

**In the Matter of**

**BODY IMAGING, P. C. and Paul Meunier,**

**Case No. 08-95**

**Final Order of Commissioner Jack Roberts**

**Issued September 16, 1997**

**SYNOPSIS**

Where respondent employer regarded and treated complainant as if she had a disability (multiple sclerosis), modified the terms and conditions of her employment and deliberately created intolerable conditions compelling complainant to resign, the commissioner found that the employer discriminated against complainant based on disability. Finding that the employer's president aided and abetted the employer, the commissioner held both liable for complainant's lost wages and benefits and mental suffering damages. ORS 659.030(1)(g); 659.400; 659.425(1)(c).

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The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 22, 23, 24, and 25, 1996, in the hearings room of the Bureau of Labor and Industries, 1004 State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Body Imaging, P.C., a professional corporation (Respondent), and Paul Meunier, M.D. (Respondent Meunier), were represented by William N. Mehlhaf, Attorney at Law, Portland. Respondent Meunier was present throughout the hearing on his own behalf and as the representative of Respondent. Therese Zeigler (Complainant) was present throughout the hearing. Her counsel, Gordon S. Gannicott, Attorney at Law, Portland, was also present.<sup>1</sup>

The Agency called the following witnesses (in alphabetical order): Respondent's former business office manager Margaret Bridges; former Agency Senior Investigator James D. Kreiss; International Business Machines (IBM) customer engineer Jeffrey W. Lehman (by telephone); Respondent's former prospective co-owner and employee Michael E. Stoll, M.D.; Complainant's neurologist Reed C. Wilson, M.D.; and Complainant.

Respondents called as their witness Respondent Meunier.

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On August 13, 1993, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondent. After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On August 24, 1994, the Agency prepared for service on Respondent Specific Charges, alleging that Respondent discriminated against Complainant in her employment with Respondent, both on the job and at termination, based on her perceived disability in violation of ORS 659.425. With the Specific Charges, the Agency served on Respondent the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of Oregon Administrative Rules (OAR) regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

3) On September 12, 1994, Respondent through counsel timely filed an answer wherein Respondent admitted employing Complainant in Oregon and that Respondent Meunier was her immediate supervisor. Respondent denied any unlawful employment practices or damages to Complainant based on disability.

4) On November 4, 1994, the Hearings Referee assigned was changed from Linda Lohr to Alan McCullough. On March 14, 1995, the Hearings Referee assigned was changed from Alan McCullough to Douglas A. McKean. In October 1995, the Administrative Law Judge<sup>2</sup> assigned was changed from Douglas A. McKean to Warner W. Gregg.

5) Between September 12, 1994, and June 6, 1995, the hearing in this matter was repeatedly delayed by order of the forum upon application of the participants. On June 6, 1995, the forum held a pre-hearing conference on the record. The meeting resolved discovery disagreements and resulted in the scheduling of responses for outstanding motions. There was discussion of the necessity for further postponement of the hearing, scheduled for June 19, based on Respondent Meunier's health.

6) On June 9, 1995, the forum postponed the hearing based on Respondent Meunier's health and directed that the participants explore available dates for hearing after October 1, 1995. There was pending at that time the Agency's motion to strike certain of Respondent's affirmative defenses and Respondent's motion for summary judgment.

7) On June 14, 1995, the Agency filed its motion to amend the Second Amended Specific Charges. The forum extended time for Respondent to object thereto until the previously pending motions were resolved.

8) On June 17, 1995, the forum struck certain of Respondent's affirmative defenses, denied Respondent's motion for summary judgment, and set the hearing for January 22, 1996. On July 31, 1995, the forum formally extended the time for Respondent to respond to the pending motion to amend until September 29, 1995.

9) Respondent's objections to amendment of the Agency's Second Amended Specific Charges were timely filed. On December 28, 1995, the forum allowed the requested amendment, which served to join Respondent Meunier personally as a respondent to the charges, and directed that the Agency, by January 2, 1996, file its third amended charges incorporating all amendments previously approved by the forum. Respondents were allowed until January 9, 1996, to answer the new charges, with the option of allowing the existing answer of the corporate respondent to stand.

10) On January 2, 1996, the Agency filed its Third Amended Specific Charges and thereafter counsel timely filed the answer thereto of Respondent Meunier and advised the forum that the corporate respondent would rely on its previous answer.

11) On January 16, 1996, the Agency and Respondents timely filed their respective summaries of the case in accordance with the orders of the forum. On January 19, Respondents filed a document denominated "Respondents' Hearing Memorandum."

12) At the commencement of the hearing, counsel for Respondents stated that he had reviewed the Notice of Contested Case Rights and Procedures and had no questions about it.

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

14) At the close of testimony the participants mutually agreed to submit written argument in accordance with a schedule set by the ALJ. Submissions under that schedule as modified with the approval of the ALJ were timely made and the record herein closed with receipt of the final submission on April 17, 1996.

15) The proposed order, containing an exceptions notice, was issued February 19, 1997. Exceptions were due, under extension of time, on March 26, 1997. Respondents timely filed exceptions which are dealt with in the Opinion section of this order.

16) After the proposed order was issued, the forum asked the Agency for a statement of Agency policy regarding aider and abettor liability under ORS 659.030(1)(g) in view of *Schram v. Albertson's, Inc.*, 146 Or App 415, 934 P2d 483 (1997), decided in February 1997. The Agency filed a policy statement, serving it on Respondents' counsel, and thereafter filed a revised statement of Agency policy, which was also served on counsel. The aider and abettor issue is discussed in the Opinion section of this order.

#### **FINDINGS OF FACT – THE MERITS**

1) At times material herein, Respondent Body Imaging, P.C., was an Oregon professional corporation operating an outpatient clinic engaged in diagnostic radiology and associated medical procedures performed at the request of referring medical practitioners. Originally, Body Imaging was an assumed business name for Richard Arkless, M.D, P.C. The professional corporation later became Body Imaging, P.C., of which Respondent Meunier was the president and sole stockholder. Both as a proprietorship and as a corporation, Body Imaging utilized the personal services of six or more employees in Oregon.

2) Respondent Paul Meunier, M.D., graduated from the U.S. Military Academy in 1973 and thereafter served four years as an infantry officer. He graduated

from medical school at the University of Vermont in 1981 and did his internship and residency in U.S. Army hospitals. His specialty was diagnostic radiology and he became certified by the American Board of Radiologists. He left the Army in June 1989 and began working as an employee of Richard Arkless, M.D, P.C. in November 1989, with the expectation of buying into the practice after one year.

3) Diagnostic radiology outpatient clinics are generally found only in urban areas because of the financial outlay involved and the need for a numerically large referral base. At the time of hearing there were three diagnostic radiology outpatient clinics in the Portland metropolitan area, including Respondent. Most radiologists are employed in hospitals providing inpatient as well as outpatient radiological services. Respondent's practice was totally dependent upon referrals from primary care or treating physicians. Respondent's physicians are never the treating physician. It is a competitive field.

4) Complainant began working as a receptionist for Dr. Arkless in April 1985. She remained employed, first by the proprietorship and then by the professional corporation. She was initially supervised by Susan Arkless, wife of the proprietor.

5) In December 1990, Respondent Meunier bought a 51 percent share of the practice. In early 1991, Susan Arkless left the office. Margaret Bridges was then supervising Complainant.

6) Margaret Bridges began working for Body Imaging in September 1988. Her initial duties were billing and collections, where she was supervised by Susan Arkless. In late 1989, Bridges began supervising the "front office" help, including Complainant. Bridges became business manager in 1991 after Respondent Meunier obtained control of the practice. Respondent Meunier was then Bridges's immediate supervisor.

7) Complainant worked in reception. Her duties as receptionist involved scheduling patients for the various procedures offered by Respondent. She set up computer records from information supplied by the referring physician's office or the patient, verified personal and insurance data, and assured that the patient had information regarding preparation for the procedure and was scheduled with the right technician and/or radiologist. The receptionist also copied and mailed reports and schedule sheets; filed reports, films, and schedules; received and transmitted films; recorded patients seen and fee information; metered the outgoing mail; and turned office machines on or off as appropriate. As a receptionist, Complainant was to make every effort to schedule patients the same day when requested by referring physicians to do so, either because of medical urgency or because the patient was from outside the area.

8) Complainant was originally the only receptionist. As the office grew, other receptionists were hired. Complainant's duties expanded to include insurance input and in 1990 she became lead receptionist, which made her responsible for assuring that the other receptionists were trained and that the front office was staffed.

9) Complainant's performance of her receptionist duties was inconsistent. She was very good with patients, both in person and by telephone. She was very good with referring physicians' offices. She was repeatedly counseled about time spent on personal phone calls, tardiness, and long lunch breaks, and on one occasion she was placed on probation by Bridges for returning late from vacation. Her written evaluations, first by Susan Arkless and later by Bridges, reflected these inconsistencies, but also reflected positive overall performance. Bridges felt that Complainant's strengths outweighed her weaknesses. Generally, written evaluation forms were completed

annually. Memos of counseling or discipline were also part of each employee's personnel record.

10) Arkless and Respondent Meunier had disagreed about the operation of the practice and about their respective duties and responsibilities, with the result that when he could not re-purchase control, Arkless resigned as an employee of the corporation effective in December 1991. Respondent Meunier bought the remaining interest of Arkless and became sole owner.

11) Around December of 1990, Complainant noted numbness in the right side of her face. Her dentist referred her to a neurologist, Dr. Wilson, who examined her in January 1991.

12) Reed C. Wilson, M.D., has practiced neurology in Portland since 1975 and has been on the neurology faculty of Oregon Health Sciences University since 1977. He is an expert in the field.

13) Multiple sclerosis (MS) is an incompletely understood disease of the nervous system characterized by a genetic or inherited susceptibility combined with an acquired factor, probably a non-specific viral infection, which lays dormant and over time alters the structure of portions of the nervous system to the extent that the body mounts an antibody response to it. It is an auto-immune disease of the central nervous system, specifically of the myelin or insulation of the nerve fibers. The resulting alteration causes a lesion, or scarred area, leading to a malfunction. Evidence obtained by history and by examination which reveals malfunctions in different areas of the nervous system occurring at different times (malfunctions separated by space and time), when other causes have been ruled out, suggests more than one scarred area, or multiple lesions. Hence, multiple sclerosis. It is a progressively debilitating disease, which can substantially limit one or more major life activities.

14) Detection and diagnosis of MS involves a history of and examination for physical symptoms of neurologic malfunction plus laboratory tests such as MRI<sup>3</sup> and CSF,<sup>4</sup> among others.

15) Dr. Wilson's examination of Complainant in January 1991 verified numbness, but not its exact cause. An MRI was normal. At that time he did not think MS was indicated, but counseled further observation because he could not rule it out. Complainant was relieved and shared the information in Respondent's office.

16) Bridges noted during the time she supervised Complainant that Complainant was "sometimes 'on,' sometimes not." Bridges learned of the facial numbness and thought she observed fatigue in Complainant. Bridges was concerned. She had a cousin who had exhibited similar symptoms and had been diagnosed with MS. When Wilson's January 1991 finding was essentially normal, Bridges suggested to Complainant that she get a second opinion. Complainant did not do so at the time.

17) Although his agreement with Dr. Arkless contained a "non-compete" clause, Respondent Meunier sensed that Arkless might attempt to dissuade referring physician offices from continuing with Respondent and might open a competing practice. In late 1991, Complainant began visiting referring physician offices and in January 1992, she was assigned the title of "Service Coordinator." Her duties were to deliver films and reports and provide pads and forms, referral kits, and information regarding preparation of patients to the staffs of the referring physicians. She dropped off items such as coffee cake and donuts for the staffs and processed and delivered the office newsletter, "Inside Image." She explained the changes at Body Imaging, the available services and future plans, and learned what Arkless had represented about Body Imaging. The purpose of her efforts was the retention of the existing referral base.

18) When she became service coordinator, Complainant had several years' experience as a receptionist and was familiar with procedures offered by Body Imaging. She had no technical knowledge of the equipment or its operation. She was well acquainted with the office staff of each of the referring physicians' offices and had established a positive rapport with each office. The position was not full time, and Complainant performed her regular receptionist duties when she was not acting as service coordinator. Respondent paid for a three month course, "Fundamentals of Marketing," which Complainant took at Portland Community College.

19) Complainant used her own automobile in her work as service coordinator. She kept a log of her marketing or public relations activities, which required her to drive, in order to claim reimbursement for mileage. Short, "spur of the moment" trips requested by Bridges were not all recorded in the log or in Complainant's personal appointment calendar.

20) In February 1992, Michael Stoll, M.D., Ph.D., a radiologist, began employment with Respondent. At that time, it was his intent and that of Respondent Meunier that he eventually become a shareholder in Respondent.

21) In 1991 and early 1992, Respondent Meunier planned to add MRI capability to the existing services of ultrasound, CT scanning, mammography, arthrography, fluoroscopy, and nuclear medicine. For this, he perceived a need for a marketing component beyond the services provided by Complainant.

22) Stoll recommended the hire of Stephen Weeks, who had done marketing for a competing radiology clinic with MRI capabilities where Stoll had practiced. Respondent hired Weeks in February 1992 with the title of "Provider Relations Representative." Weeks was a college graduate and had some technical knowledge of MRI equipment and of the imaging equipment used by Respondent.

23) Complainant was told by Bridges that Weeks was to concentrate on marketing the anticipated MRI services and other new business. Complainant would continue servicing the existing referral base. At times they worked together, with Complainant using her wide acquaintance to introduce Weeks to particular providers.

24) From December 16, 1991, through July 14, 1992, Complainant spent all or a portion of 21 work days in marketing and public relations activities, including film and report deliveries, providing bakery treats, referral forms and insurance information, and explaining changes and future plans in the office. She spent nine days on these activities in April 1992, when she also delivered the office newsletter and promoted an open house scheduled for early May. There was no activity noted for February, March, or June 1992.

25) Following Complainant's January 1991 examination, Bridges continued to observe Complainant, who had headaches from time to time and still appeared distracted and fatigued. In February 1992, Bridges memorialized a conversation with Complainant about entry errors in insurance, misquotes of costs, and personal phone calls. The memo to Complainant's personnel file concluded:

"I ask[ed] Terri to be checked again for the problem last year with the numbness & she said . . . maybe."

26) On April 16, 1992, Bridges noted that Complainant appeared preoccupied and disinterested and was "making a lot of errors." She wrote:

"I ask[ed] Terri about her health and she insists she is fine --- She has not been rechecked as she was supposed [sic] to have been. I ask[ed] her to be rechecked."

In the same memo, Bridges stated:

"She thinks maybe she has 'reception Burnout' -- I explain[ed] she's needed there --- MRI didn't materialize & she is not needed out as we had planned for --- "

27) Complainant's right facial numbness persisted after January 1991. She subsequently developed headaches and fatigue, and the numbness shifted to include the left side and seemed to increase in severity. She made a second appointment with Dr. Wilson.

28) In mid-July 1992, suspecting that the persistence and expanded location of the numbness might indicate a second base location of neurologic involvement, Dr. Wilson performed a spinal tap for a CSF test and then ordered another MRI. While the CSF results were "strongly suggestive of multiple sclerosis," the MRI was essentially normal. He thought a diagnosis of MS probable, but not confirmed, and recommended that she be followed with "serial neurological examinations" (i.e., further tests over time). He shared his findings with Complainant, who told Diana, a co-worker who had accompanied Complainant at the direction of Bridges. Bridges had instructed Diana to call Bridges with the result, which she did in Complainant's presence.

29) The following day, Complainant's co-workers knew of the diagnosis. Bridges called Complainant into her office and attempted to give her a vacation. Bridges was concerned about the psychological and emotional effect of the "probable" diagnosis. Complainant told Bridges that she didn't want special treatment and didn't need time off.

30) Upon learning of Dr. Wilson's findings, Bridges was concerned about whether Complainant should drive on office business. She asked Respondent Meunier if she should check with the corporation's attorney and insurance carrier regarding corporate liability if Complainant had a vehicle accident in her condition. He thanked Bridges for the suggestion and told her to call. Bridges learned from the attorney and the insurance agent that Complainant's driving her own car on company business was

not a problem. She reported that to Respondent Meunier, who was still concerned and directed Bridges to prohibit Complainant's driving on company business.

31) Complainant was scheduled to do marketing on August 3, 1992, including lunch with Weeks at the Metro Clinic. It was on that day that Bridges informed her that she was not to drive on company business. Complainant and Weeks had worked together to arrange that meeting several weeks in advance. Weeks drove. Complainant was the primary person arranging luncheon meetings with providers on September 18 and October 15 for herself and Weeks, who drove. She did not drive on behalf of Respondent's office after July 14, 1992.

32) Respondent Meunier twice asked to see Complainant's MRI result, which she supplied. He also saw a portion of the CSF test result.

33) Together, Stoll and Respondent Meunier looked at the MRI result and the partial CSF data. Stoll saw the MRI as normal, but was not familiar with the CSF. Respondent Meunier said there could be MS and told Bridges that Complainant should not drive for the office.

34) Complainant returned to Dr. Wilson on August 19, 1992. She had noticed some twitching around her left eye. She also reported a left hand tremor, intermittent myoclonic jerks, fatigue, and that her job duties had been changed due to her condition.

35) Because Complainant had no "neurological handicaps," Wilson thought the shift in her job duties to be unjustified. He referred Complainant to Dr. Herndon for a second opinion and at her request wrote a letter to her stating, "There is no medical reason why you are not fully capable of employment."

36) Herndon examined Complainant on September 3, 1992. His impression was possible MS. At Complainant's request, he wrote a letter regarding Complainant

stating, "there is no contraindication to her continuing to work and specifically no contraindication to her continued driving."

37) The letters from Drs. Wilson and Herndon were given to Bridges by Complainant as they were received. Bridges discussed them with Respondent Meunier, who still did not want Complainant to drive for the office. Complainant never resumed the portion of her service coordinator duties that involved driving. The delivery of kits and referral pads, films and reports were handled by others or done by mail. From a projected two days per week on public relations, Complainant was reduced to a few hours a month accompanying Weeks.

38) When Bridges first informed her that she was not to drive on company business, Complainant was upset. Bridges suggested patience, then later told her that Respondent Meunier did not want her driving for the office. Complainant felt useless, embarrassed, humiliated and hurt, and as if she had been labeled an invalid. She felt totally stripped of every bit of personal dignity.

39) There was a change in Respondent Meunier's attitude toward Complainant after July 14, 1992. He had always been sharp, direct, and authoritative, but after that date things like morning acknowledgments and politeness no longer seemed to include her. He never explained or discussed the decision regarding driving. He was more critical of her in front of patients and other workers and the severity of his manner, words, and tone increased. He focused on Complainant as being responsible for any deficiency among the three receptionists.

40) From July 1992 on, Complainant was intimidated by Respondent Meunier. She was sometimes in tears from verbal confrontations with him. Bridges described Respondent Meunier as "military." Bridges spoke weekly with Complainant and saw that the situation was negatively effecting Complainant's confidence, self

esteem, and ability. Complainant appeared nervous, anxious, and inhibited, and dreaded coming to work. Bridges discussed the ongoing conflict with Stoll in the hope of facilitating a solution with Respondent Meunier.

41) When Stoll was hired, Respondent began offering disability insurance to employees, including Complainant. Respondent Meunier remarked to Bridges that if anyone needed to get focused or straightened out, it was Complainant because she might need the disability insurance.

42) Stoll observed that Respondent Meunier was hard on employees, yelled at them, and had unreasonable expectations of them. It was reported to him by Complainant, Weeks, and Bridges that Respondent Meunier focused on Complainant more than others beginning about six months after Stoll began working. Stoll spoke with Respondent Meunier in about February 1993, suggesting a kinder approach to employees, and thought his remarks were taken positively at the time.

43) Weeks related well to the existing client base and was able to bring in additional referrals. By late 1992, Respondent Meunier did not see the need for more than one person in marketing and when another receptionist resigned in the fall, Complainant was reassigned full time to reception.

44) In November 1992, Bridges placed Complainant, then working as a receptionist, on 90 days probation for failing to return from vacation on time.

45) When she could no longer work as service coordinator, Complainant felt demoted, and about January 1993 she sought to return to the position of lead receptionist. She was supported by Bridges and Stoll. Respondent Meunier opposed her appointment to the position but allowed it to occur, holding Bridges ultimately responsible for Complainant's performance.

46) On or about April 20, 1993, Respondent Meunier had instructed that he be scheduled for no more than two procedures an hour. Because she also had standing instructions from him that referring physicians were not to be refused when requesting an immediate scheduling, Complainant inserted two extra appointments. At closing, Respondent Meunier profanely questioned her scheduling, accusing her of not paying attention or listening to instructions. He stated she was incompetent and that he had told Bridges that Complainant was not responsible enough to be lead receptionist. Complainant said nothing pleased him since he learned of her MS and he acknowledged that nothing she did pleased him, stating that she was lucky to have a job and that no one would hire her with her condition. The exchange was loud and lasted over 10 minutes. Respondent Meunier did not allow her to explain that she was following his instructions. Respondent's anger was such that she felt physically threatened.

47) Complainant went home extremely upset and called Bridges, saying she was not coming back. She felt that Respondent Meunier wanted to get rid of her. She felt stripped of dignity and respect and couldn't handle the stress. Bridges attempted to calm her by promising to talk with her the next day. Bridges told her that Respondent Meunier didn't feel that Complainant could handle lead receptionist.

48) In the spring of 1993, Respondent Meunier assigned Bridges to determine costs in regard to an office expansion. Jeffrey Lehman was a customer engineer with the International Business Machines (IBM). As a service technician, Lehman talked with Bridges about reconnecting the computer system to a nearby location. Around 5:30 p.m. on or about April 20, he was present at Respondent's office for a meeting with Stoll and Respondent Meunier to make an informal presentation of ideas for accomplishing the move.

49) While awaiting the meeting, Lehman witnessed a conversation between Respondent Meunier and an office worker whom he later identified as Complainant. Respondent Meunier was agitated, upset, and yelling. He stood very close to Complainant and loudly admonished her for between five and ten minutes. Lehman could not distinguish the exact words and did not know whether Complainant's health or medical condition were mentioned. Complainant did not raise her voice. She appeared quite upset and Lehman called her the following day to be sure she was all right.

50) In April and May of 1993, Respondent Meunier became increasingly concerned over the planned move and over expenditures made or authorized by Bridges. He learned from Stoll that Bridges and Stoll were discussing office business by telephone after hours.

51) In early May 1993, Stoll again attempted to speak with Respondent Meunier about his manner with employees. At the time, Respondent Meunier was upset with Bridges, and Stoll's remarks had no positive effect. It was suggested that Stoll leave if he was dissatisfied. Shortly thereafter, Stoll was present when Respondent Meunier placed Bridges on probation in a loud and profane manner which made Stoll uncomfortable.

52) On May 13, 1993, Respondent Meunier authored an unscheduled employee evaluation of Bridges. The spaces on the form intended for numerical rating of performance were left blank. The "Comments" section of the form stated the following in Respondent Meunier's handwriting:

"1. Probation beginning today 5/13/93 for a period of 30 days (immediate termination for any disruptive activities)

"2. Effective immediately you no longer have authority to sign checks for any reason. (Bring me new signature cards today)

"3. You have no authority to commit the corporation to contracts of any sort. Expenditures will be approved by Dr Meunier.

"4. I expect a proposed plan to accomplish all necessary billing tasks and to most effectively utilize personnel and space available by close of business Fri 5/14/93.

"5. Work hours 8 AM - 4:20 PM Mon - Fri."

Bridges called in sick on May 13 and first saw the evaluation on May 14. Respondent changed "today" in paragraph 2 to "Mon 5/17" and changed "5/14/93" in paragraph 4 to "5/17/93."

53) Bridges quit on or about May 17, 1993, and Respondent Meunier became Complainant's direct supervisor.

54) On May 24, 1993, Complainant worked according to her schedule until 6 p.m. and left. On the following morning, Respondent Meunier could not locate the arthrogram films of a patient he had seen the previous evening. When Complainant also could not locate them, Respondent Meunier became angry and again accused her of being unable to handle responsibility and of always making mistakes. Complainant learned from the patient that Respondent Meunier had given the films to the patient.

55) On May 25, 1993, Respondent Meunier authored an unscheduled employee evaluation of Complainant. Her performance ratings were mostly "Needs Improvement," "Unsatisfactory," or "Not Applicable." The "Comments" section of the form stated the following in Respondent Meunier's handwriting:

"Your personnel file has been reviewed. You have been repeatedly counseled regarding violations of office policy. You are again placed on probation. Any violation of office policy, lack of attention to detail or negativism will result in your immediate termination.

"You will 1) Maintain a schedule (30 days in advance) for all receptionists. One receptionist will be sched 7:00 - 4:00 The second 9:00 - 5:30.

"2) When Joyce is not sched. as receptionist her time will be sched. for the billing office.

"3) A no-fail mechanism for signing out films will be immediately instituted. You are responsible for implementation.

"4) You are again spending too much time in personal phone calls This must stop.

"5) You need to improve in the areas noted above. You must reach a new level of professionalism or you will be replaced."

Respondent Meunier handed the evaluation to Complainant at about 4:15 p.m. on May 25 and spent 10 to 20 minutes going over it with her in detail, particularly the expectations.

56) Complainant considered the probation conditions, particularly the film signout requirement, impossible to meet. She believed the probation was imposed as justification for eventual termination and was based on her medical condition. She was previously reluctant to resign because she thought she would lose health coverage with a new employer due to her pre-existing neurological condition. She considered that her working conditions had become intolerable, and felt compelled to leave.

57) On May 26, 1993, Complainant opened the office and left when the other receptionists arrived. On May 27, 1993, Complainant telephoned Dr. Wilson and reported work as being "very stressful." She stated she "kind of" quit that date. She reported stomach upset and feeling anxious and unable to "unwind." Dr. Wilson prescribed valium for acute anxiety reaction.

58) On May 28, 1993, Complainant returned to leave Stoll and Respondent Meunier a copy of the following :

"Dear Drs. Meunier and Dr. Stoll,

"Due to the unprofessional attitude and unrealistic demands placed on me personally by Dr. Paul Meunier, I regret [sic] to do so but must terminate my employment at Body Imaging P.C. effective immediatley [sic].

"I can no longer allow myself to be employed with and work with a company that is extremley [sic] unprofessional and places very high and unrealistic demands on their employees. There has been no compassion or understanding given to me by Dr. Paul Meunier in regards to my medical condition. Since my diagnosis of Multiple Sclerosis in July 1992, it has become quite apparent that Dr. Meunier has changed his attitude and opinion of me both professionally and personally and has not allowed me to obtaine [sic] the level of employment and work that I was doing prior to that time. This has cause me great fear and stress. The particular

incident of April 20, 1993 gave me reason to believe that his anger was out of control and could result in personal and physical harm towards me.

"Because of these incidents and others and the unrealistic demands and verbal abusiveness and harassment I enclose my keys and vacate the premise [sic] today.

"/s/ Therese M. Zeigler"

59) Stoll never realized an ownership interest in Respondent. He left employment with Respondent in early 1994, under circumstances described as "less than amicable." At the time of the hearing there was ongoing litigation between Stoll and Respondent Meunier. Stoll admitted a personal dislike of Respondent Meunier. Respondent Meunier disputed the accuracy of some of Stoll's testimony.

60) Complainant had sought counseling on earlier occasions involving, respectively, treatment of her by her family and a personal relationship. The subject matter of those sessions was not work connected. She did not seek counseling for the stress she felt from her job or for the upset resulting from having to resign.

61) On July 12, 1993, Complainant began working for Medical Marketing and Service Group (MMSG), which was owned by an acquaintance, Mike Hawkins, who had previously suggested that Complainant consider working there. She was paid \$1,500 per month July 12 to October 12, 1993, \$1,600 per month October 12, 1993, to February 1, 1995, and \$1,800 per month to the date of hearing (January 22, 1996).

62) Complainant was earning \$10.50 an hour, or \$1,825 per month, when employment with Respondent ceased. For the period July to October 1993, she earned \$975 less than if she had continued with Respondent; for the period October 1993 to February 1995, she earned \$3,487.50 less; for the period February 1995 to January 22, 1996, she earned \$293.75 less.

63) Complainant had worked as a volunteer with the YWCA prior to 1994. In January 1994 she began being paid at an hourly rate of approximately \$5.25 for about 15 hours a week. She worked Monday evenings from 5 to 10:30 p.m. and Saturdays

from 6:45 a.m. to around 4 p.m., while working full time at MMSG. In addition to her earnings, she received the equivalent of monthly dues. Prior to the hearing, her hourly rate at the YWCA had increased slightly.

64) While working at Respondent, Complainant received medical insurance, dental insurance, profit-sharing, pension, life insurance, and disability insurance. At MMSG, the employer paid for medical insurance only. Had Complainant remained employed by Respondent, she would have been credited with five per cent pension contributions each month from July 1993 through December 1996 of \$91.25 per month (five per cent of \$1,825) or \$2,737.50. She was also out of pocket \$135 for one month's unreimbursed medical insurance premium and \$140 for dental expenses incurred after May 1993.

65) Respondent Meunier's testimony was not totally credible. It was established that he was a demanding employer who took his medical and his corporate duties seriously and that he wanted employees to avoid mistakes and set high standards for them to meet. He denied viewing Complainant as having MS because he didn't think MS was Complainant's diagnosis, since what he saw (the MRI result and partial lab test) was inconclusive, but he acknowledged having some discussion of Complainant's condition with Bridges (to whom he referred sarcastically as "Dr. Marge" as a result), and that Bridges suggested that Complainant might have MS. He stated that restricting Complainant's driving and obtaining the medical letters were both prudent acts showing diligence in protecting the corporation, but that Complainant was not restored to outside duties because Weeks was covering marketing and she was needed in reception. He stated that he acquiesced to Complainant resuming lead receptionist duties in early 1993 because Bridges was ultimately responsible. Regarding the confrontation with Complainant of April 20, he stated he did not believe

he raised his voice, although an independent witness testified that he did. He testified he did not remember giving the film to the patient on May 24, but could not deny it. He testified that during busy periods his opportunity to observe the front, or receptionist area, was limited to a few minutes per day and that he was quite busy in late May 1993. He nonetheless placed Complainant on probation after four days as her immediate supervisor, citing a review of her file, one problem scheduling receptionist coverage as lead receptionist, and the "lost" film as justification. He acknowledged that he normally only evaluated the office manager (Bridges) and the chief technician, and that the May 25 evaluation of Complainant was his sole evaluation of a front office person. These seeming inconsistencies caused the forum to view Respondent Meunier's testimony with caution.

#### **ULTIMATE FINDINGS OF FACT**

1) At times material herein, Respondent was an Oregon professional corporation which engaged and utilized the personal services of six or more employees in Oregon in operating a diagnostic radiology outpatient clinic. Respondent Meunier was sole owner of Respondent from late 1991 to the time of the hearing and had sole and ultimate authority in all personnel and financial matters.

2) Complainant worked for Respondent from April 1985 until May 28, 1993. Her immediate supervisor after late 1989 was Margaret Bridges, who was supervised by Respondent Meunier. Evaluations of Complainant's job performance were positive overall.

3) Multiple sclerosis (MS) is a disease of the nervous system which over time alters the structure of portions of the nervous system. The resulting alterations cause lesions, or scarred areas, leading to malfunctions. Malfunctions separated by space and time suggest multiple scarred areas, or multiple sclerosis. MS is a progressively

debilitating physical impairment which can substantially limit one or more major life activity.

4) At times material herein, Complainant exhibited facial numbness (which was sometimes severe), headaches, fatigue, twitching around her left eye, a left hand tremor, and intermittent myoclonic jerks. Complainant was physically impaired by her condition but was not diagnosed as having MS and did not have a physical impairment that substantially limited a major life activity.

5) Bridges believed that Complainant might have MS. In January 1991, when Complainant's neurologist, Dr. Wilson, could not rule out MS, Bridges suggested that Complainant get a second opinion.

6) In December 1991, Complainant was assigned a part time position in which she used her own automobile.

7) In July 1992, when Bridges learned that Dr. Wilson thought MS was probable, Respondent Meunier told her to prohibit Complainant's driving on company business. At his direction, Bridges checked regarding corporate liability and was told that Complainant's driving on office business was not considered a problem.

8) During times material, Dr. Wilson did not make a definite diagnosis of MS. He found no medical basis for restricting Complainant's job duties. Nevertheless, Respondent Meunier continued to prohibit Complainant's driving on company business.

9) After July 1992, Respondent Meunier made remarks to or about Complainant suggesting that she was not employable elsewhere, was not insurable, and was not capable of satisfactory job performance due to her medical condition. In April 1993, he angrily told her that she was incompetent, that she was not responsible enough to be lead receptionist, that nothing she did pleased him, that she was lucky to have a job, and that no one would hire her with her condition.

10) In late May 1993, Respondent Meunier accused Complainant of being unable to handle responsibility and of always making mistakes, and gave her a written evaluation placing her on probation. She felt physically threatened by his anger.

11) On May 28, 1993, feeling unable to cope with an intolerable work environment, Complainant resigned, citing Respondent Meunier's change in attitude toward her due to her medical condition dating from July 1992 and resulting in unrealistic demands, verbal abusiveness, and her fear of physical harm.

12) Respondent Meunier knew that Complainant was substantially certain to leave employment as the result of the working conditions imposed on her.

13) From July 1993 to January 22, 1996, if Complainant had continued employment with Respondent, she would have earned \$4,756.25 more, been credited with \$2,737.50 in pension contributions, and had \$275 in medical and dental expenses paid.

14) Complainant suffered severe mental distress as a result of Respondents' conduct.

### **CONCLUSIONS OF LAW**

1) At times material herein, ORS 659.425 provided, in part:

"(1) For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:

" \* \* \* \* \*

"(c) An individual is regarded as having a physical or mental impairment."

At times material herein, ORS 659.400 provided, in part:

"As used in ORS 659.400 to 659.460, unless the context requires otherwise:

"(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has

a record of such an impairment or is regarded as having such an impairment.

"(2) As used in subsection (1) of this section:

"(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

" \* \* \* \* \*

"(c) 'Is regarded as having an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment;  
or

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment.

"(3) 'Employer' means any person who employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard."

At times material herein, OAR 839-06-205 provided, in part:

"(7) 'Physical or Mental Impairment' means an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or mental activity."

At times material herein, OAR 839-06-215 provided, in part:

"(1) As it pertains to employment, ORS 659.425 protects a [disabled] person, as defined in ORS 659.400, from discrimination by an employer because of a perceived or actual physical or mental impairment which, with reasonable accommodation, does not prevent the performance of the work involved."

At times material herein, ORS 659.435 provided, in part:

"Any person claiming to be aggrieved by an unlawful employment practice may file a complaint under ORS 659.040 \* \* \*. The Commissioner of the Bureau of Labor and Industries may then proceed and shall have the same enforcement powers, and if the complaint is found to be justified the complainant shall be entitled to the same remedies, under ORS 659.050 to 659.085 as in the case of any other complaint filed under ORS 659.040 \* \* \*."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein.

2) At times material herein, Respondent was an employer in this state subject to ORS 659.010 to 659.110 and 659.400 to 659.460.

3) The actions, inactions, statements, and motivations of Margaret Bridges and Respondent Meunier are properly imputed to Respondent herein.

4) At times material herein, Margaret Bridges, Respondent's supervisory employee, regarded Complainant as having multiple sclerosis (MS), a physical impairment, and treated her as if she were substantially limited in the major life activities of employment and transportation. Bridges did this when she suggested to Respondent Meunier that Complainant might have an accident in her condition while driving on Respondent's behalf that would create liability for Respondent. This substantially limited Complainant's ability to be employed in her public relations, marketing, and delivery driving duties and in the additional broad class or range of jobs requiring driving. Complainant had not been diagnosed as having MS and had no impairment that substantially limited her in any major life activity. Respondent violated ORS 659.425(1)(c) in changing the terms and conditions of her employment.

5) At times material herein, ORS 659.030 provided, in part:

"(1) For the purposes of ORS \* \* \* 659.400 to 659.460 \* \* \* it is an unlawful employment practice:

" \* \* \* \* \*

"(g) For any person, whether an employer or employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS \* \* \* 659.400 to 659.460 \* \* \* or to attempt to do so."

At times material herein, Respondent Meunier aided Respondent by regarding Complainant as having MS, a physical impairment, and treated her as if she were substantially limited in the major life activities of employment and transportation when he sanctioned the removal of Complainant's driving duties and later continued to

prohibit her from driving on Respondent's behalf. Complainant had not been diagnosed as having MS and had no impairment that substantially limited her in any major life activity. Respondent Meunier violated ORS 659.030 (1)(g).

6) At times material herein, Respondent Meunier perceived, regarded, and treated Complainant as having MS, a physical impairment, and limited in her major life activity of employment when, based on her medical condition, he made negative remarks about her employability, insurability, performance, competence, and responsibility, and placed her on a probation with conditions she felt she could not meet, all of which was unwelcome and offensive to her, made her feel physically threatened, and intentionally and deliberately created hostile and intimidating terms and conditions of employment so intolerable that she felt compelled to resign. Complainant had not been diagnosed as having MS and had no impairment that substantially limited her in any major life activity. By constructively discharging Complainant, Respondent violated ORS 659.425(1)(c) and Respondent Meunier violated ORS 659.030(1)(g).

7) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority to issue a cease and desist order requiring Respondents to perform an act or series of acts in order to eliminate the effects of an unlawful practice. The amounts awarded in the Order below are a proper exercise of that authority.

## **PROPOSED OPINION**

### **1. ORS 659.425(1)(c) Liability**

The record herein established that Complainant was treated adversely in her employment with Respondent following an examination in July 1992, from which her neurologist concluded that a diagnosis of multiple sclerosis (MS) was "probable." MS is a progressive physical impairment which can substantially limit major life activities. At

the time, Complainant was engaged part-time in public relations work for Respondent, which involved driving her own car.

Complainant's immediate supervisor from late 1989 to mid-May 1993, Margaret Bridges, dealt periodically with Complainant's performance and felt that her strengths outweighed her weaknesses. Bridges learned immediately of the July 1992 diagnosis, which strengthened her belief that Complainant had MS and which she discussed with Respondent Meunier. He prohibited Complainant from driving on behalf of the office. He continued the prohibition after Bridges reported that Respondent's attorney and Respondent's insurer had advised that Complainant's driving for the office was not a problem, and again after both of Complainant's neurological consultants had written letters to verify that Complainant's ability to drive was not affected. From a projected two days per week on public relations, Complainant was reduced to a few hours a month.

Respondent Meunier's attitude toward Complainant changed after July 14, 1992, and his dissatisfaction with her performance escalated. His increasingly severe criticisms of her performance were coupled with negative remarks about the effects of her perceived medical condition. Respondent Meunier testified that there was insufficient data in the MRI and CSF information that he saw for him to diagnose MS. His counsel argued that for that reason, Respondent Meunier could not have regarded Complainant as disabled. But it is not necessary under ORS 659.425(1)(c) that the "disabled person" have the actual impairment they are perceived to have. The statute is violated when the individual is regarded as having a disability. An individual is regarded as having a disabling impairment when she is seen as unemployable, or uninsurable, or incapable or incompetent because of either a known or a suspected medical condition.

Respondents also argued that because Complainant was promoted to lead receptionist during the period that Respondent Meunier was allegedly treating her as

disabled, Respondents could not have been guilty of discrimination. The facts, however, suggest that Respondent Meunier did not favor the reassignment to lead receptionist and permitted it only because Bridges would have to deal with any shortcomings. The facts are also clear that Respondent Meunier sanctioned the removal of Complainant's driving duties, leading to the loss of her marketing duties, and that he made negative remarks about her employability and performance and placed her on probation. Thus, his alleged acquiescence in one positive decision does not overshadow his role in the discriminatory decisions.

Respondents questioned the credibility of Complainant's claims, pointing to the lack of such allegations in Complainant's unemployment application or in any of the responses to criticisms in her personnel file and alleging that she did not suggest discrimination until well after she quit. But her letter of resignation stated her belief that it was her medical condition that accounted for Respondent Meunier's described attitude toward her after July of 1992.

## **2. ORS 659.030(1)(g) Liability**

Respondents argued that Respondent Meunier was not an employer contemplated by ORS 659.030(1), as "employer" is defined in ORS 659.010 (6), citing *Ballinger v. Klamath Pacific Corp.*, 135 Or App 438, 898 P2d 232 (1995). That case was brought under ORS 659.121, which provides a right of suit in state court for persons aggrieved by certain statutory unlawful employment practices, including violations of ORS 659.030. In that case, the circuit court complaint named two employees and the corporate president, a majority shareholder, as defendants to charges of violating ORS 659.030 (1)(a) and (b). The Court of Appeals held that none of the three met the statutory definition of "employer."

At times material, ORS 659.030 provided, in pertinent part:

"(1) For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340, 659.400 to 659.460 and 659.505 to 659.545, it is an unlawful employment practice:

" \* \* \* \* \*

"(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110, 659.400 to 659.460 and 659.505 to 659.545 or to attempt to do so."

This provision, as it refers to ORS 659.400 to 659.435, has been unchanged since 1975, except for renumbering.<sup>5</sup>

This proceeding is not brought under ORS 659.121. This case is brought in the administrative forum under ORS 659.060 following the filing of an administrative complaint under ORS 659.040 and a finding of substantial evidence under ORS 659.050. The Agency did not allege that Respondent Meunier was an employer. The phrase "whether employer or employee" in ORS 659.030(1)(g) is exemplary and not exclusive. Respondent Meunier was a person (ORS 659.010(12)) who was charged with having "aided and abetted" the doing of acts forbidden by ORS 659.425, in violation of ORS 659.030(1)(g). He was thus a "respondent" (ORS 659.010(13)). As a respondent, he may be required by a cease and desist order to "[p]erform an act or series of acts \* \* \* reasonably calculated to carry out the purposes of [the statute and] eliminate the effects of an unlawful practice found \* \* \* ." ORS 659.060(3), 659.010(2)(a).

A corporate president and owner who commits an act rendering the corporation liable for an unlawful employment practice may also be found to have aided and abetted the corporation's unlawful employment practice.

"The Commissioner has long held that corporate presidents are liable for aiding and abetting their Respondent corporations where the presidents were found to have personally sanctioned or engaged in the alleged discriminatory acts. *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78, 87-88, 90 (1993); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206, 214, 218 (1991); *In the Matter of Sapp's*

*Realty, Inc.*, 4 BOLI 232, 270-72 (1985); *In the Matter of N.H. Kneisel, Inc.*, 1 BOLI 28, 30, 38 (1976)." *In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 254 (1995).<sup>6</sup>

In this case, Respondent Meunier sanctioned the removal of Complainant's driving duties based on an unfounded assumption that her medical condition formed a risk to the corporation. In addition, based on her medical condition, he created an intimidating work atmosphere characterized by criticism of Complainant's supposed performance deficiencies based on her employability, insurability, performance, competence, and responsibility, and placed her on probation with conditions she felt she could not meet, all of which was unwelcome and offensive to her, made her feel physically threatened, and which intentionally and deliberately created hostile and intimidating terms and conditions of employment so intolerable that she felt compelled to resign.

On the day that the proposed order issued, the Oregon Court of Appeals decided *Schram v. Albertson's, Inc.*, 146 Or App 415, 934 P2d 483 (1997), wherein the court confirmed that a supervisor could be individually guilty of aiding and abetting an employer's unlawful employment practice under ORS 659.030(1)(g). However, the court determined that a back pay remedy was not available from such aider and abettor supervisors charged with violation of ORS 659.030(1)(g) in a circuit court proceeding under ORS 659.121. The court reasoned that the ultimate responsibility for wage loss was with the employer.

As observed previously, this proceeding is not based on ORS 659.121. Remedies available under ORS 659.060(3) in the Commissioner's administrative forum have not always run parallel to remedies available in circuit court under ORS 659.121(1). For instance, compensatory damages for mental suffering are recoverable

under ORS 659.060(3);<sup>7</sup> compensatory damages for mental suffering, in contrast, are not available under ORS 659.121(1).<sup>8</sup>

Under ORS 659.010(2), the Commissioner has authority to fashion a remedy adequate to eliminate the effects of any unlawful practice found and to protect the rights of other persons similarly situated (i.e., to the person harmed). The loss of wages through loss of employment, as well as mental suffering, can be an effect of discrimination attributable to an employer, although perpetrated by a victim's co-employee or manager, or, indeed by a non-employee customer. Accordingly, the order in this case awards both back pay and mental suffering damages against Respondent corporation for violation of ORS 659.425(1)(c), and against Respondent Meunier for violation of ORS 659.030(1)(g).

### **3. Constructive Discharge**

Respondents argued that in order to prove a claim of constructive discharge, the Agency was required to show that Respondents

"deliberately created and maintained working conditions with the purpose of forcing [Complainant] to resign. *Bell v. First Interstate Bank*, 103 Or App 165, 168, 796 P2d 1226 (1990) . . . See, also, *Seitz v. Albina Human Resources Center*, 100 Or App 665, 674-75, 788 P2d 1004 (1990); and *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989)."

*Bratcher* arose from questions certified from the US District Court to the Oregon Supreme Court regarding the tort of wrongful discharge in at-will employment. Equating constructive discharge to involuntary resignation, the court fashioned a subjective standard: that the deliberately created or maintained unacceptable working conditions must be imposed with the intention that the employee resign and that the employee must have left because of them. *Bratcher*, 783 P2d at 6.

Prior to *Bratcher*, this forum adhered to an objective standard regarding constructive discharge that if the employer imposes objectively intolerable working conditions, the employee's resignation due to those conditions is constructively a

discharge. *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion*, 63 Or App 383, 665 P2d 882 (1983); *In the Matter of Sapp's Realty*, 4 BOLI 232 (1985); *In the Matter of Richard Niquette*, 5 BOLI 53 (1986); *In the Matter of Deanna Miller*, 6 BOLI 12 (1986); *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989).

In *Bell*, the court cited *Bratcher* in holding that a constructive discharge under ORS 659.030(1)(a) be established by a showing that the employer:

"deliberately created or maintained working conditions with the purpose of forcing [the employee] to resign." 796 P2d at 1227.

In *Seitz*, *Bratcher* was followed with the court requiring that under

"an allegation of constructive discharge in a claim for violation of ORS 659.030(1)(f), [the employee] must prove that [the employer] (1) deliberately retaliated, because [the employee] filed the discrimination complaints, (2) with the intent of forcing [the employee] to leave employment and (3) that [the employee] left employment because of retaliation." 788 P2d at 1010.

Despite those holdings dealing with ORS chapter 659, this forum continued to follow its own earlier precedent. *In the Matter of City of Umatilla*, 9 BOLI 91 (1990), *aff'd without opinion*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206 (1991). The Commissioner explained that the *Bratcher* test for working conditions created by statutorily unlawful discrimination could produce results inconsistent with the Commissioner's remedial authority under Oregon civil rights statutes and held that where objectively intolerable working conditions created by statutorily unlawful discrimination leave no reasonable alternative to resignation, the resignation equates to a discharge regardless of the employer's intent about the employee's tenure. *In the Matter of William Kirby*, 9 BOLI 258 (1991); *In the Matter of Lee Schamp*, 10 BOLI 1 (1991); *In the Matter of Wild Plum Restaurant, Inc.*, 10 BOLI 19 (1991); *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183 (1992), *aff'd without opinion*, *JLG4, Inc., v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993); *In the Matter of*

*Sunnyside Inn*, 11 BOLI 151 (1993); *In the Matter of RJ's All American Restaurant*, 12 BOLI 24 (1993); *In the Matter of Loyal Order of Moose*, 13 BOLI 1 (1994).

Recently, the Oregon Supreme Court rejected the subjective standard of *Bratcher*.

" \* \* \* [I]n view of the *Bratcher* court's blurring of the distinction between purpose and intent, we now hold that the court erred when it held that a plaintiff must show, to establish a constructive discharge, that an employer acted with the purpose of forcing the employee to resign. That one aspect of the *Bratcher* opinion was inadequately considered when it was decided, and we will no longer adhere to it. \* \* \* [T]o establish a constructive discharge, [the employee] must allege and prove that (1) the employer intentionally created or intentionally maintained specified working condition(s); (2) those working conditions were so intolerable that a reasonable person in the employee's position would have resigned because of them; (3) the employer desired to cause the employee to leave employment as a result of those working conditions or knew that the employee was certain, or substantially certain, to leave employment as a result of those working conditions; and (4) the employee did leave the employment as a result of those working conditions." *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841, 856 (1995) (emphasis in original; footnotes omitted).

This forum adopted the *McGanty* standard in *In the Matter of Thomas Myers*, 15 BOLI 1 (1996).

Respondent Meunier knew that Complainant was substantially certain to leave as a result of working conditions he imposed because Bridges had resigned when a similar probation threatening "immediate termination" was imposed.

#### **4. Damages**

##### **a. Lost Earnings**

Respondents argued that, even if Complainant were unlawfully discharged, she has not suffered any recoverable damages. Respondents argued that even if she were entitled to back pay, she had no economic loss because of her earnings with the YWCA. The evidence was, however, that Complainant's earnings at the YWCA were from part-time employment performed outside her regular working hours. In other

words, she would have earned the same amount even if she had remained employed by Respondent. In such circumstances, the part-time earnings do not reduce the wage loss caused by the unlawful practice. *In the Matter of Peggy's Cafe*, 7 BOLI 281 (1989); *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989). In this forum, it is incumbent upon a respondent to establish any failure to mitigate damages. OAR 839-50-260(5) (former OAR 839-30-105 to the same effect); *In the Matter of Lucille's Hair Care*, 5 BOLI 13 (1985) on remand from *Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189 (1985). Pension contributions lost are also lost earnings. *In the Matter of West Linn School District*, 3 JT, 10 BOLI 45 (1991); *In the Matter of Mini-Mart Food Stores, Inc.*, 3 BOLI 262 (1983); *In the Matter of City of Portland*, 2 BOLI 21 (1980), 2 BOLI 71 (1981); *aff'd, City of Portland v. Bureau of Labor and Industries*, 298 Or 104 (1984).

#### b. Mental Suffering

As to the appropriateness of mental suffering damages, Respondents also argued that Oregon law does not allow for recovery of emotional distress or mental suffering damages, only back pay, and cites *Holien v. Sears*, 298 Or 76, 689 P2d 1292 (1984). *Holien* was brought under ORS 659.121, which provided only for equitable relief. The statement quoted is correct, but it does not apply to this proceeding. Again, this proceeding was not brought under ORS 659.121, but rather is brought in the administrative forum under ORS 659.060. This forum has previously ruled adverse to Respondents' argument as follows:

"It is well settled that the Commissioner may award compensatory damages for mental suffering as an administrative remedy under the Oregon civil rights law. *Williams v. Joyce*, 4 Or App 482, 504, 479 P2d 513, 523, 524, rev den (1971); *School District No. 1 v. Nilsen*, 271 Or 461, 484-86, 534 P2d 1135, 1146 (1975); *Fred Meyer, Inc., v. Bureau of Labor*, [39 Or App 253, 592 P2d 564, rev den (1979)]; *Gaudry v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668, 670-71 (1980); *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475, 484 (1984); *Schipporeit v. Roberts*, 93 Or App 12, 760 P2d 1339, 1342-43, *aff'd*, 308 Or 199, 778 P2d 953 (1989). See also OAR 839-03-090.

"As the court stated in *Schipporeit*, the legislative history of ORS 659.121, which provides for civil suits in circuit court, does not show:

'any intention to abrogate the previously existing powers of the Commissioner recognized in *Williams v. Joyce, supra*. In *Holien*, the Supreme Court concluded that the 1977 legislation did not eliminate or reduce existing administrative remedies, including damages, in employment discrimination.' 93 Or App 12, 760 P2d at 1341.

"Thus, Respondent's reliance on *Holien* is misplaced. The Supreme Court has specifically recognized the Commissioner's power to award mental suffering damages under the Oregon civil rights law." *In the Matter of Harry Markwell*, 8 BOLI 80, 82 (1989).

In *Holien*, the Oregon Supreme Court reviewed extensively the history of the legislation, (Or Laws 1977, ch. 453) which became ORS 659.121. The Court concluded that the legislature did not intend to foreclose the existing administrative remedies before the Commissioner of the Bureau of Labor and Industries, stating:

"In essence, the legislature, by its final action, said to aggrieved employees that under state statute:

"(1) You may continue to obtain such relief, including general damages, as is provided under administrative remedies.

"(2) You may obtain equitable relief as we provide by this statute.

"(3) You are deprived of a jury trial under the statute.

"(4) You may not recover general or punitive damages under the statute." 689 P2d at 1302<sup>9</sup> (emphasis supplied).

The statute itself dictates the same conclusion. ORS 659.121(4) states, in pertinent part:

"This section shall not be construed to limit or alter in any way the authority or power of the commissioner or to limit or alter in any way any of the rights of an individual complainant until and unless the complainant commences civil suit or action."

The Commissioner of the Bureau of Labor and Industries is authorized to award compensatory damages, including mental suffering damages, in the administrative forum as a means reasonably calculated to eliminate the effects of any unlawful practice found.

When Complainant was deprived of her outside public relations duties due to her medical condition, she felt as though she had been labeled an invalid and demoted. She was embarrassed, hurt, upset, and humiliated. She felt increasingly that Respondent Meunier wanted her to leave and she worried about health coverage. She appeared nervous and anxious, her confidence and self-esteem were shaken, and she dreaded coming to work. She was intimidated by Respondent Meunier, felt physically threatened by his anger, and was sometimes in tears from verbal confrontations with him. When she resigned, she felt stripped of personal dignity and respect and that conditions had become intolerable. She suffered stomach upset and her physician found an acute anxiety reaction due to stress. This evidence established Complainant's entitlement to the mental suffering damages awarded herein.

## **5. Respondents' Exceptions**

Respondents timely filed exceptions to the proposed order. Each is quoted and discussed below.

### Exception 1.

"The proposed order fails to find as fact whether or not Complainant had a physical impairment."

This exception addressed Complainant's protected class membership, that is, her status as a disabled person under the definitional section of the statute, ORS 659.400, entitled to the protection afforded by the operational section, ORS 659.425. Respondents correctly pointed out that the proposed order failed to distinguish with precision among the definitions of disabled persons possible under ORS 659.400(2). This defect is corrected in this order. The factual findings have been revised so that the forum has found that Complainant had no impairment that substantially limited her in any major life activity but was treated by the employer as if she had such an impairment and was so limited. This describes a violation of ORS 659.425 (1)(c).

## Exception 2.

"The proposed order fails to address or resolve key factual issues regarding Respondents' liability.

"a. There is no dispute that Complainant's duties were changed because another, more highly qualified employee took over her outside responsibilities, and because another receptionist left."

While it is true that Weeks had become the marketing point person, Complainant continued to assist in this effort as planned. The curtailment of her driving negatively affected her opportunity to so assist and was clearly triggered by a perception of her physical limitations. It was the initial illustration of a series of adverse occurrences traceable to Respondent Meunier's view of those limitations. Respondent Meunier's increased criticism and remarks regarding her competence were further illustrations. Because she was already a receptionist, the unpredicted happenstance of the departure of another employee leading to permanent reception duties over three months later was not seen as one of those occurrences. Neither was the probation resulting from her late return from vacation.

"b. There is no dispute that the performance problems for which Complainant was placed on probation long predated her purported diagnosis."

Respondents supported this exception with observations from Complainant's personnel file regarding errors and inattention (February and April 1992), and attitude (May 1992). Respondents argued that to treat the disciplinary action of May 1993 "as evidence of discrimination, or as an act of discrimination itself, creates an unworkable standard for employers" regarding "problem employees." But Respondent Meunier's previous oral criticism and comment to and about Complainant suggested that his view of her as impaired played a role. Thus, the "standard" enunciated by the finding is that discipline may not be motivated, wholly or in part, by discriminatory intent, even if Complainant was not a perfect employee.

"It is not a prerequisite to statutory protection against discrimination that a complainant be a superior, error-free worker." In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 82 (1992).

Exception 2. is denied.

Exception 3.

"Respondents except to the proposed order's conclusion and opinion that Respondents' conduct toward Complainant was motivated by an intent to discriminate, that it brought about a constructive termination, and that it resulted in damage as found to Complainant.

"For all the reasons stated in their submissions at the hearing of this matter, and for the reason that the evidence does not support the conclusions of the order, Respondents except to the proposed order."

The forum has reviewed the argument and evidence including Respondents' submissions and found that the record, taken as a whole, supports the proposed order as revised herein. Exception 3 is denied.

**ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found, Respondents BODY IMAGING, P.C. and PAUL MEUNIER, M.D. are hereby ordered to:

1) Deliver to the Fiscal Office of the Bureau of Labor and Industries, State Office Building, Ste 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for THERESE ZEIGLER, in the amount of:

a) FIVE THOUSAND THIRTY-ONE DOLLARS AND TWENTY-FIVE CENTS (\$5,031.25), less lawful deductions, representing \$4,756.25 in wages lost by Complainant between May 28, 1993, and January 22, 1996, and \$275 in unreimbursed medical and dental expenditures between those dates, plus

b) TWO THOUSAND SEVEN HUNDRED THIRTY DOLLARS (\$2,730) representing pension contributions for July 1, 1993, to January 1, 1996, said sum to be paid into Respondent's pension plan for the use of THERESE ZEIGLER, plus

c) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory damages for the mental and emotional distress suffered by THERESE ZEIGLER as a result of Respondents' unlawful practices found herein, plus

d) Interest at the legal rate from January 22, 1996, on the sum of \$5,031.25 until paid, plus

e) Interest at the legal rate on the sum of \$1,092 from June 30, 1994, until paid, interest at the legal rate on the sum of \$1,092 from June 30, 1995, until paid, and interest at the legal rate on the sum of \$546 from January 1, 1996, until paid, plus

f) Interest at the legal rate on the sum of \$30,000 from the date of the Final Order herein until Respondents comply therewith, and

2) Cease and desist from discriminating against any employee based upon the employee's status as a disabled person.

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<sup>1</sup>In this forum, the function of Complainant's private counsel is advisory. OAR 839-50-120.

<sup>2</sup> In July 1995, the Commissioner authorized BOLI employees functioning as hearings officers to utilize the working title of Administrative Law Judge in subsequent hearings and proceedings.

<sup>3</sup>MRI (Magnetic Resonance Imaging) involves the measurement of the magnetic charge in the protons of the cellular structure of body fluids, which creates an image of the body's structures. It is very sensitive in detecting abnormalities; it does not necessarily identify the exact nature of the abnormalities it detects.

<sup>4</sup>CSF: A laboratory test which screens spinal fluid for multiple sclerosis; highly accurate when other sources of malfunction or infection have been eliminated by other tests.

<sup>5</sup>ORS 659.030(5) in 1975; 659.030(1)(e) in 1977 and 1979; and 659.030 (1)(g), 1981 through 1993.

<sup>6</sup>See also *In the Matter of Wild Plum Restaurant, Inc.*, 10 BOLI 19 (1991) (holding corporate owner and president subject to ORS 659.030(1)(g) as an aider and abettor); *In the Matter of Loyal Order of Moose*, 13 BOLI 1 (1994) and *In the Matter of Oregon Rural Opportunities*, 2 BOLI 8 (1980) (both holding employer's manager liable under ORS 659.030(1)(g)); and *Sterling v. Klamath Forest Protective Association*, 19 Or App 383, 528 P2d 574 (1974) (holding employer's manager liable under former ORS 659.030(5)).

<sup>7</sup>*Williams v. Joyce*, 4 Or App 482, 479 P2d 513, *rev den* (1971); *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, *rev den* (1979).

<sup>8</sup>*Holien v. Sears, supra*.

<sup>9</sup>ORS 659.121 has since been amended providing for compensatory and punitive damages for certain unlawful practices; the quoted language regarding the powers of the commissioner remains the same.