

**In the Matter of**

**NORTHWEST PIZZA, INC. dba Northwest Pizza and Pasta Company,**

**Case No. 61-03**

**Final Order of Commissioner Dan Gardner**

**Issued November 13, 2003**

**SYNOPSIS**

The Agency alleged that Respondent terminated Complainant because she applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656. The Commissioner found that Complainant's compensable injury suffered while in Respondent's employ was a substantial factor in Respondent's decision to terminate her. The Commissioner awarded \$6,488.50 in lost wages and \$30,000 in emotional distress damages. *Former* ORS 659.410, ORS 659A.040.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 30, 2003, at the Oregon Employment Department office located at 119 N. Oakdale Avenue, Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Summer S. Lucero ("Complainant") was present and was not represented by counsel. Respondent did not make an appearance and was found in default.

The Agency called the following witnesses: Complainant; Mindette Herndon, Respondent's assistant manager during Complainant's employment with Respondent; and Leslie Peterson (telephonic), Civil Rights Division Senior Investigator.

The forum received into evidence:

a) Administrative exhibits X-1 through X-10 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-14 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 March 1, 2002, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued an Administrative Determination on January 23, 2003.

2) On July 18, 2003, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by discharging her because she applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656, in violation of *former* ORS 659.410 and *current* ORS 659A.040. The Agency sought damages in the amount of \$10,000 in wage loss, and \$30,000 for emotional stress.

3) On July 23, 2003, the forum served the Formal Charges on Respondent,<sup>i</sup> accompanied by the following: a) a Notice of Hearing setting forth September 30, 2003, in Medford, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On September 15, 2003, the Agency filed a motion for an Order of Default based on Respondent's failure to file an answer to the Formal Charges after being served with the documents and after being sent a notice by the Agency on September 3, 2003, that the Agency would seek a default order if Respondent did not file an answer within ten days.

5) Based on Respondent's failure to file an answer, the ALJ granted the Agency's motion and found Respondent to be in default. The ALJ issued an interim order on September 17, 2003, stating that Respondent had ten days to seek relief from default by means of a written request.

6) At the time set for hearing, Respondent did not appear and had not notified the forum that it would be late or would not attend the hearing. The ALJ waited 30 minutes, then declared Respondent to be in default and commenced the hearing.

7) At the outset of the hearing, the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

8) Respondent did not seek timely relief from default prior to or after the hearing.

9) The ALJ issued a proposed order on October 16, 2003, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent was an Oregon corporation that employed six or more persons in Oregon.

2) Complainant was employed by Respondent beginning October 3, 2001, to work as a cook and cashier at the wage of \$7 per hour, plus shared tips. At the time of

her termination, she averaged four shifts and 30 hours per week, earning \$210 per week in wages and \$26 per week in tips, for a total of \$236 per week.

3) Complainant's supervisor throughout her employment with Respondent was CJ Udell.

4) Soon after Complainant was hired, CJ told her that an assistant manager position would be coming open, and that he wanted Complainant to fill that job.

5) On October 6, 2001, Complainant slipped on Respondent's kitchen floor on water leaking from a walk-in cooler and cut her face and a finger on glass that broke when she fell.

6) Complainant was taken to the hospital and a plastic surgeon treated her cuts with 46 stitches. The next day she visited Respondent's business and asked CJ for an accident report form so she could file a workers' compensation claim. CJ told Complainant that there were no accident forms at the store. Three weeks later, CJ finally gave her an accident form to sign.

7) Complainant's injury was accepted as a compensable injury and Respondent's workers' compensation carrier has paid all medical expenses attributable to her injury, including several plastic surgeries.

8) Complainant was off work until October 14, 2001, when she was released to perform light duty work, with the restriction that she could not get her stitched finger wet. CJ put Complainant back to work as a cashier the next day.

9) Complainant received an unrestricted release to return to work at the end of October 2001 and began working as a cook and cashier again. (Testimony of Complainant)

10) On November 4, 2001, Complainant's four month old daughter had an allergic reaction to a shot she received the day before and became ill, necessitating that

Complainant stay home and care for her. On that day, Complainant was scheduled to work from 5 p.m. to 9 p.m. Complainant called Respondent between 1 and 2 p.m. and told Barbara Udell, CJ's wife and co-manager, that she would not be at work because of her daughter's illness. Barbara told Complainant it was busy and that CJ would call Complainant back if there was a problem. At 4:50 p.m., Complainant received a call from CJ, who told her that she was terminated if she did not show up for work at 5 p.m. Complainant said she couldn't be at work in 10 minutes because of her daughter's illness. CJ repeated that Complainant was terminated if she didn't show up for work in 10 minutes.

11) Complainant did not go to work and was terminated.

12) Complainant worked an average of 30 hours per week for Respondent.

13) Prior to November 4, 2001, Complainant did not miss any time from work that was not attributable to her compensable injury and had not been disciplined for any reason.

14) Three of Complainant's co-workers – Dan \_\_\_\_\_, Danny O., and Mindette Herndon missed entire work shifts during Complainant's employment and were not terminated. None of these three were injured at Respondent's workplace or filed workers' compensation claims.

15) On October 7, 2001, CJ and Herndon had a conversation in which CJ expressed extreme annoyance and showed obvious irritation that Complainant would be missing work right after she was hired. CJ "ranted" that he could not tolerate Complainant's absences and exclaimed that he couldn't believe she had gotten hurt two days after she got hired, that he needed people to work, and that he needed someone to fill her shift. At the time, Complainant had been scheduled for a full week of work.

16) Respondent's written personnel policy in effect at the time of Complainant's employment stated: "All schedule requests must be made 2 weeks prior to the requested time off, except in the case of family emergencies. \* \* \* If you have a family emergency, you must contact your manager a.s.a.p."

17) Leslie Peterson, Civil Rights Division senior investigator, investigated Complainant's complaint. In the course of her investigation, Respondent's president, Gerald Allen, sent a fax to Peterson in which he stated "She [Complainant] was released because we could not rely on her to be present for her assigned shifts."

18) Complainant actively sought work after her discharge. She began working five hours per week for her mother-in-law, earning \$8.50 per hour. In mid-May 2002, she was hired at the Ashland Tanning Salon. One month later, she was enrolled in the Jobs Plus Program by the Salon, which set a limited duration on her job. She worked at the Salon until November 17, 2002, when the Jobs Plus Program ended. She worked 30 hours per week and was paid \$7 per hour at the Salon.

In December 2002, Complainant had plastic surgery related to her compensable injury. In January 2003, when she had recovered from the surgery, she went to work at the National Marketing Group. From January through the end of July 2003 she worked 25-30 hours per week and averaged \$9-10 per hour in wages and commission.

Starting a year prior to the hearing, and continuing as of the date of hearing, Complainant worked as a caregiver one day a month, earning \$60 per month.

19) Between November 5, 2001, and December 1, 2002, Complainant earned approximately \$6,727.50. This figure was derived from the following calculations:

- a) 5 hours a week at \$8.50 per hour for 27 weeks (11/5/01 to 5/14/02) for her mother-in-law = \$1,147.50;
- b) 30 hours a week x \$7 per hour for 26 weeks (5/15/02 – 11/17/02) for Ashland Tanning Salon = \$5,460;

c) one day per month x \$60 a day for two months (10/02 – 11/02) as a caregiver = \$120;

d)  $\$1,147.50 + \$5,460 + \$120 = \underline{\$6,727.50}$ .

20) Complainant would have worked 30 hours per week, earning \$7 per hour and averaging \$26 per week in tips, for a total of \$236 per week, had she not been terminated by Respondent. Her total gross earnings between November 5, 2001, and December 1, 2002, would have amounted to \$13,216 (\$236 per week x 56 weeks).

21) Complainant would have earned an additional \$6,488.50 in wages between November 5, 2001, and December 1, 2002, had she not been terminated by Respondent.

22) Complainant's termination caused serious emotional and financial stress in her life until May 2002, when she was hired at the Ashland Tanning Salon. Complainant originally went to work for Respondent because her boyfriend had been laid off from his job and she needed the money to support her four-month-old daughter. After her termination, she became depressed. She lost sleep and became unable to breast feed her daughter, which caused additional stress. She worried about how she would support her family. She had to ask her parents, who were also financially stressed, for financial assistance. This impacted her dignity negatively and lessened her self-esteem.

23) Complainant, Herndon, and Peterson were all credible witnesses.

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

1) At all times material herein, Respondent was an Oregon corporation that employed six or more persons in Oregon.

2) Complainant was employed by Respondent beginning October 3, 2001, to work as a cook and cashier at the wage of \$7 per hour, plus shared tips.

3) Complainant's supervisor throughout her employment with Respondent was CJ Udell. Prior to her compensable injury, CJ told Complainant he would like to promote her to assistant manager.

4) On October 6, 2001, Complainant suffered a compensable injury when she slipped on Respondent's kitchen floor on water leaking from a walk-in cooler and seriously cut her face and one finger. Complainant was off work until October 15, when she was given light duty work after she received a light duty release to return to work.

5) The day after Complainant's injury, CJ expressed extreme annoyance that Complainant would be missing work so soon after being hired.

6) Complainant was scheduled to work from 5 p.m. to 9 p.m. on November 4, 2001. That morning, her four month old daughter had become ill, necessitating that Complainant stay home and care for her. Complainant followed Respondent's written policy for calling in the event of a family emergency by calling Respondent between 1 and 2 p.m. and telling a manager that she would not be at work because of her daughter's illness.

7) At 4:50 p.m., CJ called Complainant and told her that she was terminated if she did not show up for work at 5 p.m. Complainant told CJ that she couldn't be at work in 10 minutes because of her daughter's illness. Complainant did not go to work and was terminated.

8) At the time of her termination, Complainant worked an average of 30 hours per week for Respondent and received an average of \$26 per week in tips, earning an average of \$236 per week.

9) Prior to her termination, Complainant did not miss any time from work that was not attributable to her compensable injury.

10) Three of Complainant's co-workers missed entire work shifts during Complainant's employment and were not terminated. None of these three were injured at Respondent's workplace or filed workers' compensation claims.

11) Complainant actively sought work after her discharge and earned \$6,727.50 between November 5, 2001, and December 1, 2002, when she became unavailable for work.

12) Complainant would have earned \$13,216 between November 5, 2001, and December 1, 2002, if she had not been terminated by Respondent. In all, Complainant lost \$6,488.50 in back wages between November 5, 2001, and December 1, 2002.

13) Complainant suffered substantial emotional distress over a period of six months as a direct result of her unlawful termination.

#### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent was an employer subject to the provisions of *former* ORS 659.010 to *former* ORS 659.11, and *former* ORS 659.400 to *former* ORS 659.410.

2) The actions, inactions, statements, and motivations of CJ Udell are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659A.800 to ORS 659A.850.

4) Respondent's termination of Complainant was based on Complainant's application for benefits and invoking or utilizing the procedures provided for in ORS chapter 656. Respondent's termination of Complainant violated *former* ORS 659.410 and *current* ORS 659A.040.<sup>ii</sup>

5) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages resulting from Respondent's unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

## **OPINION**

### **INTRODUCTION**

Respondent was served with the Notice of Hearing and Formal Charges and did not file an answer or appear at the hearing and was found in default. When a respondent defaults, the Agency needs only to establish a prima facie case on the record to support the allegations of its charging document in order to prevail. *In the Matter of Executive Transport, Inc.*, 17 BOLI 81, 92 (1998).

### **PRIMA FACIE CASE**

In this case, the Agency's prima facie case consists of the following elements: (1) Respondent employed six or more persons in Oregon; (2) Complainant was a worker who applied for benefits or invoked or utilized the workers' compensation procedures; (3) Respondent terminated Complainant; and (4) Complainant's use of the workers' compensation procedures was a substantial factor<sup>iii</sup> in Respondent's decision to terminate Complainant.

The first two elements of the Agency's prima facie case were established by the Complainant's credible testimony. The third was established by the credible testimony of Complainant and Respondent's admission to Peterson, the Agency's investigator.<sup>iv</sup>

The fourth element requires a more substantial analysis and is discussed in the following paragraphs.

### **RESPONDENT'S ACTION WAS TAKEN BECAUSE OF COMPLAINANT'S USE OF THE WORKERS' COMPENSATION SYSTEM**

The forum applies the different treatment theory contained in OAR 839-005-0010(B) to determine if Complainant's use of the workers' compensation system was a substantial factor in her termination. Under OAR 839-005-0010(B), different treatment occurs when:

“The respondent treats members of a protected class differently than others who are not members of that protected class. When the respondent makes this differentiation because of the individual's protected class and not because of legitimate, nondiscriminatory reasons, unlawful discrimination exists. In establishing a case of different or unequal treatment:

“(i) There must be substantial evidence that the complainant was harmed by an action of the respondent under circumstances that make it appear that the respondent treated the complainant differently than comparably situated individuals who were not members of the complainant's protected class.”

During the Agency's investigation, Respondent's ostensible reason for terminating Complainant was that she missed her 5 p.m. to 9 p.m. work shift on November 4, 2001. Respondent did not dispute the facts that Complainant called in at least three hours prior to her shift to let Respondent know she could not work that night, that her absence was caused by her daughter's illness and that Respondent was aware of that fact, and that she followed Respondent's written policy in reporting her pending absence. Complainant testified credibly at hearing that she had never been tardy or missed any work except for her time off due to her compensable injury. Through the testimony of Complainant and Herndon, the Agency established that Respondent employed at least three other persons at the time of Complainant's termination who missed entire shifts of work, who had not been compensably injured while employed by

Respondent, and who were not terminated. The only difference between Complainant and these three comparators is that Complainant suffered a compensable injury and they did not. This comparative evidence is sufficient to establish that Complainant was terminated because of her use of the workers' compensation system.<sup>v</sup> The forum concludes that Respondent unlawfully discriminated against Complainant in violation of *former* ORS 659.410 and *current* ORS 659A.040.

This conclusion is bolstered by Herndon's credible testimony that CJ, the manager who terminated Complainant, expressed extreme annoyance and irritation that Complainant had gotten hurt shortly after her hire.

## **DAMAGES**

In its Formal Charges, the Agency sought \$10,000 in lost wages and \$30,000 for emotional distress.

### **A. Lost Wages.**

The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful discrimination. *See, e.g., In the Matter of ARG Enterprises, Inc.*, 19 BOLI 116, 136 (2000). Where a respondent commits an unlawful employment practice by discharging a complainant, the forum is authorized to award the complainant back pay for the hours the employee would have worked absent the discrimination. *In the Matter of Bob G. Mitchell*, 19 BOLI 162, 188 (2000). A complainant's right to back wages is cut off when he or she obtains replacement employment for a similar duration and with similar hours and hourly wages as respondent's job. *In the Matter of H.R. Satterfield*, 22 BOLI 198, 210-11 (2001). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *See, e.g., In the Matter of Servend International, Inc.*, 21 BOLI 1, 30 (2000), *aff'd without opinion*,

*Servend International, Inc. v. Bureau of Labor and Industries*, 183 Or App 533, 53 P3d 471 (2002).

Through the credible testimony of Complainant, the Agency established that, at the time of Complainant's termination, she was working 30 hours per week at the wage rate of \$7 per hour and averaged \$26 per week in tips, for total average earnings of \$236 per week. Her employment was for an indefinite tenure, and CJ, the manager, thought so highly of her work before her injury that he wanted to promote her to assistant manager. Complainant's credible testimony established that she began actively seeking work after her termination, but was unable to find alternative employment, other than five hours of work per week for her mother-in-law, until mid-May 2002, when she was hired to a limited duration job at the Ashland Tanning Salon. The Salon job, which ended in mid-November 2002, did not cut off Complainant's back pay accrual because of its limited duration. Complainant was unable to work in December 2002 because of plastic surgery related to her compensable injury and is not entitled to back pay for that period of time due to her unavailability for work.<sup>vi</sup> When she recovered from the surgery and was able to return to work, she began working at National Marketing Group, where she worked an average of "25-30" hours per week, earning combined wages and commission amounting to "\$9-10" per hour.<sup>vii</sup> This job was of indefinite tenure; in fact, Complainant was still working there at the time of hearing. Her average earnings per week, calculated at 27.5 hours per week x \$9.50 per hour, amounted to \$261.25, about \$26 per week more than she was earning at the time of her termination from Respondent's employ. Since Complainant's replacement employment at National was for a similar duration and greater pay than her employment with Respondent, her right to back wages was cut off when she started work at National. In total, her back pay loss amounts to \$6,488.50.<sup>viii</sup>

**B. Emotional Distress.**

In determining damages for emotional distress, the commissioner considers a number of things, including the type of the discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. The amount awarded depends on the facts presented by each complainant. *In the Matter of Barrett Business Services, Inc.*, 22 BOLI 77, 96 (2001). A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for emotional distress damages. *Id.* at 96.

The Agency relied on Complainant's testimony to establish emotional distress damages. Complainant credibly testified that her termination caused serious emotional and financial stress in her life until May 2002, when she obtained work at the Ashland Tanning Salon. Complainant originally went to work for Respondent because her boyfriend had been laid off from his job and she needed the money to support her four-month-old daughter. After her termination, she became depressed. She began to lose sleep and became unable to breast feed her daughter, which caused additional stress. She worried about how she would support her family. She had to ask her parents, who were also financially stressed, for financial assistance. This impacted her dignity negatively and lessened her self-esteem. All of these circumstances constitute emotional distress that may be considered by the Commissioner when determining an appropriate award of damages.

When a respondent is found to have engaged in an unlawful employment practice, ORS 659A.850(4)(a) gives the Commissioner the authority to order that respondent to "[p]erform an act or series of acts \* \* \* that are reasonably calculated to carry out the purposes of [ORS chapter 659A], to eliminate the effects of the unlawful practice that the respondent is found to have engaged in, and to protect the rights of the

complainant and others similarly situated[.]” Based on the circumstances described in the previous paragraph, the forum concludes that the \$30,000 emotional distress damages award sought by the Agency is an appropriate exercise of the Commissioner’s discretion.

### ORDER

NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of Respondent’s violation of *former* ORS 659.410 and *current* ORS 659A.040, and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Northwest Pizza, Inc.** 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 Summer Lucero in the amount of:
  - a) SIX THOUSAND FOUR HUNDRED EIGHTY-EIGHT DOLLARS AND FIFTY CENTS (\$6,488.50), less appropriate lawful deductions, representing wages lost by Summer Lucero between November 5, 2001, and December 1, 2002, as a result of Respondent’s unlawful practices found herein, plus interest at the legal rate on that sum from December 1, 2002, until paid, plus
  - b) THIRTY THOUSAND DOLLARS (\$30,000), plus interest on that sum at the legal rate from the date of the Final Order until paid.
- 2) Cease and desist from discriminating against any employee based upon the employee’s application for benefits or invocation or utilization of the procedures provided for in ORS chapter 656.

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<sup>i</sup> The Formal Charges were mailed on July 23, 2003, to Respondent at 1585 Siskiyou Blvd., Ashland, OR 97520, the address of Gerald Allen, Respondent’s registered agent, on file with the Corporations Division.

<sup>ii</sup> At the time Respondent terminated Complainant, *former* ORS 659.410 was the statute in effect that made it unlawful for an employer to discriminate against a worker because the worker had “applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656[.]” In its 2001 session, the Oregon Legislature completely reorganized ORS Chapter 659 and the substantive provisions of *former* ORS 659.410 were incorporated in ORS 659A.040(1), which became effective January 1, 2002. This change was contained in Sections 31 to 34 of chapter 621 of Oregon Laws 2001. Section 91(1), chapter 621, Oregon Laws 2001, provides that Sections 31 to 34 of chapter 621 of Oregon Laws 2001 apply to complaints filed after January 1, 2002. The complaint in this case was filed on March 1, 2002. Therefore,

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even though *former* ORS 659.4190 was in effect at the time of Complainant's termination, the forum applies *current* ORS 659A.040(1).

<sup>iii</sup> See *In the Matter of Hermiston Assisted Living*, 23 BOLI 96, 127 (citing *McPhail v. Milwaukie Lumber Co.*, 165 Or App 596, 603 (2000) ("It is sufficient in Oregon for the [complainant] to show that the unlawful motive was a substantial and impermissible factor in the discharge decision."))

<sup>iv</sup> See Finding of Fact 17 –The Merits, *supra*.

<sup>v</sup> See, e.g., *In the Matter of ARG Enterprises, Inc.*, 19 BOLI 116, 139 (2000) (The forum found complainant had been subjected to different treatment based on his use of the workers' compensation system where he violated respondent's cut glove policy and cut himself, suffering a compensable injury, and was discharged, whereas other similarly situated kitchen staff who violated the same policy but did not suffer compensable injuries received only verbal warnings.)

<sup>vi</sup> See *In the Matter of Lucille's Hair Care*, 3 BOLI 286, 297-98, 301 (1983), *modified*, *Ogden v. Bureau of Labor*, 68 Or App 235, 682 P2d 802 (1984), *order reinstated, remanded with instructions*, 299 Or 98, 699 P2d 189, *order on remand*, 5 BOLI 13, 29 (1985) (where complainant was not able to work for a limited time period due to injury, the forum did not award back pay for that time period).

<sup>vii</sup> During direct examination, Complainant testified to these working conditions. Later, in response to the ALJ's request for total earnings since January 1, 2003, Complainant testified that she earned an average of \$850 per month from January through July 2003 at National. At \$9.50 per hour, this would amount to only 89.5 hours of work per month, or about 20 hours a week. Because there was no evidence that Complainant based this estimate on any actual records and \$850 per month is substantially less than the monthly earnings her earlier estimate of hours and wages amounts to (rounded off, 27.5 hours per week x \$9.50 per hour = \$261.25 per week), the forum relies on Complainant's initial testimony to determine her earnings at National.

<sup>viii</sup> See Findings of Fact 19-21 – The Merits, *supra*.