In the Matter of

MAGNO-HUMPRHIES, INC.

Case No. 38-02

Final Order of Commissioner Dan Gardner

Issued February 18, 2004

SYNOPSIS

Respondent failed to timely file an answer and a notice of default issued. Respondent did not timely file a request for relief from default and was not permitted to present evidence or examine witnesses at the hearing pursuant to OAR 839-050-0330(3). The forum found that the Agency established a prima facie case and concluded that Respondent denied Complainant Oregon Family Medical Leave ("OFLA") by terminating her while she was absent from work due to an OFLA qualified health condition. The forum determined that Respondent should pay Complainant $22,400 in lost wages, $18,000 for mental suffering, and $2,585.31 in lost medical benefits. *Former* ORS 659.470(1); *former* 659.472(1); *former* 659.478; *former* 659.492(1); *former* 659.010 to 659.110; 659A.780; *former* and *current* OAR 839-009-0210(14)(d); *former* and *current* OAR 839-009-0320(2).

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 11, 2003, in the W.W. Gregg Hearings Room located at 800 NE Oregon Street, Portland, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Bonnie Hopperstad ("Complainant") was present throughout the hearing and was not represented by counsel. Magno-Humphries, Inc. ("Respondent"), after being duly notified of the time and place of the hearing and of its obligation to file an answer within 20 days of the issuance of the Formal Charges, failed to file an answer as required. The ALJ found Respondent in default and Respondent was thereby precluded from presenting evidence or argument

at the hearing. After Respondent's request for relief from default was denied, attorney Terrence Kay filed an appearance on Respondent's behalf. The day before the hearing, Respondent, through counsel, filed a motion to set aside the order of default and order denying relief from default, which the ALJ denied. Neither Respondent nor its counsel was present at the hearing.

In addition to Complainant, the Agency called as witnesses: Peter Martindale, Senior Civil Rights Investigator and Barbara Hopperstad, Complainant's mother.

The forum received as evidence:

a) Administrative exhibits X-1 through X-18 (generated prior to or during hearing);

b) Agency exhibits A-1 through A-10 (submitted prior to hearing) and A-11 and A-12 (submitted during hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 November 9, 2001, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of the unlawful employment practices of Respondent. On January 14, 2002, the Agency amended the complaint to correct a typographical error.[i] After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations of the complaint.

2) On August 21, 2002, the Agency submitted Formal Charges to the forum alleging Respondent discriminated against Complainant by refusing to grant her family medical leave in violation of *former* ORS 659.492. The Agency further alleged that

Respondent terminated Complainant because of absences caused by her serious health condition in violation of *former* ORS 659.492 and *former* and *current* OAR 839-009-0320. The Agency also requested a hearing.

3) On August 22, 2002, the forum served the Formal Charges on Respondent together with the following: a) a Notice of Hearing setting forth February 11, 2003, in Portland, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) A copy of the Formal Charges, together with items a) through d) of Procedural Finding 3 above, were sent by certified mail, postage prepaid, to Respondent's last known address (supplied by the Agency), pursuant to OAR 839-050-0030(1) as follows:

Thelma M. Humphries, President
Magno-Humphries, Inc. dba
Magno-Humphries Laboratories Incorporated
8800 SW Commercial
PO Box 230626
Tigard, Oregon 97223

Thelma Magno
Registered Agent
Magno-Humphries, Inc.
8800 SW Commercial
PO Box 230626
Tigard, Oregon 97223

On August 30, 2002, the Hearings Unit received two US Postal Service Certified Mail Receipts that were signed by the recipient (signature illegible) showing delivery to both addresses.

5) The "Instructions" on the Notice of Hearing (item a) in Finding 3, the Summary of Contested Case Rights and Procedures (item b) in Finding 3, and the Contested Case Hearing Rules (item c) at OAR 839-050-0130(1) in Finding 3, provide that an answer must be filed within 20 days of the issuance of the charging document. All three also provide that a corporation must be represented either by counsel or an authorized representative at all stages of the hearing, including filing an answer, and that before a person may appear as an authorized representative, the person must file a letter authorizing the person to appear on behalf of the corporation. The Hearings Unit did not receive any correspondence from Respondent within 20 days of the issuance of the charging document.

6) On September 16, 2002, Agency case presenter Cynthia Domas mailed a letter to Respondent's registered agent that stated, in pertinent part:

> "Pleased be advised that the Agency will seek a default in the above matter if you do not file an Answer within ten (10) days from the date of this letter."

7) On Monday, September 30, 2002, the Hearings Unit received a letter sent by facsimile transmission from Thelma Magno that stated in pertinent part:

> "Magno-Humphries respectfully dissagree [*sic*] with the findings of the Bureau. Please see attached summary on dates we have on [*sic*] our files that was submitted to your office and also a telephone/conference meeting. We were not given the privilege of having a hearing in person.
>
> "I have been in business for 22 years and nothing like this has ever happened. I am a small business trying to survive this unhealthy economy[.] Last May I have [*sic*] to cut down 1/3 of my employees especially in production, management and packaging because of loss of business and income.
>
> "We were not informed on how serious her condition is – a lot of times she just call-in sick with no reason – when ask [*sic*] on the day that she was warned – is there anything we can do to help on your condition – she never said that she is really sick.
>
> "I have employees that had been here 20 years and they can testify that we do not treat our employees like this. This is not fair that we should be

> accused of some things that is [*sic*] not true. I apologize for the delay of this reply (I have a serious business to run).
>
> "May we request a formal hearing – and we wanted all the paper (medical papers) from the hospital or her doctor to be submitted. If I have to hire a lawyer – I will – this is important to us that this be resolved in appropriate way.
>
> "Hope to hear from you soon."

The letter, dated September 28, 2002, included an attachment that appears to be a log documenting dates that Complainant was absent from work due to illness and dates that she returned to work with a doctor's note. The letter did not include a certificate of service indicating that it had been served on the Agency.

8) On October 1, 2002, the Hearings Unit received the original letter and attachment from Thelma Magno dated and postmarked September 28, 2002.

9) On October 3, 2002, the Agency filed a Motion for Default and Alternative Motion for Limitation of Issues at Hearing. The Agency's motion stated, in pertinent part:

> "On August 22, 2002, the Agency issued a Notice of Hearing ('Notice'). The Notice set forth in bold font that Respondent's Answer was due 20 days from the date of service. OAR 839-050-0330 controls service of Agency hearing documents. Service of the charging document in this case was complete upon mailing under OAR 839-050-0330(1)(b). Attached as Exhibit A and incorporated by reference herein is a copy of the certified mail return receipt requested card showing the correct address of Respondent. In addition, the document from Respondent received by the Hearings Unit on October 1, 2002, lists the same address for Respondent. Therefore, service was effective on August 22, 2002, making the Respondent's Answer due no later than September 11, 2002.
>
> "Although there is no Agency rule requiring that Respondent be allowed a 10-day grace period before the Agency will seek a default, the Agency Case Presenter sent a 10-day letter to Respondent on September 16, 2002, a copy is attached as Exhibit B and incorporated by reference herein. Respondent did not file an Answer. However, Respondent reportedly faxed a document to the Agency on September 27, 2002, at 7:02 p.m. Faxed filings are not allowed in this forum unless specifically provided for by the Administrative Law Judge. OAR 839-050-0040(2). The Case Presenter has not received any correspondence from Respondent. The Hearings Unit did not receive a hard copy until October

> 1, 2002. A copy of the envelope that is date stamped is attached as Exhibit C and incorporated by reference herein. This was over two weeks after the Answer was due. OAR 839-050-0050 allows the Administrative Law Judge to disregard any document that is filed late.
>
> "OAR 839-050-0110(1) requires that corporations be represented by either counsel or an authorized representative *at all stages of the contested case proceeding*. The Notice of Hearing further clarifies this requirement by specifically stating that this requirement includes the filing of an Answer. The document received from Respondent on October 1, 2002, is signed by the President of the corporation. There is no indication that Ms. Magno is an attorney or authorized representative. This is particularly clear from the last sentence of the document." [Citations omitted]

10) On October 9, 2002, the ALJ granted the Agency's motion and issued a Notice of Default noting that the Formal Charges issued on August 22, 2002, that Respondent was required to file an answer within 20 days and failed to do so, and that it was in default under OAR 839-050-0330(1)(a). Respondent was advised it had ten days from the date the Notice of Default issued to request relief from default through counsel or an authorized representative as provided in the contested case hearing rules.

11) On October 22, 2002, the Hearings Unit received a letter from Thelma Magno that was sent by facsimile transmission at 5:11 p.m. on October 21, 2002, after BOLI business hours.[ii] The letter stated that "Magno-Humphries, Inc. requests a relief from default due to my absence at the time of the prescribed deadline. At the time of my return, I did not have time to act on this." The letter included a lengthy answer that concluded as follows: "1. Because of her history of absences, there was no indication that her absences as early as August were due to a serious health condition. 2. Complainant was terminated due to her absences, not a condition that was not yet diagnosed." The letter did not include a statement authorizing Magno to appear on Respondent's behalf.

12) On October 25, 2002, the ALJ issued an order denying Respondent relief from default noting that its request for relief was not timely filed, was not filed by counsel or an authorized representative, and, in any event, failed to show good cause for Respondent's failure to timely file an answer.

13) On January 9, 2003, the Hearings Unit received a Notice of Representation of Counsel filed by attorney Terrence Kay on Respondent's behalf.

14) On February 10, 2003, the Agency submitted a case summary.

15) On February 10, 2003, Respondent, through counsel, moved the forum to set aside the notice of default and the order denying relief from default and alternatively moved for relief from default. Additionally, Respondent moved to continue the hearing to allow "reasonable" time for discovery and hearing preparation. At counsel's request, the ALJ convened a pre-hearing conference by telephone to address Respondent's motions. During the pre-hearing conference and for reasons set forth in the Ruling Upon Motions section of this order, the ALJ denied the motions and informed counsel that Respondent would not be allowed to participate in the hearing, pursuant to OAR 839-050-0330(3).

16) On February 11, 2003, the Agency filed an addendum to its case summary with the Hearings Unit which included a copy of a letter to Kay from Domas stating that a "courtesy" copy of the Agency's case summary was enclosed.

17) At the start of hearing on February 11, 2003, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Complainant of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) During the hearing, the Agency requested that the forum issue a protective order for three exhibits (submitted during the hearing) that were part of Complainant's medical records. Case presenter Domas stated she provided a copy of

the exhibits to attorney Kay prior to the hearing and to no other persons. After discussion about the extent to which the documents may be protected after their release to a non-participant, Domas offered to research and provide the forum with information pertinent to the issue.

19) On February 18, 2003, the ALJ issued a Protective Order that exempted Complainant's medical records from public disclosure and set forth conditions governing their classification, acquisition, and use.

20) The ALJ issued a proposed order on January 14, 2004, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency did not file exceptions. Respondent filed exceptions on January 26, 2004. Respondent's filing is discussed in the Opinion section of this Final Order.

RULING UPON MOTIONS

Respondent's motions to set aside the forum's default notice and ruling denying relief from default and to postpone were filed the day before the hearing and over three months after the ALJ issued an order denying Respondent relief from default. In its motions, Respondent focused on six points that are addressed as follows:

1. Respondent timely filed an answer on September 28, 2002.

Respondent asserts it "filed a letter by an authorized officer with an Answer on September 28, 2002, which was not subject to challenge as a 'default' even if the Answer was open to a motion seeking further specifically [*sic*] or detail as to form." As the procedural findings herein recite, the answer was due on September 11, not September 28, 2001. Although the Agency was not required to do so, it advised Respondent that it would not seek a default order if Respondent filed its answer within 10 days from the date of the Agency's letter which was September 16, 2001. Respondent did not file an answer on or before September 26, 2001. Instead, on

October 1, 2001, the Hearings Unit received a letter from Thelma Magno dated and postmarked September 28, 2001, that addressed Respondent's failure to timely answer the charges by stating: "I apologize for the delay of this reply (I have a serious business to run)." In her letter, Magno did not state that she was authorized to represent Respondent and she did not offer further explanation for the delayed response. Notably, Magno did not serve the Agency with a copy of its correspondence. The Agency moved for default based on Respondent's failure to timely file an answer as provided in the contested case hearing rules. The forum found and affirms the finding that Respondent did not timely file an answer. Since the corporation is obliged to timely file an answer through counsel or an authorized representative, pursuant to OAR 839-050-0110, and did not do so in this case, the forum need not determine whether Magno's September 28 letter constituted an answer as contemplated under OAR 839-050-0130(1).

2. <u>The Notice of Default was unlawful because Respondent appeared by filing an answer through an authorized representative before the Agency's Motion for Default was filed and was issued in violation of ORS 183.415(6).</u>

As previously discussed, Magno's September 28th letter was not timely filed, was not filed through counsel or an authorized representative, and, in any event, was not served on the Agency. The Agency, therefore, properly moved for default and the forum properly issued a Notice of Default.

Respondent, citing ORS 183.415(6), argues:

> "At the time of the Motion for Default Magno had requested a hearing in its September 28, 2002, submission, but that hearing was not provided, and the Case Presenter did not present, as required, a 'prima facie case,' let alone a sufficient basis for default. Even if the ALJ had discretion to consider the Motion without a hearing, the Motion was decided without waiting for a response from Magno within the time frame of the rule on motions, and it was an abuse of discretion (if there was authority to decide

> the Motion) to issue a 'Notice' which the ALJ intended to treat [as] an Order of Default."

Respondent misconstrues the statute. ORS 183.415(6) provides that:

> "An order adverse to a party may be issued upon default only upon prima facie case made on the record of the agency. When an order is effective only if a request for hearing is not made by the party, the record may be made at the time of issuance of the order, and if the order is based only on material included in the application or other submissions of the party, and such material shall constitute the evidentiary record of the proceeding if hearing is not requested."

In this case, Respondent was not required to request a hearing. Instead, Respondent was served with a charging document, notified of the time and place scheduled for hearing, and duly advised of its rights and responsibilities as required under ORS 183.413. Respondent *was* required, however, to submit an appropriate answer within a specified period and did not do so. Moreover, even after Respondent was given notice and opportunity to show good cause for its failure to timely file an answer,[iii] it failed to comply with the Notice of Default requiring it to reply within ten days of the notice and to include notice of representation by counsel or by authorized representative. Contrary to Respondent's assertion, there is no requirement that the Agency present a prima facie case on the record before the forum issues a notice of default. The Agency must, however, establish a prima facie case on the record prior to the issuance of a final order adverse to Respondent based on its default status. The Agency presented a prima facie case at the scheduled hearing prior to the issuance of the Final Order in this matter and that is all that is required under the statute.

3. <u>Respondent timely filed a request for relief from default and included another answer satisfying the Notice of Default.</u>

Contrary to Respondent's assertion, Respondent did not timely file a request for relief from default or a letter authorizing its president to appear on its behalf in accordance with OAR 839-050-0110(3).[iv] Therefore, even if the forum concluded that Magno's second submission constituted an answer in accordance with the rules, it was

not submitted by counsel or accompanied by a letter authorizing Magno to respond on Respondent's behalf. In the absence of timely notice of representation on the part of Respondent, the forum correctly disregarded the "answer."

4. Failure to grant Respondent relief from default constitutes discrimination based on Respondent's president's "protected minority class."

Respondent asserts that the ALJ's refusal to accept Thelma Magno's document "requesting relief [which included an] Answer and explanation" is a denial of "equal protection and constitute[s] discrimination against a protected minority class for Mr. Magno's business."[v] According to Respondent's counsel, Thelma Magno is "a Philippine-American U.S. Citizen" and he requests the forum to "take judicial notice of the Hearing Unit's and Agency's entire history of filings by respondents and give Magno a reasonable opportunity to review those records if this Motion is not otherwise granted." Respondent further proposes that the Agency would not refuse "such a document signed by Phil Knight as President for Nike, for President Dave Frohnmayer for the University of Oregon, or any number of other officers of companies or directors of public bodies[.]" Respondent is simply wrong. OAR 839-050-0110 spells out the requirements for appearing as an authorized representative on behalf of a corporation: "Before a person may appear as an authorized representative of a * * * corporation * * * that is a party to a contested case proceeding, the person *must file a letter authorizing the person to appear on behalf of the party*." The purpose of the rule is to ensure that the corporation *intends* a named representative represent the corporation's legal interests in the contested case proceeding. It is not enough that a corporate president respond unilaterally to a charging document. Without a written statement qualifying the corporate president or some other officer or corporate employee as an authorized representative, the forum will not otherwise make a presumption. That is true regardless of a responding officer's prominence in the community.

5. Alternatively, Respondent should be allowed to "re-open" the record.

Respondent argues that a full and fair adjudication cannot occur in this case without Respondent's evidence in the record and for that reason the ALJ *must* reopen the record for its consideration. OAR 839-050-0410 addresses the circumstance under which the record shall be reopened and provides:

> "Upon the administrative law judge's own motion or upon the motion of a participant, the administrative law judge shall reopen the record where he or she determines additional evidence is necessary to fully and fairly adjudicate the case. In making this determination, the administrative law judge shall consider whether the evidence suggested for consideration could have been gathered prior to the hearing."

Contrary to Respondent's assertion, the rule does not require the record be reopened to receive evidence from a party in default. In fact, the ALJ is barred from permitting a party in default "to participate *in any manner* in the subsequent hearing, including, but not limited to, *presentation of witnesses or evidence on the party's own behalf*, examination of Agency witnesses, objection to evidence presented by the Agency, making of motions or argument, and filing exceptions to the Proposed Order." OAR 839-050-0330(3). Additionally, under the default rules and in accordance with ORS 183.415(6), the Agency was required only to make a prima facie case in support of its allegations. The Agency did so when it appeared at the scheduled hearing in this matter.

As to Respondent's due process argument, the forum finds Respondent had ample notice and opportunity to avoid default, but through either neglect or inattention failed to take the necessary steps that would have prevented its exclusion from participation in the contested case hearing. As a previous commissioner observed:

> "A contested case hearing involving unlawful practices in connection with ORS chapter 659 does not occur in a vacuum. It is preceded by administrative complaint, investigation, administrative determination, and usually conciliation. Respondents should be well aware, following an administrative determination finding substantial evidence of a violation,

> and certainly following a failure of conciliation, that a hearing is a distinct possibility. * * * A party's neglect of or inattention concerning process such as was received by Respondents is difficult to justify. I cannot find that it was justified here."

In the Matter of 60 Minute Tune, 9 BOLI 191, 202 (1991), *aff'd without opinion, Nida v. Bureau of Labor and Industries*, 119 Or App 508 (1993). As in *60 Minute Tune,* the forum finds no justification for Respondent's failure to attend to the same procedural requirements all other participants are obliged to meet. Relief from default was properly denied in this case and this order affirms that ruling.

6. <u>The hearing must be postponed for good cause.</u>

For all of the reasons stated above, Respondent's motion to postpone the hearing to allow its participation was properly denied.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Magno-Humphries, Inc. was a corporation doing business in Tigard, Oregon, engaged in formulating over-the-counter pharmaceuticals that are shipped and distributed elsewhere in the state, and was an employer utilizing the personal services of 25 or more persons.

2) At all times material herein, Thelma Magno was Respondent's president.

3) Respondent employed Complainant as a shipping clerk from October 23, 1996, until October 19, 2001. Complainant worked the morning shift from 8 a.m. until 4:30 p.m., Monday through Friday, five days per week.

4) At all times material herein, Kim Messenger was Respondent's shipping manager and Complainant's immediate supervisor. Catherine Meneses was Respondent's human resources director and Pat Bohnert was Respondent's operations director.

5) Sometime in August 2001, Complainant began to experience stomach pains. Complainant was absent from work due to an excused illness on September 4

and 5, 2001, and was on an approved vacation September 6 and 7, 2001. On or about September 12 or 13, 2001, Complainant experienced stomach pain that included vomiting, so she went to the emergency room for treatment. She was absent from work four days. Upon her return to work, Complainant gave Messenger a "Clinician's Report of Disability" from Kaiser Permanente that was signed by Calvert J. Shipley, MD, on September 13, 2001. The medical note authorized Complainant time loss from "9/11/01 through 9/14/01." Complainant's "diagnosis (impression)" was "acute illness." Messenger did not question Complainant about her illness or her doctor's release. On September 25 and 26, 2001, Complainant was again absent from work. She called Messenger and told him she was ill. He did not question those absences or ask for medical verification.

6) In September, Complainant complied with Respondent's call-in policy by telephoning Respondent each day she missed work because of illness and she gave Respondent a doctor's note for all absences of three or more days.

7) On September 27, 2001, Messenger, Meneses, and Bohnert called Complainant into a conference room to discuss her attendance. They told her that she was a valuable employee and that Respondent did not want to lose her, but she needed to have better attendance. Bohnert asked Complainant if there was anything Respondent could do to help and Complainant told them she was undergoing medical testing and that she would provide Respondent with the test results when available. During the meeting, Messenger gave Complainant an "Employee Warning Notice," dated September 26, 2001, which was denoted as a "1st Written Warning." The type of violation noted was "Attendance" and Messenger wrote that Complainant had "excessive absences within a 90 day period (pg. 40)." During the meeting, Complainant

signed the warning, but does not recall anyone telling her she would be fired if she continued to miss work.

8) On Respondent's behalf, Messenger, Bohnert, and Meneses submitted a position statement to the Agency, which stated, in pertinent part regarding the September 27, 2001, meeting:

> "The terminated employee met with her Manager (Kim Messenger), the Director of Operations (Pat Bohnert) as well as the Director of Human Resources (Catherine Meneses). The employee's absences were unpredictable. What was stated was that she had numerous absences, both unexcused and also absences covered by a doctor's note.
>
> "*Our employee manual, which the employee received and has acknowledged receipt of, defines excessive absenteeism and the results of which, being disciplinary action leading to termination.*
>
> "The focus of the meeting and final warning was to tell the terminated employee that her absences were detrimental to the operation of the Shipping/Distribution Department. When she was present at her job, she was very productive, an asset to the team. Because her work was valuable, she was missed when she was not there. In addition, because the department was so small every body counted and even one person missing for extended periods of time created a hardship for the department and the company. The Director of Operations also asked Bonnie "Is there anything we can do to help?" Bonnie stated she was working with her doctor and she realized her attendance was important. She was told that if she continued to have excessive absences she would be terminated. This was the reason for the meeting and the final warning.
>
> "The manager could no longer count on her to be there. Because her absences were unpredictable [*sic*]. The meeting concluded with the terminated employee acknowledging her attendance responsibilities, as well as her part of a crucial department in the day-to-day operations of Magno.
>
> "The employee knew why she was given a final warning, and what needed to be done to stay employed.
>
> "At no time during her absences did she mention a specific medical condition.
>
> "At no time during the meeting, did the employee request time off for Oregon Family Leave.
>
> "The respondent recognizes that employees of the company are not authorized to diagnose an employee, nor was there a condition specifically defined by Bonnie or her doctor. Therefore, it is inappropriate for the

> employer to solicit such a request, since neither the employee nor the physician had a specific medical reason for her absences.
>
> "We were not given official notice that problem constituted ongoing or intermittent leave.
>
> "*Our employee manual also states several types of unpaid leaves, all of which were not formally requested by the employee.*" (Emphasis in original)

9) After she was warned about her attendance, Complainant continued to experience severe stomach pains and vomiting. On October 2, 2001, she underwent an "upper G.I." procedure and was off work due to continued stomach pain from October 2 through 5, 2001. During that time she went to the emergency room and was placed on intravenous ("IV") fluids because she was dehydrated.

10) When she returned to work the following Monday, October 8, 2001, Complainant gave Messenger a note from Kaiser Permanente that had "IV" written on it and authorized her to be off work for medical reasons from October 3 through 5, 2001. She told Messenger and Bohnert that her doctor believed she had "gastritis," that "it had to do with her esophagus and her reflux," and that she would need further tests. Neither Messenger nor Bohnert asked for additional information and Complainant's absence from October 2 through 5, 2001, was excused. Respondent documented the "excused" absence on its "Pre-Approved Absence Form," which was "approved" and signed by the human resource director on October 8, 2001. On that same date, Complainant gave Messenger and Bohnert a copy of a "Kaiser Permanente Appointment Reminder" showing that she was scheduled to see "Dr. Griffin" at 10 a.m. on October 25, 2001.

11) In an "Emergency Dept. Report" dictated by "Mullen, John, T." on October 5, 2001, it states, in pertinent part:

> "CHIEF COMPLAINT: Abdominal pain. Patient is complaining of continued abdominal pain over the last two months. Seen and evaluated by primary physician. Started on Protinix and ranitidine without improvement. Patient recently had GI study positive for gastroesophageal reflux disease and patient would probably improve with ranitidine as prescribed. Patient

> though complaining of an upper abdominal pain over the last two to three days. No improvement with all present medications.
>
> "* * * Patient to continue Zoloft and ranitidine as prescribed. Patient while in the emergency department received IV Inapsine and Benadryl with total resolution of discomfort. Patient informed has gastroesophageal reflux disease by GI study and will need to take ranitidine with addition of Maalox or Mylanta if needed. Patient also to stop any alcohol, smoking, caffeine, aspirin, Motrin. Patient states and understands these instructions. Will comply. Patient not improved next week to follow up with primary care physician for a re-evaluation and possible GI referral. Has continued constant abdominal pain.
>
> "DIAGNOSIS: Abdominal pain, improved, gastritis.
>
> "PLAN: As above."

The signature on the emergency room report appears as "K. Griffin, MD" and a handwritten note next to it says: "IV means 'intravenous.'"

12) Before her next scheduled medical appointment, Complainant experienced another bout of stomach pain and was absent from work from October 15 through 18, 2001. She called in daily throughout that week in accordance with Respondent's policies.

13) Complainant returned to work on October 19, 2001, where Bohnert met her in Respondent's parking lot before she entered the workplace. Complainant handed Bohnert a Kaiser Permanente "Clinician's Report of Disability" that was signed by Kristin Griffin, MD, on October 16, 2001. The medical report authorized Complainant time loss from "10/14/01 through 10/18/01." The physician's "diagnosis (impression)" was "gastritis" and the treatment plan called for "rest [and] prescribed medication." Bohnert told her: "This is not going to do it – you are terminated." Bohnert told Complainant that she was terminated because she missed too much work. Complainant did not perform any work for Respondent on October 19, 2001.

14) After Bohnert told her she was terminated, Complainant was "shocked and hurt" and cried in her car the entire drive home. She arrived home upset and in tears.

She enjoyed her job and could not understand why she was terminated after five years of employment with Respondent. Since she was fired, she has had difficulty sleeping because she cannot stop thinking about her termination. She also has had difficulty socializing with friends and family which she attributes to her termination. She gets "scared" and either returns home or does not go at all on beach trips or other outings that she enjoyed before she was terminated. She has had some depression in the past, but it became worse after she was terminated. Her primary care physician referred her to Jeanne Ewen, a licensed clinical social worker at Kaiser Mental Health. At the Agency's request, Ewen addressed Complainant's treatment for depression in a letter dated February 6, 2003 that stated, in pertinent part:

> "Ms. Hopperstad has been in treatment with me since June 3, 2002. Ms. Hopperstad presented with depressive symptoms, including panic attacks, following being fired from her job. Ms. Hopperstad told me that she had been ill and had physical problems that prevented her from going to work, and that she had been fired for being off sick. This was very distressing for her and affected her self-esteem to the extent that she was not able to socialize and had great difficulty thinking about applying and interviewing for other jobs. In addition to this she seemed to lose her self confidence and was no longer able to drive out of town, be away from home overnight, or do the things that she normally did to enjoy herself. Being fired from her job has been a major stressor in her life and her usual coping skills seemed to stop working for her at that time. She continues to struggle with these issues."

During her testimony, Complainant was visibly upset when she related her shock at being terminated following her absence due to illness.

15) Respondent documented Complainant's termination in an "Employee Warning Notice" dated October 18, 2001. The document describes the "Disciplinary Action" as "Termination" and the "Type of Violation" as "Attendance." In the space designated "Employer Statement" it says: "Continues to miss work." The document also indicates that it is Complainant's second written warning. The document shows the notice was issued by "K.M." and Kim Messenger's signature, which is dated October 17,

2001, appears to be on the line designated as "Signature of Supervisor Who Issued Warning." The employee signature line is blank. Complainant did not see or receive the termination document and was not at work on the dates appearing in the document.

16) On October 25, 2001, Complainant underwent a medical procedure that involved placing a scope "down to [her] stomach." She continues to take prescribed medication for her stomach disorder.

17) While she was employed, Respondent paid Complainant's health insurance coverage. After she was terminated, Complainant continued her health insurance benefits by purchasing COBRA coverage through Respondent. According to a statement entitled "COBRA Coverage Analysis" that Respondent mailed to Complainant in January 2003, she paid $2,585.31 for her coverage between October 30, 2001, and December 26, 2002, and still owed $595.82 as of the hearing date.

18) Complainant was earning $8.75 per hour when she was terminated. On January 24, 2003, Complainant began packing boxes of Honey Stix and tea for shipment for Stash Tea and has earned $395 since her start date.

19) The testimony of Complainant, her mother, Barbara Hopperstad, and the Agency investigator appearing herein was credible. Moreover, it was corroborated by documents Respondent prepared during Complainant's employment and during the Agency investigation.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was a corporation and an Oregon employer that utilized the personal services of 25 or more persons in Oregon for each working day during both 2000 and 2001.

2) Complainant was employed by Respondent more than 25 hours per week from October 1996 through October 18, 2001.

3) Beginning in September 2001, Complainant began to suffer from a stomach ailment that required her absence from work for more than three days on three separate occasions and which required ongoing treatment by a physician, including prescribed medication.

4) Complainant complied with Respondent's daily call-in policy and timely presented a physician's note after each of her absences due to illness.

5) Respondent was aware that Complainant had been diagnosed with gastritis, involving her esophagus and reflux, and had sufficient information about Complainant's medical condition to put Respondent on inquiry notice.

6) Respondent did not question Complainant's physician's notes or request that Complainant provide additional information or medical verification regarding her medical condition.

7) Respondent's management personnel signed a termination notice on October 17, 2001, that ended Complainant's employment effective October 18, 2001, while she was still absent due to her ongoing medical condition. The basis for Complainant's termination was her continued absences following the September 27, 2001, written warning about previous absenteeism. All of Complainant's absences after September 27 were due to her ongoing medical condition.

8) Complainant's final rate of pay was $8.75 per hour. She was regularly scheduled to work 40 hours per week, from Monday through Friday. From October 19, 2001, until January 24, 2003, Complainant lost wages totaling $22,400 ($8.75 per hour x 40 hours per week x 64 weeks).

9) Complainant suffered financial distress, shock, hurt, loss of self esteem, an inability to engage in activities that she routinely engaged in prior to her termination,

and depression because of her termination based on Respondent's denial of OFLA leave.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was a covered employer as defined in *former* ORS 659.472(1). *See also former* ORS 659.470(1).

2) The actions, inaction, statements and motivations of Thelma Magno, Respondent's president, Kim Messenger, Respondent's Shipping Manager; Catherine Meneses, Respondent's human resources director, and Pat Bohnert, Respondent's operations manager, properly are imputed to Respondent.

3) *Former* ORS 659.374(1) provides that "[a[ll employees of a covered employer are eligible to take leave for one of the purposes specified in [*former*] ORS 659.476(1)(b) to (d)" except in circumstances not applicable here. Complainant was an eligible employee.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. *Former* ORS 659.492(2); *former* ORS 659.010 to 659.110; ORS 659A.780; ORS 659A.850(2) and ORS 659A.850(4).

5) Complainant had a stomach ailment that rendered her incapable of performing any of her job functions for periods exceeding three days and for which she sought and received medical care that involved ongoing treatment from her physician, constituting a serious health condition as defined in *former* and *current* OAR 839-009-0210(14)(d).

6) Complainant was entitled to 12 weeks of OFLA leave, pursuant to *former* ORS 659.478(1). By firing Complainant during the time she was incapacitated from work due to an OFLA qualifying medical condition, and by using Complainant's previous OFLA qualifying absences from work as the reason for firing her, Respondent denied

Complainant the 12 weeks of leave to which she was entitled, thereby violating *former* ORS 659.478 and committing an unlawful employment practice. *Former* ORS 659.492(1).

7) By terminating Complainant because she used OFLA qualified leave, Respondent violated *former* and *current* OAR 839-009-0320(2).

OPINION

DEFAULT

Respondent Magno-Humphries, Inc. was found in default under OAR 839-050-0330 for failing to timely file an answer within the time specified in the Formal Charges. In a default situation, the Agency is required to present a prima facie case on the record to support the allegations in its charging document and to establish damages. ORS 183.415(6). In this case, the Agency met that burden by submitting credible witness testimony and documentary evidence to support its allegations. *See In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 124, 136 (1997).

PRIMA FACIE CASE

The Agency alleged Respondent had notice that Complainant was suffering from a medical condition that qualified her for leave under the Oregon Family Medical Leave Act ("OFLA") and failed to grant her the medical leave to which she was entitled. The Agency also alleged Respondent terminated Complainant because she was absent from work due to an OFLA qualifying medical condition in violation of *former* and *current* OAR 839-009-0320(2).

A. Unlawful Denial of OFLA Leave – *Former* ORS 659.492

To establish a prima facie case, the Agency must show that: 1) Respondent was a covered employer as defined in *former* ORS 659.470(1) and *former* ORS 659.472; 2) Complainant was an eligible employee, *i.e.*, she was employed by a covered employer

at least 180 calendar days immediately preceding the date her medical leave began; 3) Complainant had a "serious health condition" as defined in *former* and *current* OAR 839-009-0210(14)(d); 4) Complainant used or would have used OFLA leave to recover from or seek treatment for her serious health condition; and 5) Respondent did not allow Complainant to utilize the full amount of OFLA leave to which Complainant was entitled as specified in *former* ORS 659.478. *In the Matter of Centennial School District*, 18 BOLI 176, 192-93 (1999). The Agency established all of the elements with documents and witness testimony.

1. Respondent was a covered employer and Complainant was an eligible employee.

Former ORS 659.470(1) and *former* ORS 659.472 define "covered employers" as those "who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar work weeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken." Complainant credibly testified that Respondent employed over 100 workers while she was in Respondent's employ. Also, Agency investigator Martindale credibly testified that Respondent confirmed it was subject to both FMLA and OFLA provisions.[vi] The forum therefore finds the Agency made a prima facie showing that Respondent was a "covered employer."

Evidence also shows that Complainant was an eligible employee under *former* ORS 659.474. She worked the requisite number of days preceding her leave and Respondent did not dispute Complainant's eligibility during the Agency's investigation. Moreover, Martindale credibly testified that Respondent's human resource manager confirmed that Respondent was a covered employer *and* that Complainant was eligible for leave under OFLA. Consequently, the forum finds the Agency has established the first two elements of its claim.

2. Complainant had a serious health condition.

Under *former* and *current* OAR 839-009-0210(14)(d), a serious health condition is "an illness, injury, impairment or physical or mental condition of an employee * * * that:

> "involves a period of incapacity. Incapacity is the inability to perform at least one essential job function * * * for more than three consecutive calendar days and any subsequent required treatment or recovery period relating to the same condition. This incapacity must involve:
>
> "(A) Two or more treatments by a health care provider; or
>
> "(B) One treatment plus a regimen of continuing care."

On its face, the rule sets forth three objective requirements that must be met before Complainant may be deemed to have had a "serious health condition."

One, she must have had a period of incapacity during which she was unable to perform at least one essential job function. In this case, evidence shows Complainant suffered from ongoing stomach problems in September and October 2001 which rendered her unable to perform the essential functions of her job on three separate occasions. On each occasion, Complainant's physicians authorized her time loss for medical reasons. Complainant credibly testified and Respondent acknowledged during the Agency's investigation that she had given Respondent a physician's note following each of her absences, that she had complied with Respondent's call-in policy during her absences, and that Respondent had excused at least two of the three absences.[vii] Moreover, credible evidence shows Respondent did not request additional information, despite its ability to do so under *former* and *current* OAR 839-009-0250(1)(b) which provides that an employer may request additional information to determine that leave taken or requested "qualifies for designation as OFLA leave." Based on those facts, the forum finds that Complainant was incapacitated from performing any of her job functions on three separate occasions in September and October 2001.

Two, her period of incapacity must have exceeded three consecutive calendar days. Evidence shows Complainant was absent from work for medical reasons during the periods covering September 11-14, October 2-5, and October 15-18, all of which exceeded three consecutive calendar days. In each case, Complainant's physicians authorized Complainant's time loss from work. Respondent timely received all three authorizations for absence and excused all but the last absence.

Three, she must have received two or more treatments by a health care provider *or* received one treatment that included a regimen of continuing care within the period of incapacity. Here, evidence established that Complainant saw a physician for her stomach problems on or about September 13, 2001, and the physician's note stated that the "diagnosis (impression)" was "acute illness." Thereafter, she had an "upper GI study" on October 2, tested positive for "gastroesophageal reflux disease," and was placed on a regimen of medication and lifestyle changes after seeing a physician on October 5 - all while she was absent from work due to illness. Shortly thereafter, Complainant's physician scheduled her for additional testing regarding her stomach illness on October 25, 2001. On or about October 16, during another period of absence due to the same illness, Complainant again saw her physician who documented a treatment plan that included "rest and prescribed medication." Those facts are sufficient to support a finding that Complainant received more than one treatment by a physician that included a regimen of continuing care within each period of incapacity.

Based on these unrefuted facts, the forum concludes that Complainant's stomach condition met the objective criteria set forth in the rule and qualified as a serious health condition under OFLA as a matter of law.

3. Complainant used or would have used leave time to recover from or seek treatment of an OFLA qualified condition.

Under *former* and *current* OAR 839-009-0250(1), an employee need not invoke OFLA by name in order to put an employer on notice that OFLA may have relevance to an employee's absence from work.[viii] Furthermore, once an employee provides enough information to put the employer on notice that the employee may be in need of OFLA leave, the employer may request additional information, including medical verification, "to determine that a requested leave qualifies for designation as OFLA leave * * *." *See former* and *current* OAR 839-009-0250(1)(b) and OAR 839-009-0260. The Ninth Circuit has interpreted the analogous federal regulation as squarely placing the onus on "the employer, having been notified of the reason for an employee's absence, for being aware that the absence may qualify for FMLA protection." *See Bachelder v. America West Airlines, Inc.*, 259 F3d 1112 (9th Cir. 2001) (holding that "it is the employer's responsibility, not the employee's, to determine whether a leave request is likely to be covered by the [FMLA] * * * Employees need only notify their employers that they will be absent under circumstances which indicate that the FMLA might apply.); *see also, Bailey v. Southwest Gas Company*, 275 F3d 1181 (9th Cir. 2002) (determining that "[i]f the employer lacks sufficient information to determine whether an employee's leave (including leave taken in the form of a reduced schedule) qualifies under the FMLA, the employer should inquire further in order to ascertain whether the FMLA applies.").[ix] In this case, Complainant was absent from work for more than three days on three separate occasions, with notes from her physicians, written during each absence, indicating that she was unable to work for medical reasons. That was sufficient reason to compel Respondent to either count the absences as OFLA leave or to follow the procedures set forth in the rules to determine if Complainant's absences were OFLA qualified, *i.e.*, have Complainant provide additional information, have its company health

care provider contact Complainant's health care provider to supplement and complete certification information, as permitted under the rules, or require that Complainant seek a second opinion at Respondent's expense.[x]

In light of the above, the forum concludes that Complainant's efforts to communicate her condition to Respondent constitute sufficient compliance with the OFLA notice requirements and that she used leave time to seek treatment for an OFLA qualifying health condition.

4. Respondent did not allow Complainant to utilize the amount of OFLA leave to which Complainant was entitled.

Under the OFLA, eligible employees are entitled to take up to 12 weeks of leave each year and are guaranteed reinstatement to their employment position, if it still exists, after they have exercised their leave right. *See former* ORS 659.478; 659.484 and *current* ORS 659A.162; 659A.171. The forum has already determined that Complainant was an eligible employee and was absent from work under circumstances that put Respondent on notice that Complainant was a candidate for OFLA leave. Despite those circumstances, Respondent did not seek additional information from her to make that determination, but instead, summarily terminated Complainant while she was still on OFLA qualified leave. The written termination notice was signed on October 17, 2001, two days before Complainant returned to work and was told she had been fired. At that time, Respondent knew that each period of absence was related to Complainant's ongoing stomach problems, that she was seeking treatment and undergoing tests, and that another test was scheduled for October 25, 2001. There is no evidence that Complainant had exhausted 12 weeks of OFLA leave at the time she was terminated. Therefore, by summarily terminating her employment while she was out on OFLA qualified leave, Respondent denied Complainant leave to which she was entitled.

Under the OFLA, it is an unlawful employment practice for an employer to deny an eligible employee leave to recover from or seek treatment for a serious health condition. *Former* ORS 659.492 and *current* ORS 659A.193. The forum concludes that the Agency established a prima facie case that Respondent committed an unlawful employment practice by denying Complainant the right to seek treatment for or to recover from her serious medical condition, in violation of former ORS 659.492.

B. Retaliation – *Former* and *Current* OAR 839-009-0320(3)

Under OAR 839-009-0320(3), "[i]t is an unlawful employment practice for an employer to retaliate or in any way discriminate against any person with respect to hiring, tenure or any other term or condition of employment because the person has inquired about OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act." *Former* and c*urrent* OAR 839-009-0320(3).

To establish a prima facie case of retaliation, the Agency must show that: 1) Complainant invoked a protected right under the OFLA; 2) Respondent made an employment decision that adversely affected Complainant; and 3) there is a causal connection between the Complainant's protected OFLA activity and Respondent's adverse action. *In the Matter of Roseburg Forest Products*, 20 BOLI 8, 26-27 (2000).

1. Complainant invoked a protected right under the OFLA.

As previously discussed, the circumstances under which Complainant was absent from work in October for two periods exceeding three days put Respondent on notice that Complainant may need OFLA leave. It was Respondent's obligation, not Complainant's, to either designate the leave as OFLA qualifying or to follow the procedure set forth in the rules to confirm whether or not Complainant was entitled to OFLA leave. By timely providing Respondent with a medical release each time she was absent for more than three days and calling in each day while she was out in

accordance with Respondent's policies, the forum finds Complainant "invoked" her right to OFLA leave.

2. Respondent's adverse employment decision

This element is undisputed. Evidence shows Respondent acknowledged during the Agency investigation that it terminated Complainant because she continued to miss work after she was given a "final" warning about her absenteeism on September 27, 2001. The specific absences for which Complainant was terminated occurred October 2-5 and October 15-18, 2001 while Complainant was seeking treatment for or recovering from an OFLA qualified medical condition.

3. Causal connection

Evidence shows Respondent, via its management personnel, acknowledged it knew Complainant's absences in October 2001 were related to her stomach ailment. In fact, one manager stated to the Civil Rights Investigator that Complainant had advised management as early as October 8, 2001, that her physician thought she had "gastritis" and that it had affected her esophagus. Despite its knowledge of those facts and Complainant's complete compliance with Respondent's sick leave policies during both periods of absence in October, Respondent summarily terminated Complainant on October 17, 2001, *because of* those absences. The causal connection is established directly by Respondent's acknowledgement that it terminated Complainant because of those absences which Respondent knew or should have known were OFLA qualified absences.

DAMAGES

Back Pay and Benefits Lost

It is well established in this forum that the purpose of back pay awards in employment discrimination is to compensate a complainant for the loss of wages and

benefits that the complainant would have received but for the respondent's unlawful employment practices. *In the Matter of H. R. Satterfield*, 22 BOLI 198, 210 (2001). Benefits lost include, but are not limited to, out of pocket expenses for health insurance premiums the complainant incurs as a result of the respondent's unlawful employment practices. In this case, the effect of terminating Complainant during and because of her OFLA qualified leave was to deny Complainant leave to which she was entitled as a matter of law. Because of the manner in which she was unlawfully denied OFLA leave, she suffered an unnecessary wage loss and loss of medical benefits for an extended period.

The forum has accepted Complainant's testimony that she was earning $8.75 per hour when she was denied her leave and that she found subsequent employment at Stash Tea on January 24, 2003. Back pay awards generally cease when a complainant obtains replacement employment for a similar duration with similar hours and hourly wage rate as when employed by the respondent. *Id.* at 210-11. Absent evidence that Complainant's hours and earnings at Stash Tea are *not* comparable to the hours she worked and hourly wages she earned during her employment with Respondent, the forum has calculated Complainant's lost wages from October 19, 2001, to January 24, 2003, the date she obtained replacement employment. The forum calculates that Complainant lost $22,400 in wages ($8.75 per hour x 40 hours per week x 64 weeks).

Documentary evidence shows Complainant continued her health insurance after she was terminated through COBRA continuation coverage which required that she pay out of pocket for extended health benefits. The "COBRA Coverage Analysis" she received in the mail from Respondent shows she paid a total of $2,585.31 from October 30, 2001, through December 26, 2002, with a $595.82 balance owing. The forum finds that the sums Complainant expended on insurance premiums would have been

available for Complainant's use but for Respondent's denial of OFLA leave and that an award of $2,585.31, in addition to the back pay award of $22,400, is justified to compensate her fully for the effects of Respondent's unlawful employment practice, *i.e.*, the statutory violation found herein. *See former* ORS 659.010(2)(a) and *current* ORS 649A.859(4).

Mental Suffering

The Agency seeks mental suffering damages in the amount of $18,000 on Complainant's behalf. In determining a mental suffering award, the commissioner considers the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct. *In the Matter of Barrett Business Services, Inc.*, 22 BOLI 77, 96 (2001). The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Id.* at 96.

Based on Complainant's credible testimony, the forum finds she suffered significant emotional distress as a result of Respondent's unlawful employment practices. Complainant complied with Respondent's sick leave rules by calling in each day she was absent due to illness and by giving her employer a medical release after each absence exceeding three days. Despite her diligence and Respondent's assurances that she was a "valuable" employee, Complainant lost a job she had enjoyed and held for five years. As a result, she became so anxious and depressed that her physician referred her to a mental health specialist, Ewen, who determined that Complainant's self-esteem was affected to the extent that "she was not able to socialize and had great difficulty thinking about applying and interviewing for other jobs." Additionally, Ewen stated that Complainant "seemed to lose her self confidence and was no longer able to drive out of town, be away from home overnight, or do the things

that she normally did to enjoy herself. * * * Being fired from her job has been a major stressor in [Complainant's] life and her usual coping skills seemed to stop working for her at that time." According to Ewen, Complainant continued to struggle with those issues as of February 6, 2003. Moreover, during her testimony at the hearing, Complainant was still visibly upset and confused about why she lost her job. Complainant also suffered mental distress as a result of losing her income.

The forum recognizes that Complainant acknowledged that she suffered from a lesser degree of depression prior to Respondent's denial of OFLA leave. However, the forum is not compensating her for emotional distress that is not attributable to Respondent's unlawful employment practices. Evidence shows that after she was denied leave, Complainant's emotional health and financial resources declined significantly and the forum finds that $18,000 will compensate her for the suffering caused by Respondent's unlawful employment practice in violation of *former* ORS 659.492(1) and *current* ORS 659A.183.

RESPONDENT'S EXCEPTIONS

As noted elsewhere herein, after Respondent was found in default, it lost its opportunity "to participate *in any manner* in the * * * hearing, including, but not limited to * * * filing exceptions to the Proposed Order." OAR 839-050-0330(3). Consequently, even though Respondent's exceptions are included in the record, the forum is barred from giving them consideration in this Final Order.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), to eliminate the effect of Respondent's unlawful employment practices, and as payment of the damages assessed for its violation of *former* ORS 659.492 and *current* ORS 659A.183, the Commissioner of the Bureau of Labor and Industries hereby orders **Magno Humphries, 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 Bonnie Hopperstad** in the amount of:

   a) TWENTY TWO THOUSAND FOUR HUNDRED DOLLARS ($22,400), less appropriate lawful deductions, representing wages Complainant lost from October 19, 2001, to January 23, 2003, as a result of Respondent's unlawful employment practice; plus

   b) Interest at the legal rate on the sum of $22,400 from October 19, 2001, until paid; plus

   c) EIGHTEEN THOUSAND DOLLARS ($18,000), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice; plus

   d) Interest at the legal rate on the sum of $18,000 from the date of the final order until paid; plus

   e) TWO THOUSAND FIVE HUNDRED EIGHTY FIVE DOLLARS AND THIRTY ONE CENTS ($2,585.31), representing benefits lost as a result of Respondent's unlawful employment practice.

   f) Interest at the legal rate on the sum of $2,585.31 from the October 30, 2001, until paid.

2) Cease and desist from discriminating against any employee in tenure of employment based upon the employee having invoked or utilized Oregon Family Leave Act provisions.

---

[i] The original complaint misspelled Respondent's name.

[ii] The Notice of Default included a footnote pertaining to the request for relief from default deadline that stated "OAR 839-050-0040(3) provides that when the last day of the designated period falls on a 'Saturday, Sunday or holiday, the period shall run until 5 p.m. of the next day that is not a Saturday, Sunday or holiday.' In this case, the 10 day period ends on Saturday, October 19, 2002, thus, Respondent has until 5 p.m. on the following Monday, October 21, 2002, to submit its request for relief from default."

[iii] OAR 839-050-0340(1)(b) provides that "[r]elief from default may be granted where good cause is established within ten days after * * * [a] notice of default has been issued." 839-050-0340(4) provides that "[a] request for relief from default made after a notice of default has been issued * * * shall be addressed to and ruled upon by the administrative law judge."

[iv] *See* Findings of Fact – Procedural 11 and 12.

[v] There is no way to discern from the record whether or not counsel's reference to "Mr. Magno" is intended or is a typographical error.

[vi] The FMLA covers employers with 50 or more employees.

[vii] *Former* and *current* OAR 839-009-0250(3) provides that "[w]hen taking OFLA leave in an unanticipated or emergency situation, an employee must give verbal or written notice within 24 hours of commencement of the leave. * * * The employer may require written notice by the employee within three days of the employee's return to work." In this case, evidence shows Complainant complied with Respondent's call-in policy and gave Respondent medical verification of her absences on the day she returned to work following each illness.

[viii] The Agency rule is analogous to the federal regulation promulgated to carry out the provisions of the federal Family and Medical Leave Act ("FMLA") which provides that "the employee need not expressly assert rights under the FMLA or even mention the FMLA * * * The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave." 29 CFR 825.302(c).

[ix] The Ninth Circuit holdings are pertinent because federal cases interpreting the FMLA are instructive in interpreting the "same or similar" OFLA provisions.

[x] *See former* and *current* OAR 839-009-0250 and OAR 839-009-0260.