

**In the Matter of**

**GORDY'S TRUCK STOP, LLC,**

**Case No. 92-03**

**Final Order of Commissioner Dan Gardner**

**Issued June 7, 2005**

**SYNOPSIS**

Complainant took family leave to spend as much time as possible with her dying father. While on family leave, her supervisor repeatedly visited and called her and pressured her to return to work. Finally, her supervisor threatened to fire her if she did not return to work, forcing Complainant to interrupt her family leave entitlement and return to work for one day shortly before her father's death. The forum found that Respondent, acting through its supervisor, constructively denied family leave to Complainant from the first time her supervisor pressured her to return to work and actually denied her family leave by forcing her to return to work for one day during her period of family leave entitlement, in violation of ORS 659A.183. The forum also found that Respondent's act of forcing Complainant to return to work for one day before her entitlement to family leave had expired also constituted retaliation in violation of ORS 659A.183 and *former* OAR 839-009-0320(2). The forum awarded Complainant \$30,000 in damages for emotional distress and mental suffering. ORS 659A.001(12); ORS 659A.150(1), (2), (4), & (6); ORS 659A.153; ORS 659A.156; ORS 659A.159(1)(b); ORS 659A.162; ORS 659A.183; *former* OAR 839-009-0320(2).

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 1, 2005, at the office of the Oregon Employment Department located in Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick Plaza, an employee of the Agency. Penny Howell ("Complainant") was present throughout the hearing and was not represented by

counsel. Jennifer Wells, attorney at law, represented Respondent. Gordon Wanek, Respondent's owner, was present throughout the hearing.

The Agency called the following witnesses: Complainant; Job Valverde, Civil Rights Division senior investigator (telephonic); Marlene Edwards, Complainant's former supervisor (telephonic); Bernice Webster and Barbara Tinbush, Complainant's aunts (telephonic); Kathryn Sanders (telephonic) and Carolynn Eaton-Wallace, Complainant's former co-workers; and Sue Tinbush, Complainant's mother.

Respondent called Gordon Wanek and Marlene Edwards (telephonic) as witnesses.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-12 (submitted prior to hearing);
- c) Respondent exhibits R-1 and R-3 through R-5 (submitted prior to hearing).

Having fully considered the entire record in this matter, the Administrative Law Judge hereby makes 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 June 21, 2002, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent. After investigation, the Agency issued a Notice of Substantial Evidence Determination on May 6, 2003, finding substantial evidence supporting the allegations of the complaint.

2) On November 19, 2004, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by denying her family leave and harassing and retaliating against her because she used OFLA, in violation of *former*

ORS 659.492, *current* ORS 659A.183, and *former* and *current* OAR 839-009-0320. The Agency sought damages for “mental, emotional and physical suffering, including precious time lost with a dying parent that can never be recaptured, in the amount of \$30,000.” Complainant alleged in her verified complaint that Respondent terminated her in retaliation for using family leave, but the Agency did not include this allegation in its Formal Charges.

3) On November 19, 2004, the forum served the Formal Charges on Respondent, accompanied by the following: a) a Notice of Hearing setting forth March 1, 2005, in Eugene, 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, 2004, Respondent, through counsel, filed an answer and request for hearing.

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

6) On April 29, 2005, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent filed exceptions on May 6, 2005. Those exceptions are discussed in the Opinion section of this Final Order. Finding of Fact 5 – The Merits has also been modified in response to Respondent’s exceptions.

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

1) At all times material, Respondent Gordy’s Truck Stop, LLC, was a limited liability company doing business in LaPine, Oregon, and employed 25 or more persons

in the State of Oregon for each working day during each of 20 or more calendar workweeks in 2001 or 2002.

2) Gordon Wanek was Respondent's owner and a member of the LLC at all times material herein.

3) Respondent was open for business 24 hours a day, seven days a week, throughout Complainant's employment with Respondent.

4) Complainant was initially employed by Respondent on March 18, 2001, as a dishwasher at the rate of \$7 per hour. She was subsequently promoted to prep cook and continued to wash dishes as needed. She worked from 3 p.m. to 11 p.m. throughout her employment with Respondent.

5) Marlene Edwards was Respondent's kitchen manager and Complainant's immediate supervisor from September 2001 until Complainant's discharge in March 2002. Edwards was in charge of all kitchen shifts. She supervised as many as 12 people, was in charge of scheduling work shifts for kitchen staff, recommended pay raises for kitchen staff, and had the authority to fire employees. She usually worked six days a week, from 3 p.m. to 11 p.m. She also covered shifts for kitchen staff who didn't show up for work and visited Gordy's from time to time when she was not scheduled to work to make sure there were no problems.

6) Complainant had worked with Edwards about 10 years earlier at the LaPine Inn, but was not a personal friend of Edwards.

7) Complainant was continuously employed by Respondent between March 18, 2001, and February 3, 2002, and worked an average of 25 or more hours per week during the 180 days immediately preceding February 3, 2002.

8) Complainant and her parents, Ron and Sue Tinbush, lived in two separate residences about three miles apart in LaPine, Oregon during Complainant's

employment with Respondent. They had a close relationship and Complainant visited her parents daily and telephoned them almost every day.

9) On or about November 26, 2001, Complainant's father, Ron Tinbush, learned that he had lung and throat cancer and had only had six months to live. After sharing this information with his family, Ron Tinbush decided to remain living at home ("the Tinbush house") until his death.

10) During Complainant's employment with Respondent, Respondent had a written personnel policy, a copy of which was given to Complainant, which included the following language:

**"FAMILY AND MEDICAL LEAVE**

"Gordy's will provide leaves of absence to eligible employees in accordance with federal and state laws. \* \* \*

"In general, eligible employees are entitled to a total of twelve (12) workweeks of leave during any twelve month period for one of [sic] more of the following:

"\* \* \*

"To care for a child, spouse, or parent who has a serious health condition."

11) In early February 2002, Complainant told Edwards that her father had cancer, with only six months to live as of November 2001, and that she needed to take family leave to care for him. Complainant was aware of Respondent's family and medical leave policy at that time. Complainant requested leave until her father died or 12 weeks had passed, whichever came first. At the same time, Complainant gave Edwards a handwritten request containing the same information as her oral request. Edwards approved Complainant's leave request, and Complainant started her family leave on February 3, 2002. Complainant had not previously taken any family leave since starting work for Respondent.

12) Edwards orally told Respondent's main office personnel that Complainant's father was very ill and Complainant was going to be off on family leave.

13) Complainant is a single mother with two daughters. After Complainant commenced her family leave, each weekday she took one daughter to kindergarten, then went to the Tinbush house with her preschool daughter. She stayed at the Tinbush house until school was out, then picked up her daughter and returned to the Tinbush house, where she stayed until 8 or 9 p.m.

14) Edwards called Complainant at the Tinbush house an average of once a week during Complainant's family leave. Each time she called, she asked Complainant when she was going to return to work. The first call was during Complainant's first week of family leave. Edwards's calls made Complainant feel pressured to return to work.

15) On one occasion when Edwards called the Tinbush house, she asked Complainant when she would come back to work, stated that her father could linger on forever, and told Complainant she needed to come back to work. Edwards added that Complainant would lose her job if she didn't come back to work. Edwards did not specify a deadline for Complainant to return to work in that call.

16) At the time of Complainant's family leave, the Tinbushes did not consider Edwards to be a family friend.

17) Edwards, a Jehovah's Witness, visited the Tinbush house twice prior to February 3, 2002, both visits occurring sometime in the 1990s. The purpose of her visit on both occasions was to preach to Sue Tinbush about the Jehovah's Witness religion. Sue Tinbush is a Catholic and did not welcome this visit.

18) Edwards visited the Tinbush house twice after Complainant commenced her family leave and before Complainant's father died. The first visit was about February 10, 2002, when she brought a food basket as a gift from Respondent and its employees. The second visit occurred sometime between the first visit and March 5,

2002. Both times, Edwards wanted Complainant to tell her when she would return to work, with the result that Complainant felt pressured to return to work. Edwards did not visit with Complainant's parents during her visits to the Tinbush house.

19) Two to three weeks after Complainant started her family leave, she wrote a second note to Respondent in which she stated she was on family leave, that her father was sick and dying, and that she was going to stay on family leave until her father died or 12 weeks had passed. Carolynn Eaton-Wallace, Complainant's friend and former co-worker, delivered the note to Edwards. Complainant had told Eaton-Wallace that Edwards kept calling her, asking her to return to work, and that she was afraid she would lose her job. When Eaton-Wallace gave the note to Edwards, Edwards "nastily" said "I'll take it" and told Eaton-Wallace she would have to get a replacement for Complainant because "her father could just linger on forever." Edwards contacted Complainant, acknowledged she got the note, and asked when Complainant was coming back to work.

20) Bernice Webster, Complainant's aunt and Ron Tinbush's sister, stayed at the Tinbush house for several weeks immediately prior to March 7, 2002. During that period of time, she spoke with Edwards two or three times when Edwards called to speak with Complainant. On one of those occasions, Edwards told Webster that she really needed Complainant at work and asked Webster to try and persuade Complainant to come to work. Edwards told Webster that Complainant's father could live any number of days. Webster told Edwards that Complainant was in no shape to come to work. Webster informed Complainant of Edwards's comments and advised Complainant to hang up if Edwards called again.

21) Sue Tinbush, Complainant's mother, talked to Edwards on one occasion when Edwards called to talk with Complainant. Edwards told her there was no reason for Complainant to stay home because Ron Tinbush "could last forever."

22) Edwards's phone calls and visits to Complainant were "very stressful and emotional" for Complainant.

23) Complainant cried and complained to her mother that she was very upset about Edwards calling and trying to get her to come back to work because she only had a limited amount of time left with her father.

24) No one, including Complainant and her family, ever told Edwards not to call or come to the Tinbush house.

25) During Complainant's absence, Edwards and other kitchen staff worked extra hours to cover Complainant's shifts. Edwards did not hire anyone else to replace Complainant. Edwards and the other kitchen staff worked six days a week to cover Complainant's shifts. By March 5, 2005, they were tired from working the extra shifts.

26) Edwards asked Complainant to return to work on March 5, 2002, Complainant's birthday, and threatened her with loss of her job if she did not work. Complainant worked her regular shift, 3 p.m. to 11 p.m., because she was in fear of losing her job. When she arrived home after work, the hospice worker on duty at the Tinbush house told her that her father had taken a turn for the worse and only had 24-48 hours to live. Complainant phoned Edwards and told her that she had to go back on her family leave, as her father wasn't going to last much longer.

27) Being absent from her father's side on March 5, 2002, made Complainant feel "very sad and emotional." She still thinks about having to work that day and feels "very emotional" about it.

28) Complainant's father was unconscious during the last two weeks of his life. During this time, Complainant still talked to him and tried to comfort him, while crying much of each day.

29) Complainant's father died on March 7, 2002, at 5 p.m. Within three hours, Edwards showed up at the Tinbush house and asked Complainant when she was coming back to work.

30) Edwards fired Complainant a week later.

31) Edwards's calls to Complainant during her family leave kept Complainant feeling "torn up," not knowing what to do. In general, they were "very stressful and emotional" for her. Complainant was "terrified" of losing her job because she was a single mother who was the sole support of her two children.

32) Complainant was also very upset between February 3 and March 7, 2002, because her father was dying. Complainant received no income during her family leave except for her tax returns and felt financially stressed during her leave.

33) Wanek did not ask Edwards to contact Complainant and find out when she would be back to work and was unaware of Edwards's visits and calls to Complainant during her family leave except for the visit when Edwards delivered the food basket.

34) Respondent has a written "open door" grievance policy in its employee handbook stating that employees with grievances should first talk to their manager, then Wanek if their manager's response did not satisfy them. Complainant did not tell Wanek about Edwards's harassment while she was still employed by Respondent. Complainant was discharged on or about March 14, 2002. When she complained to Wanek about the harassment, he told her to talk to Edwards, the person who had harassed and discharged her, and denied that Edwards had ever gone to the Tinbush house.

35) Bernice Webster was a credible witness despite her natural bias. She had a specific recollection of conversations with Edwards and of Complainant's emotional response to her father's terminal illness and Edwards's attempts to get her to return to work. Her testimony was not exaggerated and she readily acknowledged her inability to recall or lack of knowledge in response to several questions posed by the Agency case presenter. The forum has credited her testimony in its entirety.

36) As Complainant's mother, Sue Tinbush had a natural bias. Her demeanor during the hearing was sincere. She answered questions in a forthright manner and her testimony was supported by other credible evidence, with one exception. The exception was her testimony that she thought Complainant went on family leave a week before Ron Tinbush died. With this exception, the forum has credited her testimony in its entirety.

37) Barbara Tinbush had a natural bias as Complainant's aunt. However, that did not affect her testimony. She answered questions directly, did not speculate about things she had no knowledge of, and gave testimony that was consistent with other credible evidence in the record. The forum has credited her testimony in its entirety.

38) Kathryn Sanders is Complainant's friend and former co-worker at Gordy's who quit in May 2002. Her testimony and statements she made to an Agency investigator reflected a bias against Respondent and Edwards in particular. Her memory was also impaired, as shown by her testimony that Complainant's father passed away on the same day Complainant returned to work. The forum has only credited her testimony where it was corroborated by other credible evidence in the record.

39)Carolynn Eaton-Wallace was the most objective witness who testified. Although she testified that she had been dissatisfied with Edwards's management and

quit because of it, the forum was not left with an impression that she had any sort of grudge against Respondent or Edwards that biased her testimony. She was a friend of Complainant's, but not a family friend. She is not employed by Respondent and did not have a financial stake in the outcome. Unlike Edwards, she testified in person and the forum had an opportunity to observe her demeanor. Her demeanor was sincere and she testified at length, answering questions forthrightly and without prompting. She had a clear recollection of events. The forum has credited her testimony in its entirety and relied heavily on it. Whenever her testimony contradicted testimony given by Edwards, the forum has believed Eaton-Wallace.

40) Job Valverde's testimony was mostly limited to authenticating documents and describing the procedural aspects of the Agency's investigation. He also testified that the contents of his typed interview with Complainant were accurate. The forum has credited his testimony in its entirety.

41) With two exceptions, Gordon Wanek's testimony was credible. First, his claim that he never heard anything about Edwards's calls and visits to Complainant until he received Complainant's BOLI complaint. This testimony was contradicted by the more credible testimony of Complainant and Eaton-Wallace, who both testified that Complainant told Wanek about Edwards's calls and visits during their meeting with Wanek after Edwards fired Complainant. Second, his testimony about his "open door" policy and willingness to meet with employees about their grievances was not credible in light of his instructions to Complainant to talk to Edwards when Complainant complained to him about Edwards's harassment and her termination.

42) Edwards was a telephone witness and the forum had no opportunity to observe her demeanor. In contrast, the Agency's key witnesses -- Complainant, Eaton-Wallace, and Sue Tinbush, whose testimony clashed with that given by Edwards --

testified in person. At the time of the hearing, Edwards had not worked for Respondent for some time, which eliminated the prospects of financial gain or loss or retaliation by Respondent as issues that might have otherwise affected her credibility. Her response to every question was immediate and direct. However, her testimony lacked candor and seemed contrived to show herself in the best possible light. For example, she testified that she lost her own mother, father, and husband to cancer, and that the reason she kept calling Complainant at home was to see how things were and to let Complainant know she was available if Complainant wanted to talk to someone. On direct, she testified that she considered herself to be a family friend with the Tinbushes, then on cross acknowledged she did not socialize with them, but said she had been to the Tinbush house twice "quite awhile ago." Subsequently, Sue Tinbush credibly testified that Edwards was not a family friend and the two times Edwards had visited the Tinbush house were in her capacity as a Jehovah's Witness coming to peddle her religion to an unwilling audience. Edwards's testimony was also contradicted by the more credible testimony of Complainant, Webster, and Sue Tinbush. Edwards's claim that she kept calling because "[Complainant] was hurting and I was hoping that she would talk to me and maybe be able to feel better about things" was directly contradicted by all these witnesses, who testified that the only focus of Edwards's calls were to try to get Complainant to return to work as soon as possible and that her calls included callous comments about Ron Tinbush's remaining life span. Her claim that Complainant voluntarily returned to work on March 5 is simply unbelievable. The forum can imagine no rational reason why Complainant would have voluntarily returned to work on March 5, 2002, at a time when she planned to continue her leave until her father had died or 12 weeks had passed, when she was emotionally distraught over her father's condition and Edwards's continuing harassment, and when her father had

lapsed into a coma. Edwards's credibility is further eroded by her testimony that Complainant only worked a partial shift on March 5, whereas Respondent's record shows that Complainant worked her full shift. Finally, the fact that Edwards visited the Tinbush house three hours after Ron Tinbush died to ask when Complainant would return to work undercuts her claim that she was only trying to be sensitive to Complainant and her family. The forum has only credited her testimony where it was corroborated by other credible evidence in the record.

43) Complainant was an extremely emotional witness, on the point of tears during much of her testimony. The forum found her testimony at hearing to be credible, despite conflicts between her testimony and prior statements made in on her formal complaint, intake questionnaire, and to Agency investigators. On her intake questionnaire and formal complaint she stated that Edwards "called almost daily" and "just about everyday." In her September 16, 2002 interview with Valverde, she stated that Edwards "came to see [me] almost every other day" and "came to [the Tinbush] house at least on six different times." In an April 2, 2003, interview with Agency investigator Barbara Turner, Complainant stated that Edwards came to the Tinbush house "at least four times" and "called [me] every other day asking if [I] was going to come back to work." In contrast, at hearing she testified that Edwards called once a week on the average and came to the Tinbush house several times. Since these statements agreed with testimony given by Edwards and the Agency's other witnesses, the forum has accepted them as true and considered Complainant's prior statements to be exaggerations. Likewise, on her formal complaint, intake questionnaire, and in her interview with Valverde, Complainant stated that her leave started on February 18, 2002, whereas she testified at hearing that it began on February 3, 2002, a fact that was undisputed. Complainant's testimony on all significant points was corroborated by other

credible evidence in the record. The forum has believed Complainant over Edwards and Wanek whenever their testimony conflicted.

### **ULTIMATE FINDINGS OF FACT**

1) At all times material, Respondent Gordy's Truck Stop, LLC, was an employer that employed 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in 2001 or 2002.

2) Complainant was continuously employed by Respondent between March 18, 2001, and February 3, 2002, and worked an average of 25 or more hours per week during the 180 days immediately preceding February 3, 2002.

3) Marlene Edwards was Respondent's kitchen manager and Complainant's immediate supervisor from September 2001 until Complainant's discharge in March 2002.

4) In early February 2002, Complainant told Edwards that her father had cancer, with only six months to live as of November 2001, and that she needed to take family leave to care for him. Complainant requested leave until her father died or 12 weeks had passed, whichever came first. At the same time, Complainant gave Edwards a handwritten request containing the same information as her oral request. Edwards approved Complainant's leave request, and Complainant started her family leave on February 3, 2002.

5) Edwards called Complainant at her parents's house an average of once a week during Complainant's family leave. Each time she called, she pressured Complainant to return to work. On one occasion, Edwards said Complainant would lose her job if she did not come back to work. On another occasion, she tried to get Complainant's aunt, Bernice Webster, to convince Complainant to return to work.

6) Edwards visited the Tinbush house twice between February 10 and March 5, 2002. Both times, Edwards wanted Complainant to tell her when she would be returning to work, with the result that Complainant felt pressured to return to work.

7) Edwards asked Complainant to return to work on March 5, 2002, and threatened Complainant with the loss of her job if she did not work. Complainant worked her regular shift, 3 p.m. to 11 p.m., because she was in fear of losing her job. When she arrived home after work, she learned her father only had 24-48 hours to live. Complainant phoned Edwards and told her that she had to go back on her family leave, as her father wasn't going to last much longer.

8) Complainant's father died on March 7, 2002, at 5 p.m. Within three hours, Edwards showed up at the Tinbush house and asked Complainant when she was coming back to work.

9) Complainant experienced and continues to experience substantial emotional distress and mental suffering as a result of Edwards's phone calls and visits and her absence from her father's side on March 5, 2002.

#### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent was a "covered employer" as defined in ORS 659A.153.

2) The actions, inaction, statements and motivations of Marlene Edwards, Respondent's kitchen manager, are properly imputed to Respondent.

3) At all times material herein, Complainant was an "eligible" employee as defined in ORS 659A.156.

4) Complainant's father had a "serious health condition." Complainant was entitled to take up to 12 weeks of family leave to care for her father. ORS 659A.150(4) & (6); ORS 659A.159; ORS 659A.162.

5) Respondent, through Edwards's actions of pressuring Complainant to return to work while Complainant was on family leave, then requiring Complainant to return to work on March 5 or be fired, denied Complainant family leave in violation of ORS 659A.183 and *former* OAR 839-009-0320(2).

6) Respondent, through Edwards's action of requiring Complainant to return to work on March 5 or be fired, retaliated against Complainant based on her use of family leave and violated ORS 659A.183 and *former* OAR 839-009-0320(2).

7) 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 practices found. ORS 659A.183; ORS 659A.820; ORS 659A.830; ORS 659A.850(2).

## **OPINION**

### **INTRODUCTION**

In its Formal Charges, the Agency alleged that Respondent, through Marlene Edwards, discriminated against Complainant based on three different theories – harassment, denial of family leave, and retaliation. The Agency sought \$30,000 in damages for “mental, emotional, and physical suffering” caused by the alleged unlawful employment practices. Respondent alleged two affirmative defenses: (1) The Formal Charges failed to state sufficient facts to state a cause of action; and (2) Respondent was not liable for Edwards's conduct because the alleged harassment was “not within the time and space limits authorized by employment” and because Respondent “never instructed, nor authorized Marlene Edwards to contact Complainant regarding returning to work.”

## **HARASSMENT**

The forum evaluates the Agency's harassment charges in light of OAR 839-005-0010(4), BOLI's administrative rule that defines "[h]arassment in employment based on an individual's protected class." In order to prevail in this case, the Agency is required to prove the following: (1) Respondent was a "covered" employer under OFLA; (2) Complainant was an "eligible" employee under OFLA who took family leave; (3) Respondent, through Edwards, subjected Complainant to unwelcome verbal conduct related to her family leave; (4) Edwards's conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Complainant's work performance or created an intimidating, hostile or offensive working environment for Complainant; and (5) Edwards's conduct harmed Complainant.

The Agency proved the first three elements of its case. Respondent admitted facts that established it was a "covered" employer under ORS 659A.153 and stipulated to facts that established Complainant was an "eligible" employee under ORS 659A.150(2). Undisputed evidence established that Complainant took family leave. Through credible testimony by Complainant, Eaton-Wallace, Webster, and Sue Tinbush, the Agency proved that Respondent, through Edwards, subjected Complainant to unwelcome verbal conduct related to her family leave.

The Agency's case breaks down at this point. In order to prevail, the Agency must show that Edwards's conduct had "the purpose or effect of unreasonably interfering with Complainant's work performance or creating an intimidating, hostile or offensive working environment." OAR 839-005-0010(4)(a)(A). Here, all of Edwards's conduct occurred away from Respondent's workplace. Complainant credibly testified that she returned to work on March 5 because she was in fear of losing her job. However, she did not testify that Edwards's prior conduct interfered with her work

performance or created an intimidating, hostile, or offensive working environment on that date, or that she was harassed in any way at work on March 5 because she had taken family leave.

Because there is no evidence that Edwards's conduct, objectionable as it may have been, interfered with Complainant's work performance or created an intimidating, hostile or offensive working environment, the forum must conclude that Edwards's conduct did not constitute unlawful "harassment" in the manner alleged by the Agency.<sup>i</sup>

### **DENIAL OF FAMILY LEAVE**

In order to prove Respondent unlawfully denied Complainant family leave, the Agency is required to prove the following elements: (1) Respondent was a "covered" employer; (2) Complainant was an "eligible" employee; (3) Complainant's family member had a "serious health condition"; and (4) Respondent denied Complainant family leave. See, e.g. *In the Matter of Magno-Humphries, Inc.*, 25 BOLI 175, 192 (2004).

As stated earlier, elements (1) and (2) are undisputed. "Serious health condition" includes "[a]n illness, disease or condition that in the medical judgment of the treating health care provider \* \* \* is terminal in prognosis with a reasonable possibility of death in the near future [.]" ORS 659A.150(6)(b). The Agency's witnesses credibly testified that Complainant's father was diagnosed with terminal cancer in late November 2001, with a prognosis that he had six months to live. This condition is precisely the type of condition that the statute was intended to encompass and satisfies the third element of the Agency's case.

#### **A. Complainant was actually denied family leave on March 5, 2002.**

Respondent argues that Complainant was not denied family leave because Complainant was in fact allowed to take family leave and because Complainant

voluntarily returned to work on March 5. The forum has already concluded that Complainant only returned to work on March 5 because she believed she would otherwise be fired.<sup>ii</sup> Under these circumstances, Complainant's return to work on March 5 was a coerced act, not a voluntary one. With her father so close to death, Complainant did not want to return to work on March 5 and her forced return, under pain of discharge, was an actual denial of her right to continue her family leave for 12 weeks<sup>iii</sup> or until her father died and an unlawful employment practice under ORS 659A.183.

**B. Respondent constructively denied Complainant family leave from early February 2002 until March 4, 2002, and on March 6 and 7, 2002.**

It is undisputed that Complainant began her family leave on February 3, 2002. It is also undisputed that that she had a very close relationship with her father and that her purpose for taking family leave was to spend as much time as possible with her dying father. When Complainant left work on February 3, 2002, she made it clear to Edwards, orally and in writing, that she would return to work when her father died or 12 weeks had passed, whichever occurred first. Two to three weeks later, Eaton-Wallace gave Edwards a second note from Complainant reiterating Complainant's intent to return to work when her father died or 12 weeks had passed, whichever occurred first. Because of these statements, Edwards, Complainant's supervisor, should have clearly understood that Complainant did not intend to return to work until the end of April 2002, unless her father died before that time. While on family leave, she was entitled to spend this time with her father without any interference from Respondent that disrupted her focus on her father.<sup>iv</sup> Instead, what she got was a series of unsolicited and unwelcome visits and calls from Edwards that upset her and left her with an ongoing worry about whether she would lose her job if she continued to exercise her legal right to stay home with her father, causing an emotional disruption of her family leave. Edwards's insensitive comment to Webster that Complainant's father "could just linger on forever"

is a glaring example of the attitude Edwards conveyed to Complainant during her family leave.<sup>v</sup> These calls and visits began during the first week of Complainant's family leave in early February 2002 and ended three hours after her father died.<sup>vi</sup>

According to the Oregon Court of Appeals, one of the goals the Oregon legislature had in mind when it adopted OFLA was "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." *Yeager v. Providence Health System Oregon*, 195 Or App 134, 141, 96 P3d 862, 866 (2004), *rev den* 337 Or 658, 103 P3d 641 (2004).

Although Respondent allowed Complainant to take family leave from February 3 to March 4, 2002, Edwards substantially disrupted Complainant's family leave with visits and calls so that Complainant was not able to enjoy the full benefits of time off work to spend with her father in his last days. Instead of devoting all her time and energy on her need to spend time with her father, she was repeatedly confronted with threats to her family's economic security by Edwards's attempts to get her to return to work. Those threats culminated in a final threat that forced her to return to work on March 5, only two days before her father died. Edwards's ongoing interference with Complainant's use and enjoyment of her family leave is contrary to the legislative goals expressed in OFLA and constitutes a constructive denial of Complainant's family leave in violation of ORS 659A.183.

## **RETALIATION**

In its Formal Charges, the Agency alleged that Respondent violated *former* OAR 839-009-0320 and retaliated against Complainant in the following ways:

"Respondent violated *former* and current OAR 839-009-0320 and retaliated against Complainant by urging her to return to work when she was on qualified family leave and by insinuating that if Complainant did not return to work, her job was in jeopardy.

“Respondent deliberately pressured Complainant and coerced her to return to work from qualified family leave. This pressure was so great that Complainant returned to work when she should not have been required to do so, thereby missing an opportunity to spend precious time with her dying father. Complainant was entitled to protected family leave under these circumstances and the day she returned to work is a day that is lost forever and can never be recaptured or relived. Had Respondent, through Edwards, facilitated Complainant’s use of family leave instead of retaliating against Complainant for using her entitlement and threatening her with the loss of her job, Complainant would have elected to remain on family leave and spend that additional day comforting and caring for her dying father. Respondent’s discriminatory and retaliatory actions are exactly those the Act was intended to prohibit and a violation of former and current OAR 839-009-0320.”

ORS 659A.001(12) defines “unlawful practice” for purposes of OFLA to include “a practice that violates a rule adopted by the commissioner for the enforcement of the provisions of this chapter.” *Former* OAR 839-009-0320(2) provided:

“It is an unlawful employment practice for an employer to retaliate or in any way discriminate against an employee with respect to hiring, tenure or any other termination or condition of employment because the employee has inquired about OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act.”<sup>vii</sup>

Accordingly, OFLA-based retaliation is an unlawful employment practice. *See Yeager*, 96 P3d at 865.

To prevail in an OFLA retaliation case, the Agency must prove the following: (1) Complainant availed herself of a protected right under OFLA; (2) Respondent took an employment action that adversely affected Complainant; and (3) there is a causal connection between Complainant’s protected OFLA activity and Respondent’s adverse employment action. *In the Matter of Roseburg Forest Products*, 20 BOLI 1, 26-27 (2000).

**A. Complainant availed herself of a protected right under OFLA.**

Complainant was an “eligible” employee who was entitled to take 12 weeks of family leave to care for her father, who had a “serious” health condition. Complainant availed herself of this protected right in early February 2002, when she requested and

was granted family leave. Complainant notified Edwards that she intended to continue her leave for 12 weeks or until her father died, whichever occurred first. Complainant began her family leave on February 3, 2002, and her family leave concluded on March 7, 2002, when her father died.

**B. Respondent took an employment action that adversely affected Complainant.**

*Former OAR 839-009-0320(2)*, applied to the facts and allegations in this case, prohibited Respondent from retaliating against Complainant with respect to “tenure or any other term or condition of employment.” Although Edwards’s unwanted visits and calls to Complainant were not authorized by OFLA, they cannot be considered a term and condition of employment or an adverse action against Complainant’s tenure of employment because the Agency did not prove that Complainant was required to put up with them in order to keep her job. However, things changed when Edwards required Complainant to come to work for her full shift on March 5, 2002, on pain of losing her job. This action was an adverse employment decision that constituted a term and condition of Complainant’s employment and directly affected her potential tenure of employment.

**C. There was a causal connection between Complainant’s protected OFLA activity and Respondent’s adverse employment action**

There is a direct causal connection between Complainant’s protected OFLA activity and Edwards’s action that forced Complainant to return to work on March 5, 2002. If Complainant had not been on family leave status, she would have been working, and Edwards would not have demanded that she return to work or be fired. Therefore, the forum construes Edwards’s action as a retaliatory action that violated *former OAR 839-009-0320(2)* and ORS 659A.183.<sup>viii</sup>

## RESPONDENT'S LIABILITY FOR EDWARDS'S ACTIONS

It is undisputed that Edwards engaged in conduct on her own initiative that the forum has found to be unlawful and that she engaged in this conduct without Wanek's knowledge and away from Respondent's workplace. Respondent argues that these facts insulate it from liability under the common-law "scope of employment" test.

As an initial matter, Respondent's argument does not apply to the Agency's harassment allegations. The Agency alleged that Respondent, through Edwards, harassed Complainant while she was on OFLA leave. Based on the provisions of OAR 839-005-0010(4), the forum concluded that Edwards's conduct did not subject Complainant to a hostile, intimidating or offensive working environment and did not reach the question of liability. If the forum had reached the opposite conclusion, the forum would rely on the provisions of OAR 839-005-0010(4)(e), not the common-law "scope of employment" test, to determine Respondent's liability.<sup>ix</sup>

Respondent is correct in its assertion that the forum must find that Edwards was acting within the scope of her employment for Respondent to be liable for its actual and constructive denial of Complainant's family leave and Edwards's retaliatory behavior. Respondent is also correct that "[u]nder the doctrine of *respondeat superior*, three requirements must be met to conclude that an employee was acting within the course and scope of employment." Those three requirements are:

"(1) whether the act occurred substantially within the time and space limits authorized by the employment; (2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and (3) whether the act is of a kind which the employee was hired to perform." *Chesterman v. Barmon*, 305 Or 439, 442, 753 P2d 404, 406 (1988).

Respondent contends that the first requirement was not met because Edwards's conduct occurred away from Respondent's workplace and during hours that Edwards was not working<sup>x</sup> and because Gordon Wanek had no knowledge of Edwards's actions.

In this case, Edwards was Complainant's immediate supervisor. Respondent, a truck stop with a restaurant, was open for business 24 hours a day, seven days per week. Edwards was responsible for Respondent's kitchen 24 hours a day, seven days a week, and that responsibility defines the time limits authorized by her employment.<sup>xi</sup> She controlled the work schedule of the entire kitchen staff and was responsible for Respondent's kitchen operations. She also had the authority to fire members of the kitchen staff. Her visits with Complainant during Complainant's family leave were directed at getting Complainant to return to work. On her final contact, she threatened Complainant's job if Complainant did not return to work, which caused Complainant to return to work on March 5. These actions were directly related to the essential function of Edwards's job, which was the management and scheduling of Respondent's kitchen staff. As for the space limits authorized by her employment, the fact that some of Edwards's conduct towards Complainant occurred at the Tinbush house does not immunize Respondent from liability. Edwards could not carry on work-related discussions with Complainant at work because Complainant was on family leave status and not coming to work. Her visits to the Tinbush house were to carry on work-related discussions with Complainant related to Edwards's job duty of scheduling kitchen staff. Under these circumstances, Edwards's actions meet the "space" limits requirement. Based on the above, the forum finds that Edwards's actions were within the scope of her employment and that Respondent is liable for any of those actions that constitute an unlawful employment practice.

Under the doctrine of *respondeat superior*, an employer is liable for an employee's torts when the employee acts within the scope of employment. *Chesterman* at 406. Given the forum's conclusion that Edwards acted within the scope of her employment, Wanek's lack of knowledge of Edwards's actions is irrelevant.

## **DAMAGES**

The Agency sought \$30,000 in damages to compensate Complainant for the emotional distress and mental suffering she experienced from being badgered about returning to work during her family leave, then being compelled to return to work for one day on March 5, 2002. When a respondent is found to have engaged in an unlawful employment practice, ORS 659A.850(4)(a) gives the Commissioner the authority to order that respondent to “[p]erform an act or series of acts \* \* \* that are reasonably calculated to carry out the purposes of [ORS chapter 659A], to eliminate the effects of the unlawful practice that the respondent is found to have engaged in, and to protect the rights of the complainant and others similarly situated[.]” That includes damages for emotional distress and mental suffering and a cease and desist order. In determining damages for emotional distress, the commissioner considers a number of things, including the type of the discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. The amount awarded depends on the facts presented by each complainant. *In the Matter of Barrett Business Services, Inc.*, 22 BOLI 77, 96 (2001).

Complainant and other Agency witnesses credibly testified that Complainant experienced substantial emotional upset because of Edwards’s visits and calls, and that Complainant was extremely concerned about the loss of her job. She was the sole support of her two daughters and her job was critical to her.<sup>xii</sup> Complainant and her father had a close emotional bond and it was extremely important for her to spend the last days of her father’s life in his company. At a time when Complainant was already emotionally fragile, Edwards’s repeated visits, calls, and insensitive comments created a Hobson’s choice for Complainant – should she remain with her father and risk losing her job or return to work and miss some of the limited remaining time she had left with

her father. This was a choice that OFLA is intended to prevent. According to Eaton-Wallace, Complainant was “terrified” of losing her job through most of her leave and felt “torn up” because of Edwards’s actions. She only returned to work on March 5 to avoid losing her job, still thinks about being away from her father’s side on that day, and still feels “very sad and emotional” about it. At the hearing, she was close to tears when she testified about having to work on March 5. The forum finds that Complainant’s emotional response to reliving that day was genuine.

There is no doubt Complainant also experienced substantial emotional distress before and after her family leave because of her attachment to her father, his terminal illness, and his death on March 7, 2002. However, that does not detract from the emotional distress she experienced and continues to experience as a direct result of Edwards’s behavior. As the Agency aptly pointed out in its Formal Charges and closing argument, “[c]omplainant was entitled to protected family leave under these circumstances and the day she returned to work is a day that is lost forever and can never be recaptured or relived.” Complainant is still reliving March 5, 2002, but in the sense of loss instead of the time that she had with her father on that day.

Based on these facts, Complainant is entitled to damages for her mental suffering and emotional distress. Respondent committed two separate and distinct violations of the law -- denying Complainant family leave and retaliating against her for taking family leave -- that caused Complainant mental suffering and emotional distress. The forum merges the separate “denial” and “retaliation” violations that occurred on March 5, 2002, for purposes of assessing damages because they are based on the same set of facts. Under these circumstances, the forum finds that \$30,000 is an appropriate award of damages to compensate Complainant for the mental suffering and

emotional distress she experienced as a direct result of Respondent's unlawful employment practices.

**A. Award of Damages**

Respondent excepted to the ALJ's proposed award of \$30,000 in damages for emotional distress. Based on the facts in this case, \$30,000 is an appropriate exercise of the commissioner's discretion "to eliminate the effects of any unlawful practices found." Respondent's exception is overruled.

**ORDER**

NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of Respondent's violation of ORS 659A.183 and *former* OAR 839-009-0320(2), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Gordy's Truck Stop, LLC** to:

- 1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for Complainant Penny Howell in the amount of THIRTY THOUSAND DOLLARS (\$30,000), plus interest on that sum at the legal rate from the date of the Final Order until paid, representing compensation for mental and emotional suffering.
- 2) Cease and desist from denying family leave to any employee who is entitled to take family leave under the provisions of the Oregon Family Leave Act (OFLA) and cease and desist from retaliating against any employee based upon the employee's use of OFLA.

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<sup>i</sup> Under different circumstances, conduct away from the workplace could create a hostile, intimidating, or offensive work environment. In this case, there was simply no evidence in the record that it did. *Compare In the Matter of JLG4, Inc. dba Chalet Restaurant and Bakery*, 10 BOLI 183, 196 (1992), *affirmed without opinion, JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993) (supervisor's unwelcome sexual advances to complainant at her home after her work shift ended constituted unlawful harassment when complainant was working a regular shift for respondent when the advances occurred, the supervisor also made unwelcome sexual advances to complainant at work, and complainant testified that the supervisor's unwelcome sexual advances created a hostile, intimidating, or offensive work environment for complainant).

<sup>ii</sup> See Finding of Fact 26 – The Merits, *supra*.

<sup>iii</sup> Complainant's 12 week leave would have expired on April 26, 2002.

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<sup>iv</sup> Except for seeking medical verification of a serious health condition or the illness, injury or condition of an employee's child that requires home care, neither OFLA nor BOLI's administrative rules interpreting OFLA contain any provision that allows an employer to contact an employee taking OFLA family leave. ORS 659A.159, ORS 659A.168, OAR 839-009-0260. OAR 839-009-0170(7) provides that "[a]n employer may require an employee to follow the employer's established leave policy regarding periodic reporting to work of the employee's leave status." However, there was no evidence that Respondent had any such policy and, in any event, the rule envisions the employee being required to contact the employer.

<sup>v</sup> Edwards made similar comments to Sue Tinbush and Eaton-Wallace, but there was no testimony elicited concerning whether they repeated these comments to Complainant.

<sup>vi</sup> See Findings of Fact 14, 18, and 29 – The Merits, *supra*.

<sup>vii</sup> *Current* OAR 839-009-0320(3), which went into effect on May 17, 2002, is almost identical to *former* OAR 839-009-0320(2). The only difference is that the current rule substitutes "any person" for "an employee" and "person" for "employee."

<sup>viii</sup> *Compare In the Matter of Roseburg Forest Products*, 20 BOLI 1 (2000) (respondent's discharge of complainant while she was on family leave based on respondent's uniform application of its policy of discharging employees who obtain other employment without respondent's permission while on any type of leave from respondent's employment was not retaliatory because there was no causal connection between complainant's leave and respondent's action).

<sup>ix</sup> OAR 839-005-0010(10)(4)(e) contains the following language:

"(e) Harassment by Supervisor, No Tangible Employment Action: When harassment by a supervisor with immediate or successively higher authority over the individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:

"(A) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.

"(B) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:

"(i) That the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and

"(ii) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm."

<sup>x</sup> There was no evidence presented to show the physical location from which Edwards made her phone calls to Complainant or the time of day that she called or visited the Tinbush house.

<sup>xi</sup> See Finding of Fact 5 – The Merits, *supra*.

<sup>xii</sup> Complainant testified that she and her daughters lived rent-free in a house owned by her former husband, but there was no evidence that Complainant received financial assistance of any other type from any other source.