Closing arguments were made by telephone on January 26, 2012.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick A. Plaza, an employee of the Agency. Complainant Amanda Glover was present throughout opening statements and the evidentiary portion of the

hearing and was not represented by counsel. Both Respondents were represented by G. Jefferson Campbell, Jr., attorney at law. Respondent Gary Speaks was present throughout the hearing. Susan Speaks, a corporate officer of Cyber Center, Inc. ("CCI"), was present throughout opening statements and the evidentiary portion of the hearing as the person designated to assist Respondents' attorney in the presentation of CCI's case.

The Agency called the following witnesses: Complainant; Peter Martindale and Felice Villarreal, senior investigators, BOLI Civil Rights Division (telephonic); Josh Trenton, Patricia (Allred) McCarty,[i] David Barber, and Mike Barlow (telephonic), Complainant's former co-workers; and Christopher Jones, Complainant's boyfriend.

Respondent called the following witnesses: Gary Speaks, Susan Speaks, and Jason "Jay" Winegar, CCI's former general manager.

The forum received into evidence:

a) Administrative exhibits X-1 through X-10 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-14 (submitted prior to hearing), and A-15 (submitted at hearing);

c) Respondent exhibits R-1 through R-6 (submitted prior to hearing), and R-7 (submitted at 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 October 2, 2009, 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 Cyber Center, Inc. ("CCI"). On June 23, 2010, the Agency amended the complaint to name Gary Speaks as a Respondent, alleging that he was an aider and abettor to CCI's alleged unlawful acts. After investigation, the Agency issued a Notice of Substantial Evidence Determination on July 14, 2010, in which it found substantial evidence that CCI had engaged in unlawful employment practices in violation of ORS 659A.030(1)(a) & (b) based on Complainant's sex/pregnancy and that Respondent Gary Speaks had aided and abetted CCI in the commission of the unlawful employment practices.

2) On November 18, 2011, the Agency issued Formal Charges alleging, among other things, that:

> (a) Respondent CCI was Complainant's employer and unlawfully discriminated against Complainant based on her sex/pregnancy in terms and conditions of employment by demoting her from her assistant manager position and reducing her work hours and pay, in violation of ORS 659A.029, ORS 659A.030(1)(b), and OAR 839-005-0030(1)(d)(A), OAR 839-005-0030(1)(d)(B), OAR 839-005-021, and OAR 839-005-0026(1) & (2);
>
> (b) Respondent CCI terminated Complainant based on her sex/pregnancy "and/or because of related medical conditions or occurrences" in violation of ORS 659A.030(1)(a);
>
> (c) Respondent Speaks is president and co-owner of Respondent CCI and aided, abetted, incited, compelled or coerced Respondent CCI's unlawful employment actions in violation of ORS 659A.030(1)(g).

The Formal Charges sought "[l] lost wages, including but not limited to, lost benefits and out-of-pocket expenses to be determined at hearing but estimated to be at least $8,000" and "[d]amages for emotional, mental and physical suffering in the amount of at least $100,000." The Formal Charges also requested that Respondents and any current employees "be required to attend training recognizing and preventing discrimination in the workplace based on protected class."

3) On November 14, 2011, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Complainant stating the time and place of the hearing as

January 24, 2012, beginning at 9:00 a.m., at the Oregon Employment Department, 119 N. Oakdale Ave., Medford, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Formal Charges, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

4) On December 12, 2011, Respondents jointly filed an answer through G. Jefferson Campbell, Jr., attorney at law. In the answer, Respondents denied that Respondent CCI engaged in the alleged unlawful employment practices or that Respondent Speaks aided, abetted, incited, compelled or coerced Respondent CCI's alleged unlawful employment actions.

5) On December 19, 2011, the ALJ issued an interim order requiring the Agency and Respondents to file case summaries by Friday, January 13, 2012.

6) On January 13, 2012, Respondents and the Agency filed case summaries. On January 16, 2012, the Agency filed an amended case summary.

7) At the start of the hearing, the ALJ orally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

8) At hearing, the Agency stipulated it was seeking back pay for the Complainant from the time of her demotion as assistant night manager until November 1, 2009, then from April 1, 2010, until mid-April 2010.

9) On March 9, 2012, the ALJ issued an interim order reopening the record and requiring Respondents to provide, no later than March 23, 2012, "copies of time records for employees of the CyberCenter Sports Grill for June 6, 2009, through

October 31, 2009, and from April 1, 2010 through April 15, 2010." On March 14, 2012, Respondents filed a motion for clarification of the reason for the ALJ's interim order. In the motion, Respondents argued that it was improper under OAR 839-050-0410 for the ALJ to reopen the record to obtain this evidence if the purpose of the Interim Order was to allow additional evidence relating to Complainant's lost income because it was the Agency's burden to establish Complainant's damages at hearing, the Agency could have requested these time records from Respondent CCI and offered them at hearing, and the Agency did not do so. On March 16, 2012, the ALJ issued an interim order retracting the March 9 interim order.

10) On March 21, 2012, 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 CCI was an Oregon corporation that engaged or utilized the personal services of one or more persons, including Complainant, and conducted business in Medford, Oregon.

2) At all times material herein, Respondent Gary Speaks, Susan Speaks, and Chris Speaks, Gary Speaks's son ("the Speaks"), each owned one-third of CCI's corporate shares. Gary Speaks was vice president and chief executive officer of CCI during Complainant's employment.

3) CCI operated a wholesale computer business and gaming center in a Medford warehouse prior to Complainant's employment. In 2006, the Speaks decided CCI should expand its business to fill the unused part of the warehouse, opting to build and operate a sports bar/restaurant and call it the "Cybercenter Sports Grill" (the "Grill"). They planned the Grill to be a family-oriented business that would provide amenities for both parents and their children so that parents could enjoy themselves while their

children were being entertained with various activities, including a gaming center. Construction of the Grill began in 2006, but was not completed until March 2008.

4) The Speaks did not want to run the Grill themselves and hired Monica Snow as manager in 2006. They paid Snow a salary of $500 per week until the Grill actually opened to ensure she would still be available to manage the Grill when it opened.

5) When the Grill finally opened March 2008, Gary and Susan Speaks were vacationing in Australia.

6) Snow quit several months after the Grill opened. Instead of hiring another manager, Gary and Susan Speaks began actively managing the Grill, working 16-18 hour days.

7) When the Speaks began actively managing the restaurant, Gary, Susan, and Chris Speaks agreed that no Grill employees could be fired unless all three of them were in agreement.

8) Complainant, a female, was hired in November 2008 to work as a server/bartender in the Grill. Complainant, who lived in Shady Cove at the time, likes to work nights and had eight years of experience as a server/bartender. She had previously managed two sports bars. Complainant was hired at the wage rate of $8.40 per hour, plus tips.

9) When Complainant was hired, Gary and Susan Speaks were still the Grill’s only managers.

10) During Complainant's employment, Respondent’s hours of operation were 11 a.m. to 10 p.m., Sunday through Thursday, and 11 a.m. to midnight on Friday and Saturday.

11) Complainant worked as a server/bartender at the Grill through January 2009. While she worked as a server/bartender, she worked five to six shifts a week, 30 to 35 hours a week, and averaged $400 a week in tips. She usually worked evening shifts.

12) Complainant's performance as a server/bartender was "exceptional" and Gary and Susan Speaks thought she "was a very, very good employee." While she worked as a server/bartender, Complainant was never counseled about her work or given any warnings about her work performance.

13) During the time that Complainant worked as a server/bartender, Gary and Susan Speaks began looking for someone to give them a break from the long hours they had to work to manage the Grill. They decided they could best accomplish this by hiring an assistant night shift manager. They believed that Complainant, who was available to work nights, was qualified to be assistant night manager, and felt confident that she could handle the job based on her exceptional work performance as a server/bartender. In January 2009, Gary Speaks took Complainant aside after a shift, complimented her highly on her work, and offered her the position of assistant night manager starting February 1, 2009, with a raise to $10 per hour, plus tips.

14) Complainant accepted the offer and began working as assistant night manager on February 1, 2009. She was happy about her promotion and the pay raise that came with it. She understood she would be closing the Grill the majority of her shifts.

15) As assistant night manager, Complainant's primary job duties included:

- training the staff
- supervising the cooks and servers
- making sure customers' orders were filled and paid for
- ensuring that employees took appropriate breaks
- ensuring that all servers balanced their accounts before they went home
- giving the servers cash for the tips that had been written on charge slips

- at closing, turning all the lights down, making sure that everything was clean, and turning off all electronics, including 40 televisions

She closed the Grill about 70 percent of the time, alternating with another employee, and "pre-closed" most other nights, which required staying at work until about 30-60 minutes before closing time.

16) While she was assistant night manager, Complainant continued to average $400 a week in tips.

17) As assistant night manager, Complainant worked all of her assigned shifts without complaining about the scheduling. Before she became pregnant, she also worked extra shifts for employees who called in sick.

18) On one occasion when Complainant was assistant night manager and before she learned she was pregnant, she sold a beer to a 20-year-old male who was an Oregon Liquor Control Commission (OLCC) "decoy" after she examined his driver's license and failed to notice that he was not yet 21 years old. Gary Speaks, who had been told by an OLCC representative just before that a "decoy" would be coming in, talked to Complainant about her mistake and its possible consequences. Complainant understood the seriousness of her mistake and was afraid she would be fired. However, she was not disciplined and continued working as assistant night manager. There was no evidence about the date on which this incident occurred.[ii]

19) While Complainant was assistant night manager, the Grill issued different types of discount coupons to encourage people to eat at the Grill. One of the coupons offered a 10 percent discount; another offered a free meal when two meals were purchased, with the free meal being the meal of lesser value. On one occasion, Complainant gave a 20 percent discount to two customers who each brought in 10 percent discount coupons. On another occasion when a customer brought in a “free meal” discount coupon, Complainant charged the customer for the less expensive

instead of the more expensive meal. Complainant was not counseled or disciplined either time. There was no evidence about the dates on which these incidents occurred.[iii]

20) Other employees also had problems charging customers correctly when the customers used the Grill's discount coupons.

21) On April 21, 2009, Gary Speaks posted four Grill job openings on the Medford Craigslist. The openings were for restaurant general manager, sales manager, server, and line cook. Gary and Susan Speaks told Complainant they were planning to hire a general manager and assured her that her job was not in jeopardy.

22) In late April 2009, Complainant learned she was pregnant, news that made her very happy. In early May, she told her co-workers and Gary and Susan Speaks that she was pregnant.

23) Jason Winegar was hired as general manager for the Grill on May 1, 2009. He was scheduled to work during the Grill's day shift, with the understanding that he would be working from about 10 in the morning until evening, 4p.m. or later. His first day of work was May 9, 2009. There were no changes in Complainant's employment status when Winegar was hired.

24) Gary Speaks did not know Winegar before he received Winegar's application for the Grill general manager position.

25) After Complainant became pregnant, she never asked for any accommodation in her schedule nor told the Speaks or Winegar that she only wanted to work days and no longer wanted to work nights.

26) Between May 9 and May 22, 2009, Complainant worked the following dates: May 9-10, May 14, May 18, and May 20-22. She was scheduled to work on May 11, but was sick. She worked until closing on May 14, May 18, and May 21-22.

27) On May 22, 2009, Winegar told Complainant that she was being demoted to her former position as a server and that her pay was being cut to minimum wage of $8.40 per hour. When Complainant asked why this was happening, Winegar told her “I don't feel you are going to have the availability we are looking for in the future because you are pregnant.” Complainant became very upset and cried. Prior to Complainant’s demotion, Winegar had discussed it with Gary Speaks, who instructed Winegar to take whatever action Winegar thought best. On May 23, 2009, Complainant began working again as a server. That same day, Jennifer McKenzie, a server whom Complainant had supervised, was promoted to the position of assistant night manager.

28) Complainant was upset when she was demoted. Her demotion caused some "problems" at home. In the same period of time, she had a $70 overdraw at her bank that caused the bank to decline to provide a checking account to Complainant and Jones.

29) As assistant night manager, Complainant wore black pants and a black shirt. After her demotion, she had to wear a red shirt, which made her feel degraded. Some of her long-time customers asked her why she was wearing a red shirt. Complainant responded by telling them she had been demoted and she was "pretty sure it was because she was pregnant." Complainant only volunteered information about her demotion in response to her long-time customers’ specific inquiries.

30) The $10 per hour Complainant earned as assistant night manager is the highest hourly wage Complainant had ever been paid, and she was "extremely happy" in the assistant manager position.

31) Complainant and McKenzie had no arguments or altercations after Complainant's demotion and Complainant tried to work with McKenzie.

32) Complainant and McKenzie worked the following total hours in the weeks between March 28 and May 29:[iv]

Week	Complainant	McKenzie
March 28-April 3	**32.5** hours	**32.75** hours
April 4-10	**36.5** hours	**32.5** hours
April 11-17	**27.5** hours	**32.5** hours
April 18-24	**33.75** hours	**34** hours
April 25-May 1	**34.75** hours	**36** hours
May 2-8	**34.75** hours	**38.5** hours
May 9-15	**13.25** hours[v]	**36.5** hours
May 16-22	**19.25** hours	**30.25** hours
May 23-29	**20.5** hours[vi]	**37** hours

33) Winegar and Complainant worked the same days on May 9, 14, and 20-24. After May 24, they never worked on the same day. Between May 9 and May 22, Complainant started work before 5 p.m. on only two days that Winegar also worked, once at 11 a.m. (May 9), and once at 4:45 p.m. (May 14).

34) Between May 23 and June 2, 2009, Complainant, Winegar, and McKenzie worked the following schedules:

Date:	Complainant	Winegar	McKenzie
5/23	1p-9:15p	day shift[vii]	5:30p-12:15p
5/24	11:15a-7p	day shift	9:30p-2:45a
5/25	10:45a-5:15p	did not work	5p-10:30p
5/26	not scheduled	did not work	3:45p-10:45p
5/27	not scheduled	day shift	5p-10:30p
5/28	sick	day shift	6p-7p
5/29	not scheduled[viii]	day shift	5p-12:30a
5/30	not scheduled	day shift	6p-12:30a
5/31	4:45p-10p	did not work	did not work
6/1	6p-8p	did not work	5p-10:30p
6/2	fired/no work	day shift	5p-11p

35) On May 24, Complainant declined the opportunity to work at a party scheduled to continue until 2:30 a.m. because she had already worked a full shift that day. McKenzie and Allred worked the party, both working until 2:45 a.m. This was the

only time after Complainant announced her pregnancy that any servers had to work later than 12:30 p.m.

36) Complainant was not scheduled to work on May 26 or May 27.

37) Complainant went to the emergency room on May 28 because of bleeding related to her pregnancy. She called Susan Speaks and told her she was going to the emergency room due to bleeding possibly related to her pregnancy and that she had arranged for Alisa, another server, to work her shift.

38) During Complainant's absence on May 28-29, Complainant was temporarily taken off the work schedule and other employees scheduled to work in the times she had originally been scheduled to work. When she returned to work,[ix] Gary Speaks and Winegar juggled the schedule and scheduled Complainant to work seven hours during the week of May 30-June 5.

39) On May 31, Complainant worked from 4:45pm to 10pm, and on June 1, she worked from 11am to 2pm, for a total of 7.25 hours.

40) On June 1, Gary Speaks, Susan Speaks, and Winegar met and decided to fire Complainant. During that conversation, Winegar stated "because of [Complainant's] constant references to her pregnancy we really need to cover our butts." Later that day, Winegar called Complainant at home and left a message that she was fired because of her "attitude." Complainant listened to the message when she arrived home after work that night. Complainant returned Winegar's call but he never called back.

41) After Complainant announced her pregnancy and while she was still assistant night manager at the Grill, David Barber, a cook employed at the Grill, overheard Gary Speaks and Winegar discussing Complainant's pregnancy. During the conversation, Barber heard them say that they would probably have to let Complainant go because she would be in the way. Barber told Complainant what he heard.

42) After Complainant announced her pregnancy, Josh Trenton overheard part of a conversation between Gary Speaks and Winegar in which they were discussing Complainant's pregnancy. Trenton heard Speaks say that Complainant "wouldn't be worth anything."

43) Complainant received no oral or written counseling about her attitude while she worked for the Grill.

44) At the time of her termination, Complainant intended to keep working as a server at the Grill, then take family leave and then resume working at the Grill when her leave ended.

45) Complainant is an independent person who has always been employed and has never had trouble finding a job. In her words, being fired when she was pregnant was the "most degrading, unhappy time probably in a long-time time that I've ever had * * * It went from a happy moment to an 'Oh my God, what am I going to do, I have to get on food stamps now, now I'm back on welfare * * *." "Once I was let go and I was pregnant, it was extremely difficult to find another job." She was "beyond upset" for a couple of months after she was fired.

46) Complainant felt "depressed" after being fired and didn't want to go anywhere. She went from being excited about being pregnant to being depressed after she was fired and just wanted to be left alone. Because of her depression, it was harder for her to look for work. She "cried a lot" from losing her job. She was nervous about how she would support her baby and herself.

47) Complainant felt "belittled" by her discharge. Complainant and Christopher Jones, her live-in boyfriend and the father of her baby, "bickered" a lot more after she was fired because of the financial stress caused by the loss of her job and also because a baby was on the way. At the time, Jones was unemployed and receiving

unemployment benefits and stamps. Complainant was more stressed out because she and Jones were now both unemployed and concerned over the responsibility of having a child and how they would pay for the expenses associated with having a child.

48) Complainant did not seek counseling for her depression after she was fired because she had no money to pay for counseling services. Complainant and Jones talked about going to "couples counseling" after Complainant was fired but did not go because Jones did not want to go and, in any event, they had no money to pay for counseling services.

49) Complainant applied for food stamps after she was fired. This made her feel embarrassed and degraded. She also had to get financial help from her mother to pay for "a lot of things for [her] baby."

50) Complainant first began looking for work approximately a month after her termination. She unsuccessfully sought work until about Halloween 2009,[x] when she stopped due to her pregnancy. During her job search, she believed no one would hire her because she was obviously pregnant; this was degrading to her. She still feels frustrated that she was fired instead of being able to keep her job until she went on family leave, then return to work after her leave. She thinks about her discharge frequently and it still bothers her.

51) Complainant's pregnancy was not a major factor in the depression and upset she experienced as a result of being fired.

52) Complainant's baby was born on December 29, 2009. She began looking for work again about April 1, 2010.

53) In mid-April 2010, Complainant was hired at the Rogue River Lodge, located in Trail, Oregon, as a server/bartender. Although she stopped looking for work at that time, she did not actually start work until August 11, 2010. She worked for

minimum wage and tips. In the summer she received an average of $200 per night in tips. In the winter, she received an average of $30 to $40 per night in tips. At the time of hearing, she was still employed at the Rogue River Lodge.

54) Other than the financial help she received from her mother, Complainant's only income was food stamps and WIC from the date of her discharge until August 2010.

55) The Grill remained in business at least through January 2010.

56) As a result of her demotion and termination, Complainant suffered lost wages and tips in the amount of $12,216.40, calculated as follows:

- 27.75 hours (actual hours worked from May 23 through June 1, 2009) x $1.60 per hour = $44.40
- Average hours worked per week from March 28 to May 29, 2009 = 31.6 (252.75 total hours ÷ 8 weeks = 31.6 hours)
- 17 weeks from July 1 through October 31, 2009
- 31.6 hours x 17 weeks = 537.2 hours
- 537.2 hours x $10 per hour = $5,372
- 17 weeks x $400 average weekly tips = $6,800
- $44.40 + $5,372 + $6,800 = $12,216.40

57) Complainant works nights at the Rogue River Lodge, with her shifts ending between 10 p.m. and midnight, and drives home from Trail to her present home in White City. This is approximately the same distance as from Shady Cove to Medford and involves driving on the same highway, Oregon Highway 82.

58) Sometime after Complainant was fired, CCI hired Jennifer Speaks, Gary Speaks's daughter, to work in CCI's game center. Jennifer Speaks was pregnant when hired and worked within a week of her baby's birth, then was fired a couple of months after she returned to work.

CREDIBILITY FINDINGS

59) Mike Barlow was employed as a cook at the Grill during Complainant's employment and testified that he is "friends" with Complainant. Only part of his testimony was credible. The forum has credited his testimony that Complainant was "a very good assistant manager" because he was supervised by Complainant and his statement was not linked to a specific date or event. However, the forum also notes that the Grill's time records reveal that Barlow did not work as often with Complainant as he claimed.[xi] His testimony that "Gary [Speaks] is a real ass to everyone" revealed an animus towards Speaks.

The Agency's primary reason for calling Barlow as a witness was to testify as to statements made by Gary Speaks and "Jay" that showed a possible discriminatory animus based on Complainant's pregnancy. Barlow testified that he heard Jay Reese, whom he identified as the new general manager, tell the "owners" they better put Complainant back on the schedule or they would be a big trouble.[xii] He testified that this conversation took place on a day when Complainant missed work because she was sick, and that this was the same day she was demoted from assistant manager. He also testified that his memory of the timing of Complainant's demotion and her subsequent schedule was not clear.[xiii]

The forum has not credited any of Barlow's testimony concerning this conversation for two reasons. First, Jay Winegar, not Jay Reese, was employed as the Grill's general manager at the time of the alleged conversation. Second, Complainant was demoted from assistant night manager effective May 23, and the only days she missed work in May due to sickness were on May 11, May 28, and May 29.

60) David Barber, a cook at the Grill during Complainant's employment, testified in person and responded in a forthright manner to questions on direct and cross

examination. He candidly acknowledged that he did not recall the dates of events he was asked about, but was able to testify in detail about the specific circumstances of the conversation he overheard between Gary Speaks and Jay Winegar.[xiv] In an earlier interview with an Agency investigator, Barber stated that "he has had problems with the owner because he [Gary Speaks] thinks he can do anything he wants and not suffer any consequences" and he is a “jerk who thinks he can do whatever he wants.” Barber also testified during cross examination that he had no conversations with Gary Speaks or Jay Winegar about Complainant's pregnancy or demotion; whereas on 12/1/09 he told the Agency investigator that “he tried to talk to Gary about the situation with Complainant but [Gary] would not talk to him." Barber explained this apparent inconsistency by stating he did not recall making it to the Agency investigator. Since this inconsistency is not related to a material issue and Barber’s testimony was otherwise consistent and unimpeached, the forum credits Barber’s testimony related to Complainant’s work performance and the overheard conversation in its entirety, despite Barber’s expressed dislike of Gary Speaks.

61) Patricia (Allred) McCarty, who testified in person, was employed as a server at the CSG during Complainant's employment. For several reasons, the forum has only credited her testimony when it was corroborated by other credible evidence. First, she testified that Jay Winegar began visiting the Grill a couple of months after she was hired and worked his way into a management position; whereas no other witness testified to this fact. Second, she testified she did not recall “any written limitations” on the Grill’s coupons. The forum finds it highly improbable that the Speaks would give out coupons for meals with no limitations on their use. Third, McCarty's demeanor changed considerably on cross-examination; she became testy and defensive and was evasive in responding when questioned as to whether Complainant made complaints about her

demotion being related to her pregnancy. However, the forum has credited her testimony that she heard Winegar state that the Grill “needed to cover their butts” with respect to Complainant’s pregnancy and any employment actions that might be taken against her” because Gary Speaks testified that Winegar made that statement to him.

62) Josh Trenton, who testified in person, was employed as a cook at the Grill during Complainant's employment and freely admitted that Complainant helped him get that job. He testified in a sober, forthright manner, and his testimony was not impeached during cross-examination. His earlier statement to an Agency investigator that Complainant was demoted to assistant manager, then again demoted to server after Jay Winegar was hired, though inaccurate, did not detract from the forum’s assessment of the overall credibility of his testimony. The forum has credited his testimony in its entirety.

63) Peter Martindale and Felice Villarreal, both senior investigators employed by BOLI’s Civil Rights Division who investigated this case, were called as witnesses to testify as to the interviews they conducted and authenticate exhibits. Both were credible witnesses.

64) Christopher Jones, who testified in person, is Complainant’s live-in boyfriend and the father of her child. He and Complainant have lived continuously together since before Complainant began work at the Grill. Jones was an unsophisticated witness whose memory was not particularly good and who testified mainly in generalities. His only knowledge of Complainant’s circumstances at work was what Complainant told him. The forum has credited his testimony regarding Complainant’s reactions to her demotion and discharge but not relied on any of his testimony regarding Complainant’s employment history at the Grill.

65) Jennifer McKenzie and Alisha Fuhrman were listed as witnesses in the Respondents' and Agency's respective case summaries. At hearing, the Agency case presenter and Respondent's attorney both stated that they had not been able to contact either witness. Exhibits A-5 and R-7, consisting of investigative interviews with Fuhrman and McKenzie conducted by Martindale and Villarreal, were offered and received into evidence as a putative substitute for their testimony. For several reasons, the forum has given Exhibits A-5 and R-7 and the testimony of Martindale and Villarreal concerning them no weight whatsoever. First, the outcome of this case rests primarily on an assessment of the credibility of the witnesses. Second, numerous other witnesses testified about the issues Fuhrman and McKenzie would have testified about and were subject to cross examination. Finally, neither Fuhrman nor McKenzie was present to testify under oath and be cross-examined like the other witnesses.

66) Jay Winegar, who testified in person, was general manager of the Grill at the time of the alleged discriminatory actions, but has not worked for Respondents since June 5, 2009, when he quit because of differences with Gary Speaks's management style. For several reasons, the forum has only credited his testimony when it was corroborated by other credible evidence. First, he denied ever making a "cover our butts" comment regarding Complainant's pregnancy and her job status with the Grill. In contrast, two Agency witnesses and Gary Speaks credibly testified that Winegar did make that comment. Second, he testified that Complainant was demoted from lead position effective May 23, 2009, because she told him she did not want to work until closing. Complainant credibly testified that she never said this to Winegar or anyone else, no one but Winegar testified to the contrary, and Complainant's work history before, during, and after working for the Grill shows that working until closing was not a problem for her. Third, Winegar had no recollection of Complainant being temporarily

taken off the Grill's work schedule, an undisputed fact that occurred while he supervised Complainant. Fourth, he testified that he met with Gary and Susan Speaks about two weeks after he was hired and they decided that an assistant was needed to close at night if Winegar was going to work days. Except for Winegar's testimony, the evidence is undisputed that Complainant was already that assistant and was either closing or pre-closing the majority of shifts that she worked.

67) Gary Speaks's testimony on several issues central to the case was either internally inconsistent or inconsistent with prior statements. On June 2, 2010, he told Martindale that neither he nor Winegar ever made a comment about needing to "cover their butts" regarding Complainant and any action taken affecting her job status. At hearing, he testified twice that Winegar stated, during their conversation on June 2 regarding Complainant's discharge, that "because of [Complainant's] constant reference to her pregnancy we really need to cover our butts." At hearing, he testified that he advertised on Craigslist in April 2009 and at that time planned to fire Complainant and hire a new server to replace her. He made no mention of this plan in his interview with Martindale or in either letter he drafted in response to the complaint or the investigation.[xv] In fact, in one of those letters he stated "[i]n closing, Amanda would still be here working if it had not been for insubordination towards Jason and owners."[xvi] Related to the same issue, Speaks testified that he had decided to fire Complainant in mid-April because of her poor performance as assistant manager and that he did not consider demoting her, as demoting employees has never worked out for him in the past.

In the initial position statement Speaks submitted to the Civil Rights Division ("CRD") he stated that "Amanda resented Jason from the onset and this was when

Amanda went downhill fast." At hearing, Speaks said nothing about Complainant resenting Winegar.

At hearing, Speaks testified that he, Susan Speaks, and Winegar decided to fire Complainant because of the complaints they were receiving from customers and Complainant's attitude towards Jennifer McKenzie. In marked contrast, Speaks did not even mention McKenzie's name in his interview with Martindale or his two letters.

At hearing, Speaks testified that one of the Grill's initial hires was Marie Manson, the wife of the executive chef who was hired by Snow, and that Manson was seven months pregnant when she voluntarily left the Grill's employment. This was in direct contradiction to his interview statement to Martindale that Complainant has been his only pregnant employee.

His testimony was exaggerated on at least one occasion when he testified about Complainant's problem with coupons, stating on "numerous times [Complainant] would give the more expensive meal free and charge for the lesser and Susan would point that out." In his initial position statement submitted to the CRD, Speaks stated there was only one occasion when this happened.

In Speaks's second letter, he stated that Complainant started "asking other employees to close for her, or she would just leave claiming she was sick" after she became pregnant. This contrasts with the Grill's time records, which do not show any days that Complainant left work early, and the absence of any testimony by other employees that Complainant asked them to close for her. In the same letter, he also stated that Complainant "refused to work the schedule given." There is no evidence in the record and Speaks himself did not testify that Complainant refused to work her assigned schedule.

In conclusion, the forum has only credited Speaks's testimony when it was corroborated by other credible evidence.

68) Susan Speaks is a neonatal nurse with three children and is married to Gary Speaks. Like her husband, she also testified that the decision had been made to fire Complainant at the time the Craigslist ads were posted in April, before anyone knew Complainant was pregnant. For the reasons stated in Finding of Fact #66 – The Merits, the forum does not believe this testimony. She also testified that Complainant was demoted from her assistant manager position because Complainant complained she was too tired and didn't want to work after 8 p.m. This contrasts with more credible witness testimony to the contrary. Like Gary Speaks, the forum has only credited her testimony when it was corroborated by other credible evidence.

69) Complainant testified that she called in sick once after she became pregnant. The Grill's time records show there were two occasions -- May 11 and May 28. On direct examination, she testified that she visited the emergency room in May while she was still assistant manager and that her demotion and being taken off the schedule occurred "back to back." She subsequently corrected this statement and testified that she was no longer assistant manager as of May 23 and that she went to the emergency room on May 28. On cross-examination she testified that she only worked two days as a server after her demotion before she was fired, whereas the record shows she worked five days as a server after her demotion, including two days after her trip to the emergency room. Her contemporaneous written statement submitted to the CRD prior to filing her complaint is consistent with Respondent's time records. Because of the accuracy of her earlier statement and the fact that her inaccurate testimony about her work hours does not appear to have been calculated to

enhance her case, the forum attributes this testimony to a faulty memory. The forum has credited the remainder of her testimony.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent CCI was an Oregon corporation that engaged or utilized the personal services of one or more persons, including Complainant, and owned and operated the Cybercenter Sports Grill (the "Grill") in Medford, Oregon. At all times material herein, Respondent Gary Speaks owned one-third of CCI's corporate shares and was vice president and chief executive officer of CCI. Chris Speaks, Gary Speaks's son, and Susan Speaks, Gary Speaks's wife, also owned one-third of CCI's corporate shares.

2) The Grill opened in March 2008. Several months later, Gary and Susan Speaks began actively managing the Grill after the general manager quit.

3) Complainant, a female who was an experienced server/bartender, was hired to work at the Grill in November 2008 at the wage rate of $8.40 per hour, plus tips.

4) Complainant worked as a server/bartender at the Grill through January 2009, working five to six shifts a week, 30 to 35 hours a week, and averaging $400 a week in tips. She usually worked evening shifts, which ended at 10 p.m., Sunday through Thursday, and midnight on Friday and Saturday.

5) Complainant's performance as a server/bartender was "exceptional" and Gary and Susan Speaks thought she "was a very, very good employee." As a server/bartender, Complainant was never counseled about her work or given any warnings about her work performance.

6) In January 2009, Gary and Susan Speaks decided to hire an assistant night shift manager so they did not have to work so many hours. Based on Complainant's exceptional work performance as a server/bartender and her availability to work nights, they offered the job to Complainant, along with a pay raise to $10 per

hour. Complainant accepted the offer and began working as assistant night manager on February 1, 2009. She was happy about her promotion and the pay raise that came with it and understood the job involved closing the Grill the majority of her shifts.

7) As assistant night manager, Complainant worked all of her assigned shifts without complaining about the scheduling. Before she became pregnant, she also worked extra shifts for employees who called in sick. While she was assistant night manager, Complainant continued to average $400 a week in tips.

8) On one occasion prior to May 9, 2009, when Complainant was assistant night manager and before she learned she was pregnant, she sold a beer to a 20-year-old male who was an OLCC "decoy" after she examined his driver's license and failed to notice that he was not yet 21 years old. Gary Speaks talked to Complainant about her mistake and its possible consequences. Complainant understood the seriousness of her mistake and was afraid she would be fired. However, she was not disciplined and continued working as assistant night manager.

9) While Complainant was assistant night manager and prior to May 9, 2009, on two occasions she undercharged customers for meals who used discount coupons issued by the Grill. Complainant was not counseled or disciplined either time. Other employees also had problems charging customers correctly when the customers used the Grill's discount coupons.

10) In late April 2009, Complainant learned she was pregnant. In early May, she told her co-workers and Gary and Susan Speaks that she was pregnant.

11) Jason Winegar was hired as general manager for the Grill on May 1, 2009. He was scheduled to work day shift. His first day of work was May 9, 2009. Complainant continued to work as assistant night manager.

12) After Complainant became pregnant, she never asked for any accommodation in her schedule nor told the Speaks or Winegar she only wanted to work days and no longer wanted to work nights. Between May 9 and May 22, 2009, Complainant worked May 9-10, 14, 18, and 20-22. She was scheduled to work on May 11, but was sick. She worked until closing on May 14, 18, and 21-22.

13) On May 22, 2009, Winegar made the decision to demote Complainant to her former position as a server and to cut her pay to minimum wage and told Complainant of his decision. When Complainant asked why this was happening, Winegar told her “I don't feel you are going to have the availability we are looking for in the future because you are pregnant.” The next day, Complainant began working again as a server. That same day, Jennifer McKenzie was promoted to the position of assistant night manager.

14) As assistant night manager, Complainant wore black pants and a black shirt. After her demotion, she had to wear a red shirt, which made her feel degraded. Some of her long-time customers asked her why she was wearing a red shirt. Complainant responded by telling them she had been demoted and she was "pretty sure it was because she was pregnant."

15) Complainant worked an average of 33.3 hours per week between March 28 and May 8, 2009. In the same time period, Jennifer McKenzie worked an average of 34.4 hours per week. Between May 9 and May 22, 2009, Complainant worked an average of 16.25 hours per week[xvii] and McKenzie worked an average of 33.5 hours per week. In the week of May 23-29, 2009, Complainant worked 20.5 hours[xviii] and McKenzie worked 37 hours.

16) Complainant went to the emergency room on May 28 because of bleeding related to her pregnancy. She called Susan Speaks and told her she was going to the

emergency room due to bleeding possibly related to her pregnancy and that she had arranged for Alisa, another server, to work her shift.

17) During Complainant's absence on May 28-29, Complainant was temporarily taken off the work schedule and other employees scheduled to work in the times she had originally been scheduled to work. When she returned to work, she was scheduled to work seven hours during the week of May 30-June 5. She worked from 4:45 p.m. to 10 p.m. on May 31 and from 6 p.m. to 8 p.m. on June 1.

18) On June 1, 2009, Gary Speaks, Susan Speaks, and Winegar met and made a joint decision to fire Complainant. Winegar called Complainant at home and left a message that she was fired because of her "attitude."

19) After Complainant announced her pregnancy and while she was still assistant night manager at the Grill, Gary Speaks and Winegar discussed Complainant's pregnancy at work and stated that they would probably have to let Complainant go because she would be in the way. In another conversation at work when Winegar and Gary Speaks were discussing Complainant’s pregnancy, Speaks said that Complainant “wouldn’t be worth anything.”

20) Complainant first began looking for work approximately a month after her termination. She looked unsuccessfully for work until about Halloween 2009, when she stopped due to her pregnancy. Her baby was born on December 29, 2009, and she began looking for work again about April 1, 2010. In mid-April 2010, she was hired at the Rogue River Lodge, as a server/bartender.

21) As a result of her demotion and termination, Complainant suffered lost wages in the amount of $12,216.40.

22) Complainant experienced substantial emotional and mental distress as a result of her demotion and termination and continued to experience some distress at the time of the hearing.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Cyber Center, Inc. ("CCI") was an "employer" as defined in ORS 659A.001(4).

2) At all times material herein, Respondent Gary Speaks was an individual and a "person" under ORS 659A.010(9) and ORS 659A.030(1)(g).

3) The actions, statements and motivations of Jason Winegar, Respondent CCI's general manager and Respondent Speaks are properly imputed to Respondent CCI.

4) 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.

5) Respondent CCI, acting through its general manager Jason Winegar, demoted Complainant from her assistant night manager position and cut her pay because of her sex/pregnancy, in violation of ORS 659.029, ORS 659A.030(1)(b), OAR 839-005-0021, and OAR 839-005-0026. Respondent Gary Speaks did not aid and abet Respondent CCI in this unlawful employment practice.

6) Respondents did not reduce the number of hours Complainant was scheduled to work after May 22, 2009, because of her sex/pregnancy and did not violate ORS 659.029, ORS 659A.030(1)(b), OAR 839-005-0021, or OAR 839-005-0026 by reducing her hours between May 23 and June 1, 2009.

7) Respondent CCI discharged Complainant from employment because of her sex/pregnancy. In doing so, Respondent CCI violated ORS 659A.029, ORS 659A.030(1)(a), OAR 839-005-0021, and OAR 839-005-0026. Respondent Gary

Speaks aided and abetted Respondent CCI in its discharge of Complainant, thereby committing an unlawful employment practice in violation of ORS 659A.030(1)(g).

8) 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 CCI's unlawful employment practices and Respondent Speaks's aiding and abetting of those practices 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 Respondents in the Order below are an appropriate exercise of that authority.

OPINION

INTRODUCTION

The Agency alleges that Respondent CCI unlawfully discriminated against Complainant based on her sex/pregnancy in terms and conditions of employment by: (1) demoting Complainant from her assistant manager position and cutting her hourly wage rate; and (2) reducing the hours Complainant was scheduled to work after her demotion, including temporarily taking her completely off the schedule. The Agency further alleges that Respondent CCI unlawfully discriminated against Complainant based on her sex/pregnancy by discharging her and that Respondent Gary Speaks aided and abetted Respondent CCI in all of these actions.

TERMS AND CONDITIONS OF EMPLOYMENT

A. Complainant was demoted from her assistant manager position and her pay cut because of her sex/pregnancy.

ORS 659A.030(1)(b) prohibits an employer from discriminating against an individual "in compensation or in terms, conditions or privileges of employment" because of that individual's sex. In pertinent part, ORS 659A.029 provides that "[f]or

purposes of ORS 659A.030, the phrase 'because of sex' includes, but is not limited to, because of pregnancy, childbirth and related medical conditions or occurrences." OAR 839-005-0021(1) & (2) and OAR 839-005-0026(1) & (2) echo those provisions.[xix]

To prove that Respondent CCI violated ORS 659A.030(1)(b) by demoting Complainant from her assistant manager position and cutting her hourly wage rate because she was pregnant, the Agency must establish a prima facie case consisting of the following five elements: (1) Respondent CCI was an employer subject to ORS 659A.010 to 659.865; (2) Respondent CCI employed Complainant; (3) Complainant was a pregnant woman; (4) Respondent CCI demoted Complainant and cut her hourly wage; and (5) Respondent CCI took these actions against Complainant because of her pregnancy. *See, e.g., In the Matter of Bob G. Mitchell,* 19 BOLI 162, 185 (2000).

The first four elements of the Agency's prima facie case are undisputed. The fifth element – causal connection -- is hotly contested, with the Agency asserting that Complainant was demoted and her pay reduced because of her pregnancy and Respondents asserting with equal force that Complainant's pregnancy had nothing to do with her demotion and pay reduction. To resolve this issue, the forum first reviews Complainant's employment history at CCI.

Complainant was hired as a server/bartender at the Grill in November 2008. She was supervised by Gary and Susan Speaks. When the Speaks decided to hire an assistant night manager, Complainant was offered the job based on her exceptional work performance and her availability to work nights. She was given a raise to $10 per hour and supervised all the employees at the Grill when the Speaks were not on the premises. She worked as assistant night manager for almost four months. During that time, on two occasions she undercharged customers for meals who used discount coupons issued by the Grill. She was not counseled or disciplined either time, and

other employees had the same problem. She also sold a beer to a 20-year-old male who was an OLCC "decoy" after she examined his driver's license and failed to notice that he was not yet 21 years old. After that incident, Gary Speaks talked to Complainant about her mistake and its possible consequences. At hearing, after testifying about the seriousness of Complainant's OLCC blunder, Gary Speaks then minimized it by concluding "[s]he made a mistake; big deal; I don't write people up."

About the end of April 2009, Jay Winegar was hired as general manager of the Grill and began work on May 9. Complainant continued working as assistant night manager through May 22, at which time Winegar made the decision to demote her back to her original server position, effective the next day and cut her pay to $8.40 per hour. The reason Winegar gave Complainant for her demotion was "I don't feel you are going to have the availability we are looking for in the future because you are pregnant." Earlier, after Complainant announced her pregnancy and while she was still assistant night manager at the Grill, a cook employed at the Grill overheard Gary Speaks and Winegar discussing Complainant's pregnancy and say that they would probably have to let Complainant go because she would be in the way.[xx]

Under the "specific intent" theory of discrimination, proof of a causal connection may be established through evidence that shows a respondent knowingly and purposefully discriminated against a complainant because of the complainant's membership in a protected class. OAR 839-005-0010(1)(a)(A). *See, e.g., In the Matter of WINCO Foods, Inc.,* 28 BOLI 259, 300 (2007); *In the Matter of Wal-Mart Stores, Inc.,* 24 BOLI 37, 61 (2002). While specific intent may be established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. *In the Matter of WINCO Foods, Inc., 28 BOLI 259, 300 (2007), citing In the Matter of Sierra Vista Care Center,* 9 BOLI 281, 296-97 (1991), *aff'd, Colson v. Bureau*

of Labor and Industries, 113 Or App 106, 831 P2d 706 (1992). In this case, Winegar's statement, standing alone, constitutes direct evidence of a discriminatory motive with regard to Complainant's demotion. The comment made by Winegar and Speaks in their earlier conversation also establishes a discriminatory intent based on Complainant's sex/pregnancy.

Respondent CCI's proffered defenses to the Agency's direct evidence were that (1) Speaks and Winegar did not make the latter comment; (2) Winegar's statement to Complainant when demoting her contained no reference to her pregnancy, only to her availability; (3) Complainant was demoted because she did not want to work until closing and Winegar needed an assistant night manager who would work until closing; and (4) Complainant limited her own availability by telling Winegar she did not want to work until closing. For reasons set out in the credibility findings, the forum rejects (1) and (2). The forum rejects (3) and (4) because of Complainant's credible testimony to the contrary, which is supported by her work history of working until closing for Respondent and for her prior and present employers.[xxi]

Based on the above, the forum concludes that Respondent CCI, through Winegar, demoted Complainant because of her sex/pregnancy. Because the demotion was also the direct cause of the reduction in her hourly wage rate, the forum also concludes that Respondent CCI, through Winegar, cut Complainant's pay because of her sex/pregnancy.

B. <u>Complainant's hours were not cut because of her sex/pregnancy.</u>

The Grill's time records show that Complainant was scheduled to work and worked an average of 33.3 hours per week between March 28 and May 8, 2009. She worked 13.25 hours the week of May 9-15 and was scheduled to work May 11 but did not because of sickness. She was scheduled to work and worked 19.25 hours the week

of May 16-22, 2009. In the week of May 23-29, 2009, the week immediately after her demotion, she worked 20.5 hours, not including May 28, an additional day on which she was scheduled to work but did not work because of sickness. Respondents contend that Complainant was also scheduled to work on May 29, as shown on R-1 which reflects that Complainant was "sick" on that day. For the following reasons, the forum does not believe that Complainant was scheduled to work on May 29. First, the set of time records originally provided by Respondents to the Agency on December 14, 2009, did not contain this notation.[xxii] Second, Susan Speaks testified that she made the change on R-1 based on a handwritten note she missed on the original time records. Third, Susan Speaks also testified that the original records were destroyed not long after they were created, making it impossible for her to have based a correction of the set of time records originally provided by Respondents to the Agency on the original time records. Despite this fact, the undisputed time records provided by Respondents December 14, 2009, show that Complainant's hours actually <u>increased</u> the week immediately following her demotion.

Although it is undisputed that Complainant was temporarily taken off the schedule after she went to the emergency room on May 28, then rescheduled for only 7.25 hours the following week, the evidence is muddy as to the circumstances surrounding the schedule change. Unlike her demotion, there are no statements demonstrating Respondent's intent to take Complainant off the schedule because of her sex/pregnancy. Likewise, there is no comparator evidence to show that her hours would not have been temporarily cut, had she been out sick and visited the emergency room and not been pregnant. The forum concludes that the Agency failed to prove by a preponderance of the evidence that Complainant's hours were cut because of her sex/pregnancy.

COMPLAINANT WAS DISCHARGED BECAUSE OF HER SEX/PREGNANCY

On June 1, 2009, Gary Speaks, Susan Speaks, and Winegar met and decided to fire Complainant. Winegar called Complainant that night and left a message to that she was fired because of her attitude. This was four days after Complainant had gone to the emergency room for bleeding related to her pregnancy, and eight days after Complainant was demoted because of her pregnancy.

In their testimony, Respondents' witnesses gave two reasons for this decision – Complainant's negative attitude towards Jennifer McKenzie and customer complaints about Complainant. With regard to McKenzie, Winegar testified that Complainant resented McKenzie's promotion, was behaving in a hostile manner towards McKenzie, and that McKenzie told Winegar she couldn't work with Complainant because of her attitude. Winegar and Susan Speaks both testified that customers came to them after Complainant's demotion and complained that Complainant had complained to them that she had been demoted because of her pregnancy. Gary Speaks testified that customers had also complained to him that Complainant had told them that Respondents were being "assholes" and "mean to her," but the context of his testimony places these complaints as <u>before</u> her demotion. No one was able to name any customers who allegedly complained to them. In her testimony, Complainant acknowledged telling some of her regular customers, in response to their question about why she was now wearing a red shirt, that she "was pretty sure it was because she was pregnant." However, she credibly denied having problems working with McKenzie. McKenzie did not appear to testify and Respondents did not document any of the alleged problems, pursuant to Gary Speaks's testimony that it was not their policy to document anything.

For a number of reasons, the forum does not believe Respondents' stated reasons for firing Complainant. First, the general lack of credibility of the Speaks and Winegar, as described in Findings of Fact ##65-67 – The Merits. Second, Gary Speaks testified unequivocally that he had made a decision in April 2009 to fire Complainant because he would no longer need her when a general manager was hired, yet no action was taken against her when Winegar was hired because Winegar "offered to work with her and see if she was salvageable." Winegar conspicuously failed to mention any "offer[] to work with her and see if she was salvageable" in his testimony. Third, Gary Speaks did not mention any problems Complainant had with McKenzie in two letters initially responding to the complaint in which explained why she was demoted and fired. Fourth, in those letters Speaks summarized the circumstances of Complainant's termination in the following words:

> "She then started complaining to customers and other employees that we were being unfair to her because she was pregnant. She then refused to work the schedule given[xxiii] and this was when we made the decision to terminate her."[xxiv]

Summarized, Gary Speaks, a key player in the decision to fire Complainant, stated in his testimony and letters that the decision to fire Complainant was made on three different occasions – (1) in April; (2) when she was demoted; and (3) on June 1 -- each time for a different reason. Finally, considering the emphasis Respondents put on the problems between McKenzie and Complainant and Winegar's assessment of the situation, it is notable that, after Complainant's demotion, McKenzie and Complainant only worked part of one shift together on May 23, 15 minutes of a shift together on May 25, and did not work again together until the day Respondents decided to fire Complainant.[xxv] After Complainant's demotion, Winegar and Complainant only worked together on May 23 and 24. Interestingly, the Grill's time records also show that Winegar did not work on June 1, the day the decision was made to fire Complainant.

These facts, combined with the "specific intent" statements Winegar and Gary Speaks made concerning Complainant's pregnancy vis-à-vis her continuing employment status at the Grill, her demotion eight days earlier because of her pregnancy, and her pregnancy-related trip to the emergency room a few days earlier that caused her to be temporarily taken off the schedule, lead the forum to conclude that Complainant was discharged because of her sex/pregnancy.

RESPONDENT GARY SPEAKS AIDED & ABETTED RESPONDENT CCI IN DISCHARGING COMPLAINANT

ORS 659A.030(1)(g) provides that it is an unlawful employment practice "[f]or any person, whether an employer or employee, aid, abet, incite, compel or coerce the doing of any of the acts of this chapter or to attempt to do so." This forum has previously held that aiding and abetting, in the context of an unlawful employment practice, means "to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission." *In the Matter of Sapp's Realty, Inc.,* 4 BOLI 232, 277 (1985).

In this case, Respondent Speaks was Respondent CCI's vice president and CEO and owned one third of CCI's corporate shares throughout Complainant's employment. A corporate officer and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided and abetted the corporation's unlawful employment practice. *In the Matter of Executive Transport, Inc.,* 17 BOLI 81, 94 (1998). *See also In the Matter of Body Imaging, P.C.,* 17 BOLI 162, 183-84 (1998), *affirmed* in part, *reversed* in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000); *In the Matter of Katari, Inc*., 16 BOLI 149, 161 (1997), *affirmed without opinion, Katari, Inc. v. Bureau of Labor and Industries*, 154 Or App 192, 957 P2d 1231, *rev den*, 327 Or 583 (1998); *In the Matter of Vision*

Graphics and Publishing, Inc., 16 BOLI 124, 138 (1997); *In the Matter of A.L.P. Incorporated,* 15 BOLI 211, 219-22 (1997*), affirmed, A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

The forum has determined that Respondent CCI engaged in three distinct unlawful employment actions – demoting Complainant from her assistant night manager position, cutting her pay, and discharging her. The evidence shows that Winegar discussed Complainant's job status with Speaks shortly before Winegar demoted Complainant and cut her pay, and that Winegar had the authority to take those actions. There is no evidence that Winegar told Speaks he intended to demote Complainant, that Speaks took any part in Complainant's demotion and pay cut by either recommending those actions or making a joint decision with Winegar to take one or both actions, or that Winegar told Speaks that his concerns about Complainant's job status were based on his concerns about her pregnancy. Rather, the evidence shows that Winegar brought up Complainant's job status with Speaks, that Speaks gave a neutral recommendation that Winegar should take whatever action he thought best, and that Winegar made the decision to demote Complainant, cut her pay, and promote Jennifer McKenzie in her place. Based on this evidence, the forum concludes that the Agency failed to prove by a preponderance of the evidence that Respondent Speaks played an active role in Complainant's demotion and resultant pay cut and that Speaks is not liable as an aider and abettor for that unlawful employment action.[xxvi]

Complainant's unlawful discharge is another matter. The evidence is undisputed that Respondent Speaks, Susan Speaks, and Winegar made a joint decision to discharge Complainant. Based on *Sapp's*, Respondent Speaks's participation in this decision making process places him squarely in the frame as an aider and abettor. *See, e.g., In the Matter of Loyal Order of Moose,* 13 BOLI 1, 11, 13-14 (1994) (When

female complainants were subjected to unwelcome sexual conduct by their employer's manager, the commissioner found that the manager aided and abetted the employer's unlawful practice and ordered financial remedy for each complainant against both the manager and the employer).

DAMAGES – BACK PAY

A. <u>Complainant is entitled to back pay.</u>

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *From the Wilderness,* 30 BOLI 227, 290 (2009), *appeal pending.* 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. Awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *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). A respondent has the burden of proving that a complainant failed to mitigate his or her damages. *In the Matter of Wal-Mart Stores, Inc.,* 24 BOLI 37, 65 (2003). To meet that burden, a respondent must prove that a complainant failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and which the complainant was qualified." *Id.*

While Complainant was assistant night manager, she was paid $10 per hour and averaged $400 a week in tips. She was demoted to server and her pay cut to $8.40 per hour, effective May 23, 2009. She was fired at the end of the day on June 1, 2009. After she was fired, she did not begin looking for another job until on or about July 1,

2009. From July 1 until October 31, 2009, she actively sought employment. Due to her pregnancy, she was unavailable for work from October 31 to December 29, 2009, when her baby was born. After her baby was born, she did not look for work again until April 1, 2010. She was hired at her current job on or about April 15, 2010, and the Agency does not seek back pay after that date.

Before computing Complainant's back pay, the forum addresses Respondents' arguments regarding Complainant's entitlement to any back pay. First, Respondents contends that the Agency's failure to offer Complainant's 2000 and 2010 tax returns as evidence leads to an inference that her claim for back pay is excessive. The forum disagrees. The Agency was under no obligation to offer Complainant's tax returns to support of its claim for back pay, and its failure to do so, in the absence of a discovery order, does not require the forum to draw any inference whatsoever. If Respondent wanted Complainant's tax returns in the record, it could have sought them through discovery, then moved for a discovery order that would have been granted, had the Agency refused to provide them.

Respondent also disputed Complainant's testimony that she averaged $400 per week in tips. Respondent could have presented rebuttal testimony concerning Complainant's average tips but did not do so. For example, Respondent could have solicited testimony from the other servers who testified at hearing as to the amount of tips they received. In the absence of any contravening evidence, the forum relies on Complainant's credible, unrebutted testimony to determine her average tips.

Finally, Respondent argues that Complainant did not mitigate her damages. Complainant credibly testified she looked for work between July 1 and October 31, 2009, and from April 1 through April 15, 2010. Although her testimony was not overly specific as to specific jobs that she applied for, her testimony that she actively sought

work was not impeached. In rebuttal, Respondents offered no evidence of any other job openings for which Complainant was qualified and did not apply.[xxvii]

B. <u>Computation of back pay.</u>

The Agency seeks back pay for three periods of time: (1) May 23-June 1, 2009, computed at $1.60 per hour, the difference between $10 per hour, the amount Complainant earned as assistant night manager, and $8.40 per hour, the amount she earned after her demotion; (2) June 2 to October 31, 2009, computed at a wage rate of $10 per hour and $400 per week in tips; and (3) April 1 through April 15, 2010, computed at a wage rate of $10 per hour and $400 per week in tips.

May 23-June 1, 2009

Rather than speculate as to the number of hours Complainant might have worked, had she not been demoted, the forum awards Complainant back pay at the rate of $1.60 per hour for the 27.75 hours[xxviii] she actually worked during this period of time. 27.75 hours multiplied by $1.60 equals $44.40.

June 2 to October 31, 2009

Complainant did not look for work for the first month after her discharge. Even though her lack of initiative may have been largely due to the depression she felt after being fired, her failure to look for work disqualifies her from a back pay award between June 2 and June 30, 2009.[xxix] However, she is entitled to an award for back pay and lost tips for the period of time extending from July 1 to October 31, 2009. To compute Complainant's back pay, the forum has averaged the number of hours she worked in the eight weeks beginning March 28 and ending May 29, 2009 (31.6 hours), multiplied it by the 17 weeks in the period of time extending from July 1 to October 31, 2009 (17 weeks x 31.6 hours = 537.2 hours), then multiplied that figure by $10 per hour (537.2 hours x $10 per hour = $5,372). To calculate Complainant's lost tips, the forum has

multiplied the 17 weeks by $400, Complainant's average weekly tips (17 weeks x $400 = $6,800). In total, Complainant suffered a loss of back pay and tips of $12,172 from July 1 to October 31, 2009.

April 1 through April 15, 2010

The Agency stakes its claim for a back pay award from April 1 through April 15, 2010, on the proposition that Complainant would have returned to work at the Grill, had she remained employed, after taking 12 weeks of family leave under the Oregon Family Leave Act ("OFLA").[xxx] The Agency's claim fails for two reasons.

First, because it failed to prove that Complainant would have been entitled to take OFLA leave. Under the OFLA, only "covered employers" are required to grant family leave to employees. ORS 659A.153(1) defines "covered employers" as follows:

> "The requirements of ORS 659A.150 to 659A.186 apply only to employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken."

In its answer, Respondent CCI admitted that it employed "one or more employees" and Respondent Speaks told Martindale, in a June 2, 2010, interview that CCI employed "15 or more persons" but there is evidence in the record to show that Respondent CCI employed as many as 25 persons at any time. As the Agency has failed to show that Complainant would have been entitled to take OFLA leave, its claim for back pay cannot rest on that premise.

Second, because there is no evidence in the record that any other CCI employees were allowed to take a continuous five month leave from work for any reason, then return, or that CCI had a policy allowing such a leave.

EMOTIONAL DISTRESS/MENTAL SUFFERING DAMAGES

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. It also considers the type and duration of the mental distress and the vulnerability of the complainant. 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. *From the Wilderness*, 30 BOLI 291-92 (2009), *appeal pending*.

Because this case involves two separate discriminatory acts – Complainant's demotion/pay cut and her discharge -- and Respondent Gary Speaks is only liable for the latter, the forum makes a separate award of damages for each act.

A. <u>Complainant's demotion and pay cut.</u>

Complainant was promoted to assistant night manager after working as a server for three months. She was happy about her promotion and her pay raise to $10 per hour, the highest hourly wage she has ever been paid. She continued to be "extremely happy" about working in that job. While she worked as assistant night manager, she was never counseled or disciplined about her work performance. In late April 2009, she was also happy to learn she was pregnant. On May 22, 2009, Winegar told Complainant that she was being demoted to her former position as a server and that her pay was being cut to minimum wage because he didn't feel she would be sufficiently available to work because of her pregnancy. Her immediate reaction was to become "very upset and cr[y]." She remained upset, and her demotion caused some "problems" at home with Christopher Jones, her boyfriend, and their finances.[xxxi] As assistant night manager, Complainant wore black pants and a black shirt. After her demotion, she had to wear a red shirt like the Grill's other servers, which made her feel degraded, a feeling

accentuated when long-time customers asked her why she was wearing a red shirt. She was discharged nine days after her demotion. The forum notes that there is no evidence in the record to show that the emotional and mental suffering Complainant experienced as a direct result of her demotion and pay cut continued after her discharge.

Based on these facts, the forum concludes that $20,000 is an appropriate amount to compensate Complainant for the emotional and mental suffering she experienced as a result of her demotion and pay cut.

B. <u>Complainant's discharge.</u>

Complainant testified credibly and at length as to the emotional and mental suffering she experienced as a result of her discharge and the forum bases its damage award primarily on her testimony, summarized in detail below.

Complainant is an independent person who has always been employed and has never had trouble finding a job. Being fired when she was pregnant, in her words, was the "most degrading, unhappy time probably in a long-time time that I've ever had * * * It went from a happy moment to an 'Oh my God, what am I going to do, I have to get on food stamps now, now I'm back on welfare * * *."

She was "beyond upset" for a couple of months after she was fired and was depressed and didn't want to go anywhere. She went from being excited about being pregnant to being depressed after she was fired and just wanted to be left alone. She cried a lot and was nervous about how she would support her baby and herself.

During her subsequent job search, she believed no one would hire her because she was obviously pregnant and found this degrading. At the time of hearing, she still felt frustrated that she was fired instead of being able to keep her job until she went on family leave. She thinks about her discharge frequently and it still bothers her.

Complainant felt “belittled” by her discharge. Complainant and Jones, who was unemployed at the time, “bickered” a lot more after she was fired because of the financial stress caused by the loss of her job and also because a baby was on the way. She experienced stress because she and Jones were both unemployed and concerned over the responsibility of having a child and how they would pay for the expenses associated with having a child.

Complainant considered, but did not seek counseling for her depression after she was fired because she had no money to pay for counseling services. Complainant and Jones talked about going to “couples counseling” after Complainant was fired but did not go because Jones did not want to go and they had no money to pay for counseling services.

To make ends meet, Complainant had to apply for food stamps after she was fired. This made her feel embarrassed and degraded. She also had to get financial help from her mother to pay for baby-related expenses.

Respondent argues that Complainant’s emotional and mental suffering damages should be severely limited because she did not seek medical attention or psychological counseling. The forum has addressed this issue before and held that the lack of medical consultation of the failure to seek counseling goes to the severity of mental suffering, not necessarily to its existence. *In the Matter of Katari, Inc.,* 16 BOLI 149, 161 (1997)*, affirmed without opinion*, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, *rev den*, 327 Or 583 (1998). *See also In the Matter of Portland General Electric Company,* 7 BOLI 253, 272 (1988), *affirmed, Portland General Electric Company v. Bureau of Labor and Industries,* 116 Or App 606, 842 P2d 419 (1992); affirmed, 317 Or 606, 859 P2d 1143 (1993).

Based on these facts, the forum concludes that $120,000 is an appropriate amount to compensate Complainant for the emotional and mental suffering she experienced as a result of her discharge.

MANDATORY TRAINING ON RECOGNIZING AND PREVENTING DISCRIMINATION IN THE WORKPLACE BASED ON SEX/PREGNANCY

The Agency requests that "Respondents and any employees they currently employ required to attend training on recognizing and preventing discrimination in the workplace based on protected class." The Commissioner of BOLI is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ORS 659A.850(4). Among other things, that may include requiring the respondent to:

> "(a) Perform an act or series of acts designated in the order that are reasonably calculated to:
>
> "(A) Carry out the purposes of this chapter;
>
> "(B) Eliminate the effects of the unlawful practice that the respondent is found to have engaged in, including but not limited to paying an award of actual damages suffered by the complainant and complying with injunctive or other equitable relief; and
>
> "(C) Protect the rights of the complainant and other persons similarly situated[.]"

Requiring Respondents to undergo training specifically tailored to prevent future similar unlawful practices, as the Agency seeks, falls within authority granted to the Commissioner in ORS 659A.850(4). However, since the unlawful employment practices only relate to the protected class of sex/pregnancy, requiring training related to all protected classes cuts an overly broad swath. Consequently, the forum has tailored the required training to Complainant's protected class.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent Cyber Center, Inc.'s violations of ORS 659A.030(1)(b), and as payment of the damages awarded, the Commissioner of

the Bureau of Labor and Industries hereby orders **Cyber Center, Inc.** 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 Amanda Glover** in the amount of:

1) FORTY FOUR DOLLARS AND FORTY CENTS ($44.40), less lawful deductions, representing wages lost by Amanda Glover between May 23 and June 1, 2009, as a result of Respondent Cyber Center, Inc.'s unlawful employment practice found herein; plus,

2) TWENTY THOUSAND DOLLARS ($20,000.00), representing compensatory damages for emotional and mental suffering Amanda Glover experienced as a result of Respondent Cyber Center, Inc.'s unlawful employment practice of demoting her and cutting her pay; plus,

3) Interest at the legal rate on the sum of TWENTY THOUSAND FORTY FOUR DOLLARS AND FORTY CENTS ($20,044.40) until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent Cyber Center, Inc.'s violations of ORS 659A.030(1)(a) and Respondent Gary Speaks's violation of ORS 659A.030(1)(g), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Cyber Center, Inc.** and **Gary Speaks** 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 Amanda Glover** in the amount of:

1) TWELVE THOUSAND ONE HUNDRED AND SEVENTY TWO DOLLARS ($12,172.00), less lawful deductions, representing wages and tips lost by Amanda Glover between July 1 and October 31, 2009, as a result of Respondent Cyber Center, Inc.'s and Respondent Gary Speaks's unlawful employment practices found herein; plus,

2) ONE HUNDRED TWENTY THOUSAND DOLLARS ($120,000.00), representing compensatory damages for emotional and mental suffering Amanda

Glover experienced as a result of Respondent Cyber Center, Inc.'s and Respondent Gary Speaks's unlawful employment practices found herein; plus,

3) Interest at the legal rate on the sum of $132,172.00 from the date of the Final Order until Respondents comply herein.

C. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent Cyber Center, Inc.'s violations of ORS 659A.030(1)(a) & (b) and Respondent Gary Speaks's violation of ORS 659A.030(1)(g), the Commissioner of the Bureau of Labor and Industries hereby orders and Cyber Center, Inc. to require its current employees, if any, including Gary Speaks, to attend training on recognizing and preventing discrimination in the workplace based on sex/pregnancy. Such training may be provided by the Bureau of Labor and Industries Technical Assistance for Employees unit or another trainer agreeable to the Agency.

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[i] Patricia Allred was married after she left Respondent CCI's employment and her married name is McCarty.

[ii] The forum infers that it occurred before Winegar was hired as general manager because neither of the Speaks nor Complainant testified that Winegar was present or aware of this incident and Winegar did not mention the incident in his testimony.

[iii] *Id.*

[iv] There is no documentary evidence in the record of the hours worked by Complainant during any weeks prior to April 4, 2009.

[v] Includes one sick day.

[vi] Includes one sick day.

[vii] *See* Finding of Fact #23 – The Merits.

[viii] Respondent argues that Complainant was scheduled to work on May 29 but missed work due to sickness. For reasons set out in the Opinion, the forum has concluded that Complainant was not scheduled to work on May 29.

[ix] The forum has been unable to determine from the record whether Complainant attempted to return to work on May 30 or May 31.

[x] The forum takes judicial notice that Halloween fell on October 31 in 2009.

[xi] Barlow testified that he usually worked until "3-4 p.m.," but the time records show he typically worked until 2 p.m.

[xii] Barlow's specific testimony was that "Gary Speaks said he 'didn't think [Complainant] could do her job because of being pregnant and getting sick and he took her off the schedule' and Jay Reese said 'you

better put her back on the schedule because they could get you for that or something.' I don't know the exact words but I was standing 10 feet away." Barlow also testified that Jay Reese also said "You can't fire someone just for being pregnant."

[xiii] In Barlow's words, Complainant was "taken off the schedule, then put back on the next day or later that afternoon or whatever it was."

[xiv] *See* Finding of Fact #41 -- The Merits.

[xv] *See* Exhibits A-1, R-2, R-3.

[xvi] The significance of this statement is Jason Winegar had not yet started work at the Grill at the time Speaks ran the ads on Craigslist.

[xvii] Includes one sick day, May 11, on which Complainant was scheduled to work.

[xviii] Includes one sick day, May 28, on which Complainant was scheduled to work.

[xix] OAR 839-005-0021(1) & (2) provide:

"(1) Employers are not required to treat all employees exactly the same, but are prohibited from using sex as the basis for employment decisions with regard to hiring, promotion or discharge; or in terms, conditions or privileges of employment such as benefits and compensation.

"(2) Discrimination because of sex includes sexual harassment, discrimination based on pregnancy, childbirth and medical conditions and occurrences related to pregnancy and childbirth."

OAR 839-005-0026(1) & (2) provide:

"(1) Pregnant women are protected from sex discrimination in employment.

"(2) In judging the physical ability of an individual to work, pregnant women must be treated the same as males, non-pregnant females and other employees with off-the-job illnesses or injuries."

[xx] *See* Finding of Fact #41 – The Merits.

[xxi] *See* Findings of Fact ##11, 15, 26, 34 -- The Merits.

[xxii] Exhibit A-7.

[xxiii] The forum infers this was prior to her demotion, as that is when Respondents contend that Complainant stated she did not want to close.

[xxiv] *See* Exhibit R-4.

[xxv] *See* Finding of Fact #34 – The Merits.

[xxvi] Had Winegar told Speaks that, in considering Complainant's job status, he had concerns about her pregnancy or that he had made a tentative decision to demote Complainant and cut her pay and wanted Speaks's approval for that decision, the result may have been different.

[xxvii] *See, e.g., In the Matter of ARG Enterprises, Inc.,* 19 BOLI 116, 139 (2000) (When complainant had been employed by respondent as a dishwasher and respondent proved, through the presence of numerous help wanted ads and expert testimony, that complainant should have been able to find work as a dishwasher within one week after his discharge, the forum limited complainant's back pay award to one week's lost wages even though complainant remained unemployed for a longer period of time).

[xxviii] *See* Findings of Fact ##32 & 39 – The Merits.

[xxix] *See In the Matter of Loyal Order of Moose,* 13 BOLI 1, 8, 13 (1994)(When complainant was constructively discharged and did not actively seek work until a month later, and nine weeks later

removed herself from the job market when she began work as a volunteer caregiver, the commissioner awarded back pay for the nine week period that complainant actively sought work); *In the Matter of Russ Berrie & Co., Inc.,* 9 BOLI 49, 66 (1990)(When a complainant excludes herself from the job market, other than for the reason of accepting alternative employment, she fails to mitigate her loss for the period of that exclusion. Thus, complainant was not awarded back pay during a period of maternity leave with a subsequent employer that paid less than respondent or during a month when she did not seek employment); *In the Matter of Lee's Cafe,* 8 BOLI 1, 20-21 (1989)(When complainant did not seek alternative employment for two months after she was discharged from respondents' café, the commissioner held that she was not entitled to back pay for that period because she voluntarily excluded herself from the job market, thus failing to mitigate her damages).

[xxx] ORS 659A.150 through 659A.186.

[xxxi] Complainant testified that her pay cut also caused a $70 overdraw that caused her bank to decline to provide a checking account to Complainant and Jones. Since Complainant only lost $44.40 in wages between May 22 and June 1, the forum declines to blame Complainant's demotion for the bank's action.