

In the Matter of

BOB G. MITCHELL and SHARON F. MITCHELL, dba GRANNY'S GRAINERY,

Case No. 45-99

January 7, 2000

SYNOPSIS

Respondents employed Complainant, a pregnant woman, as a bartender. Respondents reduced Complainant's work hours because they did not believe a bar was an appropriate place for a pregnant woman to work and because they did not want to be liable for Complainant's pregnancy. The reduction in hours and pregnancy-related comments of Respondents managerial employees created an atmosphere so intolerable that a reasonable person in Complainant's position would have quit her job. Complainant did quit her job because of these employment conditions, a result that Respondents had hoped for and intended. The commissioner ordered Respondents to pay \$5067.71 in wages and tips that Complainant lost as a result of Respondents' unlawful employment practices, plus \$7500.00 damages for mental suffering. ORS 659.010(2), 659.029, 659.030(1), 659.060(3).

The above-entitled 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 for the State of Oregon. The hearing was held on September 9 and 10, 1999, in Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Complainant L. Krystle Borgmann,¹ who was not represented by counsel, was present throughout the hearing. Respondents were represented by counsel, Edward L. Daniels, Attorney at Law.

The Agency called as witnesses: Complainant; Complainant's husband, Rick Borgmann; two former employees of Respondent, Susan Benson-Porter and Mary Branum; and senior investigator Harold Rogers. Respondents called as witnesses: Respondent Bob Mitchell; manager Debrah Mitchell; and current and former employees

Teresa Duffield, Patricia Howard, Michele Piefer, Terezija Joslin, Kelly Armfield, Lynette Peterson, Christine Fisher, and Edna Marie Pierce.

The forum received into evidence:

a) Administrative Exhibits X-1 through X-11 (submitted or generated prior to hearing).

b) Agency Exhibits A-1 through A-4 (submitted prior to hearing with the Agency's case summary, with A-2 being admitted only for the limited purpose of establishing jurisdiction), A-6 through A-10, A-14 and A-15 (submitted at hearing). The Agency did not offer the document marked as Exhibit A-5 that was attached to its case summary, and the ALJ did not receive that document into evidence.

c) Respondents' Exhibits R-1 through R-3 (submitted prior to hearing with Respondents' case summary).

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 October 15, 1997, Complainant L. Krystle Borgmann filed a verified complaint with the Civil Rights Division of the Agency alleging that she was the victim of unlawful employment practices by Respondents. The number assigned to Complainant's case was ST-EM-SM-971015-4140.

2) Sometime in October 1997, a copy of the complaint was sent to one of Respondents' places of business. Respondent Bob Mitchell was aware of the complaint within a week and authorized Debrah Mitchell, his daughter and manager of his restaurants, to handle the investigation and to deal with the Agency.

3) Senior Investigator Harold Rogers was assigned to investigate Complainant's complaint. Rogers found that substantial evidence supported the complaint and, on January 9, 1998, he submitted an administrative determination including that finding for review by his supervisor. Notices of Substantial Evidence Determination typically issue about 10 to 14 days after investigators submit the administrative determinations for supervisory review, unless the supervisors send the drafts back to the investigators, which did not happen in this case.

4) On some date not clearly established in the record, but no later than February 5, 1998, the Division issued a Notice of Substantial Evidence Determination in case number ST-EM-SM-971015-4140 finding substantial evidence that Respondents had violated ORS 659.030(1)(a) and (b). That Notice was signed by Rogers.

5) By letter dated February 5, 1998, attorney Edward L. Daniels informed the Agency that he represented "Appletree Restaurant dba Granny's Grainery" in regard to Complainant's complaint, Agency number ST-EM-SM-971015-4140. He further stated that he had "reviewed all the materials submitted by [Complainant] and the Notice of Substantial Evidence Determination." Daniels stated that if the Agency planned to pursue the matter, "we will need a formal hearing." The Agency's Medford office received this letter, which Daniels had sent to the Agency's Eugene office, on February 21, 1998.

6) By letter dated and mailed October 15, 1998, the Administrator of the Civil Rights Division informed Complainant that she had a right to pursue her complaint in circuit court. Enclosed with the letter was a Notice of Right to File a Civil Suit. The letter was copied to both "Edward L. Daniels, Attorney" and "Successor-in-Interest; Snarky's Other Place." The Administrator addressed an otherwise identical letter to

Debrah Mitchell, Manager, Appletree Restaurant dba Granny's Grainery, 1890 S. Main Street, Lebanon OR 97355. That letter also was dated and mailed October 15, 1998.

7) On June 2, 1999, the Agency filed a request for hearing and submitted Specific Charges alleging that Respondents unlawfully reduced Complainant's work hours because of her pregnancy, in violation of ORS 659.030(1)(b), and constructively discharged Complainant because of her pregnancy, in violation of ORS 659.030(1)(a). The Agency sought approximately \$10,000.00 in back wages and lost benefits plus \$20,000.00 for mental suffering.

8) On or about June 17, 1999, the hearings unit served on Respondents the Specific Charges, accompanied by the following: a) a Notice of Hearing stating that the hearing in this matter would take place on August 25, 1999, at the Agency office in Salem, Oregon; 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 administrative rule regarding responsive pleadings (OAR 839-050-0130).

9) Respondents filed a timely Answer on June 23, 1999, in which they admitted that they were Oregon employers subject to the provisions of ORS 659.010 to 659.494, and operated an eating and drinking establishment under the assumed business name, Granny's Grainery. Respondents also admitted that Complainant filed a verified complaint with the Agency alleging she was the victim of unlawful employment practices by Respondents. Respondents denied the remaining allegations in the Specific Charges.

10) On July 19, 1999, Respondents moved to postpone the hearing on the ground that one of Respondent's key witnesses had a prescheduled out-of-state vacation for the week of August 23. The Agency objected to any extended

postponement, but stated that it would be amenable to a brief postponement to the first or second week in September. During a July 23, 1999, teleconference initiated by the ALJ, coun-sel for Respondents and case presenter Lohr stated that they were available for hearing on September 9 and 10. Accordingly, the ALJ issued an amended notice of hearing setting the hearing to commence on September 9, 1999.

11) On July 27, 1999, the ALJ ordered the Agency and Respondents each to submit a case summary including: a list of all witnesses to be called; the identification and description of any documents of physical evidence to be offered, together with a copy of such document or evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondents only); a statement of any agreed or stipulated facts; and any wage, damages, or penalty calculations (for the Agency only).

12) Respondents filed their case summary on August 26, 1999, including documents marked as exhibits R-1 through R-3. On August 27, 1999, the Agency filed its case summary, which included copies of documents marked as exhibits A-1 through A-5.

13) On September 3, Respondents filed a supplemental case summary in which they identified additional possible witnesses.

14) At the start of the hearing, counsel for Respondents stated that he had no questions about the Notice of Contested Case Rights and Procedures.

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

16) The evidentiary record closed on September 10, 1999.

17) The ALJ issued a proposed order on December 6, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed timely exceptions.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondents Bob G. Mitchell and Sharon F. Mitchell jointly owned and operated an eating and drinking establishment under the assumed business name "Granny's Grainery" and were Oregon employers utilizing the personal services of one or more persons, subject to the provisions of ORS 659.010 to 659.494.

2) At all material times, Granny's Grainery was a tavern with dart boards and pool tables. Pool and dart leagues sometimes played tournaments at the tavern. There were occasional bar fights at Granny's Grainery, customers occasionally used or offered illegal drugs on the premises,² and the overall atmosphere was that of a bar, not a restaurant, although some food was served.

3) Respondents also own three Apple Tree restaurants. Over the years, several pregnant women have worked at those restaurants, some until immediately before the birth of their children.

4) At all material times, Debrah Mitchell, Bob Mitchell's daughter, managed Granny's Grainery and Respondent's Apple Tree restaurants. Respondents had delegated her full responsibility for the businesses' day-to-day operations.

5) At all material times, Theresa Duffield was employed by Respondents as assistant manager of Granny's Grainery. At the time of hearing, Duffield worked for Respondents at one of their Apple Tree restaurants.

6) In March 1997, Complainant applied to work as a bartender at Granny's Grainery and had interviews with both Duffield and Debrah Mitchell.³ Complainant told Mitchell that she could work either full-time or part-time, but would prefer full-time work.

Mitchell asked Complainant if she had children and would take a lot of time off because of that. Complainant said she had children, but child care would not be a problem.

7) Respondents hired Complainant to work evening and closing shifts at Granny's Grainery and paid her minimum wage, which in 1997 was \$5.50 per hour. Duffield was Complainant's immediate supervisor throughout her employment by Respondents.

8) Complainant started working at Granny's Grainery on March 31, 1997. That day, Complainant and Duffield worked together and Duffield instructed Complainant regarding various job duties. Duffield told Complainant that the closing time would vary between 11:00 p.m. and 2:00 a.m. depending on the number of customers. On Complainant's first day of work, Duffield closed the restaurant at 11:00 p.m.

9) Although Complainant was hired as a bartender, her duties at Granny's Grainery also included cooking, cleaning, stocking, serving customers, and running the cash register. On Friday and Saturday nights, a cook and cocktail waitress worked during the evening shift in addition to the bartender. They generally would leave around 10:00 p.m., although they occasionally stayed later on busy nights. The bartender handled cooking and table-waiting duties on weekday evenings and on weekends after 10:00 p.m.

10) Respondents maintained an "incident log" at Granny's Grainery based on a recommendation from the Oregon Liquor Control Commission. Duffield instructed bartenders to make notations in the incident log regarding the time they closed the bar and any problems that arose.

11) Complainant learned she was pregnant the same week she started working at Granny's Grainery. Sometime that week, Complainant informed Duffield that

she was pregnant. Although Complainant and Duffield did not discuss the issue, Complainant had decided to work throughout her pregnancy.

12) Duffield set the employees' work schedules at Granny's Grainery. Complainant usually worked five days a week, with Mondays and Tuesdays off.

13) The father of Complainant's unborn child, Robert Blevins, was incarcerated in Oklahoma during the time Complainant worked at Granny's Grainery. At the beginning of Complainant's employment, Blevins frequently called her collect at Granny's Grainery from prison. From April 18, 1997, through May 8, 1997, Respondents were billed for eight one-minute-long collect telephone calls placed by Blevins. The charges for those calls totaled \$31.28 (plus \$0.94 excise tax). Complainant paid that bill when Duffield presented it to her. Complainant testified unpersuasively that she did not accept any of these collect calls and that Respondents were billed automatically when the telephone was answered, regardless of whether the call was accepted.

14) In May 1997, Complainant started renting a room in the house of Rick Borgmann, a regular customer at Granny's Grainery. At that time, Complainant and Borgmann were not yet married and were not romantically involved.

15) Duffield often told Complainant that she looked tired and unwell. Duffield also told Complainant she did not have to empty the deep fryer, which required lifting. Complainant did that job anyway. Duffield never asked Complainant to provide a doctor's note stating her physical capabilities or limitations.

16) In early June, Susan Benson-Porter started working as a cocktail server at Granny's Grainery. Duffield told Benson-Porter that Complainant was a very good worker who was easy to get along with. Complainant trained Benson-Porter how to do her job.

17) On June 14, 1997, a Saturday night, ten customers entered Granny's Grainery at about 11:00 p.m. and placed an unusually large order for fried foods, which had to be cooked in several batches. Complainant asked Benson-Porter, who had worked as a cocktail waitress that evening, to stay and help with the food order. Duffield later told Complainant that she should have prepared the food herself and not asked Benson-Porter to stay late.

18) Sometime in the last two weeks of June, before June 26, Duffield told Complainant that if she needed to work fewer hours, that would be alright. Duffield said she had a rough time during her own pregnancy, and didn't know how Complainant "did it." Complainant told Duffield that she had been pregnant previously without difficulties and did not anticipate problems with this pregnancy.

19) Duffield maintained a business diary that she kept locked in the office safe at Granny's Grainery. Duffield made about eight entries in the diary during 1996 that related to four different employees. In 1997, Duffield made five notes, most of which related to Complainant. As explained in Finding of Fact -- the Merits 69, *infra*, the forum finds that Duffield made these notes contemporaneously with the described events. A note dated June 19, 1997, states:

"[Complainant] and I had a talk, In the office. I warned her about all the complaints

"(1) If Rick's around people get ignored

"(2) Rude to customers

"(3) No service

"(4) do not want to cook food or just refuse to cook

"(5) does no stocking or sidework

"[Duffield's signature]"

At hearing, Duffield identified a customer named Ken as the only person whose name she knew who had complained about Complainant.

20) At hearing, before Duffield testified, Complainant acknowledged that Duffield had told her that a customer named Ken had complained that Complainant had not wanted to cook food for him.

21) On June 26, Complainant made the following note in the incident log:

“What a night! promoting food is great – providing there were a cook! Gets real hard when you get 5-10 orders at once; or in a row. Dont have time to take a break.

“Sometimes I feel like people are sent here to order food to see how I react or how I handle it. Its not hard because I’m ‘pregnant’. It would be hard anyway. Maybe Im just not as good as some others. Close: 12:10. [signature]”

Complainant wrote “Its not hard because I’m ‘pregnant’” because Duffield already had suggested that she might want to reduce her hours because of her pregnancy.

22) At some point during her employ by Respondents, Complainant designed a "shift sheet" that bartenders used to record how much money was in the cash register. Duffield showed the shift sheets to Debrah Mitchell, who said they looked good and instructed Duffield to have the employees start using the sheets daily.

23) On or about June 25, 1997, Duffield hired Mary Branum to work as a part-time bartender at Granny’s Grainery, with occasional duties as cook and cocktail waitress. Duffield instructed Branum to close the bar at midnight. Duffield did not train Branum herself, but introduced her to Complainant and stated that Complainant was a good worker who would train her well. Complainant did train Branum and showed her how to perform various job duties.

24) Sometime in late June 1997, Branum overheard Duffield state that she was going to cut Complainant’s hours because she was pregnant and tired, and Duffield did not want her to lift things. Branum “didn’t make anything of” this comment because she thought that if she were pregnant, she would not want to work full-time hours.

Branum believed that Duffield was motivated by concern for Complainant and her unborn child.

25) Branum did not believe that Complainant looked tired. Complainant sometimes lifted heavy items for Branum that Branum could not lift herself.

26) Branum never heard of any customer complaints about Complainant, did not observe Duffield giving Complainant a "hard time," and did not hear Complainant complain about Duffield being hard on her.

27) Cooking food was not Complainant's favorite job duty and she sometimes shut down the grill early.

28) Overall Complainant was an adequate employee.

29) On Sundays, Duffield usually posted the work schedule for the following week. Because of the Independence Day holiday, Duffield may have posted some of the July 1997 schedules early.

30) On Monday, June 30, Complainant and Borgmann went to Granny's Grainery to check Complainant's scheduled shifts for the upcoming weeks and discovered that Complainant's hours had been reduced. Duffield told Complainant that she and Debrah Mitchell had decided that Complainant should work fewer hours because they did not want to be liable for her pregnancy. The next day that Complainant worked, July 2, she wrote in the incident log:

"Rick & I came in on Monday June 30. Asked [Duffield] about loss of hours on schedule. [Duffield] said that her & Debbie didn't want to be liable for my pregnancy."

Complainant worked an eight-hour shift on July 2.

31) Complainant took three scheduled days off over the Independence Day holiday -- July 3, 4, and 5. She then asked for additional time off because her daughter had chicken pox. Complainant was back in town and available to work by July 8, 1997. However, Duffield did not schedule her to work Wednesday through Friday, July 9

through 11. Duffield's failure to have Complainant work her regular schedule on those days constituted a reduction in Complainant's work hours.

32) Duffield reduced Complainant's work hours the work week beginning July 7 primarily because of her pregnancy, although Complainant's reluctance to cook for customers also was a factor. If Complainant had not been pregnant, Duffield would not have reduced her hours.

33) On July 8, Respondents held an employee meeting at Granny's Grainery, which Complainant attended. Complainant asked what she should do if the bar got very busy late on a weekend night and customers placed large food orders, as they had on June 14. Duffield said if that happened again, the bartender could ask the cocktail server to work an hour late if needed.

34) After the employee meeting, Duffield "wrote [Complainant] up" because of customer complaints. That single write-up is the only one Duffield gave Complainant during her employment by Respondents.⁴ At the same time, Duffield told Complainant that she was cutting Complainant's hours not only because of her pregnancy, but also because of customer complaints. Complainant explained that she needed to work more hours so she could prepare financially for the upcoming birth of her child.

35) Duffield noted in her business diary that she had "cut [Complainant's] hours back due to complaints 6 months pregnant. She is having a hard time keeping up. I'm going to go back to basic and re-train hope that works. She did sign writeup report, but said she is pissed."

36) Complainant later made an entry in the incident log in the space for July 8: "Had work meeting today from 12:00 to 1:30. Asked [Duffield] about my hours again. She responded this time -- not only due to my pregnancy but because of customer complaints."

37) At some point between July 8 and July 15, Complainant again spoke to Duffield about the reduction in her hours. By that time, Duffield had told Complainant that she would be scheduled to work only two three-hour shifts during the work week beginning July 14. Duffield told Complainant that she needed to be retrained on cooking and that she had not been properly performing her stocking and cleaning duties.

38) Complainant and Benson-Porter worked at Granny's Grainery the evening of July 12, 1997, with Complainant working the closing shift. That night, Complainant left a note in the bar for Duffield that stated:

“Teresa,
“[Benson-Porter] & I couldn't find any after shift sheets.
“Don't know where???”
“[signature of Complainant]”

Under Complainant's signature, Debrah Mitchell wrote:

“She was the only one working 150 sheets missing. She took them.”
Debrah Mitchell was referring to Complainant when she wrote “She took them.” Duffield placed this note in her business diary and also wrote in the diary that the shift sheets had been present at closing the night of July 12 and were missing when the bar was opened on July 13.

39) On or about July 13, 1997, Duffield wrote a note in her business diary that stated, in pertinent part:

“I wrote [Complainant] up on 7/8 and gave a verbal warning on 6/19 I have logged everything. [Duffield's signature]”

40) On or about July 13, 1997, both Branum and Benson-Porter left messages on Duffield's home answering machine stating that they were quitting their jobs.

41) Complainant was scheduled to work a three-hour evening shift on July 15, 1997. Before driving Complainant to work, Borgmann called Duffield at Granny's

Grainery to complain about Complainant being made to work in the kitchen. He told Duffield that if anything happened to Complainant or her baby, when he got through with Granny's Grainery, Duffield would be working for him. After he spoke to Duffield, Borgmann told Complainant that he thought it might be time for her to quit working for Respondent because of being made to work in the kitchen.

42) Borgmann drove Complainant to work at about 6:00 p.m. that evening. Duffield had told Complainant that they could speak about Complainant's hours before Complainant started her shift. When Complainant arrived, Duffield was busy working as bartender and did not speak to her except to ask if Complainant planned to work that evening.

43) After Complainant arrived at the bar, Duffield called Debrah Mitchell and said that Complainant was at the bar but would not work. Duffield also reported the statements Borgmann had made to her. Debrah Mitchell went to the bar and found Borgmann in the parking lot. She told Borgmann that he was being "86'd" off of the property, meaning that he was not permitted to come into Granny's Grainery or into the tavern's parking lot.

44) Debrah Mitchell then went into the tavern and told Complainant she needed to speak to her in the office. Debrah Mitchell told Complainant her hours were being cut because of customer complaints and her refusal to cook food. Complainant stated that she could not live on the wages she would earn working only six hours per week. Debrah Mitchell responded that pregnant women should not be in the bar business anyway, because of bar fights and cigarette smoke. She also told Complainant that she was going to give Complainant a write-up, which she needed to sign. Complainant refused to sign the document, handed Mitchell her keys to the bar, and quit her job.

45) After Complainant said she could not continue to work such low hours at Granny's Grainery, Debrah Mitchell offered her a job working at Respondents' Apple Tree restaurant in Lebanon.⁵ Debrah Mitchell told Complainant that the Apple Tree job would be better than working in a bar. Complainant did not have a car or other transportation to Lebanon and she did not accept the job.

46) Neither Duffield nor Debrah Mitchell ever told Complainant that her hours had been reduced for only one week.

47) Duffield and Debrah Mitchell decided to reduce Complainant's work hours both because of her pregnancy and because of her reluctance to cook for customers. But for Complainant's pregnancy, however, they would not have cut her hours.

48) Duffield and Debrah Mitchell cut Complainant's hours with the hope and expectation that this action would cause her to quit her job.

49) Complainant knew that Respondents had cut her hours because she was pregnant. She reasonably concluded that Respondents would schedule her to work few hours for the duration of her pregnancy. The reduction in hours and the pregnancy-related comments made by Duffield and Debrah Mitchell combined to make the working environment so intolerable that a reasonable person in Complainant's position would have quit her employment.

50) Several factors contributed to Complainant's decision to quit her job: the reduction in her hours; criticisms she perceived as unjustified; her clashes with Duffield; and her dislike of cooking. However, the reduction in hours was the primary reason Complainant quit her job; she would not have done so had Respondents not cut her hours.

51) Complainant remained physically able to work as a bartender up until her child was born. If Respondents had not reduced Complainant's hours, Complainant would have worked until mid-November 1997, just before her baby was born.

52) At some point after Complainant quit working for Respondents, the single write-up Duffield had given her disappeared from Duffield's office at Granny's Grainery.

53) Complainant looked in the newspaper help-wanted advertisements, but applied for only one job after she quit working for Respondent. She did not get that job and did not return to work until about three months after the birth of her child.

54) No evidence in the record establishes whether any jobs were available in the Albany, Oregon area for which Complainant was qualified.

55) At some point between May and November 1997, Complainant and Borgmann became romantically involved. They married on November 5, 1997. Complainant's baby was born 15 days later.

56) In April 1997, Complainant worked a total of 128.25 hours over 17 days at Granny's Grainery, for an average of 7.54 hours per day worked. In May 1997, Complainant worked a total of 147.50 hours over 21 days, for an average of 7.02 hours per day worked. In June 1997, Complainant worked 152.25 hours over 20 days, for an average of 7.61 hours per day worked. In sum, before Respondents reduced her hours, Complainant worked an average of 19.33 days and 142.67 hours per month, an average of 7.38 hours per day.

57) Respondents paid their employees twice per month. From April 2, 1997 through the pay period ending June 30, 1997 (the period during which Complainant worked a regular schedule), Complainant earned an average of \$405.38 in gross wages every half-month pay period.

58) Branum earned between \$15.00 and \$30.00 a day in tips while she worked for Respondent and the forum infers that Complainant earned about the same amount, averaging \$22.50 a day.⁶ Complainant did not report any of her tip income on her income tax returns.

59) If Respondents had not reduced her hours for the week of July 7, Complainant would have worked three additional days – Wednesday through Friday, July 9 through 11. At 7.38 hours per day, she would have earned \$121.77 those three days, plus \$67.50 in tips.

60) If Complainant had not quit her job on July 15, and Respondents had not reduced her hours, she would have worked an average of 142.67 hours each month from mid-July 1997 through mid-November 1997. Thus, from July 15 through November 15, she would have worked a total of 570.68 hours (142.67 hours/month x 4 months). For that time, Respondents would have paid Complainant \$3138.74.

61) During that same time, Complainant would have worked 77.32 days (19.33 days/month x 4 months). On each of those days, she would have earned an average of \$22.50 in tips. Her lost tips, therefore, equal \$1739.70.

62) Complainant testified that she suffered financial distress after she quit working for Respondents because she had to depend on Borgmann and was embarrassed by her need to rely on someone she did not know well. Given that Complainant had been living with Borgmann for over two months at the time she quit, Borgmann told Duffield that if she made Complainant work in the kitchen, Duffield would be working for *him*, and Complainant married Borgmann about four months after she quit, the forum disbelieves Complainant's testimony that her suffering was heightened because she did not know Borgmann well. The forum does find, however, that Complainant suffered some financial stress during the four months between the time

she quit and the birth of her child and this order includes an award of damages for that mental suffering.

63) Complainant also testified that Respondents' actions made her feel that when you are pregnant, there are things you cannot do, which she never had believed before. Complainant's testimony on this subject was contrived and the forum has given it no weight.

64) Branum was the most credible witness with knowledge of material facts. She testified in a straightforward, matter-of-fact way and gave direct answers to the questions asked. She was confident regarding the events that had taken place but admitted readily that she could not recall the exact dates on which certain events had occurred. Branum did not appear to slant her testimony to favor or harm either Respondents or Complainant and did not appear to harbor animosity toward any person involved in the decision to cut Complainant's hours. The forum has accepted Branum's testimony as fact, including her testimony that Duffield stated that she was cutting Complainant's hours because she was pregnant.

65) Duffield's testimony was credible only in part. Duffield testified defensively throughout the hearing and appeared unwilling to state anything that might reflect poorly on herself. For example, she insisted that she trained all new employees herself and never let Complainant train any of them. That statement conflicts with Branum's credible testimony that Duffield told her that Complainant would train her and that Complainant did, in fact, teach Branum how to perform her job. Duffield also testified that she -- not Complainant -- had invented the daily shift sheets that were missing on July 13, 1997. The forum finds, based on Debrah Mitchell's credible testimony, that Complainant -- not Duffield -- invented those sheets. Duffield's willingness to distort such facts casts significant doubt on the veracity of her testimony.

66) Duffield was anxious to cast Complainant's job performance in the worst possible light, both in her communications with investigator Rogers and at hearing. Duffield testified that one of Complainant's persistent problems was closing before the normal weekday closing time of 1:00 a.m. For example, Duffield stated that one of Complainant's first verbal warnings related to the fact that she had closed the tavern at midnight on Wednesday, April 30. She stated that she discovered that problem in her periodic reviews of the logbook. Indeed, the logbook reflects that Complainant closed the bar between 12:00 midnight and 12:59 a.m. 18 times. But other employees -- including Duffield -- closed between midnight and 12:59 a.m. at least 71 times⁷ during the one-year period covered by the logbook. After the case presenter pointed out the other employee's midnight closings, Duffield changed her mind and decided the regular closing time must have been midnight, and that she had disciplined Complainant for closing *before* that time.⁸ The logbook does indicate that Complainant closed earlier than midnight 10 times, including the evening that she trained with Duffield. But in the period covered by the logbook, other employees -- again, including Duffield -- closed before midnight on 21 evenings. In sum, the record indicates that Complainant closed the bar early about as often as did other employees.

67) Duffield also testified that Complainant was disciplined for closing early even though customers still were in the tavern. As evidence of this alleged misconduct, Duffield pointed to the logbook entry of April 6, when Complainant noted "Very slow closed at 12:00 though had cust's [*sic*] come in at almost 10:45 & then order food." Duffield testified that she interpreted this entry to mean that Complainant had closed the bar even though customers still were there. Similarly, Duffield told Rogers during his investigation that Complainant had stated in the logbook that she "closed even though she had customers." The forum finds that strained interpretation consistent with

Duffield's efforts to justify her actions by portraying Complainant as a very poor worker. That conclusion is corroborated by the fact that two other employees also made logbook entries that could be interpreted to mean they tried to get rid of customers to close the bar early, and there is no evidence in the record that those employees were disciplined in any way.⁹

68) Duffield misinterpreted or mischaracterized other logbook entries in her zeal to discredit Complainant. For example, on Saturday, July 12, 1997, Benson-Porter indicated in the logbook that the person who had closed the bar the previous night (July 11) had failed to perform some stocking duties. Benson-Porter mistakenly wrote that note in the logbook space for July 13, but dated it July 12 and drew arrows pointing to the space for July 12, indicating she had written her note in the wrong spot. Complainant closed the night of July 12, but did not work on July 11. During the Agency investigation, Duffield told Rogers that Benson-Porter's note had referred to Complainant. That is not correct -- someone other than Complainant had worked the closing shift on July 11. Similarly, Duffield pointed to a May 26 logbook entry stating "slow, dead, it sucks, no people" as an example of a problem with Complainant, when it actually was another employee who had written that note.

69) The Agency suggested at hearing that Duffield had manufactured her business diary after Complainant quit in a *post-hoc* attempt to justify the reduction in her hours. The forum disagrees. Duffield made two remarks in that diary that were against Respondents' interests. First, Duffield essentially stated that the reduction in hours was related, at least in part, to Complainant's pregnancy. Second, Duffield stated that she had "logged everything" -- and the log described only one verbal warning and one write-up, not the several verbal warnings and four write-ups about which Duffield testified at hearing. If Duffield had created the diary after Complainant quit, the contents of that

document probably would have more closely matched the testimony Duffield gave at trial. For this reason, the forum concludes that Duffield made the diary entries contemporaneously with the events described and also concludes that Duffield did, in fact, give Complainant one verbal warning and one write-up.

70) Debrah Mitchell's testimony also lacked credibility in part. She, like Duffield, testified that Duffield had given Complainant more than one written warning. The forum has concluded that this is not true. Consequently, the forum has credited Debrah Mitchell's testimony only where it was consistent with other credible evidence.

71) Complainant's testimony was somewhat self-serving. Complainant was extremely reluctant to admit that any aspect of her job performance might have been deficient. She even denied having disliked cooking, when the record as a whole – particularly her logbook entries -- makes it clear that cooking was not a task Complainant enjoyed. Nor was the forum persuaded by Complainant's testimony that she never accepted collect calls from Blevins and that Granny's Grainery was charged for those calls as soon as she answered the phone, even though she did not accept the charges. Most significantly, Complainant denied that Duffield ever had written her up, an event that the forum has concluded did occur. Complainant's denial of this event appears to have been calculated to bolster the argument that the reduction of her hours was based solely on her pregnancy, not on any deficiencies in her work performance. Complainant's willingness to distort facts to further the Agency's case casts doubt on the veracity of her testimony. Moreover, with regard to certain relatively unimportant events, Complainant's memory appears to have faded. For example, Complainant testified that only Duffield interviewed her for the job at Granny's Grainery. The forum has accepted as fact the contrary testimony of Duffield and Debrah Mitchell, who both stated that they both interviewed Complainant. That testimony was corroborated by

Debrah Mitchell's identification of the handwritten notes on Complainant's job application as her own.

72) On the other hand, certain important aspects of Complainant's testimony were corroborated, particularly her testimony that Respondents reduced her hours because of her pregnancy. In addition, Complainant did make one admission against her interest at hearing -- that Duffield had told her that Ken had complained that she would not serve him food. Similarly, Complainant noted in the incident log that Duffield said she was reducing Complainant's hours because of both Complainant's pregnancy and customer complaints. If Complainant had been setting Respondents up for a false discrimination claim, as Respondents suggested at hearing, she would not have noted that customer complaints played any part in Respondents' decision to cut her hours. For these reasons, the forum has accepted the accuracy of the notes Complainant made in the incident log. Overall, the forum found Complainant's testimony more credible than that of Duffield and Debrah Mitchell. Consequently, the forum has relied on Complainant's testimony in deciding the material facts, particularly where that testimony was supported by other credible evidence. In some instances, where Complainant's testimony was not corroborated, did not seem inherently credible, and was self-serving, the forum has not credited it.

73) The testimony of Benson-Porter was credible in large part, although she did appear to resent Duffield for scheduling her to work only one day per week. The forum has credited Benson-Porter's testimony insofar as it was consistent with other credible evidence in the record.

74) The testimony of Borgmann, Complainant's husband, was credible only in part. Borgmann clearly harbored animus against Duffield and, by extension, Respondents. Borgmann offered his negative opinion of Respondents' managerial

employees even when that was not relevant to the question asked. He took every possible opportunity to portray Duffield in a negative light and then stated disingenuously that he had nothing against her. For example, Borgmann testified that Duffield was a terrible manager who gave poor service to customers and did not deal well with her employees. That testimony was partially contradicted by the credible testimony of Branum, who stated that Duffield was not difficult to deal with and was not hard on other employees. Borgmann also testified that after Duffield stated she was reducing Complainant's hours because she was pregnant, she came out from behind the bar, stood between Borgmann and Complainant, and emphatically repeated that announcement. No other witness to the event testified that Duffield acted in this dramatic and presumably memorable manner, and the forum disbelieves Borgmann's description of her behavior. Because of Borgmann's clear bias, the forum has given his testimony little weight when it was not corroborated by other credible evidence. Because it comports with the testimony of Branum, Benson-Porter, and Complainant, however, the forum accepts as fact the kernel of truth in Borgmann's testimony -- that Respondents reduced Complainant's work hours in large part because of her pregnancy.

75) The testimony of Edna Pierce was not credible. She is a current employee of Respondents who worked as a part-time bookkeeper and bartender at Granny's Grainery while Complainant worked there. Pierce's testimony was transparently biased in favor of Respondents. She stated that working Sunday mornings was a problem because the bar was "always" dirty after Complainant closed the previous evening. The written record, however, establishes that Pierce only worked two Sundays during the time period in question, and neither of those followed a Saturday evening on which Complainant had worked. First, Pierce testified that she

was required to make a logbook entry whenever she worked as a bartender and stated that if she forgot, Duffield would tell her to go back and make an entry, which she would. After the Agency pointed out that she had made only two or three entries in the logbook from March 31, 1997, forward, Pierce decided that she must have worked other days, but forgot to make entries. None of the entries Pierce did make was for a Sunday following a Saturday on which Complainant had worked. Moreover, from April 1 through July 15, 1997, Pierce earned an average of only \$46.71 every two weeks, which confirms that she was only sporadically working a few short bookkeeping shifts, rather than any bartending shifts, which lasted far longer. For these reasons, the forum has not credited Pierce's testimony that Complainant was a poor worker, her testimony that customers complained about Complainant, or her testimony that she saw three written reprimands in Complainant's file.

76) The testimony of Patricia Newport Howard was not credible. She testified that she was worked at Granny's Grainery for about four years, until October 1997, and was pregnant while she worked there. Howard specifically stated that she worked at Granny's Grainery during July 1997 while she was pregnant with a child who was born late that month. Duffield testified similarly. Payroll records for Granny's Grainery, however, contain no indication that Howard worked at that tavern at any time from April through July 1997. The forum, therefore, does not believe that Howard spent any significant time working at Granny's Grainery while she was pregnant. The forum's conclusion is bolstered by the fact that, during the Agency investigation, Duffield told Rogers that Complainant was the only pregnant woman who worked at Granny's Grainery while Respondents owned the bar.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondents did business as Granny's Grainery, a tavern located in Albany, Oregon, and had one or more employees within the State of Oregon.

2) Complainant started working for Respondents on or about March 31, 1997. At about that same time, Complainant discovered that she was pregnant and informed Duffield, Respondents' assistant manager, of that fact.

3) Complainant was a satisfactory worker, although she did not enjoy cooking food and sometimes shut off the grill early.

4) Debrah Mitchell, Respondents' manager, believed that the tavern was an inappropriate and unsafe place for a pregnant woman to work and conveyed that belief to Complainant. Duffield expressed disbelief that Complainant could work long hours while she was pregnant and frequently commented that Complainant looked tired.

5) Duffield and Debrah Mitchell reduced Complainant's work hours during two consecutive weeks in July 1997. Their decision to cut Complainant's hours was based both on her pregnancy and on her reluctance to cook for customers. However, but for Complainant's pregnancy, Duffield and Debrah Mitchell would not have reduced her hours.

6) Duffield and Debrah Mitchell wanted Complainant to quit her job at Granny's Grainery and hoped that reducing her hours would lead to that result. Respondents cut Complainant's hours knowing that Complainant was substantially certain to quit her job as a result.

7) The reduction in hours and the comments of Duffield and Debrah Mitchell combined to create a working environment so intolerable that a reasonable person in Complainant's position would have quit her job.

8) Complainant quit working at Granny's Grainery primarily because of the reduction in her job hours. If Respondents had not cut her hours, Complainant would have continued working until mid-November 1997, just before her child was born.

9) At the time she quit her job, Complainant was earning \$5.50 per hour plus tips that averaged \$22.50 per day. If Respondents had not reduced her hours the week of July 7, Complainant would have earned an additional \$121.77 in wages and \$67.50 in tips that week.

10) If Complainant had not quit her job on July 15, and Respondents had not reduced her hours, she would have earned an \$3138.74 in wages and \$1739.70 in tips from July 15 through November 15, 1997.

11) Complainant suffered some financial distress as a result of her constructive discharge but did not point to any specific or lasting adverse consequences from her loss of income. The forum finds that an amount of \$7500.00 will adequately compensate Complainant for the financial stress she suffered.

12) Respondents received timely notice of the Agency's Substantial Evidence Determination in this case and suffered no prejudice if it was addressed to someone other than Respondents themselves (such as their attorney or Debrah Mitchell).

CONCLUSIONS OF LAW

1) For the purposes of ORS 659.030:

"'Employer' means any person who in this state, directly or through an agent, engages or utilizes the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed."

ORS 659.010(6). At all material times, Respondents were "employers."

2) The actions of Debrah Mitchell and Teresa Duffield, Respondents' managerial employees, properly are imputed to Respondents.

3) 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.*

4) ORS 659.095 provides, in pertinent part:

"(1) * * * Within one year following the filing of the complaint [pursuant to ORS 659.040(1) or 659.045(1)], the commissioner may issue, or cause to be issued, an administrative determination. If no administrative determination has been issued at the end of the one-year period, the commissioner has no further authority to continue proceedings to resolve the complaint, except as provided in ORS 659.070 and 659.085. * * *

"(2) As used in this section, 'administrative determination' means a written notice to the respondent and the complainant signed by the commissioner, or the commissioner's designee, which includes, but is not limited to, the following information:

"(a) The name of the complainant;

"(b) The name of the respondent;

"(c) Allegations contained in the complaint;

"(d) Facts found by the commissioner to have a bearing on the allegations contained in the complaint in the course of any investigation, conference or other information gathering function of the Bureau of Labor and Industries as such facts relate to laws within the bureau's jurisdiction; and

"(e) A statement as to whether investigation of the complaint has disclosed any substantial evidence supporting the allegations of the complaint."

The commissioner issued, or caused to be issued, an administrative determination within one year following filing of the complaint and, therefore, retained authority to continue proceedings to resolve the complaint.

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

"(1) 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:

"* * *

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

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 would not have reduced Complainant's work hours had she not been pregnant. Consequently, Respondent's reduction of Complainant's work hours violated ORS 659.030(1)(b).

6) ORS 659.030 also prohibits employers from discharging employees based on their sex:

"(1) 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."

This forum and the Oregon appellate courts previously have ruled that constructive discharge claims are cognizable under this statute. Respondents' actions constituted a constructive discharge of Complainant that violated ORS 659.030(1)(a).

7) 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 Respondent's 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

RESPONDENT'S MOTION TO DISMISS

After the Agency rested its case, Respondents moved to dismiss the Complaint and Specific Charges on the grounds that the Agency had not issued the Substantial Evidence Determination within one year of the date on which the Complaint was filed and also failed to properly serve Respondents with the Substantial Evidence Determination by that date. According to Respondents, even if the Agency timely served their attorney with the Substantial Evidence Determination, that did not constitute timely service on Respondents. The ALJ took the motion under advisement. The forum now denies the motion to dismiss.

ORS 659.095 governs the commissioner's authority to resolve civil rights complaints and provides that the commissioner retains that authority only when he issues a Substantial Evidence Determination within one year after a complaint is filed:

"(1) * * * Within one year following the filing of the complaint, the commissioner may issue, or cause to be issued, an administrative determination. ***If no administrative determination has been issued at the end of the one-year period, the commissioner has no further authority to continue proceedings to resolve the complaint***, except as provided in ORS 659.070 and 659.085. * * *"

"(2) As used in this section, 'administrative determination' means ***a written notice to the respondent and the complainant*** signed by the commissioner, or the commissioner's designee, which includes, but is not limited to, the following information:

"* * * * *

"(e) A statement as to whether investigation of the complaint has disclosed any substantial evidence supporting the allegations of the complaint."

(Emphasis added).

The record establishes that the Agency met these statutory requirements. Complainant filed her complaint on or about October 15, 1997. Investigator Rogers submitted his draft administrative determination, finding substantial evidence of unlawful

employment practices, for review by his supervisor on January 9, 1998. Rogers testified credibly that Notices of Substantial Evidence Determination typically issue about 10 to 14 days after investigators submit the administrative determinations for supervisory review. Consistent with that testimony, Respondents' attorney informed the Agency by letter dated February 5, 1998, that he had received and reviewed "the Notice of Substantial Evidence Determination." That letter, along with Rogers' testimony, establishes that the Substantial Evidence Determination issued within *four months* of the date on which Complainant filed her complaint, well before the statutory deadline.¹⁰ This evidence also proves that Respondents' counsel received the Substantial Evidence Determination nearly eight months before the one-year period would have run.

Respondents insist, nonetheless, that service of the Substantial Evidence Determination on their attorney did not constitute service on Respondents. The forum rejects that argument. ORS 659.096 does not require formal "service" on a respondent. Rather, it states only that an administrative determination is "a written notice to the respondent * * *." The forum finds that, for purposes of ORS 659.095, notice to an employer's attorney constitutes constructive notice to the employer. In his February 1998 letter, counsel for Respondents stated that he represented "Appletree Restaurant dba Granny's Grainery" in regard to the complaint filed by L. Krystle Wheelis, Agency case number ST-EM-SM-971015-4140. That letter establishes that counsel was acting as Respondents' agent with regard to Complainant's complaint when he reviewed the Notice of Substantial Evidence Determination. The Agency proved that Respondents' lawyer had notice of the determination, which satisfies the notice requirements of ORS 659.095.

Moreover, even if the Agency had not met the requirements of ORS 659.095, that would require dismissal only if Respondents proved that they did not receive

sufficient notice to enable them to respond to the allegations in the Substantial Evidence Determination. *Colson v. Bureau of Labor and Industries*, 113 Or App 106, 111, 831 P2d 706 (1992). Even where the Agency sends the Substantial Evidence Determination to the wrong person, entity or address, the Agency's substantial compliance with the statute is adequate unless the respondent suffers actual prejudice. *Id.* Here, Respondents claimed no actual prejudice and could show none, given that their attorney had notice of the claim no later than February 1998, 18 months before the hearing in this matter. Respondents' motion to dismiss is denied.

RESPONDENTS REDUCED COMPLAINANT'S WORK HOURS PRIMARILY BECAUSE OF HER PREGNANCY

The Agency charged Respondents with violating ORS 659.030(1)(b) by reducing Complainant's work hours because she was pregnant. To prove a violation of that statute, the Agency had to establish:

- 1) Respondents were employers subject to ORS 659.010 to 659.110;
- 2) Respondents employed Complainant;
- 3) Complainant was a pregnant woman;
- 4) Respondents took an action that harmed Complainant in compensation or in terms, conditions or privileges of employment;
- 5) Respondents took their action against Complainant because of her pregnancy.

See ORS 659.030(1)(b); *In the Matter of Soapy's, Inc.*, 14 BOLI 86, 95 (1995). In this case, the first, second and third elements are undisputed.

Nor does anyone dispute that Respondents reduced Complainant's work hours. There was, however, some confusion regarding when that happened. The ultimate reduction in Complainant's work hours occurred during the week of July 14, 1997, when Duffield scheduled Complainant to work only two three-hour shifts. Complainant first testified that she learned of the reduction in her hours on June 30, 1997. She later testified that she learned sometime between July 8 and July 13 that she would be

working only two three-hour shifts the week of July 14. Careful examination of the evidence provides an explanation for this apparent inconsistency.

Complainant took Thursday through Saturday, July 3 through 5, as vacation days. She was scheduled to work July 6, but called in to report that she could not work because her daughter was ill. Complainant was back from vacation, done caring for her ill daughter, and available to work on Tuesday, July 8, 1997. Although Monday and Tuesday were Complainant's normal days off, Duffield did not schedule her to work on Wednesday, Thursday, or Friday, July 9 through 11. The forum infers that Duffield had reduced Complainant's hours by not scheduling her to work those days. That inference is consistent with Complainant's testimony that she learned *both* on June 30 and sometime after July 8 that Duffield was going to reduce her hours.¹¹ Although everyone questioning the witnesses appeared to assume that Complainant's hours had been reduced only once, credible evidence in the record establishes that it happened twice.

In sum, the forum finds by a preponderance of the evidence that Duffield reduced Complainant's hours during two weeks -- the week of July 7 *and* the week of July 14. That action harmed Complainant by changing the terms and conditions of her employment. The remaining question is whether Respondents reduced Complainant's hours because of her pregnancy.

Respondents argue that they scheduled Complainant to work only two three-hour shifts the week of July 14, 1997, only because her job performance was poor and she needed retraining. The forum rejects this argument for two reasons. First, it does not explain why Respondents also cut Complainant's hours during the week of July 7, 1997, when no retraining was given.

Second, the forum gives little weight to Respondents' attempts to portray Complainant as a very poor employee. Duffield testified that both customers and other

employees frequently complained about Complainant, that she did not adequately perform her job duties, that she ignored customers in favor of flirting with Borgmann, that she sometimes flatly refused to serve customers, and that she kicked customers out of the bar so she could close early. Duffield also testified that she had given Complainant four written warnings within the space of several weeks when, during 1996 and 1997, she had given written warnings only to a few other employees, and only one of them had received more than one warning. If the forum believed this testimony, it would conclude that Complainant was an exceptionally poor employee and Respondents reduced her hours for reasons other than her pregnancy.

The difficulty for Respondents, however, is that Debrah Mitchell testified that she offered Complainant work as a hostess at Respondents' Apple Tree restaurants. That testimony simply is not consistent with her testimony and Duffield's describing Complainant as having multitudes of job performance problems. If Complainant were such a poor worker, particularly in the area of her interaction with customers and coworkers, Respondents would not have offered to move her into a more high-profile position at their other restaurants. In addition, Branum and Benson-Porter both testified credibly that Complainant did a good job.

The forum concludes that Duffield and Debrah Mitchell wanted Complainant either to quit working altogether or to switch to a job at Apple Tree because they believed she should not be working in a tavern while she was pregnant and were worried that the pregnancy might somehow result in liability for Respondents. Complainant's only actual job performance problem – a reluctance to cook – was not so significant that it alone would have caused Respondents to cut her hours. But for Complainant's pregnancy, Respondents would not have reduced her scheduled working hours. Consequently, the reduction in hours violated ORS 659.030(1)(b).

RESPONDENTS CONSTRUCTIVELY DISCHARGED COMPLAINANT BECAUSE OF HER PREGNANCY

The Agency also alleges that Respondents constructively discharged Complainant. To prove such a charge, the Agency must establish:

- 1) Respondents intentionally created or intentionally maintained discriminatory working condition(s) related to Complainant's protected work status;
- 2) Those working conditions were so intolerable that a reasonable person in Complainant's position would have resigned because of them;
- 3) Respondents desired to cause Complainant to leave employment as a result of those working conditions or knew that Complainant was certain, or substantially certain, to leave employment as a result of those working conditions; and
- 4) Complainant did leave the employment as a result of those working conditions.

In the Matter of James Breslin, 16 BOLI 200, 217 (1997), *aff'd without opinion*, *Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999).

As discussed earlier in this opinion, Respondents intentionally reduced Complainant's hours because of her pregnancy. That fact alone establishes the first element of the constructive discharge claim. The forum also finds that the comments Debrah Mitchell and Duffield made about Complainant's pregnancy contributed to the atmosphere that led to her resignation. Debrah Mitchell told Complainant that Granny's Grainery was a dangerous place for a pregnant woman to work. Duffield repeatedly commented that Complainant looked tired, and suggested that she did not know how Complainant managed to work long hours during her pregnancy. Those comments must be considered part of the "working conditions" in evaluating the wrongful discharge claim even though they might not, standing alone, constitute actionable harassment.

Taking the third element of the claim out of sequence, the question is whether Respondents wanted to cause Complainant to leave employment as a result of those working conditions or knew that Complainant was certain, or substantially certain, to

leave employment as a result of those working conditions. They did. Duffield and Debrah Mitchell thought it was inappropriate and risky for Complainant to work in the bar while she was pregnant and knew that Complainant wanted to work fulltime. They cut her hours and made the pregnancy-related comments described above with the hope and expectation that Complainant would quit her job as a result. They succeeded. These facts establish the third element of the constructive discharge claim.

The Agency also proved the second element of the claim -- that a reasonable person in Complainant's position would have quit her job because of the intolerable working conditions Respondents created. Complainant knew that Respondents had reduced her hours because she was pregnant and it was apparent to her that Respondents no longer wanted her to work at Granny's Grainery. Given those facts, it was reasonable for Complainant to conclude that the reduction in her working hours would last for the duration of her pregnancy. An employee whose hours are severely cut because of her pregnancy, and who knows that her employer wants to get rid of her, is justified in quitting her job before she is subjected to an outright termination.

Finally, the Agency proved that Complainant quit her job because of the working conditions Respondents created. Although Complainant also was upset about being made to work in the kitchen, the forum believed her credible testimony that it was primarily the reduction in work hours that prompted her to quit. Also, as noted above, Complainant reasonably concluded that the reduction in her work hours would not be short-lived, but would continue throughout her pregnancy. The forum finds that, but for the reduction in her hours and the pregnancy-related comments of Duffield and Debrah Mitchell, Complainant would not have quit her job.

DAMAGES

A. Damages for the Unlawful Reduction of Complainant's Hours the Week of July 7, 1997

During the week of July 7, Respondents unlawfully reduced Complainant's work hours by failing to schedule her to work three of her normal shifts. As detailed in Finding of Fact – the Merits 59, *supra*, Complainant is entitled to \$121.77 in lost wages and \$67.50 in lost tips for the days she would have worked if not for the unlawful reduction in her hours, for a total of **\$189.27**.

B. Damages for the Unlawful Constructive Termination Starting July 15, 1997

Complainant quit her job on July 15, 1997, as a result of the intolerable working conditions imposed unlawfully by Respondents. If she had not quit her job, Complainant would have continued working until about November 15, 1997, shortly before the birth of her child. The forum has calculated that Complainant would have \$3138.74 in wages and \$1739.70 in tips during that time, for a total of **\$4878.44**. See Findings of Fact – the Merits 60 and 61, *supra*.

C. Mental Suffering

The Agency asks this forum to award \$20,000.00 damages for mental suffering. In determining mental damage awards, 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 Tyree Oil, Inc.*, 17 BOLI 26, 44 (1998), *appeal pending*. In considering the amount of damages that would appropriately compensate Complainant for the mental suffering she experienced, the forum has reviewed the mental suffering damages it has awarded in civil rights cases over the past few years.

Complainant testified credibly that she suffered some financial strain as a result of the reduction in her hours and constructive discharge. She did not, however, point to

any specific or lasting adverse effects of this financial strain. This forum recently decided another pregnancy discrimination case, *In the Matter of Mark and Linda McClaskey*, 17 BOLI 254 (1998). In that case, the respondents terminated the complainant, a waitress at their restaurant, because of her pregnancy. The complainant was very upset and hurt by the respondents' treatment of her, cried constantly, and suffered significant financial distress. As a result of losing her income, the complainant suffered humiliation from having to rely on charity for the first time in her life. This forum awarded the complainant \$17,500.00 in mental suffering.

Complainant's financial strain did not cause her to suffer nearly to the degree the complainant suffered in *McClaskey's*. The forum finds the extent of mental distress in this case to be more similar to the distress experienced by the complainants in *In the Matter of Dennis Murphy Family Trust* (Case No. 23-99, Nov. 16, 1999) and *In the Matter of LTM, Incorporated*, 17 BOLI 226 (1998). In *Dennis Murphy*, the respondent discriminated against the complainant in housing on the basis of his mental disability. The complainant felt threatened by the respondents' discrimination (an illegal eviction threat) and modified his behavior in response to it by taking medications he did not want to take. There was no persuasive evidence of other forms of mental suffering. The forum awarded \$10,000.00 damages for the complainant's emotional distress. In *LTM*, the respondent illegally harassed the complainant for filing a worker's compensation claim. The harassment was short-lived and did not cause any severe depression or other mental suffering, but only resulted in the complainant "vegetating" around his home, something he did not normally do. The forum awarded \$5000.00 in damages for emotional distress. *Id.* at 240.

The forum finds that Complainant suffered mental distress in type and magnitude roughly similar to that experienced by these two complainants. The forum concludes that \$7500.00 will appropriately compensate Complainant for that mental suffering.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010 and ORS 659.060(3), to eliminate the effect of Respondents' unlawful employment practices, and as payment of the damages assessed for their violations of ORS 659.030(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Bob G. Mitchell and Sharon F. Mitchell, dba Granny's Grainery** 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 L. Krystle Borgmann** in the amount of:

a) FIVE THOUSAND SIXTY-SEVEN DOLLARS AND SEVENTY-ONE CENTS (\$5067.71), less appropriate lawful deductions, representing wages and tips Complainant lost from July 7, 1997, through November 15, 1997 as a result of Respondents' unlawful employment practices; plus

b) Interest at the legal rate on the sum of \$5067.71 from November 16, 1997, until paid; plus

c) SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7500.00), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondents' unlawful employment practices; plus

d) Interest at the legal rate on the sum of \$7500.00 from the date of the final order until paid.

2) Cease and desist from discriminating against any employee on the basis of pregnancy.

¹ When she was employed by Respondent, Complainant's last name was Wheelis. Between then and the date of hearing, Complainant married and changed her last name to Borgmann. For the sake of consistency, all portions of this Order refer to Complainant using the last name of Borgmann.

² Respondents' employees ejected these customers.

³ The forum finds Complainant's testimony that she was interviewed only by Duffield to be unreliable. See Finding of Fact -- the Merits 71, *infra*.

⁴ Complainant testified that Duffield never had written her up. The forum rejects that testimony for the reasons set forth in Finding of Fact -- the Merits 69, *infra*. The forum also rejects Duffield's testimony that she gave Complainant four write-ups, not one, for the reasons set forth in Proposed Finding of Fact -- the Merits 69 and the Proposed Opinion, *infra*.

⁵ Debrah Mitchell testified that she also offered Complainant a job at the Apple Tree restaurant in Albany, located only one-half mile from Granny's Grainery. The forum has found Debrah Mitchell's testimony to lack credibility in certain material areas, and does not find her uncorroborated testimony on this point to be persuasive.

⁶ Complainant testified that she made between \$30.00 and \$50.00 a night in tips. The forum finds that estimate to be exaggerated.

⁷ Not every bartender recorded the time at which he or she closed the tavern, notwithstanding Duffield's testimony that the bartenders were required to note the closing time each night.

⁸ In their response to investigator Rogers, Duffield and/or Debrah Mitchell stated repeatedly that closing time was 1:00 a.m. (Exhibit A-10)

⁹ Complainant made somewhat similar entries on May 21 and June 17, 1997 (when she stayed open until 1:00 a.m.). On December 18, 1996, a different employee wrote: "Closed at 12:15 Night was okay I had a hard time with some Mexicans to get them to go but no problem." On June 24, 1997, another employee wrote: "Stayed open til 1 am. There were still 10 customers. Stressful night."

¹⁰ All participants agreed that the Notice of Substantial Evidence Determination is the "administrative determination" that must be issued within one year of the date on which the complaint is filed, and that is apparent when the contents of the Notice of Substantial Evidence Determination in the record (Exhibit A-2) are compared with the statutory requirements set forth in ORS 659.095(2).

¹¹ Although Duffield normally posted the work schedule only one week at a time, Debrah Mitchell testified that Duffield might have posted the schedule for the week of July 7th a week early because of the July 4th holiday.