

**In the Matter of**  
**CENTENNIAL SCHOOL DISTRICT NO. 28-J**

Case Number 09-99  
Final Order of the Commissioner  
Jack Roberts  
Issued April 8, 1999.

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**SYNOPSIS**

Respondent, a public school district, allowed Complainant to take only half the OFLA leave to which he was entitled, in violation of ORS 659.478. The forum awarded Complainant \$7682.40 in lost wages and \$25,000.00 as damages for mental distress that Complainant suffered as a result of Respondent's unlawful employment practice. ORS 659.470 *et. seq.*, OAR 839-009-0210.

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The above-entitled contested case came on regularly for hearing before Erika L. Hadlock, 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 December 3 and 4, 1998, in conference room 1004 of the Portland State Office Building, Portland, Oregon. The Civil Rights Division ("CRD") of the Bureau of Labor and Industries ("the Agency") was represented by Linda Lohr, an employee of the Agency. Respondent was represented by Andrea Hungerford, of the Hungerford Law Firm. Charlene Harris, Respondent's Director of Human Resources, was present throughout the hearing. The Complainant, Dennis Frederick, also was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses, in addition to Complainant: Laura Frederick

(Complainant's wife) and David Wright (a senior CRD investigator). Respondent called Charlene Harris as its sole witness.

The ALJ admitted into evidence: Administrative Exhibits X-1 to X-9; Agency Exhibits A-1 to A-29<sup>1</sup>; and Respondents' Exhibits R-1 to R-4, R-11, R-13, R-17, and R-25.

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

#### **FINDINGS OF FACT -- PROCEDURAL**

1) On or about October 1, 1997, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging he was the victim of Respondent's unlawful employment practices. The Division found substantial evidence that Respondent had violated ORS 659.470 by terminating Complainant's employment at a time when he had not exhausted his leave under the Oregon Family Leave Act ("OFLA").<sup>2</sup>

2) On October 7, 1998, the Agency requested a hearing.

3) On October 15, 1998, the Agency served on Respondent Specific Charges alleging that Respondent had violated ORS 659.470 by denying Complainant OFLA leave to which he was entitled. The Agency sought damages of \$10,500.00 in back wages plus \$25,000.00 for mental suffering.

4) With the Specific Charges, the forum served on Respondent the following:  
a) a Notice of Hearing setting forth the time and place of the hearing in this matter;  
b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; and c) a complete copy of the Agency's administrative rules regarding the contested case process.

5) The Notice of Hearing stated that Respondent's answer was due 20 days

from receipt of the notice and that, if Respondent did not timely file an answer, it could be held in default.

6) On October 16, 1998, the Agency moved for leave to amend the Specific Charges to change the date specified on page 1, line 19 to "October 1, 1997." The ALJ granted the motion, which Respondent did not oppose.

7) Respondent timely filed its Answer and Affirmative Defenses on November 5, 1998.

8) On October 29, 1998, the ALJ ordered the Agency and Respondent each to submit a summary of the case including: a list of witnesses to be called; the identification and description of any document or physical evidence to be offered, together with a copy of any such document or evidence; a statement of any agreed or stipulated facts; and, from the Agency only, any damage computations. The Agency and Respondent submitted timely case summaries.

9) At the start of the hearing, counsel for Respondent stated that her client had received the Notice of Contested Case Rights and Procedures and had no questions about it.

10) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and procedures governing the conduct of the hearing.

11) At the close of the hearing on December 4, 1998, the ALJ asked the Agency and Respondent to submit briefs discussing whether Complainant's alleged depression had rendered him unable to perform any of the essential functions of his job. Respondent timely filed its closing brief and the Agency timely filed a written closing argument after obtaining two extensions of time.

12) On February 19, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. After receiving one extension of time, Respondent filed timely exceptions, which are

addressed in the Opinion section of this Final Order.

### **FINDINGS OF FACT -- THE MERITS**

1) At all material times, Respondent, a political subdivision of the State of Oregon, was an Oregon employer and utilized the personal services of 25 or more persons in the State of Oregon for each working day during both 1996 and 1997.

2) Complainant is married and has three children. Respondent hired Complainant to work as a custodian beginning on March 8, 1993. He started by working four hours per day and, in 1994 or 1995, was moved to a full-time position at Centennial Middle School. In January 1996, Complainant asked for a transfer away from the middle school. About six months later, Respondent assigned Complainant to work a split shift, with four hours at Pleasant Valley Elementary School (2:00 p.m. to 6:00 p.m.) and four hours at Lynch Meadows Elementary School (6:30 p.m. to 10:30 p.m.). Respondent implemented this work schedule in July 1996, when it reduced the number of custodians working throughout the school district.

3) Complainant found the work environment at Pleasant Valley to be very team-oriented. In his view, everybody who worked there understood that the school district did not have enough custodians and cooperated to do the best they could with the resources available. Employees prioritized the custodial work to ensure that important tasks were handled even if some less important jobs could not be completed.

4) Complainant perceived the work environment at Lynch Meadows to be quite different from that at Pleasant Valley. When the children returned to school in September, he found it difficult to complete all the custodial work that customarily had been performed, given the decrease in staff. One day, Complainant worked extra hours at Lynch Meadows to help prepare for an open house. He was instructed by a coworker to assist her with her duties before he performed his own. That left Complainant with insufficient time to complete his own assignments. The

following day, he was reprimanded for having not completed his own work. From then on, Complainant felt that no spirit of teamwork or cooperation existed at Lynch Meadows. Nobody helped him with his assigned duties, which he sometimes was not able to complete because, at least in his view, he insisted on performing each assigned task impeccably. Complainant discussed this concern with his supervisor, whom he did not feel appropriately handled the problem. Complainant was very upset by this situation because he took his work seriously. When he received criticism from the other employees instead of cooperation, it was extremely hard for him to deal with.

5) At about this time, Leota Clark, field representative for the Oregon School Employees Association ("OSEA"), informed Harris that Complainant believed his workload at Lynch Meadows was too heavy. Harris had another employee, Sherril Havlock (phonetic) perform Complainant's duties; Havlock reported that she completed all assigned tasks within the allotted time. Harris sent Clark a memorandum outlining Complainant's responsibilities and schedule. Harris and the Lynch Meadows principal met with Complainant and told him that they still had high expectations but understood that the custodians would not be able to accomplish everything they had in previous years. Clark did not pursue the issue any further at this point.

6) After September 1996, Complainant's mental state was "not good at all." He believed he was being penalized for the downsizing of custodial staff. When he discussed the increased workload, he was called a whiner. As a result of his conflicts with other staff at Lynch Meadows, and meetings about those conflicts, Complainant became depressed and frequently contemplated suicide. He could not sleep through the night and had anxiety attacks that made him feel like he was having a heart attack. He suffered chest pains, shortness of breath, and vomiting. Complainant sometimes cried when he called his wife during his breaks at work.

7) On October 8, 1996, during a stressful meeting with a union official, Complainant became progressively more ill. Later that day, Complainant visited his family doctor, John Loomis. The physician called Dr. Eric Mueller, a clinical psychologist, and scheduled an appointment for Complainant. Mueller saw Complainant the same day, administered verbal and written tests, and scheduled an appointment for the following week. Mueller also recommended that Complainant be put on medication to be prescribed by Loomis. For the duration of his employment with Respondent, Complainant saw Mueller once a week. These appointments were covered by the health insurance that Complainant received as an employment benefit.

8) Because of his visit to Loomis's office, Complainant was absent from work on Tuesday, October 8; he also missed work for the remainder of that week. Complainant informed Respondent that he was out for medical reasons and, at some point, stated that he had injured his shoulder. During those four days, Complainant had little communication with his wife or other family members. He mostly stayed in his bedroom and did not talk to anybody.

9) Complainant worked three days the following week. On October 15, 1996, Charlene Harris, Respondent's Director of Human Resources, sent Complainant a letter that stated in part:

"This letter is to inform you that you are eligible for Medical Leave under the Family Medical Leave Act of 1993, and the Oregon Family Leave Act due to a 'serious health condition'. OFLA and FMLA entitles you to take up to 12- weeks of unpaid (paid if you choose to use your accrued sick leave), job-protected leave in a 12-month period."

On October 16, 1996, Mueller informed Respondent that Complainant would be returning to work only at Pleasant Valley, not at Lynch Meadows.

10) On or about October 17, 1996, Complainant gave Respondent a completed application form for family/medical leave. On that form, Complainant

indicated that he needed the leave to obtain rehabilitative counseling for his severe depression. Complainant also stated: "leave will be from Lynch Meadows School only. [Complainant] is released to work at Pleasant Valley." Complainant began taking leave on October 17, 1996, when he started working only a four-hour shift at Pleasant Valley.

11) On October 22, 1996, Harris sent Complainant a document titled "FMLA NOTICE TO EMPLOYEE." In that document, Harris confirmed that Complainant would work only four hours per day at Pleasant Valley while he was on leave. Harris also stated that Complainant was required to furnish medical certification of a serious health condition by October 31, 1996. At this point, Harris believed that Complainant qualified for leave under the federal Family Medical Leave Act ("FMLA") but not for OFLA leave because she did not believe his depression was a "serious health condition" under Oregon law.

12) By letter dated October 24, 1996, Harris asked Complainant's physician, Dr. Loomis, to give his medical opinion regarding any accommodation Complainant might need to carry out his duties as a custodian and to specify any job duties that Complainant would not be able to perform. In response to Harris's letter, Loomis stated that he would defer to Dr. Mueller. Loomis's "contact with [Complainant] was too limited for [him] to be able to answer [Harris's] questions adequately." Complainant had given Harris permission to contact his doctors.

13) On or about October 31, 1996, Dr. Mueller provided Respondent with a completed "Certification of Health Care Provider," which is a FMLA form on which health care providers can describe their patients' health conditions and indicate whether the patients require medical leave from work. Mueller stated in the Certification that Complainant had major depressive symptoms that could take approximately four to six months to resolve with treatment (counseling and medication) and resolution of work stress. The Certification describes several

categories of conditions that may qualify as "serious health conditions" and asks whether the patient's condition falls within any of those categories. Mueller indicated that Complainant had a serious health condition defined as follows:

"Absence Plus Treatment

"a. A period of incapacity \* \* \* of more than three consecutive calendar days (including any subsequent treatment or period of incapacity \* \* \* relating to the same condition), that also involves:

"(1) Treatment \* \* \* two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

"(2) Treatment by a health care provider on at least one occasion which results in a regiment of continuing treatment \* \* \* under the supervision of the health care provider."

For purposes of the Certification, the term "incapacity" was defined to mean "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom." Mueller opined that, despite his depression, Complainant could work part-time "in a low stress setting." Mueller was not aware of any specific tasks that Complainant was unable to perform. Mueller completed the Certification while Complainant was in his office.

14) By letter dated November 4, 1996, Harris provided Mueller with a description of Complainant's job duties and asked him to identify any duties that Complainant would not be able to perform. Mueller did not identify any such duties, but stated that Complainant was not able to return to an eight-hour position until his depressive symptoms improved and his "work duties resolved." He recommended that Complainant work four hours per day. Mueller also recommended that Dr. Loomis continue to prescribe the medication that Complainant was taking.

15) By letter dated November 19, 1997, Harris again asked Dr. Loomis for his medical opinion regarding any accommodation Complainant might need to perform his job. In that letter, Harris stated that the information she had received from

Mueller was not helpful, and asked Loomis to explain Complainant's medical condition. Harris's letter stated, in pertinent part:

"Any stated need for accommodations, including reduction of the normal eight-hour work day, need to be supported by a rationale or explanation as to why such accommodations are necessary to treat or stabilize [Complainant's] particular mental or physical condition, and why that treatment or stabilization is necessary to allow [Complainant] to work eight hours per day, instead of only four hours per day. Further, the district needs a prognosis as to what period of time any accommodations, including a reduced work day, will be necessary.

"Without this information, the district in no way can understand why [Complainant] can perform his job duties for four hours per day, but not for the entire eight hour work day. \* \* \* \*"

On the same day, Harris sent Complainant a letter explaining that she had contacted Loomis again. Harris provided Complainant with the letters she had sent Loomis and Mueller as well as Mueller's responses. Loomis did not respond to Harris's letter.

16) In a letter to Respondent dated November 21, 1996, Dr. Mueller made formal recommendations that he believed would help facilitate Complainant's return to work. These included: continuing Complainant's part-time work schedule at Pleasant Valley, where he got along well with his coworkers and supervisors; having Harris meet with Complainant and his wife two or three times "to discuss [Complainant's] concerns about the work environment and to learn from [Harris] that this conflict can be successfully resolved"; once sufficient trust had been achieved, to have "a few additional hour[s] \* \* \* added each week" to Complainant's work schedule "as tolerated." Mueller explained that Complainant "needs to feel that a spirit of cooperation and trust exists so he can recover from his depression." Complainant would "not be able to return to work in a setting where he [felt] the pressure of others [sic] disapproval."

17) At about this time, Mueller and Harris also spoke by telephone. Mueller told Harris that working at Lynch Meadows was extremely difficult for Complainant

because of his depression and his difficulties with a coworker. Mueller said that Respondent and Complainant needed to work on developing trust. Mueller and Harris discussed having Complainant and his wife meet with Harris two or three times to try to work out some solutions to Complainant's difficulties. Mueller also told Harris that Complainant genuinely wanted to work full-time, but was not then able to work at Lynch Meadows.

18) On December 9, 1996, Harris met with Complainant and his wife to discuss the problems Complainant had faced at Lynch Meadows. Complainant expressed anger about the situation at Lynch Meadows and said he wanted to work at Pleasant Valley full time; Harris told him that was not possible. The school district's winter break was approaching, and Harris felt that Complainant might be able to work out his problems with other Lynch Meadows custodial staff when there were not many other people around. Harris hoped that Complainant would be working full-time by the end of the break. She believed that Complainant and his wife felt this was a viable plan. Complainant also felt that progress was made during the meeting toward getting him back to work.

19) Harris thought that Complainant was a good employee worth retaining and thought mediation might help the situation. After her meeting with Complainant and his wife, Harris spoke with Mueller, who agreed that mediation might be productive.

20) After the December 9 meeting, Harris sent Complainant a memorandum in which she stated that Respondent could not accommodate Complainant's request that he be assigned full-time work at Pleasant Valley.<sup>3</sup> Harris told Complainant that, before he returned to work at Lynch Meadows, he would need to attend one or two mediation sessions "to agree to a resolution regarding [his] frustrations and concerns." Harris outlined the following schedule for Complainant's eventual return to full-time work:

"The District will allow you to return to work, at Lynch Meadows, once resolution has been agreed upon by all parties, and you have received a `Release to Work' form from your treating physician allowing you to return to full time work. For the first five (5) days, of your return to work at Lynch Meadows, the District will require that you may only work two (2) hours each day for five (5) days, for a total of six (6) hours, four (4) hours at Pleasant Valley and two (2) hours at Lynch Meadows. On the sixth (6) working day, you will return to your regular four (4) hours per day at Lynch Meadows, for a total of eight (8) hours per day, between the two buildings.

"Since you are currently not working at Lynch Meadows, you are not to enter Lynch Meadows until you have submitted in writing, a `Release to Work' form from your physician, to the Human Resources office, and have completed the District's requirement as specified above.

"The District looks forward to your full-time return."

During their meeting, Harris also had told Complainant verbally that he would need a full doctor's release before going back to work at Lynch Meadows.

21) On December 12, Harris met again with Complainant and his wife. Complainant was very concerned that people were gossiping about him and asked for a transfer to Pleasant Valley. Harris again explained that she could not effect such a transfer. Complainant could have filed a union grievance regarding his denied transfer request but did not. At the end of this meeting, Harris raised the possibility of entering mediation.

22) On December 19, 1996, Dr. Mueller sent two letters to Harris. In one, he stated that Complainant was "now able to work more than 4 hours a day." Mueller suggested that Respondent not require Complainant to work with coworkers "until a significant degree of success has been achieved in the mediation process." In the other letter, Mueller recommended that Complainant not be required to work additional hours on the day during which a first mediation session was scheduled. He also stated that he "need[ed] to clarify with you that [Complainant's] ability to work additional hours is contingent on successful mediation." Mueller recommended that Complainant not return to full-time work until that occurred. He believed the best resolution "would be successful mediation and return to full time work after the

holidays."

23) On December 19, 1996, Complainant, Harris, the Lynch Meadows principal, the Lynch Meadows head custodian, and Sherril Havlock participated in a mediation session. Lavonne Sedgwick, a licensed mediator who was a former school district employee, served as mediator. Although Sedgwick was not personally acquainted with the Lynch Meadows employees involved, Complainant felt that she was partial to the school district and was more interested in getting him to make concessions than in addressing his illness. Complainant was extremely distressed by the mediation, which he characterized at hearing as a "total assassination of [his] character," and became extremely ill afterward. Harris thought the mediation was positive and believed that Complainant's coworkers were merely explaining their feelings, not attacking Complainant personally. Respondent did not require Complainant to perform any of his custodial duties the day of the mediation.

24) On December 23, 1996, Complainant requested a transfer from Lynch Meadows "due to health reasons." Complainant asked that he be assigned to work eight-hour days at Pleasant Valley. He stated that his "treating doctor" also had "requested that [Complainant] be transferred from Lynch Meadows to Pleasant Valley in order for [his] condition to improve." Complainant believed that Pleasant Valley's full-time custodian was going to transfer to another school, so the position would be available for him. Complainant reiterated his request for a transfer in a letter to Harris dated January 10, 1997.

25) A second mediation session was held on January 10, 1997, which Complainant's wife attended. Sedgwick again served as the mediator and spent much more time alone with Complainant than she had in the first session. Complainant believed Sedgwick was more interested in getting him to sign documents than she was in addressing his illness. Complainant's wife also felt the mediation was hostile and Harris did not believe the mediation was successful.

26) At some point in early January 1997, Dr. Mueller and Complainant decided that Complainant was ready to go back to working two hours per day at Lynch Meadows. On January 16, 1997, Mueller confirmed in writing to Harris that he had released Complainant to work two hours per day at Lynch Meadows in addition to the four hours per day that Complainant previously had been released to work at Pleasant Valley. Mueller also suggested that a few additional hours be added each week as tolerated. Mueller reiterated that Complainant was "motivated to return to work" and needed "to feel that a spirit of cooperation and trust exists so he can recover from his depression."

27) After Harris received Mueller's letter, she reviewed the situation and concluded that Complainant had exhausted his FMLA leave. She also believed that Complainant did not qualify for OFLA leave because he did not have a serious medical condition -- she felt his difficulties related more to a personality conflict than to an illness. Harris concluded that the school district could not afford to keep hiring substitute custodians for Lynch Meadows, where the physical facilities were suffering from lack of attention. Despite the letters from Mueller, Harris concluded that Complainant was capable of performing his job at Lynch Meadows.

28) On January 16, 1997, Harris sent Complainant a letter that stated, in pertinent part:

"Since your FMLA has expired and the District has not received from your treating physician a release to full time duty, effective Wednesday, January 22, 1997, you will be working four (4) hours per day at Lynch Meadows Elementary School.

"If the District does not receive a release from your doctor for full time duty by January 22, 1997, your four hour job will become your permanent position at Centennial School District. You will need to report to Lynch Meadows at your normal work time on January 22, 1997.

"If we do receive a release for full time duty from your physician, you will return to your eight-hour position, four hours at Pleasant Valley and four hours at Lynch Meadows Elementary School. You would then retain your regular work hours at both sites."

Complainant felt that Respondent was ignoring the fact that Mueller had released him to work two hours per day at Lynch Meadows and was presenting Complainant with an ultimatum: either return to working four hours per day at Lynch Meadows or lose his job.

29) Complainant was confused when he received Harris's January 16 letter because she previously had told him that he was not to report to Lynch Meadows until he had a full release from his doctor stating he was able to do so. Complainant also believed that his condition would not allow him to return to working four-hour shifts at Lynch Meadows.

30) For several days starting on January 16, 1997, Complainant worked four hours per day at Pleasant Valley. By letter dated January 21, 1997, OSEA field representative Clark asked for clarification of Harris's January 16 letter to Complainant. Specifically, Clark asked: "If the District does not have full release from his doctor by January 22, do you intend to terminate [Complainant] from his 4-hour position at Pleasant Valley effective January 22nd?" In response to that letter, Harris stated that Complainant had used his 12 weeks of FMLA leave, and if he was not released to full-time work, he would be provided with a part-time position at Lynch Meadows. Respondent confirmed that Complainant would "be terminated from his four-hour position at Pleasant Valley effective January 22, 1997, should he not return to full time on that date."

31) On January 22, 1997, Complainant worked four hours at Pleasant Valley but did not report for work at Lynch Meadows. Complainant did not go to Lynch Meadows because he did not have a medical release to work at that facility for four hours per day.

32) On January 23, 1997, Complainant called the Pleasant Valley custodial supervisor, who told Complainant that Respondent had replaced him with a substitute custodian for that shift. Complainant concluded that he should not report

to work at Lynch Meadows, either, because he had not been released to work four-hour shifts there. That same day, Respondent's counsel sent Mike Tedesco, the union's attorney, a letter asserting that Complainant had exhausted his FMLA leave. Respondent also stated that Complainant's doctor had released him to work eight hours per day anywhere but Lynch Meadows and had also said that he could work two hours per day at Lynch Meadows until trust was restored. Because Respondent could not easily obtain a two-hour substitute, Respondent's counsel stated that Respondent was offering Complainant the following options:

"1) Remain an 8-hour employee and immediately return to work his full job (2-6 p.m. at Pleasant Valley, 6:30-10:30 p.m. at Lynch Meadows), effective immediately.

"2) Voluntarily reduce to a 4-hour part-time employee status. He would then be assigned to Lynch Meadows for one month so they can have some immediate help with undone work and so the District can attempt to hire a regular 4-hour custodian at Lynch Meadows. After the month, [Complainant] would go to his permanent assignment of four hours at Pleasant Valley. He would abandon any right to more than four hours, but could apply for positions of more than four hours as they came open."

Respondent's counsel sought an immediate response so Respondent would know whether it needed to obtain a substitute custodian for Pleasant Valley for that day. She stated that if Complainant reported to work at Pleasant Valley, "he should be prepared to work his entire 8-hour shift at both buildings, and failure to do so [would] be treated as neglect of duty."

33) Also on January 23, Dr. Mueller sent the OSEA a letter stating that Complainant continued to be depressed but was recovering. He believed Complainant had "improved to the point that he [was] able to work at a location where there [was] not significant emotional stress." Mueller explained further:

"Location not number of hours of work, have resulted in job stress for [Complainant]. The work environment at Lynch Meadows created the stress that led to the depression. Given that there has not been a successful resolution of the situation there it is my opinion that [Complainant] would not be able to continue to recover if he was forced to return to work there full time. [Complainant] is able to work at Pleasant

Valley. He appears to enjoy his work there and to get along fine with co-workers and the administration."

34) On January 24, 1997, Harris sent Complainant a letter notifying him that he was on paid suspension and would be given a pre-termination hearing on January 28. Harris explained:

"You failed to show up for work on Wednesday, January 22, 1997, and Thursday, January 23, 1997. The district recognizes that on January 22, 1997, you only worked four (4) hours at Pleasant Valley Elementary School, however, this was not an option open to you at that time. As stated in the district's letter of January 16, 1997, if you worked four (4) hours at Pleasant Valley, you were to also work four (4) hours at Lynch Meadows. You failed to show up at Lynch Meadows on January 22 and January 23, 1997. On neither occasion did you notify the district of your intentions of not reporting to work. Your failure to report to work will possibly constitute a neglect of duty."

35) On January 28, 1997, Complainant and his wife met with Harris, the OSEA local president, a union field representative, and the field representative's supervisor. Harris asserted that Complainant had abandoned his job at Lynch Meadows; the purpose of the meeting was to determine whether Complainant's job with Respondent would be terminated as a result. The union representative told Complainant that he should have showed up for work and argued about it later.

36) By letter dated January 31, 1997, Harris informed Complainant that she would recommend that Complainant's employment be terminated for failing to report to work on January 22 and 23, for failing to timely notify the district that he would not be reporting to work, and for refusing to accept the job assignment Respondent had given him. By letter dated February 2, 1997, Respondent's superintendent notified Complainant that he agreed with Harris's recommendation and was terminating Complainant's employment effective February 3, 1997. The union did not file a grievance over Complainant's termination.

37) If Respondent had complied with the term of Mueller's work release, it would have allowed Complainant to work two hours per day at Lynch Meadows plus

four hours per day at Pleasant Valley, taking two hours per day of OFLA leave. Mueller and Complainant both believed Complainant was capable of working this schedule, but was not yet capable of working four hours per day at Lynch Meadows. The Agency proved by a preponderance of the evidence that Complainant would have been able to work this schedule.

38) Respondent challenged Complainant's subsequent application for unemployment benefits. An ALJ ruled in Complainant's favor; Respondent's appeal to the Employment Appeals Board was not successful. Complainant began receiving unemployment benefits toward the end of July 1997.<sup>4</sup>

39) From the time Complainant started having difficulties at Lynch Meadows, he suffered severe depression. Complainant, who had been very active in school activities, stopped attending his children's functions because entering school buildings and seeing school district employees caused him such distress. During the time he was on leave, Complainant felt slandered and harassed.

40) After Respondent terminated Complainant's employment, he sank further into his depression. At one point, he went into his room and did not emerge for about a week. Prior to his termination, Complainant's wages had been his family's major source of income, and the loss of income was devastating, particularly because Complainant did not start receiving unemployment benefits for several months. The family's home went into foreclosure, their credit ratings were ruined, and they had to rely on food stamps. Complainant's ability to communicate effectively deteriorated and his personality changed. He has become "gun-shy," tentative, and irritable around people and avoids dealing with them. Complainant's three school-age children recognize that he has changed and his relationship with them has weakened as a result. Complainant no longer participates in many activities with his wife and children; he sometimes "goes away" by himself, which he had not done before.

41) Complainant lost his medical benefits as a result of being fired. He paid for a few sessions with Dr. Mueller himself, but was unable to do so for very long because of his lack of income.

42) At the time his employment was terminated, Complainant was earning \$10.67 per hour.

43) Complainant did not find a new job until August 1997. He now works as a wholesale newspaper distributor, a job that does not demand much contact with other people.

44) David Wright, a senior investigator with the Agency, explained how he had determined that Respondent had not granted Complainant all the OFLA leave to which he was entitled. Under the Agency's administrative rules, leave may be taken intermittently, which means that a person eligible for leave may work half-time, using only four hours of leave per day. That person would exhaust his or her "12 weeks" of leave after 24 weeks because references to 12 weeks of leave assume that the employee is using 8 hours of leave time per day. Wright concluded that, at the time Respondent terminated Complainant's employment, Complainant had used only about half the number of hours of leave to which he was entitled. Wright also concluded that Complainant was not a person with a disability for purposes of the Americans with Disabilities Act because his limitations related to a particular work site, not to particular work duties.

45) At the hearing, Harris testified that she had come to believe that Complainant had not exhausted his 12 weeks of OFLA leave at the time his employment was terminated. Instead of arguing that Complainant had exhausted his leave, Respondent contended that he was not eligible for OFLA leave and that the procedures it had followed were fair. Respondent conceded that, if Complainant otherwise was eligible for OFLA leave, he had 240 hours left at the time his employment was terminated.

46) The Agency offered as Exhibit A-28 a form settlement agreement that Complainant had been asked to sign. Respondent objected to the admission of this proposed settlement and the ALJ admitted the document only for the limited purpose of helping to establish the degree of Complainant's mental suffering. Upon further review of the document, the forum has determined that it has no value in proving the amount of emotional distress Complainant suffered, and the forum has given it no weight in issuing this order.

47) The testimony of all witnesses was credible. Each appeared to honestly convey what he or she had perceived at the time relevant events occurred.

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

1) At all material times, Respondent, a political subdivision of the State of Oregon, was an Oregon employer and utilized the personal services of 25 or more persons in the State of Oregon for each working day during both 1996 and 1997.

2) Complainant was employed by Respondent from 1983 through January 1997. Complainant worked full-time for Respondent from 1994 or 1995 until he started working a reduced schedule in the fall of 1996.

3) Beginning in September 1996, Complainant suffered severe depression that required his absence from work for more than three days and which required ongoing care by a clinical psychologist, augmented by medication prescribed by a physician.

4) Complainant's depression caused him to be unable to work at Lynch Meadows Elementary School, although he could work at Pleasant Valley. Complainant's depression adversely affected only his ability to work at Lynch Meadows, not his ability to perform any particular task associated with his job as a custodian.

5) On October 17, 1996, Complainant began working a reduced work schedule of four hours per day, Monday through Friday. While working this

schedule, Complainant used four hours of OFLA leave per work day. Respondent allowed Complainant to take only 240 hours of intermittent OFLA leave using this reduced work schedule. Respondent then required Complainant to return to working at least four hours per day at Lynch Meadows. Because his clinical psychologist had released him to work only two hours per day at Lynch Meadows, Complainant did not report to work at that school. Respondent terminated Complainant's employment for not accepting his work assignment at Lynch Meadows.

6) If Respondent had abided by the terms of the release provided by Complainant's clinical psychologist, it would have scheduled Complainant to work four hours per day at Pleasant Valley plus two hours per day at Lynch Meadows. If Respondent had done this, Complainant would have worked for six hours per day and used two hours of OFLA leave per day for 24 weeks, until he exhausted his remaining 240 hours of OFLA leave. At his pay rate of \$10.67 per hour, Complainant would have earned \$7682.40 before he exhausted his leave on about July 7, 1997. (24 weeks x 30 hours/week x \$10.67/hour).

6) As a result of being terminated when he had not exhausted the 480 hours of OFLA leave to which he was entitled, Complainant suffered severe emotional distress, including ongoing clinical depression that caused personality changes that lasted at least until the date of hearing.

#### **CONCLUSIONS OF LAW**

1) The Oregon family leave laws apply to "covered employers," which are defined as:

"employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken."

ORS 659.472(1); see ORS 659.470(1). At all material times, Respondent was a covered employer.

2) The actions, inactions, statements, and motivations of Harris, Respondent's director of human resources, properly are imputed to Respondent.

3) ORS 659.474(1) provides that "[a]ll employees of a covered employer are eligible to take leave for one of the purposes specified in ORS 659.476(1)(b) to (d)" except in circumstances not applicable here. Complainant was an eligible employee.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.492(2); ORS 659.010 *et seq.*

5) ORS 659.476 specifies the purposes for which OFLA leave may be taken:  
"(1) Family leave under ORS 659.470 to 659.494 may be taken by an eligible employee for any of the following purposes:

"\* \* \* \* \*

"(c) To recover from or seek treatment for a serious health condition of the employee that renders the employee unable to perform at least one of the essential functions of the employee's regular position."

ORS 659.470(6) defines the term "serious health condition" as follows:

"(6) 'Serious health condition' means:

"(a) An illness, injury, impairment or physical or mental condition that requires inpatient care in a hospital, hospice or residential medical care facility;

"(b) An illness, disease or condition that in the medical judgment of the treating health care provider poses an imminent danger of death, is terminal in prognosis with a reasonable possibility of death in the near future, or requires constant care; or

"(c) Any period of disability due to pregnancy, or period of absence for prenatal care."

OAR 839-009-0210(9) is identical to ORS 659.470(6). OAR 839-009-0210(10) provides a definition of "constant care":

"(10) 'Constant care' means care wherever performed, whether at home or any nursing home, institution, hospice, or health care facility. Where, however, the family member is receiving long-term physical care

at a nursing home, institution, hospice or other health care facility, leave shall apply only to those periods of transition from one home or facility to another, including time to make arrangements for such transitions, or when the family member requires transportation or other assistance in obtaining care from a physician."

ORS 659.494(2) provides:

"ORS 659.470 to 659.494 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Family and Medical Leave Act of 1993. Family leave taken under ORS 659.470 to 659.494 must be taken concurrently with any leave taken under the federal Family and Medical Leave Act of 1993."

The Agency has interpreted these statutes and rules as follows:

"Under OFLA, a Serious Health Condition includes:

"1. an illness, injury, impairment, or physical or mental condition that requires inpatient care (ORS 659.470(6)(a));

"2. an illness, injury, impairment, or physical or mental condition that poses imminent danger of death or is terminal with a reasonable possibility of death (ORS 659.470(6)(b));

"3. an illness, injury, impairment, or physical or mental condition that requires constant care (ORS 659.470(6)(b)). Constant care means care wherever performed (OAR 839-009-0210(10)), including:

"a. care in a health care facility (OAR 839-009-0210(10));

"b. home care administered by health care professionals (OAR 839-009-0210(10)); or

"c. inability to work for more than three consecutive calendar days and 2 or more treatments by health care provider or one treatment plus continuing supervision by health care provider. (FMLA)

"i. includes 'self-care,' i.e. person taking care of themselves (BOLI interpretation)

"ii. excludes colds, flu, earaches, upset stomach, minor ulcer, headache (except migraine), routine eye or dental care (FMLA);

"4. any period of disability due to pregnancy, or period of absence for prenatal care. (ORS 659.470(6)(c));

"5. a chronic condition (like asthma, diabetes and epilepsy) that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity (OAR 839 Div. 009 App. B);

"6. a permanent longterm condition under continuing treatment (like Alzheimers, stroke), which:

- "a. Requires in-patient or constant care; or
  - "b. Poses imminent danger of death.
- "(OAR 839 Div. 009 App. B)"<sup>5</sup>

(Exhibit A-29). ORS 659.470(5) defines "[h]ealth care provider" to include physicians and clinical psychologists. Complainant's depression was a "serious health condition" for purposes of the OFLA.

6) Complainant was entitled to take OFLA leave to recover from or seek treatment for his depression only if that depression rendered him "unable to perform at least one of the essential functions of the employee's regular position." ORS 659.476(1)(c). Agency rules do not further define "essential functions of the employee's regular position." The Agency's policy statement, however, further interprets the statutory provision:

"Essential Functions [OAR 839-006-0225(1)(b); 29 CFR §1630.2(n) (ADA)]

- "1. The function or functions for which the position exists; or
- "2. a function or function which only a few people are routinely able to perform; or
- "3. a highly specialized function for which the employee has specialized knowledge."

(Exhibit A-29).<sup>6</sup> Complainant's depression rendered him unable to perform an essential function of his regular job, being a custodian at Lynch Meadows Elementary School.

7) ORS 659.478 provides, in pertinent part:

"(1) Except as specifically provided by ORS 659.470 to 659.494, an eligible employee is entitled to up to 12 weeks of family leave within any one-year period.

"\* \* \* \* \*

"(6) The Commissioner of the Bureau of Labor and Industries shall adopt rules governing when family leave for a serious health condition of an employee or a family member of the employee may be taken intermittently or by working a reduced workweek. Rules adopted by the commissioner under this subsection shall allow taking of family leave on an intermittent basis or by use of a reduced workweek to the extent

permitted by federal law and to the extent that taking family leave on an intermittent basis or by use of a reduced workweek will not result in the loss of an employee's exempt status under the federal Fair Labor Standards Act.

The Agency has defined "intermittent leave" to mean "leave taken for a single serious health condition in multiple blocks of time that requires an altered or reduced work schedule." OAR 839-009-0210(11). Complainant was entitled to 12 weeks -- or 480 hours -- of OFLA leave. Respondent permitted him to take only 240 hours of leave during the time that he worked a reduced schedule of four hours per day. By denying Complainant the remaining 240 hours of leave, and firing him when he would not return to a job which his psychologist said he was not capable of performing, Respondent violated ORS 659.478 and committed an unlawful employment practice. ORS 659.492(1).

### **OPINION**

#### **Unlawful denial of OFLA leave**

To establish a prima facie case that an employer committed an unlawful employment practice by denying an employee OFLA leave which that employee was entitled to take to recover from or seek treatment for his or her own serious health condition, the Agency must prove that:

1. The employer was a "covered employer" as defined in ORS 659.470(1) and ORS 659.472;
2. The employee was an "eligible employee" -- i.e., he or she was an employee of the covered employer;
3. The employee had a "serious health condition";
4. The "serious health condition" rendered the employee "unable to perform at least one of the essential functions of the employee's regular position";
5. The employee used (or would have used) the OFLA leave to recover from or seek treatment for the "serious health condition"; and
6. The employer did not allow the employee to utilize the entire amount of OFLA leave to which he or she was entitled, as specified in ORS 659.478.

In this case, only the third, fourth, and fifth elements are disputed. Although Respondent initially believed that Complainant had exhausted his OFLA leave on January 16, 1997, because he had been working a part-time schedule for 12 weeks, it now acknowledges that OFLA leave may be taken intermittently and, to the extent he was eligible for OFLA leave, Complainant was entitled to take 480 hours spread out over more than 12 weeks. Respondent's present understanding of the law is correct -- OFLA leave may be taken intermittently and Complainant had used only 240 of the 480 hours to which he was entitled when Respondent terminated his employment in January 1997.<sup>8</sup>

Respondent asserts, however, that Complainant did not suffer a serious health condition. Respondent's argument is based on its contention that it is not bound by the Agency policy statement admitted as Exhibit A-29. That contention has no merit, as explained below. The Agency properly has interpreted the statutory term "serious health condition" to include "an illness, injury, impairment, or physical or mental condition that requires constant care \* \* \*, including \* \* \* inability to work for more than three consecutive calendar days and 2 or more treatments by health care provider or one treatment plus continuing supervision by health care provider." Complainant was unable to work for more than three days because of his serious depression and sought ongoing treatment from clinical psychologist Mueller and physician Loomis throughout the remainder of his employment by Respondent. His depression, therefore, qualified as a "serious health condition."<sup>9</sup>

Complainant's depression also caused him to be unable to perform at least one of the essential functions of his regular position -- being present at Lynch Meadows Elementary School to perform janitorial duties. Mueller informed Harris several times that Complainant was *unable* to work four hours per day at Lynch Meadows. Because Complainant could not be present at Lynch Meadows, he could not perform the function for which the position existed -- to clean and maintain the *Lynch*

*Meadow facilities.*<sup>10</sup>

Respondent allowed Complainant to take only 240 hours of the 480 hours of OFLA leave to which he was entitled and then fired Complainant because he would not return to working four hours per day at Lynch Meadows, something Dr. Mueller did not believe Complainant was ready or able to do. Those actions violated ORS 659.478 and constituted an unlawful employment practice. ORS 659.492(1).<sup>11</sup>

## **Damages**

### Back pay

Instead of denying Complainant his remaining OFLA leave, Respondent should have complied with the terms of Dr. Mueller's release and allowed Complainant to work two hours per day at Lynch Meadows and four hours per day at Pleasant Valley. Had Respondent done so, Complainant could have worked this schedule for 24 weeks, using two hours of his remaining leave per day. Over that period of time, at his pay rate of \$10.67 per hour, he would have earned **\$7682.40**.<sup>12</sup> Respondent owes him that amount of money as damages for its violation of ORS 659.492(1). The Agency conceded at hearing that it could not prove that Complainant would have been able to work a full-time schedule (including four hours per day at Lynch Meadows) after his leave expired. Consequently, the Agency did not seek, and this forum does not award, any damages for lost wages based on pay Complainant might have earned after his OFLA leave was exhausted.

### Mental suffering

Respondent also must compensate Complainant for the emotional distress he suffered as a result of Respondent's unlawful employment practice. That distress was severe. Dr. Mueller reported in mid-January that Complainant could work two hours per day at Lynch Meadows, which suggested his condition was improving. Complainant, too, believed he was ready to meet this challenge. But over the next few weeks, when Respondent violated the OFLA by denying Complainant the

opportunity to continue working a reduced schedule, Complainant lost a job he took pride in and lost the medical benefits that had allowed him to seek psychological treatment. Instead of continuing on his path to recovery, Complainant sunk deep into his depression, which caused significant personality changes that lasted at least until the hearing. As a result of those personality changes, Complainant's relationships with his wife and children have significantly deteriorated. In addition, Complainant suffered considerable mental distress as a result of losing his income.

The forum acknowledges that Complainant had a lesser (but significant) degree of depression before Respondent denied him leave and terminated his employment. The forum is not compensating Complainant for that portion of his emotional distress, which is not attributable to Respondent's unlawful employment practice. Complainant suffered a severe set-back as a result of being denied leave, however, and the forum finds that \$25,000.00 will compensate him for that additional suffering.

#### **Statement of Agency policy**

At hearing, the Agency submitted a policy statement setting forth its interpretation of "serious health condition" and "essential functions" as those terms are used in the OFLA. Respondent argued that it is not bound by the policy expressed in this statement because it had not been enacted pursuant to notice and comment rulemaking.

Oregon law does not require all agency rules and policies to be enacted through notice and comment rulemaking. Rather, rulemaking generally is required only where "the legislature has expressly required the agency to do so." *Coast Security Mortgage Corp. v. Real Estate Agency*, 155 Or App 579, 584, 964 P2d 306 (1998); see *Trebesch v. Employment Division*, 300 Or 264, 276, 710 P2d 136 (1985); cf. ORS 183.355(5) ("if an agency, in disposing of a contested case, announces in its decision the adoption of a general policy applicable to such case and subsequent cases of like nature the agency may rely upon such decision in disposition of later

cases"). In the absence of an express rule-making requirement, the agency is free to adopt rules through orders in contested cases. *Coast Security*, 155 Or App at 584; see *Martini v. OLCC*, 110 Or App 508, 513, 823 P2d 1015 (1992) (an agency "may make policy refinements in deciding contested cases and \* \* \* those may include changes in its interpretations of statutes and rules").

The legislature did not expressly require the Agency to enact rules defining the terms "serious health condition" and "essential functions of the employee's regular position." The legislature knew how to state such a requirement when it wished. For example, it expressly required the Agency to adopt rules "governing when family leave for a serious health condition of an employee or a family member may be taken intermittently or by working a reduced workweek." ORS 659.478(6).<sup>13</sup> No such requirement exists for the terms "serious health condition" and "essential functions." Consequently, the Agency was entitled to explain its interpretation of the statutory terms at the contested case hearing and that interpretation may be implemented through this order. Indeed, the Oregon Supreme Court has recognized that the Bureau of Labor and Industries has authority to announce a policy or rule in the context of issuing an order in a contested case. *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 140, 903 P2d 351 (1995). Respondent's argument that it is not bound by the Agency's interpretations of "serious health condition" and "essential functions" has no merit.

### **Respondent's Exceptions**

In section II of its exceptions, Respondent objects to the wording of proposed factual findings 3 and 4 insofar as they appear to accept Complainant's perception of workload problems at the Pleasant Valley and Lynch Meadows schools. These objections have merit and the findings at issue have been reworded to clarify that the Agency proved only how Complainant perceived the workloads at those schools, not whether, in fact, the custodial staff was given too much to do. Respondent also

objects to the lack of a finding that Agency investigator Wright did not include in his report a finding that Complainant had a serious health condition that prevented him from performing any of his essential job functions. That description of Wright's testimony, while accurate, is not pertinent to this forum's analysis of Complainant's eligibility for OFLA leave. The requested finding, therefore, has not been added.

Respondent next objects to the ALJ's conclusion that being a custodian at Lynch Meadows Elementary School was an essential function of Complainant's job. Respondent argues at length that only particular tasks can be essential job functions -- not the requirement that an employee work at a particular location. Respondent is wrong. The Agency's policy statement defines "essential function" to include "[t]he function or functions for which the position exists." See Conclusion of Law 6, *supra*. The position Complainant held with Respondent existed to provide the Lynch Meadows School with custodial services. If that were not the case, Respondent would not have terminated Complainant from that position when he became unable to provide services at Lynch Meadows -- instead, it would have transferred him to another facility.<sup>14</sup>

The federal cases cited by Respondent on pages 7 to 8 of its exceptions do not change this result. Those cases merely describe certain tasks that may constitute essential job functions; none of the cases holds that working at a particular location cannot constitute an essential function.

Respondent also argues that Complainant was not really unable to work at Lynch Meadows -- that he only was unable to get along with one particular coworker at that school. Respondent's argument misses the point. Dr. Mueller found that Complainant had a serious medical condition -- depression -- that rendered him unable to work at Lynch Meadows. The underlying cause of that serious medical condition is immaterial, as is the reason why Complainant's depression would be exacerbated if he were forced to work at that school. An employer is not entitled to

decide that some types of serious medical conditions merit OFLA leave and some do not. Nor may an employer decide that some workplace circumstances that have caused an employee to suffer genuine medical problems justify that employee's absence from work, but others are nothing more than normal workplace stresses that employees must endure. Where the uncontroverted medical evidence establishes that an eligible employee's serious health condition leaves him unable to perform essential functions of his job, the employer must give the employee all the OFLA leave to which he is entitled, regardless of the cause of that health condition.

Respondent also objects to the ALJ's reliance on a statement of agency policy interpreting the term "serious health condition." Respondent argues that, even if such policies may be adopted during contested cases, they may be applied only to "subsequent disputes." That is not correct. Oregon appellate courts repeatedly have held that agencies may apply policy interpretations established at contested cases to the matters that are the subjects of those cases. See *Meltebeke*, 322 Or at 140 n 11; *Forelaws on Bd. v. Energy Fac. Siting Coun.*, 306 Or 205, 215-16, 760 P2d 212 (1988); *Martini*, 110 Or App at 513.

Finally, Respondent objects to the award of \$25,000.00 damages for mental suffering, claiming that it was improper for the ALJ to base such a large award solely on the testimony of Complainant and his wife. To the contrary, the testimony of a single credible witness is sufficient to prove any element of a claim, including damages. Cf. *Peery v. Hanley*, 135 Or App 162, 165, 897 P2d 1189 (in claim for intentional infliction of emotional distress, "plaintiff's testimony, if believed, established a direct causal relationship between defendant's conduct and her symptoms. The trial court did not err in denying defendant's motion [to dismiss]"), *adhered to on reconsideration*, 136 Or App 492, 902 P2d 602 (1995). Respondent also notes that the ALJ awarded the entire sum sought by the Agency, and insinuates that this consistency has something to do with the fact that the ALJ is the

case presenter's coworker.

Respondent's conclusion regarding the reason for the congruence between the amount of damages sought and the amount awarded is completely unfounded. In some cases, this forum has agreed with the case presenter's assessment of the amount of money that adequately will compensate an individual who has suffered emotionally as the result of an unlawful employment practice; in others, it has not. In this case, the amount of mental suffering was extreme, as discussed in factual finding 40, *supra*. Complainant's emotional distress lasted at least through the time of hearing, caused lasting personality changes, and profoundly affected his relationships with family members. These lasting harms are roughly similar in severity to those suffered by the three complainants in *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 124 (1997), who became depressed, anxious, and fearful of men as a result of sexual harassment. This forum awarded \$30,000 to each of two of those complainants and awarded \$25,000.00 to the other complainant as compensatory damages for their mental suffering. The record in this case amply supports the \$25,000.00 award to Complainant.

#### **ORDER**

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), to eliminate the effects of Respondents' violation of ORS 659.030(1)(a), (b), and (f), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **CENTENNIAL SCHOOL DISTRICT, NO. 28-J** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in trust for Complainant **Dennis Frederick in the amount of:**

a) SEVEN THOUSAND SIX HUNDRED EIGHTY-TWO DOLLARS AND FORTY CENTS (\$7682.40), less appropriate lawful deductions, representing wages

Complainant lost from January 1997 through July 7, 1997, as a result of Respondent's unlawful practices found herein; plus

b) Interest at the legal rate on said wages and benefits from July 8, 1997, until paid; plus

c) TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practices found herein; plus

d) Interest on said damages for mental suffering at the legal rate, accrued between the date of the Final Order and the date paid.

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<sup>1</sup>Exhibits A-26 to A-28 were admitted only for limited purposes that are described in the Findings of Fact, *infra*.

<sup>2</sup>The Agency has jurisdiction to enforce only OFLA, not the federal Family Medical Leave Act ("FMLA"), and charged Respondent only with having violated OFLA. Consequently, this Order generally discusses only the Oregon law, although many of the same considerations would apply to a determination of whether Respondent violated FMLA.

<sup>3</sup>Respondent's employees, including its custodial staff, are protected by a protective bargaining agreement that restricts Respondent's ability to switch employees' job assignments.

<sup>4</sup>Respondent objected to the admission of these documents to the extent that they might be used to establish the events that led up to Complainant's termination or the legality of that act. The ALJ sustained the objection and received the documents only for the limited purpose of establishing the length of time it took for Complainant to begin receiving unemployment benefits.

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<sup>5</sup>Appendix B, referred to in this Agency policy statement, is an OFLA form included in a 1996 Agency handbook entitled *Family Leave Laws in Oregon*. Appendix B is analogous to the FMLA Certification of Health Care Provider that Dr. Mueller completed on Complainant's behalf. See *Family Leave Laws in Oregon* at 94-96.

<sup>6</sup>This definition mirrors the definition of "essential functions" set forth in a then-effective Agency rule regarding disability discrimination. See *former* OAR 839-006-0225(1)(b).

<sup>7</sup>The employer may, as an affirmative defense, establish that the employee is exempted from the category of eligible employees because he or she falls within one of the exceptions set forth in ORS 659.474(1) and (2).

<sup>8</sup>FMLA leave also may be taken intermittently, and Complainant may have been entitled to additional FMLA leave at the time his employment was terminated. That analysis is beyond the scope of this order. See footnote appended to the first factual finding, *supra*.

<sup>9</sup>It is worth noting that FMLA does not "supersede[] any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA." 29 CFR 825.701(a). Nor does the Oregon law supersede the federal. Consequently, many employers (like Respondent) are subject to both laws and must apply whichever OFLA or FMLA provision is most beneficial to an employee entitled to leave. In this case, even if Respondent were correct that it was not bound by the Agency's policy statement regarding what qualifies as a "serious health condition" for purposes of OFLA, Respondent still would have been required to give Complainant 240 additional hours of FMLA leave, as his depression qualified as a "serious health condition" under the applicable federal statutes and regulations. See 29 CFR 825.114(a)(2). See also footnote appended to the first factual finding, *supra*.

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<sup>10</sup>The cases Respondent cited in its post-hearing brief as having "substantially similar facts" are inapposite because they relate to whether the plaintiffs' mental conditions rendered them "disabled" for purposes of the Americans with Disabilities Act ("ADA"). That determination depends on an analysis completely different from that which determines whether a person can perform the "essential functions" of his or her job for purposes of the OFLA. See *Weiler v. Household Finance Corp.*, 101 F3d 519, 524-25 (7th Cir 1996); *Dewitt v. Carsten*, 941 F Supp 1232 (ND Ga 1996), *aff'd* 122 F3d 1079 (11th Cir 1997); *Palmer v. Circuit Court of Cook County*, 905 F Supp 499 (ND Ill 1995), *aff'd* 117 F3d 351 (7th Cir 1997), *cert den* 118 S Ct 893 (1998). Indeed, in two of those cases, the courts went on to say that the plaintiffs were not "otherwise qualified" under the ADA because they could *not* perform the essential functions of their jobs. *Weiler*, 101 F3d at 525-26; *Palmer*, 905 F Supp at 508-09 *and* 117 F3d at 351-52.

<sup>11</sup>For the reasons discussed in this opinion, the ALJ denied Respondent's motion to dismiss, made after the Agency rested its case. That motion was premised on the incorrect assertion that the Agency had not proved that Complainant qualified for OFLA leave on the day of his termination.

<sup>12</sup>At the close of the hearing, the Agency moved to amend the Specific Charges to specify damages for back wages based on the fact that Complainant would have been able to work six hours a day -- four hours at Pleasant Valley and two hours at Lynch Meadows -- until he exhausted his OFLA leave. The ALJ granted that motion to amend and based its lost wages calculation on the fact that Complainant would have worked six hours a day until he used up his leave. Unfortunately, when it moved to amend the charges, the Agency also stated that it believed Complainant would have earned only \$3841.20 had Respondent given him the remaining 240 hours of OFLA leave to which

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he was entitled. The Agency's calculation was incorrect -- Complainant actually would have earned twice that amount, as explained *supra*.

Consequently, on its own motion, the forum has reconsidered its ruling granting the Agency's motion to amend the Specific Charges. The Agency's motion to amend is hereby granted only to the extent that it seeks damages based on the fact that Complainant would have worked six hours per day until he exhausted his remaining OFLA leave. The motion is denied to the extent that it specified a particular amount of money Complainant would have earned during that time. Respondent is not prejudiced by this reconsideration of the Agency's motion to amend because the amount of damages hereby awarded is based on the underlying factual premise asserted by the Agency in that motion -- that Complainant would have worked six hours per day. No new *argument* is being accepted in this order -- only a new (correct) *calculation* of the damages that conforms with the evidence presented at hearing. Cf. OAR 839-050-0140(c) ("Charging documents may be amended to request increase damages \* \* \* to conform to the evidence presented at the contested case hearing").

<sup>13</sup>The Agency has adopted such a rule. OAR 839-009-0210(11).

<sup>14</sup> Respondent attempts to rely on a job description that it submitted with its post-hearing brief to demonstrate that job location was not an essential function of Complainant's job, but that document was not received into evidence at the hearing and is not part of the evidentiary record in this case. Even assuming, however, that it was proved that Complainant's official job description did not list working at Lynch Meadows as an essential job function, that would not change the result of this case. The essential nature of the requirement that Complainant work at Lynch Meadows was proved when

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Respondent terminated Complainant's job when he became unable to work at that single school.