

In the Matter of
MURRAYHILL THRIFTWAY, INC.

Case No. 69-97

June 6, 2000

FINAL ORDER ON RECONSIDERATION

SYNOPSIS

Where Complainant, an African American male, was subjected to repeated racial insults from his white immediate supervisor, the forum relieved Respondent of liability based on its exercise of reasonable care to prevent and correct promptly any harassing behavior and Complainant's unreasonable failure to take advantage of any preventive or corrective opportunities provided by Respondent. Respondent was not liable for racial insults made to Complainant by a customer because the Agency did not prove that Respondent knew or should have known of the insults. Complainant's discharge was not due to his race or in retaliation for his opposition to the racial harassment. Accordingly, the commissioner dismissed the complaint and specific charges. ORS 659.030(l)(a)(b)(f).

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 November 12, 13, and 14, 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. Anthony Burks (Complainant) was present throughout the hearing and was not represented by counsel. Respondent Murrayhill Thriftway, Inc. was represented by Craig R. Berne, Attorney at Law. Thomas Calcagno was present as Respondent Murrayhill's representative on November 12th and 13th. Matthew Marcott, Respondent Murrayhill's president, was present as Respondent Murrayhill's

representative on November 14th. Respondent George Canfield failed to appear in person or through a representative.

The Agency called as witnesses, in addition to Complainant, Respondent Murrayhill's former employees Dora Sweet, Keith Glackin, Robert Hesla, Tiffany Cardwell (by telephone), Tony Pittman (by telephone), and Caroline Majchrzak; Respondent Murrayhill's current employees Charles Sweet, Hollie Prescott, and Thomas Calcagno; Respondent Murrayhill's customer Timothy Repp; and Agency Senior Investigator Jane MacNeill.

Respondent Murrayhill called as witnesses current employees Alexandra Maughan and Barbara Rosenberger (by telephone); former employees Jennifer Maughan, Michael Bushey, Katherine McGregor, and Douglas Bryant; and Murrayhill's corporate president, Matthew Marcott.

Administrative exhibits X-1 to X-15 and Agency exhibits A-1, A-3, A-7 through A-17, A-20 and A-21, A-23 through A-26, and A-30 through A-32 were offered and received into evidence. Respondent exhibits RM-1 through RM-10, and RM-12 through RM-15 were offered and received into evidence. The record closed on May 15, 1998. Before the record closed, administrative exhibits X-16 through X-30 were received into evidence.

On May 12, 1999, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, having fully considered the entire record in this matter, issued the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order in this case. Thereafter, Complainant (Petitioner on Appeal), sought judicial review in the Oregon Court of Appeals. On July 20, 1999, through counsel, the Agency filed its Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals for the

specific purpose of correcting a typographical error in the order, specifically, the incorrect agency number on the order.

On July 28, 1999, having revised the order to include the correct agency case number originally assigned to this case, I issued an Amended Final Order correcting the agency number on the order from 57-98 to 69-97.

On April 10, 2000, through counsel, the Agency filed its Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals.

On June 6, 2000, having reconsidered the record and the legal issues presented in this case, I make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Final Order on Reconsideration.

FINDINGS OF FACT -- PROCEDURAL

1) On March 27, 1996, Complainant, an African American,¹ filed a verified complaint with CRD alleging that he was the victim of the unlawful employment practices of Respondent Murrayhill Thriftway, Inc. (hereinafter "Murrayhill") in terms and conditions and termination 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 July 16, 1997, the Agency prepared for service on Respondents Specific Charges alleging that Murrayhill discriminated against Complainant in his employment based on his race in terms and conditions of employment in violation of ORS 659.030(l)(b) and that George Canfield, an employee of Murrayhill, had aided and abetted Murrayhill in the commission of the alleged unlawful employment practice. Both Murrayhill and Canfield were named as Respondents.

3) With the Specific Charges, the forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a 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 August 4, 1997, counsel for Murrayhill filed an answer in which it denied the allegation mentioned above in the Specific Charges, and stated numerous affirmative defenses.

5) On August 7, 1997, the Agency moved to amend the Specific Charges. The amendment was based on "newly acquired evidence." Specifically, the Agency sought to add new allegations that Complainant had been subject to discriminatory terms and conditions of employment based on his race in violation of ORS 659.030(l)(b) and that Complainant had been terminated in violation of ORS 659.030(l)(a) based on his race and in violation of ORS 659.030(l)(f) in retaliation for Complainant's opposition to unlawful employment practices. The Agency also sought to increase the damages sought to \$40,000 for mental suffering and \$7,000 for back pay.

6) On August 11, 1997, counsel for Murrayhill moved that the Agency's motion to amend be denied based on the Agency's failure to identify the newly acquired evidence or explain why such evidence could not have been found before.

7) On August 26, 1997, the ALJ granted the Agency's motion to amend based on OAR 839-050-0140. The ALJ postponed the hearing date from September 16, 1997, to a later date to be agreed upon by the participants based on the anticipated need for additional discovery. In the same Order, the ALJ issued a Discovery Order requiring Respondents and the Agency to submit a case summary pursuant to OAR 839-050-0200 and 839-050-0210 ten days prior to the new hearing date.

8) On September 3, 1997, the ALJ issued an Amended Notice of hearing resetting the hearing date to November 12, 1997.

9) On September 18, 1997, counsel for Murrayhill filed an answer to the Amended Specific Charges in which it denied the allegations mentioned above in the Amended Specific Charges and added a new affirmative defense.

10) On October 31 and November 3, 1997, respectively, Murrayhill and the Agency timely filed case summaries.

11) At the start of the hearing, the attorney for Murrayhill stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

12) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Murrayhill of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) At the commencement of the hearing, on November 12, the Agency moved for an order finding Canfield in default on the grounds that he had been avoiding service but had apparently been served with the Specific Charges and had not filed an answer, and that he was not present at the hearing.

14) In response to the Agency's motion, the ALJ ruled Canfield provisionally in default, subject to proof by the Agency that he had been served with the Specific Charges and proof from Canfield concerning the reason for his alleged default.

15) On November 14, 1997, the ALJ withdrew the provisional order of default against Canfield on the basis that he had not been served with the Specific Charges until November 12, 1997.

16) On November 17, 1997, the ALJ received a telephone call from a person identifying himself as George Canfield who inquired what to do regarding the hearing notice he had apparently received. The ALJ advised Canfield he must file a written

answer within 20 days of receiving the notice and notified the other participants, in writing, of the ex parte contact.

17) On December 1, 1997, Canfield filed a written answer responding to the Amended Specific Charges.

18) On January 7, 1998, the ALJ issued an interim order stating that the hearing would be reconvened on May 20, 1998, to allow Canfield to present his defense, and that supplementary case summaries were due on May 10, 1998.

19) On February 17, 1998, the Hearings Unit received a letter from attorney David J. Hollander stating that he had been retained by Canfield with regard to this case. Hollander enclosed an answer to the Amended Specific Charges. The answer denied that Canfield had engaged in or aided and abetted any unlawful employment practices as alleged and raised two affirmative defenses.

20) On March 4, 1998, the ALJ, on his own motion, allowed substitution of the answer filed by Hollander for the *pro se* answer filed on December 1, 1997, by Canfield.

21) On May 8, 1998, counsel for Canfield filed a pre-hearing statement of proof as a case summary.

22) On May 13, 1998, counsel for Canfield filed a motion to dismiss the charges against Canfield based on the Agency's failure to state a claim within the applicable statute of limitations.

23) On May 8, 1998, counsel for Murrayhill filed a supplementary case summary.

24) On May 12, 1998, the Agency moved to delete Canfield as a Respondent and to dismiss the allegations pertaining to Canfield's aiding and abetting Murrayhill.

25) On May 13, 1998, the ALJ issued an order deleting Canfield as a Respondent, dismissing the allegations pertaining to Canfield's aiding and abetting Murrayhill, and canceling further hearing.

26) The proposed order, which contained an exceptions notice, was issued on November 23, 1998. Under a timely requested extension of time, Respondent filed exceptions on January 11, 1999. Respondent's exceptions are addressed in the Opinion section of this Order.

FINDINGS OF FACT -- THE MERITS

1) Complainant is an African American male.

2) At all times material herein, Respondent Murrayhill Thriftway, Inc. was an Oregon corporation engaged in the operation of a grocery store in Beaverton, Oregon, and was an employer in Oregon utilizing the personal services of one or more persons. The Marcott family controlled Murrayhill and several other grocery stores in the Portland area.

3) George Canfield was employed by Murrayhill as a grocery manager from March 1995 until shortly after a robbery that occurred on or about October 27, 1995. He was Complainant's immediate supervisor during Canfield's employment.

4) Complainant was hired by Respondent Murrayhill on or about October 10, 1993 and worked until March 1995 on the night crew.

5) On October 10, 1993, Complainant signed Respondent Murrayhill's two page "Harassment Policy" as an acknowledgment of having read and understood it. In relevant part, the Policy read as follows:

" * * * Decisions involving every aspect of the employment relationship will be made without regard to an employee's race, color, creed, sex, * * *. Discrimination or harassment based upon these or any other factors is totally inconsistent with our philosophy and will NOT be tolerated.

"Any employee who believes that they have been the subject of harassment should report the alleged conduct immediately to the store

manager and/or store owner. A Harassment Complaint Form is available for this purpose. A confidential investigation of any complaint will be undertaken immediately.

"Retaliating or discriminating against an employee for complaining about harassment is against the policies of this company and prohibited by law. Employees are encouraged to come forward with information pertaining to this type of behavior with the assurance that there will be NO RETALIATION PERMITTED.

"The Company recognizes that the issue of whether harassment has occurred requires a factual determination based on all the evidence received. The Company further recognizes that false accusations of harassment can have serious effects on innocent people. We trust that all employees will act in a responsible and professional manner to establish a pleasant working environment free of harassment and/or discrimination.

"SEXUAL HARASSMENT

"Sexual harassment is illegal and against the policies of this company.

"Sexual harassment is defined by OAR 839-07-550² as:

'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 of and (sic) individual's employment, or
- (2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such an individual, or
- (3) Such conduct is of such frequency and/or severity that it has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.'

"The following are examples of sexual harassment:

"**VERBAL**

"Sexual innuendo, suggestive comments, insults, threats, jokes about gender-specific traits or sexual propositions

"**NONVERBAL**

"Suggestive or insulting noises, leering, whistling or making obscene gestures

"**PHYSICAL**

"Touching, pinching, brushing the body, coercing sexual activities or assault"

6) Walt Souther was Respondent Murrayhill's store manager from the date of Complainant's hire until the second week in July 1995, when Tom Calcagno replaced Souther.

7) In March 1995 Complainant was promoted to daytime grocery clerk. His immediate supervisor was Canfield.

8) During his employment at Murrayhill, Canfield's supervisory responsibilities included instructing Complainant and others as to their duties, as well as general responsibility for the operation of the store when all other supervisors ranked above him were gone. When he was responsible for the operation of the store, Canfield was called a person in charge (PIC). There was no evidence placed in the record to establish that Canfield had the authority to hire, fire, discipline or promote, or participate in or recommend such actions.

9) Shortly after Complainant's promotion to daytime grocery clerk, Canfield, in Complainant's presence, made a remark about "how awful" a black man and a white woman who were together in the store appeared to him. In response, Complainant told Canfield that he has a daughter who is of mixed race and that he found Canfield's remarks offensive.

10) A week later, Complainant told Canfield that he was going to be married to a Caucasian woman and showed him a picture of his fiancée. Canfield asked Complainant how he thought people would "perceive" Complainant "married to a white woman." Complainant told Canfield skin color shouldn't matter.

11) Complainant then took ten days off work to get married and honeymoon in the Caribbean Islands. When he returned, Canfield asked him how people felt about him "being married to a white woman on a cruise ship with predominately Caucasian people?"

12) Canfield's remarks intimidated Complainant and caused him to believe that Canfield, his superior, was a racist and had some kind of hatred towards mixed race couples.

13) Complainant did not complain to any other supervisor at Murrayhill about the remarks cited in Findings of Fact – The Merits ##9-11.

14) Shortly after Complainant's honeymoon, Canfield began addressing Complainant as "Toby." Complainant told Canfield that his name was "Tony" and that he objected to being called "Toby" because "Toby" was a character in "Roots." Canfield then told Complainant "Come here, boy." After that, Canfield called Complainant "Toby" and "boy" one or two times a week until Canfield left Murrayhill. Canfield often called Complainant these names at the front end of the store by the checkstands.

15) Canfield's racial remarks and name calling intimidated Complainant because he believed Canfield, his superior, was a racist. Complainant felt nervous when Canfield called him "Toby" and told him "Come here, boy." He felt "chained and whipped," like his "ancestors felt sometime years ago."

16) During the summer of 1995, Keith Glackin heard Canfield refer to Complainant as "Toby" and understood it as a reference to Complainant's race based on a remark Complainant made to Canfield. Glackin observed that Complainant did not like being called "Toby." There was no evidence placed on the record that Glackin ever brought these remarks to the attention of any other supervisors, managers, or owners of Murrayhill.

17) Glackin started work at Murrayhill sometime between March and May 1995. Glackin worked as a supervisor/person-in-charge (PIC) in the grocery section. Glackin's duties were similar to those of Canfield. There was no evidence placed in the record to establish that Glackin had the authority to hire, fire, discipline or promote.

18) Complainant did not complain to anyone except Canfield about Canfield calling him "Toby" and "boy."

19) Complainant did not file a Harassment Complaint Form regarding Canfield's racial remarks and name calling.

20) In late October or early November 1995, Canfield resigned from Murrayhill following an incident in which Murrayhill was allegedly robbed by a male African American.

21) Canfield's departure from Murrayhill's employ left the store in need of another supervisor, and Glackin "initially suggested" that Complainant be promoted. Complainant was subsequently promoted to a supervisory/PIC position and given a raise to \$13.25/hr. Complainant's new responsibilities were essentially the same ones that Canfield had. There was no evidence placed in the record to establish that Complainant had the authority to hire, fire, discipline or promote, or participate in or recommend such actions.

22) During the first week of January 1996, a woman came into Respondent Murrayhill's store with her dog. Complainant approached her and stated it was against a city health ordinance for her dog to be in the store. At the checkout stand, she swore at Complainant and told him "niggers don't belong in Oregon" and that she would "have your [Complainant's] job." The customer and Complainant then went outside the store, where she told Complainant "Niggers don't belong in Beaverton; I'm going to have your job, you motherfucker."

23) After the customer left, Complainant went back inside the store and described the incident in detail to Robert Hesla, a cashier, who advised him to talk to the store manager. The next day, Complainant described the incident in detail to Doug

Bryant, Murrayhill's grocery manager. Bryant advised Complainant to point out the customer the next time she came into the store.

24) Within two days, the woman returned to the store with her dog inside her coat. She glared at Complainant, but did not speak to him. Bryant was not in the store, so Complainant went to Calcagno and told him that the woman who had brought the dog inside the store and who had "made these complaints" and was "saying these things" was in the store again. Complainant told Calcagno this because he believed Murrayhill should make sure a similar incident didn't happen again and because he feared the woman's threats about his job.

25) Calcagno did not talk to the woman.

26) The woman came into Murrayhill's store after that but did not speak to Complainant or make any more racial remarks.

27) Complainant felt "devastated" that Bryant and Calcagno took no action after he complained about the woman. He believed that Canfield's previous racial remarks and Bryant's and Calcagno's failure to respond to his complaints about the woman showed that Murrayhill "tolerates this type of harassment."

28) On January 12, 1996, Tom Calcagno met with Complainant and discussed complaints by fellow workers regarding Complainant's management style. Calcagno made a written record of the meeting, which states as follows:

"Met with Tony and discussed complaints by fellow workers w/regards to his management style. Complaints from Tiffany, Hollie, Charlie, Tony P., Shannon, Jennifer, Courtney. In General - rudeness, abrasiveness, and lack of respect shown to workers. Recommended changing approach and attitude. Verbal warning about women employees being asked out on dates."

29) On January 22, 1996, Cindy Rose, a courtesy clerk employed by Murrayhill who was under 21 years of age, filed a written complaint with Tom Calcagno alleging that, at work, Complainant had "pinched her butt," put his arms around her,

asked her to party with him. Rose told Calcagno that she was afraid of working with Complainant. Earlier, Rose had told Tony Pittman, another PIC/supervisor employed at Murrayhill, that Complainant had inappropriately touched her and Jennifer Maughan, tried to ask them out for dates, and touched their butts.

30) On January 23, 1996, Calcagno met with Complainant and informed him that allegations of sexual harassment had been made against him that generally involved touching, rubbing, and asking individuals out on dates. Complainant asked who had made the allegation, and Calcagno would not disclose their names. Complainant denied sexually harassing anyone at Murrayhill.

31) Calcagno instructed Complainant to take some time off while Calcagno investigated the complaints. Complainant took off January 24th and 25th.

32) Calcagno instructed Complainant to take time off from work because he did not want minor girls working under Complainant another day.

33) When a complaint of harassment is filed, Murrayhill's policy is to conduct a confidential investigation and keep the names of the complaining parties as confidential as possible during the investigation.

34) On January 24, 1996, Jennifer Maughan, a 17-year-old courtesy clerk employed by Murrayhill, filed a written complaint with Calcagno alleging that, at work, Complainant had brushed by her, kissed her, and invited her to go to a dance/bar for persons over 21 years of age. Maughan also reported that she was in fear of working with Complainant because of Complainant's sexual behavior towards her. Earlier in the month, Maughan had verbally complained to Tony Pittman that Complainant intimidated her and had inappropriately touched her.

35) In response to the complaints of Rose and Maughan, Calcagno conducted an investigation by interviewing Mike Bushey, Debbie Gabel, Barbara Rosenberger, and Tiffany Duong (now Tiffany Caldwell).

36) Bushey told Calcagno that he saw Complainant kiss Jennifer Maughan in a way that was unwelcome. Gabel told Calcagno that she had seen Complainant walk around with his arms around the neck of Jennifer Maughan and Courtney, another female employee. Rosenberger told Calcagno that she had seen Complainant touching Jennifer Maughan around her waist and putting his face into her neck area, "coming on to" a female Oriental customer, and touching and rubbing Rose in an inappropriate manner.

37) Calcagno discussed the sexual harassment allegations against Complainant and his investigation with Matthew Marcott, Murrayhill's president, and Pam Garcia, Marcott's sister. Calcagno recommended that Complainant be terminated because he would not be able to effectively supervise any longer due to the sexual harassment and due to the severity of the harassment, in that it involved minor females and other females who felt they could no longer work with Complainant.

38) On January 26, 1996, Calcagno informed Complainant that he was terminated due to sexual harassment.

39) Complainant earned \$13.25/hr. at the time of his termination.

40) Complainant's next employment after his termination from Respondent Murrayhill was at Safeway in March 1996. At Safeway, Complainant earned \$14.00/hr.

41) In March 1997, Art Majchrzak brought a letter to Matthew Marcott detailing sexual harassment allegations against John Smolders, the director of baking for the multiple stores owned by the Marcott family. Marcott referred the matter to Calcagno and instructed him to investigate. Majchrzak, Caroline Reid, Dora Sweet, and Linda

Evans, all employees of Murrayhill's bakery, completed Harassment Complaint Forms and submitted them to Calcagno. In the Forms, they alleged that Smolders had engaged in sexual harassment consisting of the following: (a) Asking Majchrzak "How does it feel to fuck your own boss?;" (b) Saying that he and his wife only had sex twice a year but he was still happy; and (c) Lifting his apron up and telling Sweet "This will get you five dollars" in response to her joking inquiry about when she would get a raise. There were no allegations that Smolders had touched anyone or that anyone was in fear of him.

42) Calcagno investigated the incident by speaking with Reid, Sweet, Evans, and Majchrzak. He did not speak to Smolders because Smolders was not his employee and was "in some ways above me [Calcagno] as far as his participation in the company." Calcagno reported back to Marcott, who informed Smolders of the allegations without disclosing the identity of the complainants. Smolders denied the allegations, and Marcott warned him that any future remarks of the type alleged would be grounds for disciplinary action up to and including termination. Subsequently, Calcagno followed up by asking Reid and the others on two occasions about Smolders' behavior.

43) Smolders was not terminated because the allegations against him did not involve allegations of touching or harassment of minor females, and the complaining employees did not express that they were intimidated by or in fear of Smolders.

44) In early 1995, Robert Hesla was employed as store manager of Baseline Thriftway, another grocery store in the Portland area owned by the Marcotts. Hesla received a complaint alleging that a white male employee had commented to a cashier "Linda, you shouldn't bend over like that; it really turns me on." Hesla suspended the employee while investigating the complaint. During his investigation, Hesla received a

second complaint that the same employee, in front of three witnesses, had lifted his apron and invited a deli clerk to "Take a break on this." Hesla fired the employee after confirming the allegations of the complaints.

45) On December 19, 1995, Alexandra Maughan, a checker at Murrayhill and Jennifer Maughan's mother, completed a Harassment Complaint form alleging that Dennis Normoyle, a supervisor, had told her that he hadn't had sex since his wife left, asked Maughan about her sexual activity, then subsequently suggested that they should "take care of each other's needs" and that Maughan should "come up with a plan." Maughan told Calcagno that she felt she could keep working with Normoyle as long as he did not bother her again. Calcagno questioned Normoyle about the allegations on December 29, 1995, and followed up by asking Maughan a month later if Normoyle had bothered her again. Normoyle, who is about the same age as Maughan, did not bother Maughan again.

46) Normoyle was not terminated because the allegations against him did not involve allegations of touching or harassment of minor females, and the complaining employees did not express that they were intimidated by or in fear of Normoyle.

47) In the spring of 1996, John Atterberry, a male employed in Murrayhill's health and beauty aids department, brought the back of his hand in contact with Dora Sweet. Sweet complained to Caroline Reid (now Majchrzak), head of the bakery department, about this. Two other women also complained to Matthew Marcott about Atterberry invading their personal space. There were no complaints that anyone was afraid of or intimidated by Atterberry. Either Linda Harris or Pam Garcia, Marcott's sisters, talked to Atterberry about this complaint, and no more complaints were received about Atterberry.

48) Atterberry was not terminated because Calcagno and the Marcott family were not aware that he had touched anyone and the complaining employees did not express that they were intimidated by or in fear of Atterberry.

49) In the summer of 1997, Calcagno fired Kyle, a learning disabled white male, after Calcagno observed that Kyle had been touching female employees after Calcagno warned him not to. No one had complained to Calcagno about Kyle's behavior before Calcagno terminated him.

50) Complainant's testimony was not wholly credible. His recollection of dates and time frames was confused, and at times, clearly in error. For example, he testified that he was hired in October 1993, then worked on night crew six months to a year before his promotion to daytime grocery clerk, at which time Canfield became his supervisor for the next seven months. He testified that Canfield made racially harassing comments to him in March and April 1994, just prior to and after his marriage, whereas his complaint clearly states the harassing comments began in March 1995. Complainant also testified that he told Calcagno about these comments in March 1995, but the evidence clearly shows that Calcagno did not become the store manager until July 1995. He testified that he was made a supervisor in November 1994 before being reminded that it was actually in 1995. Regarding the woman/dog incident, Complainant testified that he walked out of the store so the woman couldn't see him, whereas another credible witness testified that Complainant followed the woman out of the store. Testimony by a different credible witness established that if Complainant really wanted to avoid the woman, he could have done it by going to the back of the store or upstairs in the store, instead of going outside where he was bound to encounter the woman again when she left the store. Finally, Complainant's blanket denial of all the allegations of sexual harassment is simply not credible, given the number of credible witness

statements to the contrary. Accordingly, the forum gave Complainant's testimony less weight whenever it conflicted with other credible evidence on the record.

51) Thomas Calcagno's testimony was not wholly credible. His ability to recall events was suspect, but not selective. For example, he was unable to recall whether or not Complainant complained to him about the woman with the dog. He made statements to a representative of the Employment Department that were at odds with his testimony at the hearing. Based on Calcagno's statements, the Employment Department issued an administrative decision with findings of fact stating that "During the year 1995, employer [Respondent Murrayhill] received verbal complaints from female employees regarding your [Complainant's] sexual behavior" and "On November 11, 1995, your employer [Respondent Murrayhill] held a meeting with you [Complainant] to discuss your behavior regarding female employees and a memo was issued." In contrast, Calcagno stated at the hearing that no one complained about Complainant before January 12, 1996. He testified he thought Tony Pittman told him that he had seen Cindy Rose and Complainant physically touching, but could not explain why he did not write this down. He also wrote down that Shannon Viera stated she had been subject to verbal harassment from Complainant and witnessed him touching others from behind, a statement that was contradicted by his written notes. Accordingly, the forum gave Calcagno's testimony less weight whenever it conflicted with other credible evidence on the record.

52) The testimony of Robert Hesla, Keith Glackin, Hollie Prescott, and Charles Sweet was credible.

53) The testimony of Jennifer Maughan was not entirely credible. Her testimony was inconsistent on several points. She testified on direct that Complainant had intentionally brushed against her "maybe 10 times," then on cross-examination

testified that all the brush-ups except for one were unintentional. She testified on direct that Complainant kissed her on January 23rd, then on cross testified the incident actually occurred a day earlier. She also testified that she signed Murrayhill's sexual harassment policy in October 1995, when she in fact signed it on January 21, 1996. Accordingly, the forum gave Maughan's testimony less weight whenever it conflicted with other credible evidence on the record.

54) The testimony of Alexandra Maughan was not entirely credible, in that her memory was suspect. Relative to the time in which Complainant was terminated, she testified "Could be right around six months, could be less" as the amount of time that Jennifer, her daughter, reported Complainant's first inappropriate touching to her. In contrast, Jennifer's testimony established that she did not start working for Murrayhill until three months before Complainant was terminated. Accordingly, the forum did not believe her testimony as to specific times and dates and gave her testimony less weight whenever it conflicted with other credible evidence on the record.

55) The testimony of Tiffany Caldwell was not credible. She was biased against Jennifer Maughan because Maughan touched Pittman, Caldwell's boyfriend. In an apparent attempt to help Complainant, she also testified that she heard Jennifer Maughan invite Complainant to a party and that Jennifer and Alexandra Maughan told her they had invited Complainant to their house for dinner. In contrast, Complainant did not mention these incidents, despite the fact that they would have bolstered his case.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Murrayhill was an employer in the state of Oregon utilizing the personal services of one or more persons.

2) Respondent Murrayhill employed Complainant.

3) Complainant is an African American male.

4) Respondent George Canfield was employed by Respondent Murrayhill between March and October 1995 and was Complainant's immediate supervisor in that period of time.

5) Canfield engaged in verbal conduct, consisting of racial remarks referring to mixed racial marriages and addressing Complainant as "Toby" and "boy," directed at Complainant because of his race between March and October 1995.

6) Canfield's racial remarks were unwelcome to Complainant and were sufficiently severe to have created an intimidating, hostile, and offensive working environment for Complainant.

7) Complainant did not complain to Calcagno, Murrayhill's store manager, about any racial remarks made to him by Canfield.

8) At all times material, Respondent Murrayhill had in place a written Harassment Policy that prohibited harassment in the workplace based on race, color, sex, and other protected classes. The Policy specified that employees who believed they had been harassed should report the harassment immediately to the store manager and/or store owner and stated that a confidential investigation would be undertaken immediately, with **"NO RETALIATION PERMITTED."** (*emphasis in original*)

9) Respondent Murrayhill's Harassment Policy was effectively used by employees to file sexual harassment complaints against Complainant and other males.

10) Complainant was aware of Respondent Murrayhill's Harassment Policy, but unreasonably failed to utilize it to complain about Canfield's racial remarks or the racial remarks directed at him by the woman who came into the Murrayhill store with her dog. Complainant did describe the latter incident to Respondent Murrayhill's grocery manager.

11) Canfield's racial remarks caused Complainant to experience mental suffering.

12) Respondent Murrayhill informed Complainant of the general nature of the sexual harassment allegations made against him, and Complainant denied engaging in any sexual harassment.

13) Prior to Complainant's termination, Respondent Murrayhill reasonably believed that Complainant had sexually harassed minor females employed by Respondent Murrayhill through physical touching and verbal conduct.

14) Complainant was discharged based on Respondent Murrayhill's good faith belief that Complainant had sexually harassed minor females employed by Respondent Murrayhill through physical touching and verbal conduct.

15) Complainant was not treated differently than non-African American males who were the subject of sexual harassment complaints by Respondent Murrayhill's female employees.

16) Complainant's race was not a factor in his discharge.

17) Complainant's complaints of racial harassment were not a factor in his discharge.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Murrayhill Thriftway, Inc., was an employer subject to the provisions of ORS 659.010 to 659.110.

2) The actions, statements, and motivations of Thomas Calcagno, Matthew Marcott, and Pam Garcia are properly imputed to Respondent Murrayhill Thriftway, Inc. herein.

3) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

- 4) ORS 659.010(l) provides, in part:
"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 race to bar or discharge from employment such individual. * * *"

Respondent Murrayhill Thriftway, Inc. did not discharge Complainant due to his race, African American, and did not violate ORS 659.030(l)(a).

- 5) ORS 659.010(l) provides, in part:
"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 race to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Former OAR 839-050-01 0 provided, in part:

"(3) Harassment on the basis of protected class is an unlawful employment practice if the employer knew or should have known both of the harassment and that it was unwelcome. Unwelcome conduct of a verbal or physical nature relating to an employee's protected class is unlawful when such conduct is directed toward an individual because of the individual's protected class and

“* * * * *

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

"(d) The standard for determining harassment will be what a reasonable person would conclude if placed in the circumstances of the person alleging harassment."

Current OAR 839-005-0010³ provides, in relevant part:

"(4) Harassment in employment based on an employee's protected class is a type of intentional unlawful discrimination. In cases of unlawful sexual harassment in employment see OAR 839-007-0550.

"(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when:

"(A) Substantial evidence of the four elements of OAR 839-005-001 0 (1) is shown; and

"(B) Such conduct is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment, * * *

"(b) 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.

“* * * * *

"(d) Harassment by Supervisor, No Tangible Employment Action: Where harassment by a supervisor with immediate or successively higher authority over the 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:

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

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

"(f) Harassment by Non-Employees: An employer is liable for harassment by non-employees in the workplace, where the employer or its agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases, the Civil Rights Division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees."

Under ORS 659.030(l)(b) and OAR 839-005-0010, Respondent Murrayhill Thriftway, Inc. is not liable for Respondent Canfield's racial remarks about "mixed marriages" and "Toby" and "boy" that were directed at Complainant based on his race/color, African-American.⁴ Respondent Murrayhill Thriftway, Inc. did not subject Complainant to discriminatory terms and conditions of employment, in violation of ORS 659.030(l)(b), through a customer who made insulting and demeaning remarks based on Complainant's race, African American. Respondent Murrayhill Thriftway, Inc. did not subject Complainant to disparate terms and conditions of employment in the enforcement of their Harassment Policy in violation of ORS 659.030(l)(b).

6) ORS 659.030(l) provides, in part:

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

"(f) For an employer, because of an individual's race * * * to discharge any person because the person has opposed any practices forbidden by this section * * *."

Respondent Murrayhill Thriftway, Inc. did not discharge Complainant because of Complainant's opposition to racial harassment and did not violate ORS 659.030(l)(f).

7) ORS 659.010(1) provides, in part:

"For the purposes of ORS 659.010 to 659.110 it is an unlawful employment practice:

" * * * * *

"(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110 * * * or attempt to do so."

The Specific Charges alleging aiding and abetting on the part of Respondent Canfield have been dismissed.

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

OPINION

1. INTRODUCTION.

In this case, the Agency charged that Respondent Murrayhill unlawfully discriminated against Complainant in terms and conditions of employment and discharge from employment. The Agency further charged that Respondent George Canfield, an employee of Respondent Murrayhill, aided and abetted Respondent Murrayhill by calling Complainant racially derogatory names.

The charges against Respondent Canfield were dismissed before the record closed and will not be discussed in this Opinion. Accordingly, this Opinion will hereafter refer to Respondent Murrayhill as "Respondent."

2. RESPONDENT'S LIABILITY FOR CANFIELD'S RACIAL REMARKS.

Credible testimony by Complainant, Prescott, Glackin, and Charles Sweet establishes that Canfield was Complainant's supervisor with immediate authority over Complainant, and made racial remarks toward Complainant between March 1995 and October 1995. Specifically, Canfield made three remarks to Complainant concerning "mixed marriages" and Complainant's marriage to a white woman in March and April, then repeatedly addressed Complainant as "Toby" and "boy" from May through October. Under the circumstances, there can be no question that these remarks were directed at Complainant because of his race. Likewise, the history of race relations in

this country, common sense, and Complainant's reaction to Canfield's remarks establishes that the remarks were sufficiently severe to create a hostile, intimidating or offensive working environment for a reasonable person in the circumstances of Complainant, and in fact did so for Complainant.⁵ OAR 839-050-0010(4)(a)-(c).

The evidence did not show, and that Agency did not allege, that Canfield took, or caused to be taken, a tangible employment action against Complainant as a result of these remarks. Where actionable harassment occurs, but no tangible employment action is taken as a result, the forum applies the provisions of *current* OAR 839-005-0010(4)(d).⁶

The first level of analysis under OAR 839-005-0010(4)(d) is to determine whether Respondent "knew" of the harassment. If so, then Respondent's only available defense is that it took "immediate and appropriate corrective action." OAR 839-005-0010(4)(d)(A). In this case, the evidence is undisputed that no one but Canfield and Complainant knew of the "mixed marriage" remarks. Only one supervisory employee, Keith Glackin, a supervisor/PIC on the same level as Canfield, heard Canfield call Complainant "Toby." There is no credible evidence that Calcagno or Bryant, Respondent's manager and assistant manager, or the storeowners, were aware of it. The issue, then is whether, under subsection (4)(d)(A), knowledge by Canfield and Glackin is imputed to Murrayhill. The analysis begins with the rule's text. OAR 839-005-0010(4)(d) expressly distinguishes between an employer and a supervisor. Subsection (4)(d) begins with the premise that a supervisor has harassed a subordinate employee. Under subsection (4)(d)(A), the employer is liable "if the employer knew of the harassment." The conjunction "if" shows that the rule does not automatically impute to an employer knowledge of all instances of harassment committed by its supervisors.

The context – most notably, subsection (4)(d)(B) – confirms that interpretation. Subsection (4)(d)(B) makes an employer liable for a supervisor’s harassing behavior if the employer “should have known” about the harassment. As with subsection (4)(d)(A), that language shows that knowledge of a supervisor’s harassing behavior will not automatically be imputed to the employer.

Another aspect of the context bolsters this construction. ORS 659.030 was modeled on Title VII, and decisions interpreting Title VII are instructive in construing and applying the similar state law. See, e.g., *Mains v. Il Morrow, Inc.*, 128 Or App 625, 634, 877 P2d 88 (1994) (federal cases construing Title VII are “instructive” in interpreting ORS 659.030). OAR 839-005-0010(4)(d), a rule implementing ORS 659.030, was adopted against the backdrop of two 1998 decisions under Title VII: *Faragher v. City of Boca Raton*, 524 US 775, 118 S Ct 2275, 141 L Ed 2d 662 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 US 742, 118 S Ct ____, 141 L Ed 2d 633 (1998). In *Faragher* and *Ellerth*, the Court reiterated its holding in *Meritor Savings Bank v. Vinson*, 477 US 57, 106 S Ct 2399, 91 L Ed 2d 49 (1986), that in applying Title VII, courts should look for guidance in common-law principles of agency, as outlined in the *Restatement (Second) of Agency*. See, e.g., *Ellerth*, 141 L Ed 2d at 648-49. The Court stated the “general rule that sexual harassment by a supervisor is not conduct within the scope of employment.” *Id.* at 650. Consequently, section 219(1) of the *Restatement* – making a master liable for the torts of its servants committed while acting in the scope of their employment – will not apply to workplace harassment. *Ellerth*, 141 L Ed 2d at 649-50. The Court also analyzed *Restatement* section 219(2), setting forth principles under which an employer may be liable for an employer’s torts committed outside the scope of employment. Section 219(2)(a) renders a master liable in those circumstances where “the master intended the conduct or the consequences.” The Court explained that

section 219(a) “addresses direct liability, where the employer acts with tortious intent, and indirect liability, *where the agent’s high rank in the company makes him or her the employer’s alter ego.*” *Ellerth*, 141 L Ed at 651 (emphasis added). Thus, under the agency principles that inform Title VII, only the knowledge of certain high-ranking employees will be automatically imputed to the employer. OAR 839-005-0010(4)(d) was adopted in response to *Faragher* and *Ellerth*. Those agency principles thus bear on the rule as well.

Thus, the text and context of that rule show that the supervisor’s knowledge will be imputed to the employer only where the supervisor’s high rank in the company makes him or her the employer’s alter ego. Although Canfield and Glackin were supervisors, they occupied such a low level in the corporate structure – lacking the authority to hire, fire, discipline, or promote – that they cannot realistically be viewed as Murrayhill’s alter egos. This forum concludes, therefore, that because neither Murrayhill’s owners nor any members of upper management knew of Canfield’s harassment, that the “employer” did not know of the harassment.

The next level of analysis is set out in OAR 839-005-0010(4)(d)(B), which states that when a supervisor with immediate authority over an individual harasses that individual, but no tangible employment action is taken against the individual as a result of the harassment, the employer is liable if the employer "should have known" of the harassment.⁷ There is a presumption that the employer "should have known," unless the employer can prove a two-pronged affirmative defense by a preponderance of the evidence. First, the employer must prove that it "(i) * * * exercised reasonable care to prevent and correct promptly any harassing behavior." Second, that "(ii) * * * [Complainant] unreasonably failed to take advantage of any preventive or corrective opportunities provided by [Respondent] or to avoid harm otherwise."

In order to prevail on the affirmative defense contained in OAR 839-005-0010(4)(d)(B), Respondent has the burden of proving that it "exercised reasonable care to prevent and correct promptly any harassing behavior" and that Complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." In *Faragher and Burlington*, the Supreme Court further explained the requirements of the two necessary elements of the affirmative defense.⁸

"While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Faragher*, at 2293; *Burlington* at 2270.

In analyzing whether the City of Boca Raton, the employer in *Faragher*, had presented evidence establishing the affirmative defense, the Court noted that an employer's dissemination of the antiharassment policy, assurances in the antiharassment policy that supervisors could be bypassed in registering complaints, and efforts to keep track of the conduct of its supervisors were all relevant avenues of inquiry. *Id.*

In this case, the first prong of Respondent's defense is established by credible evidence of the existence of an effective written Harassment Policy which provided a viable means for a harassed individual to bring harassment based on race, color, sex, and other protected classes to Respondent's attention. The Policy provided that complaints could be made to the store manager or Respondent's owner, insuring that a harassing supervisor or manager could be bypassed in registering a complaint. Ironically, the effectiveness of the Policy is most clearly shown by the fact that

Complainant was discharged as a result of written harassment complaints filed against him.

The second prong turns on whether or not Complainant "unreasonably failed" to utilize Respondent's complaint procedure. Three examples of the type of evidence that would defeat this defense would be Complainant's ignorance of the procedure, credible testimony from Complainant that he was intimidated from filing a complaint based on retaliatory threats or his reasonable belief that Calcagno or Respondent's owners would not take any action on his complaint.⁹

There is no question that Complainant was aware of Respondent's Harassment Policy. He signed it at the time of his hire.¹⁰ Even though an employee is aware of an employer's policy in this regard, there may be circumstances where it would nonetheless not be unreasonable for an employee not to use such a policy. In this case, however, there is no evidence that, during Canfield's employment, Complainant was discouraged or intimidated from filing a complaint by such things as threats of retaliation, personal knowledge that other harassed employees had filed complaints upon which no action was taken, or pervasiveness in the workplace of the type of harassment suffered by the harassed employee. Complainant did testify that he believed Canfield's remarks, coupled with the later incident where the customer directed racially harassing insults at Complainant, showed the Respondent "tolerated" harassment; however, there is no evidence that at the time of Canfield's remarks any other such incidents, or any failure of Respondent to take corrective action, had occurred. Consequently, the forum concludes that Complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by Respondent to complain of Canfield's remarks and that Respondent has met its burden of proving the

affirmative defenses set out in OAR 839-005-0010(4)(d)(B). Therefore, Respondent is not liable for Canfield's racial remarks.¹¹

3. RESPONDENT'S FAILURE TO TAKE ACTION ABOUT THE WOMAN AND HER DOG.

A different test applies when harassment is from a non-employee. An employer can be held liable for racial harassment by a non-employee, a customer in this case, if the employer knew or should have known¹² of the conduct and fails to take immediate and appropriate corrective action. Unlike the case where an immediate supervisor is the harasser, there is no presumption that the employer "should have known." OAR 839-001-0010(4)(f); *In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 252(1995); *In the Matter of United Grocers, Inc.*, 7 BOLI 1, 35 (1987).

First, a review of the facts. Credible testimony from Complainant, Hesla, and Repp established that a customer made racially insulting remarks toward Complainant. After consulting Hesla, the next day Complainant complained about the racial insults to Respondent's assistant store manager, Bryant, who told him to point the customer out the next time she came into the store. When the customer came in again a day or two later, Bryant wasn't in the store, so Complainant followed Bryant's instructions and told Calcagno that the customer was in the store. However, Complainant failed to specifically report to Calcagno that the customer had racially harassed him. Calcagno took no action, and the customer did not speak to Complainant or make any more racial remarks during that visit or subsequent visits to the store.

Under these circumstances, the forum finds that the customer's remarks were directed at Complainant because of his race, that a reasonable person in Complainant's circumstances would have perceived that the remarks were sufficiently severe to create a hostile, intimidating or offensive working environment, and that Complainant had the same perception. The next question is whether Respondent knew or should have

known of the customer's conduct, and if so, whether Respondent took immediate and appropriate corrective action.

Bryant, the assistant store manager, had knowledge of the harassment because Complainant told him. In contrast to Glackin, his position as second in command at Respondent's store justifies imputing knowledge of the customer's harassment to Respondent. However, at the time Complainant reported the incident to him, there was no corrective action he could take, as the incident had occurred the day before and the customer was no longer in the store. Instead, he instructed Complainant to point out the customer the next time she came into the store. When the customer came back two days later, Complainant reported to Calcagno that the woman who had "made these complaints" and was "saying these things" was in the store again, but did not explain that she had racially harassed him. The woman came back to the store after that, but never harassed Complainant again. As a result, there is no evidence Calcagno was made aware the woman had racially harassed Complainant or that it occurred again so that he could correct it. Bryant, having directed Complainant to point the customer out the next time she came in to the store, and not being informed of any further harassment, likewise had no reason to take any further action. Finally, there is no evidence that the harassment became pervasive through the customer or other non-employees making racial remarks again in Complainant's presence.¹³

Under these circumstances, even though the harassment was unarguably hostile, intimidating and offensive, Respondent cannot be held liable for the harassment inflicted upon Complainant by Respondent's customer.

4. WAS COMPLAINANT'S DISCHARGE BASED ON RETALIATION?

In order to prevail on a retaliation claim, the Agency must establish that Calcagno and/or Matthew Marcott and Pam Garcia, the individuals responsible for discharging

Complainant, were aware of his opposition to the racial harassment that occurred and that Complainant's opposition motivated them, at least in part, to discharge him. There was no credible evidence presented that established that Calcagno, Marcott, or Garcia had actual knowledge of any racial harassment or that Complainant opposed it. Without actual knowledge by these individuals, the Agency's retaliation claim fails.

5. WAS COMPLAINANT TREATED DIFFERENTLY IN TERMS AND CONDITIONS OF EMPLOYMENT THAN WHITE CO- WORKERS WHO WERE ACCUSED OF SEXUAL HARASSMENT?

The Agency alleged that Complainant was not given notice of the specific sexual harassment allegations made against him, interviewed, or given the opportunity to respond to the allegations prior to his termination, whereas white males accused of sexual harassment were given notice, interviewed, and given an opportunity to respond. The evidence portrays a different story. Although Calcagno did not disclose all the specific allegations to Complainant and did not identify his accusers, Complainant was told that he had been accused of touching and rubbing female employees and asking them out on dates. In response, Complainant denied having sexually harassed anyone at Respondent. When Calcagno investigated, he obtained credible evidence from four more employees describing additional sexual harassment they had observed by Complainant. Since Complainant had already denied sexually harassing any employees, there was little to be gained from asking Complainant to respond to the new allegations.

Evidence was presented of sexual harassment complaints against five white males employed by grocery stores owned and operated by the Marcott family. There was no evidence that any of them were informed of the identities of the individuals filing complaints against them. John Smolders, the Marcott's director of baking, was informed of the allegations and denied them. Dennis Normoyle, a supervisor at Respondent, was

questioned by Calcagno about the allegations. John Atterberry was talked to about the allegations. The details in which the allegations were discussed with Smolders, Normoyle, and Atterberry were not brought out in the testimony related to their situations. Kyle, the learning disabled male, was fired before anyone filed a complaint against him based on Calcagno's observations. There was no evidence presented to show whether or not Robert Hesla's employee, referred to in Finding of Fact - The Merits #43, was talked to at any stage of Hesla's investigation prior to his termination. In conclusion, Complainant was not discriminated against in the investigation process on the basis of his race.

6. WAS COMPLAINANT TREATED DIFFERENTLY IN HIS DISCHARGE THAN WHITE CO- WORKERS WHO WERE ACCUSED OF SEXUAL HARASSMENT?

The previous paragraph discussed the procedural aspects surrounding investigations of sexual harassment complaints brought against Complainant and five white males. In this discussion, the forum compares the substantive outcomes of these sexual harassment complaints to determine if Complainant was treated differently and unlawfully discharged based on his race.

The decision-makers in Complainant's discharge were Calcagno, Marcott, and Harris. When Complainant was discharged, they had credible evidence that he had inappropriately touched and asked out two minor females, kissed one of them, and touched another female employee, and that the two minor females were afraid of working with him. Two other white males who touched female employees, Robert Hesla's employee and Kyle, were also discharged. Smolders and Normoyle, who were not discharged, were not alleged to have touched anyone, did not make sexual remarks to minor females, and no one alleged they were afraid of working, with them. No more complaints were received against Normoyle and no more against Smolders after the March 1997 complaints. Atterberry was alleged to have touched a female employee's

bottom, but this complaint never reached Calcagno or the Marcott family. The complaint against Atterberry that did reach the Marcott family did not involve touching, but "invading personal space," no one alleged they were afraid of working with him, and no more complaints were received against him.

In summary, three of the four males (including Complainant) who touched females were all discharged. The complaint against the fourth, Atterberry, never went beyond a low-level manager, and he has not repeated his behavior. The two males who were not alleged to have touched females were not discharged, and have not repeated their behavior. This shows a consistent pattern of discipline, rather than different treatment and unlawful discrimination based on Complainant's race.

7. RESPONDENT'S AFFIRMATIVE DEFENSES.

Respondent raised a number of affirmative defenses in its Answer that the forum need not address, given its disposition of the case.

8. RESPONDENT'S EXCEPTIONS

Respondent correctly points out that the only witnesses who testified that they heard Canfield call Complainant "Toby" or "Boy" were Sweet, Prescott, and Glackin. Although this is accurately reflected in Finding of Fact -- The Merits #14, the Opinion included Tony Pittman's name in paragraph 2(b). Accordingly, Pittman's name has been deleted from that section of that Opinion.

Respondent's remaining exceptions to the Proposed Order are addressed in the body of the Opinion.

ORDER ON RECONSIDERATION

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the Complaint and Specific Charges filed against

Respondent Murrayhill Thriftway, Inc. are hereby dismissed according to the provisions of ORS 659.060(3).

¹ Complainant identified himself on the administrative complaint as "Afro-American."

² OAR 839-07-550 is a Bureau of Labor and Industries rule on sexual harassment, here quoted in part as it appeared in Oregon Administrative Rules at times material. The current rule is OAR 839-007-0550.

³ Current OAR 839-005-001 0 became effective on October 23, 1998.

⁴ A detailed discussion of how this conclusion was reached is contained in the Opinion, *infra*.

⁵ See, e.g. *In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 252-53(1995) (The word "boy," when applied to a black employee, constitutes racial harassment because it "implies an inherent inferiority" because of race. Respondent's posting of a Confederate flag in front of a black employee's work station and requiring him to salute it daily, given the historical significance of race relations in this country, makes it difficult to imagine how anyone could not perceive this action as a racial insult.) Canfield's use of the name "Toby," a black slave from the movie "Roots," carries a similar connotation.

⁶ All subsequent references to OAR 839-005-0010(4)(d) refer to the current version of the rule.

⁷ This dovetails with former OAR 839-005-0010(3), which made employers liable for harassment on the basis of protected class unlawful "if the employer knew or should have known both of the harassment and that it was unwelcome."

⁸ See also *Burrell v. Star Nursery, No. 97-17370*, slip op. (9th Cir., March 25, 1999) (summary judgment absolving employer from liability in an actionable sex harassment case reversed and remanded, with instructions to apply the *Faragher and Burlington* affirmative defense, and quoting the Court's explanation of the requirements of the two necessary elements of the affirmative defense.)

⁹ Examples of how a victim of actionable harassment could acquire a reasonable belief that an employer would not take any action on his/her complaint include, but are not limited to, personal knowledge that other harassed employees had filed complaints upon which no action was taken, and pervasiveness in the workplace of the type of harassment suffered by the harassed employee, indicating tacit approval of the harassment by the employer. The latter type of evidence could, in some cases, also defeat the first prong of the affirmative defense by demonstrating that the employer had not exercised reasonable care to prevent and promptly correct harassment.

¹⁰ See, e.g. *Broad v. Kelly's Olympian Co.*, 156 Or 216, 229, 66 P2d 485, 490 (1937) (a person is presumed to be familiar with the contents of any document that bears his signature.)

¹¹ Employers should not view this order as holding that liability for harassment by low-level supervisors can be avoided by the mere adoption of a harassment policy. Whether or not an employer exercised reasonable care to prevent and correct promptly any harassing behavior and whether a complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer is dependent on the facts in each case.

¹² "Should have known" includes "constructive knowledge" and "constructive notice." These terms were defined by the forum in *In the Matter of Wing Fong*, 16 BOLI 280, 292 (1998). "Constructive knowledge" was defined as "if one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such a fact; e.g. matters of public record."

"Constructive notice" was defined as "Such notice as is implied or imputed by law I I *. Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing. That which the law regards as sufficient to give notice and is regarded as a substitute for actual notice."

¹³ In prior harassment cases before this forum, "should have known" has been equated as having constructive knowledge or notice, which can be shown through evidence of pervasiveness of conduct. *Id.*, at 292-94 (1998).