

In the Matter of

TREES, INC.

Case No. 56-04

Final Order of the Commissioner Dan Gardner

Issued February 28, 2007

SYNOPSIS

The Agency established by a preponderance of credible evidence that Respondent demoted Complainant because he reported and opposed a workplace safety hazard. Accordingly, the forum awarded Complainant \$3,007.08 in lost wages and \$30,000 in mental suffering damages. ORS 654.062(5)(a); ORS 659.030(1)(f); OAR 839-004-0001.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 27-29, 2005, in the Bureau of Labor and Industries Conference Room, located at 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Michael Nolan, Jr. ("Complainant") was present throughout the hearing and was not represented by counsel. Douglas S. Parker, Attorney at Law, and his co-counsel, Matthew Lysne, represented Trees, Inc. ("Respondent"). Michael Hebert was present throughout the hearing as Respondent's corporate representative.

The Agency called the following witnesses: Complainant; Jack Larson, former Respondent employee; Miguel Bustamante, former BOLI Civil Rights Intake Officer/Investigator; Steven Walberg, former Respondent employee; Mike Hebert, Respondent employee; and Angela Nolan, Complainant's wife.

Respondent called the following witnesses: Mike Hebert, Respondent employee; Tony Feldman, Respondent employee; Bill Horn, former Respondent employee; Jeffrey Jackson, Respondent employee; Jason Swarm, Respondent employee; and Kelly MacDonald, Local 659 business manager.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-31;
- b) Agency exhibits A-1 through A-17, A-20 through A-22, A-25 through A-27 (submitted prior to hearing), A-28, A-31 and A-32 (submitted at hearing).
- c) Respondent exhibits R-7 through R-15, R-23 (submitted prior to hearing), and R-26 through R-28 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On November 4, 2003, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging he was the victim of Respondent's unlawful employment practices in that Respondent demoted him in retaliation for opposing and investigating a safety hazard in the workplace. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting Complainant's allegations.

2) On May 24, 2005, the Agency submitted Formal Charges to the forum alleging that Respondent discriminated against Complainant by demoting him shortly after he reported a workplace safety violation, in violation of ORS 654.062(5). The Agency further alleged that Complainant suffered lost income and experienced mental,

emotional and physical suffering as effects of Respondent's unlawful employment practice. The Agency also requested a hearing.

3) On June 3, 2005, the forum served the Formal Charges on Respondent along with the following: a Notice of Hearing setting forth September 27, 2005, at 9:30 a.m. in Salem, Oregon, as the date and place of the hearing; a language notice; a Servicemembers Civil Relief Act notification; a notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; a complete copy of the Agency's administrative rules regarding the contested case process; and a separate copy of the specific administrative rule regarding responsive pleadings.

4) On June 23, 2005, Respondent, through counsel, timely filed an answer to the Formal Charges.

5) On July 18, 2005, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damages calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by September 16, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On July 18, 2005, the forum issued a Protective Order governing the classification, acquisition, and use of Complainant's medical records throughout the proceeding in response to the Agency's motion and Respondent's statement of non-opposition to the motion.

7) On July 27, 2005, the Agency submitted Complainant's medical records to the forum for an *in camera* inspection. After inspection, the forum released all of the medical records to Respondent.

8) On September 19, 2005, the forum granted the Agency's September 7, 2005, motion for discovery after considering Respondent's timely filed responses.

9) The Agency and Respondent timely filed case summaries after the due date was extended to September 21, 2005.

10) On September 23, 2005, the Agency filed a "Response to Respondent's Case Summary." The Agency objected to Respondent's "attempt to include matters that were not set forth in Respondent's Answer" and further stated:

"1. Respondent appears to be alleging estoppel in Item B on page 4 of the Case Summary. A copy of Respondent's Case Summary is attached as Exhibit A. That defense is not mentioned in Respondent's Answer. A copy of Respondent's Answer is attached as Exhibit B. Therefore, Respondent should not be allowed to present evidence on that issue since it was not raised in Respondent's Answer.

"2. Respondent alleges for the first time in its Case Summary (Item D on page 6) that Plaintiff's subsequent conduct was cause for removing him from his management position. Respondent cannot allege this matter for the first time in a Case Summary if it has not been alleged in the Answer. Respondent should not be allowed to present evidence on this issue.

"3. Attached as Exhibit C is Respondent's Response pursuant to Interim Order on Discovery dated September 22, 2005 and signed by Matthew J. Lysne. The aforementioned matters are not included in Exhibit C."

11) On September 23, 2005, the Agency filed a supplemental case summary.

12) On September 26, 2005, the Agency filed a request to add a tape recording to its exhibit list. The Agency stated that Respondent already had a copy of the tape and that a transcript of part of the tape was already added to the exhibit list in its supplemental case summary.

13) On September 27, 2005, the date of hearing, the Hearings Unit received Respondent's Reply to Agency's Response to Case Summary, Cross-Objection to Agency's Case Summary, and Motion to Amend Answer.

13) At the start of hearing, pursuant to ORS 183.415(7), the ALJ advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

14) The ALJ issued a proposed order on August 8, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency and Respondent timely filed exceptions which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent was a duly registered corporation that employed at least one person in Oregon.

2) At times material herein, Complainant worked for Respondent as a foreman for a two man bucket crew. He started with Respondent in 1988 as a groundman, worked several years as a journeyman tree trimmer, and was promoted to foreman in 1994. Throughout his employment and at times material herein, Complainant was a union shop steward.

3) Respondent's job classifications and wages are governed by a collective bargaining agreement ("Agreement") between Respondent and Local Union 659 of the International Brotherhood of Electrical Workers ("IBEW" or "the Union"). Generally, foremen supervise two to five person crews that can include a flagger, groundman, and apprentice and journeyman tree trimmers. Bucket crews use mechanical buckets to access tree limbs and climbing crews use ropes to ascend and descend trees. Foremen deal with customers, *i.e.*, power companies and power company customers, who are usually homeowners or businesses; handle paperwork; and, in accordance with

the collective bargaining agreement, supervise the flaggers, groundmen, and tree trimmers. Flaggers are used wherever they are needed and primarily are responsible for flagging traffic. Sometimes they handle brush between flagging duties, but they are not permitted to climb trees. Groundmen “drag brush” and “pull hangers.” Hangers are tree branches that get stuck in the trees after they have been cut. Groundmen are not permitted to climb trees or use aerial equipment. Groundmen earn more per hour than flaggers. Tree trimmers are trained to climb and trim trees and are not permitted to work alone in a tree, especially near charged power lines. Only certified journeyman tree trimmers are permitted to trim trees that are less than 10 feet from charged power lines.

4) Primary power lines are insulated, run “pole to pole,” and carry the most voltage. Secondary power lines run from “power pole to house” and carry less voltage. Cable television and phone lines are not the same as “energized power lines,” but in the interest of safety, all lines are considered hazardous by Respondent’s tree trimmers. A “hazardous tree” is one that is directly under or is growing less than 10 feet away from a power line.

5) Aerial rescue training is conducted in conjunction with monthly safety training meetings. Training occurs more than 10 feet from “energized conducted areas” and tree trimming is not performed during the training. The rescue exercise consists of three people, foreman, trimmer and either a groundman or apprentice. Rescue exercises are not done on roadside projects because it would tie up traffic. During an actual aerial rescue near a roadside, flaggers may be asked to make phone calls but are not involved in rescue exercises because they are usually working on roadside projects. Groundmen participate in aerial rescues as ground support by calling 911 or

by pulling ropes away from the tree trimmer. During training exercises, groundmen practice working with the ropes from the ground.

6) On or about September 26, 2003, journeyman tree trimmer Jason Swarm told Complainant that he had “gotten into an argument with Tiffany Hebert,” the foreman of a crew working in Corvallis, Oregon, and that she had ordered a flagger to climb and trim a tree that was under a primary power line. Tiffany Hebert was Swarm’s foreman and the wife of Complainant’s supervisor, Mike Hebert. The flagger, Don Thing, was from foreman Bill Horn’s crew and had no training or experience climbing and trimming trees. Swarm was upset and wanted a face to face meeting with Complainant. He asked Complainant why a flagger was allowed up in a tree. After some additional telephone contact, Complainant met with Swarm in person to discuss Swarm’s concerns. Complainant’s shop location at that time was in Scio, Oregon. His bucket crew consisted of journeyman tree trimmer Jack Larson who was present when Swarm first contacted Complainant.

7) On or about September 30, 2003, Complainant received another report about the Corvallis incident from journeyman tree trimmer Steve Walberg. Walberg and Thing lived in adjoining towns and carpoled to work each day. Walberg told Complainant that Thing had told him Tiffany Hebert had ordered him to climb a tree and trim some branches so she could “see what he had in him.” He also said that Thing told him he had put on climbing gear and trimmed a few branches on a tree that extended within 10 feet of power lines. Walberg told Complainant that Thing had stated he was not aware he needed to be “certified and qualified” to trim trees. Walberg reported Thing’s statements to Complainant because Complainant was a shop steward and shop stewards deal with safety issues. Walberg believed that Thing had been put in danger

and that the incident was a violation of safety rules and the collective bargaining agreement.

8) On or about October 1, 2003, Complainant contacted the Union Hall and told Ron Johnson, a Union representative, about the reports he had received from the two journeymen. Johnson told him to look into the allegations and give Union business manager Tom Ellis a report on October 6, 2003, the date Ellis would be back in the office.

9) On or about October 1, 2003, Complainant told his supervisor, Mike Hebert, that he was conducting a safety investigation at the Union's behest based on employee reports that foreman Tiffany Hebert had allowed a flagger to climb and trim a tree near charged power lines in Corvallis. Hebert already knew about the incident from his wife, Tiffany, and immediately became defensive when Complainant detailed the information reported by the employees. Hebert did not believe the incident constituted a safety violation and told Complainant that his wife "wasn't that stupid." Hebert also told him that "we all break the rules." Complainant told Hebert that he was preparing a report to give to Tom Ellis on October 6. Hebert subsequently called Tiffany's supervisor, Tony Feldman, and warned him that there was "trouble in his area." Hebert told Feldman that "the Union" had called and told him "two employees had reported a "safety violation."

10) On or about October 1, 2003, Complainant called Feldman and gave him the same information he gave Hebert. Feldman told Complainant he already knew about the allegations and repeated Hebert's words that "everybody breaks the rules." Feldman told Complainant that he did not intend to pursue any action against Tiffany. Complainant asked if the tree was on the Pacific Power and Light ("PP&L") list of

hazardous trees and Feldman confirmed that it was. Complainant told Feldman he would be making a report to the Union on October 6.

11) During his investigation, Complainant separately interviewed some of the crew involved in the Corvallis incident, including Tiffany Hebert, Thing, Swarm, and Horn. Tiffany acknowledged that she asked Thing to climb and trim a tree but only as part of a “training exercise.” She told him the flagger was only eight feet off the ground but acknowledged the tree was on the PP&L list of trees to be trimmed and that some of the limbs “may have been around ten feet from the power line.” Thing told Complainant that he climbed and trimmed a tree and that “Tiffany said to him, ‘Oh get up there, let’s see what you can do.’” He also told Complainant that the limbs were within 10 feet of primary lines. Horn told Complainant that he was sitting in his truck doing paperwork at the time of the incident and did not want to “get involved.” Complainant kept notes of his interviews in a “Daytimer” that he later used to draft his report to the Union on or about October 5, 2003.

12) Around 8 a.m. on October 6, 2003, Complainant arrived “at the Scio yard” with Larson to “pick up a truck” per Mike Hebert’s instructions. Previously, on September 30, 2003, Hebert had given the crew a three day notice to make the move to the Lyons, Oregon, shop. When Complainant and Larson arrived, they learned that someone else had already picked up the truck and that plans had changed. Hebert approached Complainant and told him he was being demoted to tree trimmer and to “get all your stuff off the truck.” Complainant became very upset after Hebert refused to tell him why he was being demoted and he accused Hebert of retaliating against him as a result of the Corvallis investigation involving Hebert’s wife. After exchanging heated words with Hebert, he called Hebert’s “boss” Dwayne Pope, PP&L’s forester Jay Neil, and the Union to protest his demotion. That same day, Hebert moved Complainant to a

tree trimmer position on a “two man” bucket crew with foreman Ron Kator. Larson was assigned to a different crew. Both crews moved to Lyons about one week later. Randy Wellborn replaced Complainant as foreman of the bucket crew and Randy Muravez was promoted from tree trimmer to foreman of Wellborn’s climbing crew. At that time, Hebert planned to move his Scio crews to Lyons when the Scio “circuit” was completed, but not all at the same time. One crew had already moved to the Lyons shop and other crews did not move until later in October.

13) On or about October 6, 2003, Complainant filed a Union grievance. Kelly MacDonald, assistant business manager for IBEW, Local 659, conducted an investigation and concluded that Tiffany Hebert was in violation of Respondent’s safety rules and the collective bargaining agreement. Thereafter, MacDonald gave Tiffany Hebert a verbal reprimand. On October 16, 2003, MacDonald sent a letter to Respondent’s Division Manager that stated in pertinent part:

“In accordance with Article IV, Section 4.14 of the Working Agreement between Trees, Inc. and IBEW Local Union 659 enclosed is a grievance filed by myself representing Mr. Michael J. Nolan.

“The grievance should be self-explanatory.

“I will await your reply in this matter.”

MacDonald attached a “Notice of Grievance” dated October 6, 2003. Under the section calling for the “nature of the grievance and circumstances out of which it arose,” MacDonald stated: “Journeyman Tree Trimmer Foreman was discriminated against for giving evidence with respect to an alleged violation of this Agreement,” specifically, “Article 4, Section 9, Article 4, Section 14 and all other Sections that may apply.”

14) Article 4, Section 9 of the Agreement states, in pertinent part:

“Under no circumstances shall the Employer dismiss or otherwise discriminate against an employee for making a complaint or giving evidence with respect to any alleged violation of this Agreement.”

Article 4, Section 14 of the Agreement states, in pertinent part:

“The Company shall have the right to exercise customary and regular functions of management, including the right to hire, suspend, discharge, discipline, promote, demote, or transfer employees for just cause. However, the right of the Union to bring a grievance alleging abuse of these rights is recognized.”

Article 7, Section 11 of the Agreement states, in pertinent part:

“It is understood that the Groundman will not climb or use aerial equipment.

“The Flagger/Brush Handler’s job, primarily, is to flag traffic and is only to be used as a brush handler, intermittently, between flagging duties.”

The understanding that a groundman “will not climb or use aerial equipment” is related to safety issues and compensation matters.

15) The Agreement includes a grievance procedure that states, in pertinent part:

“4.15 Any grievance which may arise between Union or any of its members and Company with respect to the interpretation or application of any of the terms of this Agreement and with respect to such matters as the alleged discriminatory or arbitrary discharge or discipline of an individual employee, shall be determined by the procedure set forth in the following Sections.

“4.15.1 As the initial step in the adjustment of a grievance, it shall be presented to the Supervisor by the Union Shop Steward or in the absence of a Shop Steward, by an authorized Union Representative (not later than twenty (20) calendar days after the date of the action complained of, or the date the employee became aware of the incident which is the basis of the grievance). The Supervisor shall make his reply within eight (8) business days to the authorized person presenting the grievance. The Supervisor and the Shop Steward or Business Representative shall state the reasons in writing as to why they have been unable to resolve the grievance at this level, when and if it becomes necessary to refer to the next step of the grievance procedure.

“4.15.2 If a grievance is not settled satisfactorily under Section 4.15.1, it shall be presented in writing by the Union to the District Manager within eight (8) business days, following receipt of the Supervisor’s reply, setting forth the following:

- (a) a statement of the nature of grievance and the facts upon which it is based;
- (b) the Section or Sections of this Agreement, if any, relied upon as being applicable thereto;

(c) the remedy or correction which is desired.

“The District Manager shall reply in writing within eight (8) business days after the receipt setting forth the Company’s position on the grievance. The District Manager and the Business Representative shall state the reasons in writing as to why they have been unable to resolve the grievance at this level, when and if it becomes necessary to refer to the next step of the grievance procedure.

“4.15.3 If no satisfactory settlement is arrived at under Section 4.15.2, either party may within twenty-one (21) calendar days, request that the grievance be referred to arbitration.

“4.15.4 An Arbitration Board shall be appointed on each occasion that a grievance is submitted to arbitration. The Board shall be composed of three (3) members, one to be appointed by the Union, one to be appointed by the Company. At the earliest convenience of the representatives, after their appointment, they shall meet for the purpose of selecting the third member who will serve as Chairman of the Board. In the event the parties are unable to agree on a person to act as a third member (within five (5) working days), they shall jointly request the Director of Federal Mediation and Conciliation Service or the American Arbitration Association to submit a list of five (5) persons qualified to act as a third member.

“The Board shall hold such hearings and shall consider such evidence as to it appears necessary and proper. The decision of a majority of the members of the Board shall be final and binding on Company and Union and the aggrieved employee, if any, provided that such decision does not in any way add to, disregard, or modify any of the provisions of this Agreement.

“The Company and the Union shall each bear the expense of its own representatives. The expense of the third party shall be borne equally by the Company and the Union.

“Either party may call any employee as a witness in any proceeding before the Arbitration Board, and if the employee is on duty, the Company agrees to release such employee from duty so he may appear as a witness.”

16) To bolster his grievance, Complainant continued to gather information about the Corvallis incident. On one occasion, Swarm came to Complainant’s home and they discussed Complainant’s demotion. Complainant’s wife, who met Swarm for the first time on that occasion, observed that both were “scared for their jobs” and concerned about whether they should be discussing the events leading to the demotion.

17) On or about October 31, 2003, Tony Feldman told Walberg and Thing they were laid off due to budget cuts. On or about November 2, 2003, Complainant interviewed Walberg and Thing and tape recorded their statements. Subsequently, Walberg and Thing prepared or dictated written statements that they signed and dated on November 4, 2003. In the statements, Walberg and Thing described their perceptions of events that occurred before they were laid off. In his account of the week following his contact with Complainant about the Corvallis incident, Walberg stated, in pertinent part:

“The following week in Corvallis, at Pilkington yard, I saw acts of hostility toward me. The facts where [sic]: rumors that I’m a snitch, written words left on my truck and broken bottles wedged under my truck tires. I believe that I was being retaliated [sic] by the crews in question, because they knew the seriousness of the offense.

“Friday October 10th I went to the supervisor Tony Feldman at 7:44 a.m. to inform him what was happened [sic]. Tony said: that I should have not called the union and get things stirred up. I said that I did not call the union. Tony told me that I’m a liar and asked if I would put it in writing about not calling the union. Tony continued: if you and Mike Nolan didn’t get together to report Tiffany Hebert on a safety violation this wouldn’t had [sic] happened. I’m not going to have anybody disrupt my yard and the rest of my workers; I’m going to get rid of the problem. Then I said, Tony this is not right. Tony replied it’s not my problem but yours, so deal with it and pay the price! After these words from Tony I felt that my safety and my job was [sic] in jeopardy after reporting a safety issue, and get discriminated by my supervisor.

“Monday October 13th called Mike Nolan for some advice. Mike told me that if he can he would help me and get back to me.

“Tuesday October 14th Mike called me; there would be a union representative at the Pilkington yard first thing in the morning, Wednesday the 15th.

“Wednesday morning October 15th the union representative Kelly McDonald was there and said to all workers that this animosity [sic]. Harassment is a safety issue and will not be tolerable [sic] at all by anybody at any time.

“Friday October 17th after work, Don Thing noticed my truck taillight was smashed.

“Monday morning October 20th before work I told Tony Feldman about my smashed taillight. Tony told me to call my union representative if I have a problem. Hearing these words from Tony Feldman, my supervisor from Trees, Inc., I know that Tony would not help me and has denied me of a safe working environment, and the animosity against me. I called the union, and left several messages for Kelly McDonald. My calls were never returned. The next day Tuesday, October 21st I called Tom Ellis from the union. Tom said that he will take care of this. Kelly McDonald called me to inform me that he will be there today for a meeting at the workshop at 4:30 p.m.

“Kelly came to the yard and talked to all workers for the second time and told them clearly that there are other ways to handling situations then [*sic*] in the form like destroying property. This is a safety issue at the workplace if we can not keep our minds on what we doing [*sic*]; workers can be killed or injured. There will be penalties if caught physical damage [*sic*] or animosity at the workplace. Kelly talked with Tony and me after the meeting, Tony agreed with Kelly to pay for the taillight that was damaged on work property. After a few days Tony gave me a new truck taillight.

“Friday October 31st Tony Feldman came to the work site at 1:36 where I was working. Tony told me that he had to lay me off because of budget cuts. I will receive my final check today.” (internal quotations omitted)

Walberg sought Complainant’s help when he prepared his statement. He knew that Complainant planned to file a BOLI civil rights complaint and Walberg was preparing to do the same.ⁱ

18) Thing’s account of the Corvallis incident and subsequent events, signed on November 4, 2003, states, in pertinent part:

“At the job area, Friday September 26, at 1280 19th street, Corvallis, Oregon [*sic*]. In, the backyard where the work order was to be performed [*sic*]. After 10:00 am break time, Tiffany told Don to put some climbing gear on. Tiffany instructed Don not to wear spurs [*sic*], then pointed out the tree to be climbed. Tiffany wanted to see what Don had in him, and Tiffany told Don: let me see what you got.

“Bill Horn, the foreman of Don, said to Tiffany: What are you doing???? Tiffany said: I want to see what Don’s got. Bill had no response on that, Tiffany said to Don, go and trim the tree.

“Tiffany gave no instructions to Don, just climb the tree and I will walk you through it. Don did comply with the order, and climbed the tree, about 15 foot [*sic*] in the tree. Don put a lifeline around a branch as Tiffany told him. Don’s thoughts were, what ever they say I will do out of respect. I do what

I'm told. Tiffany at this time told Don how to tie a repailing [sic] knot. Tiffany then gave Don instructions to repaile [sic] down to a several branch's [sic] that needed to be cut. Diameter was about 3 to 4 inches. Tiffany said to Don, be sure you pull the branch at the same time you saw, the branch Tiffany was talking about was within 10 foot [sic] of power line. Don cut several branches, as told by Tiffany, then was instructed to come down by Tiffany.

"At the time Don came down out of the tree, Tiffany said to Bill Horn: My guy Don is done before your guy Jason. Bill had no comment on what Tiffany just said. Don took off the gear. Don continued the job as a ground man dragging and chipping brush and waited for further orders.

"Wednesday October 1st 2003, Tiffany had a telephone conversation, after the call Tiffany said: FUCKING A, SOMEONE TURNED ME IN TO THE HALL!!!!!!

"Tiffany approached Don and said: I hate to ask you this. Don: Then don't. Tiffany walked away . . . Jason came to Don and said: Let's say how it happened. Don: I don't live in lala land . . .

"Tiffany came by, after Jason left and said to Don: Don't listen to what Jason says to you. Don: Thank you very much. That was the end of the conversation.

"Don was home the evening of Wednesday October 1st 2003. Don received a phone call from somebody who did not say his name. The voice on the phone told Don: YOUR [sic] DONE, PICK UP YOUR PAYCHECK! Don: Wow, a rumor gets esculated [sic] when it leaves the original mouths. Don recognized now after hearing what the voice said to him as Mike Hebert. Mike: yeah, but you know, you have to watch what you say; it could come back around and harm you. You're a hard worker; I want to keep you around. Just be careful who you talk to, like Mike Nolan. Mike Nolan is not trust worthy and will stab you in the back.

"Don: I never met the guy. I like my work. Mike: you don't have to do what you don't want to. Don: do you have something for me? Mike: I was just kidding. The telephone conversation was ended.

"Don went to work on Thursday October 2nd 2003. Tiffany approached Don before lunch with a paper, and told Don: SIGN THIS!!! Don asked Tiffany what the paper was. Tiffany said: this is for the training exercise in the back yard on September 26th 2003, at 1280 19th Street, Corvallis, Oregon. Don at this time was thinking about the telephone conversation from Mike Hebert. Don knew that his job was at risk. Don signed the paper ordered by Tiffany.

"On Friday October 31st 2003, after work, Don and Steven where [sic] sitting in Steven's truck. Tony Feldman, the supervisor, approached the truck on the passenger side and told Don: I have to lay you off, because of budget costs. Tony told Don to come back Monday November 3rd to

receive the final Paycheck from that week just worked with the 2 hour show up time for Monday. Don asked Tony if the retro pay as a ground man will be on the final check too. Tony said to Don: yes.

“Steven Walberg was a witness of this conversation between Tony and Don.” (internal quotations omitted)

During his taped interview, Thing acknowledged to Complainant that Tiffany Hebert ordered him to climb and cut tree branches within 10 feet of a “primary distribution line.” When Complainant asked him if he believed he was discriminated against and laid off because he did not “say what [Respondent] wanted [him] to say,” Thing said, “Yes, I do.” Complainant concluded the interview, stating: “Don, I do appreciate your time and effort and I hope to see you back on union payroll very soon and I am going to conclude this interview at this time and Don thank you for your time.”

19) Thing provided Complainant with his pay stub for the week ending September 27, 2003, that shows Thing was paid \$10.59 per hour (flagger wages) for groundman work he performed during that pay period. Although Complainant believed Thing was improperly paid, he did not file a grievance on Thing’s behalf because Thing asked him not to.

20) On or about December 6, 2003, at Complainant’s request, the Union’s Executive Board (“E-Board”) met to determine whether to refer Complainant’s grievance to arbitration. During the meeting, Complainant submitted evidence to support his grievance, including the statements Walberg and Thing signed on November 4, 2003. To support his decision to demote Complainant, Mike Hebert had previously told the Union that Complainant had 14 unexcused absences. He also told them Complainant “could promote to foreman again.” The E-Board declined to refer Complainant’s grievance to arbitration. The Union dropped Complainant’s grievance because “they didn’t think they could win it on the merits.”

21) After Complainant filed a BOLI complaint in November 2003, Mike Hebert responded to the allegations by letter dated December 10, 2003, that stated in pertinent part:

“In response to Mr. Nolan’s being [*sic*] demoted from a Foreman to a Trimmer position [*sic*]. This was a decision that was already in the works well before Mr. Nolan’s investigation; his reasons of my actions are per [*sic*] speculation on his part. I decided to give another Foreman that had been running a climb crew through 2 winters Mr. Nolan’s Ariel lift truck and chipper. This was not a disciplinary action what so ever. Mr. Nolan was bumped back to a Trimmer’s position not demoted. I had made the decision to restructure my crews when the circuit being worked in the town of Scio, OR was complete. Perhaps it was bad timing on my part, but it had to be done before all my crews moved to Lyons, OR to start a new circuit. If I failed to do it at this time I would have had to pay per diem to some employees.

“Part of my job as a General Foreman is to structure my crews to run as efficient as possible. To give my customer the most out of their money, make my company money and to keep my employees happy in the process [*sic*]. Sometimes I have to make decisions that are not agreed on by my employees or even myself, but that’s business.”

In the letter, he described Complainant’s work performance as “top notch” and Complainant as “an asset to the trade” and stated he had told Complainant that “the opportunity to become a Foreman again still exists.”

22) In early 2004, Hebert prepared a chronology of events that precipitated crew changes and the demotion. He placed the document in Complainant’s file and gave it to BOLI. In his chronology, he stated that he had to “bump a current foreman” and he “could not base it on production numbers. They fluctuate.” He “could not base it on audits. They fluctuate.” Therefore, he “researched all foremen” and “[Complainant’s] past performance caught up with him.” Hebert further stated that he promoted Randy Muravez to foreman of the climbing crew because “Randy was a stronger climber than [Complainant]” and “for production that’s a big plus.” Hebert stated he had “never had any past problems or discipline with [Randy,] he never has missed work” and “if Randy did not work out I could offer the crew to [Complainant].” In early February 2004, Hebert

told the BOLI investigator that his decision to demote Complainant was based on “attendance and past discipline.” He told the investigator that Complainant had 14 unexcused absences. Hebert gave the investigator a copy of an attendance record illustrating Complainant’s “very poor attendance” and claimed Complainant was in jail “in April or May because of a fight.”

23) The attendance record Mike Hebert provided to the Union and BOLI shows 14 absences designated as “U” for unexcused. Nine of the absences were actually excused or were designated holidays. One of the absences designated as “U” was dated March 20, 2003, and circled with a handwritten note that stated “court for fighting. Excused Pre-arranged.” Hebert wrote the note on the attendance record sometime after Complainant was demoted. Complainant was not in court or jail for fighting that day or any other day in 2003. Although Hebert knew during the BOLI investigation that Complainant had fewer absences “than he thought,” he did not tell the BOLI investigator there were inaccuracies in the attendance record.

24) Complainant had previously signed a statement on March 25, 2003, agreeing that he had missed work on prior occasions without notifying Respondent before or during the absences. He agreed that, henceforth, either he or an immediate family member would notify Respondent of unanticipated absences and that he was subject to disciplinary action if he failed to “abide by these stipulations.” On May 27, 2003, Complainant received a “final written warning” and a 3 day suspension for failing to contact a supervisor during an unscheduled absence. The absence was ultimately excused because Complainant was home with his pregnant wife who gave birth on June 6, 2003. Complainant had one unexcused absence after he signed the March 25 agreement and before he was demoted. Respondent took no action against Complainant for that absence.

25) Complainant received a commendation by letter dated April 17, 2003, from Respondent's corporate president Brian Delaney that stated, in pertinent part:

"Dear Michael,

"Trees, Inc. has always taken pride in its outstanding employees. Our employees are professionals who provide a service to our communities, exceeding customer expectations every day. I received a letter from a PacifiCorp customer. She commended you **and your crew** for an outstanding job performance. I want to express my appreciation as well.

"Quality requires the commitment of all of our team members and your extra effort reflects this commitment to quality. With your help, our vision **to be the first choice of our customer** will be a reality. Thanks again for your extra effort."

Throughout his employment, Complainant consistently received high scores on the quarterly audits and statistics summaries. The "Quarterly Tree Crew Audit" is conducted by PacifiCorp Vegetation Management for quality control purposes. Without satisfactory audits, PP&L can discontinue contracts. During an audit, a designated forester checks the quality of the cuts and equipment upkeep, among other things. Complainant's total score for the quarter ending March 13, 2003, was 100 percent. Complainant's total score for the quarter ending September 13, 2003, was 100 percent and Complainant's production was rated the "6th best of the (16) crews operating in the Willamette area."

26) After his grievance was dropped, Complainant filed a complaint with the National Labor Relations Board ("NLRB") against Respondent and against Kelly MacDonald alleging MacDonald failed his duty of fair representation. MacDonald was "unhappy" with Complainant for filing the complaint and although it had been withdrawn in or around Spring 2004, he was still unhappy with Complainant at the time of hearing.

27) On or about February 9, 2004, Mike Hebert accompanied Don Thing to the Union Hall. Thing had been unemployed since his October 2003 lay-off. He told Kelly MacDonald that his "ultimate goal" was to "get back on the books" so he could get

a job. Thing made and signed two statements that were typed by a notary in MacDonald's presence. The first statement, dated February 9, 2004, said in pertinent part:

"At the job site Fri Sept 26 2003 at 1280 19th St in Corvallis Oregon [sic]. During break I bravely bugged Tiffany Hebert to let me show her how an Islander climbs trees. At the end of our break I saw Tiffany walking to her truck so I ran over to her and asked if she was gonna give me a chance to show her what I got.

"She then had me grab her gears and follow her to the house. In the back of the house she showed me how to strap on my gears & life line and asked me if I know how to tie a rappelling knot. I said no, she then asked what Corey showed me while she tied a rappelling [knot] as I watched. After 2nd time she had me try a rappelling knot on the ground before climbing.

"Up on the tree about 15 to 20 feet I put my lifeline around a branch as Tiffany said so and rappelled down to a lower branch where I could squat and smack her hand high-five.

"She then told me which branch to cut one at a time, 4 branches total no more, looking up I saw cable for TV I asked Jason next branch over, cuz he also was watching about wires he said, your far from power lines, only cable TV & phone lines were close but not touching my branches. Tiffany told me to come down I was done I wanted more rush but I did what I was told cuz of respect.

"On the ground Tiffany looked at Bill Horn & said my guy is done before your guy smiling. I took off Tiffany's gears put them in her truck and a grounds man [sic].

"Day after Tiffany brought me a paper to sign for the training of my climbing.

"Tiffany asked Jason during break if he knew or he himself turned her in to the Hall. Jason swears up and down he did not do such a thing. She walked away and Jason and I were piling brush next to the chipper. Jason began to ask me over & over if I told someone about what happened. Telling him no and I expressed my temper was rising cus I felt like a target so he dropped it and Tiffany heard our talk and told me to ignore him.

"Mike Hebert called me giving me a message to call Mike Nolan. He asked what was going on and if I was talking lies & rumors. I told him no. Mike told me who to call and I need to call him. He than said he has no anger towards me or his wife Tony also. I asked if he had some for me cuz I thought per diem was still behind and not my check like Mike Nolan says."

The second statement, also dated February 9, 2004, said in pertinent part:

“Statements Mike Nolan took from me was half a page only and it was recorded on tape. 2-3 days later Steve Wahlberg called saying Mike Nolan needs my statements to make correct typing errors and notarized and I will get them back.

“To this day I have not gotten back my papers. The statements I have since read is very insulting and not true. Things were added on and extra page of lies.”

After Thing signed the statements, MacDonald had him sign the “Union books” and in less than one week Thing was dispatched to Respondent for work on a job site in Lincoln City.

28) Thing has a prior record on file with Marion County Circuit Court that shows he was convicted of a felony in March 2002 and a crime involving dishonesty in July 2002.

29) On or about the same day Thing went to the Union Hall, Tony Feldman went to Swarm’s work site and showed him a document Complainant had filed with the Union that included statements Swarm made to Complainant after the Corvallis incident. After questioning Swarm about the document, Feldman accompanied Swarm to the Union Hall where they met with Kelly MacDonald. MacDonald typed up two statements that Swarm signed before a notary. The first statement, dated February 10, 2004, stated in pertinent part:

“Mike Nolan gave me Jason Swarm a call at 10:08 am on Tuesday or Wednesday. Nolan told me he had heard Don the groundman had been in a tree trimming near the power lines and pulling overhang. I responded to Mike Nolan stating that he was only in the tree about 8’ to 10’ maximum. Mike Nolan then responded saying that he referring to Don Thing, ‘wasn’t anywhere near the lines?’ I then told Mike Nolan, ‘No he wasn’t anywhere near the lines.’ Mike Nolan then said ‘was any part of his body, or limbs near or within 10’. I told him, ‘NO’. Mike Nolan asked me then, ‘why was he in the tree.’ I said, ‘I’m guessing the general standard.’ (I was irritated by his persistence. He cut into what I was saying at the time and told me to tell Don to call him and hung up.

“Mike Nolan has a habit from my experience of cutting into a conversation before a person can finish.”

The second statement, also dated February 10, 2004, stated in pertinent part:

“No conversation went on with Mike Nolan and I on Friday, September 26th 2003 about an alleged safety violation with Don the groundman. Mike Nolan did call me and asked me questions on the following week about Don and a tree he climbed in. In the statement that Mike Nolan presented to the Union Hall was false and did not fit the one and only conversation that we had. I wrote out a statement of our conversation on another sheet of paper.”

Swarm remained in Respondent’s employ and at the time of hearing was still “technically” employed.

30) Complainant’s BOLI complaint and NLRB complaint against MacDonald were investigated “simultaneously” in February 2004. Mike Hebert and Tony Feldman were present when Thing and Swarm signed their February 2004 statements. Prior to or during that time, Hebert shared some of the “BOLI documents” with MacDonald. MacDonald believed that the February 2004 statements “refuted” Thing’s November 11, 2003, statement and Complainant’s report to the Union summarizing Swarm’s prior statements. MacDonald used the February 2004 statements to defend himself against Complainant’s NLRB complaint.

31) On February 25, 2004, Complainant sustained a compensable injury and received time loss payments until he became medically stationary on June 1, 2005. His worker’s compensation claim closed on June 23, 2005. Complainant has not returned to work since his injury. When his claim closed, the Worker’s Compensation Board deemed Complainant 29 percent disabled. Complainant was released for “modified” work, but has been disabled from performing tree trimmer work since his work injury.

32) Throughout his employment as a tree trimmer, Complainant was a certified arborist and licensed commercial pesticide applicator. After his work injury, Complainant continued to maintain his professional membership in the International

Society of Arboriculture (\$145 in 2004), his arborist certification (\$145 in 2004), and his pesticide applicator's license (\$50 for 2004; \$50 for 2005). Complainant paid for his licenses and certification out of his own pocket.

33) In March 2004, Complainant sent a letter to PP&L alleging Respondent had ordered him to supervise other public utility companies at PP&L's expense. He alleged he was expected to charge the costs of equipment and personnel used on other accounts to PP&L's account. Following his lengthy contentions, and as explanation for the letter, Complainant stated in part:

"The reason I come forward now is that Mike Allen, Dwayne Pope and Mike Hebert have went [*sic*] back on their word and promises.

"I was demoted when Mike Hebert's wife was involved in an incident where she made a flagger, Don Thing, climb a tree in a back yard in Corvallis. I, Mike Nolan, being shop steward for this area was asked by Local 659 to look in to these allegations. After talking to employees that were there, and Tiffany Hebert herself, everyone told me the same story that it in fact took place and that three journeyman watched as the flagger trimmed under a primary distribution line that was on PP&L's list to be trimmed. Tiffany Hebert gave the order and Don Thing was being paid flaggers rate.

"The whole inquiry was completed by Thursday, October 2nd, I was to wait and give all findings to Tom Ellis on Monday the sixth of October for Tom was out of the office till then.

"On Monday, October 6th Mike Hebert demoted me to a trimmer slot and told me not to use the phone on his time. I asked Mike Hebert four times why he was demoting me and he finally said, 'I just don't want you running a crew.' I explained to him that I had no accidents, no injury's [*sic*], that I was number six out of sixteen crews, was an I.S.A. certified arborist, as well as a utility specialist. He said that he did not care and put Randy Walburn [*sic*] in as foreman in my place who has no herbicide license, no CPR, no I.S.A., no I.S.A. Utility and has had two DUI's. That's when I knew that it was personal and I was being singled out because of his wife's allegations against her (misconduct). I know [*sic*] longer feel I need to keep this information to myself. One day out of five was devoted to other companies at your expense. On all time sheets, my name and employee number is listed as supervisor on these accounts.

"I swear the above to be the true [*sic*] and will go before any inquiry and testify to this information. I have evidence to prove my statement and will present it at your request."

Complainant also made specific allegations about Mike Hebert and other employees to PP&L's forester Jay Neil.

34) Complainant was distraught, angry and upset following his demotion. His relationship with his family changed as he became "more absorbed and focused" on the circumstances involved in his demotion. He became detached from his family and less patient with his children. Although he had been demoted from area supervisor to foreman a few years before, the reason for this demotion was more upsetting because it was for "reporting safety concerns" and previously he had won an award for safety. He felt degraded and belittled by Respondent. The demotion negatively impacted his relationship with his co-workers, some of whom perceived he was "stirring up shit." Consequently, he worried about the reasons behind the demotion and its financial effects "every day, every hour" and those worries adversely affected the quality of his home life and professional relationships.

35) Complainant earned \$23.87 per hour as a foreman. Complainant was paid \$20.63 per hour after he was demoted to tree trimmer. Complainant's rate as a tree trimmer was \$3.24 (\$6.48 overtime rate) less than his earnings as a foreman. Between October 6, 2003, and February 28, 2004, Complainant lost \$3,007.08 in wages as a consequence of his demotion.

36) Complainant's testimony was credible. His account of key facts remained consistent and was corroborated by most of the witnesses. His testimony that he reported a safety issue on October 1, 2003, to supervisors Mike Hebert and Tony Feldman and that the issue, involving Hebert's wife, Tiffany, was reported to the Union, was corroborated by Mike Hebert and Feldman. Moreover, neither Tiffany Hebert nor Don Thing appeared at hearing to contradict Complainant's testimony that during his investigation of the incident both acknowledged that Tiffany had asked Thing, a flagger,

to climb and trim a tree near a power line on or about September 26, 2003. Also, Complainant's account of his demotion at the start of his shift on October 6, 2003, was substantially similar to Mike Hebert's version and corroborated by credible witness testimony. Although there were some questions raised about precise dates and times certain phone calls were received or made, any apparent inconsistencies were adequately explained and, in any event, were minor and not material to any issue. Overall, Complainant's testimony was trustworthy and the forum has credited it in its entirety.

37) Angela Nolan's testimony was credible despite a natural bias as Complainant's wife. She testified only to her personal knowledge and did not embellish her observations in any way. Her testimony that she first met Jason Swarm when he came by the house to pick up a tool belt after Complainant was demoted and that she overheard Swarm, Complainant and Jack Larson discussing the demotion and their concerns about their jobs was credible and the forum accepts it as fact. Moreover, her testimony that Complainant was distraught and upset after he was demoted and that his "absorption" with the way he perceived he was treated by Respondent negatively impacted his family life was credible and not impeached in any way. The forum credits Angela Nolan's testimony in its entirety.

38) Jack Larson's testimony generally was credible. He readily admitted a close friendship with Complainant that the forum weighed carefully when considering his testimony. His memory for dates was poor, but his recollection of the general time period and the events he observed was consistent and not contradicted. His testimony that he was present when Swarm called Complainant to report the Corvallis incident was convincing and bolstered by other credible evidence. The forum credits Larson's testimony in its entirety.

39) Steven Walberg's testimony was credible. As a tree trimmer for 21 years, he demonstrated knowledge of safety procedures and expressed genuine concerns about the ramifications of unsafe working conditions. He testified only to his knowledge and observations with no embellishment and his testimony was not contradicted. He was not impeached in any way and the forum credits his testimony in its entirety.

40) Mike Hebert's testimony was internally inconsistent, self serving and was not substantiated by credible evidence. Moreover, as Respondent's corporate representative, Hebert was present throughout the hearing and his testimony demonstrated he was influenced by other testimony he heard at the hearing. For instance, after the Agency investigator testified and was excused from the hearing, Hebert acknowledged he told the Union that Complainant was demoted because he had 14 unexcused absences. On cross-examination, he testified that Complainant had only five unexcused absences and thereafter advised the BOLI investigator "there were not as many absences as [he] thought." That testimony was contradicted by the Agency investigator who appeared later in rebuttal and credibly testified that Hebert presented the attendance record showing 14 unexcused absences without qualification and claimed Complainant's "very poor" attendance was the reason Complainant was demoted. Hebert's testimony was not believable and the forum gave it no weight unless it was a statement against interest or corroborated by other credible evidence.

41) Kelly MacDonald readily acknowledged that he remained "unhappy" with Complainant for having filed an NLRB complaint and his apparent unhappiness influenced his testimony in large part. His bias surfaced when he initially testified that following his investigation of the Corvallis incident, he concluded that the collective bargaining agreement provision which prohibits a groundman from climbing trees "was not being abused." He further stated that he found that "Don Thing was cutting limbs

pertinent to [the crew's] job assignment" and that if he "had found a case where Thing had been used sporadically day in, day out, to do tree trimming work it would have been a different scenario." This testimony was contradicted by his actions and his subsequent testimony that the forum found believable because it was corroborated by other credible evidence.

First, unequivocal evidence shows that following his investigation, MacDonald filed a formal grievance against Respondent on Complainant's behalf. MacDonald's grievance, dated October 16, 2006, alleged that Complainant had been discriminated against for "giving evidence with respect to an alleged violation of this Agreement."

Second, MacDonald testified on cross-examination that he interviewed Tiffany Hebert and her crew on or about October 13, 2003, and was told that Don Thing had climbed a tree and cut three or four limbs around the "distribution level." He also testified that Tiffany Hebert told him that the incident was part of an aerial training exercise and that "Thing was being trained in tree top rescue." He further stated that Jason Swarm told him that he was in a tree "adjacent" to Don Thing and that following the interviews, he "quoted to Tiffany about not having a groundman climb trees." MacDonald's description of the discussions he had with Tiffany Hebert and her crew was consistent with Complainant's description of his interviews with Tiffany Hebert, Swarm, and other crew members. Although he gave a diluted version of his "quote to Tiffany" about groundmen climbing trees, his testimony sufficiently affirms Complainant's and the BOLI investigator's credible testimony that MacDonald told them he had given Tiffany a "verbal reprimand" for the violation. Tiffany Hebert did not appear at hearing to contradict any of those statements. The forum therefore infers that her testimony would not have been substantively different.

Third, on cross-examination, MacDonald testified that the collective bargaining agreement provision that prohibits groundmen from climbing trees was “for safety reasons” as well as addressing compensation. That testimony also is contrary to his initial testimony that he had determined the collective bargaining agreement provision had not been abused.

Finally, MacDonald’s testimony that Swarm and Thing “volunteered” to recant or deny their previous statements to Complainant is not believable. His own testimony shows Mike Hebert and Tony Feldman brought Thing and Swarm to the Union Hall where they signed the February 2004 statements that discredited Complainant’s safety concerns - the crux of Complainant’s complaints filed against Respondent and the Union. The forum infers that It was not mere coincidence that Thing was immediately given a job and Swarm managed to hang on to his job following their execution of notarized statements that Respondent and the Union believed, albeit misguidedly, would aid their dubious positions. For all of the reasons set forth herein, the forum credited MacDonald’s testimony only when it was consistent with or corroborated by other credible evidence.

42) Tony Feldman’s testimony was not credible. His bias as a Respondent employee was profoundly evident by his demeanor and the prepared responses he gave to anticipated questions. Some of his testimony was given, literally, “tongue in cheek.” Feldman’s demeanor was relatively neutral when he testified to collateral facts. However, he noticeably and repeatedly rolled his tongue against the inside of his cheek immediately preceding and intermittently during his testimony about key issues, such as his account of the “investigation” he conducted following Complainant’s safety complaint and what he was told by the Corvallis crew during that investigation. His testimony that Complainant told him he found “no violation” of safety procedures during his

investigation of the Corvallis incident was not only punctuated by his tongue physically in cheek, it was contradicted by Feldman's subsequent admission, albeit somewhat vague, that Complainant had asked him to conduct a "safety meeting" reiterating company policy involving groundmen climbing trees and "to do something in response to [the situation]." Unless it was corroborated by other credible evidence or a statement against interest, Feldman's testimony was given no weight.

43) Bill Horn's testimony was internally inconsistent. Initially he stated the first thing he observed when he left his truck to join the crew was Don Thing up in a tree and "everybody else on the ground watching him and explaining to him what to do and all that stuff." When specifically asked about Swarm's whereabouts, he stated Swarm was in the tree with Thing but that he couldn't "think clearly exactly where [Swarm] was at" in the tree. Later, while describing the safety conditions at the time, Horn stated he observed that Thing was in the tree "all tied down and everything and Tiffany and Jason [Swarm] were just showing him that that's how it's done, climbing trees and stuff like that, and to see if he would really like to do it for his future." On cross examination, Horn stated he did not see Swarm trimming the tree before Thing climbed the tree because when he arrived on the scene, Thing was already up in the tree and Swarm "was on his way down" from the tree. Later still, Horn stated Swarm was 15 feet up observing Thing who was only 10 feet up in the tree. During his testimony, Horn's breathing was uneven and he appeared nervous. His testimony was punctuated with uncertainty and he appeared to struggle to remember what he was supposed to say. Overall, his testimony was unreliable. However, his statement that Tiffany Hebert told him she "put Thing in the tree" to see how he would do was consistent with other credible evidence. Moreover, his observation that Thing was in a tree in climbing gear

was corroborated by other eye witnesses. The forum credited Horn's testimony only when it was consistent with or corroborated by other credible evidence.

44) Jeofrey Jackson's testimony was similar in character to other Respondent witnesses. His apparent intent was to demonstrate that Complainant's report of unsafe practices was not well founded. At one point, he acknowledged that Thing was in a hazardous tree and cut some branches, because "they wanted him to get the feel of cutting branches in an awkward position." However, that testimony was inconsistent with his and other witness testimony that Thing's presence in the tree was part of a training exercise and that no trimming takes place during training exercises.ⁱⁱ His overall description of the Corvallis incident conflicts with the version Tiffany Hebert and Swarm told Complainant and MacDonald during the initial investigation. For instance, Jackson testified that "another guy was up in the tree trimming" and "was pretty much done trimming the tree around the primary lines" when Thing climbed the tree. Complainant credibly testified that Thing told him he was alone in the tree. MacDonald credibly testified that Swarm told him he was in a tree "adjacent" to the tree Thing climbed. Given the conflicting versions and Jackson's evident bias as a current Respondent employee, the forum gave Jackson's testimony weight only when it was corroborated by other credible evidence.

45) Jason Swarm was a reluctant witness. When asked on direct examination if Respondent currently employed him, he responded, "technically." When asked on cross examination what he meant by "technically," he refused to answer. He eventually stated, albeit hesitantly, that he was currently seeking part time work at a gas station. He was otherwise unresponsive about his employment status with Respondent. By his attitude and demeanor, the forum inferred he was under pressure to testify on Respondent's behalf. Moreover, he testified that in February 2004, his supervisor (Tony

Feldman) came to his work site to ask him about statements attributed to Swarm that Complainant previously had given to the Union. According to Swarm, he and Feldman went to the Union Hall to “document” that Swarm “did not write that falsified letter.”ⁱⁱⁱ He testified that he and Feldman met with Kelly MacDonald and that Don Thing was present at the Union Hall when Swarm made a “notarized statement” denying he talked to Complainant on September 26, 2003, about the Corvallis incident. In the statement, he claimed to have talked to Complainant the following week and that Complainant’s notes describing the “one and only conversation” he had with Complainant were “false.” Swarm’s testimony and the two sworn statements he made at the Union Hall in February 2004 were contradicted by Complainant’s credible testimony and telephone records that establish Swarm talked to Complainant at least four times on September 26, 2003, and several times thereafter. When he was confronted with Complainant’s telephone records on cross-examination, Swarm admitted he had talked to Complainant on September 26, but had “no recollection of the Corvallis issue coming up.” Complainant’s wife testified that Swarm was in her home after Complainant was demoted and he and Complainant were “scared” about their jobs. Her credible testimony supplies a plausible explanation for Swarm’s attempt to distance himself from Complainant after Feldman confronted him with the Union report summarizing Swarm’s statements to Complainant. While the forum falls short of finding that Respondent conditioned Swarm’s continued employment on his willingness to discredit Complainant’s safety investigation which was the subject of a BOLI complaint, the forum infers, based on the record herein, that Swarm’s testimony was significantly influenced by his apparent uncertainty about his job security with Respondent. The forum therefore has only credited Swarm’s testimony when it was consistent with other credible evidence in the record.

46) Don Thing's two statements, signed and notarized on February 9, 2004, are not credible. First, the Agency introduced impeachment evidence showing Thing was recently convicted of a felony and a second crime involving dishonesty. Although the record establishes Thing was available, he did not appear and explain the circumstances of his prior convictions. Second, Thing's "sworn" statements recanting his prior statements to Complainant apparently were made in exchange for a job. MacDonald testified that Thing's "ultimate goal" when he appeared at the Union Hall that day was to "get on the books and get a job." MacDonald also testified that Respondent's supervisor Mike Hebert accompanied Thing and that after Thing signed the statements, Thing was listed on the Union books and within one week was dispatched to Respondent for a job in Lincoln City. Thing did not appear at hearing to explain the discrepancies between his prior statements, including a taped interview, and his subsequent notarized statements. For those reasons, the forum has discredited Thing's February 2004 statements.

47) Miguel Bustamante was a credible witness. His testimony was straightforward and he readily acknowledged that he relied on his file notes to refresh his memory of interviews he conducted during the civil rights investigation. He was not impeached in any way and the forum credits his testimony in its entirety.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent was a corporation conducting business in Oregon and has employed Complainant since 1988.

2) At times material herein, Complainant was a bucket crew foreman and union shop steward.

3) On October 1, 2003, after receiving two complaints from other employees, Complainant reported to his supervisor Mike Hebert that crew foreman Tiffany Hebert had permitted flagger Don Thing to climb and trim a tree near charged power lines in

violation of Respondent's workplace safety standards and the collective bargaining agreement. Hebert already knew about the incident and did not agree that it was a safety issue. He became defensive and told Complainant that his wife "was not that stupid" and that "everyone breaks the rules" occasionally. Complainant told Hebert that he was asked by the union to file a report with his findings on October 6. After Complainant left, Hebert called Tiffany Hebert's supervisor, Tony Feldman, and warned him "there was trouble in his area."

4) After talking to Hebert, Complainant contacted supervisor Tony Feldman and told him about the employee complaints involving Tiffany Hebert and Don Thing. Feldman already knew about the incident and parroted Hebert's response. He told Complainant that he did not intend to pursue any action against Tiffany Hebert and warned Complainant not to pursue the issue.

5) Complainant subsequently interviewed Tiffany Hebert, who acknowledged that she asked Thing to climb and trim a tree and that some limbs may have been near a power line. He also interviewed Don Thing, who told him that Tiffany told him to climb the tree and that the limbs were within 10 feet of primary lines. Complainant interviewed other employees who were present at the site on the day of the incident, including Bill Horn, who did not want to be involved, and Jason Swarm, who originally reported the incident.

6) On or about 6, 2003, Complainant faxed a report to the union. His report documented his investigation through October 2, 2003, including his interviews with T. Hebert, Swarm, Thing, and Horn.

7) On October 6, 2003, Mike Hebert demoted Complainant from foreman to tree trimmer and moved Complainant to a different crew. On the same day, Complainant filed a grievance with the union.

8) On October 8, 2003, Complainant filed a supplemental report with the union that included information about the October 6 events.

9) The union's assistant business manager Kelly MacDonald looked into Complainant's grievance and concluded that T. Hebert violated Respondent's safety rules and the collective bargaining agreement. He subsequently gave her a verbal reprimand and by letter dated October 16, 2003, notified Respondent that he was filing a grievance on Complainant's behalf. A "Notice of Grievance" was attached to the letter and stated that Complainant was "discriminated against for giving evidence with respect to an alleged violation of this Agreement." MacDonald cited the applicable collective bargaining agreement provisions, including those that pertained to safety standards.

10) On or about October 31, 2003, Tony Feldman told tree trimmer Steve Walberg and flagger Don Thing that they were laid off due to budget cuts. Tree trimmer Jason Swarm was not laid off.

11) On or about November 2, 2003, Complainant interviewed Walberg and Thing and tape recorded their statements. On the same date, Complainant filed a BOLI civil rights complaint against Respondent. Later, Walberg and Thing prepared or dictated written statements that they signed on November 4, 2003. Complainant submitted both statements to the union's E-Board as support for his grievance.

12) On or about December 6, 2003, the E-Board met to determine whether to grant Complainant's request for arbitration of his grievance. Mike Hebert told the union representatives that Complainant was demoted for poor attendance and disciplinary reasons, including 14 unexcused absences the previous year. The E-Board declined to refer Complainant's grievance to arbitration and dropped or withdrew their grievance on Complainant's behalf.

13) Complainant had five unexcused absences prior to October 6, 2003. He had signed a statement on March 25, 2003, agreeing that he had missed work on prior occasions and agreed that he was subject to discipline if he did not follow certain guidelines. Complainant had one unexcused absence in mid-July 2003 after he signed the March 25 statement and before he was demoted. He was not disciplined for the mid-July absence.

14) After Complainant filed his BOLI complaint in November 2003, Mike Hebert told a BOLI representative that his decision to demote Complainant was based on Complainant's "attendance and past discipline," including 14 unexcused absences. Hebert knew at that time that Complainant had only five unexcused absences. Hebert described Complainant's work performance as "top notch" and Complainant as "an asset to the trade."

15) After his grievance was dropped, Complainant filed NLRB complaints against Respondent and Kelly MacDonald. Complainant alleged MacDonald failed his duty of fair representation. MacDonald was upset with Complainant for filing the complaint and even though the complaint was subsequently withdrawn in spring 2004, MacDonald was still upset with Complainant at the time of hearing.

16) On or about February 9, 2004, Mike Hebert accompanied Don Thing to the Union Hall to meet with MacDonald. Thing had been unemployed since his October lay-off and his "ultimate goal" was to "get back on the books" so he could get a job. After signing two notarized statements retracting his November 4, 2003, statements, Thing signed the "union books" and Respondent put him back to work within a week. On or about the same day, Tony Feldman accompanied Jason Swarm to the Union Hall after showing Swarm a copy of Complainant's report to the Union that summarized Swarm's statements to Complainant after the Corvallis incident. Swarm signed two

notarized statements denying he made any statements to Complainant. Swarm remained in Respondent's employ and at the time of hearing was still "technically" employed by Respondent.

17) MacDonald used the notarized statements of both Swarm and Thing to defend the NLRB complaint and also gave them to the BOLI investigator because he thought they were relevant to the case.

18) Complainant lost wages of \$3007.08 and suffered significant emotional distress as a consequence of his demotion.

CONCLUSIONS OF LAW

1) At times material, Respondent was a corporation subject to the provisions of ORS 654.062 and ORS chapter 659A, and Complainant was an employee as defined in ORS 654.005(4).

2) The actions, inaction, and motivations of Mike Hebert 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 practices found. ORS 654.062(6)(a) and ORS 659A.800 to ORS 659A.850.

4) Respondent violated ORS 654.062(5)(a) and OAR 839-004-0004 by demoting Complainant because he opposed and reported unsafe working conditions.

5) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages and benefits resulting from Respondent's unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of the Complainant and others similarly situated. The sum of money awarded

and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

The Agency alleges Respondent engaged in an unlawful employment practice by demoting Complainant because he complained about or opposed practices related to the Oregon Safe Employment Act (OSEA). As damages for Respondent's alleged unlawful employment practice, the Agency seeks back wages of \$3,007.08, out of pocket expenses totaling \$422, and mental suffering damages of \$30,000 on Complainant's behalf.

ORS 654.062 provides, in pertinent part:

“(5) It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because the employee or prospective employee has:

(a) Opposed any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780;

(b) Made any complaint * * * under or related to ORS 654.001 to 654.295 and 654.750 to 654.780[.]”

ORS 654.062(6)(a) provides that allegations of unlawful employment practices under ORS chapter 654 shall be processed “in the same manner and to the same extent that the complaint would be processed if the complaint involved allegations of unlawful employment practices under ORS 659A.030(1)(f),” an anti-retaliation statute.

A violation of ORS 659A.030(1)(f) is established by evidence that shows a complainant opposed an unlawful practice, the respondent subjected the complainant to an adverse employment action, and there is a causal connection between the complainant's opposition and the respondent's adverse action. *In the Matter of Robb Wochnik*, 25 BOLI 175, 196 (2004). Consequently, to prevail in this case, the Agency was required to prove by a preponderance of credible evidence that: (1) Complainant was an employee who complained about or opposed a practice forbidden under or

related to the OSEA; (2) Respondent subjected Complainant to an adverse employment action; and (3) there is a causal connection between Respondent's adverse employment action and Complainant's opposition to practices forbidden under or related to OSEA. ORS 654.062(5)(a), 654.062(6)(a), ORS 659A.030(1)(f), and OAR 839-004-0001. See also *In the Matter of Tomkins Industries, Inc.*, 17 BOLI 192, 206 (1998), citing *Butler v. Department of Corrections*, 138 Or App 190, 202 (1995) (“[W]e hold that, in order to prove [a] claim [under ORS 654.062(5)(a)], plaintiff needed to establish only that he was subject to an unlawful employment practice [*i.e.*, retaliation] because he made a complaint related to unsafe working conditions”).^{iv}

A. Complainant was an employee who complained about or opposed a practice forbidden under or related to the OSEA.

The Agency and Respondent agree that Complainant was Respondent's employee for 18 years and at material times was a crew foreman and union shop steward until on or about October 6, 2003. Additionally, supervisors Mike Hebert and Tony Feldman agree that Complainant told them (1) he had received complaints from two employees that Tiffany Hebert, Mike Hebert's wife and Tony Feldman's foreman, ordered Don Thing, an untrained and unqualified person, to climb and trim a tree that was located under primary power lines [“the Corvallis incident”] and (2) he was investigating the complaints at the Union's request.

Eyewitness testimony unequivocally placed Thing in a hazardous tree, dressed in climbing gear, and trimming branches near a primary power line on the day in question. Respondent's legal theory that there were no unsafe conditions since “nothing unsafe happened” according to their eyewitnesses is misguided. Whether Thing actually was near a primary power line or whether he cut tree limbs or a few small branches is irrelevant. To prove a violation of ORS 654.062(5)(a), the Agency need not establish that Complainant opposed conditions that actually violated a statute or rule. The

Agency need only prove that Complainant was discriminated against for expressing safety concerns “under or related to” the OSEA. *In the Matter of Rogue Valley Fire Protection*, 26 BOLI 172, 183 (2005). *See also Yeager v. Providence Health System Oregon*, 195 Or App 134, 141-42 (2004), *quoting McQuary v. Bel Air Convalescent Home, Inc.*, 69 Or App 107, 111-12 (1984) (“Statutes which protect employes against retaliation do not require that the alleged violation which the employe claims be ultimately proved. *See, e.g.* * * * ORS 654.0625(5) (protects any employe who makes a complaint under the [OSEA] * * *.”)). In this case, however, the Agency proved through MacDonald’s testimony that Thing was permitted to engage in an activity that was in violation of Respondent’s safety practices and the collective bargaining agreement. A preponderance of credible evidence shows those facts were brought to Complainant’s attention in his capacity as Union steward. Complainant thereafter reported those facts to two of Respondent’s supervisors and expressed his concern about the reported unsafe conditions. That fact is not in dispute. For that reason, the forum concludes that Complainant reported and opposed unsafe working conditions to Respondent that were under or related to OSEA.

B. Respondent demoted Complainant

Respondent does not dispute that Complainant was demoted from his foreman position to tree trimmer on October 6, 2003, or that Complainant’s hourly pay rate was reduced by \$3.24 per hour as a result of the demotion. The forum concludes the demotion was an adverse employment action taken against Complainant by Respondent.

C. Complainant was demoted because he complained about or opposed practices forbidden under or related to the OSEA.

Proof of a causal connection may be established through circumstantial evidence. *See In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 61 (2002), *citing In*

the Matter of Sierra Vista Care Center, 9 BOLI 281, 296-97 (1991) (“[E]vidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is [the] Forum’s task to decide which inference to draw. Thus, the absence of direct evidence of [respondent’s] specific intent is not determinative because such intent may be shown by the circumstantial evidence referred to herein”). (citations omitted) See also *Boynton-Burns v. University of Oregon*, 197 Or App 373, 380-381, 105 P3d 893, 897-898 (2005), quoting *DeCintio v. Westchester County Medical Center*, 821 F2d 111, 115 (2d Cir), cert. den. 484 U.S. 965, 108 S.Ct. 455, (1987) (“Proof of a causal connection can be established [1] *indirectly*, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or [2] *directly*, through evidence of retaliatory animus directed against a [complainant] by the [respondent]”).

Additionally, the Oregon Court of Appeals 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.” *Id.* at 381, citing *Clark County School District v Breeden*, 532 US 268, 273 (2001). In this case, Complainant was demoted less than three business days after he reported unsafe working conditions to Respondent’s supervisors Hebert and Feldman, and the Union. By any standard, the proximity in time is close enough that the forum may and does in fact infer causation.^v

Additionally, the preponderance of credible evidence established that Respondent’s alleged reason for demoting Complainant was patently false. Hebert’s contention at hearing that he found it necessary to “bump” a foreman in order to fulfill a “promise” to place another foreman on a bucket crew and that he chose to bump

Complainant because of his “past” attendance and disciplinary record was contradicted by his own testimony and prior statements.

First, he admitted he promoted a less experienced tree trimmer to foreman to replace the foreman who replaced Complainant, which negates the implication that he could not put the other foreman on a bucket crew without first “bumping” a foreman back to trimmer.

Second, he admitted Complainant’s attendance record was not as poor as he had previously represented to the Union and BOLI. In fact, documentary evidence established that Complainant’s attendance problems, which were significantly less than Hebert represented, had resolved months before his demotion. Moreover, other than the previously resolved attendance problems, Complainant had no disciplinary record whatsoever. In fact, Complainant’s employment record shows he consistently received perfect scores on customer audits for quality and production, and, during the time he was having so-called attendance problems that allegedly affected his production, he received a commendation from the company president for his “outstanding job performance.”

Third, in his initial position statement to BOLI in early December 2003, Hebert declared that Complainant was “top notch” and an “asset to the trade” and insinuated that he bumped Complainant back to trimmer because of a previous decision to “restructure” his crews for efficiency reasons and if his employees do not agree with his decisions, “that’s business.” Later, in early February 2004, at the same time he and Feldman were questioning Swarm and Thing about their prior statements to Complainant, Hebert told BOLI that his decision to demote Complainant was based on Complainant’s “very poor” attendance and disciplinary record. He presented BOLI with

a chronology that included the statement that Complainant's "past caught up with him" and resulted in Hebert targeting Complainant for demotion.

Because Hebert's various explanations for demoting Complainant proved false, the forum may reasonably infer that Hebert was concocting explanations to conceal a discriminatory motive for the demotion, which was to retaliate against Complainant for his pursuit of the truth about a safety issue implicating Hebert's wife.^{vi}

Given the close proximity of events and Hebert's false explanations, the forum concludes that the Agency established by a preponderance of credible evidence a causal connection between Respondent's decision to demote Complainant and his opposition to unsafe practices.

DAMAGES

A. Back Pay

Back pay awards are intended to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful discrimination. The awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *In the Matter of H.R. Satterfield*, 22 BOLI 198, 210 (2001). Here, the Agency proved that Complainant's demotion resulted in a \$3.24 per hour decrease in his pay, including a \$6.48 decrease in overtime pay, beginning October 6, 2003. The Agency also proved that as a result of the demotion, Complainant lost \$1,542 in wages from October 6 through December 2003, and \$1,464.60 in wages from January 1 through February 28, 2004. The Agency's back pay calculation took into account that Complainant received time loss benefits after he suffered a compensable injury on February 28, 2004, and thereafter was found to be permanently disabled from performing his job duties as a tree trimmer. See *In the Matter of Dandelion Enterprises, Inc.*, 14 BOLI 133, 148 (1995) (the effects of a

respondent's unlawful employment practice do not include lost wages when a complainant is receiving time loss benefits for an on-the-job injury and unable to seek replacement employment). Accordingly, prior to February 28, 2004, Complainant would have earned an additional \$3,007.08 but for Respondent's retaliatory demotion. The forum concludes that Respondent owes Complainant lost wages totaling \$3,007.08 for the wages he lost due to the unlawful employment practices found herein.

B. Out of Pocket Expenses

This forum has consistently held that economic loss that is directly attributable to an unlawful practice is recoverable from a respondent as a means to eliminate the effects of any unlawful practice found, including actual expenses. *In the Matter of Southern Oregon Subway, Inc.*, 25 BOLI 217, 242 (2004). At hearing, the Agency and Respondent stipulated to an exhibit that summarized Complainant's claim for out of pocket expenses totaling \$412 that accrued after he was demoted. The evidence introduced at hearing shows Complainant paid \$22 for a commercial pesticide applicator recertification course in December 2003 and \$145 for his certified arborist recertification in 2005. His testimony that he paid \$145 for his certified arborist recertification in 2004 was not refuted. Also, his testimony that he paid \$50 in 2004 and \$50 in 2005 to renew his commercial pesticide applicator license was not refuted. However, the Agency presented no evidence that shows Complainant's expenses were directly attributable to the unlawful employment practice found, *i.e.*, Complainant's demotion. Absent evidence showing that Respondent's actions caused Complainant to incur those out of pocket expenses, the forum concludes that Complainant's expenses are not recoverable from Respondent.

C. Mental Suffering

The Agency seeks mental suffering damages in the amount of \$30,000 on Complainant's behalf. In determining a mental suffering award, the Commissioner considers the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct. *In the Matter of Barrett Business Services, Inc.*, 22 BOLI 77, 96 (2001). 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. *Id.* at 96. Moreover, respondents must take complainants as they find them. *In the Matter of Courtesy Express, Inc.*, 8 BOLI 139, 148 (1989).

Based on the record herein, and Complainant's demeanor and testimony in particular, the forum finds Respondent's retaliatory action against Complainant caused Complainant to suffer significant emotional distress. Credible evidence established that Complainant had been employed by Respondent for 18 years - since he was approximately 19 years old - and he was proud of his foreman position. He took his responsibilities as a Union shop steward seriously. When he reported a perceived safety hazard to two supervisors and the Union, he believed "it would be acted upon immediately" by Respondent. Instead, his concerns were met with resistance from the supervisors, followed by an abrupt demotion to tree trimmer. His testimony that he was completely focused on the demotion and its cause and effects was bolstered by his wife's credible testimony that, given the circumstances of the demotion, Complainant feared for his job and was upset to the point of distraction. This ultimately adversely affected his family life. He had less patience with his young children and appeared "distracted" and "distant" from the family because he was more "absorbed" and "focused" on the events surrounding the demotion. In his words, he "worried about it every day, every hour." His wife, whom the forum has found to be a credible witness,

observed this focus and that he was distraught and upset and suffered a diminished sense of self esteem after the demotion. Based on the evidence presented, the forum awards Complainant \$30,000, the amount sought, as compensation for the suffering caused by Respondent's unlawful employment practice in violation of ORS 654.062(5)(1).

D. Favorable Letter of Reference

In addition to damages, the Agency seeks on Complainant's behalf "a favorable letter of reference from respondent." Under ORS 659A 850(4)(a), the Commissioner may issue an order requiring that Respondent:

"[p]erform an act or series of acts designated in the order that are reasonably calculated to carry out the purposes of [ORS chapter 659A], to eliminate the effects of the unlawful practice that the respondent is found to have engaged in, and to protect the rights of the complainant and other persons similarly situated."

The Agency established no link between a favorable letter of reference and Complainant's unlawful demotion. While the Commissioner may award non-economic as well as economic damages, the damages sought must be attributable to the unlawful practice found. In this case, the Agency neither alleged nor proffered any evidence that Complainant was unlawfully terminated. In fact, there is no evidence in the record that Complainant ever voluntarily or involuntarily left his employment with Respondent. The Agency offered no evidence and made no argument to support Complainant's request for a favorable reference letter as a means of redress for his unlawful demotion. Consequently, the forum concludes that a favorable reference letter in this case is not reasonably calculated to eliminate the effects of the unlawful demotion and is outside the scope of non-economic remedies available to Complainant.^{vii}

RESPONDENT'S EXCEPTIONS

Respondent contends the ALJ ignored "critical evidence" regarding Complainant's safety investigation, objects to the ALJ's credibility findings, disputes the ALJ's findings and conclusions regarding Complainant's complaint about unlawful practices and Respondent's reasons for demoting Complainant, and requests that Complainant's emotional distress award be "reduced in whole or in considerable part due to [Complainant's] unspeakably poor behavior following his behavior [sic]."

1. Complainant's Safety Investigation

Respondent's assertion that Complainant "told Mr. Hebert on October 2 that he had concluded there had been no safety problem in Corvallis on September 26" is not substantiated by any credible evidence. Respondent asserts Complainant's credibility is affected by inconsistencies in his "story about how he heard about the Corvallis incident" and by the omission of his October 2, 2003, telephone conversation with Mike Hebert in his report to the Union.

First, Respondent makes much ado about how and when Complainant was told about the Corvallis incident. Respondent did not dispute that the incident occurred or that Complainant reported what he had heard to Hebert. The sole issue in this case was whether Hebert demoted Complainant shortly thereafter because Complainant made an issue about safety problems involving Hebert's wife. Any inconsistencies

about the precise time and place Complainant talked to Jason Swarm are irrelevant and overcome by Swarm's admission on cross-examination that he talked to Complainant more than once on September 26 as Complainant contended. Moreover, Respondent's suggestion that Complainant lacks credibility because he "did nothing at that time in response to [Swarm's complaint] * * * despite his acknowledged responsibility as a shop steward to immediately respond to and act on reports of safety violations" ignores uncontroverted evidence showing that Complainant was demoted less than six business days from the date he was first told about the incident and less than three business days after he reported the incident to Hebert.

Second, Complainant's telephone records establish that he talked to several crewmembers involved in the Corvallis incident on October 2, 2003, as well as Hebert. Complainant credibly testified that he did not include his conversation with Hebert in his report to the Union because his focus was on the investigation and those crewmembers who were interviewed as part of the investigation. Complainant denies he told Hebert on October 2 that he had found no safety violations. Only Complainant and Hebert know what they talked about that day. However, based on the entire record herein, the forum has determined that it is more likely than not that Complainant informed Hebert he was filing his report with the Union on October 5 or 6 and Hebert, who knew the underlying facts about the incident, perceived the report was not favorable to Respondent; hence, Complainant's demotion on October 6, 2003. There is no credible evidence that leads to any other conclusion and Respondent's exception is therefore **DENIED.**

2. Credibility Findings

Respondent objects to the ALJ's "heavy reliance on demeanor observations when the veracity of a particular witness otherwise was largely unassailable." Quoting

from a footnote in *Koskela v. Willamette Industries, Inc.*,^{viii} Respondent contends that “the value of demeanor evidence may be overrated * * * [and] some empirical studies suggest that the observation of demeanor *diminishes* rather than enhances the accuracy of credibility judgments.” (emphasis supplied by Respondent) Notably, Respondent did not complete the quote or put it into context with the case. First, the primary issue in *Koskela* was whether a workers’ compensation claimant is entitled to an evidentiary hearing on all claim closure issues, including the permanent total disability (“PTD”) determination that occurs after “the worker already has been determined to be compensably disabled.” The Court held that “due process principles do not entitle a claimant to present evidence through in-hearing testimony rather than through written reports and sworn affidavits [when determining the extent of permanent disability in a workers’ compensation case].” In its reasoning, the Court distinguished cases involving claim closure issues from those involving disputes of historical fact, stating:

“[N]either claimant nor the dissenting opinions satisfactorily demonstrate the extent to which the PTD determination turns on a claimant’s credibility or that the credibility assessment cannot be made reliably without live testimony. To make the case for the importance of live testimony, the argument must be not only that credibility is central to the decision, but that a *demeanor-based* credibility determination is essential to the integrity of the decision. *To be sure, personal demeanor provides insight into credibility, especially when the dispute involves competing versions of historical facts, such as two witnesses’ differing memories of an event.* That reality leads appellate courts generally to defer on credibility matters to factfinders who had the opportunity to ‘see and hear’ the witness testify. However, as Judge Richardson aptly observed some years back, demeanor is only one of many considerations that *may*, in a given case, bear on the weight to give to a witness’s statements; meaningful credibility assessments can be and often are made on the basis of written evidence alone.” (second emphasis added) (footnote omitted)^{ix}

Second, although the Court stated in its footnote that demeanor evidence may be overestimated and observed certain empirical studies on demeanor, the Court concluded by stating:

“For present purposes, we do not need to take sides in that debate. It should be enough to observe that classic credibility contests are those in which two individuals relate competing accounts of an historical event and there is no record of the event except their memories.”^x

Third, and more importantly, in 2000, the Oregon Supreme Court reversed the Court of Appeals decision in *Koskela* and held that a permanently totally injured worker’s interest in receiving PTD benefits, “which are intended to restore permanently injured workers to economic self-sufficiency through lifetime wage-replacement benefits,” is great, and a worker seeking those benefits has a right to procedural due process that includes an oral evidentiary hearing during the claim closure process. *Koskela v. Willamette Industries, Inc.*, 331 Or 362, 379-82 (2000). Citing the U. S. Supreme Court in *Califano v. Yamasaki*^{xi} and *Goldberg v. Kelley*,^{xii} respectively, the Court stated, in pertinent part:

“In situations requiring the decision-maker to apply a broad standard that includes subjective assessments of, among other things, a person’s credibility and veracity, due process requires ‘personal contact between the recipient and the person who decides his case. * * * What is more, when, as here, the decision-maker must resolve factual disputes involving credibility and veracity, due process requires an opportunity for at least some kind of an oral evidentiary hearing.”

Thus, if the Court of Appeals is correct that “the argument [for live testimony] must be not only that credibility is central to the decision, but that a *demeanor-based* credibility determination is essential to the integrity of the decision,” the Oregon Supreme Court squarely confirmed that demeanor-based credibility findings are integral to the fact-finding process in all cases of factual disputes involving credibility and veracity.^{xiii}

In this case, the testimony of Respondent’s witnesses was far from “largely unassailable” and was evaluated by both objective and subjective criteria. The ALJ properly gave less weight to those witnesses whose demeanor did not reflect the serious, deliberate consideration that is requisite to reliable testimony. In this forum, an ALJ’s credibility findings are accorded substantial deference and absent convincing

reasons for rejecting those findings, they are not disturbed. *In the Matter of Robb Wochnick*, 25 BOLI 265, 290 (2002), citing *In the Matter of Staff, Inc.*, 16 BOLI 97, 117 (1997). Respondent proffered no convincing reason for disturbing the ALJ's credibility findings and its exceptions to the findings are **DENIED**.

3. Exceptions to Legal Conclusions and Opinion Pertaining to Complainant's Complaint and Demotion

Respondent asserts that Complainant was not "in active opposition or reporting of alleged unsafe working practices" after October 2, 2003, and that the "cause/temporal chain of events" was broken on that date. Additionally, Respondent asserts that "Hebert determined to demote Complainant by September 26 for valid business reasons and that he delayed making an announcement of this so long as his crews were 'shopping' near Scio." Respondent's assertions rely solely on Hebert's testimony which the forum has deemed not credible. As already discussed herein, there is no convincing reason to disturb the ALJ's credibility findings. Respondent's exceptions are thus **DENIED**.

4. Damage Award

In its exception to the emotional distress damage award, Respondent urges the forum to reduce or eliminate the award based on Complainant's "unspeakably poor behavior" after he was demoted from his supervisory position. His behavior included accusing his supervisor of illegal conduct and contacting a customer about specific misconduct on Respondent's part. While not condoning "retaliation" of any kind, the forum finds Complainant's actions, albeit impulsive, reflected his state of mind at that time. Rather than negating the emotional distress award, his unseemly actions illustrate his extreme angst at being demoted for reporting and investigating a safety concern which was an intrinsic part of his job. Although Complainant's actions reflect a troubled spirit, this forum has consistently held that "employers must take employees as they find them." *Wochnick*, 25 BOLI at 290, citing *In the Matter of Entrada Lodge, Inc.*, 24 BOLI

125, 154 (2003); See also *In the Matter of the Loyal Order of Moose*, 13 BOLI 1, 12-13 (1994) and *In the Matter of Allied Computerized Credit & Collections*, 9 BOLI 206, 217-18 (1991).

Complainant's allegations of wrongdoing were fairly specific, including names and details that are readily verifiable. While somewhat extreme, the forum finds Complainant's actions were a reaction to his unlawful demotion and absent any credible evidence that his specific allegations about Respondent were patently false the forum affirms the award for emotional distress damages in the amount of \$30,000. Respondent's exception to the emotional distress award is hereby **DENIED**.

AGENCY'S EXCEPTIONS

The Agency correctly points out that the forum did not address all of the relief sought in the Formal Charges, specifically, the Agency's request that Respondent give Complainant a favorable letter of reference. The forum has corrected that deficiency by addressing that issue in the damages section of this opinion.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), to eliminate the effect of Respondent's unlawful employment practices, and as payment of the damages assessed for its violation of ORS 654.062(5)(a), the Commissioner of the Bureau of Labor and Industries hereby orders **Trees, Inc.** to

- 1) 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 Michael Nolan** in the amount of:
 - a) THREE THOUSAND SEVEN DOLLARS AND EIGHT CENTS (\$3007.08), less lawful deductions, representing wages lost by Michael Nolan between October 6, 2003, and February 28, 2004, as a result of Respondent's unlawful practice found herein; plus

- b) Interest at the legal rate on the sum of \$3,007.08 from March 28, 2004, until paid; plus
 - c) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice; plus
 - d) Interest at the legal rate on the sum of \$30,000 from the date of the final order until paid.
- 2) Cease and desist from discriminating against any person based upon the person's opposition to unlawful employment practices.

ⁱ Complainant filed his BOLI complaint on the same day Walberg signed his statement. There is no record evidence that Walberg filed a civil rights complaint with BOLI.

ⁱⁱ See Finding of Fact – The Merits 5.

ⁱⁱⁱ There is no record evidence that Complainant gave the Union a letter purportedly written by Swarm. The record shows the “letter” was actually Complainant's report to the Union that chronicled his investigation and included summaries of his interviews with Swarm.

^{iv} This case overrules the forum's prior misstatement of the elements *In the Matter of Logan International Ltd.*, 26 BOLI 254, 282 (2005). Except for “mixed motive” cases, the Oregon Court of Appeals and this forum, with the exception of *Logan*, have consistently determined that the elements of a prima facie case for retaliation include proof of a causal connection between the protected activity and adverse action. See *Hardie v. Legacy Health System*, 167 Or App 425 (2000); *Lansford v. Georgetown Manor*, 192 Or App 261 (2004); *Chase v. Vernam*, 199 Or App 129 (2005); *Butler v. Department of Corrections*, 138 Or App 190 (1995); *Kirkwood v. Western Hyway Oil Co.*, 204 Or App 287 (2006); *Jensen v. Medley*, 170 Or App 42 (2000); *Boynton-Burns v. University of Oregon*, 197 Or App 373 (2005).

^v Some examples of how close in time is considered “very close” may be found in *Thomas v. City of Beaverton*, 379 F3d 802, 812 (2004) wherein the Ninth Circuit held that a causal link can be inferred from timing alone when there is a close proximity between the protected activity and the alleged retaliation. In *Thomas*, the Court determined seven weeks was sufficient to establish a causal link and was consistent with its previous cases holding “that events occurring within similar intervals of time are sufficiently proximate to support an inference of causation,” citing *Yartzhoff v. Thomas*, 809 F2d 1371, 1376 (9th Cir. 1987) (causation was inferred when adverse employment action occurred less than three months after the protected activity) and *Miller v. Fairchild Indus., Inc.*, 797 F2d 727, 731-32 (9th Cir. 1986) (adequate evidence of a causal link when the retaliatory action occurred less than two months after the protected activity). Cf *Clark County School District v Breeden*, 532 US 268, 273 (2001) (20 month lapse between the protected activity and the alleged retaliatory employment action was not close enough to establish a causal connection, and, in fact, the length of time showed no causal connection at all).

^{vi} See *Reeves v. Sanderson Plumbing Products*, 530 US 133, 147 (2000) (“In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.”)

^{vii} Complainant could have sought reinstatement to his former supervisory position as an appropriate remedy for unlawful demotion. See *In the Matter of West Linn School District*, 3JT, 10 BOLI 45, 64 (1991)(When the complainant was demoted and transferred to a different work location because he reported a health violation to OR-OSHA, the commissioner ordered the respondent to reinstate the complainant to his former position, “with all pay, benefits, privileges and seniority as if he had continued in that position and classification from [the date of his demotion]).

^{viii} 159 Or App 229, 247 n. 14 (1999).

^{ix} *Id.* at 246-47.

^x *Id.* at 247 n. 14.

^{xi} 442 US 682, 697 (1979).

^{xii} 397 US 254, 268 (1970).

^{xiii} This forum does not hold that demeanor may be evaluated only by live testimony. Key to determining credibility is what a witness says and how the witness says it, and even if a witness testifies by telephone, “the audible indicia of a witness’ demeanor are sufficient for [an ALJ] to make an adequate judgment as to believability.” *Babcock v. Employment Division*, 72 Or App 486, 490 (1985).