

In the Matter of
OREGON DEPARTMENT OF FISH AND WILDLIFE, Respondent.

Case Number 22-96
Final Order of the Commissioner
Jack Roberts
Issued March 4, 1998.

SYNOPSIS

Where the agency alleged that complainant was treated differently based on her sex and in retaliation for opposing unlawful employment practices, the commissioner found that the agency failed to prove the violations by a preponderance of evidence on the whole record. ORS 659.030(1)(b) and (f).

The above-entitled matter came on for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on July 16, 17, and 18, 1996, in a conference room of the offices of the State of Oregon Department of Employment, 1901 Adams Avenue, La Grande, Oregon. Linda Lohr, Case Presenter with the Bureau of Labor and Industries (BOLI or the Agency) represented the Agency. The State of Oregon Department of Fish and Wildlife (Respondent) was represented by Josephine Hawthorne, State of Oregon Assistant Attorney General. Sandra Whybark (Complainant) was present throughout the hearing.

The ALJ admitted into evidence Administrative Exhibits X-1 through X-18, Agency Exhibits A-1 through A-4, A-6, A-7 and A-9, and Respondent Exhibits R-1 through R-4, R-12, R-15 through R-32, and R-34 through R-47.

The Agency called the following witnesses in addition to Complainant:

Complainant's mother Margaret Dudgeon, Complainant's father Ronald Dudgeon, Respondent's personnel officer Judith Hvam, and Fish and Wildlife Screens Technicians Scott Kelso, Curtis Mattson, and Charles D. Simpson.

Respondent called the following witnesses: Respondent's Enterprise Screens Manager Gary C. Findley, Respondent's personnel officer Dorothy Hoover, Scott Kelso, Agency Senior Investigator Susan Moxley, and Fish and Wildlife Biologists Bradley J. Smith and Kim Jones (by telephone).

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, 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 July 18, 1994, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondent. After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On February 22, 1996, the Agency prepared for service on Respondent Specific Charges alleging that Respondent discriminated against Complainant in her employment with Respondent based on her female sex and in retaliation for having previously filed a complaint against Respondent under ORS chapter 659, and had thus violated ORS 659.030(1)(b) and 659.030(1)(f), respectively. On February 28, 1996, with the Specific Charges, the Agency served on Respondent the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of Oregon Administrative Rules (OAR) regarding the contested case

process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

3) On March 14, 1996, Respondent through counsel filed a motion to make the Specific Charges more definite and certain in several particulars. The Agency timely opposed the motion, and on March 19, 1996, the ALJ, treating Respondent's motion as being in the nature of a request for discovery, denied Respondent's motion conditioned on the Agency supplying Respondent's counsel with information by March 26, 1996, regarding the identity of comparators and coworkers and training opportunities referred to in the Specific Charges. The ALJ ruled further that if the Agency supplied those items, Respondent's answer would be due March 29, 1996. Finally, the ALJ ordered that each participant submit a summary of the case by April 3, 1996.

4) On March 20, 1996, Respondent moved to postpone the scheduled hearing due to the unavailability of an essential witness. The Agency's only objection was that rescheduling would create a long delay because of the necessity for the mutual availability of Respondent's counsel, the Agency Case Presenter, and the ALJ. On March 22, 1996, the ALJ postponed the hearing to July 16, 1996, extended the due date for the items ordered to be supplied by the Agency to Respondent, extended the time for Respondent's answer, and set a new date for case summaries.

5) Respondent timely filed its answer and the participants filed their respective case summaries. The Agency thereafter moved to amend its Charges and for particular discovery. Respondent filed a motion to strike and for leave to file an amended answer. On July 12, 1996, the ALJ issued a notice to the participants that he would rule regarding amendments, discovery, and challenged allegations at the time scheduled for hearing on July 16.

6) At the commencement of the hearing, counsel for Respondent stated that she had reviewed the Notice of Contested Case Rights and Procedures and had no questions about it.

7) At the commencement of the hearing, the ALJ heard the presentation of the participants regarding telephone witnesses, discovery, the amended Specific Charges, Respondent's motion to strike, and Respondent's amended answer. Ruling that discovery had been accomplished, the ALJ allowed amendment of the amount claimed in the Specific Charges from \$15,000 to \$25,000. The ALJ denied Respondent's motion to strike, allowed Respondent's amended answer, and limited proof of discrimination and resulting damage to acts alleged to have occurred after July 1993.

8) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) On August 12, 1996, Respondent submitted all four pages of the April 1994 application of Brad Jarrett with the request that the record be reopened as the exhibit submitted at hearing had but three pages. An examination of the two documents leads the forum to the conclusion that the exhibit accepted at hearing was incomplete, in that the second page was missing, and the offer is accepted, designated as Exhibit R-48. The forum is also admitting the Gary Findley report of operation, February 28 to June 24, 1994.

10) At the close of testimony the participants mutually agreed to submit written argument in accordance with a schedule set by the ALJ. Submissions under that schedule were timely made and the record herein closed with receipt of the final submission on August 16, 1996.

11) The proposed order, which contained an exceptions notice, was issued on December 9, 1997. Exceptions were due by December 19, 1997. No exceptions were received.

FINDINGS OF FACT -- THE MERITS

1) Respondent is an agency of the State of Oregon engaged in natural resources regulation and preservation in various locations throughout the state and utilizing the personal services of individual employees for those purposes.

2) Complainant, female, first worked for Respondent as a seasonal Fish and Wildlife Technician 1 (screens tender) in Enterprise, beginning in March 1991. She was supervised by Gary Findley, Fish and Wildlife Manager 1.

3) Gary Findley was a screens manager for Northeast Oregon at Enterprise at the time of the hearing. He had been screens manager since March 1990. He was reclassified to F. & W. Tech 3 for a brief period in 1992 along with other Manager 1's in state service who had less than a minimum number of subordinates. This temporary removal from management was over a manager's "span of control" and was not performance based. It had nothing to do with any personnel action in connection with Complainant.

4) Complainant had worked with Findley at the Safeway in Enterprise and he had urged her to apply for the seasonal position and suggested what extra training and knowledge she might need.

5) The duties of a Fish and Wildlife Technician 1 (working title: screens technician, screens checker, or screens tender) at Enterprise included the installation, repair, and maintenance of rotary fish screens.¹ A rotary fish screen is a device installed at the headgate of a stream fed irrigation ditch intended to divert fish back into the stream and away from the irrigated land. Each rancher abutting a river or creek

diverted water from the stream into the ranch fields. The installation generally consisted of a concrete basin or box supporting a shaft with paddles which were activated by the flowing water. Fish were prevented from entering the ditch by a rigid mesh arrangement on the ditch side and were shunted back toward the stream by the paddle action. The screen tenders installed screens in each box at the beginning of the irrigation season, verified that each was operating properly, kept accumulated debris cleared away, kept surrounding grass and weeds cut, greased the mechanical portions of the device, performed minor on-site repairs, and on occasion brought the mechanical assembly to the shop for repair or refit. Included among screen tender duties were contacts with ranchers regarding irrigation plans, access to land, coordination of repair shutdowns, and other operational concerns.

6) Personnel assigned to operation and maintenance of screens were assigned to check particular screens by geographic location. Screens located along a specific stream formed a route which was assigned to an individual. Each screen had an identifying number. At times material, the routes for which the Enterprise office was responsible were Upper Valley or Imnaha route (Upper Wallowa River, Hurricane Creek, Imnaha River, Little Sheep, Camp, Grouse, Freeze Out, Summit, and Upper and Lower Big Sheep Creeks), Catherine Creek route (Catherine Creek and Grand Ronde River from La Grande to Union), Lower Valley route (Lower Wallowa and Lostine Rivers, Bear and Whiskey Creeks), and Umatilla River route (Umatilla and Walla Walla Rivers, Birch Creek).

7) Personnel assigned to operation and maintenance of screens were required to maintain two separate records of their activities. One was a "Screen Maintenance Record." That form had a grid with the screen numbers along the side of the grid and the date along the top. There were codes for the screen checker to use in the corresponding square of the grid:

1- screen installed

- 2- screen checked, operation normal
- 3- not operating, no water
- 4- not operating, flood or trash
- 5- not operating, mechanical failure
- 6- low water, bypass operating only
- 7- by-pass not operating, repaired
- 8- screen pulled
- L- Lubricated, operation normal
- V- Vandalized screen
- R- repaired screen, operation normal

Thus, on the screen maintenance record for Wallowa for April 1994 by screen checker Charles Simpson, an entry of "6" on line 33 in column 6 would indicate that on April 6, screen 33 had "low water, bypass operating only." The screen checker might also add at the bottom of the form or on the back pertinent detail regarding particular screens.

8) The second record kept by each screens checker was a "Report of Operation." This form had the days of the week, with each day's date, in seven equal rows, top to bottom. It was intended that the employee enter important or unusual detail for each day. Thus, on Simpson's report of operation for the week ending April 9, 1994, the entry for Wednesday, April 6, was "cleaned shop; checked some screens in the Lower Valley; set up computer table & moved computer."

9) In 1991, in addition to maintaining a screens route, Complainant periodically worked on screens repair in the Enterprise shop, assisted in installation or reinstallation of the concrete screens boxes on site, which involved working with concrete forms and running a backhoe, and had some work assignments involving wildlife operations.

10) Complainant worked as a screens tender at Enterprise until approximately the end of January 1992. At that time she transferred to Respondent's

John Day office, also as a seasonal screens tender. The John Day screens manager was Coby Moulton. Respondent's Enterprise and John Day offices were both administered by Respondent's La Grande regional manager Jim Lauman. Adam Schumacher supervised the screens program for the region. Respondent's state headquarters office was in Portland.

11) Complainant complained to Respondent's management in 1991 concerning her treatment at the time by Findley. Schumacher suggested the transfer to John Day.

12) In May 1992, Findley received a formal reprimand from Respondent concerning his supervision of employees at Enterprise in 1991. As a result of an investigation into concerns expressed by a subordinate (not Complainant), Respondent found that Findley's subordinates perceived that he had favored Complainant by providing more personal guidance and career goal development to her than to his other subordinates, that he later discussed Complainant's performance with another subordinate, and that he criticized Complainant in front of her coworkers. While Findley's subordinates also perceived that his "high level of involvement in her job performance was based on a personal involvement between" Findley and Complainant, Respondent found that not to be the case.

13) In 1992, the John Day shop was principally engaged in the fabrication, installation, and repair of the screens mechanisms. Complainant's duties there, in addition to a screens route, were in fabricating screen assemblies, including reading blue prints, replacing old screen drum mesh, fabricating/building screen trash racks, new screen drums, covers for drive components, screen hanger gantry systems, screen walkway systems, drum cradles and paddle wheels. This included welding, metal fabrication, and the use of power tools. While at John Day, she was transferred to

concrete forms construction, which included preparation of screen sites, constructing form walls and installation of rebar, installation of screen components into forms, working concrete, and pulling forms from completed pours. This included the use of power tools, backhoe, and boom truck. Although she was hired in March 1991 as a seasonal (4 to 6 months or more) employee, she was employed continuously until September 1993.

14) In July 1993, on behalf of Complainant, attorney W. Eugene Hallman, Pendleton, filed a letter with Respondent in Portland denominated "Notice of Claim" intended to satisfy ORS 30.275, Oregon's tort claim statute. The letter asserted a claim for damages against Respondent and its employees Gary Findley and Adam Schumacher for violation of Complainant's rights between March 1991 and May 1993, based on alleged discrimination and harassment of Complainant in Enterprise and John Day because of her sex. The letter alleged that the violations were continuing. It was addressed to Respondent's Director's office in Portland.

15) In December 1993, Complainant received a formal written warning from Respondent for her actions while at John Day in connection with allegations of misuse of a state vehicle, of failure to report damage to a state vehicle assigned to her and two co-workers, and of falsifying an expense claim.

16) Complainant enrolled as a part-time student at Eastern Oregon State College in La Grande in September 1993. She attended through winter term, 1994.

17) From time to time, Complainant kept a personal diary or journal. She noted such things as appointments, things to do, and her impression of events. She kept such a journal from September 1993 to early July 1994. A portion of that document, from March 7, 1993, through July 10, 1994, was received in evidence, as was the entire original document.

18) In or around December 1993, Complainant filed an employment application seeking another assignment with Respondent. She anticipated another seasonal screens tender job; she was also interested in a stream survey job with Respondent's Research section. The "job applied for" box of the application was marked "All Positions." In the "Education and Formal Training" section, Complainant entered her enrollment at Eastern Oregon State College, La Grande, showing "Pre-Dental" under "Major," plus the entry "Minor/ Fish & Wildlife."

19) In early 1994, Complainant filed an employment application seeking another assignment with Respondent. It was a copy of the earlier application except that the "job applied for" box was marked "Fish & Wildlife Tech 1 (Screens Technician 1)."

20) Complainant was interviewed for the screens position in February by a four person panel that included Findley and Judith Hvam, a personnel officer for Respondent.

21) At the time of the interview, Findley voiced some apprehension about working again with Complainant. However, his rating of Complainant after the interview was consistent with those of the other members of the panel.

22) Beginning in 1992, the National Marine Fisheries Service (NMFS) listed the Snake River Chinook on the endangered species list. In Oregon, this affected the entire drainage for which Respondent's Enterprise office was responsible. At the same time, NMFS changed the design of the concrete boxes by changing the angle of the screens to the concrete box. NMFS provided funding (from electrical rate payers) for the rebuilding of existing screens and the placement of new screens to meet the new criteria. The new design required more concrete and stronger metals for guardrails, handrails and walkways. In addition to the maintenance of existing screens, construction of new screens and reconstruction of old screens became important.

Screens maintenance routes at Enterprise no longer included shop or construction work, except for minor repair. Technicians not assigned to maintenance routes were assigned to on site construction and reconstruction of new or existing screens. Metal fabrication was done in John Day.

23) When Complainant was interviewed in February 1994, she was not hired to fill one of two seasonal screen tender positions at Enterprise. One of the two persons hired was Brad Jarrett.

24) Brad Jarrett had a degree in fisheries management from the University of Idaho. He was the only Enterprise screens employee (other than Findley) qualified under federal rules to service the only Enterprise screens district fish trap, which was located on the Lower Valley Route.

25) In March 1994, Complainant filed a complaint with the Agency alleging unlawful employment practices based on sex by Respondent at John Day in 1993 and referencing alleged unlawful employment practices by Respondent in 1991.

26) Complainant recalled being reinterviewed by telephone in April 1994, for the screens job. When nothing happened she sought other work. On April 25, she got a mill job with RY Timber. On April 27, 1994, she was advised by Findley by telephone to come to work in a seasonal screen tender position starting May 2, 1994. The specific position offered was the combined Catherine Creek and Imnaha (Upper Valley) routes.

27) Charles "Chuck" Simpson started employment with Respondent as a seasonal Fish & Wildlife Tech 1 (Screens Technician 1) in Pendleton in 1991. He worked with Complainant occasionally in 1991 and as a seasonal Screens Technician 1 was her crew leader in 1994 in Enterprise. At that time he was in charge of the screens checkers and the local shop maintenance of screens. At the time of hearing, he was a full-time regular Fish & Wildlife Tech 2 in Enterprise. Findley had always been his

manager, with the exception of six months he was in the Research section in Burns in 1991-92. Complainant came to work as a screens checker under his leadership in early May 1994.

28) Scott Kelso was a full-time regular Fish & Wildlife Tech 2 in Enterprise at the time of the hearing. He had started in 1989 as a Seasonal Tech 1 and had worked at Enterprise since about 1990 with Findley as his manager. In May and June 1994, he was crew leader of the construction crew.

29) In a meeting with Findley and Lauman on April 25, 1994, Simpson was appointed lead worker over the screens checkers. Lauman instructed Simpson to treat the screens checkers in his charge equally, to give each the same chance to learn, to watch his language and what he said in front of them, and to act professionally. Findley told Simpson that Complainant would be coming back to work in Enterprise. He expected Simpson to show Complainant her screen route and job duties and responsibilities, give her the new employee forms, and to have her come to Simpson with any problems. If Complainant needed to talk to Findley, Simpson was to be present.

30) In April 1994, Brad Jarrett ran the Lower Valley route, Charles Simpson ran Upper Valley, and Brian Kilgore ran Umatilla and Catherine Creek. Kilgore installed several screens on Catherine Creek and Simpson installed several screens on Upper Valley. Beginning in May, Complainant was assigned the combined Catherine Creek and Upper Valley (Imnaha) routes (approximately 60 screens), Brad Jarrett was assigned the Lower Valley route, (approximately 42 screens) and Brian Kilgore retained the Umatilla River (Walla Walla River) route (approximately 35 screens). The Umatilla route was the longest in miles, followed by Catherine Creek-Upper Valley, with Lower Valley being lowest in mileage. The rancher-landowner and the available flow of water

controlled when and how often the headgate above any particular screen would be opened or closed. Some headgates, as in the Lower Valley, were opened early in the irrigation season (April). Others, notably the Upper Valley such as Big Sheep, had water flow later in the season (*i.e.*, July) or not at all.

31) The construction and maintenance crews met at the Enterprise office each morning shortly after 7 a.m. to start work at 7:30 a.m. The day's activities and any problems were discussed between crew members and the respective crew leader. Both crews generally were "on the road" by 7:40 a.m. Because the Umatilla River route was run out of Pendleton, Kilgore was stationed in Pendleton and rarely came to the Enterprise office.

32) On May 2, 1994, Simpson accompanied Complainant, showing her the Upper Valley route. On May 3 he showed her the Grande Ronde and Catherine Creek screens.

33) On or about May 4, 1994, while moving lumber in a state pickup truck accompanied by Simpson and under his direction, Complainant ran the lumber into a breezeway structure at Respondent's old Enterprise shop, damaging the tailgate of the pickup. Simpson reported the damage to Findley, who called both Simpson and Complainant in on May 5 and directed that they report the accident and obtain damage estimates. Complainant learned that it was unnecessary to file an accident report with the police. She had been concerned with the effect of such a report on her driving record and on her employability with the state, particularly in view of the John Day reprimand.

34) When he asked for an accident report, Findley was referring to an internal agency accident report, kept in the glove compartment of each vehicle and required when there is damage to the vehicle. He did not mean a police report. Because

Complainant was concerned about her driving record, Findley called the state's risk management office and verified that a report to DMV² was not required.

35) Complainant had several conversations with agency investigator Moxley during May and June 1994, mostly about John Day. Early on May 6, about 6:35 a.m., she told Moxley that she was considering a retaliation complaint.

36) Among Findley's duties in respect to the screens tenders were to visually observe and inspect the work twice monthly, to review work needs and accomplishments in staff meetings, and to identify work accomplished and identify and correct problem areas.

37) On May 11, Findley received a call from the regional office regarding screen number 143 on Catherine Creek. Early on May 12, on his way to a regional meeting in La Grande, he removed two links from the drive chain and readjusted the jack shaft of 143. He was of the opinion that this maintenance duty should have been detected and repaired by the screens checker.

38) On May 12, 1994, all personnel in the screens program attended an all day meeting at La Grande. It was an orientation program for seasonal employees and dealt with such items as time sheets, payroll, insurance, performance appraisals, administrative rules, federal Fair Labor Standards Act regulations, use of state-owned vehicles, and employee behavior. The program included a short (10 minute) presentation on sexual harassment and had been scheduled in the ordinary course of agency business. A similar program was presented in 1995.

39) Complainant attended the May 12 meeting and thought the sexual harassment portion was not well done. She also thought, because some John Day employee or employees said "Well, Whybark, you've done it again," that the harassment portion might have been included because of her prior history. She was unable to

identify who made the comment.

40) Sometime around May 12, uniform items were issued for the seasonal employees, including coats, hats, and some name tags. Complainant did not at that time receive a hat, a coat, or a name tag. Hats were available on an as needed basis in Findley's office, and Complainant eventually got one. At Complainant's request, Simpson asked Findley about the coat and name tag and Findley suggested that Simpson find out if the coat she'd had at John Day was available. Name tags sometimes took several months to order. Neither Findley nor Simpson recalled whether one was ordered for Complainant, who was hired later than Mattson or Jarrett. Complainant did not receive her own coat or tag before leaving in June. Simpson gave her permission to use her own coat if one was needed.

41) Complainant also did not get her own pair of hip boots. There were boots available at the office. The ones she used did not fit well. She mentioned the boots to Simpson, but never got new ones.

42) Because an assistant regional supervisor had earlier discovered hats and boots abandoned around the Enterprise shop, vehicles and office, these items were kept in central locations and handed out as needed. Findley was unaware that Complainant's boots were an issue.

43) Complainant felt slighted by what she saw as the unavailability of uniform items and was upset by what she saw as the focus of a portion of the May 12 orientation meeting in La Grande. She thought something was amiss, because she also thought she had seen Findley on her route previously. On May 13, she decided to run her route backwards, that is, opposite the normal direction.

44) On May 13, Findley received a call from the regional office regarding screen number 109 on Catherine Creek as well as a second complaint regarding screen

number 143. Findley and Simpson were headed in that direction to do flow meter checks on some of the screens. They found debris and dead fish in front of 109. At 143, which Findley had repaired the previous day, there was a stick alongside the wall. Complainant came up, looking tense and Findley assured her he was just investigating a complaint. Complainant said if there was a problem with that screen that Brian Kilgore had the route before she did. Both Findley and Complainant were talking loudly.³ Findley commented that if she couldn't do the job, he'd find some one who could. Complainant said she was done with her route and Findley told her she could return to the office.

45) Findley and Simpson returned to screen 109 and found it as before. They removed the debris and dead fish. Each check of 109 in April and May was coded "3 - not operating, no water."

46) On May 13, a citizen named Harvey Moyer, known as a frequent complainer, called regarding Complainant's driving relative to alleged excessive speed and alleged failure to signal. Simpson discussed the complaint with her.

47) On May 16, Findley and Simpson inspected Upper Valley screens (Complainant's) and Lower Valley Screens (Jarrett's). Findley instructed Simpson to advise the screen tenders of problems found and that the next inspection would be within a month.

48) On May 18, Simpson met with Complainant and Jarrett and advised them of what was expected of them as screens checkers. He assisted Complainant in installing two screens.

49) Overall, Complainant was a more competent screens checker than Jarrett in that she was able to assess and correct mechanical or structural difficulty with the fish screens. Jarrett was slower and required assistance with mechanical difficulties.

50) Kim Jones was a Fish & Wildlife Biologist 3, a project leader with Respondent's Research section at the time of the hearing. He had held a similar position in Corvallis in March 1994 when Complainant was interviewed for a stream survey position. Some of the stream survey work was in the Eastern Oregon region. Jones's record showed that Complainant had visited Corvallis in mid-March and advised his office that she was available beginning April 1, 1994. His record also reflected that Gary Findley gave a "good reference - hard worker, motivated" in response to a "telephone reference check" in early April. Jones had no record of what date he notified Complainant that she would be hired, but he generally advised candidates within two weeks of interview.

51) Before Complainant came to work in May 1994, Findley learned from Brad Smith, Respondent's district fish biologist, that Complainant was going to work with Respondent's Research section about the middle of June.

52) During the first week of May 1994, Findley, Simpson, and Kelso discussed Complainant's leaving in mid-June and a possible search for a replacement. Findley instructed Simpson to obtain a letter of resignation from Complainant so that a search for a replacement could be authorized. Following the meeting, Simpson requested that Complainant write such a letter. He reminded her several times and finally was told that June 17 would be her last day at Enterprise.

53) Andrew Yost was hired by Respondent as a seasonal screens technician and assigned to the on-site screens construction crew under crew leader Scott Kelso in May 1994. Before Complainant left the Enterprise job, Yost asked to transfer from the construction crew to screens maintenance to take over the combined Upper Valley-Imnaha and Catherine Creek screens routes. This was cleared in a meeting including Yost, Kelso, Simpson, and Findley. As a result, Yost ran these combined routes with

Complainant on June 3, and they were his from June 17 through the end of July. In August, Jarrett took over the Upper Valley-Imnaha route along with Lower Valley and Kilgore ran Catherine Creek along with Umatilla River.

54) There was no evidence that Kilgore, Jarrett, or Yost, all males, had previously complained to or about Respondent or Findley regarding any unlawful employment practice.

55) In May and June 1994, because of the concentration on on-site construction and reconstruction of the Enterprise area screens and the concentration of screen fabrication and manufacture at John Day, there was very little welding or fabrication work available for either the screen techs running screens routes or for those engaged in construction. Neither Complainant nor her coworkers did other than very occasional work of this type, and she was not isolated from training opportunities in the shop.

56) In May and June 1994, Simpson provided assistance to Complainant when she asked for it. He helped her himself and at least once assigned Jarrett to help her install screens. Complainant preferred not to have Jarrett assist her because he was slow. Other than the construction crew and Kilgore in Pendleton, there was no one else available.

57) During Complainant's tenure at Enterprise, the mileage record book for Complainant's state vehicle was found in the office yard. Findley noted that it was not up to date. He instructed Simpson to go over the maintenance of vehicle mileage books with Complainant.

58) During Complainant's tenure at Enterprise, the regional office questioned why Complainant was not obtaining gasoline for her state vehicle at the fish hatchery pumps and recording same. When questioned by Simpson, Complainant stated that she

had no 3686 key, which gave access to the state pumps. Simpson gave her a key.

59) Because she went into La Grande for the Catherine Creek route twice a week, Complainant had the extra duty of carrying confidential mail between the Enterprise office and the regional office. On June 9, she forgot the mail while unloading a computer.

60) On June 16, 1994, Findley instructed Simpson to prepare a report on Complainant's tenure at Enterprise. Included in the report were the damaged tailgate, the incomplete mileage book, the citizen complaint about her driving, the situations with screens 109 and 143, Complainant's failure to submit an evaluation form on the orientation presentation, an incident wherein Simpson had to go out after Complainant's monthly screens report, her tardiness in submitting a resignation letter, the undelivered mail, and the use of the gas key. Findley later learned that it was not necessary to evaluate an employee on transfer if the employee had worked less than 90 days. Simpson's report was not sent to anyone and never became part of Complainant's personnel file. The items in Simpson's report were described individually by Findley as being "no big deal;" none was ever the basis for any disciplinary or other action against Complainant.

61) Complainant was emotionally upset by what she understood as the necessity for a police report on the pickup damage. She was further upset by what she saw as Findley's focusing on her regarding the situation with screen 143 and her perceptions of his remark. She believed that her route assignment was longer and more difficult than that given others, and that she was deprived of training opportunities and assistance with her work. Each correction or discussion relayed to her by Simpson, such as the missing mail, the mileage book, or the gas key she saw as a further indication of Findley's intent to damage her. She saw each such event as a damaging

blow to her chance to make screens a career.

62) Complainant's stream survey job with Respondent's Research section began on June 20 and ended in mid-September 1994. She enjoyed the assignment and in a note to Jones thanked him for "the wonderful chance to work in Research."

63) In January 1995, the Agency notified Complainant regarding her March 1994 complaint with the Agency that it had not found substantial evidence of any unlawful employment practice by Respondent.

64) In February 1995, Findley included Complainant's name, together with the names of four male 1994 employees (Wright, Bronson, Mattson, and Simpson), in an intradepartmental memo regarding prospective employees for 1995 seasonal positions. Jarrett was not included. Findley's justification of Complainant's selection included the statement that she:

"appears to be a well rounded employee in the screens program which will be a great benefit to the Enterprise Screen District in allowing us great felxibility (sic) in her assignments."

The recommended position was not funded.

65) Ronald Dudgeon, Complainant's father, was a retired US Forest Service engineer. He and Margaret Dudgeon, Complainant's mother, had moved from Arizona to assist Complainant, who was a single parent of one son. The boy was enrolled in school in Prairie City, near John Day, living with Complainant's parents when Complainant attended school in La Grande. They were still at Prairie City when Complainant began work in May 1994 at Enterprise. Ronald Dudgeon worked at a state park in Wallowa County, near Enterprise, in the summer of 1994. The boy stayed with him. Complainant visited or lived with the parents and her son as the situation allowed in 1994.

66) Complainant's parents noted that Complainant seemed emotionally upset

and nervous while working at the Enterprise screens office in 1994. Her mother stated that Complainant was upset by the pickup incident (which she may have confused with the earlier John Day vehicle problem, since she testified that Complainant was not in the vehicle), and by one other incident she couldn't recall. She noted Complainant's nervousness and loss of weight. Complainant's father was even less precise as to the cause of his daughter's upset, describing "an instance something to do with a pickup" and "something to do with the screens not being ran right." "[I]t seemed like it was just one problem after another." She was stressed out and cried easily. Both noted that they discussed Complainant's work situation with her and all seemed to decide that her career plans were not working out. Both parents testified that the living situation and weekend visits to her son created a stressful time.

67) Prior to the week of the hearing, Findley had never seen the July 1993 tort claim notice letter from Complainant's attorney or Complainant's March 1994 complaint with the Agency. He was aware in 1994 that Complainant had previously accused him of sexual harassment. He denied that he took any adverse action toward or regarding Complainant in April, May, or June 1994 because she had opposed unlawful practices or because she was female.

68) At the time of the hearing, Complainant had been employed in Boise, Idaho, as a registered dental assistant since January 1996.

69) Complainant's testimony was not altogether credible. Her testimony about her career goal to make her career in screens was not borne out by her educational goals. There was little testimony or other evidence confirming her view of events. She testified that she called Hvam and Hoover on May 13, 1994, after her upset at screen 143, but neither recalled such a call. She denied that there was debris at 109 on May 13, but two persons found it both before and after she should have been there. Her

perspective on the harassment presentation at the orientation meeting was not objectively reasonable. The forum has credited only those portions of her testimony which were uncontroverted or which were confirmed by other evidence or inference on the whole record.

ULTIMATE FINDINGS OF FACT

1) Complainant, female, was employed by Respondent as a Fish and Wildlife Technician 1 (Screens Tender) on a seasonal basis between March 1991 and September 1993 and between May and June 1994.

2) Complainant's supervisor between March 1991 and February 1992 and in May and June 1994 was Gary Findley, Fish and Wildlife Manager 1, at Respondent's Enterprise, Oregon, office. Between February 1992 and September 1993, Complainant's supervisor was Coby Moulton at Respondent's John Day, Oregon, office.

3) In May 1992, Findley received a formal reprimand from Respondent concerning his supervision of employees at Enterprise in 1991, including both favorable and unfavorable treatment of Complainant. Respondent made no finding of any unlawful practice involving her gender.

4) In 1994, Findley was aware that Complainant had complained regarding incidents of alleged sexual harassment involving Findley.

5) In February 1994, Complainant was interviewed for and not hired to fill one of two seasonal screen tender positions at Enterprise. Later, in April, she was notified by Findley that she was hired. She began working on May 2, 1994, with Findley as her supervisor.

6) In March 1994, Complainant was interviewed for a position with Respondent's Research section in Corvallis, Oregon. Findley gave a positive recommendation on Complainant to the Research section. She was advised in early

April that she had that job beginning June 20, 1994.

7) Complainant was not treated adversely at Enterprise in May and June 1994 because of her sex, because she had opposed unlawful practices, or because she had initiated or assisted in a proceeding under ORS chapter 659.

CONCLUSIONS OF LAW

1) At times material herein, ORS 659.010 provided, in part:
"As used in ORS 659.010 to 659.110 * * * unless the context requires otherwise:

" * * * * *

"(6) 'Employer' means any person, including state agencies, * * * who in this state * * * engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.

Respondent was an employer subject to ORS 659.010 to 659.110 at all times material herein.

2) At times material herein, ORS 659.040(1) provided, in part:
"Any person claiming to be aggrieved by an alleged unlawful employment practice, may * * * make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the * * * employer * * * alleged to have committed the unlawful employment practice complained of * * * no later than one year after the alleged unlawful employment practice."

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

3 At times material herein, the actions, inactions, statements, and motivations of Gary Findley are properly imputed to Respondent herein.

4) ORS 659.030 provides, in part:
"(1) For the purposes of ORS 659.010 to 659.110 * * *, it is an unlawful employment practice:

" * * * * *

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

" * * * * *

"(f) For an employer * * * to discriminate against * * * any person because the person has opposed any practices forbidden by this section * * * or because the person has filed a complaint, testified or assisted in any proceeding under ORS 659.010 to 659.110 * * * or has attempted to do so."

Respondent did not discriminate against Complainant because of her sex. Therefore, Respondent did not violate ORS 659.030(1)(b).

5) Respondent did not discriminate against Complainant because she had opposed practices forbidden by ORS 659.030. Therefore, Respondent did not violate ORS 659.030(1)(f).

6) Respondent did not discriminate against Complainant because she had filed a complaint or assisted in a proceeding under ORS 659.010 to 659.110. Therefore, Respondent did not violate ORS 659.030(1)(f).

7) At times material herein, ORS 659.060(3) provided, in part:
" * * * The commissioner shall * * * issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged * * *."

The Final Order below is a proper disposition of this matter.

OPINION

The Agency's Specific Charges accused Respondent, through its manager, Gary Findley, in 1994, of discriminating against Complainant because of her sex, female, and in retaliation for her having previously opposed unlawful practices based on sex and sexual harassment by Findley and other Respondent employees in 1991 and 1993, including the filing of complaints with the Agency under ORS chapter 659.

RETALIATION

Respondent argued that there was no showing that Findley was aware in February through June 1994 that Complainant had opposed unlawful practices and particularly that Findley was aware of the contents of the July 1993 tort claim notice or

of the March 1994 complaint with the Agency. Findley testified that he had seen neither until the week of the hearing. However, I conclude from the following colloquy that Findley knew that Complainant had accused him of sexual harassment:

QUESTION (by the Agency): "So when Ms. Whybark started her employment with you on May 2nd, 1994, you were aware of her previous complaints regarding you and sexual harassment; isn't that correct?"

ANSWER (by witness Findley): "Yes."

Sexual harassment is discrimination because of sex, which by definition is an unlawful employment practice. ORS 659.030(1). Accusing an employer/ manager of sexual harassment is opposing an unlawful employment practice.

Findley received a reprimand from Respondent for his management of subordinates, particularly Complainant, in 1991. But Complainant was not the employee who had initiated Respondent's investigation of Findley's management and the reprimand specifically found that there was no evidence of sexual misconduct. Thus, as to the reprimand, the Agency established that Findley might have had motivation to retaliate, but that particular retaliation would not be based on an unlawful employment practice.

DIFFERENT TREATMENT

Whether Respondent's allegedly adverse treatment of Complainant was because of her sex or because of retaliation or both, the Agency must show that such treatment was discriminatory, that is, that it was not accorded to males and/or was not accorded to persons who had not opposed forbidden practices.

The evidence showed that Findley was apprehensive about re-employing Complainant. On the other hand, it also showed that he evaluated her fairly on interview, that he gave a positive recommendation for her to another section of Respondent, and that he included her in his preliminary planning for his program for

1995. Jarrett, on the other hand, was not included in the 1995 planning and was not rehired.

Findley testified positively that Complainant was a competent screens tender with commensurate mechanical ability. He did have Simpson list a series of instances wherein Complainant may have fallen short of expectation, but the list was not disseminated. It was not placed in her personnel file or even discussed with her. Findley acknowledged that singly, the items listed were not "big deals," and that collectively they illustrated carelessness or inattention which could be corrected.

Respondent countered with the argument that each incident perceived as discriminatory by Complainant was, in fact, not discriminatory but rather was the result of non-discriminatory circumstances wherein Complainant was treated no differently than males or than persons who had not made complaint of unlawful employment practices. There was simply no evidence that any male screens tender, or any employee who had opposed unlawful practices, had been involved with a damaged tailgate, an incomplete mileage book, a citizen complaint about driving, a verbal confrontation about screens, a failure to submit an evaluation form on the orientation presentation, a crew leader retrieving a monthly screens report, a tardy resignation letter, undelivered mail, or the use on non-use of the a key.

The Agency alleged that the assignment of the combined Catherine Creek and Upper Valley-Imnaha screens routes was discriminatory, in that they were ordinarily assigned to two screens tenders, and that the assignment was designed to isolate Complainant from the office and the other screens personnel. The evidence showed that she accepted the job knowing that was the assignment, that the mission of the Enterprise office had been changed by NMFS since 1991 to emphasize construction and reconstruction of the screens system, that Complainant did not request transfer to

the construction crew, and that, as between the three screens checkers available, the assignment was the most logical. Jarrett was the only checker also qualified to service the fish trap in Lower Valley, and was also the most mechanically inept and was assigned to the route closest to Enterprise, should he need assistance. Kilgore was completely isolated in Pendleton and ran a combined route which was the longest route as to distance. Complainant's route had more screens, but had fewer operating in early season than the Lower Valley. After she left to do stream survey work, Yost, a male who had not protested unlawful practices, received the exact same route assignment.

The Agency alleged that Complainant, although qualified, was not allowed to work in the shop at fabrication and welding while her co-workers with less experience were permitted to do such work. The evidence demonstrated that the job and its mission had changed since Complainant's prior employment at Enterprise. No screens tender, even among the construction crew, did fabrication in 1994 and the only welding was in connection with construction.

The Agency alleged that Complainant was denied the same assistance that her co-workers were offered and received. There was simply no evidence to support this allegation.

The Agency alleged that Findley ordered special items such as name tags, coats, and hats for "the entire crew except Complainant." There was no evidence that Findley individually ordered these items for anyone. There was evidence that Complainant did not receive some items, but no showing by a preponderance of evidence that any missing items were due to intent rather than the assumption that an ex-employee already had them or the fact that Complainant was expected to leave in mid-June or any other non-discriminatory reason.

Thus, the Agency failed to prove by a preponderance of evidence on the whole

record that in 1994 at Enterprise, Respondent engaged in any unlawful employment practice prohibited by statute which caused harm to Complainant.

ORDER

NOW, THEREFORE, Respondent not having been found to have engaged in the unlawful employment practices charged, the Specific Charges and the Complaint against Respondent State of Oregon Department of Fish and Wildlife are hereby dismissed according to the provisions of ORS 659.060(3).

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¹The term "screen" or "screens" was used in the testimony and documents to mean, depending on the context: the total screen assembly, as in "screen number 143;" the generic description of a work assignment, as in "screens route," "screens construction," or "screen tender;" or the mesh portion of the individual device.

²Department of Motor Vehicles

³This is a composite finding. All three persons present agreed on the date and location of this confrontation. Complainant insisted that she arrived first, removed a stick and was leaving when the other two arrived. Because Findley stated there was a stick laying near the wall, Complainant may well have removed it first. Simpson thought he or Findley may have removed the stick, but could not recall exactly. Complainant stated that Findley said he had ten men who could do the job if she couldn't. All agree that screen 109 was not mentioned.