

In the Matter of

HERMISTON ASSISTED LIVING, INC.,

dba Meadowbrook Place

Case Nos. 87-01 and 88-01

Final Order of Commissioner Jack Roberts

Issued May 2, 2002

SYNOPSIS

The Agency alleged that Respondent suspended and discharged husband and wife complainants in violation of Oregon's whistleblower law based on the wife's good faith report of criminal activity and Respondent's perception that the husband had reported criminal activity. The Commissioner found that Respondent's belief that both complainants had reported wrongdoing which, if proven, would constitute criminal activity, was a substantial factor in Respondent's decision to suspend and discharge complainants. The Commissioner awarded \$2,413.80 and \$30,763.03 in back pay to complainants, and \$5,000 and \$10,000 in damages for emotional distress. *Former* ORS 659.550; ORS 659A.850; *former* OAR 839-010-0100; *former* OAR 839-010-0110.

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 evidentiary portion of the hearing was held on November 6-7, 2001, at the office of the Oregon Employment Department, Baker City, Oregon. Closing arguments were made by teleconference on November 16, 2001.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. Complainant Bruce Hahn ("Hahn") was present throughout the hearing. Complainant Sue Bentley ("Bentley") was only present on November 6. Neither Bentley nor Hahn was represented by counsel. Respondent was represented by attorney Darryl D. Walker.

The Agency called as witnesses, in addition to the Complainants: Cheryl Krantz, Respondent's former employee; and Bryan Woolard, Hahn's current supervisor.

Respondent called as witnesses: Gayle Gazley, executive director at Meadowbrook Place; Suzanne Bender, Gazley's administrative assistant; Ron Semingson, director of operations for Greenbriar Corporation, Respondent's parent corporation; and Tony Constantine, Hahn's former employer.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-34;
- b) Agency exhibits A-1 through A-39 (submitted prior to hearing);
- c) Respondent exhibits R-1 through R-28 (submitted prior to hearing), and R-29 through R-37 (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 December 9, 1999, Complainant Bentley filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent. On September 28, 2000, the Division amended her complaint to include the correct name of Respondent. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued an Administrative Determination on October 31, 2000.

2) On January 24, 2000, Complainant Hahn filed a verified complaint with the Agency's Civil Rights Division alleging that he was the victim of the unlawful employment practices of Respondent. On September 28, 2000, the Division amended his complaint to include the correct name of Respondent. After investigation, the

Agency found substantial evidence of an unlawful employment practice and issued an Administrative Determination on October 31, 2000.

3) On June 28, 2001, the Agency issued Specific Charges alleging that Respondent discriminated against Complainants by discharging them based on Bentley's good faith report to Respondent's corporate headquarters that Julie Jones, a co-worker, had falsified her time cards, and Respondent's perception that Hahn had participated in making the report. The Agency alleged that these actions violated ORS 659.550. The Agency sought damages in the amount of \$3,050 and \$32,127 in wage loss, and \$5,000 and \$10,000 for emotional stress for Bentley and Hahn, respectively.

4) On July 2, 2001, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth August 28, 2001, in Baker City, 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.

5) On July 18, 2001, Respondent, through attorney David S. Jones of Dallas, Texas, filed an answer to the Specific Charges.

6) On July 30, 2001, 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 August 17, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

) On July 30, 2001, the forum issued an interim order that required Respondent to file, no later than August 8, 2001, one of the following: 1) a petition for David S. Jones to appear on behalf of Respondent as counsel *pro hac vice* in accordance with the requirements of ORS 9.241 and UTCR 3.170; (2) a notice of appearance by Oregon counsel as "counsel" is defined in OAR 839-050-0020(8); or, (3) a letter from Respondent authorizing an officer or regular employee of Respondent to appear on behalf of Respondent as provided in OAR 839-050-0110(2) & (3). The order stated that Respondent would be subject to default if it did not take one of these actions.

8) On August 8, 2001, David S. Jones filed a petition to appear as counsel *pro hac vice* on Respondent's behalf and stated that he would be assisted in the proceeding by the Oregon law firm of Bullard Smith.

9) On August 9, 2001, the forum issued an interim order granting Jones's motion to appear as counsel *pro hac vice*. In the same order, the ALJ noted his *ex parte* phone conversation with Jones in which the ALJ notified Jones that his motion had been granted.

10) On August 14, 2001, the Agency moved to amend the Specific Charges to correct a clerical error, clarify allegations, and lower its claim for back pay damages for Complainant Hahn.

11) On August 16, 2001, the Agency filed its case summary.

12) During a pre-hearing conference held on August 16, 2001, Respondent's counsel Jones moved for a postponement. The Agency did not object, and the ALJ granted the motion, resetting the hearing for November 6, 2001, and the due date for case summaries to October 19, 2001.

13) On October 19, 2001, Respondent requested an extension of time to file its case summary until October 30, 2001. The Agency did not oppose the motion and the forum granted it.

14) On October 29, 2001, Respondent, through counsel Darryl D. Walker of Bullard Smith, filed its case summary.

15) 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.

16) Prior to opening statements, the Agency provided the forum with a legal memorandum from the attorney general's office interpreting Oregon's whistleblower statute. Respondent did not object and it was received as an administrative exhibit.

17) Prior to Woolard's testimony, Mr. McSwain disclosed that Hahn had discussed portions of Constantine's testimony with Woolard. Mr. Walker objected to any testimony from Woolard responding to testimony of Constantine that Hahn had discussed with him. At the time of the objection, the ALJ postponed his ruling until the proposed order. This issue was rendered moot when the ALJ granted the Agency's and Respondent's motions to strike all of Woolard's testimony concerning Woolard's employment with Constantine.

18) The evidentiary portion of the hearing concluded at 5:20 p.m. on November 7, and closing arguments were set for November 16, 2001, at 9:30 a.m., by teleconference.

19) On November 12, 2001, Respondent filed a motion requesting that it be allowed to call Gayle Gazley as a rebuttal witness, with her testimony limited to the scope of testimony given by Cheryl Krantz during Krantz' rebuttal testimony on the

Agency's behalf. Respondent based its motion on the provisions of OAR 839-050-0250(7) and "as a matter of fundamental fairness."

20) On November 14, 2001, the forum issued an interim order denying Respondent's motion. The order included the following language:

"The forum's administrative rule provides that 'participants may present rebuttal evidence.' Properly interpreted, the rule means that a respondent has the opportunity to present evidence to rebut the Agency's case-in-chief. It does not extend to giving a respondent the opportunity to present evidence to rebut evidence presented by the Agency in rebuttal of respondent's evidence. As the Agency bears the burden of proof, the Agency is entitled to the last word in the case. This interpretation does not prevent the forum from conducting a full and fair inquiry. Respondent's request is **DENIED.**"

21) On November 16, the hearing reconvened and Respondent and the Agency made their closing arguments by teleconference. At the conclusion of closing arguments, the ALJ granted Respondent's request to submit a legal brief on the Agency's prima facie case, burden of proof, and the necessity that the Respondent knew or believed that Complainants had made a complaint, and set a filing deadline of November 25, 2001. The Agency requested an opportunity to respond to Respondent's brief and to discuss the case of *Jensen v. Medley*, 170 Or App 42 (2000), which Respondent argued as controlling the outcome of this case. The ALJ granted the Agency's request and set a filing deadline of December 10, 2001.

22) Respondent timely filed its legal brief on November 21, 2001.

23) On December 10, 2001, the Agency's counsel, assistant attorney general Stephanie Andrus, requested an extension of time until December 17, 2001, in which to file the Agency's post-hearing brief. Respondent did not object to the request and the ALJ granted it.

24) The Agency timely filed its post-hearing brief, through assistant attorney general Stephanie Andrus, on December 17, 2001. On January 24, 2002, the ALJ

observed that Andrus had not signed and dated the Agency's brief and mailed a copy of the brief to her, along with an interim order instructing her to sign and date it, and file it with the ALJ no later than February 4, 2002.

25) On January 28, 2001, Andrus filed a signed and dated copy of the Agency's post-hearing brief.

26) On March 29, 2002, 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.

27) On April 5, 2002, Respondent filed an unopposed motion to extend the time in which to file exceptions to April 18, 2002.

28) On April 9, 2002, the ALJ issued an interim order extending the time in which to file exceptions to April 18, 2002. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

PARTICIPANTS AND WITNESSES

1) At all times material herein, Respondent was an Oregon corporation that owned and operated an assisted living facility in Baker City, Oregon, doing business under the assumed business name of Meadowbrook Place, and employed one or more persons. At all times material herein, Respondent was owned by Greenbriar Corporation, a Texas-based corporation that operated a number of assisted living facilities.

2) Complainant Sue Bentley was hired by Respondent in February 1995 and worked as a caregiver until her discharge on October 22, 1999.

3) Complainant Bruce Hahn was hired as a temporary maintenance employee on May 27, 1999, to replace Rudy Martinez, Respondent's permanent maintenance worker who had to take leave for health reasons. Hahn performed maintenance work until his discharge on October 20, 1999.

4) Bentley and Hahn had lived together for 20 years at the time of hearing and consider themselves to be husband and wife. Gazley was aware of this relationship.

5) Gayle Gazley started work for Respondent in 1988 and became Respondent's executive director in 1992.

6) Ron Semingson became director of operations for Greenbriar in 1996 and, at the time of hearing, supervised the operations of 14 retirement and assisted living facilities. Semingson has been Gazley's direct supervisor since 1996.

7) Suzanne Bender is Gazley's daughter and Julie Jones's sister. She was hired as Gazley's administrative assistant in 1994. Gazley has been her direct supervisor since that time.

8) Julie Jones is Gazley's daughter and Bender's sister. She was hired by Respondent in 1996 and became Respondent's head housekeeper in August 1999. Jones was no longer employed by Respondent at the time of hearing.

9) Cheryl Krantz was residential care manager and nurse supervisor for Respondent in 1999 and left Respondent's employment in May 2000. She was Bentley's immediate supervisor.

COMPLAINANT BENTLEY'S EMPLOYMENT BEFORE OCTOBER 19, 1999

10) On March 16, 1998, Respondent gave Bentley a performance appraisal that evaluated Bentley as "above average." Bentley was a good employee and a hard worker while she worked for Respondent and, prior to October 19, 1999, was never issued any warnings or subjected to any disciplinary action.

11) In early August 1999, the position of head housekeeper came open at Respondent's facility. Bentley considered applying but chose not to because she was

informed that the job was only 35 hours per week, fewer hours than Bentley currently worked.

12) Julie Jones applied for and was given the position of head housekeeper, effective August 6, 1999. Because there were some undone chores at Respondent's facility and some extra money in Respondent's housekeeping budget, Gazley asked Semingson if Jones could work up to 40 hours a week to complete those chores. Semingson approved the request. Three weeks later, Gazley got Semingson's approval to use Jones to transport Respondent's residents and Jones's position was budgeted for 40 hours per week. Gazley then began using Jones to transport residents, get prescriptions, and go to the bank. None of Jones's co-workers were aware of these added job duties.

COMPLAINANT HAHN'S EMPLOYMENT BEFORE OCTOBER 19, 1999

13) Gazley hired Hahn as a temporary maintenance employee on May 27, 1999, at the pay rate of \$10.40 per hour, to work 40 hours per week. His duties included lawn care, sprinkler system care, plumbing, electrical, pruning trees, maintaining park benches, general landscaping, and interior and exterior building repairs. Hahn was hired to replace Martinez, Respondent's former maintenance employee, who was absent on medical leave. When Gazley hired Hahn, she anticipated that his employment would only be temporary, until such time as Rudy could resume his job duties.

14) When Hahn was hired, Respondent's grounds were in poor condition and repairs had not been kept up on the exterior and interior of Respondent's building. Hahn corrected the problems with the grounds and made needed repairs on Respondent's building, except for siding that had fallen off and continued to fall off after he repaired it.

15) Hahn had problems getting Respondent's sprinklers to work properly and had to have Tony's Tree Service come out several times to help him adjust the system before it began to work properly.

16) Shortly after Hahn was hired, he used the "F word" in front of a co-worker. Gazley counseled Hahn about his language. Hahn apologized to his co-worker. Gazley did not document this incident.

17) During the summer of 1999, Hahn used cut-up old t-shirts as a sweatband while working outside in hot weather. On one or more occasions he wore a sweatband and smoked cigarettes while mowing Respondent's lawn, using Respondent's riding mower. He also wore clothes with holes in them. Semingson observed him on one of these occasions. Gazley also observed him on at least one of these occasions.

18) In or around August 1999, Gazley told Hahn that several residents had asked what Hahn was wearing around his head, that they didn't think it looked good, and she didn't want him to wear it any more. Gazley also counseled Hahn not to smoke while working. Hahn said he wouldn't do it any more.

19) At some point, Bender filled out a "Complaint Resolution" form stating that residents and staff had complained about Hahn's appearance "off & on since temp. hire./again on 8/19/99," noting "management observed [this behavior]." Bender dated it "8/19/99" and Gazley signed it. "Verbal Warning" is handwritten on the form's upper left-hand corner. Hahn was not informed at any time during his employment that Gazley's counseling had been documented as a "verbal warning."

20) No more complaints were made about Hahn's appearance after August 19, 1999.

21) On or about August 18, 1999, Gazley asked Hahn to level the public bathroom so that a contractor could install new linoleum. Around this same time,

Lonnie Yarbrough, a Greenbriar employee who oversaw Greenbriar's building and maintenance projects, had instructed Gazley to have Hahn do everything he could within his ability or job description so that Respondent could save money on facility maintenance costs. Hahn told Gazley that the contractor's bid should have included leveling the floor. Gazley told Hahn to do as he was told and Hahn explained that, based on his construction work experience, the contractor should do that job. Gazley told Hahn that she would find someone else to do the job if he didn't want to do it, at which point Hahn agreed to level the floor. Hahn subsequently leveled out the floor.

22) At some point subsequent to the floor leveling incident, Bender filled out an "Employee Disciplinary Report" ("EDR") that was signed by Gazley and dated "8/18/99." On it, she wrote that the reason for completing the EDR was "Employee arguing with manager about tasks needing to be completed." She indicated on the EDR that it was a "written warning" and dated it 8/18/99. She did not ask Hahn or a witness to sign it in the spaces provided for the signatures of the "employee" or a "witness," even though Respondent's personnel policy requires that the employee or a witness sign and date written warnings. This EDR was never shown to Hahn, nor was he informed he had received a written warning at any time during his employment.

23) Bender also filled out a "Complaint Resolution" form documenting the floor-leveling incident. She dated it "8/18/99" and Gazley signed it. This form was never shown to Hahn during his employment.

24) Subsequent to the floor-leveling incident, Gazley told Hahn that Rudy would not be returning and asked Hahn if he wanted to be a permanent fulltime employee. Gazley also told Hahn he was doing better work than Rudy. Gazley told Hahn he would have to take and pass a drug test before he could be hired as a permanent fulltime employee, which Hahn did. Hahn then became a probationary,

permanent fulltime employee and Gazley completed paperwork showing that Hahn became a fulltime employee effective September 13, 1999. On that date, Hahn began a 90-day probationary period. He continued to receive \$10.40 per hour and to work 40 hours per week.

25) On or about October 11, 1999, some drains in Respondent's building began to overflow and Respondent had to call a plumber. Hahn showed the plumber the problem and went home. Shortly thereafter, one of Respondent's employees called Hahn and told him that the plumber had left and the drains were still overflowing. Hahn tried unsuccessfully to call Gazley, then tried to reach Bender and was only able to leave a voice mail message. Knowing that Bender sometimes didn't answer the phone when she was home, Hahn left a message in which he told Bender to "pick up the damn phone." The next day, Gazley called Hahn into her office and told him that swearing at her daughter was unacceptable. Subsequently, Bender completed an EDR regarding the incident that she characterized, with Gazley's signed approval, as a "verbal warning."ⁱ Bender and Gazley both dated their signatures "10/12/99." Hahn was not shown or asked to sign the EDR.

JULIE JONES'S TIMECARDS

26) In 1999, Respondent used a time clock and time cards to keep track of the time worked by its hourly employees. The time clock and time cards were located in a public area in the employee break room. All staff could see each other's timecards, and members of the public could see them if they went through the break room to use the restroom.

27) Employees were expected to use Respondent's time clock to punch in and out when they arrived at and left work. Respondent's corporate policy requires that

employees punch out for a 30 minute lunch break, and an employee's failure to do so is grounds for counseling.

28) Except for two occasions, Jones did not use the time clock to punch in and out from the time she became head housekeeper until sometime in October 1999, but instead handwrote the time she arrived and left. Jones did not punch or write in a 30-minute lunch break on any of her time cards that were faxed to Greenbriar.

29) Not long after Jones was promoted to head housekeeper, Bentley was told by another caregiver that "everybody" noticed that Jones was being paid for eight hours work a day but didn't have to work eight hours a day. Bentley and several other caregivers began inspecting Jones's timecards.

30) Bentley, Alice Cole, Sandy Gorts, Shannon Skeels, and Cheryl Krantz subsequently observed and copied Jones's timecards from late August 1999 until early October 1999. During this time, with limited exceptions, Jones reported her hours worked as "7:00" to "3:30" each day, for a total of "8" hours. Bentley and the others observed that Jones was absent from Respondent's premises on a number of occasions between 7 a.m. and 3:30 p.m. On some of these occasions, Jones transported residents, went to the bank, or picked up prescriptions from a pharmacy at Gazley's instruction. Bentley and her co-workers had no knowledge of what Jones was doing when she was absent from Respondent's premises during her scheduled work shift.

31) Bentley believed that Jones should be at work for the hours she wrote on her timecard and didn't like the fact that it looked like Jones was getting paid for hours she didn't work. Bentley believed that if she and her co-workers had to stay on Respondent's premises and work 40 hours to be paid for 40 hours, Jones should have to do the same.

32) Bentley decided to report the discrepancies on Jones's timecards. She decided not to report them to Gazley or Bender because they were members of Jones's family.

33) Bentley called Greenbriar's corporate headquarters in Texas and spoke to a male employee. Bentley said there was a discrepancy in Jones's timecards and Jones was getting paid for hours she didn't work. The male employee wanted to know Bentley's name and she said she wasn't comfortable giving it.

34) About two weeks later, Gazley passed out some Greenbriar letters to residents that had Greenbriar's phone number on it. Alice Cole told Bentley that she called that number and spoke with Toni Ruden, the owner's personal assistant. Toni asked Cole to please fax Jones's time cards to her.

35) Bentley and Krantz handwrote notes on the copies of Jones's timecards noting discrepancies they and others had observed, as well as notes about Bender and Gazley.

36) In August, September, and October 1999, Bentley, Krantz, and Alice Cole all faxed copies of Jones's timecards containing these handwritten notes to Ruden. During this time, at least ten employees, including Krantz's nursing staff and employees of other departments, complained to Krantz that Gazley's family did not have to work their full eight hour shifts in order to get paid for eight hours a day.

37) Examples of the handwritten notes on the timecards, some of which had the author's initials, included the following:

"Never here until 7:15 am. SB"

"Not here, called in sick."

"Was yard sailing [sic] all morning from 9-12 w/Gayle. SS"

"Left at 11:00 a.m. SS. AC"

"Wasn't here – in Sumpter"

"Left at 2:15. SB"

"She is here at 3:00 when dayshift leaves."

"Suzanne left at 3:00."

"Suzanne left 2:30."

"7:20. 10:00 to LaGrand (sic) w/Gayle. Never came back."

"Out sick."

"She hasn't clocked on all week. These are her hours according to other employee."

"Gayle is selling the living rm. furniture. Some of it has gone to the Nursing Home. Staff was told \$75 a chair."

"Suzanne has carpet in the garage that came in the wrong color & they are taking it to her house."

38) By October 1999, Krantz's staff had become so upset by their perception that Jones was collecting pay for hours she had not worked that a number of them told Krantz they were prepared to walk off the job. In response, Krantz called Greenbriar's corporate office and asked that an investigation be conducted. Krantz also faxed some more of Jones's timecards to Ruden. Krantz did not complain to Gazley because Jones is Gazley's daughter.

39) On or about October 19, 1999, Gazley received a phone call at home from an employee at Hermiston Assisted Living, who reported that Bentley and Cole had been faxing Jones's timecards, with notes written on them, to Greenbriar. Gazley told Bender this. They were both "totally shocked." Gazley then called Semingson, who looked into the matter and called Gazley back, reporting that this had been going on for "about a month." Semingson told Gazley that some of Respondent's employees were claiming that Jones had reported hours worked on her timecards and had been paid for hours that she had not actually worked. Two of Jones's timecards that had been faxed to Greenbriar were then faxed to Gazley.

40) Jones's alleged timecard falsification, if proven, would constitute a Class A misdemeanor under ORS 165.080 that makes falsification of business records a crime.

41) On October 19, 1999, Hahn and Bentley were having lunch with two female co-workers in Respondent's activities room when Gazley entered and said she wanted Hahn and Bentley in her office at 3 p.m. One co-worker commented "she knows" and she and Bentley told Hahn what they'd been doing with Jones's timecards. The other co-worker said that Bentley was going to be fired. Hahn commented that if Bentley got fired over that, if everything Bentley had done was true about Jones, "Susan is going to be one rich bitch." This was the first time Hahn heard anything about Jones's timecards being faxed to Greenbriar.

BENTLEY AND HAHN'S SUSPENSION AND DISCHARGE

42) On October 19, 1999, Gazley called Hahn into her office and took one of Jones's timecards that had been faxed to Greenbriar, set it in front of him, and asked him if he knew what it was. Hahn denied any knowledge of it and Gazley called Hahn "a liar." Gazley told Hahn he was suspended for three days, and that would give her time to prove that he had been involved with Jones's timecards.

43) When Hahn walked out of Gazley's office, Gazley called Bentley into the office. Gazley angrily showed Bentley a copy of one of Jones's faxed timecards and asked Bentley if she knew anything about it. Bentley said that she had copied and faxed it to Greenbriar. Gazley asked if it was Bentley's handwriting on the timecards; Bentley acknowledged that it was. Gazley asked if it was only Bentley's handwriting; Bentley refused to answer. Gazley told Bentley she thought Hahn's handwriting was on it; Bentley told Gazley that Hahn's handwriting wasn't on it. Gazley then told Bentley she was suspended for three days so that Gazley could "investigate" the matter. During the same meeting, Gazley also called Bentley a "backstabber."

44) Bentley did not report Jones's timecards to anyone else, including any law enforcement agencies.

45) Neither Bentley, Gazley, nor Semingson thought that falsification of employee timecards was a crime in Oregon.

46) After suspending Hahn and Bentley, Bender filled out an EDR for Hahn and Gazley signed and dated it "10/19/99." The EDR stated that Hahn was being placed on "Disciplinary Suspension." The reason she gave for her action was:

"Report of employees who were taking copies of another employee's time cards and sending false statements of operation to the corporate office. Suspension investigating reports of above claim."

47) Subsequently, one of Respondent's employees told Gazley that Hahn had stated if Bentley was fired because of Jones's timecards, Bentley would be "one rich bitch." Gazley then called Semingson and recommended that Hahn be discharged, and Semingson concurred.

48) Bender or Gazley completed a "Complaint Resolution" form with regard to Hahn that was signed by Gazley and dated "10/20/99." Handwritten on the form are the following statements:

"Employee was overheard telling residents that this building was not being ran right and that Sue Bentley was going to see to it personally that it was corrected. Also stated that Sue was going to be one rich bitch when this was all over.

"This was reported to us by Alice Street, another Meadowbrook employee who heard him saying this.

"Employee already on a three day suspension, has been warned repeatedly about his severe insubordination, will talk to regional director about termination during this trial period."

Next to her signature, Gazley noted that Semingson had verbally approved Hahn's termination.

49) On the morning of October 20, Bentley and Hahn visited an attorney to find out what their rights were related to their employment with Respondent.

50) On October 22, 1999, Gazley called Bentley and Hahn on the phone. Gazley said she wanted to meet with them at her office. They went to her office, where

they met individually with Gazley and Bender, Hahn first. Bender gave Hahn his check and told him he was terminated. Gazley told Bentley that “for the act of insubordination” she was giving Bentley an evening shift that paid \$.20 per hour less than the day shift she currently worked, that Bentley could start on the Saturday evening shift instead of day shift, that Bentley might get worked back into her regular rotation, and that Bentley “could drop all this foolishness and we could get on with it.” Bentley told Gazley “No ma’am, my attorney says I do not have to drop this to keep my job.” There was no discussion of what Bentley and her attorney might be thinking of doing and Bentley did not tell Gazley that she was going to sue Respondent.

51) At the time of this conversation, Bentley had spoken with a BOLI representative and BOLI had sent her “paperwork.” Bentley did not convey this to Gazley and did not threaten to file a complaint with BOLI in her conversation with Gazley.

52) In Bentley’s presence, Gazley unsuccessfully tried to contact Semingson by telephone. After Bentley left her office, Semingson called Gazley back. Gazley told Semingson that Bentley had stated she would sue Greenbriar. Semingson instructed Gazley to phone Lewis Cole, Greenbriar’s corporate counsel. Gazley phoned Cole and told him that Bentley had stated she would sue Greenbriar. Lewis asked what kind of lawsuit Bentley was going to file, and Gazley said she didn’t know. Lewis then told Gazley that if Bentley was going to sue Respondent, she couldn’t be in the building and should be terminated immediately. Gazley then called Bentley back and fired her. As Bentley left, Hahn demanded that Gazley give them a copy of their personnel records, and Gazley refused.

53) Bender completed an “Employee Separation Report” for Hahn. On it she handwrote that Hahn was discharged because of:

“Insubordination during trial period. Verbal warnings of rude and inappropriate language. Ignored explanation of how to complete tasks by management. Frequent complaints by residents and staff on language and personal appearance.”

Bender signed the Report and dated it October 20, 1999.

54) Bender completed an “Employee Separation Report” for Bentley. On it, she handwrote that Bentley was discharged because of:

“Contact with corporate office with false statements of operation. Stated she doesn’t like decisions administrator is making, wants to see a change. Threatening to sue facility. Facility received complaints of abusive verbal behavior towards residents.”

Bender signed the Report and dated it October 22, 1999.

55) The following week, Gazley held a staff meeting and told employees that Jones’s and Bender’s timecards were being watched. There was no more talk about their timecards after that.

COMPLAINANT BENTLEY’S WAGE LOSS AND EMOTIONAL DISTRESS

56) Bentley earned \$7.45 per hour and worked an average of 72 hours every two weeks at the time of her discharge. Bentley was unemployed for approximately nine weeks following her October 19 suspension.

57) Bentley sought work at the Oregon Employment Department the day of her termination and continued to visit the Employment Department every other day for the purpose of seeking work until she found work on December 20, 1999, at Taco Time, where she has been continuously employed through the dates of hearing. She was hired at Taco Time as evening supervisor at a salary of \$1300 per month.

58) Bentley would have earned \$2,413.80 in gross wages, had she continued to work for Respondent from October 20 through December 19, 1999.

59) After her termination, Bentley had no other income until she obtained the job at Taco Time. She had little savings at that time and bills to pay. When she was fired, she felt some panic because bills were due and she had no money coming in to

pay them with. She believed she would get unemployment benefits, with which she thought she could make her house payment and meet most of the bills, but knew it would be hard to pay for groceries. Bentley filed for unemployment benefits, but had to go through two hearings to receive them and did not know for certain until February 4, 2000, that she would not have to pay back benefits she had already received. During this time, Bentley felt very stressed out because of her termination. She slammed doors, broke some glassware, and lost sleep between October 22 and December 20, 1999. During this same period of time, she had difficulty concentrating and had less energy. She had nightmares about being thrown out of her house because she couldn't pay the bills and having to live in her car or on the streets.

60) Bentley did not seek medical assistance for the stress she experienced after being discharged by Respondent because she had no health insurance and no money to pay for a doctor or psychiatrist.

61) Bentley and Hahn's relationship suffered after October 22, 1999, and they didn't get along as well, in part because of Hahn's remarks to acquaintances and friends that Bentley had lost him his job.

COMPLAINANT HAHN'S WAGE LOSS AND EMOTIONAL DISTRESS

62) Hahn was unemployed and having financial difficulties at the time Respondent hired him and had previously experienced an extreme amount of trouble keeping jobs.

63) After his discharge, Hahn first visited the Employment Department in Baker City to seek work on October 25, 1999, the Monday after his termination. Hahn then sought work through the Employment Department with Bentley several times a week until Bentley started work at Taco Time. After that, Hahn visited the Employment

Department on a weekly basis to seek work. Hahn also applied for work that he was qualified for at a number of different establishments until May 2000.

64) Hahn found another job in May 2000 at Tony's Tree Service. He worked 20-25 hours per week for three weeks, then began working 40 hours per week. He earned \$7.50 per hour during his employment at Tony's until July 28, 2000, when he was laid off. Hahn earned \$2,349.36 in gross wages while employed at Tony's.

65) When Hahn was fired, he didn't know where he would find his next job. He stopped paying his personal bills entirely. After he was fired, his sleep was "crummy" for awhile. In Hahn's words, he "didn't know whether to be angry or just to buckle down and just move forward as fast as I could." His moods "wanted to go wild" and fluctuated considerably. Unlike before his discharge, his appetite was "hit and miss." He had to "force" himself "to keep moving." He considered taking his clothes and leaving Bentley, imagining things might be better that way. As time went on and he didn't get a job, he "felt pretty crummy." He held Bentley responsible for the loss of his job, and they "fought a lot" as a result.

66) Hahn stopped worrying when he got the job at Tony's. He began worrying again after he was laid off from Tony's.

67) In 2000, Hahn earned another \$304.50 while working at C.C.P.D., Inc., \$275.11 while working for Greg Brinton Construction, and \$160 through self-employment by cutting up deer.

68) Between gainful employment in 2000 and obtaining his next regular work at Rick's Tree Service, Hahn sought work at gas stations, as a dishwasher, doing yard work, as a fast food cook, and driving a cab.

69) Prior to 1993, Hahn had worked primarily in the construction field. In 1993, he was involved in a car accident. Since that time, he has had physical

limitations that prevent him performing many of the construction jobs he could perform before the accident. For example, he cannot carry heavy timbers or swing a framing hammer on a continuous basis. He cannot “mechanic” any longer. He can prune bushes and do landscaping, use a shovel, carry an aluminum step ladder, and can carry 2” x 4” and 2” x 6” lumber for half a day.

70) In February or March 2001 Hahn started work for Rick’s Tree Service & Landscaping. His starting wage was \$7.00 per hour. In June or July he got a raise to \$7.50 per hour. In August he got a raise to \$8.00 per hour. Throughout this time, he worked 40 hours per week or more. His work performance was satisfactory. He was laid off in mid-October 2001.

71) In all, Hahn earned \$13,748.97 in gross wagesⁱⁱ between his discharge from Respondent’s employment and November 6, 2001, the date of hearing. Hahn would have earned \$44,512 gross wagesⁱⁱⁱ had he not been discharged by Respondent, making his total wage loss \$30,763.03.

72) Hahn didn’t see a medical professional for any of the problems he experienced after being fired from Respondent because he had no money.

RESPONDENT’S PERSONNEL POLICY

73) Respondent’s written personnel policy in effect during Bentley’s and Hahn’s employment contained the following language regarding “Disciplinary Actions:”

“3.3.1. Recording Disciplinary Action

“The Employee Disciplinary Report (EDR) form is used to record disciplinary actions. * * * The original of this report will be filed in the employee’s personnel record. A copy will be retained by the employee’s supervisor, and *a copy will be given to the employee.*

“The EDR will indicate whether the action taken is a verbal warning, written warning, disciplinary suspension, or administrative suspension (recommendation for termination). Verbal warning does not require the employee’s signature. *All other actions on this form require the employee’s signature. If the employee refuses to sign, another member of*

management will be required to sign as a witness to the presentation of the warning.” (Emphasis added)

“* * * * *

“3.3.3. Verbal Warning

“Verbal warning is the mildest form of discipline. It is a written record of a verbal counseling, which serves as evidence that an issue has been discussed with an employee. It is not punitive, and therefore, does not require an employee’s signature.

“3.3.4. Written Warnings

“Written warnings are given for serious misconduct or poor performance. They are also given when an employee fails to take required corrective action after receiving a verbal warning. Only one written warning may be administered at a time. If multiple offenses have occurred, they may be cited in a single warning.

“* * * * *

“3.3.5. Disciplinary Suspension Without Pay

“The suspension may be administered for a very serious problem of misconduct or poor performance. Usually a suspension is administered when prior warning has not resulted in corrective action, or as an alternative to termination. The length of the suspension may vary on an individual basis.

“3.3.7. Termination

“* * * employment at Greenbriar Corporation is ‘at will’ and is subject to termination when the Company in its sole discretion concludes that it is warranted. Termination may occur in situations including but not limited to the following:

“3.3.7.1. Training Period

“The 90 day training period is provided as an opportunity to ‘try out’ an employee’s skills, attitude, and job performance. If, for any reason, it is believed that the new employee is not suited to the job, termination during this period is appropriate, either with or without prior warnings.

“3.3.7.2. Progressive Discipline

“If an employee has been issued two written warnings, and within a twelve month period a third written warning is required, termination is appropriate.

“3.3.7.3 Gross Misconduct/Performance Deficiency

“A. Dishonesty

“(1) Falsifying any business record or document of employer * * * .

“* * * * *

“(4) Other forms of dishonest conduct.

“* * * * *

“4. PROCEDURES

“Disciplinary actions will be recorded on the EDR (from Appendix A). The original must be placed in the employee personnel file after all required signatures are secured. Relevant facts must be recorded and verbiage should be free of emotion. The supervisor will retain the original and give a copy to the employee.”

“Proper documentation is critical. * * *

“THIS IS A LEGAL DOCUMENT. FAILURE TO CHECK THE CORRECT ACTION, FAILURE TO PROPERLY DESCRIBE THE FACTS, FAILURE TO GET REQUIRED SIGNATURES, OR FAILURE TO DATE THE SIGNATURES MAY RENDER THE DOCUMENT INVALID.”

74) Respondent’s written personnel policy in effect during Bentley and Hahn’s employment contained the following language regarding “TIME CARDS:”

“All employees must punch in and out on their own time cards. Failure to punch in or out, or make corrections or changes, requires the card to be initialed by your supervisor on your next scheduled work day. If you are negligent in the handling of your time card or, if under any circumstances, you punch a time card for another employee, this will constitute grounds for disciplinary action. * * *”

COMPARATORS

75) Gazley put a “disciplinary note” in Alice Cole’s personnel file for faxing Jones’s timecards to Greenbriar. Cole did not threaten to sue Respondent. Cole is still employed by Respondent and has been promoted.

76) On December 30, 1999, Krantz testified at a hearing held to determine Bentley’s eligibility for unemployment benefits based on her discharge from Respondent. Krantz testified that several of Respondent’s employees had come to her and complained about Jones’s timecards and that she had called Greenbriar’s corporate office and asked for an investigation. On January 3, 2000, Gazley called Krantz into her office and angrily said she wanted a list of the persons who had complained about Jones. Krantz refused to divulge their names.

77) In November 1999, Krantz and Gazley had decided to hire a new nurse to work eight hours a month. Two weeks after January 3, Krantz's work schedule was cut from three days a week to two days a week, and a new nurse was hired to work 8 hours a week.

78) Between January 1998 and February 2000, four persons besides Hahn were involuntarily terminated by Respondent during their first 90 days and trial period of employment. Two were terminated for "Failure to meet standards during eval. Period." One was terminated for "Failure to meet standards during eval. Period/Disqualifying Criminal Record." The fourth was terminated because of "Failed Drug Test."

CREDIBILITY FINDINGS

79) Sue Bentley responded directly to questions on direct and cross-examination, exhibited a forthright demeanor throughout her testimony, and gave internally consistent testimony. The forum has credited Bentley's testimony in its entirety.

80) Bruce Hahn's demeanor varied during his testimony. Initially, he appeared very tense, and he avoided any eye contact with the ALJ. During direct examination, the hearing adjourned for lunch and Hahn was noticeably more relaxed afterwards. He became perceptibly nervous again during cross-examination when he was asked questions about his interview with Agency investigator Susan Moxley. Some of his answers were nonresponsive and he had to be instructed to listen more carefully and answer questions directly. Hahn's testimony also indicated a strong personal animus against Gazley. Hahn's testimony was inconsistent with more credible evidence on at least two issues. First, he testified that he was hired as a permanent employee in August 1999, whereas Respondent's documentation shows he was hired as a permanent employee on 9/13/99.^{iv} Second, Hahn testified he started work for Tony's

Tree Service in March or April 2000, whereas Constantine credibly testified that Hahn was hired in May 2000, a date consistent with Hahn's total earnings at Tony's. Hahn's testimony was also internally inconsistent on at least two issues. On direct, Hahn testified that he did no work in 2000 except for those jobs represented on his W-2s; and on cross he admitted that he earned another \$160 cutting up deer. He testified that he can no longer do concrete work due to physical limitations caused by a 1993 auto accident, but later acknowledged that he poured concrete for a week for Brinton Construction in 2001 as a laborer. On the other hand, he volunteered on direct that Gazley had warned him early in his employment for using the "F word" in front of a co-worker, an incident that was undocumented by Respondent. He also acknowledged that the incidents documented by Bender for which he was disciplined took place. This tended to enhance Hahn's credibility concerning his evaluation of his own job performance. The forum finds that Hahn's testimony concerning his employment with Respondent was credible and has believed Hahn wherever his testimony conflicted with that of Gazley and Bender except for the date he was hired as a permanent employee.

81) Cheryl Krantz had a potential bias based on her belief that Gazley retaliated against her by cutting her hours, but this did not detract from her credibility. Her testimony was internally consistent and was not impeached on cross-examination or by other, more credible evidence. The forum has credited her testimony in its entirety.

82) Bryan Woolard was a credible witness. His testimony was brief, to the point, and he was not impeached on cross-examination. As noted earlier, his testimony concerning his employment with Tony Constantine was stricken.

83) Tony Constantine was a neutral witness with no apparent self-interest. He responded directly to questions in a forthright manner. The forum has credited his testimony in its entirety.

84) Semingson's testimony was credible except for testimony that he and Gazley had multiple conversations between September 13 and "1-2 weeks" before Hahn's termination on October 20, 1999, regarding Hahn's insubordination and Hahn's abilities that was leading them both to conclude that Hahn wouldn't make it past his 90 day probationary period. There was no credible evidence of any incidents of insubordination or poor performance by Hahn in this period of time, except for Hahn's "pick up the damned phone" comment, which occurred only eight days before Hahn's suspension and nine days before his termination. Significantly, Semingson's testimony differed from Gazley's unequivocal testimony that she and Semingson had decided to discharge Hahn before October 20. As a result, the forum has believed neither Semingson nor Gazley on this point.

85) Suzanne Bender's demeanor was impressive; her testimony was not. She had significant financial and familial biases in this matter that were reflected in several ways in her testimony, as discussed below. She had a further motivation to color her testimony in that Jones's timecards that were faxed to Greenbriar also alleged that she had committed improprieties. At the time of hearing she had worked for Respondent for seven years and was second in command at Meadowbrook. Gazley, Respondent's executive director, is her mother, and Julie Jones, the person whose activities Bentley reported, was her sister.

Bender exaggerated her testimony on a critical issue. Bender testified on direct that she and Gazley had discussions between September 13 and October 19, 1999, in which "it was clear" that Hahn would be terminated in his trial period based his

continuing performance problems after he became a fulltime employee on September 13. She testified that those problems included insubordination “over and over,” lack of willingness to do jobs, complaints about his job performance by others, and his inability to transport patients because of his appearance and complaints about him calling patients “honey” and “sweetie.” On cross, she was unable to recall any specific incidents or resident complaints except that Hahn ruined molding in October. Although Bender’s testimony and acts made it clear to the forum that she knew how to document performance problems, there is no documentation of a molding incident or any other performance problem by Hahn, leading the forum to doubt that the incident ever occurred. And Jones had begun transporting patients long before September 13, partly as a benefit to give her additional hours. When the ALJ and Respondent’s counsel asked Bender how long before Hahn’s discharge she and Gazley had their discussion where it was made clear that Hahn would be let go, Bender was unable to give a time. Finally, Krantz credibly testified that it was common practice among Respondent’s staff to call residents “honey” and “sweetie.” As a result, the forum has entirely discredited Bender’s testimony that she and Gazley had decided to terminate Hahn before October 19.

Bender testified that Hahn was not fired for the timecard issue. However, this testimony was directly contradicted by a document she created, the disciplinary suspension EDR she wrote immediately before Hahn’s discharge stating that Hahn was suspended based on that very timecard issue.

Besides her untruths, Bender’s memory was also defective. Bender’s testimony was at odds with that of the credible testimony of Gazley, Bentley, and Hahn with regard to the two separate meetings in which Hahn and Bentley were suspended, then

terminated. In contrast, Bender, who was present at the meetings, testified there was only one meeting. This further detracts from her testimony.

In conclusion, the forum has only credited Bender's testimony where it was corroborated by other credible evidence. The forum has also believed Bentley and Hahn's testimony over that of Bender's, with one exception. That exception is Hahn's date of hire as a fulltime employee.

86) Gayle Gazley had the same financial and familial biases in this matter as Bender. At the time of hearing she had been Respondent's executive director for nine years, and Bender and Jones were her daughters. Like Bender, she had a further motivation to color her testimony in that Jones's timecards that were faxed to Greenbriar also alleged that she had committed improprieties.

On direct, Gazley's demeanor was convincingly forthright. This changed dramatically on cross when she was asked questions about the accusations made against Jones, when she became rattled and extremely defensive. At one point, she inexplicably claimed that she was "deaf." As cross-examination continued, her answers became increasingly nonresponsive. She was given several opportunities to acknowledge that a reason for saving Hahn's disciplinary write-ups could be that they might be needed as a basis for future disciplinary action, and inexplicably refused to acknowledge this obvious truth.^v

Gazley's testimony that she and Semingson had already decided to let Hahn go before the timecard incident arose differed substantially from Semingson's testimony that he and Gazley were coming to the conclusion that Hahn would not make it past his 90 day probationary period. As noted earlier, the forum has believed neither Semingson nor Gazley on this point

The forum views Gazley's untrue statement to Semingson and Cole that Bentley threatened to sue Greenbriar as evidence of her willingness to distort the truth in order to further her own agenda.

Gazley's claim that "curiosity" was her only motivation in trying to find out who had complained about Jones's timecards was disingenuous in the extreme and also contradicted Krantz' credible testimony, further eroding Gazley's credibility.^{vi}

In conclusion, the forum has disbelieved Gazley's testimony wherever it conflicted with other credible evidence. In some cases, the forum did not believe her uncontradicted testimony. The forum has also believed Bentley and Hahn's testimony wherever it conflicted with Gazley's, with one exception. That exception is Hahn's date of hire as a fulltime employee.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an employer in the state of Oregon that employed one or more persons.

2) Gayle Gazley was Respondent's executive director throughout Complainants' employment with Respondent. Suzanne Bender, her daughter, was Respondent's assistant director throughout Complainants' employment with Respondent.

3) Complainant Bentley was employed by Respondent from February 1995 until her discharge on October 22, 1999. She was a satisfactory employee and hard worker throughout her employment with Respondent.

4) Complainant Hahn was employed by Respondent from May 27, 1999, until his discharge on October 20, 1999. He was hired as a temporary employee and became a permanent fulltime employee on September 13, 1999, at Gazley's invitation. Prior to September 13, Hahn was warned on several occasions for performance-related issues. After September 13, Hahn received only one warning, a verbal warning on

October 11 for leaving an inappropriate voice mail message for Suzanne Bender, Gazley's other daughter who was also Respondent's assistant administrator.

5) At the time of hearing, Bentley and Hahn had lived together for 20 years and considered themselves to be married. Gazley was aware of their relationship.

6) On August 9, 1999, Gazley promoted her daughter, Julie Jones, to the position of head housekeeper.

7) In August, September, and early October 1999, numerous staff members, including Bentley and Alice Cole, observed that Jones was not at work on Respondent's premises during some of the hours she handwrote on her timecard as having worked. Bentley, Cole, and Cheryl Krantz, their supervisor, began copying Jones's timecards and writing notes on the copies that pointed out discrepancies between the hours Jones reported and the hours she was actually on Respondent's premises. Bentley, Cole, and Krantz all faxed different copies to Respondent's corporate headquarters at different times.

8) By October 19, 1999, a number of Respondent's employees had become so upset about their perception that Jones was reporting and being paid for hours that she had not worked that they were ready to walk off the job.

9) Jones's alleged timecard falsification, if proven, would constitute a Class A misdemeanor under ORS 165.080 that makes falsification of business records a crime.

10) On or about October 19, 1999, an employee at Hermiston Assisted Living reported to Gazley that Bentley and Cole had faxed copies of Jones's timecards, with notes on them describing how Jones had falsified her timecards, to Respondent's corporate headquarters. Gazley verified this with Semingson, her corporate supervisor, then instructed Bentley and Hahn to come to her office.

11) Gazley asked Hahn if he knew about the timecards and Hahn denied it. Gazley told him he was a liar and that he was suspended for three days, which would give her time to prove he had been involved with the timecards. Bender completed a report placing Hahn on "Disciplinary Suspension" based on Gazley's belief that Hahn had been involved in copying and writing notes on Jones's timecards and faxing them to corporate headquarters.

12) Gazley asked Bentley if she knew about the timecards. Bentley admitted writing notes on some of them and faxing them to the corporate office. Gazley asked Bentley who else was involved, and Bentley refused to tell her. Gazley called Bentley a "backstabber" and suspended her for three days so she could "investigate" the matter.

13) Later on October 19 or 20, Gazley learned that Hahn had stated if Bentley was fired because of Jones's timecards, Bentley would be "one rich bitch." Gazley phoned Semingson and recommended that Hahn be discharged. Semingson agreed.

14) On October 22, 1999, Gazley called Hahn and Bentley into her office. Gazley told Hahn he was fired and gave him his final paycheck. Gazley told Bentley that she was being transferred to a lesser paying job on swing shift because of her insubordination, and told Bentley she "could drop all this foolishness." Bentley, who had seen an attorney on October 20, told Gazley that her attorney said she did "not have to drop this to keep my job." Bentley did not tell Gazley that she planned to sue Respondent.

15) Gazley then called Semingson and Lewis Cole, Respondent's corporate counsel, and advised them that Bentley had threatened to sue Respondent. Cole advised her to immediately discharge Bentley. Gazley then told Bentley that she was discharged.

16) Gazley suspended, demoted, and discharged Bentley for the reason that Bentley reported to Respondent's corporate headquarters that Jones was falsifying her timecards.

17) Gazley suspended and discharged Hahn for the reason that she believed Hahn had reported to Respondent's corporate headquarters that Jones was falsifying her timecards.

18) Bentley diligently sought work after her discharge and began a higher paying job on December 20, 1999. She would have earned an additional \$2,413.80 in gross wages, had she continued to work for Respondent from October 20 through December 19, 1999.

19) Hahn diligently sought work after his discharge, but did not find another job until May 2000, and has not yet found subsequent equivalent employment. As of the first day of hearing, his total wage loss amounted to \$30,763.03.

20) Bentley experienced substantial emotional distress as a result of her discharge from Respondent's employment.

21) Hahn experienced substantial emotional distress as a result of his discharge from Respondent's employment.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.550.

2) The actions, inactions, statements, and motivations of Gayle Gazley are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.550.

4) *Former* ORS 659.550(1)^{vii} provided, in pertinent part:

“It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported criminal activity by any person, has in good faith caused a complainant's information or complaint to be filed against any person, has in good faith cooperated with any law enforcement agency conducting a criminal investigation, has in good faith brought a civil proceeding against an employer or has testified in good faith at a civil proceeding or criminal trial.”

Former OAR 839-010-0100(1) provided:

“(1) ORS 659.550 prohibits any employer with one or more employees in Oregon from discriminating or retaliating against an employee because the employee has:

“(a) In good faith reported criminal activity to a law enforcement agency; or

“(b) Caused in good faith a complainant's information or complaint to be filed against any person; or

“(c) Cooperated in good faith with a law enforcement agency criminal investigation; or

“(d) Brought in good faith a civil proceeding against the employee's current employer; or

“(e) Testified in good faith at a civil proceeding or criminal trial.”

Former OAR 839-010-0110 provided:

“(1) To be protected by this section, the criminal activity reported must be a violation, misdemeanor or felony either in the jurisdiction in which the act occurred or in which it was reported.

“(2) The criminal activity must be reported to a police agency or prosecutor.

“(3) The employer must know a complaint was made or believe that a complaint was made.”

Respondent's suspension, demotion, and discharge of Bentley violated *former* ORS 659.550(1). Respondent's suspension and discharge of Hahn violated *former* ORS 659.550(1).

5) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award

Complainants lost wages resulting from Respondent's unlawful employment practices and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

THE AGENCY'S PRIMA FACIE CASE

The Agency's prima facie case with regard to Bentley consists of the following elements:

- (1) Respondent is an employer as defined by statute;
- (2) Bentley was employed by Respondent;
- (3) Bentley in good faith reported criminal activity by Julie Jones;
- (4) Respondent suspended, then discharged Bentley;
- (5) Respondent suspended, then discharged Bentley for the reason that Bentley in good faith reported criminal activity by Julie Jones.

The Agency's prima facie case with regard to Hahn consists of the following elements:

- (1) Respondent is an employer as defined by statute;
- (2) Hahn was employed by Respondent;
- (3) Someone reported criminal activity by Julie Jones;
- (4) Respondent suspended, then discharged Hahn;
- (5) Respondent suspended, then discharged Bentley for the reason that it believed that Hahn reported criminal activity by Julie Jones.

A. Employer/Employee Relationship

There is no dispute that Respondent was an employer that employed at least one person and that Bentley and Hahn were employed by Respondent.

B. Did Bentley In Good Faith Report Criminal Activity?

This element of the Agency's prima facie case contains three interrelated requirements. First, a complainant must make a report. Second, the report must

concern criminal activity. Third, the criminal activity must be reported in good faith. All three requirements must be satisfied in order for a complainant to prevail.

1. Bentley made a “report” within the meaning of ORS 659.550.

There is no dispute that Bentley’s act of faxing Jones’s timecards to Respondent’s corporate headquarters, with handwritten notes accusing Jones of falsifying her timecards, constituted a “report[.]” However, Respondent contends that Bentley did not meet the reporting requirement of ORS 659.550 because BOLI’s administrative rules in effect at the time, *former* OAR 839-010-0100(1)(a) and OAR 839-010-0110(2), required that the report must be made “to a law enforcement agency,” including “a police agency or prosecutor.”

The forum begins its evaluation of Respondent’s argument by examining the pertinent statutory language. Where statutory interpretation is required, the forum must attempt to discern the legislature’s intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). To do that, the forum first examines the text and context of the statute. *Id.* The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature’s intent. *Id.* Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. *Id.* at 611. If the legislature’s intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. *Id.*

The term in question is contained in a phrase that reads “for the reason that the employee has in good faith *reported* criminal activity by any person.” (Emphasis added) There is no language in ORS 659.550 that defines the term “reported” and no language in ORS 659.550 or anywhere else in ORS chapter 659 that modifies the term by stating *to whom* the activity must be reported. A natural reading of the plain words of this statute, without question, yields a single and unambiguous meaning:^{viii} So long as

criminal activity is *reported*, it does not matter to whom the report is made. Respondent would have the forum interpret the phrase by inserting the same words used by the Agency in its administrative rule in effect at the time of Respondent's alleged violation after "person," making the aforementioned phrase read:

"for the reason that the employee has in good faith reported criminal activity by any person to a law enforcement agency, *including a police agency or prosecutor.*"

ORS 174.010 mandates that the judge is "not to insert what has been omitted, or omit what has been inserted." Consequently, the forum is not free to insert the terms urged by Respondent and adopt Respondent's interpretation of the whistleblower reporting requirement for criminal activity.

Regarding BOLI's administrative rules, although ORS 651.060(4) gave the commissioner the authority to adopt administrative rules interpreting *former* ORS 659.550, it did not give the commissioner the authority to adopt rules inconsistent with that or any other statute. See *Schoen v. University of Oregon*, 21 Or App 494, 499 (1975). Consequently, this forum finds that the provisions of OAR 839-010-0100(1)(a) and OAR 839-010-0110(2) in effect at the time of Bentley and Hahn's discharge impermissibly restricted the scope of the statute and, as a result, were invalid.

Based on the above, the forum concludes that Bentley met the statutory requirement of having "reported" by faxing Jones's timecards, with handwritten notes accusing Jones of falsifying her timecards, to Respondent's corporate headquarters.

2. Bentley reported "criminal activity."

In this case, the forum only need determine if the activity reported by Bentley was "criminal." The specific activity reported was falsification of an employee's timecards. The forum relies on ORS 161.515, ORS 165.075 and ORS 165.080 to resolve this issue.

ORS 161.515 provides:

“(1) A crime is an offense for which a sentence of imprisonment is authorized.

“(2) A crime is either a felony or a misdemeanor.”

ORS 165.075 provides, in pertinent part:

“As used in chapter 743, Oregon Laws 1971, unless the context requires otherwise:

“* * * *

“(2) “Business records” means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activities.

“(3) “Enterprise” means any private entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, charitable, political, industrial or organized fraternal activity.”

ORS 165.080 provides:

”(1) A person commits the crime of falsifying business records if, with intent to defraud, the person:

“(a) Makes or causes a false entry in the business records of an enterprise; or

“(b) Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

“(c) Fails to make a true entry in the business records of an enterprise in violation of a known duty imposed upon the person by law or by the nature of the position of the person; or

“(d) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

”(2) Falsifying business records is a Class A misdemeanor.”

An employee’s timecards fit within the definition of “Business records” under ORS 165.075(2), and an employee’s act of writing down hours not worked on a timecard, for the purpose of establishing the wages an employee is entitled to be paid, fits within the definition of ORS 165.080(1)(a). BOLI’s administrative rules in effect at that time required that “the criminal activity reported must be a violation, misdemeanor, or felony either in the jurisdiction in which the act occurred or in which it was reported.” *Former OAR 839-010-0110(1)*. Jones’s alleged acts, if proven, constitute a Class A

misdemeanor, and the forum concludes that Bentley reported “criminal activity” within the meaning of ORS 659.550.

3. Bentley’s report of criminal activity was in “good faith.”

To determine whether or not Bentley acted in “good faith,” the forum must examine the reasons that prompted her report, including her beliefs about the nature of Jones’s activity. Respondent argues that “good faith” in this case requires proof that Bentley acted without an ulterior motive and reasonably believed that Jones was engaged in criminal activity at the time Bentley made her report. The Agency argues that because the activity reported was criminal activity, if proven, Bentley’s statutory “good faith” obligation was simply that she reasonably believed, at the time of reporting, that Jones had falsified her timecards.

Neither ORS 659.550 nor the Agency’s administrative rules define “good faith.” There is no Oregon case law in which the court’s holding hinged on the correct definition of “good faith” in the context of reporting criminal activity. *Jensen v. Medley*, 170 Or App 42 (2000), is the only reported case that provides any guidance. In *Jensen*, the court held that the following jury instruction, “viewed as a whole, accurately informed the jury about the ‘good faith’ requirement” in ORS 659.550.

“ * * * Definition of good faith [i]n the whistleblower statute. To be protected against discharge under the whistleblower statute, the employee must make a [report of] criminal activity in good faith. For purposes of this statute, *good faith means that plaintiff, acted out of good faith concerning the criminal activity rather than out of malice, spite, jealousy, or personal gain; two, had reasonable cause in reporting her employer or supervisor’s suspected violation of criminal law*” (Emphasis in original)

Id. at 53, 54.

Respondent argues that the forum should adopt the italicized language as the “good faith” test under ORS 659.550(1). The forum disagrees for two primary reasons. First, the court did not hold that the italicized language was the test for “good faith”

under ORS 659.550(1), only that it “properly focused the jury’s attention on whether plaintiff had the requisite ‘good faith’ at the time she [blew the whistle].” *Id.* at 54. Consequently, the definition of “good faith” contained in the jury instruction is not binding on the forum. Second, “malice, spite, jealousy, or personal gain” are all ulterior motives that tend to negate reasonable cause, rather than co-exist as separate elements. The dictionary definition of “malice” and the definition given to “malice” by Oregon appellate courts in another context support this conclusion. *Webster’s* defines “malice” as: “1. A desire to harm others or to see others suffer. 2. *Law.* Intent, without just cause or reason, to commit an unlawful act injurious to another or others.” *Webster’s II New College Dictionary*, 662 (1985). In cases involving punitive damages, Oregon courts have held that “malice” means “the intentional doing of a wrongful act, *without just cause or excuse* and with intentional disregard of the social consequences.” *Blades v. White Motor Credit Corporation*, 90 Or App 125, 130 (1988) (citing *Friendship Auto v. Bank of Willamette Valley*, 300 Or 522, 535 (1986); *McElwain v. Georgia-Pacific*, 245 Or 247 249 (1966); *Andor v. United Air Lines*, 303 Or 505, 513 (1987)) (Emphasis added).

Based on the above, the forum concludes that the “good faith” requirement in ORS 659.550 does not require the absence of ulterior motives on the whistleblower’s part, but only a belief that is reasonable. However, evidence of ulterior motives on the part of the whistleblower may shed light on whether the whistleblower in fact had a belief that was “reasonable.”

In this case, there was undisputed testimony that Bentley and a number of other employees believed, at the time of Bentley’s report, that Jones was falsifying the hours worked written on her timecards. This belief was based on undisputed facts that Jones was gone from Respondent’s premises during some of the hours that she reported as

having worked, that Gazley did not inform persons on her staff that she had assigned duties to Jones that took Jones off the premises, and that Jones handwrote all the hours on her timecards instead of using the standard procedure of using Respondent's timeclock. Bentley was aware of all of these facts. The belief was strong enough that a number of Complainant's co-workers were prepared to walk off the job in protest if Krantz, their supervisor, did not take action to deal with the situation. Under these circumstances, the forum concludes that Bentley had a reasonable belief, at the time she made her report, that Jones was falsifying her timecard.

A key question remains – *what* is it that the whistleblower must reasonably believe? In formulating an answer, the forum bears in mind that *former* ORS 659.550 was a remedial statute, and remedial statutes are to be construed broadly so as to effectuate the purposes of the statute. See *In the Matter of Earth Science Technology, Inc.*, 14 BOLI 115, 125 (1995), *aff'd without opinion*, *Earth Science Technology, Inc. v. Bureau of Labor and Industries*, 141 Or App 439, 917 P2d 1077 (1996). The purpose of the language of *former* ORS 659.550 under scrutiny here was to prevent retaliation against employees who report criminal activity. That purpose would be defeated if an employee who reported criminal activity, reasonably believing that the activity reported had taken place, could be discharged without consequence to his or her employer. In addition, the public interest is furthered by preventing retaliation by an employer against an employee who reports wrongdoing that is criminal activity, if proven, or who reports wrongdoing that the employee reasonably believes to be criminal activity. *Id.*

As applied to this case, the "good faith" requirement for reporting criminal activity under *former* ORS 659.550 is met when a whistleblower has a reasonable belief that the wrongdoing reported has occurred, and the wrongdoing reported, if proven,

constitutes criminal activity. Bentley meets those criteria and thereby satisfies the “good faith” requirement.

BENTLEY WAS SUSPENDED, THEN DISCHARGED FOR REPORTING THAT JONES HAD FALSIFIED HER TIMECARDS

The Agency alleges that Bentley was suspended, then discharged because she reported to Respondent’s corporate headquarters that Jones had falsified her timecards. Respondent’s position is that Bentley was discharged because she threatened to sue Respondent.

As background, there is no credible evidence that Bentley had any performance problems or was ever disciplined for any reason during her employment with Respondent prior to October 19, 1999. To the contrary, Respondent regarded her as a good employee and hard worker.

A. Bentley’s Suspension.

Just prior to meeting with Bentley on October 19, 1999, another employee reported to Gazley that Bentley had been faxing Jones’s timecards, with notes written on them, to corporate headquarters. Gazley confirmed this with Semingson, who added that some employees at Meadowbrook were claiming that Jones had reported hours on her timecards and had been paid for hours she had not actually worked. Semingson also faxed two of Jones’s timecards to Gazley. Against this backdrop, Gazley called Hahn and Bentley into her office to confront them with this information. In the meeting, Gazley angrily showed Bentley one of Jones’s faxed timecards and asked Bentley what she knew about it. Bentley acknowledged she had copied it and sent it to corporate headquarters, then refused to tell Gazley if other co-workers had also written on the timecards. Bentley also denied that Hahn’s handwriting was on the timecard. Gazley called Bentley a “backstabber” and told Bentley she was suspended for three days so Gazley could “investigate” the matter.^{ix} This version of events is corroborated in part by

the “10/19/99” EDR signed by Gazley. Bentley’s involvement and knowledge concerning Jones’s faxed timecards was the only subject discussed in that meeting, and her confession of involvement was the event that immediately precipitated her suspension. Coupled with Bentley’s work performance prior to her confession and Gazley’s angry demeanor during her meeting with Bentley, these facts lead the forum to conclude that Bentley’s report of discrepancies in Jones’s timecards to corporate headquarters was a substantial factor^x in Gazley’s decision to suspend Bentley. This suspension violated *former* ORS 659.550(1).

B. Bentley’s Termination

On October 20, the day after their suspension, Bentley and Hahn visited an attorney to obtain advice about their employment rights with Respondent. On October 22, they met separately with Gazley. Gazley told Bentley that “for the act of insubordination” she was giving Bentley an evening shift that paid \$.20 per hour less than the day shift she currently worked, that Bentley could start on the Saturday evening shift instead of day shift, that Bentley might get worked back into her regular rotation, and that Bentley “could drop all this foolishness and we could get on with it.” Bentley’s response was “No ma’am, my attorney says I do not have to drop this to keep my job.” There was no discussion of what Bentley and her attorney might be thinking of doing and Bentley did not tell Gazley that she was going to sue Respondent. Subsequently, Gazley called Semingson and told him untruthfully that Gazley had threatened to sue Respondent. Semingson referred Gazley to Respondent’s corporate counsel, who instructed Gazley that if Bentley was going to sue Respondent, she couldn’t be in the building and should be terminated immediately. Gazley then fired Bentley. In short, Gazley lied to Semingson and Cole, then discharged Bentley based on Cole’s reaction to that lie. Bentley’s “Employee Separation Report” completes the picture. It gives four

reasons for Bentley's termination,^{xi} not one of which is supported by any credible evidence.

Gazley's retaliatory animus is apparent. She was angry that Bentley had reported discrepancies in her daughter's timecards to corporate headquarters and initially suspended Bentley for this action. When Bentley indicated her unwillingness to drop the issue, Gazley retaliated by falsely telling Semingson and Cole that Bentley had threatened to sue Respondent. Not surprisingly, Cole told Gazley to fire Bentley, a decision that coincided with Gazley's own desire to further retaliate against Bentley. Further evidence of this retaliatory animus is: (1) Gazley's discharge of Hahn, and (2) credible testimony by Krantz that in January 2000, after Krantz had testified at an unemployment hearing that several of Respondent's employees had come to her and complained about Jones's timecards, Gazley called Krantz into her office and angrily demanded a list of the persons who had complained about Jones.^{xii}

Respondent argues that its failure to fire Alice Cole, who also participated in reporting Jones's timecards to corporate headquarters, shows Gazley lacked a retaliatory motive. This evidence, while relevant, does not outweigh the already discussed credible evidence establishing Gazley's retaliatory motive towards Bentley. Respondent also argues that Cole made the decision to discharge Bentley, and Cole lacked a retaliatory motive. That argument lacks merit for the reason that Gazley's unlawful motivations and actions are properly imputed to Respondent.

In summary, the Agency established, by a preponderance of evidence, that Bentley's report of discrepancies in Jones's timecards to corporate headquarters was a substantial factor in Gazley's decisions to demote and discharge Bentley. Respondent's actions in demoting and discharging Bentley constitute violations of *former* ORS 659.550(1).

HAHN WAS SUSPENDED AND DISCHARGED BASED ON GAZLEY'S BELIEF THAT HE HAD REPORTED THAT JONES HAD FALSIFIED HER TIMECARDS

The Agency alleges that Hahn was suspended, then discharged because Gazley believed that he, like Bentley, had reported to Respondent's corporate headquarters that Jones had falsified her timecards. Respondent's position, expressed in the EDR completed by Bender and signed by Gazley, is that Hahn was suspended to allow Gazley time to investigate reports that "employees * * * were taking copies of another employee's timecards and sending false statements of operation to the corporate office." Respondent contends that Hahn was discharged based on his poor work performance.

A. Hahn's Suspension.

The historical setting for Gazley's October 19, 1999, meeting with Hahn was set out earlier in this Opinion in the section entitled "Bentley's Suspension." When Gazley called Hahn into her office, she took one of Jones's faxed timecards, set it in front of him, and asked him if he knew what it was. Hahn denied any knowledge of it and Gazley called him a liar. Gazley then told Hahn he was suspended for three days, and that would give her time to prove his involvement with Jones's timecards. This is confirmed in the EDR documenting Hahn's suspension that Bender wrote and Gazley signed.^{xiii} This exchange, along with the comments Gazley made to Bentley on the same day concerning Hahn's culpability, leaves the forum with no doubt that Gazley believed Hahn had been involved in reporting that Jones had falsified her timecards. Like Bentley, Hahn's involvement and knowledge concerning Jones's faxed timecards was the only subject discussed in the meeting, and his suspension immediately followed that discussion. Under these circumstances, the forum concludes that Gazley's belief that Hahn had been involved in reporting Jones's timecard discrepancies to corporate

headquarters was a substantial factor in Gazley's decision to suspend Hahn. This suspension violated *former* ORS 659.550(1).

B. Hahn's Discharge.

Hahn was discharged on October 20, 1999, but not informed of his discharge until October 22. Respondent advanced a number of reasons to justify Hahn's discharge and contends that it had already made the decision to discharge Hahn before October 19, and that Jones's timecards played no role in Respondent's decision to discharge Hahn. Those reasons are summarized in two documents created by Respondent at the time of Hahn's discharge.

The first document, a Complaint Resolution form dated "10/20/99," contains the following statements:

"Employee was overheard telling residents that this building was not being ran right and that Sue Bentley was going to see to it personally that it was corrected. Also stated that Sue was going to be one rich bitch when this was all over.

"This was reported to us by Alice Street, another Meadowbrook employee who heard him saying this.

"Employee already on a three day suspension, has been warned repeatedly about his severe insubordination, will talk to regional director about termination during this trial period."

The second document, Hahn's "Employee Separation Report" dated October 20, 1999, states:

"Insubordination during trial period. Verbal warnings of rude and inappropriate language. Ignored explanation of how to complete tasks by management. Frequent complaints by residents and staff on language and personal appearance."

For several reasons, the forum finds that these statements are not credible.

First, the testimony of Gazley and Bender was not believable, and Semingson was not credible regarding Respondent's pre-October 19 deliberations concerning Hahn's discharge.^{xiv} Their stories did not match and are all undermined by Gazley's

statement on the October 20 “Complaint Resolution” form – “will talk to regional manager about termination during this trial period.” Why would Gazley need to discuss Hahn’s discharge with Semingson if that decision had already been made? Also, Respondent offered no reasonable explanation for not firing him earlier.

Second, Gazley’s statements to Hahn at the time she suspended him and her retaliatory behavior towards Bentley and Krantz demonstrate a retaliatory motive towards Hahn because of his perceived report of Jones’s timecards.

Third, the timing of Hahn’s discharge, coming the day after he was suspended because Bentley perceived he had been involved in reporting Jones’s timecards, is inherently suspect. Bender said it best when she testified that the decision to fire Hahn had nothing to do with Jones’s timecards. In her words, “it was horrible timing.”

Fourth, there was no credible evidence to support the statement in the 10/20/99 “Complaint Resolution” form that Hahn “was overheard telling residents that this building * * * it was corrected.” Hahn admitted making the “rich bitch” remark, although not in the same context recorded by Gazley. If these statements had actually been made as recorded, Respondent could have called Alice Street as a witness. She was not called, leaving Gazley’s statements without any credible support.

Fifth, the forum is under no illusion that Hahn was a model employee. However, that does not invalidate his complaint. *See, e.g., In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61, 82 (1992) (“It is not a prerequisite to statutory protection against discrimination that a complainant be a superior, error-free worker.”) With one exception, based on Respondent’s own documentation, Hahn’s only performance problems occurred *before* Respondent hired him as a permanent, fulltime, probationary employee on September 13, 1999. The paperwork generated by Respondent to document Hahn’s pre-September 13 performance shows that Respondent knew how to

document performance problems. Despite testimony by Gazley and Bender about Hahn's continued unsatisfactory performance after September 13, Respondent failed to document any of it except for the "pick up the damned phone" incident on October 12 that resulted in a verbal warning.^{xv} On the other hand, Hahn admitted the October 12 and pre-September 13 incidents and credibly denied other performance problems after September 13. The absence of any post-September 13 documentation except for the "damned phone" incident leads the forum to conclude that Hahn had no other performance problems after September 13.

Based on all of the above, the forum concludes that Respondent's proffered reasons for discharging Hahn were untrue and merely a pretext for the actual reason Hahn was discharged – because Gazley believed he had reported to corporate headquarters that Jones had falsified her timecards.

HAHN'S SUSPENSION AND DISCHARGE VIOLATED *FORMER* ORS 659.550(1).

Since Hahn did not actually report Jones's timecards falsification, he fits under the category of perceived whistleblower. *Former* OAR 839-010-0110(3) provided protection for perceived whistleblowers in the following language:

"[To be protected] [t]he employer must know that a complaint was made or believe that a complaint was made."

The "complaint" described is the whistleblower's report of "criminal activity." In this case, Gazley believed that both Bentley and Hahn had made a report that Jones had falsified her timecards. The action reported, if proven, constitutes "criminal activity." Gazley discharged Hahn on her belief that he had reported Jones's activity to Respondent's corporate headquarters. In doing so, Gazley caused Respondent to violate *former* ORS 659.550.

DAMAGES SUFFERED BY BENTLEY AND HAHN

A. Back Pay

The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful discrimination. See, e.g., *In the Matter of ARG Enterprises, Inc.*, 19 BOLI 116, 136 (2000). Where a respondent commits an unlawful employment practice by discharging a complainant, the forum is authorized to award the complainant back pay for the hours the employee would have worked absent the discrimination. *In the Matter of Bob G. Mitchell*, 19 BOLI 162, 188 (2000). A complainant's right to back wages is cut off when her or she obtains replacement employment for a similar duration and with similar hours and hourly wages as respondent's job. *In the Matter of H.R. Satterfield*, 22 BOLI 198, 210-11 (2001). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. See, e.g., *In the Matter of Servend International, Inc.*, 21 BOLI 1, 30 (2000), *appeal pending*.

1. Bentley.

Bentley earned \$7.45 per hour and worked an average of 72 hours every two weeks at the time of her suspension. She was unemployed for nine weeks following her October 19 suspension. The Agency presented undisputed, credible evidence that Bentley diligently sought work during those nine weeks. During that time, she would have earned \$2,413.80 in gross wages, had she continued to work for Respondent (\$7.45 per hour x nine weeks x 36 hours = \$2,413.80). On December 20, 1999, she obtained replacement fulltime work at Taco Time that paid \$1300 per month, wages equal to or greater than those she earned while employed by Respondent. Consequently, her back wages are cut off as of December 20, 1999. She is entitled to an award of back pay in the amount of \$2,413.80.

2. Hahn.

Hahn earned \$10.40 per hour and was working 40 hours per week at the time of his discharge. As of September 19, 1999, his employment status changed from that of a temporary employee to a probationary, permanent fulltime employee. Like Bentley, his entitlement to back pay also began on October 19, 1999, the date of his suspension. The Agency established, through Hahn's credible testimony, that Hahn began searching for replacement work on October 25, 1999, and exercised reasonable diligence in his job search by applying for work that he was qualified for at a number of different businesses up to May 2000. In May 2000, he was hired at Tony's Tree Service, where he was paid \$7.50 per hour until his layoff on July 28, 2000, working 20-25 hours per week to begin with, and later working 40 hours per week. Later in that year, he obtained temporary, short-term work at C.C.P.D., Inc. and Greg Brinton Construction, and earned another \$160 through self-employment by cutting up deer. His next significant employment was at Rick's Tree Service, where he worked from February or March 2001 until shortly before the hearing, when he was laid off. He worked 40 hours per week and earned wages ranging from \$7.00 to \$8.00 per hour. Again, the Agency established through Hahn's credible testimony that Hahn exercised reasonable diligence in seeking work in the period of time extending from his layoff from Tony's Tree Service and his date of hire at Rick's Tree Service.

At the time of the hearing, Hahn had not yet obtained work similar to Respondent's employment in duration and hourly wage. Therefore, he is entitled to back wages extending from October 19, 1999, to November 6, 2001, the date the hearing commenced, less interim earnings. See, e.g., *Earth Science Technology, Inc.*, 14 BOLI at 125 (duration of a back pay award extends only up to the date of the hearing). In all, Hahn earned a total of \$13,748.97 in gross wages between October 19

and November 6, 2001, the date the hearing commenced. Had he continued to work for Respondent, he would have earned gross wages of \$44,512. The difference between the two figures is \$30,763.03, and Hahn is entitled to an award of back pay in that amount.

B. Emotional Distress.

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). A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *Id.* at 96.

1. Bentley.

The Agency sought \$5,000 in emotional distress damages for Bentley and made its case for those damages through her credible testimony. That testimony established that she experienced panic and serious stress between October 19 and December 20, 1999 as a direct result of her suspension and discharge from Respondent's employment. The primary reason for her panic and stress was that she had no income and little savings with which to meet her financial obligations. She had nightmares about being thrown out of her house because she couldn't pay the bills and having to live in her car or on the streets. Before finding replacement employment at Taco Time, she slammed doors, broke some glassware, and lost sleep. She had difficulty concentrating and had less energy than usual. In addition, her relationship with Hahn suffered, in part because of Hahn's remarks to acquaintances and friends that Bentley had lost him his job. Under these circumstances, the forum has no difficulty in justifying

an award of \$5,000 for emotional distress damages and would award more if not limited by the pleadings. See, e.g., *In the Matter of Kenneth Williams*, 14 BOLI 16, 26 (1995) (forum may not award damages greater than those sought by the agency in Specific Charges or subsequent amendments).

2. Hahn.

The Agency sought \$10,000 in emotional distress damages for Hahn and made its case for those damages through his credible testimony. That testimony established that after his suspension and discharge, he worried, stopped paying his personal bills, experienced unstable moods, suffered loss of appetite, had “crummy” sleep, felt generally “crummy,” considered leaving Bentley, and argued with her a lot. He stopped worrying when he was hired at Tony’s Tree Service, but began worrying again after he was laid off from Tony’s. Based on the type, effects, and duration of Hahn’s emotional distress, the forum awards \$10,000, the amount sought by the Agency, to compensate Hahn for the emotional distress he experienced as a result of Respondent’s unlawful employment practices.^{xvi}

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 **Hermiston Assisted Living, 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 Sue Bentley in the amount of:

a) FIVE THOUSAND DOLLARS (\$5,000.00), representing compensatory damages for mental suffering suffered by Sue Bentley as a result of Respondent’s unlawful practices found herein, plus

b) TWO THOUSAND FOUR HUNDRED THIRTEEN DOLLARS AND EIGHT CENTS (\$2,413.80), less lawful deductions, representing wages

lost by Sue Bentley between October 20 and December 20, 1999, as a result of Respondent's unlawful practices found herein, plus

c) Interest at the legal rate on the sum of \$2,413.80 from December 20, 1999, until paid, plus

d) Interest at the legal rate on the sum of \$5,000 from the date of the Final Order until Respondent complies herewith.

2) 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 Bruce Hahn in the amount of:

a) TEN THOUSAND DOLLARS (\$10,000.00), representing compensatory damages for mental suffering suffered by Bruce Hahn as a result of Respondent's unlawful practices found herein, plus

b) THIRTY THOUSAND SEVEN HUNDRED SIXTY-THREE DOLLARS AND THREE CENTS (\$30,763.03), less lawful deductions, representing wages lost by Bruce Hahn between October 20, 1999, and November 6, 2001, as a result of Respondent's unlawful practices found herein, plus

c) Interest at the legal rate on the sum of \$30,763.03 from November 6, 2001, until paid, plus

d) Interest at the legal rate on the sum of \$10,000 from the date of the Final Order until Respondent complies herewith.

3) Cease and desist from discriminating against any employee based upon the employee's good faith reporting of criminal activity by any person.

ⁱ On the EDR, the box next to "written warning" is also checked, but crossed out, with a note on the EDR stating it is a "verbal warning." Bender testified that she had no recollection of why the checked box next to "written warning" was crossed out.

ⁱⁱ This figure was arrived at by adding together the wages reported on Hahn's 2000 W-2s, the \$160 he earned in 2000 cutting up deer, and his 2001 earnings at Rick's Tree Service. The figures from 2001 are only approximate and are based on Hahn's testimony, as there was no evidence of the exact date Hahn started work at Rick's, or the exact dates he received raises. His 2001 earnings at Rick's Tree Service were calculated by multiplying 17 weeks (February 7 to June 4) x 40 x \$7.00 per hour = \$4,760; multiplying 9 weeks (June 5 to August 6) x 40 x \$7.50 per hour (\$2,700); and multiplying 10 weeks (August 7 through October 15) x 40 x \$8.00 per hour (\$3,200).

ⁱⁱⁱ This figure was arrived at by multiplying 106 weeks x 40 hours x \$10.40 per hour.

^{iv} Although the forum questions the dates that Respondent's other disciplinary documents concerning Hahn were created, the forum does not question that Respondent made Hahn a probationary permanent employee on September 13, 1999, for the reason that there is no apparent motivation for Respondent to give this document a false date.

^v Respondent uses a system of progressive discipline, which relies in part on prior disciplinary write-ups to support disciplinary actions, and Gazley herself claimed that Hahn's write-ups supported her decision to terminate Hahn.

^{vi} Her pertinent testimony on this issue was as follows:

Q: "So you attempted to get a list of the people who were involved in this, is that correct?"

A: "I didn't attempt to get lists; I just wanted to know who was involved. I wasn't trying to figure out what the reasoning was. I didn't understand."

Q: "Well, for what purpose were you trying to figure out who was involved?"

A: "Because I just wanted to know."

Q: "Just curiosity?"

A: "Yeah."

^{vii} Subsequently renumbered as ORS 659A.230(1).

^{viii} See *Young v. State of Oregon*, 161 Or App 32, 36 (1999), *rev den* 329 Or 447 (1999).

^{ix} As an aside, Gazley did not complete an EDR to document Bentley's suspension, an action that was required by Respondent's personnel policy. See Finding of Fact 73 – The Merits, *supra*.

^x See *McPhail v. Milwaukie Lumber Co.*, 165 Or App 596, 603 (2000) ("It is sufficient in Oregon for the [complainant] to show that the unlawful motive was a substantial and impermissible factor in the discharge decision.")

^{xi} See Finding of Fact 54 – The Merits, *supra*.

^{xii} An example of Respondent's corporate attitude towards "whistleblowers" was expressed by Gazley in the following exchange between the Agency case presenter and Gazley during cross-examination:

Q: "Can you tell me what, at the time that this termination of Miss Bentley and termination of Mr. Hahn and the non-termination of Miss Cole occurred, what, if any, would have been your policy about whether or not people who report wrongdoing within the company should be punished?"

A: "They'd probably just, well, be counseled (pause) is our policy."

^{xiii} See Finding of Fact 46 – The Merits, *supra*.

^{xiv} See Findings of Fact 84-86 – The Merits, *supra*.

^{xv} See Finding of Fact 25 – The Merits, *supra*.

^{xvi} Compare *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 16, 27-28 (1997) (whistleblowing complainant who was unlawfully discharged and experienced emotional distress similar to Hahn's for a two to three month period awarded \$20,000 in mental suffering damages).