

In the Matter of
KATARI, INC., dba Morgan's Restaurant & Lounge, and Charles Morgan,
Respondents.

Case Number 40-97
Final Order of the Commissioner
Jack Roberts
Issued August 13, 1997.

SYNOPSIS

Respondent corporation, which operated a restaurant and lounge, discriminated against complainant, a female bartender, because of her sex when it twice reduced her shifts and gave her weekend shifts to male bartenders, in violation of ORS 659.030 (1)(b). The individual respondent, who owned and was the president of the corporation, aided and abetted the corporation's unlawful employment practice in violation of ORS 659.030(1)(g) when he hired the male bartenders and gave complainant's shifts to them because he preferred male bartenders. Respondents did not bar complainant from employment when she twice voluntarily resigned due to the shift changes, and thus the Commissioner found no violation of ORS 659.030 (1)(a). The Commissioner awarded Complainant \$15,000 in compensation for her mental suffering. ORS 659.030 (1)(a), (b), and (g).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 28 and 29, 1997, in the Conference Room of the Oregon Department of Transportation, Highway Division, 63055 N Highway 97, Bend, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Amy M. Springer (Complainant) was present throughout the hearing. Katari, Inc. (Respondent Katari) and Charles Morgan (Respondent Morgan) were represented by Gregory Lynch, Attorney at Law. Kathy Morgan, Respondent Katari's representative, was present throughout the hearing.

The Agency called the following witnesses: Reed Clovos, manager of the Meadow Lakes Golf Course; Sandy Lampert and Mike Mansfield, former employees of Respondent Katari; Kathy Morgan, Respondent Morgan's wife; Susan Moxley, senior investigator with the Civil Rights Division of the Agency; Janet Petty, employee of Respondent Katari; Amy Springer, Complainant; and Mary Williams, former manager of the Prineville Golf and Country Club.

Respondent called the following witnesses: Michelle Taylor (now Hickson), former general manager for Respondent Katari; Ike Hoff, former employee of Respondent Katari; and Charles (Chuck) Morgan, Respondent.

Administrative exhibits X-1 to X-9, Agency exhibits A-1, A-2, A-4, A-7 (except p. 9), and A-8 to A-11, and Respondents' exhibits R-1 to R-5 and R-7 to R-13 were offered and received into evidence. The Agency withdrew exhibit A-3. The record closed on May 29, 1997.

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 June 10, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondents discriminated against her

because of her sex in that Respondents changed and reduced her hours because they preferred male bartenders.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices by Respondents.

3) On around February 10, 1997, the Agency prepared and duly served on Respondents Specific Charges that alleged that Respondent Katari had treated Complainant differently and barred her from employment because of her sex, in violation of ORS 659.030(1)(a) and (b), and that Respondent Morgan aided and abetted Respondent Katari in violation of ORS 659.030(1)(g). Complainant claimed damages for lost wages and mental suffering.

4) With the Specific Charges, the forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice 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 February 28, 1997, Respondents filed an answer in which they denied the allegations mentioned above in the Specific Charges and alleged as affirmative defenses that (1) Complainant was hired to work only one weekend, for which she received final payment, and (2) requiring a male bartender on particular shifts "because of his gender, physical strength, and masculine presence, to discourage and/or thwart probable or actual violence" was "a bonafide occupational requirement reasonably necessary to the normal operation of Respondents' business." Respondents withdrew their bona fide occupational requirement defense at hearing.

6) On March 12, 1997, Respondents' attorney, Gregory Lynch, requested a postponement of the hearing because of depositions previously scheduled in another case with out-of-town counsel. The Agency did not object and the ALJ granted a postponement, resetting the hearing for May 28, 1997.

7) Pursuant to OAR 839-050-0210 and the Administrative Law Judge's order, the Agency and Respondent each filed a Summary of the Case.

8) At the start of the hearing, the attorney for Respondents stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

9) Pursuant to ORS 183.415(7), the Administrative Law Judge orally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) During the hearing and pursuant to OAR 839-050-0140(2)(b), the Agency moved to amend the Specific Charges to delete the request for back wage damages. Respondents had no objection and the ALJ granted the motion.

11) On July 22, 1997, the Administrative Law Judge issued a Proposed Order in this matter. On August 4, 1997, the Hearings Unit received Respondents' timely exceptions, which are addressed throughout this Final Order.

FINDINGS OF FACT -- THE MERITS

1) At times material herein, Respondent Katari was an Oregon corporation and the owner and operator of a restaurant and lounge in Prineville, Oregon, using the assumed business name of Morgan's Restaurant & Lounge. Respondent Katari was an employer in the state of Oregon utilizing the personal services of one or more persons, subject to the provisions of ORS 659.010 to 659.435. Charles (Chuck) Morgan was an owner and the president of Respondent Katari and as corporate president is personally

liable for aiding and abetting Respondent Katari in the commission of the unlawful employment practices alleged in Section 3 of the Specific Charges.

2) Complainant is female.

3) In March 1996, Respondent Morgan and his wife bought the Cinnabar restaurant and lounge, which they renamed Morgan's Restaurant & Lounge (bar). They remodeled the bar during March and early April 1996.

4) Respondent Morgan preferred male bartenders over female bartenders because if there was a fight in the bar, he believed it would be easier for a male bartender to handle it than for a female bartender. He believed that if he employed a male bartender, he would not need a bouncer.

5) Respondents hired Sandy Lampert as the bar manager in March 1996, before the bar reopened in mid-April 1996. Lampert and Complainant had worked for the previous owners of the Cinnabar. Complainant filled out an application on March 28, 1996, and gave it to Lampert. During the first half of April 1996, Lampert helped clean and restock the bar, started booking bands to provide live entertainment, and hired and scheduled bartenders and cocktail waitresses. Respondent Morgan gave Lampert the responsibility to hire and schedule enough employees to fill the shifts. Only two males applied to be bartenders. Lampert interviewed and hired Complainant, Mike Mansfield, and others to work for Respondents. Lampert posted the schedule. Complainant's shifts were Friday and Saturday nights, Sunday, and one week day. Complainant received a uniform. Around April 10, 1996, Respondent Morgan and Lampert could not agree on a salary for Lampert, and Respondent Morgan changed her title to "bar supervisor." She retained the same duties as before. After the Bull Bash weekend in mid-April, Respondent Morgan took over the responsibility for hiring and firing bar employees. Lampert then worked as a cocktail waitress, hostess, and bartender.

6) In April 1996, Complainant also worked as a part-time bartender for two other employers: the Prineville Golf and Country Club and the Meadow Lakes Golf Course. Complainant reduced her work hours for these employers to work for Respondent Katari. Complainant was never told by Respondent Morgan, Lampert, or Michelle Taylor (general manager and bookkeeper for Respondent Katari) that she was hired for only the Bull Bash weekend.

7) Complainant had seven years' experience as a bartender. She was an excellent bartender; she was well liked and very professional. She was accustomed to rowdiness in the bars where she had worked and was able to handle it. Fights were not unusual and she was able to break them up. She was never injured in a fight.

8) Respondent Morgan had a meeting with the employees before the opening weekend. Many of the employees were former Cinnabar employees. He gave them a pep talk and told them he had never operated a restaurant and lounge before. He did not tell them they were hired to work only one weekend or that their schedules or hours were "up in the air."

9) Following the remodeling, Respondent Katari opened the bar on Thursday, April 18, 1996. The following Friday and Saturday were during the weekend of the annual Bull Bash in Prineville, which resulted in a much larger crowd than normal at the bar. Respondent Katari employed three security people, two people to check identification at the door, three bartenders (Complainant, Colleen Archer, and Mike Mansfield), and two cocktail waitresses that weekend. At 1:17 a.m. on Saturday, April 20, 1996, Prineville police were dispatched to the bar in response to "multiple fights." Two Oregon Liquor Control Commission (OLCC) inspectors observed several visibly intoxicated customers and several arguments among customers. They issued a warning to general manager Michelle Taylor regarding the visibly intoxicated customers

and the disorderly activities on the premises. The Prineville Police Department advised Respondent Morgan that he needed to increase his security to maintain order at the bar. Complainant did not see any fights on Friday or Saturday night.

10) Complainant worked for Respondents Thursday through Sunday, April 18 to 21, 1996.

11) Around April 23, 1996, Respondent Morgan told Lampert that he had hired Rod Williams as a bartender to work Friday and Saturday nights. Respondent Morgan wanted a male bartender who could handle fights and protect the female employees. Williams had no experience as a bartender. Respondent Morgan directed Lampert to train Williams. When Complainant came to the bar that day to check the work schedule, Lampert told Complainant her hours were cut because Respondent Morgan wanted male bartenders. Instead of Complainant, Williams was scheduled to work Friday and Saturday nights with Mike Mansfield. Those nights were the best nights to work because tips were the highest. Lampert, whose bartending hours were also reduced and given to Williams, was crying and Complainant was very upset. Complainant did not know what to do because she had already reduced her hours with her other employers. Lampert advised her to wait a couple of days. Complainant had several conversations with Taylor about the schedule. On Thursday, April 25, 1996, Taylor told Complainant that she (Taylor) had not yet talked with Respondent Morgan, and she apologized because Respondent Morgan wanted men behind the bar. Complainant felt hurt and embarrassed because she was replaced by Rod Williams, who had no experience. Complainant was on the schedule for only Sunday during the day. She quit because she thought she had been hired for full time work. On April 27, 1996, she turned in her uniform and Taylor paid her for her four days' work. The hourly rate of pay used to calculate Complainant's wages was wrong, and on April 29, 1996,

Kathy Morgan gave Complainant a second check for the difference.

12) Complainant was able to get her hours back at the Prineville Golf and Country Club and the Meadow Lakes Golf Course. Complainant was upset when she asked her manager at Prineville Golf and Country Club, Mary Williams, for her hours back.

13) Rod Williams was incapable of performing the bartender job and Respondent Morgan fired him around April 30, 1996.

14) After Williams was fired, Respondents placed an advertisement in the newspaper for a bartender. Respondent Morgan wanted to hire a male bartender. Only females applied.

15) Respondent Morgan sent Ike Hoff to contact Complainant about coming back to work for Respondent Katari.

16) On Saturday, May 4, 1996, Taylor contacted Complainant at Respondent Morgan's direction and asked if she would return to work for Respondent Katari. Taylor offered Complainant employment with a full time schedule that included Friday and Saturday nights and Sundays, Mondays, and Tuesdays. Complainant accepted and said she could start on Monday, May 6, 1996. She said she would not be able to work until around 10 p.m. on Friday nights. Complainant needed to talk with her other two employers about her schedule. Complainant and Taylor agreed that Complainant would come in on Monday and work out her hours. Complainant was excited to return to work for Respondents because she wanted full time work and the higher income she could earn at Respondent Katari's bar. She again contacted her other employers and asked that her schedule be adjusted to accommodate her hours at Respondents' bar.

17) On Sunday, May 5, 1996, Respondent Morgan changed his mind about hiring Complainant because Craig Ortman became available to work, and Respondent

Morgan wanted to hire a male bartender. Respondent Morgan hired Ortman. Taylor called Complainant to offer her only Sunday days, on-call shifts, and work during special events. Complainant declined this job.

18) Reed Clovos, Complainant's manager at Meadow Lakes Golf Course, told her that he had seen a new male bartender at Respondents' bar. Respondent Morgan had said that he wanted male bartenders because they could tend bar and be the bouncer. Complainant and her husband went into the bar and saw Ortman working as the bartender.

19) Complainant was very upset when she did not get the full time job with Respondent Katari. She felt that what Respondent Morgan did (preferring male bartenders over female bartenders) was wrong. She was embarrassed to go back to her other jobs and again ask for her hours back. She got her hours back and continued working at her other jobs, but at an hourly rate of pay that was lower than she would have earned working for Respondent Katari. Complainant experienced financial stress during this time because her husband was unemployed and she had five children, three of whom lived with her year round and two of whom lived with her during summers. She had expected to earn more wages and tips while working at Respondents' bar than she had at her two part-time jobs.

20) OLCC prepared a compliance plan, dated August 28, 1996, for Respondent Katari to address the problems of "Disorder, overservice." This plan was sent to Respondents on September 5, 1996, following a meeting to discuss the "recent problems at your premises." One item of the plan, which Respondents agreed to, required Respondents to have a bouncer and ID checker on duty when there was any live entertainment at the bar. The OLCC inspector who inspected the bar in April 1996 and who wrote the compliance plan in August 1996 did not tell Respondents that they

had to hire a male bouncer. No OLCC rule requires that a bouncer or ID checker be male.

21) Respondent Morgan's testimony was not credible. The ALJ carefully observed the demeanor of each witness and evaluated the credibility of the testimony based upon its inherent probability, its internal consistency, whether it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrated it was logically incredible. See *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256, 602 P2d 1161 (1979) (Richardson, J., concurring in part and dissenting in part). Respondent Morgan's testimony was internally inconsistent. For example, he denied ever saying that he preferred male bartenders; however, he also testified that he might have told people he liked male bartenders. This denial was corroborated by only his wife, and it was heavily contradicted by credible evidence (testimonial and documentary) that he made no secret of his preference for male bartenders. Likewise, Respondent Morgan testified that Complainant was hired for only the Bull Bash weekend and that he told all the employees at the pre-opening meeting that their schedules were up in the air. That testimony was contradicted by the vast majority of the evidence in the record. Accordingly, the forum gave Respondent Morgan's testimony less weight whenever it conflicted with other credible evidence on the record. In some instances, the forum did not believe his testimony even when it was not controverted by other evidence.

22) The testimony of Michelle Hickson (formerly Taylor) was not entirely credible. Her memory was unreliable and selective. At times her testimony was evasive. On several disputed issues of fact, Hickson's testimony was inconsistent with statements she made to an investigator for the Civil Rights Division in August 1996 and was contradicted by credible evidence. Accordingly, the forum gave Hickson's testimony

less weight whenever it conflicted with credible evidence on the record. In some instances, the forum did not believe her testimony even when it was not controverted by other evidence.

ULTIMATE FINDINGS OF FACT

1) Respondent Katari was an employer in the state of Oregon with one or more employees. Respondent Morgan was the president of Respondent Katari.

2) Respondent Katari employed Complainant.

3) Complainant is female.

4) In April 1996, Respondent Katari, through Respondent Morgan, hired a male bartender because Respondent Morgan preferred to employ male bartenders. Respondent Morgan gave the male bartender work shifts that Complainant had been hired to work. Respondent Morgan changed Complainant's work schedule by decreasing the number of shifts she was scheduled to work and by giving her less desirable shifts because she is female. Complainant quit her employment with Respondent Katari.

5) In May 1996, Respondent Katari, through its general manager and at the direction of Respondent Morgan, again offered Complainant a full-time job as a bartender, working shifts that included Friday and Saturday nights. Complainant accepted that offer. Before Complainant began work, Respondent Morgan hired a male bartender because he preferred to employ male bartenders. He gave the male bartender shifts that had been offered to Complainant. Respondent Morgan changed Complainant's work schedule, offering her only on-call work, because she is female. Complainant again quit her employment with Respondent Katari.

6) Complainant suffered embarrassment, humiliation, disappointment, and distress because of Respondents' conduct.

CONCLUSIONS OF LAW

1) Respondent Katari was an employer subject to the provisions of ORS 659.010 to 659.110.

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

3) The actions, inactions, and knowledge of Respondent Morgan, Sandy Lampert, and Michelle Taylor, each an employee or agent of Respondent Katari, are properly imputed to Respondent Katari.

4) ORS 659.030(1) provides in part:

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

"(a) For an employer, because of an individual's * * * sex * * * to refuse to hire or employ or to bar or discharge from employment such individual. However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

"(b) For an employer, because of an individual's * * * sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

" * * * * *

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

Respondent Katari did not violate ORS 659.030(1)(a). Respondent Katari violated ORS 659.030(1)(b). Respondent Morgan violated ORS 659.030(1)(g).

5) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondents: to refrain from any action that would

jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

ALLEGED VIOLATION OF ORS 659.030(1)(A) -- BARRED FROM EMPLOYMENT

The Agency contends that Respondent Katari barred Complainant from employment because of her sex, in violation of ORS 659.030(1)(a). In the Specific Charges, the Agency alleges that Respondent Katari did this by: reducing Complainant's hours around April 23, 1996 (when a male bartender was hired); again offering her full time work around May 4, 1996; then rescinding the offer around May 6, 1996 (when another male bartender was hired), and advising her she was only needed on an on-call basis; and taking these actions at a time when Complainant could not afford to work on an on-call basis.

Respondents claim that they hired Complainant for only the Bull Bash weekend, she quit after that weekend, and thus they did not bar or discharge her from employment because of her sex. They claim that Complainant never accepted their offer of employment in May 1996.

As explained in greater depth in the next section of this opinion, the preponderance of credible evidence revealed and the forum found the following facts. Respondent Katari hired Complainant for more than just the Bull Bash weekend and Respondent Katari's agent Lampert promised her certain shifts. Complainant quit her employment when Respondent Morgan reduced her hours in April 1996. When Taylor again offered Complainant employment in May 1996, Complainant accepted that offer, although there was to be additional discussion regarding her hours after she talked with

her other employers. Respondents changed the offer to include only on-call shifts and special events. Complainant declined this position and, in effect, quit again.¹

The preponderance of credible evidence does not establish that Respondent Katari barred Complainant from employment because of her sex. The evidence shows that she quit each time Respondent Katari offered her an unacceptable schedule. The Agency did not plead (or offer evidence that would prove) that Respondent Katari actually or constructively discharged Complainant. Accordingly, the Agency has failed to prove that Respondent Katari violated ORS 659.030(1)(a).

VIOLATION OF ORS 659.030(1)(B) -- DIFFERENT TREATMENT IN THE TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT

The Agency contends that Respondents reduced Complainant's work hours because of her sex, in violation of ORS 659.030(1)(b). It alleges that Respondent Morgan preferred to employ male bartenders, especially on weekends when Complainant was scheduled to work, because the males could also act as bouncers and protect the "girls." The Agency alleges that Respondent Katari twice reduced Complainant's shifts when Respondent Morgan hired male bartenders.

Respondents contend that Respondent Katari hired Complainant for the Bull Bash weekend only and did not assure her any hours thereafter. They contend that Lampert had no authority to offer Complainant anything more than the shifts she worked during the Bull Bash weekend. They say Complainant quit after that weekend. They also contend that Complainant never accepted employment in May 1996 and that they hired Craig Ortman to fill the vacant position. They deny any intent to discriminate against Complainant because of her sex.

The preponderance of credible evidence on the whole record shows persuasively that Respondent Morgan preferred to employ male bartenders. His denial that he did so

was overwhelmed by the testimony of the other witnesses, including his own witness Hickson, and by the documentary evidence, including Respondents' exhibits. The forum has no doubt that Respondent Morgan hired Rod Williams and Craig Ortman specifically because they were male and because Respondent Morgan wanted male bartenders on the weekends.

Likewise, the preponderance of credible evidence was persuasive that Respondent Katari hired Complainant for more than just the bar's first weekend. The evidence was uncontroverted that Complainant was an excellent bartender and did a great job on the weekend of the Bull Bash. Respondent Katari employed other employees, such as Lampert and Mansfield, for an indefinite period beyond the opening weekend.² Further, the preponderance of credible evidence shows that, in the meeting with employees before April 18, Respondent Morgan did not state, as he claims he did, that employees were hired only through the Bull Bash and that their hours were up in the air after that. No witness corroborated that claim. The forum concludes that Respondent Katari hired Complainant as a permanent employee for an indefinite period and for shifts that included weekend nights.

Respondents' next claim that Sandy Lampert did not have any authority to offer Complainant particular shifts after the Bull Bash. The preponderance of credible evidence is to the contrary. Respondent Morgan gave Lampert the authority to hire bartenders and authorized her to set the schedule. Whether her title was bar manager or bar supervisor, her duties were the same. Respondent Morgan authorized Lampert to make sure the shifts were covered and to post the schedule. She did that and, as an agent of Respondent Katari, offered the weekend night-shifts to Complainant and Mansfield. Complainant accepted this and adjusted her hours with her other employers accordingly. There was no credible evidence that Respondent Katari hired Complainant

or promised her shifts for only the opening weekend.

An employer has a right to reduce or change an employee's schedule, provided the reason for that adjustment is not based on the employee's protected class. Here, the evidence is persuasive that the only reason Respondent Katari did not schedule Complainant to work weekend night shifts after the Bull Bash was her sex. Mike Mansfield continued to work weekend night shifts after the Bull Bash. The only reason Complainant was not there to work with him was that Respondent Morgan wanted male bartenders to work those shifts. By doing so, Respondent Katari discriminated against Complainant in the terms and conditions of her employment, in violation of ORS 659.030(1)(b).

The preponderance of credible evidence is also persuasive that, on Saturday, May 4, 1996, Respondent Katari (at Respondent Morgan's direction and through the general manager Taylor) offered Complainant a full time position that included weekend night shifts. Complainant testified credibly that she accepted this position, even though her exact hours would not be determined until the following Monday, when she would start work. That evidence was corroborated by Lampert's testimony and notes. No reliable evidence rebutted it. Respondent Morgan then hired Craig Ortman for the weekend shifts, and Taylor had to call Complainant back on May 5 to offer her only on-call work. As stated above, the forum has no doubt that Respondent Morgan hired Craig Ortman specifically because he was male and because Respondent Morgan wanted male bartenders on the weekends. The forum concludes that the shifts that were first offered to Complainant were taken away from her because she is female and Respondent Morgan wanted a male to work those shifts. That constitutes discrimination because of sex in violation of ORS 659.030(1)(b).

In their exceptions, Respondents argue that, while Respondent Morgan

"may have preferred to have a male bartender on the premises during certain shifts, the clear and unequivocal testimony by [Hickson] was that Morgan never acted on this preference. [Hickson] testified that no male was ever hired in place of a female."

As explained below, the forum found Hickson's testimony unreliable. The forum specifically finds this claim -- that Respondent Morgan never acted on his preference for male bartenders -- incredible. The preponderance of credible evidence showed that Respondent Morgan wanted male bartenders on weekends so they could handle the fights. Aside from that, Respondents offered no plausible reason why they would hire an inexperienced male bartender and schedule him to work weekend nights, rather than schedule the already-hired, experienced, and able female Complainant for those shifts. From the evidence, the forum must conclude that Respondents hired and then scheduled the inexperienced Williams to work the weekend night shifts solely because of his sex. The forum must also conclude that Respondents did not schedule Complainant to work the weekend night shifts solely because of her sex. Concerning Respondents' arguments that they never hired a male in place of a female, those arguments are irrelevant concerning whether Respondents reduced Claimant's work hours because of her sex, in violation of ORS 659.030(1)(b).

VIOLATION OF ORS 659.030(1)(G) -- AIDING OR ABETTING AN UNLAWFUL EMPLOYMENT PRACTICE

The forum has concluded that Respondent Katari violated ORS 659.030(1)(b) by hiring the male bartenders and reducing Complainant's shifts because of Complainant's sex. Respondent Morgan, as Respondent Katari's president and as the person who made the hiring and scheduling decisions following the Bull Bash weekend, directly aided and abetted Respondent Katari's discriminatory acts, in violation of ORS 659.030(1)(g).

In their exceptions to this section of the opinion, Respondents again argue that

Respondent Morgan "never hired a male bartender to replace a woman or instead of a woman." For the reasons given in the previous section of this opinion, the forum rejects this exception.

DAMAGES

Awards for mental suffering damages depend on the facts presented by each complainant. Here, the forum found that the discrimination Complainant experienced caused her mental suffering including stress, upset, embarrassment, hurt, and disappointment as described in the Findings of Fact. Respondents are directly liable for these damages.

In their exceptions, Respondents claim the damages award is punitive and, therefore, unauthorized by statute. Relying on *School District No. 1 v. Nilson*, 271 Or 461, 534 P2d 1135 (1975), they argue that the facts here are far less egregious than those in *School District No. 1*, where the court struck down the Commissioner's mental suffering award of \$1,000. The forum disagrees that the damages issue here is "virtually identical" to that in *School District No. 1*, as Respondents contend.

First, the award here is for compensatory damages only. It is not an award of punitive damages.

Second, no part of the award compensates Complainant for the stress that is inherent in litigating this matter. *School District No. 1; In the Matter of Portland General Electric Company*, 7 BOLI 253 (1988), *aff'd*, *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993); *In the Matter of German Auto Parts, Inc.*, 9 BOLI 110 (1990), *aff'd*, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992). Complainant heard from her patrons that Respondent Morgan made negative comments about the merits of this case. She was humiliated. However, the forum awarded her no damages for this.

Third, a lack of medical consultation or a failure to seek counseling goes to the severity of mental suffering, not necessarily to its existence. *In the Matter of Portland General Electric Company*, 7 BOLI 253 (1988), *aff'd*, *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Jeromy Dusenberry*, 9 BOLI 173 (1991). In the proper case, with proof of emotional distress, an unlawful disparity in pay based upon sex has supported an award for mental suffering. *In the Matter of City of Portland*, 2 BOLI 110 (1981), *aff'd*, *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475 (1984); *In the Matter of Courtesy Express, Inc.*, 8 BOLI 139 (1989). In relation to mental suffering, the forum sees little difference between sex-based discrimination in the form of lower wages and sex-based discrimination in the form of reduced work shifts.

Fourth, the forum has held repeatedly that financial insecurity and anxiety caused by an unlawful employment practice is compensable. *In the Matter of WS, Inc.*, 13 BOLI 64 (1994); *In the Matter of German Auto Parts, Inc.*, 9 BOLI 110 (1990), *aff'd*, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992). Here, Complainant twice gave up part-time hours with her two other employers to take employment with Respondent Katari. She did so with an expectation that she could earn more money and work full time for one employer. She provided the sole support for her family because her husband was unemployed. Twice Respondents discriminated against her because of her sex and she had to seek additional work with the other employers. Since she was able to increase her hours with the other employers, the duration and severity of her financial insecurity were tempered. Nevertheless, it is compensable.

Finally, when an individual is discriminated against because of her immutable characteristics, such as her sex or race, the forum recognizes and may infer that she has suffered some diminution of her human dignity. *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, 571, *rev den* 287 Or 129 (1979). Often, complainants cannot articulate this, but instead complain of upset, humiliation, distress, hurt, and embarrassment. These are precisely the emotions Complainant described. This mental suffering is compensable.

The amount awarded to Complainant in the order below is compensation for her mental suffering and is a proper exercise of the Commissioner's authority to eliminate the effects of the unlawful practices found.

RESPONDENTS' EXCEPTIONS

In Respondents' exceptions to the Proposed Order, they challenge several findings of fact. For example, they contend that Lampert had no authority to offer Claimant permanent employment. Lampert gave inconsistent testimony about the authority she had at different times, as her job evolved from bar manager to cocktail waitress. But besides Lampert's testimony, the preponderance of credible evidence shows that Respondent Katari hired Claimant and that she was still employed after the Bull Bash. That evidence also shows that Lampert set the schedule and Claimant's hours were reduced after Respondents hired Rod Williams as a bartender. Contrary to Respondents' arguments, Respondent Morgan did not make it clear to the employees that their hours were up in the air following the opening weekend.

In their exceptions, Respondents rely in part on Hickson's testimony. The forum has added a finding of fact that Hickson's testimony was not credible. See Finding of Fact -- The Merits 22. After reviewing the evidence, it is clear the ALJ made findings of fact contrary to her testimony. In other words, the ALJ gave greater weight to evidence

that contradicted her testimony. Express credibility findings are not needed when there is evidence in the record both to make more probable and to make less probable the existence of any particular fact. *Dennis v. Employment Division*, 302 Or 160, 169, 728 P2d 12, 18 (1986). However, to clarify the basis for the other findings and the reasoning in this order, the forum has made an express finding of fact regarding Hickson's credibility. After reviewing the evidence, the forum agreed with the ALJ's implicit credibility finding and, for the reasons given in Finding of Fact 22, found Hickson's testimony unreliable.

Respondents also take exception to the ALJ's finding on the credibility of Respondent Morgan's testimony. An Administrative Law Judge's credibility findings are accorded substantial deference by the forum. Absent convincing reasons for rejecting such findings, they are not disturbed. *In the Matter of Western Medical Systems, Inc.*, 8 BOLI 108, 117 (1989). After considering Respondents' arguments and the evidence, the forum concurs with the ALJ's finding regarding credibility and finds no convincing reason to reject it. Accordingly, the credibility finding has not been disturbed.

After considering each of Respondents' exceptions and reviewing the evidence, the forum believes the findings, as modified, are supported by the preponderance of credible evidence. Insofar as Respondents' exceptions are contrary to the findings, they are rejected.

Respondents also took exception to three sections of the opinion. The forum addressed those exceptions in the respective sections of the opinion.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondents, KATARI, INC. and CHARLES

MORGAN, are hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street # 32, Suite 1010, Portland, Oregon 97232- 2162, a certified check, payable to the Bureau of Labor and Industries in trust for Amy M. Springer, in the amount of:

a) Fifteen Thousand Dollars (\$15,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondents' unlawful practice found herein; plus,

b) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondents comply herewith, to be computed and compounded annually.

2) Post in a conspicuous place on the premises of Morgan's Restaurant & Lounge a copy of ORS 659.030, together with a notice that anyone who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

3) Cease and desist from discriminating against any current or future employee because of the employee's sex.

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¹Respondent did not bar Complainant from employment by changing her schedule to only on-call work. A person hired for on-call or casual work is still an employee. *In the Matter of Lebanon Public Schools*, 11 BOLI 294, 306 (1993).

²There was evidence that one employee, Colleen Archer, was discharged after the Bull Bash. She was discharged, according to Kathy Morgan and Sandy Lampert, because she was Lampert's daughter. Respondent Katari had a policy that prohibited the employment of family members of employees. There was conflicting evidence about whether the Morgans knew Archer was Lampert's daughter before she was employed. In any event, her family relationship with Lampert was the reason for her discharge, not that she was hired for only the Bull Bash weekend. The forum notes that a blanket policy, such as the one Kathy Morgan described, prohibiting the employment of an individual solely because another member of the individual's family works or has worked for the employer could violate ORS 659.340.