

In the Matter of

DENNIS MURPHY FAMILY TRUST, dba MT. SCOTT RESIDENTIAL CARE HOME,

Case No. 23-99

November 16, 1999

SYNOPSIS

Respondent owned and operated several adult care homes, including the Lambert Street Room and Board Facility, and rented a room in that facility to Complainant, a person with mental and physical disabilities. Respondent discriminated against Complainant because of his disabilities by threatening to evict him unless he took certain prescribed medications. The commissioner found that Complainant suffered emotionally as a result of the threat and ordered Respondent to pay Complainant \$10,000.00 as compensation for that suffering. ORS 659.430.

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 July 14, 1999, in Hearings Room 1004, Portland State Office Building, 800 NE Oregon St., Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency. Complainant David E. Cummings was present and was not represented by counsel. Respondent appeared through its counsel, Warren Wadsworth, of the law firm Bittner & Hahs, PC. Dennis Murphy also was present throughout the hearing as Respondent's representative.

The Agency called as witnesses: Complainant; Respondent employee Sandra Cantu; and nurse Linda Gillins. The Agency called BOLI senior investigator Peter Martindale as a rebuttal witness. Respondent called Cantu, Gillins, and Dennis Murphy as its witnesses.

The forum received into evidence administrative exhibits X-1 to X-15 at the start of the hearing. After the close of the hearing, the forum received administrative exhibits X-16 to X-26.

Agency exhibits A-1 through A-6, which had been attached to the Agency's case summary, were received into evidence. The Agency sought to introduce four additional exhibits during the hearing. The forum received exhibit A-7, a document dated April 12, 1996, for the limited purposes of proving the content of that document and of impeachment.¹ The forum received exhibits A-8 and A-9 for impeachment purposes only, and received exhibit A-10 (copies of Multnomah County Administrative Rules) without limitation. From Respondent, the forum received into evidence exhibits R-1 through R-5, which had been attached to Respondent's case summary. Pursuant to order of the ALJ, Respondent submitted additional exhibits (R-4A and R-5A) after hearing, and the ALJ received those exhibits into evidence.

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 April 20, 1998, Complainant David E. Cummings filed a verified complaint with the Civil Rights Division of the Agency. Complainant alleged that Respondent unlawfully discriminated against him in housing on the basis of his mental disability and/or perceived mental disability.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence that Respondent had committed an unlawful housing practice by threatening to evict Complainant from its room and board facility if he did not take his medications.

3) On February 8, 1999, the Agency submitted Specific Charges to the forum alleging that Respondent had violated ORS 659.430 by threatening to evict Complainant from its residential care facility if he did not take medications, and by making Complainant's taking of those medications a term or condition of his continuing to reside at the care facility. The Agency also requested a hearing.

4) On March 18, 1999, the forum served the Specific Charges on Respondent.

5) With the Specific Charges, the forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place for hearing; 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 hearing process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

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

7) Respondent filed a timely answer through its attorney, Warren Wadsworth of the law firm Bittner & Hahs, P.C., in which it admitted that Complainant rented property from it at its residential care facility in Portland, Oregon. Respondent denied that it threatened to evict Complainant if he did not take medication, denied that it "made Complainant taking his medication a term or condition of his continuing to reside in Respondent's residential care facility," and denied that it had discriminated against Complainant. Respondent also alleged two affirmative defenses: failure to state a claim and unclean hands.

8) On March 22, 1999, the ALJ received a letter from Complainant in which he argued that he was entitled to a jury trial, not an administrative hearing. In response,

the ALJ sent a letter to all participants enclosing a copy of Complainant's letter and asking Complainant's counsel and the Agency case presenter to explain to Complainant why a contested case proceeding, not a jury trial, was scheduled to take place. The ALJ also asked for clarification of Complainant's address, which the Agency provided.

9) By motion dated May 11, 1999, Respondent sought leave to depose the Complainant. The Agency did not oppose the motion, which the ALJ granted.

10) Respondent filed a motion to compel Complainant to sign forms releasing certain medical information. Respondent later withdrew that motion after Complainant voluntarily complied with part of Respondent's request and, through counsel, assured Respondent that he would sign the remaining release.

11) On June 11, 1999, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by July 2, 1999, and notified them of the possible sanctions for failure to comply with the case summary order. Respondent and the Agency filed timely case summaries.

12) At the start of the hearing, counsel for Respondent stated that he had received the Summary of Contested Case Rights and Procedures and had no questions about it.

13) 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.

14) At the close of the Agency's case, Respondent moved for a directed verdict. The forum construed the motion as one to dismiss the Specific Charges and took it under advisement. As discussed in the Opinion section of this Order, the forum now has denied the motion to dismiss.

15) Respondent's Exhibits R-4 and R-5 are summaries of certain medical records of other residents at Respondent's facility. During the hearing, Respondent agreed to submit the underlying medical records, with the residents' last names redacted, as Exhibits R-4A and R-5A. The ALJ ordered Respondent to submit those records by July 23, 1999, to both the forum and case presenter Gerstenfeld, and stated that she would issue a protective order for the documents.

16) On July 19, 1999, the ALJ issued a protective order that stated, in pertinent part:

"At the July 14, 1999, hearing in this matter, Respondent offered Exhibits R-4 and R-5, summaries of certain information from the medical records of residents of Respondent's room and board facility. Case presenter Gerstenfeld objected to the exhibits because he did not have access to the underlying medical records and could not verify the accuracy of the summaries. I ordered Respondent to submit the underlying medical records, with the last names of the residents and any other identifying information redacted, as Exhibits R-4A and R-5A. Respondent agreed to submit those redacted documents to the Hearings Unit and to Gerstenfeld by July 23, 1999. I told the participants that the documents would be sealed and that I would issue a protective order against disclosure of information in the documents.

"I hereby find and order that:

"a) The documents to be submitted as Respondent's Exhibits R-4A and R-5A are personal, privileged and confidential medical records of persons not involved in this proceeding. As such, they are exempted from disclosure under the Public Records law pursuant to ORS 192.502(2) and ORS 192.502(9).

"b) All parties to this proceeding shall maintain the confidentiality of these records and shall not disclose them or their contents to any person not a party or a representative of a party to this proceeding.

"c) After the Final Order in this case has issued, Gerstenfeld shall return his copy of the records to Respondent or Respondent's counsel.

"d) Exhibits R-4A and R-5A shall be placed in a sealed envelope in the official record of the case. That envelope shall be labeled to indicate that the enclosed records are confidential and privileged medical records that are exempt from disclosure under the public records law."

17) The forum received Exhibits R-4A and R-5A on July 21, 1999, and closed the evidentiary record on that date.

18) On July 26, 1999, the Agency submitted a written supplemental closing argument, which the ALJ accepted for filing.

19) By order dated July 22, 1999, the ALJ ordered the participants to submit briefs answering the following questions:

"1. Oregon statutes specifically permit the establishment of housing designed to serve the needs of disabled individuals and other persons who require assistance. Such housing presumably will provide services to disabled individuals that differs from the services that would be provided to non-disabled individuals. For example, ORS 443.400(9) and (12) together permit "residential treatment facilities" for "mentally, emotionally or behaviorally disturbed people" to provide treatment that includes "medical, psychological, or rehabilitative procedures, experiences and activities designed to relieve or minimize mental, emotional, physical or other symptoms or social, educational or vocational disabilities resulting from or related to the mental or emotional disturbance, physical disability or alcohol or drug problem." Do such practices specifically authorized by statute nonetheless violate ORS 659.430 because they discriminate because of disability by making a "distinction" or "restriction" in the terms, conditions, or privileges related to the housing? Why or why not?

"2. Do other practices neither explicitly authorized nor specifically prohibited by statute,* that are designed to facilitate the provision of housing services to disabled individuals, violate ORS 659.430 if they make a "distinction" or "restriction" in the terms and conditions of housing on the basis of disability? (An example of such a practice might be the "verbal prompting" to take medication that several witnesses described at hearing.) Why or why not?

"3. MCAR 891-018-100(f) states that residents of Multnomah County Adult Care Homes have the right to refuse medication. The Agency charges, *inter alia*, that Respondent discriminated against Complainant on the basis of disability by making the taking of medication a term or condition of Complainant's ability to continue residing in Respondent's facility. Does a housing provider's violation of any one of the many statutes and rules that govern the provision of housing to disabled individuals -- thereby changing a term or condition of residency --

automatically constitute discrimination in violation of ORS 659.430? Why or why not? What if the violated rule is one that relates in some way to the resident's disability? (An example of this might be a Multnomah County Adult Care Home's failure to give a resident complete privacy when receiving treatment or personal care, which is required by MCAR 891-018-100(w).)

"4. If the answer to Question 3 is "no," did the alleged threat of eviction for refusal to take medication nonetheless constitute discrimination? Why or why not?"

*"But which may be authorized or required by administrative rule."

The ALJ ordered the participants to submit their post-hearing briefs by August 25, 1999, and also ordered the Agency to submit a response to Respondent's motion to dismiss by that same date. The ALJ later granted the Agency's August 4, 1999, unopposed motion to extend the briefing deadline to September 1, 1999. Respondent and the Agency each filed a timely post-hearing brief and the Agency filed a timely response to Respondent's motion to dismiss.

20) On September 1, 1999, Respondent filed a supplementary closing argument and supporting affidavit that responded to issues raised in the Agency's supplemental closing argument. The Agency moved to strike the affidavit and those portions of Respondent's supplemental closing argument that discuss it. Respondent opposed the motion and implicitly asked that the record be reopened so the affidavit could be received into evidence. For reasons set forth in the Opinion section of this Order, Respondent's implicit motion to reopen the record is denied and the Agency's motion to strike is granted.

21) The ALJ issued a proposed order on October 19, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. By November 4, 1999, the forum had received no exceptions. The ALJ then asked case presenter Gerstenfeld whether he had received any exceptions from Respondent and Gerstenfeld responded that he had. Gerstenfeld provided the ALJ with

a copy of those exceptions, which he had received on October 29, 1999. The ALJ accepted this copy of Respondent's exceptions for filing and deemed them as having been timely filed. The exceptions are addressed in the Opinion section of this Final Order.

22) On November 10, 1999, counsel for Respondent left a voice-mail message informing the hearings unit that the exceptions he had filed by hand-delivery had been returned to him. The ALJ called Respondent's counsel back and discussed the matter with him. Apparently, although the exceptions were correctly addressed and hand-delivered to the Portland State Office Building where the Bureau of Labor and Industries is located, they somehow were misdirected to the Workers Compensation Board, which is located in the same building, then sent to the Workers Compensation Board office in Salem, and eventually returned to Respondent's counsel. The ALJ informed Respondent's counsel that she had obtained a copy of the exceptions from the Agency case presenter and had accepted them as timely filed.

FINDINGS OF FACT – THE MERITS
(Respondent's residential facilities)

1) At all material times, Respondent Dennis Murphy Family Trust, dba Mt. Scott Residential Care Home, owned and operated several residential care facilities in Oregon, and rented real property at those facilities for residential purposes. Murphy oversees operations of these facilities but is not "on the floor" on a daily basis.

2) One of Respondent's residential facilities is the "Lambert Street Room and Board," which is located in Portland, Oregon, and can house up to five residents. Although all Lambert Street residents have some sort of disability, they generally do not require nursing or nighttime care. Rather, the facility is designed to provide a home-like atmosphere in which staff can give the residents verbal reminders to take their medications and engage in other Activities of Daily Living ("ADLs") such as taking

showers. One of the goals at Lambert Street is to encourage residents to be independent and make decisions. Each resident at Lambert Street has a private bedroom; the remainder of the living facilities are shared.

3) Lambert Street is an “adult care home” that is licensed by Multnomah County and is subject to Multnomah County Administrative Rules (“MCARs”) for Adult Care Homes and the MCARs for Room and Board Facilities. Respondent’s employees are instructed to become familiar with the MCARs and to comply with them.

4) Respondent operates another facility, called the Mt. Scott Residential Care Facility (“Mt. Scott”), which is located across a breezeway from Lambert Street. Mt. Scott residents are less independent and require more nursing care than the people who live at Lambert Street. Mt. Scott is a “residential care facility” that is licensed by the Oregon Department of Human Resources, Senior and Disabled Services Division (“SDSD”). People sometimes refer to the Mt. Scott Residential Care Facility and the Lambert Street Room and Board collectively as “Mt. Scott.” Sandi Cantu is the administrator of both facilities and manages them for Respondent.ⁱⁱ She supervises approximately 14 of Respondent's employees.

5) Potential residents are referred to Lambert Street by social workers in hospital settings. When a social worker refers a patient to Lambert Street, Cantu evaluates the person’s needs to determine whether they can better be met at Lambert Street or at Mt. Scott.

6) Lambert Street residents go across the breezeway to Mt. Scott to take their prescribed medications. Multnomah County regulations require Mt. Scott staff to make medications available to residents during a one-hour period. If a resident does not take the medication during that time, staff are supposed to dispose of the medication and notify the resident’s physician.ⁱⁱⁱ When a Lambert Street resident does not go to Mt.

Scott for medication, Mt. Scott staff often call the resident to prompt him or her to come take the medication. Respondent considers these verbal promptings or encouragements to be part of the necessary care for residents.^{iv}

7) MCAR R-891-060-113 permits room and board facilities to provide promptings in certain circumstances:

"Operators, Resident Managers and service givers in Room and Board Facilities may give verbal prompting to residents if it encourages maximum resident independence and enhances the resident's quality of life."

(Complainant's disabilities and residence at Lambert Street)

8) Complainant suffers, and has at all material times suffered, from mental and physical impairments, including schizoaffective disorder, which substantially limit one or more of his major life activities, including self-care and socialization. At all material times, Respondent was aware of those disabilities.

9) Complainant's medical condition causes him to have disorganized thinking, including paranoia and suspicion. Those symptoms worsen without medication. People with Complainant's mental disabilities may take certain words in a statement out of context and give them another meaning.

10) Complainant acknowledges his physical disability (herniated disks) but does not believe he is mentally disabled or has any mental illness. When people say Complainant is mentally ill, he feels stigmatized because he is being accused of something that he believes is not true.

11) In January 1995, Complainant was admitted to the Veteran's Administration Medical Center ("VAMC") in Portland, Oregon. Documentation from that hospital stay showed that Complainant had "no physical limitations" but was prescribed Depakote, Risperidone, and Valproate, apparently for treatment of depression and cognitive disorganization.^v Nurse practitioner Linda Gillins, who is licensed to prescribe medicine,

was Complainant's primary care provider at the VAMC and continued in that role at least through the time of hearing. Gillins coordinated Complainant's treatment with other care providers, including Dennis Morgan, Complainant's social worker. A VAMC summary report of Complainant's hospitalization stated that Complainant would be discharged to "Mt. Scott Room and Board" on March 2, 1995. The report noted that Complainant had "some difficulties maintaining a schedule in terms of showing up to take his medications and showing up for meals and other activities because of his cognitive disorganization" and stated that, "[f]or this reason, it would be helpful to give him frequent friendly reminders to help him stay on task."

12) In March 1995, Complainant was discharged from VAMC and referred to Respondent. Starting that month, and continuing at least through the time of hearing, Complainant rented property from Respondent at Lambert Street. Complainant lives at Lambert Street, not the Mt. Scott Residential Care Facility, because his impairments do not require regular nursing care.

13) Since Complainant's 1995 hospitalization, Gillins has prescribed various medications for Complainant. As of June 1998, those medications included Depakote, Cogentin, Tagamet, Risperdal, Motrin, Desyrel, Mycler, Hydrocortizone, and Ibuprofen. Depakote is a mood stabilizer that helps keep people from becoming manic and depressed. Common side effects are sedation and weight gain that lessen with time. Risperdal is used to treat thought disorder. It can cause muscle and joint stiffness as well as tremors. Complainant suffered those side effects and took Cogentin to help his muscle stiffness. The Cogentin, in turn, can cause a dry mouth and sedation, much like an anti-histamine. For that reason, Gillins tries to keep doses low. Gillins believes Complainant benefits from taking his prescribed medications, which keep him stable

and help him function at his highest level. When patients stop taking these medications, their condition generally deteriorates over several months.

14) Complainant does not like taking his prescribed medications because of side effects including lethargy, weight gain, and dry mouth. Complainant also believes his prescribed medications affect his concentration and cause memory problems. He feels better when he does not take his medications. Throughout his treatment by Gillins, Complainant has asked about his medication levels and Gillins has tried lowering the dosages.

15) In April 1995, Mt. Scott nursing personnel developed a "RESIDENT CARE PLAN" for Complainant. That document indicated that Complainant was "independent" with his ADLs, was "good about keeping clean & neat," dressed appropriately, and only occasionally needed to be asked to shower. The plan also stated that Complainant had "to be called many [times] in a.m. to come to [the residential care facility] & get meds." Respondent's goal for Complainant was "to see [him] come over to [the residential care facility] to get his medication [at] appropriate [times and without] staff having to call him."

16) From July through September 1995, Complainant frequently refused to take his medications, and occasionally refused to take them in October, November, and December 1995. Starting in January 1996, Complainant again frequently refused his medications, through early August 1996.

17) On April 12, 1996, Complainant signed a document prepared by an employee of Respondent that stated:

"I David Cummings agree to shower 2 times a week and go to day tx: as scheduled is Mon-Wed Thur. Showers are Tues no later than 12n Sat no later than 12n. Medications haven't been problem will continue. All clothes that need laundered will be brought to facility every Tues. Thur. Sat. for wash. If staff request an additional shower I will comply without argument. If I fail to comply with any of the above I will be given notice to vacate 7928 SE Lambert in 14 days. My lay down time in Rm is 1:00 pm - 4:30 pm and 8:00 pm - 7:30 am."

Claimant believes he was “coerced” into signing this agreement.

18) In April 1996, Cantu noted on Complainant's care plan, in the section titled "BATHING NEEDS," that he had a "contract in chart" regarding "ADLs compliance." She stated that Complainant was "isolative" and needed cues regarding "ADL compliance per contract agreement in chart." During this period, Respondent's employees spent an unusual amount of time dealing with Complainant's isolative behavior.

19) From August 1996 to October 1997, Complainant only occasionally refused to take his medications. However, during that time, Complainant frequently did not go to Mt. Scott to take his medication and did not call Mt. Scott to report that he was not going to take it. Instead of disposing of Complainant's medication after the one-hour period in which he was supposed to take it, as the law requires, Respondent's staff often let the medications sit out unattended and unlocked for up to four hours. During that time, staff often continued to prompt Complainant (through telephone calls and personal visits to Lambert Street) to come take the medication. Cantu believes that she put her license in jeopardy by making medications available to Complainant for more than one hour.

20) In May 1997, Cantu noted on Complainant's care plan that "staff need[ed] to really enforce" the April 1996 agreement. Cantu also noted that Complainant had "improved" and was "more compliant" with regard to medications. Because of Complainant's isolative behavior, Cantu had started a process of trying to encourage Complainant either to take his medication or to inform staff that he was not going to take them, instead of just failing to go to Mt. Scott at the appointed time.

21) Respondent did not give Lambert Street residents other than Complainant additional time to take their medications. When other residents did not come to Mt.

Scott to take their medicine, Respondent's employees followed the required procedure of disposing of the medication after one hour.

22) In describing his own and his staff's responsibility toward residents, Murphy twice stated that if matters got to the point of eviction, Respondent would have failed. According to Murphy, "the whole reason [Respondent] even exist[s] is to prevent getting to that point." Murphy acknowledged that Respondent would have more difficulty getting referrals if people thought Respondent had a high rate of having residents' symptoms worsen.

(allegations of discrimination)

23) On October 20, 1997, Complainant refused to take his 8:00 p.m. medications because he believed they gave him a sore throat, swollen glands, and a dry mouth. The next day, Complainant again refused to take his 8:00 p.m. medications, reporting the same symptoms. Complainant stated that he would not take the medications until he spoke with his doctor.

24) On October 22, 1997, Complainant refused his 8:00 a.m. medications. That same day, Cantu told nurse practitioner Gillins that she would give Complainant notice to move if he did not take his medications and cooperate with treatment. Cantu's statement is accurately reflected in Gillins' electronic chart for Complainant, which other care providers review and rely upon.

25) In or around November 1997, Cantu verbally informed Complainant that she would evict him from Lambert Street if he did not take his medications. Cantu made this threat because she felt frustrated and burdened by the behaviors Complainant exhibited when he did not take the medications.

26) Complainant felt threatened and was upset by Cantu's warning that he might be evicted. Complainant did not want to leave Lambert Street, and he started taking his

medications because he believed he would otherwise be evicted. Claimant did not refuse to take medications again until January 1998.

27) Complainant testified that Cantu actually tried to hand him a paper that she stated or implied was a written eviction notice at the same time she verbally threatened to evict him. No reliable evidence corroborated that somewhat vague testimony and the forum does not find that Cantu took this action.

28) On November 19, 1997, Complainant told Gillins that Cantu had said that he would get evicted if he did not take his medication.^{vi} Complainant asked Gillins to cancel his medication because he did not think he had a mental problem.

29) MCARs 891-018-100(f) (the Residents' Bill of Rights) and R-891-060-142 give residents of Multnomah County adult care homes and room and board facilities the right to refuse to take medications. In addition, Cantu and Murphy testified that threats of eviction would be an inappropriate means of encouraging a resident to take medication. The forum infers from this testimony, and from the inclusion of the right to refuse medication in the Residents' Bill of Rights, that a threat to evict a resident for failure to take medications is an action that is against that resident's interests.

30) Respondent's official policy is to recognize residents' right to refuse medications, and not to threaten residents with eviction for failure to take medication.

31) Complainant filed his verified complaint with the Agency in April 1998, in which he alleged that on April 12, 1997, he "was required to sign an agreement [to] take medication for a perceived mental disability." Complainant further alleged that in November 1997, he "was threatened with eviction if [he] did not continue taking the medication."

32) After Complainant filed his complaint, senior investigator Peter Martindale was assigned to investigate the case. Martindale spoke with Complainant, Gillins, and

Respondent's representatives and made contemporaneous notes of those conversations. In one of those conversations, Martindale asked Gillins about her October and November 1997 chart notes involving Complainant. Gillins did not question the reliability of the notes during that conversation.

33) Martindale also spoke with Cantu, who said she was not aware that Complainant ever had refused to take medications. At that time, Cantu said the only problem was with the timing of Complainant taking his medications. When Martindale asked Cantu for a copy of the April 1997 agreement that Complainant alleged he had been forced to sign, he was provided with the note from April 1996.

34) For several months immediately prior to hearing, Complainant did not take his prescribed medications. Complainant stopped taking the medications after his attorney told him that he had the right to refuse them. At about the same time, Complainant's attorney also sent a letter to Respondent stating that Complainant no longer would take the medications. Complainant's behaviors have changed since he stopped taking his medications. For example, he has typed hundreds of pages of documents "day and night" and piled them in large stacks in the common living areas. According to Cantu, that is not a "baseline" behavior for Complainant. Other Lambert Street residents filed a grievance because the stacks of paper in the living areas were "overwhelming" them. In another example of "decompensation" described by Murphy, Complainant wrote notes about Jews, gun rights, "testing" the bank, and other topics on the last rent check he submitted to Respondent prior to hearing.

35) Complainant testified credibly that he felt threatened by Cantu's statement that he would be evicted if he did not take his medications. Complainant did not want to move out of the Lambert House because he was settled in and, therefore, resumed taking the medications. The forum finds that \$10,000.00 will appropriately compensate

Complainant for the fear, upset, and loss of dignity he suffered as a result of Cantu's threats. The forum does not find that, on balance, the adverse side-effects Complainant suffered outweighed the positive effects of the medications he took under duress. Consequently, the forum is not awarding money as compensation for those side-effects.

(credibility findings)

36) The forum finds that, as Gillins testified, Complainant suffers from schizoaffective disorder, which leads to disorganized thinking and paranoia. This medical testimony was confirmed by the testimony of Cantu and Murphy, who described specific episodes of Complainant's disorganized thought.^{vii} From this evidence, the forum concludes that Complainant's testimony was not reliable, because his perception and memory of events was not always accurate.^{viii} For that reason, the forum generally has relied on Complainant's testimony only where it was verified by other credible and reliable evidence in the record.

37) For the reasons set forth in this paragraph and the following two paragraphs, the forum finds Cantu's testimony regarding the alleged threat of eviction not credible. Cantu was extremely defensive during the contested case hearing. She avoided answering questions directly when her answers might reflect poorly on herself or Respondent. In some respects, her testimony appeared calculated to provide an after-the-fact justification for Respondent's actions. For example, Cantu testified that Respondent's employees were treating Complainant better than they treated other residents when they encouraged him for up to four hours to take his prescribed medication, instead of disposing of the medication one hour after the dose was to be administered. Cantu, however, offered no explanation of why Respondent would have favored Complainant over other residents, and the forum is skeptical of her

characterization of the protracted "prompting" of Complainant as constituting preferential treatment.

38) In addition, the Agency impeached certain aspects of Cantu's statements. Cantu initially testified that, other than in the April 1996 agreement, she never communicated with Complainant about a possible eviction, and she was not aware that any other Respondent employee ever had done so. Later in her testimony, she reiterated that there was no agreement dated April 1997. In fact, on April 8, 1997, Respondent had Complainant sign a document titled "HOUSE RULES AND RESIDENT RESPONSIBILITIES," and placed the document in his file. This document included the following statement: "I agree to comply with house rules, **physicians' orders, and treatment plans** as long as I reside at Mt. Scott. **I understand that failure to comply will result in a notice to move.**" (Emphasis added). In addition, Cantu made at least three inaccurate statements to Martindale during his investigation. First, she told Martindale in May 1998 that she had never contacted the VAMC regarding Complainant, and the VAMC never had contacted her. At hearing, Cantu acknowledged that she would have had conversations with Gillins or other VAMC personnel regarding Complainant before April 1998 (when Complainant's attorney first notified Respondent that Complainant felt he had been discriminated against), although she could not remember the details of the conversations. Moreover, Gillins' chart notes confirm that Cantu did speak with her in 1997. Second, when Martindale asked Cantu whether Complainant ever had stopped taking his medication during the fall or winter of 1997, Cantu said she was not aware of that, and that the only problem had been that Complainant sometimes took medications late, so there was not enough time between dosages. At hearing, Cantu acknowledged that "everyone" had been aware that Complainant had stopped taking his medications during that time period. Third, when

Martindale told Cantu that Complainant had alleged that he was forced to sign an agreement to take medications in 1997, she told him – incorrectly – that the 1996 agreement was the only one that Complainant had signed.

39) Finally, Cantu’s testimony that she neither threatened Complainant with eviction nor told Gillins that she would evict Complainant is contradicted by Gillins’ notes, which the forum finds more reliable. The inconsistencies in Cantu’s testimony suggest either that her memory regarding the relevant events is unreliable or that her testimony regarding those events is not credible. In either event, the forum disbelieves much of Cantu’s testimony regarding the threat of eviction and has not given it weight except where it was corroborated by other credible, reliable evidence.

40) Gillins’ testimony generally was reliable and credible. She is a very experienced prescribing nurse practitioner and has been Complainant’s primary provider for several years. The forum has relied heavily on her explanation of Complainant’s mental disabilities, the medications she has prescribed for him, and the benefits and drawbacks of those medications.

41) On the subject of Cantu’s alleged threat of eviction, however, Gillins’ testimony was not persuasive. Gillins believes that Respondent provides good care at its facilities and refers many patients there. Her testimony appeared designed to benefit Respondent to the greatest degree possible. At one point, Respondent’s attorney elicited testimony from Gillins that apparently was meant to suggest that one of her chart notes was substantively inaccurate. That October 22, 1997, chart note states:

“Telephone conversation with [Complainant] and with Sandy, Mr. [sic] Scott^[ix]

“[Complainant]:

“O: In the vague, concrete, disorganized process, [Complainant] tells me that he stopped taking his sedication [sic] two days ago because the VA doctor said it was causing “gland” problems – dry mouth. [Complainant] now says he feels “wonderful” without the medication. He would agree to

“change” meds as long as he didn’t have side effects. I told him any med would have side effects and that I have lowered the dose to reduce the side effect problem – fatigued, drugged feeling, stiffness and dry mouth.

“In the past as well as now, [Complainant] has little to no insight into his illness and need for treatment. I talked with him about risking relapse/ and hospitalization, being required to leave his residence or losing [sic] visitation with his son if he had psychotic sx [sic] again. [Complainant] has no appreciation [sic] to these risks.

“I spoke Sandy, who said she would [sic] give [Complainant] notice to move if he did not take meds and cooperate with treatment.”

(Emphasis added). Gillins, who had no independent recollection of this telephone conversation, testified credibly that her electronic chart notes sometimes contain typographical errors. That is apparent from the note itself. Respondent’s counsel then asked Gillins whether the note might not “accurately reflect” her conversation with Cantu. Gillins testified that it might not, because she is not a trained typist and types a high volume of notes during her lunch hour. Significantly, however, Gillins did *not* testify that she believed the *substance* of her conversation with Cantu was not accurately reflected in the note. In addition, in her conversation with investigator Martindale regarding her chart notes, Gillins did not suggest that the notes did not accurately reflect her conversations with Cantu or Complainant. At hearing, Gillins also acknowledged that she tries to make her notes accurate. Given that the chart notes are an official record of patient care and that other care providers rely on those notes to guide their own treatment of patients, the forum gives no credence to Respondent’s theory that only a typographical error caused the note to state that Cantu said she was going to evict Complainant if he did not take his medications.^x Nor does the forum give any weight to the related testimony of Gillins, to the extent it may be interpreted to imply such an incredible level of inaccuracy in note-taking.

(other patients and their medical records)

42) During 1996 and 1997, several other residents at Respondent's facilities refused to take their medications. Cantu and Murphy testified that none of those residents had been evicted or threatened with eviction because of these refusals. The forum gives no weight to this testimony. Cantu's testimony on the issue of eviction is suspect, as explained in Findings of Fact - the Merits 37, 38 and 39, *supra*, and Murphy likely would not know if any threats had been made.^{xi}

ULTIMATE FINDINGS OF FACT

1) Complainant suffers from schizoaffective disorder, which is a mental impairment that substantially limits his major life activities of self-care and socialization.

2) Respondent owns and operates the Lambert Street Room and Board Facility, which is governed by the Multnomah County Administrative Rules pertaining to adult care homes and room and board facilities.

3) Complainant rented real property at Lambert Street Room and Board from Respondent.

4) Respondent threatened to evict Complainant from its real property if he did not take certain prescribed medications. That threat was against Complainant's interests.

5) Respondent made the threat because Complainant's disability caused him, if he did not take the prescribed medications, to engage in behavior that was inconvenient and frustrating to Respondent's employees.

6) Complainant experienced mental suffering because of the threat of eviction.

CONCLUSIONS OF LAW

1) ORS 659.400 provides, in pertinent part:

"(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life

activities, has a record of such an impairment or is regarded as having such an impairment.

"(2) As used in subsection (1) of this section:

"(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

"(b) 'Has a record of such an impairment' means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

"(c) 'Is regarded as having such an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

"(C) Has none of the impairments described in subparagraph (A) or (B) of this paragraph, but is treated by an employer or supervisor as having a mental or physical impairment that substantially limits one or more major life activities."

"(d) 'Substantially limits' means:

"(A) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or

"(B) The impairment significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity."

Complainant is a disabled person.

2) The actions of Cantu, the administrator of Respondent's Lambert Street and Mt. Scott facilities, are properly imputed to Respondent.

3) MCAR 891-018-100, the Residents' Bill of Rights, provides, in pertinent part:

"Each resident of an Adult Care Home in Multnomah County has a right to:

"(a) be treated as an adult with respect and dignity"

"* * * * *

“(f) consent to or refuse treatment, medication or training.

“* * * * *

“(v) be involuntarily moved out of the home by an Operator only for the following:

“(1) medical reasons;

“(2) the resident’s welfare;

“(3) the welfare of other residents;

“(4) nonpayment;

“(5) behavior which poses an immediate threat to self or others;

“(6) behavior which substantially interferes with the orderly operation of the home”

“(7) the care needs of the resident exceed the ability or classification of the Operator; or

“(8) the home is no longer licensed.”

MCAR R-891-060-142 provides:

“Residents shall have the right to consent to or refuse all medications. If a resident refuses medication, the refusal shall be immediately documented in the resident’s records and appropriate persons notified, including the doctor, family, legal representative and case manager. Other persons involved in providing resident services, including the Resident Manager and service giver, shall also be informed.

Respondent violated MCAR 891-018-100 and MCAR R-891-060-142 by threatening to evict Complainant if he did not take his medication. This threat of eviction was against Complainant’s interests.

4) ORS 659.430(1) states:

"No person, because of a disability of a purchaser, lessee or renter, a disability of a person residing in or intending to reside in a dwelling after it is sold, rented or made available or a disability of any person associated with a purchaser, lessee or renter, shall discriminate by:

"(a) Refusing to sell, lease, rent or otherwise make available any real property to a purchaser, lessee or renter;

"(b) Expelling a purchaser, lessee or renter;

"(c) Making any distinction or restriction against a purchaser, lessee or renter in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or the furnishing of any facilities or services in connection therewith; or

"(d) Attempting to discourage the sale, rental or lease of any real property."

OAR 839-008-0210 provides:

ORS 659.400 to 659.435, as they relate to real property transactions, prohibit handicap discrimination by:

(1) Sellers, lessors, advertisers, real estate brokers and salespersons, or the agents of any of them;

(2) Any person assisting, coercing, inducing or inciting another to permit or engage in an act or practice violating ORS 659.430.

Respondent leased real property and, therefore, was subject to the provisions of ORS 659.400 to 659.435. At all material times, Complainant was a renter entitled to the protection of ORS 659.430. Respondent made a restriction against Complainant in the terms and conditions related to Complainant's rental of Respondent's real property, in that Respondent threatened to evict Complainant if he did not take certain prescribed medications. Respondent made this restriction against Complainant because of his disability and, therefore, violated ORS 659.430(1).

5) ORS 659.430(9) states:

"Any violation of this section is an unlawful practice."

Respondent committed an unlawful practice by violating ORS 659.430(1).

6) ORS 659.435 provides:

"Any person claiming to be aggrieved by an unlawful employment practice may file a complaint under ORS 659.040, and any person claiming to be aggrieved by an unlawful practice may file a complaint under ORS 659.045. The Commissioner of the Bureau of Labor and Industries may then proceed and shall have the same enforcement powers, and if the complaint is found to be justified the complainant shall be entitled to the same remedies, under ORS 659.050 to 659.085 as in the case of any other complaint filed under ORS 659.040 or 659.045."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and the subject matter herein and has the authority to eliminate the effects of any unlawful practice found. ORS 659.060(3). The award of damages and cease and desist order described below are appropriate exercises of that authority.

OPINION

The Agency's primary theory of liability is that Respondent violated ORS 659.430(1) by threatening to evict Complainant if he did not take certain prescribed medications. To establish this claim, the Agency was required to prove four things:

- 1) that Complainant was a disabled person;
- 2) that Respondent sold, leased, or rented real property to Complainant;
- 3) that Respondent made a distinction or restriction against Complainant in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or the furnishing of any facilities or services in connection therewith; and
- 4) that Respondent made the distinction or restriction against Complainant because of his disability.

ORS 659.430(1); see OAR 839-050-0010(1).

The first two elements are not subject to dispute in this case. Respondent admitted, and the forum has found, that Complainant suffers from disabilities, including schizoaffective disorder, that substantially limit his major life activities of self-care and socialization. Complainant is, therefore, a disabled person as that term is defined in ORS 659.400.^{xii} Respondent admits that it rented real property to Complainant.

With regard to the third element, the forum finds that Respondent, through Cantu, threatened to evict Complainant if he did not take his prescribed medications. The forum was persuaded by Gillins' chart notes, which state that Cantu told her she would evict Complainant if he did not take his medications. Those notes are consistent with Complainant's credible testimony that Cantu made that threat and his similar report to Gillins. Cantu's contrary testimony was not credible, for the reasons set forth in Findings of Fact – the Merits 37, 38 and 39, *supra*.

The eviction threat violated ORS 659.430(1) if it constituted a "distinction or restriction against" Complainant in the terms or conditions of his real property rental. The threat was a "restriction" of Complainant's behavior in regard to the conditions

under which he could remain in the Lambert Street facility – it forced him to choose between asserting his right to refuse medications and maintaining his housing. Moreover, that restriction was "against" Complainant because it denied him his legal right to refuse medication. The Agency met its burden of proving the third element of its claim – that Respondent made a restriction against Complainant.

The final element the Agency must prove is that Respondent threatened to evict Complainant "because of" his disability. The forum finds that it did. One of Complainant's disabilities is schizoaffective disorder. When Complainant does not take his medications, that disorder causes him to behave in ways that are time-consuming and somewhat burdensome to Respondent's employees. At least once, those behaviors have caused other Lambert Street residents to file a grievance. Cantu testified that, although Respondent's employees generally followed the rule requiring them to make medications available to residents only for one hour, they frequently tried to get Complainant to take his medicine for up to four hours after the time it was supposed to be administered. The forum infers that Complainant's unmedicated behaviors were more difficult for Respondent to handle than the unmedicated behaviors of other residents, and that is why Respondent's employees tried so hard to persuade him to take his medicine.

During 1997, Complainant frequently failed to go to Mt. Scott to take his medications. In late October 1997, Complainant started refusing medication and asserted that he would not take any more medications until he had spoken to his doctor. The forum infers that Cantu's frustration with Complainant's unmedicated behaviors, coupled with his declaration that he was going to stop taking his medication, led her to threaten him with eviction in hopes that he either would start taking the medication (albeit under duress) or would leave the facility. It follows that she made the threat

“because of” Complainant’s disability. Consequently, the threat constituted an unlawful practice that violated ORS 659.430(1).

The Agency asserted as an alternate theory of liability that Respondent violated ORS 659.430(7), which provides

"No person shall coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this section."

Because the forum has found that Respondent violated ORS 659.430(1), it need not also determine whether Respondent violated ORS 659.430(7), and that question is not addressed in this Order.

DAMAGES

Complainant testified credibly that he felt threatened by Cantu’s statement that he would be evicted if he did not take his medications. Complainant explained that he did not want to move out of the Lambert Street facility because he was settled in. From Complainant’s demeanor and his obvious strong feelings about being threatened in this manner, the forum infers that Complainant suffered a loss of dignity as a result of the illegal threat. No evidence in the record, however, establishes that Complainant’s fear of being evicted or his indignation lasted for any particular length of time. Nor did Complainant suffer the sort of financial loss that often accompanies illegal discrimination.

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 he

did experience, the forum has reviewed the mental suffering damages it has awarded in civil rights cases over the past few years. No other BOLI case has involved allegations of discrimination against disabled persons in housing. In the forum's view, the most analogous case is *In the Matter of Westwind Group of Oregon, Inc.*, 17 BOLI 46 (1998), in which a restaurant denied a patron service based on her race. The forum described the patron's mental suffering as follows:

"Complainant felt surprised, upset, humiliated, and embarrassed when [the restaurant employee] did not help her. The incident hurt her self esteem. She spoke to her pastor about the incident later because she felt depressed and hurt. Up to the time of hearing, she still thought about the incident and was upset by it. She never went to another Burger King restaurant."

Westwind Group, 17 BOLI at 50. In awarding \$15,000.00 damages for mental suffering, the forum made the following observations about discrimination in public accommodation:

"First, the battle against race discrimination has been at the front line of civil rights. Discrimination in public accommodation impairs a 'person's basic right to move about freely in society and to be recognized thereby as a part of his or her community.' It is particularly 'insidious and devastating.'

"Second, suffering in such cases is usually mental, rather than physical or financial, making it difficult to measure. However, to follow the mandate of the statute to "eliminate the effects" of discrimination, a compensatory award must be measured in terms of mental suffering.

"Third, because such discrimination is particularly devastating, it is important to emphasize that the duration of the discrimination does not determine either the degree or duration of the effects of discrimination, 'and it is these effects which damages awarded are meant to compensate.'"

Id. at 53.

The forum concludes that these considerations are equally applicable to discrimination against disabled persons in housing. Such discrimination is particularly insidious and devastating because it undermines the disabled individual's ability to function with dignity and humanity, and as independently as possible. Although the

discriminatory episode (in this case, the threat of eviction) may last only a few moments, its effects may be felt for long periods of time, as the victim continues to suffer fear and anger, or modifies his or her behavior as a result of the discrimination.

In this case, Complainant felt threatened by Cantu's threat and was bothered enough by it to report it to Gillins. In addition, he modified his behavior by starting to take the prescribed medications, in fear that he otherwise would be evicted. The forum infers from that fact that Complainant suffered impaired human dignity, in that he was unlawfully forced to choose between his right to refuse medication and his ability to remain at Lambert Street.

The forum finds, however, that Complainant's mental suffering does not rise to the level of the distress experienced by the complainant in *Westwind*, who suffered impaired self-esteem, humiliation, and embarrassment. In addition, the *Westwind* complainant, unlike Complainant, testified credibly that she was still upset by the incident at the time of hearing. No evidence in the record supports an inference that Complainant suffered similarly as a result of Cantu's threat. The types of distress Complainant did experience, including modification of his behavior, also were experienced by the *Westwind Group* complainant. See *id.* at 50. The forum concludes that \$10,000.00, rather than the \$15,000.00 awarded in *Westwind*, will appropriately compensate Complainant for the mental suffering that resulted from Respondent's unlawful act.

The Agency argued that the forum should provide additional compensation to Complainant because he suffered adverse side-effects from taking medication that he would not have taken absent the threat of eviction. For two reasons, the forum disagrees. First, although Complainant testified credibly that he took medication that he would not otherwise have taken, no evidence in the record establishes the length of

time during which he took the medications under duress. Without such evidence, an assessment of damages is difficult at best. Second, although Complainant clearly did not like taking his medications and suffered adverse side-effects from them, the objective medical testimony also establishes that Complainant benefited when he took medications in that he was less paranoid and was able to function "at a higher level." The forum is unable to conclude that the adverse effects of the medications outweighed the benefits that Complainant gained from taking them. Consequently, the forum declines to award additional damages as compensation for the side-effects Complainant experienced.

MOTION TO DISMISS

After the Agency rested its case, Respondent moved for a directed verdict on the issue of liability, which the forum construed as a motion to dismiss the Specific Charges. Respondent argued that the Agency had presented no "evidence that [Respondent] has acted discriminatorily *vis a vis* other residents who are non-disabled." According to Respondent, the Agency could prevail only if it proved that Respondent treated disabled persons differently than it treated disabled persons. Because all the residents of Lambert Street are disabled, Respondent reasoned, no discrimination against disabled persons could be established. In support of this position, Respondent cited *Anonymous v. Goddard Riverside Community Center*, FH-FL Rptr. para. 16,208, pp. 16208.1 - 16,208.2 (SDNY 1997).

In response, the Agency asserted that Respondent's reliance on a federal case based on the federal Fair Housing Act was misplaced because there are "significant" differences between that law and ORS 659.430. The forum agrees.

The decision in *Anonymous* centered on section 3604(b) of the federal Fair Housing Act, which provides that it is unlawful to:

"discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."

42 USC sec. 3604(b). The *Anonymous* plaintiff alleged that the defendants, from whom she obtained residential housing, had discriminated against her on the basis of her psychiatric disability. The plaintiff framed her claim as one of "disparate treatment," in that she alleged that defendants did not subject any non-psychiatrically disabled individuals to the same bad treatment she claimed she had received. The trial court granted the defendants' motion to dismiss plaintiff's disparate treatment claim on the ground that the plaintiff had not alleged that the defendants actually had other housing residents who were not psychiatrically disabled, and, therefore, had not sufficiently alleged that defendants treated her differently from non-psychiatrically disabled persons. *Anonymous*, at 16,208.2.

Whatever the merits of the *Anonymous* court's analysis, it does not assist Respondent in this case. The Agency has not relied solely on a disparate treatment theory. Rather, it also argues that Respondent violated the emphasized portion of ORS 659.430(1):

"No person, because of a disability of a purchaser, lessee or renter, a disability of a person residing in or intending to reside in a dwelling after it is sold, rented or made available or a disability of any person associated with a purchaser, lessee or renter, shall discriminate by:

"* * * * *

"(c) Making any distinction **or restriction against** a purchaser, lessee or renter in the price, terms, conditions or privileges relating to the sale, rental, lease or occupancy of real property or the furnishing of any facilities or services in connection therewith[.]"

This statute, unlike 42 USC section 3604, defines discrimination to include not only disparate treatment (arguably, the significance of the word "distinction") but also any "restriction against" a renter based on the renter's disability. There is no need to

compare the defendant's treatment of disabled persons to its treatment of non-disabled persons. Rather, the mere fact that a defendant has made a restriction against a disabled person because of that person's disability is sufficient to establish liability under ORS 659.430.

The Agency proved: that Cantu threatened to evict Complainant if he refused to take medications; that the threat was adverse to Complainant's interests; and that the threat was made because of Complainant's disability. The evidence establishes a violation of ORS 659.430(1) and Respondent's motion to dismiss is denied.^{xiii}

RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent asserted two affirmative defenses -- failure to state a claim and unclean hands. The first defense fails for the same reasons that the forum has rejected Respondent's motion to dismiss.

Respondent's "unclean hands" defense is based on two assertions: that "Complainant falsely represented to Gillins on or about November 19, 1997 that Respondent would evict him if he did not take his medications"; and that "Complainant falsely represented to his attorney, Dawna Scott, sometime in December 1997 that Respondent would evict him if he did not take his medications." The forum's finding that Respondent did, in fact, make such a threat negates the factual premise underlying Respondent's affirmative defense. For that reason, the defense fails.

THE SUPPLEMENTAL CLOSING ARGUMENTS AND THE AGENCY'S MOTION TO STRIKE

By way of Exhibits R-4, R-4A, R-5, and R-5A, Respondent sought to demonstrate that many other current and former residents had refused to take medications and had not been evicted. The Agency filed a supplemental closing argument in which it contended that Exhibits R-4A and R-5A demonstrate that residents who, like Complainant, refused to take psychoactive medications no longer live at Respondent's

facilities. “If anything,” the Agency argued, “these exhibits, along with the testimony of Ms. Cantu and Mr. Murphy, show that some residents who refused medication which was not for psychological illnesses are still living at Respondent’s facility, but that all residents who have refused to take the same medicines Mr. Cummings refused, no longer live there.”

In response, Respondent filed a supplemental closing argument in which it provided a “detailed account of the circumstances surrounding the departure of the [former] residents identified in Exhibit R-4.” Respondent asserted that each of these individuals, including those who refused to take psychoactive medications, either died, voluntarily chose to move to another facility, or suffered a deterioration in health that required a move to a facility that could provide more nursing care. Respondent supported its supplemental closing argument with the affidavit of Dennis Murphy.

The Agency then filed a motion to strike the affidavit of Dennis Murphy and those portions of Respondent’s supplemental closing argument that rely on the affidavit. The Agency argued that the affidavit should be struck because the evidentiary record had been closed and the Agency did not have the opportunity to cross-examine Murphy regarding the basis for the assertions in his affidavit. Respondent, relying on OAR 839-050-0410,^{xiv} argued that the record should be reopened for receipt of the affidavit.

The Agency’s motion to strike is hereby granted, but only because the forum finds that the information in Exhibits R-4, R-4A, R-5, and R-5A is not necessary to fully and fairly adjudicate the case, with or without the additional information included in Murphy’s affidavit. The issue in this case is whether Respondent, through Cantu, threatened to evict Complainant if he did not take his medications. The forum finds that evidence regarding Respondent’s treatment of other residents who allegedly refused medication simply is not helpful in deciding that issue. One disabled resident’s refusal

of medication could cause the resident to act in ways very frustrating to Respondent's employees, while another resident's refusal might not cause any difficulties for them. Without detailed information regarding the nature of each resident's disabilities and behaviors, any analysis of Respondent's treatment of them would be too superficial to either support or refute a claim of disparate treatment based on the particular nature of Complainant's disabilities. Consequently, the forum rejects Respondent's argument that it did not evict or threaten to evict other residents who refused medication and that the forum should, therefore, infer that Respondent did not treat Complainant in that manner. Nor has the forum given any weight either to the Agency's argument that Exhibits R-4, R-4A, R-5, and R-5A demonstrate that only residents who have refused psychoactive medications no longer reside at Respondent's facilities or to the Agency's intimation that some bad act on Respondent's part caused those residents to leave.

RESPONDENT'S EXCEPTIONS

Respondent's first exception challenges the ALJ's denial of its motion to dismiss. Respondent renews its argument that it cannot have violated ORS 659.430 unless it treated Complainant, a disabled resident, differently from non-disabled residents. Respondent implicitly concludes that, because it had no non-disabled residents, its actions toward Complainant cannot constitute a statutory violation.

Respondent's argument fails for the reasons discussed earlier in this Opinion. Under the plain language of the statute, it was unlawful for Respondent to "discriminate" by making any "restriction against" Complainant "because of" his disability. No comparison with non-disabled persons was necessary if the Agency could prove by other means that Respondent's restrictions against Complainant were based on his disability. As discussed above, the Agency proved just that.

Respondent argues that such an interpretation of the phrase "restriction against" does not comport with the usual understanding of the word "discrimination," which requires comparison of one group of people with another. Whatever the merits of that argument in a case where a statute prohibits only "discrimination" without further explanation, it has no relevance here. ORS 659.430 *defines* discrimination to include a "restriction against" a person "because of" that person's disability. Nothing in the statute requires the Agency to prove that Respondent treated disabled persons differently from non-disabled persons. The exception is denied.

In its second exception, Respondent contends that the award of \$10,000.00 in mental suffering damages is excessive. In support of that argument, Respondent cites a string of cases from other jurisdictions awarding less money to plaintiffs who had been discriminated against in housing. Those cases have no bearing on the appropriate amount of damages in a case in *this* forum, where the commissioner serves as ultimate fact-finder. The commissioner would be similarly uninfluenced by the citation of cases from other jurisdictions in which plaintiffs were awarded significantly larger sums of money. The commissioner has compared the facts of this case to the facts in other Bureau of Labor and Industries cases in which he awarded damages for mental suffering, and has awarded an amount -- \$10,000.00 -- he finds commensurate with the degree of mental anguish Complainant suffered. The exception is denied.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2), ORS 659.060(3) and ORS 659.435, and as payment of the damages assessed as a result of Respondent's violation of ORS 659.430(1), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Dennis Murphy Family Trust, dba Mt. Scott Residential Care Home**, 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 David E. Cummings** in the amount of **TEN THOUSAND DOLLARS AND NO CENTS (\$10,000.00)**, representing compensation for mental suffering caused by Respondent's unlawful act, plus interest at the legal rate on the sum of \$10,000.00 from the date of the final order in this case until paid.
- 2) Cease and desist from making restrictions against any resident because of that resident's disabilities; and
- 3) Post in a conspicuous place in the shared living area of the Lambert Street facility copies of the current versions of MCARs 891-018-100 (the Residents' Bill of Rights) and R-891-060-142 printed in at least 12 point type, to be replaced with the new rules whenever those rules may be amended, together with a notice that any person who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

ⁱ Respondent had objected to introduction of the exhibit because it feared the Agency would allege that the content of the 1996 document demonstrated a separate violation of ORS 659.430. Case presenter Gerstenfeld stated that the Agency would not seek to amend the Specific Charges to allege such a violation.

ⁱⁱ Cantu's last name used to be Benfit, and many of the documents in evidence refer to her by that name. This order refers to the witness as "Cantu" throughout.

ⁱⁱⁱ Cantu testified that this required is imposed by MCAR R-891-060-560. That rule, however, provides only that unused medications "shall be disposed of according to the pharmacist's recommendations."

The forum infers from the rule and Cantu's testimony that pharmacists have recommended to Respondent that medications be disposed of after one hour has passed.

^{iv} Respondent's employees also give residents verbal promptings to do such things as take showers or change their clothing.

^v The single page of the hospital report does not include a formal diagnosis.

^{vi} Gillins' November 11, 1997, chart note states that Complainant told her that the "supervisor" had said that if he did not take his medication, he would be evicted. For the reasons set forth in Finding of Fact – the Merits 41, the forum finds that chart note, which corroborates Complainant's testimony, reliable and relies on it in making this finding.

^{vii} See Finding of Fact – the Merits 34, *supra*.

^{viii} Although Complainant's testimony was not reliable, it was credible in that Complainant clearly believed that the events he described in his testimony had, in fact, occurred.

^{ix} This note apparently records two separate telephone conversations; no witness believed a telephone conference between Complainant, Cantu, and Gillins had occurred.

^x In any event, it is difficult to see how a typographical error would result in the emphasized statement being substantively inaccurate. No witness testified that Cantu told Gillins that she "would not" evict Complainant if he did not take his medications, which is the only type of statement that might get misrecorded as a statement that Cantu "would" evict him. It also defies common sense to suggest that Gillins would have attempted to memorialize a statement that Complainant "would not" be evicted if, as Cantu testified, the subject of eviction never was raised.

^{xi} Even if it were true that Respondent never evicted or threatened to evict other residents, the result in this case would be the same, as explained in the Opinion section of this Order.

^{xii} The Agency also alleged that Complainant fell within the definition of "disabled person" because Complainant had a "record of such an impairment" (see ORS 659.400(2)(b)) and because Respondent "regarded [Complainant] as having such an impairment" (see ORS 659.400(2)(c)). Because the forum

finds that Complainant is a disabled person because he has a mental impairment that substantially limits one or more major life activities, it need not address these alternate theories.

^{xiii} As discussed in the last section of this Opinion, the forum has given no weight to the argument made in the Agency's supplemental closing argument regarding Respondent's treatment of other disabled individuals. Consequently, the forum rejects the Agency's alternative theory that Respondent did subject Complainant to disparate treatment based on the "particular type of disorder" from which he suffered.

^{xiv} OAR 839-050-0410 provides:

“The administrative law judge shall reopen the record where the administrative law judge determines additional evidence is necessary to fully and fairly adjudicate the case. In making this determination, the administrative law judge shall consider whether the evidence suggested for consideration could have been gathered prior to hearing.”