

In the Matter of
ENTRADA LODGE, INC., dba BEST WESTERN

Case No. 25-00

August 2, 2000

SYNOPSIS

Where Respondent failed to restore Complainant to her former housekeeping position, which had been filled by replacement workers, for two and one-half weeks after she took OFLA leave and attempted to return to work, the forum awarded Complainant \$262.50 in lost wages and \$15,000 damages for mental suffering that Complainant experienced as a result of Respondent's unlawful employment practice. The forum found that Complainant had not been constructively discharged when she quit Respondent's employ to go to work for another inn that offered more hours. ORS 659.470 *et. seq.*, OAR 839-009-0270.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 8 and 9, 2000, at the Bureau of Labor and Industries office located at 1250 N.E. 3rd, #B-105, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Complainant Cheryl Buxton was present throughout the hearing, and was not represented by counsel. Respondent was represented by Gregory P. Lynch, trial attorney, and co-counsel Stanley D. Austin, of the law firm Hurley, Lynch & Re, P.C. Douglas F. Ritchie was present throughout the hearing as Respondent's representative.

The Agency called as witnesses, in addition to Complainant: Douglas Ritchie, Respondent's general manager; Christina (Crain) Delong and Kimberly Ford, formerly employed as housekeepers for Respondent; Richard Buxton, Complainant's husband;

Jeffrey Carlson, accounting coordinator for BOLI; and Jane MacNeill, Civil Rights Division senior investigator.

Respondent called Ritchie and Complainant as witnesses.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-19 (submitted prior to hearing), X-20 (submitted at hearing), and X-21 through X-30 (issued or submitted after hearing);
- b) Agency exhibits A-1 through A-7 (submitted prior to hearing with the Agency's case summary), and A-8 through A-14 (submitted at hearing);
- c) Respondent's exhibits R-1 (submitted prior to hearing with Respondent's case summary), R-2 through R-9, R-13 and the first four pages of R-14 (submitted at hearing).

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 October 28, 1998, Complainant filed a verified complaint with Agency's Civil Rights Division ("CRD") alleging that she was the victim of the unlawful employment practices of Respondent in that Respondent failed to return her to her former housekeeper position upon returning to work from parental leave. On July 16, 1999, BOLI amended Complainant's complaint to correct Respondent's name and add the name of Respondent's registered agent. After investigation and review, the CRD issued an Administrative Determination finding substantial evidence supporting the allegation that Respondent did not return Complainant to her former job following her medical leave.

2) On November 8, 1999, the Agency submitted to the forum Specific Charges alleging that Respondent discriminated against Complainant by: (a) failing to restore her to the position she held at the time she commenced family leave after she was ready to return to work; and (b) constructively discharging her by reducing her hours so that it was necessary for her to find other employment, both in violation of ORS 659.492. The Agency also requested a hearing.

3) On November 18, 1999, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth February 8, 1999, in Bend, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On December 6, 1999, Respondent, through Gregory P. Lynch, filed an answer to the Specific Charges.

5) On January 6, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any damage calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The forum ordered the participants to submit case summaries by January 28, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On January 20, 2000, Respondent filed a motion for a postponement in which it alleged that the Agency would not cooperate in arranging discovery depositions

that Respondent needed to conduct “to ensure that respondent has a full and fair opportunity to present its case at the contested hearing.”

7) On January 20, 2000, Respondent also filed a motion for a discovery order to be allowed to take the deposition of Complainant.

8) On January 25, 2000, the Agency filed objections to Respondent’s motion to postpone, arguing that the Agency had not impeded Respondent’s efforts to seek a deposition or obtain discovery of documents and that Respondent’s failure to make adequate efforts to complete discovery before the scheduled hearing date did not constitute good cause for granting a postponement.

9) On January 25, 2000, the Agency filed objections to Respondent’s request to take Complainant’s deposition, arguing that Respondent’s request was untimely and failed to demonstrate why a deposition rather than informal or other means of discovery was necessary.

10) On January 25, 2000, the forum issued an interim order denying Respondent’s motion to take Complainant’s deposition on the basis that Respondent had failed to seek discovery through an informal exchange of information before requesting a discovery order to take Complainant’s deposition. The forum noted that an informal attempt to arrange for a deposition did not constitute an attempt to seek discovery through an informal exchange of information. In the same order, the forum denied Respondent’s motion for a postponement on the basis that Respondent’s inability to make an informal arrangement to take Complainant’s deposition did not meet the good cause requirement of OAR 839-050-0020(10).

11) On January 28, 2000, Respondent filed a motion for reconsideration of the forum’s rulings on its motions for postponement and to take Complainant’s deposition.

12) On January 28, 2000, the Agency and Respondent timely filed their case summaries.

13) On January 28, 2000, the forum denied Respondent's motion for reconsideration of the forum's rulings on Respondent's motions to postpone and to take Complainant's deposition.

14) At the commencement of the hearing, the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) Prior to opening statements, Respondent objected to the ALJ's receipt of the Agency's case summary, marked as Exhibit X-15, into evidence on the basis that Respondent had just received it at 3 p.m. on February 7, the previous day. Respondent alleged that it was prejudiced by the Agency's failure to provide Respondent with the case summary in a timely manner. At the ALJ's request, Respondent provided the forum with the manila envelope that the Agency's case summary was mailed in, bearing the postmark of "Jan 28'00," and it was marked and received as Exhibit X-20. The ALJ admitted Exhibit X-15 because: (1) Exhibit X-20 demonstrated it was timely filed pursuant to the requirements of OAR 839-050-0040(1); and (2) testimony by Jeffrey Carlson, BOLI's accounting coordinator who is responsible for internal controls regarding BOLI's mailroom procedures, established that Exhibit X-20 was in fact postmarked and placed in a U. S. Postal Service receptacle on January 28, 2000, in the normal course of business.

16) On May 4, 2000, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions, and a Final Order was issued on June 8, 2000.

17) On June 27, 2000, Respondent's attorney Respondent's attorney, Gregory P. Lynch, notified the Agency's case presenter that neither the Proposed Order nor the Final Order had been served on him. After confirming this fact, on July 10, 2000, the commissioner issued an order entitled "Order Withdrawing Final Order For Purpose of Reconsideration." The commissioner ordered that the ALJ reissue the Proposed Order and serve it on Mr. Lynch so that Respondent would have the opportunity to file exceptions pursuant to OAR 839-050-0380. On July 12, 2000, an amended¹ Proposed Order was reissued pursuant to that Order.

18) On July 20, 2000, Respondent filed exceptions to the Amended Proposed Order. Those exceptions are addressed in the Opinion section of this Amended Final Order.

FINDINGS OF FACT – THE MERITS

1) In 1998, Respondent was an Oregon corporation providing commercial lodging in and around Bend, Oregon, under the assumed business names of Best Western Entrada Lodge ("Entrada") and Best Western Inn & Suites.

2) Respondent employed 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in both 1997 and 1998.

3) Douglas Ritchie, Entrada's general manager, hired Complainant as a housekeeper at Entrada on January 16, 1998. Complainant's first day of work was January 17, 1998. When Complainant was hired, her last name was Schulze.

4) When Complainant was hired, Ritchie did not promise Complainant a specific schedule or number of hours she would work per week.

5) Complainant was paid the state minimum hourly wage throughout her employment with Entrada. In 1998, the state minimum wage was \$6.00 per hour.

6) Complainant's present husband, Richard Buxton, interviewed with Ritchie on the same day as Complainant and was hired as Entrada's maintenance person. He

began work at the same time as Complainant. Complainant and Buxton were married on April 7, 1998.

7) Buxton's wages were garnished for child support payments throughout the time he worked for Entrada. His bi-monthly net earnings while employed by Entrada were \$300 after taxes and the child support garnishment.

8) Complainant had five children at the time she married Buxton.

9) Respondent's business is dependent on the tourist industry and occupancy rates fluctuate considerably during the course of the year. Summer is Respondent's busiest season. The hours worked by housekeepers vary considerably depending on occupancy rates, ranging in 1998 from a low of 98.5 hours between November 1-15, 1998, to a high of 647.5 hours between July 15-31, 1998.² The hours worked by housekeepers are directly proportionate to Respondent's occupancy rates.

10) Ritchie was responsible for the scheduling of housekeeper's hours throughout Complainant's employment with Respondent.

11) Complainant's housekeeping duties involved cleaning rooms. Specifically, she made beds, vacuumed, washed bathrooms, cleaned up "stayovers," did some "deep cleaning," and occasionally worked as a leadperson when she was the most senior housekeeper scheduled to work, during which time she assigned rooms to other housekeepers and did laundry.

12) During Complainant's employment, her supervisors filled out semi-monthly time cards showing the hours she and other housekeepers worked. Complainant maintained a contemporaneous record of her own hours on her calendar at home.

13) Complainant's daughter made Complainant's 1998 home calendar. On that calendar, Complainant wrote down significant events as they occurred or were scheduled,³ as well as her hours at work. Based on an inspection of the calendar and

Complainant's testimony, the forum finds that Complainant's handwritten entries on the calendar are an accurate, contemporaneous account of events in Complainant's life during the time she worked for Entrada.⁴ Where Complainant's testimony concerning dates conflicted with those written on the calendar, the forum has relied on the calendar to determine accurate dates.)

14) Ritchie does very little documentation concerning Respondent's housekeepers because there is such a high turnover. Ritchie did not contemporaneously document any of his conversations with Complainant.

15) When Complainant was hired, Entrada already employed four other housekeepers – Jennifer Bliss, Karla Henley, Laurie Knox and Nikke Standley.

16) Complainant learned she was pregnant on January 17, 1998, her first day of work for Entrada, and told Standley, the housekeeping supervisor, that she was pregnant.

17) Sometime in the spring of 1998, Ritchie learned Complainant was pregnant. He assumed she would take 12 weeks of leave when her baby was born.

18) From January 16-31, 1998, Entrada's five⁵ housekeepers worked the following hours, for a total of 219.25⁶ hours:

Complainant:	51.75
L. Knox:	52.75
J. Bliss:	37.25
N. Standley:	49.75
K. Henley:	27.75

19) Prior to February 1, 1998, Bliss, Henley, and Standley left Entrada's employ. Knox replaced Standley as housekeeping supervisor. Between February 1 and February 15, 1998, Entrada employed two new housekeepers – Ramona Lopez and Angela Rodgers. In that time period, Entrada's four housekeepers worked the following hours, for a total of 110.5 hours:

Complainant:	36.25
L. Knox:	46.75
A. Rodgers:	17
R. Lopez:	10.5

20) Between February 16 and February 28, 1998, Entrada employed three new housekeepers - Lynn Cornell, Holly Luckins and Bobbie Mitchell. In that time period, Entrada's seven housekeepers worked the following hours, for a total of 262 hours:

Complainant:	64.25
L. Knox:	56.25
A. Rodgers:	34.75
R. Lopez:	24
B. Mitchell:	37
L. Cornell:	14.5
H. Luckins:	31.25

21) Prior to March 1, 1998, Cornell and Lopez left Entrada's employ. Between March 1 and March 15, 1998, Entrada employed three new housekeepers - Kimberly Ford, Sammie Garrett, and Jennifer Rafford. In that time period, Entrada's eight housekeepers worked the following hours, for a total of 201.5 hours:

Complainant:	56.75
L. Knox:	73.75
K. Ford:	18.25
A. Rodgers:	2.75
B. Mitchell:	16.5
H. Luckins:	5.5
S. Garrett:	15.25
J. Rafford:	12.75

22) Prior to March 16, 1998, Garrett, Luckins, Rafford, and Rodgers left Entrada's employ. Between March 16 and March 31, 1998, Entrada employed six new housekeepers - Tempie Davis, Wynona Grilley, Darcie Ingram, Tamara Keck, Alicia

Lopez and Anna Mort. In that time period, Entrada's 10 housekeepers worked the following hours, for a total of 326.25 hours:

Complainant:	61.5
L. Knox:	52.5
K. Ford:	60.25
B. Mitchell:	31.5
T. Davis:	28.25
D. Ingram:	18.75
A. Lopez:	11.75
W. Grilley:	49
T. Keck:	3.5
A. Mort:	9.25

23) Prior to April 1, 1998, Keck, A. Lopez, Mitchell, and Mort left Entrada's employ. Between April 1 and 15, 1998, Entrada re-employed one housekeeper – Ramona Lopez. In that time period, Entrada's seven housekeepers worked the following hours, for a total of 231.25 hours:

Complainant:	46.25
L. Knox:	61
K. Ford:	50.75
T. Davis:	26.25
D. Ingram:	25.25
R. Lopez:	12
W. Grilley:	9.75

24) Prior to April 16, 1998, Davis and Grilley left Entrada's employ. Between April 16 and 30, 1998, Entrada's five housekeepers worked the following hours, for a total of 192.75 hours:

Complainant:	46.75
L. Knox:	67.25
K. Ford:	53.5
D. Ingram:	19
R. Lopez:	6.25

25) Prior to May 1, 1998, R. Lopez left Entrada's employ. Between May 1 and 15, 1998, Entrada's four housekeepers worked the following hours, for a total of 176.25 hours:

Complainant:	48.5
L. Knox:	59.75
K. Ford:	52.25
D. Ingram:	15.75

26) Between May 16 and 31, 1998, Entrada employed one new housekeeper – Christie Hammell. In that time period, Entrada's five housekeepers worked the following hours, for a total of 228.75 hours:

Complainant:	54.25
L. Knox:	65
K. Ford:	75
D. Ingram:	17.75
C. Hammell:	16.75

27) Prior to June 1, 1998, Hammell and Ingram left Entrada's employ. Between June 1 and 16, 1998, Entrada employed two new housekeepers – Josh Price and Kevin Seibert. In that time period, Entrada's five housekeepers worked the following hours, for a total of 207.75 hours:

Complainant:	48
L. Knox:	60.5
K. Ford:	67.25
K. Seibert:	26
J. Price:	6

28) On June 9, 1998, Complainant's doctor restricted her to light duty. On or about the same day, Complainant presented her light duty note to Ritchie. For the rest of June, Ritchie assigned lighter duty work to Complainant. Starting on June 13, Ritchie assigned laundry duties to Complainant, which Complainant performed through July 26,

1998. The lighter duty and laundry work assigned to Complainant was an accommodation of her light duty restrictions due to her pregnancy.

29) Between June 16 and 30, 1998, Entrada employed four new housekeepers – Reba Balcomb, Janelle Grant, Tara Hunter and Lance Robbins. In that time period, Entrada's nine housekeepers worked the following hours, for a total of 416.50 hours:

Complainant:	53.25
L. Knox:	58.75
K. Ford:	61.75
K. Seibert:	53
J. Price:	63.25
R. Balcomb:	14
J. Grant:	20.5
T. Hunter:	46
L. Robbins:	46

30) Between July 1 and 15, 1998, Entrada employed two new housekeepers – Michelle Miller and Brittney Richman. In that time period, Entrada's 11 housekeepers worked the following hours, for a total of 526.5 hours:

Complainant:	40.75
L. Knox:	75
K. Ford:	62
K. Seibert:	73.75
J. Price:	54
R. Balcomb:	56.25
J. Grant:	50.75
T. Hunter:	48.75
L. Robbins:	58.25
B. Richman:	3.5
M. Miller:	3.5

31) Between July 15 and 31, 1998, Entrada employed one new housekeeper – Jennifer Carroll. In that time period, Complainant worked 6.25 hours on July 18, 6.75

hours on July 19, and 7.25 hours on July 26. In the same time period, Entrada's 12 housekeepers worked the following hours, for a total of 646.75 hours:

Complainant:	20.25
L. Knox:	94.75
K. Ford:	79.45
K. Seibert:	85.75
J. Price:	71.5
R. Balcomb:	64.5
J. Grant:	61.25
T. Hunter:	21
L. Robbins:	21
B. Richman:	68.5
M. Miller:	50.5

32) On July 27, 1998, Complainant stopped working due to her pregnancy, based on the advice of her physician. Prior to July 27, Complainant told Ritchie that she would be taking maternity leave until her six week checkup after her baby was born and planned to return to work for Respondent at that time. When Complainant told Ritchie she was beginning her leave, Ritchie told her to contact him when she was ready to come back to work.

33) Between January 17, 1998 and July 26, 1998, Complainant worked an average of 23 hours per week.⁷

34) Ritchie considered Complainant to be a "fine" employee at the time her leave commenced.

35) At the time Complainant's leave commenced, Complainant and her husband were behind in paying their bills.

36) During Complainant's entire period of employment with Respondent, Ritchie said nothing negative regarding Complainant's pregnancy or her anticipated maternity leave. Complainant and Ritchie had a good working relationship.

37) Prior to August 1, 1998, Hunter and Robbins left Entrada's employ. Between August 1 and 15, 1998, Entrada employed one new housekeeper – Robin

Rynniewicz. In the same time period, Entrada's 10 housekeepers worked the following hours, for a total of 555.5 hours:

L. Knox:	81.5
K. Ford:	76.75
K. Seibert:	71.5
J. Price:	79
R. Balcomb:	79.75
J. Grant:	38.25
B. Richman:	58.25
M. Miller:	32.25
J. Carroll:	21.5
R. Rynniewicz:	16.75

38) Complainant's child was born on August 20, 1998. Complainant visited Entrada several times to show off her baby.

39) Prior to August 1, 1998, Carroll, Grant and Rynniewicz left Entrada's employ. Between August 16 and 31, 1998, Entrada's seven housekeepers worked the following hours, for a total of 414.75 hours:

L. Knox:	61.75
K. Ford:	85.25
K. Seibert:	73.75
J. Price:	75.25
R. Balcomb:	40.5
B. Richman:	52.25
M. Miller:	26

40) Prior to September 1, 1998, Balcomb, Miller, and Richman left Entrada's employ. Between September 1 and 15, 1998, Entrada employed one new housekeeper – Korissa Garfield, whose first day of work was September 15, 1998. Garfield was hired on an as-needed basis. In the same time period, Entrada's five housekeepers worked the following hours, for a total of 239.75 hours:

L. Knox:	13.5
K. Ford:	62.25
K. Seibert:	92.75
J. Price:	65

K. Garfield: 6.25

41) Prior to September 16, 1998, Knox left Entrada's employ. Some time prior to that, Seibert had replaced Knox as housekeeping supervisor. As housekeeping supervisor, he was paid more than Entrada's housekeepers. Between September 16 and 30, 1998, Entrada employed one new housekeeper – Cristina Crain.⁸ In the same time period, Entrada's five housekeepers worked the following hours, for a total of 245.25 hours:

K. Ford:	62.25
K. Seibert:	94.25
J. Price:	19
K. Garfield:	30.25
C. Crain:	59.5

42) Garfield's last day of work was September 25, 1998. On September 24, she worked 3.5 hours, and on September 25, she worked 5 hours.

43) Crain started work on September 17, 1998. She was hired as an "on-call" employee who telephoned Respondent each day to see if work was available. From September 25 to September 30, she worked the following schedule: September 25 – 5 hours; September 26 – 5 hours, September 27 – 5.5 hours, September 28 – 3.5 hours, September 29 – 4 hours, September 30 – 4 hours, for a total of 27 hours. Complainant could have worked these hours.

44) Complainant received no income during the period of her leave, which placed an additional financial stress on her family.

45) On September 21, 1998, Complainant and her husband received a 72-hour eviction notice from their landlord, based on their failure to pay rent, which was due on September 1, 1998. In the same period of time, their electricity was almost shut off. Complainant and her husband called several churches to inquire about financial

assistance and eventually got rent assistance from "AFS." There was no evidence presented regarding the amount of rent paid by Complainant and her husband.

46) On September 24, 1998, Complainant visited the office of Dr. Weeks, who had cared for her during her pregnancy and delivery. Complainant was unable to see Dr. Weeks, but told his nurse that she needed to go back to work. Dr. Weeks' nurse told her it was all right for her to return to work. Complainant felt she needed to go back to work at this time because of the financial needs of her family.

47) Later in the day on September 24, 1998, Complainant called Ritchie and told him she was ready to come back to work. Ritchie told her to report back to work on September 26, a Saturday. Ritchie did not ask Complainant to provide a medical release on this or any subsequent occasion.

48) When Complainant told Ritchie that she was ready to come back to work, she anticipated and expected that she would be given the same number of hours she had averaged before going on leave, which she believed was 25 to 30 hours per week.

49) On September 26, Ritchie phoned Complainant and told her not to come to work because he had enough housekeepers for the day.

50) On September 29, Complainant called Ritchie again and asked about work. He told her that business was slow, that he would use her on an as-needed basis, and that he would not take hours away from Siebert and Ford. By this time, Complainant was aware that another housekeeper besides Siebert and Ford was working who had been hired after she went on leave.

51) In September 1998, Ritchie knew that Complainant and her husband had six children, that they needed money, and that any hours assigned to Complainant or her husband would help them.

52) Complainant completed and filed an application for unemployment benefits on October 5, 1998.

53) Prior to October 1, 1998, Price left Entrada's employ. On October 10, 1998, Entrada restored Complainant to a housekeeper position. Between October 1 and 15, 1998, Complainant worked 4.5 hours on October 10 and 5.75 hours on October 11, for a total of 10.25 hours. In the same time period, Entrada's other three housekeepers worked the following hours, for a total of 151.75 hours:

K. Ford:	44.75
K. Seibert:	80.0
C. Crain:	16.75

54) Crain's last day of work for Entrada was October 7, 1998. Between October 1 and 7, 1998, Crain worked the following schedule: October 2 – 4.5 hours, October 3 – 4.25 hours, October 4 – 3.75 hours, October 7 – 4.25 hours. Complainant could have worked these hours.

55) Between October 16 and 31, 1998, Complainant worked 5 hours on October 17 and 2.75 hours on October 18, for a total of 7.75 hours. In the same time period, Entrada's two other housekeepers worked the following hours, for a total of 123.5 hours:

K. Ford:	45
K. Seibert:	70.75

56) Complainant would have worked an additional 43.75 hours if she had been assigned the work that Crain performed on September 25-30, October 2-4, and October 7, 1998. Complainant would have earned \$262.50 in gross wages for this work. This would have enabled Complainant and her husband to pay some, but not all, of their outstanding bills.

57) Between September 24 and October 20, 1998, Complainant and her family were under considerable financial stress. Complainant was very worried and scared, and experienced considerable stress because of the lack of hours Ritchie scheduled her to work at Entrada. During this time period, Complainant cried on a number of nights because of her stress, worry and fear. Because of that stress and the financial needs of her family, Complainant began looking for other work after she started back to work for Entrada.⁹ On October 20, 1998, Complainant was hired as a housekeeper at the Inn of the Seventh Mountain, working 40 hours per week. Complainant actually started work at the Inn of the Seventh Mountain on October 23, 1998.

58) During her leave from Entrada, Complainant had reserved childcare for her baby at the Growing Tree, a local child care facility. She lost her reservation because she was unable to give the Growing Tree a definite date when she could bring the baby in because of her uncertainty as to when she would be returning to work at Entrada and inability to pay their fee. There was no evidence presented regarding the amount of the fee.

59) Between November 1 and 15, 1998, Ford and Seibert were Entrada's only housekeepers. In that time period, they worked the following hours, for a total of 98.5 hours:

K. Ford:	44.75
K. Seibert:	53.75

60) Between November 16 and 31, 1998, Ford and Seibert were Entrada's only housekeepers. In that time period, they worked the following hours, for a total of 132.75 hours:

K. Ford:	54
K. Seibert:	78.75

61) Respondent did not hire another housekeeper until December 9, 1998.

62) No evidence was presented concerning the availability of work at Respondent's other Bend facility at material times, except for the fact that housekeepers employed at Entrada sometimes worked there.

63) Respondent had no written policies regarding leaves of absence during Complainant's employment with Respondent. Respondent's general practice was that anyone who left was welcome to come back.

64) Jeffrey Carlson's testimony concerning the operation and procedures of BOLI's mail room was credible in its entirety.

65) Richard Buxton's testimony was not entirely credible. As Complainant's husband, he had an inherent bias. He demonstrated a tendency to exaggerate by testifying that Complainant had worked 37 to 38 hours per week before beginning her leave, and that he and Complainant could have paid their bills, had she worked her regular hours after September 24. In contrast, Respondent's time records, which the forum has found reliable, established that Complainant had worked only 23 hours per week before beginning her leave, and Complainant herself testified that all their bills could not have been paid, even if Complainant had worked her former hours after September 24. His memory was not totally accurate as to dates, as shown by his testimony that Complainant returned to work for Entrada before she applied for unemployment benefits and did not work for Entrada after she filed for unemployment benefits. Consequently, the forum has relied on his testimony only where it is not controverted by other credible evidence.

66) Doug Ritchie's testimony was not entirely credible. He did not contemporaneously document any of his conversations with Complainant. His testimony that Complainant did not contact him to ask about returning to work before October 3, and that he immediately offered Complainant work on October 4, which she declined, is simply not believable. To begin with, his testimony on this point is contrary to the credible testimony of Complainant and her husband. Secondly, it makes no sense that he would offer Crain's October 4 hours to Complainant, but not Crain's October 7 hours. Finally, in a letter to the Agency dated November 10, 1998, in which Ritchie initially responded to Complainant's complaint, Ritchie made no mention of scheduling her to work on October 4. Ritchie's claim that he had problems with Complainant's job performance was likewise was not supported by any evidence other than his own testimony, and was partially controverted by Ritchie's own testimony that Complainant was a "fine employee" and his written statement in the same November 10, 1998 letter to the Agency that he would "love to put her back to work." In addition, Ritchie testified that he had given Kim Ford a raise because she was one of Respondent's better employees, but Ford testified credibly that she was never given a raise. The forum has discredited Ritchie's testimony concerning his testimony that Complainant never asked him to return to work before October 3 and that he scheduled her to work on October 4. The forum has also discredited Ritchie's testimony concerning Complainant's alleged performance problems. The forum has credited the remainder of Ritchie's testimony except where it is controverted by other credible evidence, such as Complainant's calendar.

67) Complainant's testimony was not entirely credible. Like her husband, she showed a tendency to exaggerate. She testified that she sometimes showed up as early as "6:30 to 7:30 a.m." to do laundry, contrary to her time cards and the contemporaneous entries on her calendar. She testified she believed she was a "supervisor" because she sometimes assigned rooms, did laundry, and trained new employees when the housekeeping supervisor was absent, and told the Employment Department in her application for unemployment benefits that she was an "assistant supervisor." However, she also testified that no one ever told her she was a supervisor and that she never got a raise indicating she had been promoted, and her husband testified she was not a supervisor. Her estimate that she worked an average of 25 to 30 hours per week, with the average being closer to 30, was substantially more than the 23 hours per week she actually averaged. Her answers were non-responsive to a number of questions asked on both direct and cross-examination, and she did not seem to understand the substance of a number of questions put to her. On cross-examination, she was defensive, argumentative, and had to be instructed by the ALJ to listen carefully and respond directly to the questions asked of her. On the other hand, her testimony regarding the dates that she contacted Ritchie asking to return to work after her doctor's appointment on September 24 was supported by contemporaneous entries on her calendar that the forum has found to be reliable. The forum has credited Complainant's testimony except where it conflicts with her calendar entries and Respondent's time cards, and has credited her calendar entries in full.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was an Oregon employer that utilized the personal services of 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in both 1997 and 1998.

2) Complainant was employed by Respondent at the Best Western Entrada Lodge from January 17, 1998, through October 19, 1998.

3) Complainant learned she was pregnant on January 17, 1998.

4) On July 27, 1998, Complainant left work due to her pregnancy, based on the advice of her physician. Complainant did not work again for Respondent prior to the birth of her child. More than 180 days elapsed between January 17, 1998, and July 27, 1998. Prior to July 27, Complainant worked an average of 23 hours per week for Respondent.

5) Complainant's child was born on August 20, 1998. She did not immediately return to work, but remained on leave.

6) During Complainant's absence, Respondent hired two housekeepers, Korissa Garfield and Christina Crain, on an as-needed basis to perform work that Complainant would have performed, had she not been off work on parental leave.¹⁰

7) On September 24, 1998, Complainant called Douglas Ritchie, Respondent's general manager, and told him she was ready to come back to work.

8) Complainant anticipated being scheduled for 25 to 30 hours of work per week upon her return to work.

9) Respondent did not assign any work hours to Complainant between September 25 and September 30, 1998. During that period, Garfield and Crain worked a total of 27 hours that Complainant could have worked.

10) Between October 1 and October 15, 1998, Crain worked a total of 16.75 hours that Complainant could have worked. Complainant worked only 10.25 hours in

that time. Had Respondent restored Complainant to her former position, she would have worked a total of 27 hours during that two-week period.

11) Complainant lost \$262.50 in gross wages as a result of Respondent's failure to restore her to a housekeeping position immediately after she attempted to return to work on September 24, 1998.

12) Complainant experienced mental suffering as a result of Respondent's failure to immediately restore her to a housekeeping position between September 24, 1998, when she attempted to return to work, and October 10, 1998, when Respondent restored her to a housekeeping position.

13) Respondent's occupancy rates fluctuate dramatically during the course of a year. The record indicates that the 1998 occupancy rate ranged from a high in the last half of July 1998 to a low in the first half of November 1998. The hours worked by Respondent's housekeepers are directly proportionate to Respondent's occupancy rate, ranging from a high in the last half of July 1998 of 646.75 hours worked by eleven housekeepers to a low in the first half of November 1998 of 98.5 hours worked by two housekeepers.

14) After July 31, the number of hours worked by housekeepers per bi-monthly payroll period dropped steadily until November 16, 1998, when they begin increasing again, as indicated below:

August 1-15:	555.5 hours
August 16-31:	414.75 hours
September 1-15:	239.75 hours
September 16-30:	245.25 hours
October 1-15:	151.75 hours
October 16-31:	123.5 hours
November 1-15:	98.5 hours
November 16-31:	132.75 hours

15) Respondent did not hire any new housekeepers between September 25, 1998, and October 7, 1998, Garfield's and Crain's respective last dates of employment, and December 9, 1998.

16) Respondent's failure to schedule Complainant to work the number of hours she anticipated upon her eventual restoration to her position was due to Respondent's low occupancy rate, not unlawful discrimination.

17) Complainant left Respondent's employment on October 20, 1998, to take a fulltime job as a housekeeper, earning more than she would have earned had she continued to work for Respondent. She left because of financial hardship that she and her family were experiencing and additional financial stress she anticipated based on Respondent's failure to schedule her to work 25 to 30 hours per week. Some of this financial hardship was caused by her loss of \$262.50 in gross wages that she would have earned between September 25 and October 7, 1998, had Respondent restored her to her former position upon her request. A significant part of the financial hardship was due to the fact that Complainant earned no wages during her leave.

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."

Respondent was a "covered employer." ORS 659.470(1); ORS 659.472(1).

2) The actions and motivations of Douglas Ritchie, Respondent's general manager, are properly imputed to Respondent.

3) ORS 659.474(1) provides in pertinent part:

"All 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: * * * (b) An

employee who worked an average of fewer than 25 hours per week for the covered employer during the 180 days immediately preceding the date on which the family leave would commence.”

OAR 839-009-0210(2)(a) further explains that “Eligible employee” means:

“(a) For the purpose of parental leave, an employee who has worked for a covered employer for at least 180 calendar days immediately preceding the date on which family leave begins.

“(b) For all other leave purposes, an employee who has worked for a covered employer for an average of at least 25 hours per week for the 180 calendar days immediately preceding the date on which family leave begins.”

OAR 839-009-0200 provides in pertinent part:

“The 1995 Oregon Family Leave Act, hereinafter referred to as OFLA, provides leave:

“(1) To care for an employee’s newborn * * * child. These rules refer to this type of leave as parental leave.

“(2) For an employee’s own serious health condition or to care for a family member with a serious health condition, including pregnancy related conditions. These rules refer to this type of leave as serious health condition leave.”

Complainant worked at least 180 calendar days immediately preceding July 27, 1998, the date on which she stopped working because of her pregnancy-related serious health condition leave began on July 27, 1998, but did not work an average of at least 25 hours per week for Respondent immediately prior to that date and was therefore not eligible for serious health condition leave. Complainant did work for Respondent at least 180 calendar days immediately preceding August 20, 1998, the date her parental leave commenced, and was an “eligible employee” for parental leave.

4) ORS 659.476(1)(a) provides:

“(1) Family leave under ORS 659.470 to 659.494 may be taken by an eligible employee for any of the following purposes:

“(a) To care for an infant * * * .”

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.”

Complainant was entitled to take up to 12 weeks of family leave to care for her infant.

5) ORS 659.484 provides, in pertinent part:

“(1) After returning to work after taking family leave under the provisions of ORS 659.470 to 659.494, an eligible employee is entitled to be restored to the position of employment held by the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave. If the position held by the employee at the time family leave commenced no longer exists, the employee is entitled to be restored to any available equivalent position with equivalent employment benefits, pay and other terms and conditions of employment. If any equivalent position is not available at the job site of the employee’s former position, the employee may be offered an equivalent position at a job site located within 20 miles of the job site of the employee’s former position.

“* * * * *

“(3) This section does not entitle any employee to:

“* * * * *

“(b) Any right, benefit or position of employment other than the rights, benefits and position that the employee would have been entitled to had the employee not taken the family leave.”

OAR 839-009-0270 provides, in pertinent part:

“(1) The employer must return the employee to the employee’s former position if the job still exists even if it has been filled during the employee’s family leave unless the employee would have been bumped or displaced if the employee had not taken leave. The former position is the position held by the employee when family leave began, regardless of whether the job has been renamed or reclassified. * * *

“(2) If the position held by the employee at the time family leave began has in fact been eliminated and not merely renamed or reclassified, the employer must restore the employee to any available, equivalent position.

“(a) An available position is a position which is vacant or not permanently filled.

“(b) An equivalent position is a position which is the same as the former position in as many aspects as possible. If an equivalent position is not available at the employee’s former job site the employee may be restored to an equivalent position within 20 miles of the former job site.”

“* * * * *

(10) An employer may not use the provisions of this section as a subterfuge to avoid the employer’s responsibilities under OFLA.”

During Complainant's family leave, Respondent hired two housekeepers, Garfield, and Crain, to perform work that Complainant would have performed, had she not been on leave. Respondent violated ORS 659.484 by failing to give Complainant the opportunity to work the shifts worked by Garfield and Crain, beginning September 25, 1998, after Complainant's request to return to work on September 24, 1998.

6) ORS 659.492 (1) provides:

“(1) “A covered employer who denies family leave to an eligible employee in the manner required by ORS 659.470 to 659.494 commits an unlawful employment practice.”

Respondent committed an unlawful employment practice in violation of ORS 659.492(1) by failing to restore Complainant to the position of employment she held when her leave commenced. Respondent did not constructively discharge Complainant.

7) ORS 659.492(2) provides:

“(2) Any employee claiming to be aggrieved by a violation of ORS 659.470 to 659.494 may file a complaint with the Commissioner of the Bureau of Labor and Industries in the manner provided by ORS 659.040. The Commissioner of the Bureau of Labor and Industries shall enforce the provisions of ORS 659.470 to 659.494 in the manner provided in ORS 659.010 to 659.110 for the enforcement of other unlawful employment practices.”

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.*

OPINION

INTRODUCTION

In its Specific Charges, the Agency alleged that Respondent violated Oregon's Family Leave Act by: (1) failing to restore Complainant to the position she held at the time she commenced her family leave, and (2) constructively discharging Complainant. The Agency prayed for \$1,000 in back pay and \$15,000 mental suffering damages to compensate Complainant for Respondent's unlawful acts.

FAILURE TO RESTORE COMPLAINANT TO THE POSITION SHE HELD AT THE TIME SHE COMMENCED HER PARENTAL LEAVE

To establish a prima facie case that an employer committed an unlawful employment practice by failing to restore an employee to the position she held at the time she commenced her family/parental leave, the agency must prove:

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” for family/parental leave – *i.e.*, she was employed by a “covered employer” and worked for the employer at least 180 calendar days immediately preceding the date on which her parental leave began [ORS 659.474; OAR 839-009-0210(2)(a)];
3. The employee took up to 12 weeks of family/parental leave [ORS 659.476(1)(a), ORS 659.478];
4. The employee attempted to return to work after taking family/parental leave and was denied or refused restoration to the position of employment held by the employee when the leave commenced [ORS 659.484(1); OAR 839-009-0270(1) & (2)].

The first and third elements of the Agency’s prima facie case are undisputed.

The second element, although undisputed regarding whether or not Complainant had worked 180 days for Respondent prior to taking parental leave, requires additional discussion because of the particular circumstances of Complainant’s leave. When Complainant left work on July 27, she had worked for Respondent for 180 days “immediately preceding” her leave, but only worked an average of 23 hours per week, two hours less than the minimum average of 25 hours per week required for eligibility for the purpose of taking a “serious health condition” leave due to her pregnancy related condition. See *OAR 839-009-0210(2)(b)*. Eligibility for parental leave, on the other hand, requires only that the employee worked for the employer at least 180 calendar days immediately preceding the date on which her parental leave began. There was no evidence presented showing that Complainant’s employment relationship with Respondent was in any way severed between July 27 and August 20, 1998. In

contrast, Ritchie's testimony was that he expected Complainant to return to her housekeeping duties after her leave. Consequently, because Complainant never stopped being Respondent's employee, the forum concludes that Complainant satisfied the requirement of working for Respondent "at least 180 calendar days immediately preceding" August 20, 1998 and was an "eligible employee" for parental leave as defined in ORS 659.474(2) and OAR 839-009-0210(2)(a). This satisfies the second element of the Agency's prima facie case.

As for the fourth element, credible testimony from the Complainant, corroborated by her calendar notes, establishes that Complainant attempted to return to work from her parental leave on September 24, 1998 and was not rescheduled for work until October 10. Respondent's time cards and Complainant's credible testimony establish that employees who were hired after Complainant went on leave, Garfield and Crain, worked 43.75 hours between September 24, 1998 and October 7, 1998 that Complainant could have worked. This evidence is sufficient to establish the fourth element of the Agency's prima facie case.

Once the Agency has established the four elements of its prima facie case, there is a rebuttable presumption that Respondent refused to give effect to Complainant's entitlement to job restoration. *In the Matter of TJX Companies, Inc.*, 19 BOLI 97, 102 (1999). No motive or intent need be proved. *Cf. In the Matter of Roseburg Forest Products*, 20 BOLI 1, ___ (2000). Respondent may negate that presumption by coming forward with evidence of one or more of the following:

1. The position of employment held by the employee when the leave commenced no longer existed when the employee attempted to return to work; and no available equivalent position existed [ORS 659.484(1); OAR 839-009-0270(1) & (2)];
2. The employee gave unequivocal notice of intent not to return to work [OAR 839-009-0270(8)];

3. The employee would have been bumped or displaced if the employee had not taken leave [OAR 839-009-0270(1)].

In this case, Respondent's primary proffered defense relates to the undisputed temporal nature of its housekeeping positions. It runs something like this: (1) All housekeeping positions are temporary and all housekeepers work on an as-needed basis, subject to hours that fluctuate based on occupancy rates; (2) Because housekeeping positions are temporary, there are no distinctive, identifiable positions – merely an as-needed, variable amount of work to be performed; (3) Complainant was a housekeeper and therefore did not occupy an identifiable position; (4) Because Complainant did not occupy an identifiable position, it is impossible that her "former" position could still exist for the reason that she never had a "position" to start with; (5) Because Complainant did not occupy an identifiable position, Respondent could not have filled her position, during her family leave, with a replacement worker; (6) Because Complainant did not occupy an identifiable position, Respondent was not obligated to schedule Complainant, after her request to return to work, for any additional hours other than the as-needed hours that she actually worked.

The forum rejects Respondent's argument. ORS 659.484 entitles a worker to be restored "to the position of employment held by the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave." In this case, Complainant held the position of housekeeper when her leave commenced. During the last weeks of Complainant's leave, Respondent hired two new housekeepers, Garfield and Crain, to perform work on an "as-needed" basis. Before and after September 24, 1998, they performed exactly the same type of housekeeping work that Complainant had performed before her leave commenced. Between September 25 and October 7, they performed 43.75 hours of work that Complainant could have performed. Under

these circumstances, where an “eligible” employee such as Complainant occupies a position involving nonsupervisory, unskilled labor in which the hours worked vary considerably and turnover is high, making it virtually impossible to “track” any one position, the forum holds: (1) Any worker hired during an eligible employee’s leave to perform the same work that the eligible employee performed before commencing leave meets the definition of “replacement worker” under ORS 659.484(1); and (2) After the eligible employee attempts to return to work, the employer must give that employee the opportunity to work any hours that the replacement worker would have otherwise been scheduled to work. The practical application of this rule in this case is that Respondent should have given Complainant the opportunity to work the hours worked by Garfield and Crain, beginning September 25, 1998. Had Respondent done so, Complainant would have worked an additional 43.75 hours. Respondent violated ORS 659.484 and ORS 659.492 in failing to give Complainant this opportunity.

The forum additionally notes that adoption of Respondent’s argument would have the practical effect of stripping the restoration provisions of OFLA from every employee who, like Complainant, works for a “covered” employer in an unskilled minimum wage position in which hours vary considerably and turnover rates are high. The language of OFLA contains no suggestion that the ORS 659.484 should be interpreted in this manner.

Respondent presented three other defenses that merit minimal discussion. First, that Complainant never presented a medical release to return to work. Second, that Complainant was given all the work that was available. Third, that Complainant did not attempt to return to work until October 3 and turned down Ritchie’s offer of work on October 4. None of these defenses have any merit. First, the medical release is a red herring, in that it is undisputed that Ritchie never asked Complainant to present such a

release.¹¹ Second, the argument that Complainant was given all available work has already been resolved in favor of the Agency. Third, based on an assessment of Ritchie's credibility, the forum has rejected Ritchie's claim that Complainant failed to contact him about work until October 3 and that she subsequently turned down his offer for work on October 4.

BACK PAY

The Agency prayed for \$1,000 in back pay in the Specific Charges. The forum has found that Complainant would have worked an additional 43.75 hours, earning an additional \$262.50 in gross wages, had she been properly restored to her housekeeper position after attempting to return to work on September 24, 1998.

CONSTRUCTIVE DISCHARGE

A prima facie case of constructive discharge resulting from an unlawful employment practice consists of the following elements:

- (1) The respondent must have intentionally created or intentionally maintained discriminatory working condition(s) related to the complainant's protected class status;
- (2) Those working conditions were so intolerable that a reasonable person in the complainant's position would have resigned because of them;
- (3) The respondent desired to cause the complainant to leave employment as a result of those working conditions or knew that complainant was certain, or substantially certain, to leave employment as a result of those working conditions; and
- (4) The complainant did leave the employment as a result of those working conditions.

In the Matter of James Breslin, 16 BOLI 200, 217 (1997), *aff'd without opinion*, *Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999).

A. Did Respondent intentionally create or intentionally maintain discriminatory working condition(s) related to Complainant's protected class status?

Complainant's protected class was that of a worker returning from family leave who was entitled to be restored to her former position of housekeeper, which included being scheduled for any hours that a "replacement worker" would otherwise perform. The evidence shows that Ritchie intentionally failed to schedule Complainant for the hours that Garfield and Crain worked between September 25 and October 7, 1998, in violation of ORS 659.484(1).¹² Ritchie's intentional and discriminatory failure to schedule Complainant for any hours between September 25 and October 7 satisfies the first element of the Agency's prima facie case.

B. Were the discriminatory working conditions so intolerable that a reasonable person in the Complainant's position would have resigned because of them?

The forum has found that Complainant's discriminatory working conditions ended on October 7, 1998, Crain's last day of work. After October 7, Complainant was scheduled to work but the number of hours clashed with her expectation that she would be assigned to work 25 to 30 hours per week. However, the low number of hours that she worked was directly attributable to Respondent's low occupancy rate, not unlawful discrimination. Because of her economic need, she began seeking alternative employment on October 15, a week *after* her discriminatory working conditions had ceased to exist. On October 20, she effectively resigned from employment with Respondent by accepting a higher paying, fulltime job.

Based on the fact that discriminatory working conditions no longer existed when Complainant made her decision to seek alternative employment or when she resigned, the Agency has failed to satisfy the second element of its prima facie case.

Consequently, the forum need not consider whether the third and fourth elements are satisfied, and the Agency's claim of constructive discharge must fail.

MENTAL SUFFERING

The Agency sought an award of \$15,000 to compensate Complainant for the mental suffering she experienced due to Respondent's unlawful discrimination. The forum has concluded that Respondent unlawfully discriminated against Complainant by failing to give Complainant the opportunity to work the hours worked by Garfield and Crain, two "replacement workers," between September 25 and October 7, 1998. Therefore, Complainant is entitled to damages to compensate her for any mental suffering she experienced as a result of Respondent's failure to schedule her to work those hours.

In determining mental distress awards, the commissioner considers a number of things, including the type of discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. *In the Matter of James Breslin*, 16 BOLI 200, 219 (1997), *aff'd without opinion*, *Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999). Awards for mental suffering damages depend on the facts presented by each complainant. A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999).

In this case, Complainant attempted to return to work on September 24, 1998, after taking family leave. At the time, her family was experiencing acute financial distress, largely as a result of her lack of earnings while on family leave. This financial situation, which caused Complainant and her husband to experience considerable stress, is the primary reason she attempted to return to work on September 24, several days earlier than planned. Although Respondent is not responsible for Complainant's

distress caused by her lack of earnings during her family leave, this forum has held that “employers must take employees as they find them.” *In the Matter of Loyal Order of Moose*, 13 BOLI 1, 12-13 (1994); *In the Matter of Allied Computerized Credit & Collections*, 9 BOLI 206, 217-18 (1991). Here, Complainant was already experiencing considerable stress at the time of Respondent’s discriminatory conduct. However, Complainant and her husband credibly testified that Complainant experienced a heightened stress level between September 25 and October 20, 1998, which manifested itself in the form of Complainant being very worried and scared, and crying frequently because Ritchie had not scheduled her for any hours for the first two and one-half weeks after she attempted to return to work, further exacerbating her family’s financial distress.

This forum has previously held that financial insecurity and anxiety caused by an unlawful employment practice is compensable. *In the Matter of Katari, Inc.*, 16 BOLI 149, 161 (1997), *aff’d without opinion, Katari, Inc. v. Bureau of Labor and Industries*, 154 Or App 192, 957 P2d 1231, *rev den* 327 Or 583 (1998). In *Katari*, the commissioner awarded Complainant \$15,000 in mental suffering damages based on circumstances equivalent to what Complainant experienced in this case. Accordingly, the forum concludes that the \$15,000 sought by the Agency to compensate Complainant for her mental suffering is an appropriate award. In making this award, the forum is mindful that the Agency prayer for \$15,000 was based on a failure to restore Complainant to her position, which was proven, and constructive discharge, which was not proven. However, the commissioner’s authority to award monetary damages is only limited as to the total amount sought in the Specific Charges or subsequent amendments. *In the Matter of Kenneth Williams*, 14 BOLI 16, 26 (1995). For the

reasons discussed, the forum finds that \$15,000 is an appropriate award for Complainant's mental suffering for the violation found.

RESPONDENT'S EXCEPTIONS

Respondent filed numerous exceptions to the Amended Proposed Order. The forum addresses them by section.

A. Proposed Findings of Fact – The Merits.

Finding of Fact 33. Respondent objects to this finding as "irrelevant and misleading." This finding is relevant to the forum's conclusion of law that Complainant was not eligible for "serious health condition" leave beginning July 27, 1998. Respondent's objection is overruled.

Finding of Fact 48. Respondent objects to the relevance of this finding. This finding regarding Complainant's state of mind is relevant to the forum's conclusion that Complainant was not constructively discharged. Respondent's exception is overruled.

Findings of Fact 47, 49, 50, 51, 56, and 66. Respondent objects to these findings on the basis that they are in direct conflict with the testimony of and letter written by Doug Ritchie. Based on reasons stated in this Order, the forum determined that Ritchie was not a credible witness and has not relied on his testimony or letter. However, the forum has deleted the reference to Ritchie's voice in Finding 66. Respondent's exceptions are overruled.

B. Proposed Ultimate Findings of Fact.

Ultimate Finding 4. Respondent objects to the relevance of this finding. This finding has the same relevance as Finding of Fact – The Merits 33. Respondent's exception is overruled.

Ultimate Finding 6. Respondent objects to the finding that Garfield and Crain performed work that Complainant would have performed, based on reasoning that has been rejected in this Order. Respondent's exception is overruled.

Ultimate Finding 7. Respondent objects to this finding on the basis that it relies on the Complainant's testimony, not Ritchie's. Again, the forum has determined that Ritchie was not a credible witness and overrules Respondent's exception.

Ultimate Finding 8. Respondent objects to this finding for the reasons cited in its objection to Finding of Fact – The Merits 48. Respondent's exception is overruled for the reason cited earlier in the forum's response to Respondent's objection to Finding 48.

Ultimate Finding 9. Respondent objects to this finding because it assumes Complainant requested a return to work in September. The forum has determined that Complainant did request a return to work in September. Respondent's exception is overruled.

Ultimate Finding 10. Respondent objects to this finding on the basis that Complainant "was never promised any number of hours." This finding is not predicated on a "promise" of a specific number of hours, but on the premise that Complainant was available to work the 16.75 hours worked by Crain. Respondent's exception is overruled.

Ultimate Finding 11. Respondent objects to the forum's finding that Complainant lost \$262.50 as a result of Respondent's failure to restore her to a housekeeping position after September 24, 1998. This finding is supported by substantial evidence in the record. Respondent's exception is overruled.

Ultimate Finding 12. Respondent objects to the forum's finding that Complainant experienced mental suffering. This finding is supported by substantial evidence in the record. Respondent's exception is overruled.

C. Proposed Conclusions of Law.

Conclusion 5. Respondent objects to the forum's conclusion that Complainant would have performed work that Garfield and Crain performed. This conclusion is supported by substantial evidence and substantial reason explained elsewhere in the Order. Respondent's exception is overruled.

Conclusion 6. Respondent objects to the forum's conclusion that Respondent failed to restore Complainant to the position of employment she held when her leave commenced. This conclusion is supported by substantial evidence and substantial reason explained elsewhere in the Order. Respondent's exception is overruled.

D. Proposed Opinion.

Respondent objects that the Agency did not satisfy the fourth element of its prima facie case, that Complainant was awarded back pay, and to Complainant's mental suffering award. Respondent's exceptions were adequately addressed in the Proposed Opinion and are overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and to eliminate the effects of Respondent's violation of ORS 659.484(1) and ORS 659.492(1), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **ENTRADA LODGE, INC.** to:

1) 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 Cheryl Buxton in the amount of:**

a) FIFTEEN THOUSAND DOLLARS (\$15,000.00), representing compensatory damages for mental suffering suffered by Cheryl Buxton as a result of Respondent's unlawful practices found herein, plus

b) TWO HUNDRED SIXTY-TWO DOLLARS AND FIFTY CENTS (\$262.50), less lawful deductions, representing wages lost by Cheryl Buxton between September 25, 1998 and October 7, 1998, as a result of Respondent's unlawful practices found herein, plus

- c) Interest at the legal rate on the sum of \$262.50 from October 8, 1998, until paid, plus
 - d) Interest at the legal rate on the sum of \$15,000 from the date of the Final Order until Respondent complies herewith.
- 2) Cease and desist from discriminating against any employee based upon the employee's use of the Oregon Family Leave Act.

¹ There were no substantive changes in the Amended Proposed Order.

² Ritchie testified, and Respondent's timecards reflect, that housekeeper hours were tracked on a semi-monthly basis for payroll purposes.

³ For example, February's calendar contains numerous entries showing the specific dates and time Complainant worked for Respondent, as well as other entries, such as a reference to a legal notice in "The Bulletin," a note to "pay Farmer's Insurance \$66.46," a note that Complainant "mailed off tax papers & phone bill payment 83.83," and a note that she had "side" and "back pain" on the 12th and 13th.

⁴ Another significant indicator of the calendar's reliability is the fact that the total number of hours recorded on it by Complainant as worked prior to July 27, 1998, is 630.25 hours, whereas the total number of hours on her time cards for that period was 627.50 hours.

⁵ In this and subsequent Findings of Fact, the forum has listed the number of housekeepers who actually worked during the specified time period, based on the time cards in Exhibits A-5, A-7, and R-1. In some instances, this total differs from Respondent's summary entitled "Number of Housekeeping Employees Working Per Pay Period (1998)" (Exhibit R-9).

⁶ In this and subsequent Findings of Fact, the total number of hours worked by housekeepers was derived from adding together the specific hours listed after each housekeeper. In some instances, this total differs from Respondent's summary of "Total Housekeeper Hours" (Exhibit R-7). The forum has used this method of calculation instead of relying on the hours listed in Exhibit R-7 based on Ritchie's testimony that the hours in Exhibit R-7 were derived from housekeeper's time records in Exhibits A-5, A-7, and R-1.

⁷ This figure was reached at by dividing 191 (the number of days in the period of time beginning January 17, 1998 and ending July 26, 1998) by 7 to determine the number of weeks worked by Complainant, then dividing 27.3 (the number of weeks worked by Complainant) into 627.5 (the total number of hours worked by Complainant).

⁸ Crain has since married and identified herself as “Christina Marie Crain Delong” during the hearing. To avoid confusion, this Order refers to her by Crain, her name at the time of the alleged discrimination.

⁹ Complainant did not testify as to the specific date that she began actively seeking other employment. However, Exhibit A-10, which is the “Work Search Record” Complainant completed for the Employment Department after filing her claim for unemployment benefits, shows that she first began searching for other employment on October 15, when she used the Employment Department’s computer to look for work and that she applied for two jobs, including a housekeeper position at the Inn of the Seventh Mountain, on October 16.

¹⁰ The forum refers to Complainant’s leave after the birth of her child on August 20, 1998 as “parental” leave, noting that “parental” leave is a particular type of “family” leave. See OAR 839-009-0200(1).

¹¹ See OAR 839-009-0270(5).

¹² After October 7, 1998, Ritchie did not use Crain again and scheduled Complainant for all the hours not worked by Ford, a housekeeper hired in March 1998, and Siebert, the housekeeping supervisor. However, Complainant was not entitled to work any of the hours worked by Ford or Siebert. The Agency implied, during the presentation of its case, that Complainant should have been entitled to a prorated share of Ford’s and Siebert’s hours after she attempted to return to work. Complainant was not entitled to Siebert’s hours because he was the housekeeping supervisor and occupied a position different than Complainant’s position at the time she commenced her leave. See Finding of Fact – The Merits #41, *supra*. Ford performed the same work as Complainant, but was not a “replacement worker” because Ford was hired before Complainant went on her leave. If the evidence had established an objective, quantifiable methodology consistently used by Ritchie to determine the specific number of hours he

assigned individual housekeepers to work and the Agency proved that use of that methodology would have resulted in Complainant being scheduled for some of Ford's hours after October 7, the result may have been different. Absent such evidence, the forum will not speculate as to what portion of Ford's hours, if any, Complainant would have been scheduled to work, had she not taken family leave.