

**In the Matter of**  
**MARK & LINDA McCLASKEY,**  
**both dba McClaskey's Restaurant,**  
**Respondents.**

Case No. 43-98  
Final Order of the Commissioner  
Jack Roberts  
Issued December 23, 1998.

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**SYNOPSIS**

Respondents operated a restaurant and employed Complainant as a waitress. After Complainant became pregnant with twins, Respondents discharged her because of her pregnancy. The Commissioner ordered Respondents to pay Complainant \$2698.75 in back wages and \$17,500.00 damages for the mental suffering caused by Respondents' unlawful employment practice.

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The above-entitled contested case came on regularly for hearing before Erika L. Hadlock, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on November 3 and 4, 1998, in the conference room of the State of Oregon Adult and Family Services Division, 3800 East Third Street, Tillamook, Oregon. The Civil Rights Division of the Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Respondents were represented by Dennis V. Gilbert, Attorney at Law, Tillamook. Respondents Mark McClaskey and Linda McClaskey were present throughout the hearing. Complainant

Cheryl Winfrey also was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses, in addition to Complainant: Marlene Thompson (Complainant's mother); Carrie Lagers, Karen Caillier, and Carmin Dummer (all former employees of Respondents); Ebon Bergeron (Linda McClaskey's son and a former employee of Respondents); and Job Valverde (an Agency investigator called as a rebuttal witness).

Respondents called as witnesses: Respondents Mark McClaskey and Linda McClaskey; former employees Heather Orin, Kim Travis, Lonnie McFarland, Cheryl Carver, and Neal Zudima; and customers William Howard, Sr., William Howard, Jr., and Justin Howard.

The ALJ admitted into evidence: Administrative Exhibits X-1 through X-15; Agency Exhibits A-1, A-2, A-4,<sup>1</sup> A-5, A-6, A-8, and A-9; and Respondents' Exhibits R-1, R-3, R-6, and R-10.

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 or about December 6, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. Complainant alleged that Respondents terminated her employment because of her pregnancy.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence that Respondents unlawfully had discharged Complainant based on her pregnancy.

3) On February 27, 1998, the Agency requested a hearing.

4) On March 18, 1998, the Agency served on Respondents Specific Charges alleging that Respondents had discharged Complainant based on her sex/pregnancy, in violation of ORS 659.029 and ORS 659.030(1)(a). The Agency sought damages of \$3,700.00 in back wages and tips plus \$25,000.00 for mental suffering.

5) 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 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.

6) The Notice of Hearing stated that Respondents' answer was due 20 days from receipt of the notice and that, if Respondents did not timely file an answer, they could be held in default.

7) Respondents filed their answer on April 6, 1998. Respondents denied they discharged Complainant because she was pregnant, denied they unlawfully discriminated against females, and affirmatively alleged that they discharged Complainant primarily because she "refus[ed] to follow the directives of management and to comply with the rules and policies of the restaurant."

8) By motion dated April 14, 1998, Respondents requested "copies of all medical reports, records and writings in the possession, control or within the ability of the Bureau of Labor and Industries or complaintant [*sic*] Cheryl Winfrey to obtain" regarding Complainant's alleged mental suffering, Complainant's alleged ability to work until January 1, 1997, and the physical condition of Complainant between June 1, 1996, and October 15, 1996. The ALJ granted the motion and ordered the Agency and

Complainant to produce the requested documents. The Agency produced the documents on May 13, 1998.

9) On April 28, 1998, the ALJ ordered the Agency and Respondents each to submit a summary of the case including: a list of witnesses to be called; the identification and description of any document or physical evidence to be offered, together with a copy of any such document or evidence; a statement of any agreed or stipulated facts; and, from the Agency only, any damage computations. The Agency and Respondents submitted timely case summaries.

10) On June 26, 1998, the Agency requested that Respondents admit certain facts alleged in their Answer. Respondents admitted those facts in a response dated July 10, 1998.

11) By motion dated June 29, 1998, the Agency moved for a postponement of the hearing. On July 10, 1998, Respondents also filed a motion for setover of the hearing, to which the Agency did not object. By order dated August 5, 1998, the ALJ granted Respondents' motion and reset the hearing to commence on November 3, 1998. The ALJ denied the Agency's motion as moot.

12) On July 10, 1998, attorney Dennis V. Gilbert filed a notice that he would appear on behalf of Respondents.

13) By letter dated September 16, 1998, the Agency notified the Forum that it would be represented by case presenter Linda Lohr.

14) On October 21, 1998, the Forum notified the participants that the matter had been reassigned from ALJ Warner W. Gregg to ALJ Erika L. Hadlock.

15) At the start of the hearing, counsel for Respondents stated that his clients had read the Notice of Contested Case Rights and Procedures and had no questions about it.

16) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) Approximately two hours after the start of the hearing, the ALJ discovered that the proceedings had not been properly recorded on audiotape. The ALJ notified the participants of this problem, and stated that the two witnesses who already had testified (Complainant and Heather Orin) would need to testify again, since the Forum would base its decision solely on evidence in the record and not on testimony that had not been recorded. Those witnesses did testify again; that testimony and the remainder of the hearing were recorded on audiotape. The participants waived their right to repeat the opening statements they had made, but which had not been recorded.

18) On December 3, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. Respondents filed timely exceptions, which are addressed in the Opinion section of this Final Order.

### **FINDINGS OF FACT -- THE MERITS**

1) At all material times, Respondents Mark McClaskey and Linda McClaskey owned and did business as McClaskey's Restaurant, located in Tillamook, Oregon. Respondents had 15 or more employees at any given time. Mark and Linda McClaskey supervised the restaurant employees; there were no other managers.

2) The restaurant business in Tillamook is seasonal, with business being heaviest during the summer and falling off during October or November. Respondents sometimes laid off employees at the end of the busy season and cut back the hours worked by others. Before 1996, however, Respondents never had discharged a long-term waitperson because of a slowdown in business.

3) Complainant started working for Respondents as a waitress in 1983. In 1987, Linda McClaskey fired Complainant after they had an argument.

4) In May 1988, Respondents developed an employee handbook that explained company policies, including rules about taking direction without resentment, not allowing anybody in the restaurant after hours, not discussing restaurant business so loudly that customers could hear, and keeping conversations with customers to a minimum. Through the years, Respondents occasionally held employee meetings and passed around copies of the employee handbook, which Mark McClaskey read aloud. Not all employees paid attention while the handbook was being read. Many, if not all, of Respondents' employees also received copies of the employee handbook when they were hired.

5) Respondents rehired Complainant in 1989 or 1990. Complainant worked primarily as a waitress but also was given other responsibilities such as counting the till and ordering supplies. When Mark and Linda McClaskey went out of town, Complainant sometimes ran the restaurant. Complainant, in the words of Mark McClaskey, was "a heck of a worker."

6) Sometime in 1992 or 1993, Complainant experienced difficulties with an excavation company that was preparing a home site for her, and had a conversation about those difficulties with some customers. Mark McClaskey thought Complainant's behavior was unprofessional and gave her a "dirty look," but did not speak with her about it. At the hearing, Mark McClaskey identified this incident as an example of the problems that led to Complainant's termination in 1996. When asked to identify other similar incidents, Mark McClaskey could not recall anything specific.

7) In about 1994, Linda McClaskey overheard Complainant and other employees complaining about the nature of the Christmas bonuses they had received. Complainant apologized to Linda McClaskey for that incident.

8) Respondents employed a cook named Laura who had a difficult personality and did not get along well with many other employees. Complainant, as well as other employees, sometimes had loud discussions with Laura that probably could be overheard by customers. Complainant's disagreements with Laura did not contribute to Respondents' later decision to fire Complainant.

9) Complainant's mother, Marlene Thompson, worked for Respondents for about 14 years and still works at the restaurant, which Respondents recently sold. Thompson got along well with Respondents. Thompson never heard Respondents complain about Complainant's work or her demeanor in the workplace. She was not aware of any complaints from customers about Complainant.

10) Complainant, who already had four children, became pregnant in the spring of 1996. She reported that pregnancy to Linda McClaskey in June or July. Later in July, Complainant learned that she was going to have twins, and gave Linda McClaskey that information. Complainant told Linda McClaskey that, if it was at all possible, she wanted to continue working until January 1, 1997.

11) At some point, Complainant told some customers (William Howard, Jr., and his son, Justin) that she was pregnant with twins and that her husband was not the children's father. Howard testified credibly that he was not bothered by this conversation, which he did mention in passing to Mark McClaskey. The Forum has not credited former waitress Carver's contrary testimony that Howard told her he did not appreciate hearing the details of Complainant's private life.<sup>2</sup>

12) William Howard, Sr., a regular customer, once overheard customers kidding Complainant about being pregnant with twins and felt that neither Complainant nor the customers were acting appropriately. Howard also once left the restaurant without being seated because Complainant and another waitress were engaged in a loud conversation of which several customers were aware. Those two incidents were the only problems Howard had with Complainant in the 12 years he frequented Respondents' restaurant, and he spoke only to his sons about them. Respondents later learned of the second incident.

13) After she learned of Complainant's pregnancy, Linda McClaskey asked some employees to look out for Complainant and make sure she did not do too much. The employees did offer to help Complainant; she sometimes accepted that help and sometimes did not. Complainant had no difficulty performing her job duties, however, and her doctor had said she could perform all aspects of her job during her pregnancy, including lifting ice buckets and dishes, as well as vacuuming and cleaning.

14) Linda McClaskey never asked Complainant to provide a doctor's certification that she was physically able (or unable) to perform her job duties. She never told Complainant that she was worried about Complainant's ability to perform any particular task. Mark and Linda McClaskey decided independent of any medical advice or expertise that it was dangerous for Complainant to perform certain jobs, such as lifting heavy items.

15) Respondents' waitresses regularly carried buckets of ice through the kitchen to the front of the restaurant. Sometime after she became pregnant, Complainant quickly carried a bucket of ice through the kitchen in a manner that concerned Mark McClaskey, who told Linda McClaskey to get Complainant out of the kitchen before she got hurt. Neither Linda nor Mark McClaskey spoke to Complainant

about the incident. Complainant never was told that she was using an improper technique for carrying the ice.

16) Sometime in September, Linda McClaskey discovered that Complainant had allowed her boyfriend to remain in the restaurant with her after closing time. Linda McClaskey did not discuss that incident with Complainant.

17) In late September 1996, Complainant fell off a bucket she had been standing on while washing her car. Complainant was bruised and sore, but did not suffer a back injury. Linda McClaskey offered to cover Complainant's next few shifts, but Complainant insisted on working.<sup>3</sup> The bruises and scrapes Complainant had suffered did not prevent her from performing her normal job duties.

18) Soon after Complainant fell off the bucket, an elderly couple remarked to Mark McClaskey that they had been given a good meal at Respondents' restaurant, but that a pregnant waitress was really "humping it" around there. McClaskey interpreted this remark as meaning that the couple believed Complainant was working too hard.

19) By September 1996, Linda McClaskey had decided she was going to terminate Complainant's employment and had spoken with Agency personnel and the Employment Division about the impending discharge. She specifically told the Agency that she had safety concerns related to Complainant's pregnancy.

20) Respondents developed a job description for waitresses years ago, and at least some of their waitresses were familiar with it. After her conversation with Agency personnel, Linda McClaskey directed Ebon Bergeron to weigh various items that waitresses were responsible for moving, such as ice buckets (20 pounds) and racks of glasses (12 pounds). Respondents then added that weight information to the job description. At about the same time, Respondents developed a medical leave policy.

21) In October 1996, somebody -- perhaps Complainant -- told a cook named Lonnie McFarland to cook a frozen prime rib, which was not a proper procedure. Customers may have overheard the resulting dispute between Complainant and McFarland. Mark McClaskey disciplined McFarland and told him not to take cooking instructions from waitresses. Neither he nor Linda McClaskey spoke to Complainant about the incident.

22) In early October 1996, Mark McClaskey found that Complainant had allowed her boyfriend to remain in the restaurant after it had closed, while Complainant ate some food. Mark McClaskey gave Complainant a "dirty look" but did not discuss the incident with her.

23) Soon thereafter, Mark McClaskey went on a hunting trip and left Linda McClaskey in charge of the restaurant. At that point, he, too, had decided that Complainant should be fired. McClaskey testified that he felt that Respondents should lay Complainant off for "lack of work" so she could collect unemployment benefits and return to work after her babies were born.

24) While Mark McClaskey was away, Complainant got into a dispute with McFarland about the way he had prepared some orders and commented that Mark McClaskey should have left her in charge while he was gone.

25) On October 15, 1996, Linda McClaskey asked Complainant and Thompson to meet her in her office. Linda McClaskey started the meeting by saying something like, "I think you probably know why you're here." Complainant and Thompson responded that they did not know what the meeting was about, and Linda McClaskey said she was letting Complainant go. Linda McClaskey said that she was afraid Complainant might fall or get hurt at work during her pregnancy, and that she was an insurance risk. She also mentioned a former employee who had filed a fraudulent

Workers' Compensation claim against Respondents in 1984, and said they could not afford another lawsuit if Complainant slipped or fell. Complainant got upset and said she wanted to keep working. Linda McClaskey told Complainant that she would lay her off and attribute the layoff to a slowdown in business so Complainant could get unemployment benefits. Complainant did not agree to characterize what had happened as a "layoff." Linda McClaskey told Complainant that she had worked her last shift. As Complainant left the office, Linda McClaskey handed her documents from which she had read during the meeting.

26) The documents Linda McClaskey gave Complainant were the job description for waitresses and Respondents' medical leave policy. During the meeting, Linda McClaskey had discussed certain duties of waitresses, particularly those that involved heavy lifting or other strenuous physical activity, stating that the work was too much for Complainant to handle while she was pregnant. Linda McClaskey also stated that Complainant was being let go in part because she had not stopped performing certain tasks, such as carrying ice, lifting racks, or vacuuming floors. Although Linda McClaskey indicated in writing on the job description that there were "problems with" keeping voices down, keeping conversations with customers brief, and communicating with the kitchen in a professional manner, she did not mention those purported job performance problems during the meeting.

27) The medical leave policy that Linda McClaskey gave Complainant read as follows:

"McCLASKEY'S RESTAURANT

"GENERAL MEDICAL LEAVE POLICY

"If an employee encounters a medical condition which, in the opinion of the employer may interfere with the employees ability to perform the duties required in their job, or may subject the employee to injury of themselves or others, the employer will make a determination as to medical leave. Due to the fact that employer is engaged in a small

seasonal business, no guarantee of job availability can be made, but employer will endeavor, as circumstances dictate. Medical leave is unpaid."

28) The entire time Complainant worked for Respondents during her pregnancy with the twins, she felt fine and wanted to keep working until January 1, 1997. As Complainant testified, pregnancy was an "easy thing" for her. Complainant was able to perform all of her job duties, including lifting. On October 28, 1996, Complainant obtained a letter from her physician stating that Complainant "has not had any condition at this point which has not allowed her to work." Complainant requested this note because she did not believe Respondents were in a position to decide whether or not she was able to work. Had Respondents not discharged her, Complainant would have been physically able to work, and would have continued working, until January 1, 1997.

29) At the time Respondents discharged her, Complainant was earning \$5.25 per hour plus tips. In 1995, Complainant worked 182 hours in October, 160.5 hours in November, and 143.5 hours in December. Until Respondents fired Complainant on October 15, 1996, she had been working about the same numbers of hours as she had worked in 1995. The Forum infers that, if Complainant had continued working, she would have worked the same number of hours for the remainder of 1996 as she had worked during the corresponding months in 1995. Complainant reported an average of about \$250.00 per month in tips during slow months, which was approximately 30% of the amount she actually earned. Linda McClaskey was aware that the waitresses reported only a portion of their tips and instructed at least some waitresses to ensure that they reported similar percentages of the actual amounts they received. When Linda McClaskey was a waitress, she reported none of her tips.

30) Although Complainant's husband (the father of her third and fourth children) earned about \$26,877.00 during 1996, he and Complainant were separated and he did not share that money with her. Nor did he provide child support during 1996. The father of Complainant's two oldest children did provide \$450.00 per month in child support, but, before Complainant was fired, that was the only income her family had in addition to what she earned working for Respondents.

31) Complainant was very upset and surprised by the discharge. Her feelings were hurt because of Respondents' attitude toward her pregnancy. After she was fired, Complainant cried "all the time." She was not able to pay her family's bills or keep food in the house, and had to rely on assistance from other family members. After about two months, Complainant started receiving unemployment benefits. Christmas of 1996 was very hard because Complainant had no money to buy presents or food for her four children and had to accept charity for the first time in her life. She received assistance not only from family, but also from local churches and customers of Respondents' restaurant. Complainant was humiliated by having to accept this charity.

32) In March 1997, after her twins were born, Complainant started working for another Tillamook restaurant.

33) After Respondents discharged Complainant, other employees' hours increased as they worked Complainant's old shifts. One hostess, Sarah Walker, who had worked for Respondents only for a few weeks, picked up most of Complainant's shifts. A few weeks after Respondents terminated Complainant's employment, Sarah quit, and Respondents advertised for (and hired) a new waitress because they could not afford to pay overtime to their other employees.

34) On cross-examination, Mark McClaskey was asked to list the reasons that Complainant was terminated. He identified several factors that allegedly contributed to

the decision: a slowdown in business; Complainant talking too much about her personal problems (Mark McClaskey identified the time William Howard, Sr., left the restaurant without being seated, as well as the time Complainant told William Howard, Jr., that she was pregnant); Complainant not taking direction without resentment (Mark McClaskey did not give a specific example); the frozen prime rib incident; Complainant allowing people to stay in the restaurant after closing; and Complainant's remark about how Mark McClaskey should have left her in charge. McClaskey never spoke to Complainant about any of these alleged problems.

35) At the hearing, Linda McClaskey stated that she chose to lay off Complainant when business slowed down because she had been causing problems since June 1996. Linda McClaskey identified the following problems that allegedly contributed to that decision: Complainant's refusal to comply with Linda McClaskey's directions not to carry ice, to bring racks down, or vacuum floors; Complainant's "ongoing" problem with talking too much about her personal problems; the incident when Complainant said she should have been left in charge of the restaurant; and Complainant allowing her boyfriend to remain in the restaurant after hours. Linda McClaskey, however, never spoke to Complainant about any of these alleged problems.

36) Carrie Lagers worked as a waitress for Respondents from about September 1995 through April 1998, and worked the same shift as Complainant. Lagers never heard customers complain about Complainant, never heard Respondents complain about Complainant's work performance, and was not aware that Complainant had any problems with coworkers. Lagers believed Respondents were great employers who treated her and other employees well.

37) Cheryl Carver worked as a waitress for Respondents from about 1988 or 1989 until 1997 or 1998, and worked with Complainant. Carver got along well with

Complainant, who went out of her way to help other people. During her pregnancy, Complainant was somewhat more emotional than usual, and Carver felt she was trying to do more than she should, like lifting trays that Carver thought were too heavy for her. Carver never heard Respondents complain about Complainant. Carver observed that men sometimes came into the restaurant to visit Complainant, but she did not believe Complainant invited them in, and did not believe the visits interfered with Complainant's work. Customers occasionally had complained about Carver, and she acknowledged that restaurant customers do sometimes complain about waitstaff.

38) Karen Caillier worked as a waitress for Respondents from March 1993 to November 1997, and occasionally worked the same shift as Complainant. Caillier never heard complaints about Complainant's conduct in the workplace or her job performance. Complainant worked hard and was dedicated to her job. Caillier never saw Complainant violate restaurant rules. Complainant talked with customers, but not more than other waitresses did. Caillier was treated well by Respondents and did not observe them treating other employees unfairly.

39) Carmin Dummer worked as a cook for Respondents off and on from 1992 to early 1997, and sometimes worked the same shift as Complainant. She heard no complaints about Complainant's job performance, except that she had a personality conflict with the cook named Laura, who did not get along with many people. Dummer was not aware that Complainant ever was criticized or reprimanded for her disagreements with Laura. She did not see Complainant have any difficulties performing her job while she was pregnant.

40) In 1994 or 1995, Dummer became pregnant while she was working for Respondents, who suggested that she not do heavy lifting. Because Dummer had problems with her feet swelling, Respondents allowed her to work the morning shift,

when it was cooler. Dummer continued performing her normal job duties, except for heavy lifting, until her doctor said she should not work anymore. After she had her baby, Dummer went back to work for Respondents in July 1996.

41) Heather Orin worked as a part-time waitress for Respondents from approximately 1993 to 1995, and testified credibly that Complainant was a hard worker. In 1994, Orin once became irritated with Complainant for something related to Complainant talking to customers, and spoke with Linda McClaskey about that. However, Orin did not believe that Complainant spoke more loudly or more excessively with customers than did other waitresses. Orin heard no complaints from customers about Complainant. Nor did she hear Linda McClaskey or Mark McClaskey complain about Complainant's demeanor or behavior in the workplace. Orin was not aware that Complainant violated any restaurant rules.

42) Kim Travis worked as a waitress for Respondents from approximately 1987 through 1994. She testified credibly that Complainant was a good worker who was more energetic than most employees and never let anything "slide." Travis never saw Complainant cause disruption in the restaurant, never saw her fight with Respondents, and never heard any complaints about her. She did not ever hear Mark or Linda McClaskey complain about Complainant's work performance or her demeanor in the restaurant. Travis did once see Complainant disagree with a cook named Laura, who was difficult to get along with.

43) In 1994, Travis became pregnant with a single child and continued to work for Respondents into her eighth month of pregnancy. Respondents allowed Travis to rest when she needed to, and allowed her to ask other employees to help her with heavy lifting. Travis believed Respondents were good bosses and treated their employees fairly.

44) The Forum has accepted these other employees' credible testimony that Complainant was a good, hard worker whose behavior was not disruptive to Respondents' business.

45) In the late 1980s, Respondents employed Neal Zudima, who has a severe arthritic condition, as a cook. Respondents accommodated Zudima by arranging for other employees to help him with certain tasks.

46) The Forum observed Complainant carefully throughout the hearing and found her testimony generally to be credible. She gave straightforward answers to questions and did not go out of her way to portray Respondents in a bad light. Complainant also readily admitted to one incident of poor behavior -- complaining in the restaurant about the staff's Christmas bonuses. Complainant appeared to be justifiably proud of her job skills and performance, which nearly every witness commended, and became somewhat defensive when asked if she had committed particular misdeeds. She also appeared reluctant to acknowledge that her memory may have faded with regard to events several years old. This defensiveness, however, was not so marked as to lead the Forum to reject Complainant's testimony, and the Forum has found it credible except as noted below.

47) The testimony of Respondents Mark and Linda McClaskey also was credible with regard to some historic events. They acknowledged that Complainant had been a good, hard worker and they did not appear to have completely fabricated specific instances of misbehavior on her part. Respondents did, however, make unsubstantiated generalizations about the problems they allegedly had with Complainant in the fall of 1996. For example, Mark McClaskey testified that Complainant's behavior was "erratic" and "out of control," yet he was able to describe only a few specific instances of her alleged misconduct, one of which dated back

several years.<sup>4</sup> Respondents also minimized the role Complainant's pregnancy played in their decision to terminate her employment in a manner that was not credible, and the Forum has given little weight to their testimony about their motivations for firing her. Respondents' insistence that they would have fired Complainant even if she had not been pregnant is unbelievable, especially in light of Mark McClaskey's testimony that Respondents had planned to rehire Complainant after she had her babies. Nor does the Forum believe Respondents' testimony that Complainant was out of control and had ongoing behavior problems, given the uniformity of opinion among waitstaff (other than Bergeron) that Complainant was a hard worker who did not frequently cause problems or break rules. Overall, the Forum found Respondents' testimony to be less credible than Complainant's, and generally has credited Complainant's testimony where it conflicted with Respondents', particularly where Complainant's testimony was corroborated by Thompson's.

48) Linda McClaskey testified that she sometimes wrote contemporaneous notes on her desk calendar when she had problems with employees; on the first day of each month, she would copy those notes onto the employees' monthly time sheets and the employees' yearly payroll sheets. Linda McClaskey wrote no notes on Complainant's time sheets for January through August 1996. On Complainant's September 1996 time sheet, Linda McClaskey wrote a note that she had found Complainant's boyfriend in the restaurant (with Complainant) after closing. Another note on the September time sheet states that Complainant fell and injured herself, but insisted on working. Linda McClaskey testified that she previously had written those notes on her desk calendar, which she had not retained. A third note on the time sheet states, "fight, Bill left." According to Linda McClaskey,<sup>5</sup> there also are handwritten notes on Complainant's October time sheet regarding: Mark McClaskey finding Complainant's

boyfriend in the restaurant after closing; the frozen prime rib incident; and Complainant having stated that Mark McClaskey should have left Complainant in charge of the restaurant.

49) Complainant's 1996 yearly payroll sheet includes several notes. The first note states:

10-15-96 -- Laid off lack of work (decided on by waitperson/em- ployer). Called CW and MT to office to inform her of my concerns & medical policy & job description & that I had no other job available that is not a safety problem in her medical condition. She decided to take laid off for lack of work & get unemp. until she could find suitable work.

Other handwritten notes written toward the edges and bottom of this document state that Complainant: "pack[ed] ice" even though she had been told not to; had her boyfriend in the restaurant after hours; "jump[ed] all over cooks"; flirted and "[got] pregnant by customer"; and told customers of her personal problems. Linda McClaskey initially testified that she had written these notes before she laid off Complainant. She then admitted that she had not written the notes on the payroll sheet until immediately *after* discharging Complainant in mid-October. She later specifically acknowledged that she had not written the notes regarding September 1996 incidents on the first of October, which would have been her normal practice, but had written them only after she had fired Complainant. The Forum finds that Linda McClaskey wrote the notes in a post-hoc attempt to justify the termination of Complainant's employment.<sup>6</sup>

50) The Forum also has not credited Linda McClaskey's testimony that she told Complainant several times not to perform certain of her job duties, like pulling down racks of glasses and carrying ice buckets. According to their own testimony, which largely comports with Complainant's, Respondents rarely spoke to Complainant about any problems they allegedly observed. For example, Linda McClaskey testified that she had spoken to Complainant about her alleged "ongoing" problem with excessive talking

only once every few years. She also could not recall having spoken to Complainant after Mark McClaskey complained that she had been walking quickly through the kitchen with an ice bucket. There is no reason to believe that Linda McClaskey told Complainant to restrict her job duties when she rarely spoke to her about other perceived misconduct. In addition, Complainant testified credibly that Respondents had not asked her to stop performing certain tasks.

51) The Forum has attached no significance to the evidence that waitresses routinely reported only 30% of their tips as income. This appears to have been a universal practice among waitresses at Respondent's restaurant, and a practice of which Linda McClaskey was aware. Although the underreporting of tips is dishonest, because nearly everybody involved in this case colluded in the practice to some extent, the Forum has not found that it reflects poorly on the credibility of any particular witness.

52) The Forum has found it unnecessary to resolve certain factual discrepancies between the testimony of Complainant and that of Respondents and McFarland. For example, Complainant denied she told McFarland to cook the frozen prime rib, but Mark McClaskey and McFarland testified that Complainant was the person who gave McFarland that instruction. McFarland could not remember in what year the incident occurred. Carver, whom Mark McClaskey testified was the sole person who had informed him that Complainant was the person at fault, testified that she could not recall if Complainant had been involved at all. It is clear from Carver's and McClaskey's vague recollection of the incident that it did not strike them at the time as being particularly serious or unusual. The Forum finds it unnecessary to determine whether Complainant gave the order to cook the frozen meat because it finds that, even if Complainant gave the order, that incident did not contribute significantly to Respondents' decision to terminate her employment.<sup>7</sup> That finding is confirmed by

Linda McClaskey's testimony that she already had decided to fire Complainant before the prime rib incident took place.

53) Another instance in which the various witnesses' testimony does not agree relates to Respondents' employee handbook. Complainant testified that she never had seen or read a copy of the handbook, but Respondents testified that the handbooks were passed around at all employee meetings, and Complainant must have seen one. Several employees agreed with Respondents' testimony on this point; two others, like Complainant, did not recall having read the handbook. The Forum finds it unnecessary to resolve these disputes because its ultimate factual findings and legal conclusions would not change even if it found Complainant's versions of events to be less accurate than Respondents'. Given the amount of time that has passed since the incidents at issue, the discrepancies in the testimony are not important, and the Forum does not find the conflicts to reflect adversely on any given witness's credibility. Moreover, Complainant acknowledged that she was familiar with Respondents' rules and policies, even if she did not gain that knowledge from having read the handbook.

54) The Forum found Thompson's testimony to be highly credible, despite the fact that Complainant is her daughter. Thompson testified in a straightforward manner to facts favorable both to Complainant and to Respondents. She readily admitted when she could not recall particular matters. Thompson was upset when Respondents discharged Complainant, but did not appear to harbor any grudge against them that would lead her to give false or misleading testimony. The Forum has relied heavily on Thompson's testimony in making its findings.

55) Several of Respondents' former employees testified about rumors they had heard regarding the reason Respondents discharged Complainant. The witnesses

stated forthrightly that they had no personal knowledge of the truth or falsity of those rumors, and the Forum has given no weight to the testimony on that subject.

56) The Forum was not favorably impressed by the ever-changing testimony of Ebon Bergeron, Linda McClaskey's son, who worked for Respondents from 1994 to about 1997. Bergeron initially testified that he could not recall any specific complaints about Complainant's work performance, other than "little squabbles" that occur in the restaurant business. He then remembered that Complainant once had demeaned Respondents in front of customers. Similarly, Bergeron initially could not recall whether he had been asked to weigh items in the kitchen, then recalled that he had been asked to perform that task to determine whether lifting those items could cause injury. Bergeron first insisted he never had spoken with any Agency civil rights investigator, including Job Valverde. Later, Bergeron remembered that he had spoken to Valverde by telephone, but could not remember the substance of the conversation. Bergeron's testimony also was slanted dramatically in favor of Respondents. He, alone among employee witnesses, testified that he was "scared" for Complainant because she was "so big" and Respondent's kitchen was slippery. Unlike any other employee, Bergeron also testified that Complainant violated restaurant rules "countless times" by holding hands with her boyfriends in the restaurant. He testified that employee meetings were held every two or three months, far more frequently than any other witness testified they were held. Bergeron stated many times, in a manner completely unresponsive to the questions asked, that Respondents treated their employees like a family, that all employees looked out for each other, and that the employees naturally were concerned about protecting the "children within" Complainant. The Forum found Bergeron's testimony overblown, designed to protect Respondents, and generally unreliable.

Consequently, the Forum has given little weight to his testimony and has given it no weight where it conflicted with other more credible evidence.

#### **ULTIMATE FINDINGS OF FACT**

1) At all material times, Respondents did business as McClaskey's Restaurant in Tillamook, Oregon, and had one or more employees within the State of Oregon.

2) Complainant worked as a waitress for Respondents for many years. In 1996, she became pregnant with twins. Complainant informed Respondents that she planned to keep working until January 1, 1997.

3) On October 15, 1996, Respondent Linda McClaskey discharged Complainant from employment because of her pregnancy. Respondent Mark McClaskey previously had told Linda McClaskey that he believed Complainant should be discharged, and the termination was a joint decision and action by Respondents.

4) Complainant was a hard worker. Her overall job performance was satisfactory. Complainant did not talk loudly more than did other waitstaff. Complainant did not speak with customers more than did other waitstaff. Complainant's behavior in the restaurant was professional and did not disrupt the business. Respondents would not have discharged Complainant from employment had she not been pregnant.

5) During her pregnancy, Complainant remained physically able to perform all her job duties. If Respondents had not terminated her employment, she would have kept working, performing all aspects of her job, until January 1, 1997.

6) At the time Respondents terminated her employment, Complainant was earning \$5.25 per hour plus tips. If Respondents had not discharged her, Complainant would have worked approximately 395 hours from October 16, 1996, until December 31, 1996, for total wages of \$2,073.75. In addition, Complainant would have reported

tips of approximately \$625.00 during that time. Her total lost earnings, therefore, equal \$2698.75.

7) Complainant was very upset and distressed as a result of being discharged because of her pregnancy. She cried "all the time," and her feelings were hurt by Respondents' attitudes and remarks about her pregnancy. In addition, Complainant suffered financial distress and unemployment because of the termination, and was humiliated by having to accept charity for the first time in her life.

### **CONCLUSIONS OF LAW**

1) At all material times, Respondents were "employers" for purposes of ORS 659.030. See ORS 659.010(6).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.022; ORS 659.040 *et seq.*

3) ORS 659.030 outlines what acts constitute unlawful employment practices. It states, in pertinent part:

"For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340 and 659.400 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 reasonable necessary to the normal operation of the employer's business."

The phrase "because of sex" is explained in ORS 659.029, which states:

For purposes of ORS 659.030, the phrase "because of sex" includes, but is not limited to, because of pregnancy, childbirth and related medical conditions or occurrences. Women affected by pregnancy, childbirth or related medical conditions or occurrences shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work by reason of physical condition, and nothing in this section shall be interpreted to permit otherwise."

Respondents violated ORS 659.030(1) by discharging Complainant from employment because of her sex.

4) Pursuant to ORS 659.010(2), ORS 659.040, and ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages resulting from Respondents' unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondents in the Order below are appropriate exercises of that authority.

### **OPINION**

#### **Unlawful Employment Practice**

It is undisputed that Complainant was pregnant at the time Respondents terminated her employment. This case, therefore, hinges on whether Respondents discharged Complainant *because of* her pregnancy. They did. Respondents believed that Complainant's pregnancy put her at risk of injury and terminated her employment because they were unwilling to assume that risk. Those beliefs are evidenced in Linda McClaskey's assertions during the October 1996 meeting that Respondents were discharging Complainant because she was an insurance risk and could not safely perform her job while she was pregnant. By firing Complainant because they believed her pregnancy made her a liability to their business, Respondents fired Complainant "because of" pregnancy or sex.

Respondents deny firing Complainant because of her pregnancy and argue that they had legitimate reasons for terminating her employment. Those purported reasons fall into two categories. First, Respondents argue that Complainant's general behavior was "out of control" -- that she repeatedly violated Respondents' rules against talking

too loudly in the restaurant, speaking to customers about her personal problems, airing business issues in public, and having her boyfriend in the restaurant after closing. The Forum has found, however, that Complainant's behavior was professional and not disruptive to Respondents' business. All of Respondents' former employees, except Linda McClaskey's son, testified credibly to that effect. Complainant did occasionally violate Respondents' rules, particularly those against having non-employees in the restaurant after closing. But Respondents did not reprimand Complainant for that behavior or take any other action that would suggest they considered the rule violations to be serious. In addition, several of the incidents now cited by Respondents occurred *after* they already had decided to fire Complainant. The Forum finds that the rule violations did not prompt Respondents to discharge Complainant. To the extent Respondents cite the rule violations as the basis for the termination, they constitute a pretext intended to hide Respondents' discriminatory motivation.

The pretextual nature of Respondents' proffered reasons for terminating Complainant's employment is corroborated by Mark McClaskey's own testimony. In passing, he stated that Respondents had planned to rehire Complainant after she gave birth to the twins. If Complainant's job performance was as poor as Respondents claim, they surely would not have wanted her to return to work. McClaskey's testimony confirms that Respondents wanted Complainant to stop working for them only while she was pregnant, not permanently. When she insisted that she could continue working during her pregnancy, they fired her.

Respondents also claim the termination was justified for safety reasons. They claim that they warned Complainant not to perform certain tasks, such as heavy lifting, because they were afraid she would injure herself or the twin fetuses. To the contrary, the Forum has found that Respondents did not instruct Complainant not to perform

certain tasks. Consequently, her purported disobedience could not have formed the basis of Respondents' termination decision.

Even if Respondents had told Complainant to stop performing some of her job duties, however, Complainant's refusal to comply still could not justify her termination. Respondents had no objective medical reason for requesting that Complainant not lift certain items, vacuum, or wash floors. Their decision that Complainant should not do those things was based on stereotypical assumptions about the capabilities of pregnant women and an overly protective attitude toward them.<sup>8</sup> That is not permissible. As the federal Equal Employment Opportunity Commission has observed in an analogous context, an employer may not require a disabled employee to take "safety precautions" that are based on paternalistic attitudes instead of the employee's actual ability to safely perform the job:

"An employer may require \* \* \* that an individual not pose a `direct threat' to the health or safety of the individual or others, if this standard is applied to all applicants for a particular job.

\* \* \*

"The determination that an individual applicant or employee with a disability poses a `direct threat' to health or safety must be based on objective, factual evidence related to that individual's present ability to safely perform the essential functions of a job. It cannot be based on unfounded assumptions, fears, or stereotypes about the nature or effect of a disability or of disability generally. Nor can such a determination be based on patronizing assumptions that an individual with a disability may endanger himself or herself by performing a particular job.

\* \* \*

"The determination of a `direct threat' to health or safety must be based on a reasonable medical judgement that relies on the most current medical knowledge and/or the best available objective evidence.

\* \* \*

"Employers should be careful to assure that assessments of `direct threat' to health or safety are based on current medical knowledge and other kinds of evidence listed above, rather than relying on generalized and frequently out-of-date assumptions about risks associated with certain disabilities."

EEOC, Disability Discrimination, IV-8, IV-10 to IV-11 (April 1997) (underscoring in original).

The same principles apply under Oregon law. ORS 659.448 provides, in pertinent part:

(1) Except as provided in this section, an employer may not require that an employee submit to a medical examination, may not make inquiries of an employee as to whether the employee is a disabled person, and may not make inquiries of an employee as to the nature or severity of any disability of the employee, unless the examination or inquiry is shown to be job-related and consistent with business necessity.

The Agency's administrative rules explain further:

Notwithstanding the other provisions of these rules, an employer may refuse to employ a disabled person who poses a direct threat to the health or safety of the individual or others. Direct threat means significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. *The determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.*

OAR 839-006-0244; see *In the Matter of WS, Inc.*, 13 BOLI 64, 87-88 (1994) (employer must make an individualized assessment of the capabilities of a disabled employee and not rely "solely on their fears about safety, presumptions about [disabled persons] and misconceptions about [the employee's] abilities and limitations"). The same is true of pregnancy:

Regarding the ability or inability to work by reason of physical condition, pregnant women must be treated the same as males, non-pregnant females and other employees with off the job illness or injuries.

OAR 839-007-0510(2).<sup>9</sup>

Here, Respondents made no attempt to determine, based on objective medical evidence, whether Complainant posed a "direct threat" to her own safety or the health of

others in the restaurant work environment. If they had, they would have discovered that Complainant was perfectly capable of performing her job.

Respondents' counsel argued in closing that it is not discriminatory for employers to ask pregnant employees to refrain from performing certain tasks as long as there is no penalty to the employee. Whatever the merits of that argument,<sup>10</sup> it has no application to this case. Respondents did penalize Complainant because she was pregnant -- they fired her. Even if Respondents had asked Complainant to stop doing certain things -- and she had ignored those requests -- that could not justify the termination. Although Respondents may have believed in good faith that Complainant could not safely lift heavy objects or vacuum, that determination was impermissibly based on stereotypes and assumptions, not on objective medical evidence.<sup>11</sup>

## **Damages**

### Back wages and tips

Respondents are liable for Complainant's lost wages and tips from the date they fired her until January 1, 1997, the date on which she would have voluntarily left their employment. In 1995, Complainant worked a total of 304 hours in November and December and worked 182 hours in October. The Forum has determined that, had Complainant not been fired, she would have worked the same number of hours in October, November, and December 1996 as she had worked in the corresponding months in 1995. Complainant did work through October 15, 1996, and already has been paid for that first half of the month. The Forum, has, therefore, calculated Complainant's back wages as follows: 91 (1/2 the hours Complainant worked in October 1995) plus 304 (Complainant's hours for November and December 1995) equals 395 hours times \$5.25/hour equals \$2073.75. To this amount, the Forum has added two

and one-half months worth of reported tips. At \$250.00 per month, that adds \$625.00, for a total of \$2698.75 in back wages and tips.

Respondents suggested in their answer that Complainant's unemployment benefits should be deducted from any award of back wages. That is not correct. *Colson v. Bureau of Labor and Ind.*, 113 Or App 106, 831 P2d 706 (1992); *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61, 84 (1992).

#### Mental suffering

In determining damages for mental suffering, the Commissioner considers "the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused." *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 21, 27 (1997). The Commissioner also considers "a complainant's vulnerability due to such factors as age and work experience." *Id.*

Here, Respondents fired Complainant because she was pregnant and because her behavior did not conform to their assumptions and stereotypical beliefs regarding appropriate behavior for pregnant women. The effects of that unlawful practice lasted for about eleven weeks -- from the date Respondents fired Complainant until January 1, 1997. Complainant was very upset by the discharge and was hurt by Respondents' attitude toward her pregnancy. Complainant's mother testified credibly that Complainant cried "all the time" after she was let go. Before being fired, Complainant's only reliable source of income had been her wages from Respondents. After the termination, she had to rely on charity to feed her children and to provide them with Christmas gifts. Complainant testified credibly and persuasively that she was humiliated by having to accept charity for the first time in her life. On these facts, the Forum finds \$17,500.00 to be an appropriate amount to compensate Complainant for

the mental distress she suffered as a result of Respondents' unlawful employment practice.

### **Exceptions**

In its exceptions, Respondent first claims that the evidence does not support a statement that Complainant sometimes accepted other employees' offers to assist her with her work. That is not correct. Complainant testified credibly that she did not *a/ways* accept other employees' offers of help, and Carver suggested that, although she believed Complainant was doing more than she should, Complainant at least sometimes accepted help. The Forum has inferred from this evidence that Complainant sometimes, if not frequently, allowed other employees to assist her. To clarify that Complainant did not always accept help, however, the Forum has reworded Finding of Fact No. 13 to state that Complainant sometimes accepted help and sometimes did not.<sup>12</sup>

In exception 1(b), Respondents assert that "the only evidence in the record of a doctor's opinion regarding complainant's pregnancy is in agency exhibit A-6, which was prepared after the termination of complainant's employment and makes no mention of workplace requirements, conditions or even the nature of her work." Respondents' characterization of the record is flawed. The Forum has accepted as fact Complainant's credible testimony that, *before she was fired*, she informed her doctor of her pregnancy, and he stated that she was capable of performing all aspects of her job. Respondents' exception is denied.

Respondent objects to the finding that "Linda McClaskey was aware that the waitresses reported only a portion of their tips and instructed at least some waitresses to ensure that they reported similar percentages of the actual amounts they received." The evidence supports this finding. Caillier, in particular, testified credibly that Linda

McClaskey instructed her to report only about 30% of her tips, so that the waitresses would be reporting similar amounts. And contrary to Respondent's assertion, Thompson did not state clearly that Linda McClaskey was unaware of the amount of tips waitresses were claiming. In fact, Thompson testified that she believed Linda McClaskey probably *was* aware of the practice of reporting only 30% of tips, although she could not be positive of that. Respondents' exception is denied.<sup>13</sup>

Respondent also insists that the Forum must take into account Complainant's underreporting of tips in assessing her credibility. To more fully explain why it has declined to do so, the Forum has added to Finding of Fact No. 29 the statement: "When Linda McClaskey was a waitress, she reported none of her tips." That finding is a direct reflection of Linda McClaskey's testimony during cross-examination. Just as the Forum did not base its determination of Complainant's credibility on her admission that she underreported tips, it has not based its findings regarding the credibility of Linda McClaskey's testimony on her similar admission. Respondents' exception is denied.

In their third exception, Respondents assert that Complainant's testimony regarding the employee handbook changed between the time she first testified (in the portion of the hearing that was not recorded) and when she testified later in the hearing. Respondents accuse the Forum of being unwilling to acknowledge "the eagerness of the complainant to change her testimony." To the contrary, the Forum carefully considered the testimony of Mark McClaskey regarding the nature of Complainant's testimony in the unrecorded part of the hearing, and compared that to the testimony she delivered later. The Forum has not found any discrepancies in the testimony significant enough to overcome its findings regarding the credibility of Complainant's testimony, as discussed in Findings of Fact Nos. 46 and 53. The exception is denied.

In their fourth exception, Respondents argue that the order should contain more factual findings than it does. There is no legal requirement, however, that the order summarize *all* evidence that was offered. To the extent that Respondents argue that the evidence does not support an inference that they engaged in a *pattern* of discrimination, the Forum agrees. That is not relevant to the question presented by this case, however, which is whether Respondents engaged in an unlawful employment practice with respect to Complainant. Consequently, the order need not include the additional information proposed by Respondents. In any event, the order does already contain findings that many employees thought Respondents treated their employees well and accommodated physical difficulties they had in performing their jobs. See Findings of Fact Nos. 36, 38, 40, 43, and 45.

Respondents also claim that the order should contain a finding that they generally did not inform employees of problems they were having with other employees, so that there is no significance to the testimony of various employee witnesses that they never heard Respondents complain about Complainant's work performance. The only evidence to that effect came from Respondents themselves, and the Forum has not found their testimony with regard to such matters to be particularly credible. The exception is denied.<sup>14</sup>

Respondents' first exception to the Proposed Ultimate Findings of Fact merely reiterates their arguments regarding whose testimony the Forum should accept. The Forum adheres to its stated findings regarding the various witnesses' credibility.

In their second exception to the Proposed Ultimate Findings, Respondents argue that the Forum cannot award damages for mental distress related to the economic hardship a Complainant suffers as the result of an unlawful discharge. That argument lacks merit. See *In the Matter of WS, Inc.*, 13 BOLI 64, 91 (1994); *In the Matter of*

*Pzazz Hair Designs*, 9 BOLI 240, 257 (1991). The Forum also notes that, contrary to Respondents' assertion, there is credible evidence in the record that Complainant's distress was caused not only by her sudden unemployment, but also by Respondents' attitude toward her pregnancy. The exception is denied.

Respondents also argue generally that the proposed order has the effect of stripping employers of "the right to care about the well being of a pregnant woman and her unborn fetus \* \* \*." To the extent that an employee's pregnancy poses a genuine safety risk in the work environment, Respondents are wrong. The Forum has expanded the opinion section of this order to explain the circumstances under which an employer may inquire whether an employee's pregnancy presents a "direct threat" to her own safety or that of others. The laws cited in that section of the opinion also serve to protect employees from employers -- like Respondents -- who base employment decisions on unfounded assumptions regarding the abilities of persons with actual or perceived disabilities, whether those actual or perceived disabilities result from pregnancy or from some other condition.

Respondents' exceptions to the Proposed Conclusions of Law and portions of the Proposed Order mirror their exceptions to the proposed findings and are denied for the reasons set forth above. In their final exception to the Proposed Order, Respondents point out that they no longer own McClaskey's Restaurant, and conclude that the proposed cease and desist order is inappropriate. Respondents are correct that there is no evidence in the record that they presently own or operate any business that utilizes the services of employees. Consequently, the Forum has deleted the cease and desist language from the Order.

**ORDER**

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and to eliminate the effects of Respondents' violation of ORS 659.030(1)(a) and ORS 659.029, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents Mark McClaskey and Linda McClaskey, dba McClaskey's Restaurant, to 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 Cheryl Winfrey in the amount of:

a) TWO THOUSAND SIX HUNDRED NINETY EIGHT DOLLARS AND SEVENTY-FIVE CENTS (2698.75), less appropriate lawful deductions, representing wages and tips Complainant lost from October 16, 1996, through December 31, 1996, as a result of Respondents' unlawful practice found herein; plus

b) Interest at the legal rate on said wages and tips from January 1, 1997, until paid; plus

c) SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS (\$17,500.00), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondents' unlawful employment practice found herein; plus

d) Interest on said damages for mental suffering at the legal rate, accrued between the date of the Final Order and the date paid.

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<sup>1</sup>Exhibit A-4 is a document that Linda McClaskey gave to Complainant. Portions of the original document are highlighted in yellow. The Agency offered, and the Forum received into evidence, the original document as well as a photocopy of it.

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<sup>2</sup>The Forum does *not* find that Carver testified dishonestly. It is clear, however, that either she or Howard is mistaken regarding the significance the conversation had to Howard, and the Forum finds that Howard's recollection of the event is more accurate than Carver's. The Forum bases that finding in part on the fact that Howard's testimony comports with the testimony of his son, Justin, who did not state that he or his father were disturbed by the conversation, and in part on the fact that Howard testified credibly that the conversation was "unimportant" and "irrelevant" to him.

<sup>3</sup>When Mark McClaskey learned that Complainant had returned to work soon after her fall, despite the fact that Linda McClaskey had offered to cover a few of her shifts, he chastised Linda McClaskey for letting Complainant "tell her what to do."

<sup>4</sup>See findings 6 and 34, *supra*.

<sup>5</sup>The monthly time sheets are not in the record.

<sup>6</sup>There is a handwritten note on Complainant's payroll sheet from 1983 stating: "CW/Off - for Birth of Child." Linda McClaskey testified that she had not seen that note for years, and had not written that note after she laid off Complainant. During closing argument, the Agency suggested that Linda McClaskey must have written that note much later than 1983 because Complainant's initials then were "CB", not "CW." Respondents objected that there was no evidence in the record of Complainant's name in 1983. Respondents are not quite correct -- the name on the 1983 timesheet is Cheryl Bake, not Cheryl Winfrey - - but there is no evidence in the record regarding whether Complainant may casually have used some name other than Bake in 1983. The Forum finds Linda McClaskey's use of the initials "CW" on a note dated 1983 to be highly suspicious, but will not infer from that evidence alone that she actually wrote the note years later and lied about that fact on the stand.

<sup>7</sup>Nor does the Forum find that the discrepancy in testimony reflects poorly on the credibility of Complainant. McFarland's testimony about the incident was extremely nervous and vague -- one of the few details he purportedly could recall about the incident was that Complainant was the person who

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instructed him to cook the frozen prime rib. The Forum did not find McFarland's testimony on this point to be convincing.

<sup>8</sup>The Forum dismisses as pretextual Respondents' claim that their safety concerns were based primarily on the fact that Complainant had a "bad back," which she recently had reinjured. Complainant testified credibly that she had no chronic back problems and had not injured her back in the fall off the bucket.

<sup>9</sup>When Complainant was fired, subsection (5) of this rule explicitly permitted employers to request medical verification of a pregnant woman's ability to perform her job. That subsection was deleted from the rule by an amendment effective in February 1998. The Forum's decision would be the same under either version of the rule.

<sup>10</sup>It is possible to conceive of a situation in which an employer's baseless requests that a pregnant employee stop performing many of her job duties could create an offensive or hostile work environment, even if the employee suffered no direct loss of wages or seniority.

<sup>11</sup>The fact that other pregnant employees may have needed or appreciated special accommodation, which Respondents provided, did not relieve Respondents of the responsibility not to make the *assumption* that Complainant was not capable of heavy work.

<sup>12</sup> It is worth noting that, even if Complainant *never* allowed other employees to help her with physically demanding tasks, the Forum's ultimate findings of fact, legal conclusions, opinion and order would not change.

<sup>13</sup>The Forum does agree with Respondents that "the taxation of tips is not a direct and material fact to the matters under consideration here," and finds that the matter, being so tangential to the charged allegations of sexual discrimination, was not fully litigated for purposes of an issue preclusion analysis. The Forum included this finding only to explain why it was not basing its determination of any witness's credibility on the fact that the witness may have underreported -- or encouraged the underreporting of -- tips.

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<sup>14</sup>In any event, the Forum did not rely heavily on the employees' testimony that they never heard Respondents complain about Complainant. The Forum found it much more significant that almost all present and former employees stated that Complainant was a good, hard worker who had no particular job performance problems.