

In the Matter of
NORTHWESTERN TITLE LOANS LLC, dba Northwest Title Loans,

Case No. 84-05

Final Order of Commissioner Dan Gardner

Issued March 28, 2008

SYNOPSIS

The Agency alleged that Respondent discharged Complainant because she reported activity or activities by Respondent that she reasonably believed to be criminal and because she initiated a civil proceeding against Respondent by filing a complaint with the Department of Consumer and Business Affairs (“DCBS”). The forum dismissed the charges based on findings that Respondent’s behavior was not criminal and Complainant did not believe Respondent’s activity was criminal and because Respondent did not know or believe that Complainant had contacted DCBS at the time Respondent discharged Complainant. ORS 659A.230, OAR 839-010-0110(2), OAR 839-010-0140(1)(b).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge (“ALJ”) by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 11-13, 2007, at the Medford office of the Oregon Employment Department, located at 119 N. Oakdale Ave., Medford, Oregon.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by Chet Nakada, case presenter, an employee of the Agency. Complainant Deborah McClure (“Complainant”) was present throughout the hearing and was not represented by counsel. Northwestern Title Loans LLC, dba Northwest Title Loans (“Respondent”) was represented by William E. Gaar, attorney at law. Steve Miller, Respondent’s vice president of operations, was present throughout the hearing as the natural person

designated by Respondent to assist in the presentation of its case pursuant to OAR 839-050-0150(3)(b).

The Agency called the following witnesses: Complainant; Steven Lamb, Complainant's domestic companion; Leslie Laing, Civil Rights Division senior investigator; Michael McCord, former field examiner for the Oregon Department of Consumer and Business Services ("DCBS") (telephonic); and Kristine Mastoris, Respondent's former employee (telephonic).

Respondent called as witnesses: Steve Miller; Michael Reed, Respondent's general counsel; Kari Callaway, Respondent's Oregon area manager (telephonic); and Sarah Hooper (formerly Sarah Yanez), former Oregon area manager for Respondent (telephonic).

The forum received into evidence:

- a) Administrative exhibits X-1 through X-33 (submitted or generated prior to and after the hearing).
- b) Agency exhibits A-1 through A-32 (submitted prior to hearing); and A-34 (submitted after hearing at the ALJ's request). A-33 was offered, but not received.
- c) Respondent exhibits R-1 through R-30 (submitted prior to hearing). R-31 was offered but not received.

Having fully considered the entire record in this matter, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

- 1) On March 8, 2004, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that Respondent discharged her "for invoking the

workers' compensation system and for reporting criminal activity to the State Auditors office (whistleblowing)."

2) After investigation, the Agency issued a Notice of Substantial Evidence Determination on March 8, 2005, finding substantial evidence of an unlawful employment practice "on the basis that Complainant [was terminated because she] invoked the Workers' Compensation system and blew the whistle on activity that she believed to be criminal in nature."

3) On August 1, 2007, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant in that:

a) "Respondent terminated Complainant because Complainant reported criminal activities or activities she reasonably believed to be criminal at her place of employment, * * * constitut[ing] an unlawful employment practice in violation of ORS 659A.230 and OAR 839-01-0110(2)"; and

b) "In addition to or in the alternative to the [above-cited] violation * * *, Respondent terminated Complainant because Complainant reported Respondent's business practices to an administrative agency, DCBS. Respondent's termination of employment in retaliation for initiating, in good faith, a civil proceeding, constitutes an unlawful employment practice in violation of ORS 659A.230 and OAR 839-01-0140(1)(b)."

The Agency alleged that Respondent's violations of the versions of ORS 725.618ⁱ and OAR 441-730-0275(18) and (19) in effect as of July 1, 2001, constituted the criminal activities and business practices that Complainant reported. The Agency sought damages of "[l]ost wages, including but not limited to, lost benefits and out-of-pocket expenses, in an amount to be proven at hearing and estimated to be \$8,000" and \$30,000 for damages for "mental, emotional, and physical suffering."

4) On August 2, 2007, the forum served the Formal Charges on Respondent, accompanied by the following: a) a Notice of Hearing setting forth October 17, 2007, in Medford, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS

183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On August 14, 2007, Respondent served interrogatories and a subpoena duces tecum and for deposition on Complainant.

6) On August 20, 2007, Respondent filed an answer and request for hearing through counsel William Gaar. Respondent also filed a motion to postpone the hearing based on the unavailability of a key witness on the date set for hearing. The Agency did not object to Respondent's motion and, on May 18, 2007, the ALJ granted Respondent's motion for postponement.

7) On August 20, 2007, the Agency moved to quash Respondent's subpoena to depose Complainant.

8) On August 21, 2007, the ALJ issued an interim order noting there was a jurisdictional issue in the case, in that the Agency's Formal Charges alleged that the Agency issued a Substantial Evidence Determination setting forth its findings more than one year after Complainant filed her verified complaint, whereas ORS 659A.830(3) provides:

"Except as provided in subsection (4) of this section, all authority of the commissioner to conduct investigations or other proceedings to resolve a complaint filed under ORS 659A.820 ceases one year after the complaint is filed unless the commissioner has issued a finding of substantial evidence under ORS 659A.835 during the one-year period."

To resolve this issue, the ALJ ordered the Agency to provide a copy of complainant's verified complaint with a legible date stamp showing the date of filing and a copy of the Agency's Substantial Evidence Determination and any other documentation that was issued showing the date the Agency issued it. The Agency subsequently provided documents showing that the complaint was filed on March 8, 2004, and the Substantial

Evidence Determination issued on March 8, 2005. On September 12, 2007, the ALJ issued an interim order concluding that the forum had jurisdiction to hear the case.

9) On August 27, 2007, the ALJ granted the Agency's motion to quash Respondent's subpoena to depose Complainant on the grounds that Respondent had not filed a motion to take Complainant's deposition nor demonstrated that other methods of discovery were so inadequate that Respondent would be substantially prejudiced by the denial of a motion to depose Complainant.

10) On August 28, 2007, the ALJ issued an interim order retracting his August 27 interim order quashing Respondent's subpoena to depose Complainant and gave Respondent until August 31, 2007, to respond to the Agency's motion. The interim order was based on the ALJ's recognition that the August 27 interim order was issued before Respondent had an opportunity to respond.

11) On September 13, 2007, Respondent filed a motion for a discovery order to depose Complainant, arguing that the Agency's "obfuscatory" responses to Respondent's interrogatories demonstrated the need for a deposition and further asserting that denial of Respondent's motion constituted reversible error based on *Bernard v. Board of Dental Examiners*, 2 Or App 22 (1970).

12) On September 18, 2007, the ALJ issued an amended ruling on the Agency's motion to quash Respondent's subpoena to depose Complainant. The ruling is reprinted below in its entirety.

"On August 20, 2007, the Agency moved to quash Respondent's subpoena to depose Complainant Deborah McClure. The Agency attached to its motion a copy of a '*Subpoena Duces Tecum and For Deposition to Complainant Deborah McClure*' commanding the appearance of Complainant McClure for a deposition on October 22, 2007, along with the production of nine categories of documents at the time of the deposition. The Agency's motion was based on OAR 839-050-0200(3), which states:

‘Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.’

“On August 27, 2007, I issued an Interim Order quashing the subpoena to depose Complainant. After an August 28, 2007, prehearing conference, I issued a ruling allowing Respondent to file a response to the Agency’s motion. On August 31, 2007, Respondent filed a response to the Agency’s motion, together with a motion for a discovery order to depose Complainant McClure. On September 17, 2007, I conducted a prehearing conference with Mr. Nakada, the Agency case presenter assigned to this case and Ms. Lentzner, Respondent’s counsel, to discuss this matter. This ruling considers the Agency’s motion, Respondent’s response, and Respondent’s motion for a discovery order to depose Complainant.

“Respondent contends that it is entitled to depose Complainant as a matter of law, citing OAR 839-050-0200(9), ORCP 55(A), ORS 183.440(1), and *Bernard v. Board of Dental Examiners*, 2 Or App 22 (1970) in support of its argument. Respondent also contends that it will be substantially prejudiced if not allowed to depose Complainant based on the Agency’s ‘obfuscatory responses’ to interrogatories.

“OAR 839-050-0200(9) provides:

‘Unless limited by the administrative law judge, the participants may issue subpoenas in support of discovery. Counsel representing a party may issue subpoenas in the same manner as subpoenas are issued in civil actions, as set forth in the Oregon Rules of Civil Procedure. The administrative law judge may issue subpoenas in support of discovery for any party not represented by counsel. The Bureau of Labor and Industries may apply to the circuit court to compel obedience to a subpoena.’

“ORCP 55(A) allows for subpoenas to be issued against:

‘a person and may require the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require such person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place.’

“ORS 183.440(1) provides that ‘[a] party entitled to have witnesses on behalf of the party may have subpoenas issued by an attorney of record of the party, subscribed by the signature of the attorney.’

“Respondent argues that because its attorney has the authority to issue subpoenas for the purpose of discovery, and depositions are a form of discovery, then Respondent has the unconditional right, under BOLI’s own hearing rules, to issue a subpoena to depose Complainant and to depose Complainant. The forum disagrees with Respondent’s analysis.

“Under OAR 839-050-0200(9), counsel may issue a subpoena in support of discovery. However, OAR 839-050-0200(3) creates an exception for depositions, providing that depositions will be allowed **only** when the requesting participant ‘demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.’ This rule requires a party seeking a deposition to file a motion for a discovery order to depose a particular witness and to establish that substantial prejudice will occur if the deposition is not allowed.

“Respondent has met the first requirement by filing a motion for a discovery order to depose the Complainant. However, Respondent has not met the second requirement. Respondent seeks to depose Complainant ‘to determine what her testimony will be at hearing.’ Through interrogatories and a request for documents, Respondent has sought information and documents from the Agency. However, the record at this point shows that only two interrogatories have been propounded to Complainant, both related exclusively to her claim for damages. Complainant’s responses are not part of Respondent’s motion for a discovery order or otherwise in the record, so the forum has no way of evaluating the adequacy of her responses to those interrogatories.

“As a means of discovery, Respondent may prefer conducting a deposition to writing and serving interrogatories on the Agency and Complainant. However, OAR 839-050-0200(2)(a) specifically provides for interrogatories as a means of discovery, and the forum does not presume that a deposition is the only adequate means of determining what the Complainant’s testimony will be at hearing. Respondent has not yet demonstrated that interrogatories to Complainant are such an inadequate means of determining what Complainant’s testimony will be at hearing that Respondent will be substantially prejudiced by its inability to depose Complainant.

“Respondent cites *Bernard* for the proposition that ‘a Hearings Officer’s failure to allow the complaining witness to be deposed is reversible error.’ However, *Bernard* can be distinguished from the present case. In *Bernard*, the Board of Dentistry sought to revoke a dentist’s license to practice dentistry. At issue was the Board’s refusal to allow the dentist’s counsel to take the deposition of the Board’s chief investigator who, under oath, had accused the dentist of fraud and misrepresentation. The court concluded that the dentist’s counsel was entitled to take the deposition of the Board’s chief investigator, but limited its holding in stating that:

‘We hold only that the testimony of the complaining witness in a license revocation case is of such “general relevance” under ORS 183.440 as to entitle the accused to a subpoena thereunder.’

Bernard at 29. Because this is not a license revocation proceeding, the forum is not bound by the holding in *Bernard*.

“The forum **DENIES** Respondent’s motion for a discovery order to take Complainant’s deposition and **GRANTS** the Agency’s motion to quash the subpoena issued by Respondent’s counsel requiring Complainant to submit to a deposition.

“If Respondent decides to serve written interrogatories on Complainant and determines (1) that Complainant’s responses are inadequate so that Respondent will be substantially prejudiced if not allowed to depose Complainant or (2) that Complainant is not responding in the timeline set out in OAR 839-050-0200(6), Respondent may renew its motion for a discovery order to depose Complainant.

“The Agency did not move to quash the portion of Respondent’s subpoena requiring Complainant to appear and provide nine categories of documents and Complainant remains bound to present those documents as required by subpoena. Should they choose to do so, Complainant and the Agency may provide the documents sought in the subpoena at any time previous to October 22, 2007, the date specified in the subpoena. If Complainant and the Agency choose this option, the documents should be sent directly to the office of Respondent’s counsel.”

“IT IS SO ORDERED”

13) On November 8, 2007, the Agency filed a letter stating that the parties had agreed in principal to settlement. On November 8, the Agency case presenter asked that the hearing be reset to give Respondent and the Agency an opportunity to finalize the settlement. Respondent did not object and the ALJ granted the motion, resetting the hearing to begin at 9:30 a.m. on December 11, 2007. On November 13, 2007, the ALJ issued an interim order confirming the postponement and new hearing date. In the same order, the ALJ ruled that persons served with subpoenas were ordered to honor that subpoena at the new hearing date and that it was the responsibility of Respondent and the Agency to send a copy of the ALJ’s interim order containing this ruling to their respective witnesses.

14) The Agency and Respondent each submitted case summaries in the time ordered by the ALJ. Each also submitted supplemental case summaries. Respondent e-mailed its supplemental case summary to the Agency on December 9, 2007, but the Agency did not receive it until Nakada arrived at the hearing.

15) At the outset of the hearing, Steve Miller and Michael Reed were both present. Respondent's counsel stated that they would both be witnesses and asked that they both be allowed to be present throughout the hearing. The ALJ ruled that either Miller or Reed could be present and the other would have to leave. Reed left the hearing room and thereafter was only present when he testified. (Statements of Gaar, ALJ)

16) At hearing, the Agency moved to amend its Formal Charges to change the word "much" on page six, line two, to "must." Respondent did not object and the ALJ granted the motion.

17) At hearing, the Agency moved to amend its Formal Charges to allege that Complainant filed her complaint with the Civil Rights Division on March 8, 2004, instead of March 3, 2004. Respondent did not object and the ALJ granted the Agency's motion.

18) On December 19, 2007, the ALJ conducted a telephonic post-hearing conference with Gaar and Nakada regarding the submission of simultaneous post-hearing briefs. The ALJ ordered Respondent to submit a legal brief analyzing the application of the applicable law in this case to the facts and the Agency to submit a legal brief or, at the agency's option, a statement of agency policy analyzing the application of the applicable law in this case to the facts. In addition, the ALJ ordered the Agency to submit copies of OAR 441-730-0275(18) and (19) that were in effect immediately prior to July 1, 2001, and any amendments to those rules in effect from July 1, 2001, until March 11, 2003. The Agency submitted the copies of OAR 441-730-0275(18) and (19) on December 27, 2007. The Agency and Respondent submitted post-hearing briefs on January 15, 2008.

19) On March 13, 2008, 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. The Agency filed exceptions on March 24, 2008. The Agency's exceptions are discussed at the end of the Opinion.

FINDINGS OF FACT – THE MERITS

Oregon Statutes and Administrative Rules Governing Title Loans: 2001-2003

1) At all times material, Oregon statutes regarding title loans were contained in ORS chapter 725. In ORS chapter 725, the Oregon legislature assigned regulatory authority over businesses making title loans to the Department of Consumer and Business Services (“DCBS”). In the 1999 edition of ORS, the chapter title of ORS chapter 725 was “Consumer Finance” and referred to title loans as “consumer” loans.

2) Effective March 22, 2001, the definition of “title loans” used by DCBS was contained in OAR 441-730-0010(17) and read as follows:

“(17) ‘Title loan’ means a loan primarily for personal, family or household purposes, other than a purchase money loan:

“(a) Made for a period of 60 days or less;

“(b) Secured by the title to a vehicle;

“(c) With a single payment payback;

“(d) Made by a person who is in the business of making Short-Term Personal Loans not including financial institutions or trust companies as defined in ORS 706.008; but,

“(e) Does not include a loan made for the purchase of a motor vehicle.”

In the same time period, OAR 441-730-0270 set out “Conditions Applicable to Short-Term Personal Loans,” which covered both title and payday loans. In pertinent part, those conditions were:

“(1) The following conditions apply to all Short-Term Personal Loan licensees

“* * * * *

“(b) If a consumer can not pay off the loan on the due date, the lender may renew the loan no more than three times in compliance with the provisions of subsectionⁱⁱ of this section.

“* * * * *

“(h) A Short-Term Personal Loan licensee may not make a loan to a consumer without forming a good faith belief that the consumer has the ability to repay the loan by considering factors including but not limited to: past experience with the borrower, the frequency with which the consumer routinely receives non-borrowed funds, the amount of those funds; and, the source of the funds that will be used to payback the loan if the consumer is not employed or receiving regular income. A licensee who meets the provision of section (2) of this rule will be deemed to be in compliance with this section.

“(i) A Short-Term Personal Loan licensee may not renew or extend a loan more than three times. If the consumer is unable to repay the loan after the third renewal or extension, the lender may not assess further charges, but may institute collection efforts to recover the balance of the loan.

Example

A consumer borrows \$300 for two weeks on June 5 for a fee of \$45. The due date is June 19. On June 19, being unable to pay-off the loan, the consumer renews or extends the loan for another two weeks by paying the \$45 fee. The new due date is July 3. On July 3, the consumer is unable to pay-off the loan and renews or extends the loan a second time by paying another \$45. The new due date is July 17. On July 17 the consumer is unable to pay-off the loan and renews or extends the loan for a third time by paying another \$45 with a due date of July 31. On July 31 the consumer is unable to pay off the balance. The lender may not charge any additional interest fees or other charges, but may institute collection efforts.

“* * * * *

“(k) If a Short-Term Loan licensee permits a borrower to renew or extend a loan after the due date, the extension or renewal shall be effective on the due date of the loan and no late charge shall be permitted.

“* * * * *

“(2) A licensee will be presumed to have complied with the provisions of subsection (h) of section 1 of this rule if the licensee:

“(a) Requires the consumer to produce the consumer’s current bank statement to evidence an active bank account and to enable the licensee to review the number of non-sufficient check charges and the dates of deposits;

“(b) Requires the consumer to produce the consumer’s most recent pay stub to evidence current employment, or requires the consumer to otherwise confirm the consumer’s source of funds for repayment of the loan;

“(c) Establishes the amount of salary or earnings and the date of the month on which compensation is paid or on which the consumer receives funds and solicits information on the number, amounts, and dates of maturity on outstanding loans;

“(d) Reviews a current driver’s license, utility bill or other evidence to confirm the address of the residence of the applicant; and,

“(e) Lends no more than 25% of the consumer’s monthly net income.

“(3) A licensee is not required to perform the due diligence in section (2) of this rule for every transaction, but may rely on prior experience, within 60 days, with repeat customers to take advantage of the presumption of compliance and Subsection (h) of Section (1) of this rule.”

3) In 2001, the Oregon Legislature amended ORS chapter 725ⁱⁱⁱ by enacting SB 171, subsequently codified as ORS 725.600 through 725.625, that specifically regulated “title loans.” SB 171 became effective on July 1, 2001. The chapter title to ORS chapter 725 was also changed to “Consumer Finance; Title Loans” in the 2001 edition of Oregon Revised Statutes. In pertinent part, ORS 725.600 through 725.625 contained the following provisions:

“725.600 Definitions for ORS 725.600 to 725.625. As used in ORS 725.500 to 725.625:

“(3) ‘Title loan’ means a loan, other than a purchase money loan:

“(a)(A) Secured by the title to a motor vehicle, recreational vehicle, boat or mobile home;

(B) Made for a period of 60 days or less;

(C) With a single payment payback; and

(D) Made by a lender in the business of making title loans; or

“(b) That is secured, substantially equivalent to a title loan as defined in paragraph (a) of this subsection, and designated as a title loan by rule or order of the Director of the Department of Consumer and Business Services.

“725.605 good faith belief in consumer ability to repay. A lender may not make a title loan to a consumer without forming a good faith belief that the consumer has the ability to repay the title loan. In forming a good faith belief, the lender shall consider factors adopted by the Director of the Department of Consumer and Business Services by rule. A lender that meets conditions adopted by the director by rule shall be deemed to be in compliance with this section.

“* * * * *

“**725.615 Prohibited actions.** A lender in the business of making title loans may not:

“* * * * *

“(6) Renew a loan that is secured by one title more than six times after the loan is first made[.]”

4) Effective December 26, 2001, DCBS adopted OAR 441-730-0275 and amended other Division 441 rules in response to the legislature’s enactment of ORS 725.600 through 725.625. In pertinent part, the amendments read as follows:

“**OAR 441-730-0010. Definitions**

“(16) “Title Loan means a loan as defined in §197(3) of Chapter 445, Oregon Laws 2001.

“* * * * *

“(18) “A person is ‘in the business of making Short-Term personal loans’ that are Title Loans if the person meets the requirements of § 197(1) of Chapter 445, Oregon Laws 2001.

“* * * * *

“**OAR 441-730-0275. Conditions Applicable to Short-Term Personal Loans that are Title Loans.**

“* * * * *

“(18) In compliance with § 198 Chapter 445, Oregon Laws 2001, prior to making a loan, a Short-Term Personal Loan licensee making a Title Loan must form a good faith belief that the applicant has the ability to repay the Title Loan under consideration.

“(19) A Short-Term Personal Loan licensee making a Title Loan will be presumed to have complied with section 18 of this rule if the licensee:

“(a) Requires the applicant to evidence a source of funds to repay the loan such as pay stubs, bank statements or similar record or evidence of employment or income.

“(b) Establishes the amount of salary or earnings of the applicant and the date of the month on which compensation is received by the applicant or on which the applicant receives funds[.]

“(c) Solicits the applicant for information on the number, amounts and dates of maturity on outstanding loans on which the applicant is the a [sic] payor or guarantor.

“(d) Lends no more than 25% of the applicant’s monthly net income to an applicant that earns \$60,000 a year or less. This limitation does not

apply to applicants with an income in excess of \$60,000 a year. If a loan is based upon anticipated receipt of funds from other sources, the licensee must so note in the file and may lend no more than 25% of the total anticipated funds received by the applicant during the loan period.

“(20) If the licensee has established a preexisting business relationship with the borrower in which the licensee has entered into a loan or loans within the previous 12 months that have been satisfactorily repaid in full, the licensee may rely on that preexisting relationship to form the good faith belief required under section (18) of this rule.”

In addition, OAR 441-730-0270 was amended so that its provisions only applied to “Payday Loans”^{iv} and no longer applied to “title loans.”

5) At all times material, ORS 725.910 provided that DCBS could assess a civil penalty and revoke the license of any licensee who violated provisions of ORS chapter 725, but there was no provision in ORS chapter 725 stating that such violations were a felony or misdemeanor.

6) Violation of ORS 725.615 is not a crime.

7) At all times material, DCBS’s definition of “renewal” was “granting a consumer the right to postpone repayment of a Short-Term Personal loan for a fee.”^v

Complainant’s Employment with Respondent and Her Termination

8) At all times material, Respondent Northwestern Title Loans LLC was a domestic limited liability company doing business in Oregon under the assumed business name of Northwest Title Loans and employed one or more persons in the State of Oregon.

9) At all times material, Respondent was in the business of making 30-day title loans and operated about a dozen stores in Oregon. Steve Miller was in charge of Respondent’s Oregon stores and employees throughout Complainant’s employment. Miller has worked for Respondent since 1998 and was involved in Respondent’s first store openings in Oregon.

10) Complainant was hired by Respondent on April 20, 2000, to work as assistant manager in Respondent's Medford store ("Medford") under the supervision of Chris Sears, Respondent's Medford manager. Throughout Complainant's employment with Respondent, only two persons were employed at the same time in Medford, a branch manager and assistant manager.

11) At all times material, Respondent's policy and procedure for evaluating loan applications was the following:

- If a client brings in a pay stub, make a copy and put it in the file. Otherwise, don't ask for one.
- See if the client has photo ID and that their vehicle title is free of all liens and encumbrances.
- Inspect the client's vehicle, drive it forward and back to make sure it runs and that the transmission works, and evaluate the condition of the vehicle.
- Ask the client if they are working, how much they earn, about their work history, and where they live and how long they've lived there.
- Ask how much money the client wants to borrow.
- Have the client fill out a loan application, which included a request for the client's income and payday.

Miller was trained in this procedure when Respondent hired him. Miller trained Sears, and Sears trained Complainant.

12) A major reason that Respondent did not require pay stubs is that a large number of its clients are independent contractors who do not have pay stubs.

13) Respondent's corporate policy has always been to have a good faith belief that consumers can repay loans. Respondent does not want to repossess cars, as they may lose money when they repossess cars.

14) In February 2001 Complainant was promoted to Medford store manager when Sears was transferred to another store. Complainant worked in that position until she was fired.

15) In March 2001 Kari Callaway was hired as assistant manager in Medford and worked under Complainant's supervision until July 2001, when she was promoted to manager of Respondent's Springfield store.

16) At all times material herein, Michael Reed was Respondent's in-house corporate counsel. When SB 171 became law on July 1, 2001, Reed advised Respondent that there were two options – Respondent could either continue to use its existing procedures to evaluate a customer's loan application and form a good faith belief that customers could repay the loans or change its procedures to benefit from the presumption contained in the "safe harbor" provision of SB 171. Respondent elected to continue its existing procedures because Respondent believed the "safe harbor" provision was too limiting and "just basically forced customers to go down the road to our competitors."

17) On July 3, 2001, Miller distributed a memorandum addressed to "All Stores" on the subject of "Rule Changes as of 07/01/01." In pertinent part, it read:

"As of 07/02/01, no loan may be extended more than 6 times. All loans which currently exist as of that date may not be charged any more interest. Instead we will be offering them the opportunity to pay their outstanding balance including any interest due up to 07/02/01 in three equal monthly installments. The computer will be reprogrammed to reflect these changes on Monday, but in the meanwhile credit memo off the interest that has accrued from 07/02/01 to the day they come in and then post their payment.

"On Monday, when a customer with over 6 flips pays, the computer will automatically freeze interest and give them an extension showing a payment equal to 1/3 of the total balance due in 30 days. With subsequent payments, if the customer pays the total payment due, they will be given an additional 30 days. If they do not pay their full payment, they will not be extended."

18) On July 5, 2001, H. James Krueger, Program Manager of DCBS, Division of Finance and Corporate Securities, sent out a letter addressed to Oregon's "Title Lenders." In pertinent part, it stated:

“Re: New Title Loan Provisions

SB 171

“As you were previously notified SB 171 was passed by the Legislature and signed by the Governor. That bill amended Chapter 725 of the Oregon Revised Statutes and added provisions relating to Title Loans. Last week representatives of the Director met with representatives of a licensee to clarify some issues that arose as a result of the new legislation. The purpose of this letter is to advise all Title Lenders of the direction we provided to the representatives of the licensee.

“At issue is what to be done if a consumer wants to renew a loan after July 1, 2001, that has already been renewed one or more times. If a consumer tries to renew a loan on or after July 1 and that loan has been renewed three times prior, the maximum of six renewals applies and the lender may only renew that loan three more times. If the loan had been renewed twice, the lender could permit 4 more renewals. If it had been renewed once, the lender could renew the loan five times. If the loan was due and had never before been renewed, the lender could renew the loan six times. Because the administrative rule limiting the loan renewals to three became effective on March 23, 2001, and assuming a 30-day loan maturity there should be no loans that had been renewed more than three times on or before July 1, 2001.

“A second issue which we discussed with the representatives of the licensee relates to the safe harbor provision of the rule which says a lender will be presumed to have made a determination that a loan could be paid back if the lender lends no more than 25% of the income the consumer receives or expects to receive during the period of the loan. The period of the loan for title loans is 30 days. If lenders are relying on the safe harbor, they should not consider the possibility of the aggregate net income to be generated over 6 renewal periods when calculating the 25% net income amount. The whole intent of the rule and of the new legislation is to prevent consumers from getting caught in a cycle of debt that requires multiple renewals. Net monthly income should be the amount over a single loan repayment cycle without renewals.”

“contained^{vi} in the safe harbor provisions, there may well be other good grounds for making the determination of a consumer’s ability to repay a loan. Lenders should make a note of the grounds they use so that the examiner can see the thinking of the lender. If the lender has made a good faith effort to determine the ability of a consumer to repay a loan, they will be in compliance with the law.”

Reed was involved in the discussions with DCBS and Respondent received this letter.

19) After July 1, 2001, Miller held meetings for Oregon’s store managers to discuss SB 171 and its requirements and implications. He repeatedly explained the

“safe harbor” provision to Respondent’s Oregon employees, telling them that they didn't have to follow that provision, that Respondent did not want them to follow it -- including the pay stub provision -- and that employees should continue to follow Respondent’s existing procedures.

20) On July 28, 2001, Complainant attended a manager’s meeting that was attended by all Oregon store managers or their assistants. At the meeting, Miller stated that Respondent’s computer was still having problems freezing interest after the maximum number of “flips”^{vii} and that managers should manually adjust the total if the computer did not freeze interest after six renewals by determining the interest charged after the sixth renewal and crediting it back. Miller also told managers that Respondent was continuing its existing policy of not asking for pay stubs and the managers did not have to have pay stubs in the customer’s files.

21) Complainant disagreed with Miller’s interpretation of the law and believed it was unlawful for Respondent not to require new customers to produce pay stubs. Accordingly, Complainant began requiring new customers to produce pay stubs and stored them in the customer’s file.

22) At all times material, ORS 725.312 required DCBS to conduct examinations of licensees “not more than 24 months apart” and gave DCBS the authority to conduct examinations “at other times as the director deems necessary.” In 2001-02, DCBS regulated about 600 licensees. Rick Bihm and Mike McCord were DCBS’s only field examiners. In practice, DCBS conducted examinations every 12-15 months, with examinations being more frequent if a licensee got a bad score.

23) When DCBS conducts field examinations, it issues a report that assigns a composite rating of “1” to “4” to the subject store. A “1” rating is “outstanding,” with hardly anything wrong. A “2” is “satisfactory” – there may be some minor issues, but a

customer usually not affected monetarily. "3" is a "fair" rating, and "4" is a "marginal" rating. Interest overcharges "take the score down drastically."

24) On October 18, 2001, Bihm conducted a routine examination of Respondent's Medford store. Bihm noted two problem areas in the examination -- original notes in two accounts had not been canceled and returned to borrowers, and refund checks had not been sent out timely to three borrowers -- and assigned a "2" rating.

25) On November 17, 2001, Complainant attended another store manager's meeting. At the meeting, the subject again came up that Respondent's computer was not always freezing interest after six loan renewals. Steve Miller asked the managers to put the problems in writing and told them not to worry about DCBS exam scores.

26) Before and after SB 171 was passed, managers were always told at manager's meetings to not worry about DCBS exam scores so long as "the doors remained open."

27) At a subsequent manager's meeting, Miller told Respondent's Oregon store managers that he was going to hire an area manager and that anyone who was interested should let him know. Callaway was one of two managers who expressed interest. Complainant did not tell Miller that she was interested in the position. In January 2002, Callaway was promoted to the position of area manager, at which time she became Complainant's immediate supervisor. As area supervisor, Callaway visited the stores she supervised an average of once a month.

28) After Callaway became area manager, she heard that several store managers, including Complainant, were making negative comments about her. Callaway talked with Miller, then Complainant, about this issue and things improved.

29) When Callaway was promoted, Complainant and other store managers were disgruntled at Callaway's promotion. They would occasionally call Hooper and complain. Complainant occasionally called Hooper instead of Callaway, bypassing the clear chain of command, and eventually Hooper told Complainant not to call her.

30) At all times material, Respondent was leasing computer software from a Florida company. At times, that company had difficulty modifying its software to comply with changes in the law affecting Respondent in the 22 different states in which Respondent conducted business. When SB 171 went into effect, the company had problems adapting Respondent's computer system to the six renewal limitation of SB 171. Because of this, the computer projected interest past the sixth renewal, even when no more interest was actually charged. As a result, Miller instructed Respondent's store managers to make manual corrections when necessary. After Callaway became area manager, she personally inspected and made manual corrections of store files. At some point after Complainant was discharged, Respondent acquired a new computer system and had no more problems with calculating interest correctly.

31) In February 2002, Complainant hired Kristine Mastoris as assistant manager. Mastoris worked in that position until Complainant's discharge, at which time Mastoris was promoted to branch manager.

32) On May 13, 2002, McCord conducted an examination of Respondent's Gresham office. On his findings, he noted that on one account "[a]lthough the computer is showing 0% interest on future payments from 5/3/01 forward, the receipt/ext agreement given to the borrower shows a continuation of interest. Please send a corrected receipt to the borrower (corrected during examination) and please advise how and when this will be corrected on future receipts." On the same account, the sixth

renewal occurred on the 268th day after the original loan, yet McCord did not cite Respondent for charging interest that entire period of time.

33) From July to September 2002, Respondent held a contest among its northwest stores to see which stores could show the greatest increase in operating balance^{viii} and “lowest late %” of loans, offering a prize of leather office furniture to each winning store. On September 12, 2002, Respondent announced that Medford had won the prize for having the “lowest late %” of loans among its Northwest branches.

34) In September 2001, the Medford store operating balance was \$93,244.32. In July 2002, the Medford store operating balance was \$97,533.83. In September 2002, the Medford store operating balance was \$108,723.70.

35) In September 2002, Miller observed that Medford had not increased its volume proportionate to Respondent’s other stores and was growing at a rate about 10% lower than other stores in Oregon. Since Medford’s percentage of late payments was also lower than expected, he wondered if there was a correlation and instructed Callaway to conduct an internal audit of Medford and to observe Medford’s customer procedure.

36) Callaway visited Medford, conducted an internal audit, and discovered that there were pay stubs in almost every client file. When Callaway told Miller this, Miller was displeased, as it violated Respondent’s policy and Miller believed that requiring pay stubs was costing Respondent business, particularly with regard to self-employed persons who would not have a pay stub. Miller told Callaway to instruct Medford to stop requiring pay stubs, and Callaway told Complainant to stop requiring pay stubs.

37) After Callaway’s audit of Medford, Miller became concerned that other stores might be requiring customers to produce pay stubs. Miller instructed Sarah Hooper, who had become promoted to area manager of Respondent’s northern Oregon

stores, to shop the stores that Callaway supervised, and Callaway to “shop” the stores Hooper supervised, to see if any other stores were requiring pay stubs as a condition of getting a loan. Callaway and Hooper did this, with Hooper “shopping” Medford. When she was “shopped,” Complainant told Hooper that income verification, like a pay stub, was required in order to get a loan. Complainant was the only person “shopped” who required a pay stub. Hooper reported Complainant’s response to Callaway and Miller.

38) After the audit, Miller instructed Callaway to go to Medford and tell Complainant that Rod Aycox, Respondent’s owner, had shopped her and was upset because Complainant had asked him to bring in a pay stub. Miller had instructed Callaway to tell Complainant that Aycox had shopped her because he thought it might make more of an impression. Callaway did this, and Complainant and Callaway talked about the law and Complainant and Mastoris’s belief that they were required to have pay stubs in the file. Callaway told Complainant and Mastoris this was not corporate policy and that they were not to require prospective customers to bring in pay stubs. Callaway said it was Rod’s company and they had to do what he said because it was his company. Callaway told Complainant that it was a violation of Respondent’s policy to have pay stubs in a customer’s file and to stop doing it.

39) Miller and Callaway did not consider discharging Complainant when she was “shopped” because “she was generally an excellent employee” and Miller’s policy is to counsel employees before terminating them.

40) After Callaway’s visit and counseling, Complainant and Mastoris continued to ask customers for pay stubs, but no longer kept them in customer’s files. At some point before Complainant was discharged, Callaway and Miller became aware of this continuing practice.

41) Complainant believed that Respondent was violating the law by not requiring pay stubs from customers and overcharging interest after six loan renewals. She did not believe that the violations were a crime, but did believe that they might cause trouble for Medford and cause her to lose her job. From her experience, Complainant knew that DCBS had regulatory authority over Respondent's business and had met Bihm during one of his prior exams at Medford. Based on these beliefs and knowledge, she telephoned DCBS in October 2002 and spoke with Dale Laswell, DCBS Program Manager at that time, about her concerns. Laswell told Complainant that Respondent had to have a pay stub in customer's files, that Respondent had to verify customers' income, whether through a pay stub or tax return or bank statement, that Respondent could not loan "more than 25%," and the interest was to freeze after the sixth payment. Laswell also told her that DCBS would audit Medford in the near future.

42) In October or November 2002, in the course of a five day, multi-store visit, Miller visited the Medford store. Complainant was off work that day, so Miller spoke with Mastoris, inspected loan files to see if copies of pay stubs were still being put in files, and determined that pay stubs were no longer being put in files.

43) On December 3, 2002, Bihm visited Respondent's Medford office and conducted an examination. Complainant spoke with Bihm about her conversation with Laswell. Bihm asked if she would show him some accounts in which interest had not been frozen, and Complainant agreed to do this. As part of the exam, Bihm had Complainant fill out a questionnaire entitled "Payday Loan Questionnaire & Request Items." One of the questions asked "[m]aximum amount of loan in relation to (net or/gross) income." Complainant wrote in "Reasonable Amt," the answer Respondent's management had previously directed her to provide. Complainant showed him accounts in which interest had not been freezing and Bihm began his exam. Bihm

asked Complainant and Mastoris questions during his exam and also called McCord and talked with McCord to see if they should examine another of Respondent's stores to see if there was a companywide problem. At the end of the exam, Bihm told Complainant it would be obvious to Respondent that Complainant had called DCBS, as he would not have known which accounts to audit if Complainant had not alerted him. Bihm also said he was giving Respondent a score of "4," and that he was taking the scoresheet with him to mail to Respondent after they had done another audit.

44) Bihm noted three problems areas in the examination. First, that Respondent had overcharged interest to 14 borrowers by not stopping interest after the "6th loan roll over." Second, that Respondent failed to obtain copies of two borrowers' employment pay stubs.^{ix} Third, that Respondent failed to honor a 30 days interest free offer made to a borrower.

45) In a page entitled "Examiner's Statistical Report," Bihm noted, among other things:

"Dale, this is the branch where the employee called to advise that the company is not getting checks stubs, exceeding the 25% rule, and exceeding the maximum 6 roll over rule. The manager offered many files where the interest should have been stopped, and all files were incorrect. Because they exceeded the maximum 6 roll over rule, I will rate this branch a 4 rating, just in case that we need to start building an example. The manager has brought these exceptions up to her District Manager, and was told just do what is expected, and they will deal with the state. * * * We need to make sure that all offices are corrected in Oregon. That means every account that is over 210 days old is review [sic] and refunded."

46) During Bihm's visit, Complainant followed company procedure by calling Callaway and telling her that Bihm was at the store, conducting an exam. Complainant told Callaway they were getting a low score, but that the results of the exam would be mailed to Complainant. Respondent's policy at the time was for store managers to

notify their area manager that an exam had been conducted, and the area manager would then notify Miller. Callaway did not notify Miller.

47) Complainant did not tell anyone employed by Respondent, at any time during her employment, that she had made the report that initiated Bihm's December 3 examination.

48) Bihm's examination occurred at a time when Respondent would have expected an exam and Miller was not surprised to learn of the exam because he believed it was slightly overdue.

49) On December 24, 2002, Michael McCord, DCBS's other field examiner, conducted a "special" examination of Respondent's store located at 8128 SE Powell Blvd, Portland, Oregon. The purpose of McCord's examination was to see if the 210-day rollover problems Bihm found in the Medford exam were an isolated or statewide case. At that time, McCord was not aware that Complainant had contacted DCBS and asked them to audit her store. So far as McCord knew, the exam had nothing to do with Complainant, but was being conducted for the specific reason of determining whether consumers were being overcharged interest.

50) DCBS's most recent previous examinations of the Powell store had been conducted on April 30, 2001, and July 11, 2002. On April 30, 2001, Bihm conducted the examination and assigned a "1" rating, noting that the Powell store was not "complying with the safe harbor rule." On July 11, 2002, McCord conducted the examination and assigned a "2" rating, making no mention of the "safe harbor" provision in his examination report.

51) McCord wrote a report of his December 24, 2002, exam of the Powell store and assigned a "4" rating based on his finding that the branch had numerous accounts that "charged excessive finance charges." Specifically, the report noted:

“The maximum number of days allowed to collect interest would be 210. This represents the initial loan of 30 days plus a maximum of 6 renewals for 30 days each. Please refund the amounts shown as “interest variance” and reduce the interest rate to zero.”

This was the same violation that Bihm had found in Respondent’s Medford office.

52) In early March 2003, Complainant attempted to file a worker’s compensation claim because of the carpel tunnel syndrome she was experiencing. Complainant asked Callaway for the name of Respondent’s worker’s compensation insurance carrier. During the conversation, Complainant told Callaway that Respondent was screwing its employees and cheating its customers.

53) Callaway contacted Miller after this conversation and told Miller what Complainant had said. Miller contacted Dan Gotch, his immediate supervisor, and discussed the situation. After talking with Gotch, Miller decided to discharge Complainant based on Complainant’s statements to Callaway and Complainant’s continuing violation of company policy.^x

54) On March 11, 2003, Miller went to the Medford store for the express purpose of discharging Complainant. When Miller arrived, Complainant was at the store by herself. As soon as Mastoris arrived, Miller took Complainant aside and told her she wasn’t happy with the company, that he wasn’t happy with her, and that she was fired. Miller then asked Mastoris if she could run the store. Mastoris responded affirmatively, and Miller promoted her to manager “on the spot.”

55) No one employed by Respondent had any knowledge that Complainant had called DCBS until Complainant’s attorney mailed a letter on June 25, 2003, to Respondent’s Human Resources Director stating:

“ORS 725.615(6) provides that a licensee may not renew a loan more than six times after the loan is first made. [Respondent’s] computer did not freeze interest after six payments. Ms. McClure informed a State auditor of [Respondent’s] noncompliance with the applicable law during a December 1, 2002 audit. Ms. McClure believes that her firing is in

retaliation for blowing the whistle to the State auditor concerning [Respondent's] violation of the law.”

56) At the time she was discharged, Complainant earned \$30,000 per year and Respondent paid 50 percent of her health insurance premium, which totaled \$1,285.96 per year.

57) Complainant liked her job and her discharge made her very upset. Complainant had always worked and paid her own way, and it was the first time she had ever been fired. She suffered a loss of self esteem and feelings of shame when she was fired. She was “very, very down” for the first week after she was discharged. She had a hard time getting to sleep and began having nightmares that continued until January 2005, when she enrolled in a career college. At that time of hearing, Complainant and Lamb had lived together for 10 years, and they had a joint mortgage on the house they lived in and shared expenses. Complainant, who had been earning more than Lamb, was supported by Lamb, who only earned \$12 per hour, from the time of her discharge until June 2003. She felt humbled by having to be supported by Lamb. Complainant collected unemployment benefits from June 3, 2003, until February 2004, and searched for employment during that time. She attended a career college from January 2005 to September 2005, financing it with a student loan, and returned to the workforce in October 2005.

58) After her termination, Complainant did not look for work before April 24, 2003, when she underwent surgery on both hands for carpal tunnel syndrome. After her surgery, Complainant was unable to work until June 2003. After that, Complainant looked for work through classified ads but did not actually go out and look for work. She collected unemployment benefits from June 3, 2003, until February 2004. Her unemployment benefits covered her house and COBRA payments.

59) In August 2003, Lamb's father, who had congenital heart disease and had been living in an assisted living facility, had a stroke and began deteriorating. At that time, he was also diagnosed with frontal lobe dementia. About the same time, Lamb's sister had surgery for colon cancer, then began chemotherapy. Between August 2003 and February 2004, when Lamb's father died, Complainant took care of Lamb's father. In February 2004, Lamb's sister was diagnosed with terminal cancer and chose to stay at home. From February 2004 until August 2004, when Lamb's sister entered a care facility, Complainant was the sister's primary caregiver. After Lamb's sister entered the care facility, Lamb received money from the sale of her trailer around September 2004. Lamb's sister died in October 2004. The time caring for Lamb's father and sister affected Complainant's ability to look for work.

60) Mastoris was fired three months after Complainant's discharge for not following company policy and for not projecting an image that was acceptable to Respondent.

61) From 2002 to April 2004, Respondent fired three employees besides Complainant and Mastoris – Laura Wilcox, Lynda Gugler, and Sue Ramsdell. Wilcox was fired for not following company policy and shirking work. Gugler and Ramsdell were fired for poor job performance.

CREDIBILITY FINDINGS

62) For the most part, Complainant testified in a candid manner, as exemplified by her admission that she did not believe that the loan policies that she complained about constituted a crime. She was not credible on two issues. First, she testified that she never talked or complained to Sara Hooper about Callaway's promotion, whereas Hooper credibly testified that Complainant did complain to her about Callaway's promotion. Second, she testified that she looked for work after June

3, 2003, but partially contradicted that testimony by acknowledging that she did not leave her house to look for work and that she was a primary caregiver for both Lamb's father and sister, then just the sister, from August 2003 until August 2004. The forum has credited Complainant's testimony except when it was contradicted by more credible testimony or her own testimony.

63) Laing is an experienced investigator who had been employed by BOLI for 18 years at the time of hearing and worked as a compliance specialist for BOLI's Wage and Hour Division before transferring to the position of senior investigator for the Civil Rights Division in 2003. Her testimony was straightforward and responsive to the questions asked of her on direct and cross examination. On cross examination she readily acknowledged not making several specific inquiries that may have elicited information relevant to her investigation. She also testified that she did not recall investigating whether the activities that complainant complained about constituted a crime, that she had not read SB 171, and that she did not recall asking complainant why complainant thought that Respondent's behavior was criminal. Based on her demeanor and candor, the forum has credited her testimony in its entirety.

64) Lamb had a natural bias because of his long-term relationship with Complainant, as well as a financial interest in the outcome of the case,^{xi} but he did not attempt to downplay these factors in an attempt to bolster his credibility. His testimony was thoughtful, forthright, and internally consistent, and the forum has credited his testimony in its entirety.

65) Michael McCord's testimony was primarily related to his DCBS examinations, the authentication of Bihm's examination of Medford, and DCBS's procedures in general. The forum has credited his testimony in its entirety.

66) Sarah Hooper's testimony was forthright. She responded without hesitation to questions asked of her and did not hesitate to acknowledge her inability to answer some questions because of her lack of memory on the particular issue. Her testimony was internally consistent and she was not impeached on cross examination. Hooper had been an Oregon area manager for Respondent during Complainant's employment and testified that she would have discharged Complainant earlier because of her disruptive behavior. However, Hooper herself was discharged by Respondent in 2006. Despite these potential biases, the forum found Hooper's testimony to be objective and has credited her testimony in its entirety.

67) Kristine Mastoris was promoted to take Complainant's position, then fired three months later and given no reason for her discharge. She testified that Medford had the "best store in Oregon as far as overall business," which the forum finds to be an unsupported exaggeration. She testified on direct that "we were told" the computers would be fixed and to manually write off the excess interest, but on cross examination testified that she didn't recall being told that, but only got a memo with this instruction after Complainant was fired. Like Complainant, she also believed that Respondent was violating the law by not requiring customers to provide pay stubs. Her testimony further demonstrated a bias towards Callaway.^{xii} The forum has only credited her testimony that was corroborated by other credible evidence.

68) Michael Reed, Respondent's in-house counsel at times material and an experienced attorney whose job experience includes eight and one-half years as an Oregon assistant attorney general, testified at length about SB 171, his interpretation of it and the administrative rules promulgated by DCBS interpreting that legislation, and his interactions with DCBS. Despite projecting an arrogant attitude, laughing at times when he described DCBS's interpretation of the rule -- as though no one who disagreed with

his legal opinion could be taken seriously -- the forum has credited his testimony except for his unequivocal, unsupported testimony on direct examination that Respondent loses money on 9 out of 10 repossessions.^{xiii}

69) Steve Miller, Respondent's manager who made the decision to discharge Complainant, was Respondent's vice president of operations at the time of hearing. His demeanor was relaxed and unruffled throughout his testimony, and he responded directly to questions asked on direct and cross examination. His testimony on key issues – Respondent's policies and the reasons for Complainant's discharge – was consistent with other testimony that the forum has found credible on those same issues. His testimony was internally consistent and he was not impeached on any significant issue on cross examination. The forum has credited his testimony in its entirety.

70) Kari Callaway, Complainant's immediate supervisor at the time of Complainant's discharge, was Respondent's Oregon operations manager at the time of hearing. Her testimony was internally consistent and also consistent with Miller and Hooper's credible testimony. The forum found her to be a candid witness, as exemplified by her acknowledgment that she had no recollection of the date Complainant told her that Respondent was screwing employees and cheating customers or when she related these statements to Miller. The forum has credited her testimony in its entirety.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent was an employer that used the personal services of one or more employees in the state of Oregon, reserving the right to control the means by which those services were performed.

2) Respondent employed Complainant in its Medford store from April 20, 2000, until March 11, 2003.

3) Respondent's business operations in Oregon were regulated by DCBS.

4) In October 2002, Complainant telephoned DCBS and expressed concerns that Respondent was violating the law by not requiring pay stubs from customers and charging interest after six loan renewals.

5) On December 3, 2002, DCBS conducted an examination of Respondent's Medford store. DCBS subsequently issued an exam report that was sent to Respondent. The report assigned a "Marginal" rating and noted that Respondent had overcharged interest to 14 borrowers by not stopping interest after six renewals and had failed to obtain copies of two borrowers' pay stubs.

6) The concerns expressed by Complainant were not criminal activity and Complainant did not believe Respondent's pay stub and loan renewal policies and practices constituted a crime.

7) On March 11, 2003, Respondent discharged Complainant because she made negative comments about Respondent's company and because she continued to violate Respondent's policy of not requiring customers to produce pay stubs as a condition of obtaining a loan.

8) Respondent did not learn that Complainant had complained to DCBS until June 2003.

CONCLUSIONS OF LAW

1) At times material, Respondent was an employer subject to the provisions of ORS 659A.230. ORS 659A.001(4).

2) The actions, inactions, statements, and motivations of Steve Miller are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659A.800; ORS 659A.830.

4) Complainant did not report criminal activity and did not believe she was reporting criminal activity. For these reasons, Respondent's discharge of Complainant did not violate the provision of ORS 659A.230(1) that prohibits an employer from discharging an employee because the employee reported criminal activity.

5) Respondent was unaware, at the time it discharged Complainant, that Complainant had initiated a civil proceeding. For this reason, Respondent's discharge of Complainant did not violate the provision of ORS 659A.230(1) that prohibits an employer from discharging an employee because the employee brought a civil proceeding.

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

OPINION

INTRODUCTION

The Agency alleged two theories of unlawful discrimination. First, that Respondent discharged Complainant in violation of ORS 659A.230 and OAR 839-010-0140(2) for reporting criminal activity. Second, that Respondent discharged Complainant in violation of ORS 659A.230 and OAR 839-010-0140(1)(b) for bringing a civil proceeding against Respondent. The Agency alleges that Complainant's telephone call to DCBS, described in Finding of Fact 41 –The Merits, was both the report of criminal activity and the initiation of a civil proceeding as defined in ORS 659A.230, and the specific act that brought about Complainant's discharge.

REPORTING CRIMINAL ACTIVITY

In relevant part, ORS 659A.230(1) provides that “[i]t is an unlawful employment practice for an employer to discharge * * * an employee * * * for the reason that the

employee has in good faith reported criminal activity by any person * * *.” This language protects employees who either in good faith report criminal activity or employees who in good faith report activity they believe to be criminal.

The Agency has promulgated rules interpreting ORS 659A.230(1). The rule in effect at the time of Complainant’s discharge was *former* OAR 839-010-0110.^{xiv} It read:

“An employee reporting criminal activity is protected by ORS 659A.230(1) and these rules if:

“(1) The employee reports to any person, orally or in writing, the criminal activity of any person;

“(2) The employee has in good faith reported activity the employee believed to be criminal, or caused criminal charges to be brought against any person. This can be done by either the complainant’s information or by a complaint, as defined in ORS 131.005(3) and (4);

“(3) The employee cooperated in good faith, whether or not under subpoena, in an investigation conducted by a law enforcement agency;

“(4) The employee testified in a criminal trial, whether or not under subpoena; or

“(5) The employer knows or believes that the employee engaged in the reporting acts described above.”

The Agency specifically alleged a violation of OAR 839-010-0140(2). That rule protected employees who in good faith reported activity that they believed to be criminal. The Agency’s case fails because Complainant did not report activity that she believed to be criminal. There is no evidence that Complainant believed that Respondent’s activity was a crime. Complainant testified that she believed the interest overcharges and Respondent’s pay stub policy she reported were unlawful, but did not believe they were a “crime.” A crime carries with it the possibility of a prison sentence,^{xv} and there is no evidence that Complainant believed or told anyone else that she or anyone else could be sent to prison for participating in the interest overcharges.^{xvi} Notably, there was no evidence that a violation of any provision of ORS Chapter 725 is a felony or misdemeanor.

In its post-hearing brief, the Agency cited *In the Matter of Cleopatra's, Inc.*, 26 BOLI 125 (2005), in support of its case. In *Cleopatra's*, the complainant learned that the respondent had cancelled her health insurance without notifying her and had continued to withhold premiums from her paycheck for three months after cancellation. The complainant then told her manager that the continued payroll deductions were theft and that she expected reimbursement for what she believed were purloined funds. Although the respondent did not dispute the complainant's charge and reimbursed her for the full amount, she was discharged one week later. The forum concluded that complainant had a good faith belief that respondent had engaged in criminal activity and in fact reported activity by respondent that, if proven under the criminal law standard, constituted criminal activity. *Id.* at 134. *Cleopatra's* does not help the Agency because it is distinguishable from this case in two critical ways: (1) Complainant McClure lacked a good faith belief that respondent had engaged in criminal activity, and (2) The activity she reported to DCBS was not activity that, if proven under the criminal law standard, constituted criminal activity.

INITIATING A CIVIL PROCEEDING

ORS 659A.230(1) prohibits an employer from discharging an employee because the employee "has in good faith brought a civil proceeding against an employer." An employee "is considered to have initiated a civil proceeding when the employee has contacted an administrative agency the employee believes in good faith to have jurisdiction and the ability to sanction the employer." OAR 839-010-0140(1)(b). The employee is protected when the employee initiates a civil proceeding and "[t]he employer knows or believes that the employee has [initiated a] civil proceeding[.]" See also *In the Matter of Earth Sciences Technology*, 14 BOLI 115, 125 (1995), *affirmed*

without opinion, Earth Sciences Technology, v. Bureau of Labor and Industries, 141 Or App 439, 917 P2d 1077 (1996).

Complainant was aware that DCBS was the regulatory agency that regularly conducted examinations of Respondent's stores and issued a written report containing the examination results. She initiated a civil proceeding when she contacted Dale Laswell at DCBS and complained about Respondent's practices. As a result of Complainant's complaint, Laswell directed Rick Bihm, a DCBS field examiner, to conduct a special examination of Respondent's Medford store. Bihm conducted that investigation on December 3, 2002, and gave Respondent a "Marginal" rating based on problems he found and described in his examination report that mirrored Complainant's complaints to Laswell. However, Complainant testified that she told no one of her complaint to Laswell; there was no evidence that DCBS told Respondent that Complainant had contacted DCBS; and Miller, Respondent's manager who made the decision to discharge Complainant, credibly testified that he was not aware that Complainant had contacted DCBS before making that decision. Based on this evidence, the forum concludes that Respondent did not know or believe that Complainant had contacted DCBS when it discharged Complainant.

Even if there was evidence that Miller knew or believed that Complainant had contacted DCBS, Respondent would still prevail. Miller testified that Complainant was discharged because of her continuing violation of Respondent's policy of not asking customers for pay stubs, with the "last straw" being Complainant's negative comments about Respondent. Complainant acknowledged this behavior and her previous warnings for violating Respondent's pay stub policy, and there is no comparator evidence that other non-whistleblowing employees engaged in these same behaviors and were not discharged.

Even the timing of Complainant's discharge does not aid the Agency's case. Complainant contacted DCBS in October 2002, DCBS conducted its inspection on December 3, 2002, and Complainant was discharged on March 11, 2003. The Oregon Court of Appeals has held that when relying on "mere temporal proximity" between the protected action and the allegedly retaliatory employment decision to indirectly establish a causal connection, the "events must be 'very close' in time." *Boynton-Burns v. University of Oregon*, 197 Or App 373, 381, 105 P3d 893, 897-898 (2005), *citing Clark County School District v Breeden*, 532 US 268, 273 (2001).^{xvii} Under the facts in this case, the six and four month intervals separating Complainant's initial DCBS contact and DCBS's Medford examination from Complainant's discharge are too remote for the forum to infer causation from the timing of her discharge.

Because Respondent did not know or believe that Complainant made a report to DCBS, the forum concludes that Respondent could not have and did not discharge Complainant based on her contact with DCBS.

THE AGENCY'S EXCEPTIONS

A. Exception 1.

The Agency argues that Miller and Callaway's testimony was not credible for two reasons.

First, the Agency argues that Miller's testimony was not credible because he testified that his policy is to counsel employees before terminating them and, contrary to this testimony, he did not counsel Kristine Mastoris prior to her termination. A review of the record shows that there was no documentary evidence presented by the Agency or Respondent or any attempt to elicit any testimony to show that Miller did or did not counsel Mastoris prior to her termination. Consequently, the Agency's exception must fail because there is no evidence in the record to support it.

Second, the Agency argues that Miller and Callaway were not credible based on their testimony that Respondent's Medford store was not growing at the rate of other Oregon stores. The Agency asserted the following:

"On pages 22 and 23 of the Proposed Order, the Forum concluded from Miller and Callaway's testimony that Complainant's store was not growing at a rate similar to other stores. This conclusion was unsupported by any documents to show lack of growth in the store Complainant managed or amount of growth for other Respondent stores in similar markets. Complainant supplied the only documents to show the number of loans, average loan amount and totals (Agency Exhibit A-31). The unsupported theory Complainant was not growing the store enough was not mentioned until the hearing. Michael Reed responded to the Civil Rights Division during the initial investigation and did not mention Complainant was not growing the store at a rate similar to other stores (Agency Exhibits A-9 and A-11). If this were a credible reason for Complainant's termination then why was it not brought forward in Respondent's answer to the Agency's formal charges with the supporting documentation? Two of Respondent's managers testified to slow growth in the store Complainant managed but without any data to verify this assertion. Miller and Callaway's testimony on this issue was not credible."

The Agency's assertion that this evidence was not presented during the initial investigation or in Respondent's answer to the Agency's formal charges is correct. On March 8, 2004, Complainant filed her complaint with the Division. She alleged she was terminated for "invoking the worker's compensation system and for reporting criminal activity to the State Auditors Office (whistleblowing)." Her complaint contained no references to her job performance. A copy of that complaint was sent to Respondent, and Reed, Respondent's in-house counsel, provided an initial response to the complaint on April 2, 2004, giving the following reasons for Complainant's termination:

"[Complainant] was terminated primarily because she voiced an extremely negative attitude toward the company, coupled with her repeated refusal to follow company policy."

On April 6, 2004, Laing requested additional information, but did not request any specific information regarding the growth rate of any of Respondent's Oregon offices during Complainant's tenure as manager. Reed responded in a letter dated April 28,

2004, that did not provide any additional reasons for Complainant's termination. On August 1, 2007, the Agency issued its Formal Charges. Like the complaint, the Formal Charges did not contain a specific allegation regarding the growth rate of Respondent's Medford office while Complainant was manager. Respondent's answer alleged that "Respondent terminated Complainant for consistently and repeatedly failing to follow company guidelines and policies for providing loans to Respondent's customers," but did not address the growth rate of the Medford office. Although an inference could be drawn that this evidence was not presented during the investigation or in the answer to the Formal Charges because Respondent invented it to support its case at hearing, the forum declines to draw that inference for reasons discussed below.

First, Miller and Callaway's testimony did not contradict any prior statements made by Respondent. Rather, Respondent simply failed to address this issue before the hearing in its position statement and answer and there is no evidence that Miller or Callaway were interviewed by the Division or made any statements to the Division concerning this issue prior to giving testimony at the hearing.

Second, Respondent was not asked to address this issue during the investigation and was not required to in its answer. OAR 839-050-0130 provides that an answer "must include an admission or denial of each factual matter alleged in the charging document and a statement of each relevant defense to the allegations." As stated earlier, the store growth rate issue was not alleged in the Formal Charges. Therefore, Respondent was not required to admit or deny it in the answer. The forum does not consider it to be a "relevant defense" because it was not a reason for Complainant's termination and, other than as a credibility issue between Mastoris, Miller, and Callaway due to their conflicting testimony, was only relevant to show the context for the store inspection in which Callaway initially discovered Complainant was requiring pay stubs

from Respondent's prospective clients. The issue arose only after Complainant and Callaway testified in the Agency's case-in-chief about the growth rate of the Medford office and Respondent elicited testimony from Miller and Callaway to rebut that testimony.

Third, the reasons Respondent gave during the investigation for terminating Complainant are consistent with the evidence presented at hearing, including Complainant's own testimony that she engaged in the specific behaviors that Miller and Callaway testified caused Complainant to be terminated.

Fourth, the Agency did not present any credible evidence to show that the Miller and Callaway's testimony concerning the growth rate was untrue. It is true that Respondent presented no records to support Miller and Callaway's testimony about the growth rates. However, it is equally true that the Agency could have requested Respondent's records through pre-hearing discovery if it intended to show that the Medford office had a superior growth rate. There is no evidence that the Agency made such a request.

For all these reasons, the Agency's exceptions are overruled. The forum notes that, even if the forum disbelieved Miller and Callaway's testimony about the growth rate, the ultimate result would still be the same because a preponderance of the evidence establishes that: (1) the activity Complainant complained of was not criminal activity and Complainant did not believe it was criminal activity; and (2) Respondent did not know or believe that Complainant made a report to DCBS and thereby initiated a civil proceeding.

B. Exception 2.

In footnote 10 of the Proposed Order, the ALJ quoted Miller's specific testimony concerning why he terminated Complainant. The Agency quotes part of the footnote

and argues that Miller's statement that Complainant was "going behind my back" referred directly to her whistleblowing activity, in that "[i]f Miller terminated Complainant only for 'violating company policy' then he would have simply said something about Complainant ignoring a directive, not following directions or being insubordinate." To reach the conclusion sought by the Agency, the forum must draw an inference. When there is more than one inference to be drawn from the basic fact found; it is the forum's task to decide which inference to draw. *In the Matter of WINCO Foods, Inc.*, 28 BOLI 259, 300 (2007). This involves a consideration of all the evidence relevant to the issue under scrutiny. The overwhelming weight of the evidence supports the conclusion drawn by the ALJ – that Complainant's whistleblowing activity was not a factor in her termination – and the only evidence supporting the inference sought by the Agency is the Agency's speculation regarding the linguistic significance of the detail in Miller's testimony. The Agency's exception is overruled.

C. Exception 3.

In its third exception, the Agency argues that:

"Respondent first learned of Complainant's initiating a civil proceeding after the December 3, 2002 examination by DCBS and resulting marginal score. * * * The Forum failed to recognize Respondent did not terminate Complainant immediately following the contact with DCBS because it was not practical during Respondent's busiest months of the year during and after the holiday season in December, January and February."

This exception fails because it is based on an inaccurate factual premise. Respondent did not learn that Complainant had called DCBS until June 25, 2003, long after Complainant had been terminated.^{xviii} Without that knowledge, there can be no violation of the whistleblower statute. The Agency's exception is overruled.

ORDER

NOW, THEREFORE, as Respondent has been found not to have violated ORS 659A.230, OAR 839-010-0110(2), or OAR 839-010-0140(1)(b), the complaint and

formal charges against Respondent are hereby dismissed according to the provisions of ORS 659A.850.

ⁱ The forum has been unable to find any statute numbered ORS 725.618 in Oregon Revised Statutes, but infers, from the record as a whole, that the Agency intended to refer to ORS 725.615.

ⁱⁱ The rule does not contain a cross reference after the word “subsection.”

ⁱⁱⁱ See Chapter 445, Oregon Laws 2001.

^{iv} Effective December 6, 2001, DCBS defined “Payday loans” as “a loan of money to a borrower primarily for personal, family or household purposes:

“(a) Collateralized by a check(s) or bank draft(s) dated as of the date of the loan or later in the amount of the principal of the loan plus interest or deferral charges assessed by the lender;

“(b) With a single payment payback;

“(c) Made by a person who is in the business of making payday loans including making Short-Term Personal Loans which are collateralized by personal checks and made with the understanding that the lender will not process a check for an agreed to period of time, but not including financial institutions defined in ORS 706.008.”

^v The definition was contained in OAR 441-730-0010(13) prior to December 26, 2001, and in OAR 441-730-0010(12) after that date.

^{vi} The previous paragraph ends at the bottom of page one of Krueger’s letter and this paragraph begins in mid-sentence at the beginning of the second page of Krueger’s letter.

^{vii} “Flips” was a word frequently used by the witnesses to mean a loan renewal.

^{viii} “Operating balance” is the amount of outstanding loans on a store’s books at any given time.

^{ix} Bihm’s complete note read: “You failed to obtain a copy of the borrowers['] employment pay stub, which is required to form your good faith. Going forward, all borrowers must have a current pay stub in file. Once you have established a business relationship with the borrower, then you need to up date the pay stub every 12 months.”

^x Miller’s specific testimony was that this was the “last straw” for him, with Complainant “going behind my back, asking for the paychecks, going against company policy, then still asking for paychecks, even though they didn’t put them in the file; it was just the last straw for me. She was negative about the company and I felt that anybody that thought we were cheating our customers, after we had counseled and counseled on all these changes that were going on and everything we were trying to do with DCBS and did it her way instead because she apparently knew more than we did, I just didn’t want this employee any more.”

^{xi} He testified that he and Complainant share bank accounts and that if Complainant prevailed, they would share the proceeds “50-50.”

^{xii} She testified that “Kari acted very high and mighty or cocky, kind of like ‘she’s the boss’ kind of thing. She was nice, but cocky.”

^{xiii} On direct, he testified “Nine times out of 10 if you repossess a car, you’re losing money. It costs more to repossess it than the car is worth.” On cross examination, he testified “I don’t recall using the eight or nine out of 10 in that context. I wouldn’t have any way to hone it down to that kind of a figure.”

^{xiv} OAR 839, Division 10, was amended effective January 1, 2008, and this rule became part of OAR 839-010-0100.

^{xv} ORS 161.515 provides:

“(1) A crime is an offense for which a sentence of imprisonment is authorized.

“(2) A crime is either a felony or a misdemeanor.”

ORS 161.525 defines a “felony.”

“Except as provided in ORS 161.585 and 161.705, a crime is a felony if it is so designated in any statute of this state or if a person convicted under a statute of this state may be sentenced to a maximum term of imprisonment of more than one year.”

ORS 161.545 defines a “misdemeanor:”

“A crime is a misdemeanor if it is so designated in any statute of this state or if a person convicted thereof may be sentenced to a maximum term of imprisonment of not more than one year.”

^{xvi} Although not dispositive of the case, the forum notes that there is no provision in ORS Chapter 725 or any other section of Oregon Revised Statutes that specifically designates violation of any provision of ORS Chapter 725 as a felony or misdemeanor. Also, McCord, a DCBS manager and the Agency’s witness who testified as to SB 171 and the corresponding administrative rules promulgated by DCBS, testified that violation of ORS 725.615 is not a crime.

^{xvii} See, e.g., *In the Matter of Trees, Inc.*, 28 BOLI 218, fn. 5 (2007) for examples of cases of how close in time is considered “very close.”

^{xviii} See Finding of Fact 55 – The Merits.