In the Matter of

MOYER THEATRES, INC.

Case Number 36-97
Final Order of the Commissioner
Jack Roberts
Issued March 11, 1999.

SYNOPSIS

Where the Agency failed to establish by a preponderance of credible evidence that Complainant, a female, had been sexually harassed by a male co-worker or a male supervisor as alleged, or that Complainant quit as a result of discriminatory working conditions related to Complainant's protected class status, the commissioner dismissed the complaint and specific charges. ORS 659.030(1)(a)(b); OAR 839-005-0012; OAR 839-007-0550.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, 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 June 23, 24, and 25, 1997, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Sarah A. Vaughan (Complainant) was present throughout the hearing and was represented by Janice E. Jackson, Attorney at Law. Respondent Moyer Theaters, Inc. was represented by Terry W. Baker, Attorney at Law. Christine Moyer, Respondent's corporate president, and Larry Moyer, Respondent's chairman of the board emeritus[1], were present throughout the

hearing.

The Agency called as witnesses, in addition to Complainant, Respondent's former employees Nicholas Bridges (by telephone), Leah Arstill (by telephone), Jennifer Joslin, and Cathy Burkhartzmeir; Civil Rights Division ("CRD") Senior Investigator Donna Renton; Complainant's attorney Janice Jackson; Complainant's boyfriend Garon Primmer; and Complainant's mother, Janette Vaughan.

Respondent called as witnesses former employees Robert Kysor, Scot Hicks, Tylan ("Ty") Hamilton, Darlene Rivera[2], and Ron Dentler; Robert Kysor's wife Brenda Kysor; and Respondent's corporate president Christine Moyer.

Administrative exhibits X-1 to X-26 and Agency exhibits A-1 through A-4, and A-7 were offered and received into evidence. Respondent exhibits R-3 through R-8 were offered and received into evidence. The record closed on June 25, 1997.

Having fully considered the entire record in this matter, the Administrative Law Judge hereby makes the following Proposed Findings of Fact (Procedural and on the Merits), Proposed Ultimate Findings of Fact, Proposed Conclusions of Law, Proposed Opinion, and Proposed Order.

FINDINGS OF FACT -- PROCEDURAL

1) On October 10, 1995, Complainant, a female, filed a verified complaint with CRD alleging that she was the victim of the unlawful employment practices of Respondent in terms and conditions and discharge from employment. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations regarding terms and conditions of employment.

2) On January 9, 1997, the Agency prepared for service on Respondent Specific Charges alleging that Respondent discriminated against Complainant in her employment based on her sex in terms and conditions and discharge from employment in violation of ORS 659.030(1)(a) and (b).

3) With the Specific Charges, the forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On January 13, 1997 the Agency moved to amend the Specific Charges to change the amount of back pay sought from $46,400 to $25,000, based on a February 25, 1995 discharge.

5) On January 13, 1997 Douglas McKean, the ALJ assigned to the case, granted the Agency's motion to amend.

6) On January 16, 1997 Terry W. Baker, Attorney at Law, filed a notice of appearance on behalf of Respondent and moved for a postponement on the basis of previously scheduled commitments to attend several out of state Board of Directors meetings, noting in his motion that the Agency had no objection.

7) On January 17, 1997 the ALJ granted Respondent's motion to postpone and tentatively rescheduled the hearing from February 25, 1997 to April 1, 1997. On January 21, 1997, based on agreement of the participants, the ALJ rescheduled the hearing for April 17, 1997.

8) On January 27, 1997 counsel for Respondent filed an answer in which it denied the allegations mentioned above in the Specific Charges and stated several affirmative defenses.

9) On January 31, 1997 the ALJ issued a Discovery Order requiring Respondent and the Agency to submit a case summary pursuant to OAR 839-050-0200 and 839-050-0210 by April 4, 1997.

10) On February 13, 1997 Respondent moved for a Discovery Order allowing Respondent to take the deposition of the Complainant, Sarah Vaughan, and her

mother, Janette Vaughan, based on the materiality of their testimony and Respondent's inability to interview either witness.

11) On February 18, 1997 the ALJ issued a Discovery Order allowing Respondent to take the deposition of Sarah and Janette Vaughan, noting that Respondent had made a showing of materiality and the Agency had agreed to make both individuals available for deposition.

12) On March 6, 1997 the ALJ was informed that the Agency had reassigned the case from Linda Lohr, case presenter, to Judith Bracanovich, another case presenter pursuant to a redistribution of cases. The Agency requested that the hearing be postponed until April 21 in order to give the participants additional time to prepare for the hearing after depositions, noting that counsel for Respondent had no objection.

13) On March 6, 1997 the ALJ granted the Agency's motion for postponement and an Amended Notice of Hearing was issued resetting the hearing to April 21, 1997, and making case summaries due on April 11, 1997. Due to a docket conflict, the ALJ was changed from Douglas McKean to Warner W. Gregg.

14) On March 17, 1997, the Agency moved to postpone the hearing until June 10, 1997 based on Ms. Bracanovich's serious medical condition requiring surgery, with a projected 6-8 week recovery time. The Agency's motion noted that Respondent did not object.

15) On March 17, 1997 the ALJ granted the Agency's motion for postponement for the reasons given in the request and issued an amended Notice of Hearing resetting the hearing for June 10, 1997 and making case summaries due on May 29, 1997.

16) On March 20, 1997, the Agency moved to reschedule the hearing for June 23, 1997, based on the mutual agreement of the participants. On March 21, 1997 the ALJ granted the Agency's motion and issued an amended Notice of Hearing

resetting the hearing for June 23, 1997 and making case summaries due on June 13, 1997.

17) On June 2, 1997, the Agency notified the forum that the case was being reassigned to case presenter Linda Lohr. On June 12 and 13, 1997, the participants timely filed their respective case summaries.

18) On June 16, 1997, Respondent filed a request to cross examine the "affiant, certificate preparer or other document preparer or custodian of Exhibits A-1 through A-5" enclosed with the Agency's case summary and on June 17, Respondent sent a letter to the forum designating Scott Hicks as a telephone witness.

19) At the start of the hearing, Respondent's counsel stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

20) At the commencement of the hearing, 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.

21) The Proposed Order, which included an Exceptions Notice, was issued on January 20, 1999. The Hearings Unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) Complainant is female.

2) At all times material herein, Respondent Moyer Theatres, Inc., was an Oregon corporation engaged in the operation and management of motion picture theaters within the State of Oregon and was an employer in this state that engaged or utilized the personal services of one or more persons.

3) Complainant was initially employed by Respondent on August 3, 1994, at Respondent's Rose Moyer theater. Complainant was hired by Robert Kysor, Complainant's neighbor and manager of the theater. At the time Complainant was hired, Kysor gave Complainant a copy of Respondent's Personnel Policy Manual

and Complainant signed and dated a statement acknowledging that she read and understood the policies in the manual.

4) Page 7 of Respondent's personnel policy manual that Complainant received contained Respondent's policy on sexual harassment. It read as follows:

> "Moyer Theatres, Inc. will not allow any form of sexual harassment or any such conduct that has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.
>
> "Such conduct, when experienced or observed, should be reported to the supervisor/manager or personnel department. The personnel department will conduct an investigation and will be required to report the findings to the president's office or his or her appointed representative.
>
> "Any intentional sexual harassment is considered to be a major violation of company policy and will be dealt with as determined at the sole discretion of management.
>
> "It is the intent of Moyer Theatres, Inc. to provide a work environment free from verbal, physical and visual (signs, posters, or documents) forms of sexual harassment. All employees are asked to be sensitive to the individual rights of their co-workers."

5) Complainant was a senior in high school when she went to work for Respondent and lived at home with her mother, Janette Vaughan. Like the majority of other new hires, Complainant began work in the concessions stand. Complainant worked different shifts until school started. When school started, Complainant was scheduled to work from 6 p.m. until about 10 p.m. on school days, and from noon until closing on Saturdays and Sundays.

6) During Complainant's employment with Respondent, Respondent employed several different assistant managers who were Complainant's immediate supervisors. They included Greg Shafer (sp), Ron Dentler, Darlene Navalta, and Mary Jacobs.

7) During Complainant's employment with Respondent, Dentler was day assistant manager and worked from noon until 6 or 7 p.m. on weekdays and sometimes on weekends.

8) During Complainant's employment with Respondent, Kysor worked from 6 p.m. until closing (midnight-1 a.m.) on weekdays and from noon until 7 p.m. on Sundays.

9) One of Complainant's co-workers was Ty Hamilton, male, another high school student.

10) The Specific Charges alleged that Hamilton daily grabbed Complainant's breasts and crotch and did the same with other female co-workers, that she complained repeatedly to her supervisors about Hamilton, and was told it was a "guy thing" and was accused of lying about sexual harassment.

11) During her employment with Respondent, Complainant did not complain to Darlene Navalta or any other manager employed by Respondent that Hamilton had grabbed her breasts and crotch.

12) Jennifer Joslin, Complainant's cousin who was employed by Respondent during the same time period as Complainant, did not complain to any manager employed by Respondent that Hamilton had grabbed her breasts and crotch.

13) Hamilton did not grab Complainant's breasts or crotch during Complainant's employment with Respondent.

14) The Specific Charges further alleged that Ron Dentler repeatedly commented on Complainant's apparel in a sexually suggestive manner and lifted her skirt to reveal her underwear, that Dentler "constantly" lifted the skirts of Cathy Burkhartzmeir and Leah Arstill, that Dentler repeatedly referred to her as a "slut," in front of co-workers and repeatedly stated that she was sleeping with a male co-worker at Dentler's home, that Dentler frequently commented in front of her co-workers that she had a "nice butt."

15) At some time prior to Complainant's termination, Complainant told her mother that Dentler had lifted her skirt. Her mother told this to Brenda Kysor, her neighbor and Robert Kysor's wife. Brenda Kysor then told this to Robert Kysor, who

in turn asked Dentler if he had done this. Dentler told him he had tugged on Complainant's skirt, and that it was a nice skirt. Kysor instructed Dentler not to do it again. Dentler did not touch Complainant's skirt again.

16) Around the end of January 1995, Complainant erroneously perceived that Dentler was telling co-workers that she was a slut and was sleeping with co-workers at Dentler's house. Complainant told her mother about this. Her mother instructed her to quit Respondent's employ, then called Robert Kysor and complained to him that Dentler had lifted Complainant's skirt and was telling co-workers that Complainant was a slut and was sleeping with co-workers at Dentler's house.

17) In response, Robert Kysor immediately contacted Dentler, who was at home, and had him come back to work, where Kysor described the allegations made by Complainant's mother. Dentler again admitted "tugging" Complainant's skirt, but denied the other allegations. Kysor instructed Dentler to call Complainant and at least apologize for tugging on her skirt. Dentler then called Complainant's home. Complainant answered, and Dentler asked to speak with Complainant's mother. Dentler talked with Complainant's mother, but did not apologize to Complainant for 'tugging" at her skirt.

18) Dentler had grasped Complainant's skirt, but did not lift Complainant's skirt so he could see her underwear during Complainant's employment with Respondent.

19) Dentler did not repeatedly refer to Complainant as a "slut" in front of Complainant's co-workers or repeatedly state to Complainant's co-workers that Complainant was sleeping with someone from the workplace at Dentler's home.

20) Dentler told Complainant she had a "nice dress" and made a comment to Complainant along the lines of "looking mighty fine today, are you," but did not repeatedly comment on Complainant's apparel in a sexually suggestive manner or frequently comment to Complainant in front of her co-workers that she had a "nice butt."

21) Dentler did not, with Complainant's knowledge, repeatedly lift the skirt of Complainant's female co-workers, tell them they had a "nice butt," or comment on their apparel in a sexually suggestive manner. Dentler did make "dirty jokes" on occasion in the workplace, but not when Complainant could hear.

22) Complainant quit Respondent's employ shortly thereafter based on her mother's instructions and her belief that Dentler was spreading defamatory rumors about her sexual activities and Respondent was not taking any action to stop it.

23) After Complainant quit, Kysor also called Scott Hicks, his supervisor and Respondent's operations manager, and told him that an employee had made allegations of sexual harassment at Rose Moyer theater and the employee would be calling him soon.

24) Complainant called Hicks and repeated her allegations against Dentler. Within 24 hours, Hicks visited the Rose Moyer theater and confronted him with Complainant's allegations. Dentler denied lifting Complainant's skirt or spreading any rumors about Complainant, but did admit he had touched Complainant's skirt and told her she had a "nice dress." Hicks spoke with Jacobs, Navalta, and a female snack bar employee, and they all indicated they had not been sexually harassed and were not aware of Dentler sexually harassing Complainant. Hicks called Complainant back and spoke with her mother, telling her what he had found and asking her to have Complainant provide him with more supportive evidence. Hicks also offered Complainant a job at one of Respondent's other theaters or video stores. Hicks then told Dentler that there was a very serious sexual harassment claim against him, currently unsubstantiated, but if anyone else came through with any evidence that Dentler had engaged in this type of behavior, Dentler would be terminated.

25) After she quit Respondent's employ, Complainant would not have accepted any job offer from Respondent to work at any of Respondent's facilities.

26) After Complainant quit Respondent's employ, she was hired as a temporary employee to work two days at a warehouse. Complainant quit after one day because she felt uncomfortable working around her male co-workers. Complainant did not apply for any other jobs after that. Complainant gave birth to a daughter on January 17, 1996. Complainant went to work again in September 1996 as a certified nursing assistant.

27) At some point between 1989 and the date of the hearing, allegations of sexual harassment at Respondent's Grandview theater were brought to Respondent's attention. After an investigation, the alleged harasser was discharged.

28) Complainant's testimony was not credible on a number of material issues because of internal inconsistencies; inconsistencies with her prior statements, statements by other credible witnesses, and facts capable of objective determination; and assertions that were not supported by the testimony of other Agency witnesses who were in a position to support those assertions. An exhaustive list of examples is unnecessary, but the following are illustrative of the evidence that led the forum to its conclusion about Complainant's lack of credibility. She testified that she was "absolutely certain" that Ron Dentler lifted her skirt in the box office in October 1994, whereas unrebutted personnel records showed that Complainant did not even work in the box office until December 5, 1994. She testified that she quit on February 25, 1995, whereas the same personnel records show her last day of work was January 29, 1995, and the Agency provided no credible evidence to rebut these records. She told Don Alcoke, the first CRD investigator assigned to the case, that "all the women" working at Rose Moyer had gone to Robert Kysor to complain about Ron Dentler's behavior, but no evidence was produced at the hearing to support this assertion. She told Alcoke that Hamilton's sexual harassment of her went on for "about a week", but testified at the hearing that it went on for three weeks. She told Alcoke that Dentler "constantly"

lifted the skirts of Cathy Burkhartzmeir and Leah Arstill, but Burkhartzmeir testified that it only occurred once and Arstill, who was fired by Respondent, testified that it never happened to her at all. She testified that Nicholas Bridges told her he was disgusted with Dentler's comments about her, but Bridges, who no longer works for Respondent, denied that he ever talked to Complainant about the way Dentler talked about her. As a result, the forum has credited only those portions of her testimony which were corroborated by other credible evidence.

29) The testimony of Janette Vaughan was not entirely credible because of internal inconsistencies, inconsistencies with statements by other credible witnesses, inconsistencies with Complainant's testimony, and inconsistencies with undisputed facts. She recalled with certainty that she had talked with an individual at Respondent's corporate headquarters who had identified himself as "Scott Moyer" and had, among other things, offered Complainant a job at one of Respondent's more geographically distant facilities in Tigard or Tualatin. It was clear from the evidence presented at the hearing that she had actually talked with Scott Hicks, Respondent's operations manager, and undisputed that Respondent did not have any facilities in Tigard or Tualatin. She testified that it was the beginning of 1995 when Complainant told her that Dentler had lifted her skirt a day or two earlier, whereas Complainant testified she was "absolutely certain" this event happened in October 1994. She testified that Complainant quit in late February 1995, whereas documentary evidence established Complainant's last day of work was January 29, 1995. Finally, she testified to three different versions of the same event regarding Complainant's complaints to her about Ty Hamilton. Those versions were: (1) In October 1994, Complainant told her that Ty was grabbing her breasts and crotch, but she doesn't think she went to Brenda Kysor because Complainant said she could handle it; (2) She thinks she did talk to Brenda and Bob Kysor about Ty's behavior and; (3) She did tell Brenda Kysor about Ty's behavior in October 1994. Finally, the

forum notes that Vaughan, as Complainant's mother, has an obvious bias. As a result, the forum has credited only those portions of her testimony which were corroborated by other credible evidence.

30) Cathy Burkhartzmeir was extremely nervous and vague about dates in her testimony, demonstrating a poor recollection in general. However, she was no longer employed by Respondent at the time of the hearing and had no apparent motive to lie. Consequently, the forum has credited her testimony where it was corroborated by other credible evidence.

31) Leah Arstill's testimony was not credible. She seemed to have trouble hearing and understanding the questions posed to her. Her recollection was extremely poor. For example, although she was only 20 years old at the time of the hearing, she couldn't recall the year she dropped out of high school or the year she worked for Respondent. She gave general answers because of her apparent inability to recall specifics. Her testimony was inconsistent on material issues with Complainant's testimony, her prior statements, and other undisputed facts. For example, Complainant testified that Ron Dentler lifted her skirt inside the box office before Halloween 1994, and Arstill testified she saw Dentler lift Complainant's skirt outside the box office. Exhibit R7 shows that Arstill was not even employed before Halloween 1994. She testified at the hearing that she didn't hear Dentler make any sexual remarks to Complainant, but had earlier told Donna Renton, the CRD investigator, that she did hear Dentler make sexual remarks to Complainant. She recalled that Ty Hamilton was a new employee at the time she was discharged by Respondent, when everyone else was in agreement that Hamilton was already an employee at the time Arstill was hired. Because of these disparities, the forum has discredited Arstill's testimony in its entirety except where corroborated by other credible evidence.

32) The testimony of Jennifer Joslin was not entirely credible. It was

inconsistent with Complainant's testimony on a material issue in that she testified that she heard Complainant tell Dentler to "knock it off" after Dentler lifted Complainant's skirt, whereas Complainant testified that she didn't say anything to Dentler when this incident occurred. She also testified she complained to Navalta about Hamilton's harassment, which contradicts Navalta's credible testimony to the contrary. She was extremely nervous and had difficulty speaking clearly and audibly at times and was vague and confused on dates and the chronology of specific occurrences. Finally, as Complainant's cousin, she had reason to be biased. As a result, the Forum has credited only those portions of her testimony which were corroborated by other credible evidence.

33) The testimony of Nicholas Bridges was not credible. On several material issues, it was at odds with a verifiable fact or the testimony of Complainant. He testified that he worked fall 1994 and winter 1995, whereas his personnel records show he worked only from December 4, 1994, through January 26, 1995. He testified he saw Ty Hamilton grab Complainant, but he was not even employed by Respondent in October 1994, the time period in which Complainant alleges Hamilton's behavior occurred. Finally, he testified that he heard Dentler call Complainant a "slut" to her face on three occasions, a fact not even alleged by Complainant.

34) The testimony of Chialeah Byrd, Darlene Rivera, Scott Hicks, and Christine Moyer was credible.

35) Although he became nervous during cross examination and appeared confused at times regarding the chronology of material events, the testimony of Robert Kysor was generally credible.

36) Brenda Kysor was defensive concerning the allegations made against Robert Kysor, her husband. Although her testimony that Janette Vaughan told her three different versions of the skirt lifting incident were less than credible, she did

admit she had passed on two complaints of sexual harassment to her husband from Janette Vaughan and the Forum has found her testimony to be generally credible.

37) The testimony of Garon Primmer was not entirely credible. At the time of the hearing, he had been Complainant's boyfriend since early 1994 and was biased as a result. The Forum has credited only those portions of his testimony which were corroborated by other credible evidence.

38) The testimony of Ron Dentler was in some respects unreliable. His explanation that he "tugged" on Complainant's skirt in the context of commenting about Respondent's dress code, is simply unbelievable. Likewise, his explanation that he did not apologize to Complainant when he called Complainant's home because Janette Vaughan hung up on him is incredible, given the undisputed fact that Complainant answered the phone, giving Dentler a perfect opportunity to apologize to her. He testified Robert Kysor didn't tell him to apologize the Complainant, but Kysor testified credibly to the contrary. Finally, because he was the manager accused of sexually harassing Complainant, he had a substantial motive to lie, even though he was no longer employed by Respondent at the time of the hearing. As a result, the Forum has credited only those portions of his testimony which were corroborated by other credible evidence.

39) The testimony of Ty Hamilton was suspect. Although his testimony was brief, his testimony that he had never been to Ron Dentler's house was at odds with Dentler's credible testimony that Hamilton had been to his house to watch a basketball game. Like Dentler, he was accused of sexually harassing Complainant and had a motive to lie about the harassment, even though he was no longer employed by Respondent at the time of the hearing. Although he testified that he had used the name Tylan "Nilson" in his application with Respondent and his personnel file showed he in fact used the name "Hamilton", the Forum does not attach significance to this disparity because there was no apparent effort to disguise

his identity.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Moyer Theatres, Inc., was a corporation operating theaters in the state of Oregon that utilized the personal services of one or more employees, reserving the right to control the means by which such service was performed.

2) Complainant is a female who was employed by Respondent from August 3, 1994 until January 29, 1995 at its Rose Moyer theater facility.

3) Ty Hamilton, a male co-worker, did not grab Complainant's breasts or crotch.

4) Ron Dentler, a male assistant manager, grasped Complainant's skirt and commented on her dress and appearance once. He did not refer to Complainant as a "slut" or spread rumors that she was sleeping with male co-workers at Dentler's house.

5) Complainant voluntarily quit Respondent's employment.

6) Respondent had a published sexual harassment policy in effect at all times material that was provided to all new employees, including Complainant, at their time of hire. The policy stated that any sexual harassment should be reported to the supervisor/manager or personnel department.

7) When Respondent manager Kysor learned of Complainant's allegations of sexual harassment against Dentler, and Dentler admitted touching Complainant's skirt, Kysor told Dentler he should not do this again. Dentler did not do it again.

8) When Scott Hicks, Respondent's operations manager, learned of Complainant's allegations of sexual harassment against Dentler,
he immediately investigated. Although the allegations were not substantiated, he told Dentler he would be fired if there were any further allegations of a similar nature.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in part:

"As used in ORS 659.010 to 659.110 * * * unless the context requires otherwise:

" * * * * *

"(6) 'Employer' means any person * * * who in this state * * * 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.

" * * * * *

"(12) 'Person' includes one or more * * * corporations * * *."

At all times material herein, Respondent Moyer Theatres, Inc. was an employer subject to ORS 659.010 to 659.110.

2) ORS 659.040 (1) provides:

"Any person claiming to be aggrieved by an alleged unlawful employment practice, may * * * make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the * * * employer * * * alleged to have committed the unlawful employment practice complained of * * * no later than one year after the alleged unlawful employment practice."

Under ORS 659.010 to 659.110, the Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein.

3) The actions, inactions, statements and motivations of Darlene Navalta, Ronald Dentler, Robert Kysor, and Scott Hicks are properly imputed to Respondent herein.

4) ORS 659.030 provides, in part:

"(1) For the purposes of ORS 659.010 to 659.110 * * * , it is an unlawful employment practice:

" * * *

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

" * * * * *"

Former OAR 839-07-550 provided, in part:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

" * * * * *

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Former OAR 839-07-555 provided, in part:

"(1) An employer * * * is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether:

"(a) The specific acts complained of were authorized by the employer;

"(b) The specific acts complained of were forbidden by the employer; or

"(c) The employer knew or should have known of the occurrence of the specific acts complained of.

"(2) An employer is responsible for acts of sexual harassment by an employee against a co-worker where the employer, its agents, or supervisory employees knew or should have known of the conduct, unless it can be shown that the employer took immediate and appropriate corrective action."

Former OAR 839-07-565 provided:

"Generally an employee subjected to sexual harassment should report the offense to the employer. Failure to do so, however, will not absolve the employer if the employer otherwise knew or should have known of the offensive conduct."

Current OAR 839-007-0550[3] provides, in part:

"(1) Sexual harassment is unlawful discrimination on the basis of gender. Sexual harassment includes the following types of conduct:

"(a) Unwelcome sexual advances, requests for sexual favors or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's gender; and

"(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment;

" * * *.

"(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive working environment .

"(2) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complainant would so perceive it.

" * * *.

"(4) Harassment by Supervisor, No Tangible Employment Action: Where sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred but no tangible employment action was taken:

"(a) The employer is liable if the employer knew of the harassment unless the employer took immediate and appropriate corrective action.

"(b) The employer is liable if the employer should have known of the harassment. The Civil Rights Division will find that the employer should have known of the harassment unless the employer can demonstrate:

"(A) That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and

"(B) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

"(5) Harassment by Co-Workers or Agents: An employer is liable for sexual harassment by any of the employer's employees or agents who do not have immediate or successively higher authority over an offended individual where the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action."

Complainant's co-worker Ty Hamilton did not direct unwelcome sexual advances or requests for sexual favors or any conduct that would create an intimidating, hostile or offensive working environment towards Complainant. Respondent's assistant manager Ron Dentler did not direct unwelcome sexual advances or requests for sexual favors or any conduct towards Complainant that was sufficiently severe or pervasive to create a

hostile, intimidating, or offensive work environment for Complainant. Respondent did not violate ORS 659.030(1)(b).

5) ORS 659.030 provides, in part:

> "(1) For the purposes of ORS 659.010 to 659.110 * * * , it is an unlawful employment practice:
>
> "(a) For an employer, because of an individual's * * * sex * * * to bar or discharge from employment such individual. * * *"

OAR 839-005-0012[4] provides:

> "Constructive Discharge.
>
> "Constructive discharge occurs when an employee leaves employment because of unlawful discrimination. The elements of a constructive discharge are:
>
> "(1) The Respondent intentionally created or intentionally maintained discriminatory working conditions related to the Complainant's protected class status;
>
> "(2) Those working conditions were so intolerable that a reasonable person in the Complainant's position would have resigned because of them;
>
> "(3) The Respondent desired to cause the Complainant to leave employment as a result of those working conditions or knew or should have known that Complainant was certain, or substantially certain, to leave employment as a result of those working conditions; and
>
> "(4) The Complainant did leave employment as a result of those working conditions."

Complainant did not quit because of discriminatory working conditions that actually existed and was not constructively discharged in violation of ORS 659.030(1)(a).

6) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and the complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

Introduction

The Agency alleged Complainant was subjected to a hostile, offensive, and intimidating work environment through physical sexual harassment by Ty Hamilton,

a co-worker, and verbal and physical sexual harassment by Ron Dentler, a supervisor, and that Complainant was constructively discharged as a result.

Hostile Environment

The Specific Charges state a prima facie case of "hostile environment" sexual harassment which, if proven, would give rise to damages. To prevail, the Agency must prove its allegations by a preponderance of the evidence. *In the Matter of Sunnyside Inn*, 11 BOLI 151, 165 (1993). The Agency specifically alleges that the hostile environment arose through verbal and physical acts of a sexual nature by Hamilton and Dentler that were directed at Complainant based on her sex. During the course of the hearing, the Agency presented testimony supporting all of Complainant's specific allegations of harassment. In defense, Respondent presented testimony rebutting the same allegations. There were no undisputed material facts, although evidence did establish that Dentler had "tugged" on Complainant's skirt, told her she had a "nice dress," and made a comment to her along the lines of "looking mighty fine today, are you." However, these incidents, standing alone, were not severe or pervasive enough to create a hostile, intimidating, or offensive work environment as a matter of law. Consequently, the outcome of the case hinges on an assessment of the credibility of the witnesses testifying as to the allegations.

First, the allegations against Hamilton. There were no credible witnesses who observed Ty Hamilton's alleged grabbing of Complainant's breasts and crotch. Although Jennifer Joslin testified that Ty Hamilton also grabbed her breasts and crotch, and that she and Complainant complained to Darlene Navalta about it, both she and Complainant were found to be less credible witnesses than Navalta, who denied that the complaints were made. As a result, the Agency has not proved the sexual harassment allegations regarding Hamilton by a preponderance.

Next, the allegations against Dentler, with the skirt raising incident, the "slut"

remarks, and the rumors of sleeping with co-workers at Dentler's house being the most significant. The Agency relied on the testimony of Complainant and several other witnesses to establish that the alleged acts had in fact occurred. An evaluation of this testimony shows that it is a maze of inconsistencies and contradictions which, taken together, do not prove by a preponderance that any specific alleged act occurred in any specific time frame. Chief among these contradictions is Complainant's absolute certainty that the skirt incident occurred in October 1994 in the box office, whereas unrebutted documentary evidence shows that Complainant did not even work in the box office until December 1994. Testimony by Complainant's mother and by co-workers who were not employed in October 1994 that they observed the alleged act at a later date does not rehabilitate Complainant's testimony. As for the "slut" remarks and alleged rumors, there is simply no credible witness testimony that anyone actually heard Dentler make these remarks. Although Dentler's credibility was also suspect, the burden of proof rests with the Agency and they did not carry that burden. As a result, the forum is unable to conclude that Dentler ever made the alleged remarks or spread the alleged rumors. No matter what Complainant may have perceived, the forum cannot hold Respondent liable for remarks attributed to Dentler that Dentler did not make.

Immediate and Appropriate Corrective Action

Where an employer "knew or should have known" of sexual harassment by a co-worker, OAR 839-007-0550(5) states that the employer will be liable for the harassment unless the employer took "immediate and appropriate corrective action." The co-worker in this case is Ty Hamilton. Since the forum has determined that the alleged sexual harassment attributed to Hamilton did not occur, the question of whether or not Respondent took immediate and corrective action is moot.

OAR 839-007-0550(4) states that an employer can be held liable "Where sexual harassment by a supervisor with immediate or successively higher authority over an

individual *is found to have occurred*." (emph. added) The supervisor in this case is Ron Dentler. The Agency has established, by preponderance of the evidence, only the acts cited in Findings of Fact -- The Merits 13 and 15. These acts do not rise to the level of sexual harassment as defined in OAR 839-07-0550. Since the forum has determined that Dentler did not engage in sexual harassment, the forum is not required to evaluate whether or not Respondent proved the affirmative defenses set out in OAR 839-07-0550(4)(a) and (b).

Constructive Discharge

For a constructive discharge to occur, the Respondent must have intentionally created or intentionally maintained discriminatory working conditions related to the Complainant's protected class status. As stated earlier, the preponderance of evidence fails to establish that discriminatory working conditions existed related to Complainant's protected class, her sex. Consequently, there can be no constructive discharge.

ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the Complaint and the Specific Charges filed against Respondent is hereby dismissed according to the provisions of ORS 659.060(3).

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[1]Mr. Moyer announced that this was his title.

[2]Rivera has married since her employment with Respondent. During her employment with Respondent, her last name was Navalta. To avoid confusion, she will be referred to as Diane Navalta throughout this Order.

[3]The current OAR 839-005-0010 became effective on October 23, 1998.

[4]This rule became effective October 23, 1998. It recites, verbatim, the language contained in *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841, 856 (1995), that

the forum adopted as its test for constructive discharge in the case of *In the Matter of Thomas Myers*, 15 BOLI 1, 14-15 (1996).