

In the Matter of

ROGUE VALLEY FIRE PROTECTION, LLC

Case No. 33-04

Final Order of Commissioner Dan Gardner

Issued January 24, 2005

SYNOPSIS

The Agency alleged that Respondent discharged Complainant because he opposed safety hazards in Respondent's workplace. The Commissioner found that Complainant's opposition to Respondent's ladder safety policy was a substantial factor in Respondent's decision to discharge him and awarded \$10,749.60 in lost wages and \$5,000 in emotional distress damages. ORS 654.062(5)(a); OAR 839-04-0004.

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 December 1, 2004, at Medford office of the Oregon Employment Department, located at 119. N. Oakdale Ave., Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Patrick A. Plaza, an employee of the Agency. Complainant Forest Wilson ("Complainant") was present throughout the hearing and was not represented by counsel. Respondent Rogue Valley Fire Protection did not make an appearance and was held in default.

The Agency called the following witnesses: Complainant; Danielle Wilson, Complainant's wife; and Harold Rogers, former Civil Rights Division Senior Investigator.

The forum received into evidence:

a) Administrative exhibits X-1 through X-24 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-3, A-5 through A-8, and A-10 through A-13 (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 May 27, 2003, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that he was the victim of the unlawful employment practices of Respondent. After investigation, the Agency issued a Notice of Substantial Evidence Determination on October 24, 2003, finding substantial evidence supporting the allegations of the complaint.

2) On August 5, 2004, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by discharging him in retaliation for opposing safety hazards in Respondent's workplace in violation of ORS 654.062(5)(a) and OAR 839-004-0004. The Agency sought damages of "[l]ost wages in an amount to be proven at hearing and currently estimated to be approximately \$6,000" and \$5,000 for emotional stress.

3) On August 6, 2004, the forum served the Formal Charges on Respondent, accompanied by the following: a) a Notice of Hearing setting forth December 1, 2004, 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 August 27, 2004, the Agency filed a Notice of Intent to File a Motion for Default based on Respondent's failure to file an answer to the Formal Charges after being served with the documents.

5) On September 14, 2004, the Agency moved for an Order of Default against Respondent based on Respondent's failure to file an answer.

6) On September 17, 2004, the ALJ issued a Notice of Default to Respondent in which the ALJ granted the Agency's motion and notified Respondent that it had ten days to seek relief from default. Respondent did not respond and on October 5, 2004, the ALJ issued an Order confirming Respondent's default.

7) 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.

8) On October 20, 2004, the Agency moved to amend the Formal Charges in order to:

“clarify for the record that it is Respondent's alleged unlawful employment practice as identified in paragraph II.15 and not Complainant's actions in paragraph II.14 that form the basis for the Agency's allegations that Complainant was retaliated against and subjected to unlawful employment practices as a result of his protected activity and membership in a protected class.”

To accomplish this, the Agency sought to substitute “paragraph II.15” for “paragraph II.14” in six different places in the Formal Charges. The Agency also changed its prayer for damages to “[l]ost wages in an amount to be proven at hearing and currently estimated to be approximately \$9,200[.]”

9) On October 27, 2004, the ALJ granted the Agency's motion. The ALJ relieved Respondent of default and directed the Agency to serve a copy of the Amended Formal Charges on Respondent.

10) On November 5, 2004, the Agency served its amended Formal Charges on Respondent, along with duplicates of all the documents served with the original notice of hearing.

11) On November 24, 2004, the Agency moved for the ALJ to take judicial notice of OAR 437-003-0503. At the hearing, the ALJ granted the Agency's motion and took judicial notice of that administrative rule.

12) Respondent did not file an answer to the amended Formal Charges.

13) On November 29, 2004, the Agency moved for an order of default against Respondent based on Respondent's failure to file a timely answer.

14) At 9 a.m. on December 1, 2004, the time set for hearing, Respondent did not make an appearance and did not contact the forum prior to the hearing. The ALJ waited until 9:30 a.m. to begin the hearing. When Respondent did not appear, the ALJ declared Respondent to be in default, then advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) Respondent did not seek relief from default prior to or after the hearing

16) On January 5, 2005, the ALJ issued a proposed order 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 a limited liability company registered in Oregon and an employer doing business in Oregon that engaged or

utilized the personal services of one or more employees In Oregon, reserving the right to control the means by which such service would be performed.

2) Complainant enrolled as an apprentice sprinkler fitter in 1996 through a union program and completed his apprenticeship in or around 2001. Complainant continued working as a sprinkler fitter until he was laid off in February 2003.

3) During his apprenticeship, Complainant received training in ladder safety. During his training, Complainant was instructed that extension ladders must be secured at the top or the bottom to prevent slippage while someone was working on the ladder. This can be done by tying the ladder with a rope or having one person “foot the ladder” by holding it from the bottom.

4) In 2002, Complainant completed OR-OSHA online courses in Safety & Health Management, Safety Committee Operations, Accident Investigation, and Effective Safety Supervision. The primary focus of these courses was developing and maintaining a safe workplace and determining the cause of workplace accidents. Complainant received certificates of completion for each course.

5) On April 24, 2003, Complainant applied for work with Michael Couch, Respondent’s “owner.”ⁱⁱ At the time he applied, Complainant provided Couch with copies of his OR-OSHA completion certificates. Although Respondent was not a “union shop,” Complainant’s union approved his employment with Respondent under a “salting agreement.” Couch agreed to hire Complainant to install fire sprinklers. Complainant was happy to be hired by Respondent because it was a “local” job for him. When Complainant went to work for Respondent, he intended to work as long as Respondent’s jobs continued.

6) Complainant’s rate of pay while employed by Respondent was \$28.84 per hour. Complainant was scheduled to work eight hours per day, five days per week.

7) Complainant's first day of work was April 28, 2003. Complainant worked at the Eagle Point Elementary School project installing fire sprinklers on April 28 and 29.

8) On April 30, 2003, Couch transferred Complainant to the White City Middle School Project to work as a Respondent's foreman. Couch told Complainant he was "responsible for running that job." Complainant's duties included supervising Weston Truelove, another employee of Respondent. Couch told Complainant that Truelove "had the skill level of an apprentice."

9) At the White City project, Complainant's job was installing piping into structural members to supply water to fire sprinkler heads. Complainant used several types of ladders on the job, including A-frame ladders, extension ladders, and a scissors lift.

10) Complainant worked at the White City project on April 30th, May 1st and 2nd, and May 5th, 7th, and 8th, 2003.

11) Between April 30th and May 1st, Complainant and Truelove used an A-frame ladder and scissors lift when they needed to perform work at heights they could not reach from the floor. They used the A-frame ladder when installing pipe in ceilings 8'-10' in height, and the scissors lift in rooms where the ceiling was higher. Ceiling heights on the White City project were as high as 30'.

12) On May 7th, it rained at the White City project.

13) On May 8th, it rained again at the White City project. In the morning, Complainant and Truelove installed pipe in the "Practice Rooms." Couch then called Truelove and asked him to inventory all the piping on the job. When Truelove finished that job, he came over to help Complainant. That was not possible because there was only one lift and Complainant was using it. However, there was work available for

Truelove and Complainant on the west side of the rooms that required the use of an extension ladder.

14) The area where the extension ladder was needed had a concrete floor and roof, but unfinished walls, and the floor was wet from rain that had blown in. The work required Complainant or Truelove to work at a 15' height on a "20-25" extension ladder borrowed from another subcontractor, with the top of the ladder resting on wooden ceiling joists.

15) Complainant called Couch to discuss the work situation. Couch told Complainant if he couldn't keep Truelove working, then send him home. Complainant told Couch there were projects that needed to be completed from an extension ladder. Complainant decided that Truelove could "foot" the ladder and Complainant would climb it. Truelove told Complainant that "we are not allowed to foot the ladder."

16) Complainant asked Couch if he wanted "one guy footing the ladder while one is in the air or do you just want one guy on the ladder?" Couch interrupted Complainant and yelled "Forest, forget all that union shit. Okay? If I see two guys on an extension ladder I'll fire both of them. If that's not something you can handle, then I'm gonna have to let you go." Complainant responded "No, I understand. I just wanted to learn what you wanted so I wouldn't get in trouble if something happened." Couch answered "Yeah. Well just forget about all that OSHA crap. The fuckin' OSHA guy has never turned pipe wrenches in his life. If they come on the job, you'll know about before you see them because Scott will come and tell you – hey, the OSHA guy just showed up!"

17) Complainant shared this information with Truelove, who was so upset that he decided to go home and left Respondent's work site.

18) Complainant was concerned about Couch's statements and his own personal liability in the event an accident occurred while he or Truelove was using the extension ladder unsafely. Before proceeding with the extension ladder, Complainant decided to seek clarification from Couch regarding Respondent's ladder safety policy.

19) Complainant went to the contractor's job shack Complainant faxed a note to Mike Couch on which Complainant had handwritten the following:

"TO: Mike Couch 541-772-6641
RVFP
FR: Forest Wilson
Foreman, WCMS
re: use of extension ladder

Mike –

Regarding our telephone conversation this afternoon: I am sending this fax to confirm that it is the policy of RVFP to disregard OSHA regulations pertaining to the use of ladders.

Specifically, the company policy is that one man shall work from an extension ladder. The ladder shall not be held on the ground by another employee (i.e. 'footed') or, 'footed' until the ladder is securely fastened.

I understand that it is the company policy (as stated in our tele. conversation) to dismiss employees who disregard the company ladder standard.

Employees working on the WCMS project are following company rules and are not working under my direction. Furthermore, I am not responsible for their safety or compliance with OSHA regulations.

Signed,
Forest Wilson"

It took Complainant "5-8 minutes" to write and fax the note.

20) Complainant returned to work. An hour later, Complainant was told that his fax had not gone through to Couch. Complainant returned to the job shack and faxed the note again.

21) Two minutes later, Couch called Complainant on his cell phone. Complainant was in the contractor's job shack at the time. Couch made the following statement to Complainant:

"Forest, I got your fax. I need you to come into the office and pick up your checks. Bring your keys and the tools I gave you. I can't be having this shit on my jobs. I don't know what you're talking about OSHA rules. I just got off the phone with OSHA and they said there is no such rule. So, I need you to come get your check."

Complainant understood from Couch's statements that he was fired.

22) The prime contractor's project superintendent and another employee of the prime contractor were also in the job shack when Couch told Complainant to come get his check. Complainant told both persons he had been fired.

23) Prior to his discharge, Respondent did not warn or discipline Complainant about any aspect of his work performance.

24) Complainant experienced embarrassment and humiliation at being terminated while he was in the prime contractor's shack. He had never been fired from a job before. He also felt shocked, disappointed, and aggravated at being "fired from a nice local job while trying to work safe." Complainant was very upset and very disappointed when he arrived home after being fired and told his wife that he had been fired.

25) On May 8, 2003, Complainant had been married for 14 months and had a six month old son. Complainant was the sole support of his wife and son. He applied for unemployment benefits, but they were initially denied because he had been fired. He contested the benefits and was awarded them four weeks after his termination. When he did receive benefits, they were less than half of the net weekly pay he earned while employed by Respondent. During that four week period, he had no income. He used a credit card to pay his mortgage and used his savings to pay his other expenses.

It took Complainant about seven months to pay off his credit card bill and replenish his savings.

26) Complainant looked for work between May 8 and July 3, 2003. During that time, he talked constantly about how Respondent had fired him and had a hard time focusing on his relationship with his family. He became more irritable the longer he was out of work.

27) Complainant obtained subsequent employment on July 3, 2003, with Cascade Fire Protection Company. He worked 40 hours per week, earning \$23.50 per hour, or \$940 per week. He remained with Cascade until a month prior to the hearing.

28) Respondent continued to employ workers at the Eagle Point and White City projects until at least September 2003.

29) Complainant suffered \$10,749.60 in wage loss between May 9 and September 1, 2003, as a result of his discharge from Respondent's employment, calculated as follows:

5/9:	\$ 230.72 (\$28.84 x 8 hours)
5/12-16:	1,153.60 (\$28.84 x 40 hours)
5/19-23:	1,153.60 (\$28.84 x 40 hours)
5/26-30:	1,153.60 (\$28.84 x 40 hours)
6/2-6:	1,153.60 (\$28.84 x 40 hours)
6/9-13:	1,153.60 (\$28.84 x 40 hours)
6/16-20:	1,153.60 (\$28.84 x 40 hours)
6/23-27:	1,153.60 (\$28.84 x 40 hours)
6/30-7/2:	1,153.60 (\$28.84 x 40 hours)
7/3:	42.72 (\$230.72 - \$188)
7/7-11:	213.60 (\$1,153.60 - \$940)
7/14-18:	213.60 (\$1,153.60 - \$940)
7/21-25:	213.60 (\$1,153.60 - \$940)
7/28-8/1:	213.60 (\$1,153.60 - \$940)
8/4-8:	213.60 (\$1,153.60 - \$940)

8/11-15: 213.60 (\$1,153.60 - \$940)
8/18/22: 213.60 (\$1,153.60 - \$940)
8/25-29: 213.60 (\$1,153.60 - \$940)

30) Complainant filed a complaint with OR-OSHA after his termination. OR-OSHA inspected Respondent's work site on May 13 and 14, 2003. As a result of the inspection, OR-OSHA cited Respondent for three violations – failure to train all employees in ladder safety prior to work activity; failure to train all employees in the use of fall protection systems and the use of protective measures prior to the commencement of their work activity, and lack of MSDS sheets.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was a limited liability company registered in Oregon and an employer doing business in Oregon that engaged the personal services of one or more employees.

2) Respondent, through Michael Couch, a member of the LLC, hired Complainant on April 24, 2003, to work as a fire sprinkler installer working 8 hours per day, forty hours per week, Monday through Friday, at the rate of \$28.84 per hour.

3) Complainant's first day of work for Respondent was April 28, 2003. He worked April 28th and 29th at the Eagle Point Elementary School Project.

4) On April 30, 2003, Couch transferred Complainant to the White City Middle School Project to work as a Respondent's foreman. Complainant's duties included supervising Weston Truelove, another employee of Respondent who had less experience than Complainant as a fire sprinkler installer.

5) On May 8, Complainant and Truelove began their day by installing pipe in the "Practice Rooms." Truelove then inventoried Respondent's piping on the job. When he finished that job, he came over to help Complainant. That was not possible because there was only one scissors lift and Complainant was using it. However, there was work

available for Truelove and Complainant on the west side of the rooms that required the use of an extension ladder.

6) The area where the extension ladder was needed had a concrete floor and roof, but unfinished walls, and the floor was wet from rain that had blown in. The work required Complainant or Truelove to work at a 15' height on an extension ladder borrowed from another subcontractor, with the top of the ladder resting on wooden ceiling joists.

7) Complainant called Couch and to discuss the work situation and told him there were projects that needed to be completed from an extension ladder. Complainant asked Couch if he wanted Complainant or Truelove to "foot" the ladder while the other worked on the ladder. Couch told Complainant that he would fire both of them if he saw them doing this.

8) Complainant was concerned about Couch's statements and his own personal liability in the event an accident occurred while he or Truelove was using the extension ladder unsafely. Before proceeding with the extension ladder, Complainant decided to seek clarification from Couch regarding Respondent's ladder safety policy and faxed a handwritten note to Couch in which he asked Couch to confirm that Respondent's policy was that employees should work alone on extension ladders, with no one else supporting it from ground level.

9) Within minutes of receiving Complainant's fax, Couch called Complainant and discharged him.

10) Couch discharged Complainant because he opposed Respondent's policy of not allowing one employee to support an extension ladder at ground level while the other person climbed the ladder or worked on it.

11) Complainant experienced emotional distress as a result of his discharge.

12) Complainant lost \$10,749.60 in back wages as a result of his discharge from Respondent's employment.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 654.062 and ORS chapter 659A.

2) The actions, statements and motivations of Michael Couch are properly imputed to Respondent.

3) Respondent's discharge of Complainant violated ORS 654.062(5)(a) and OAR 839-004-0004.

4) 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 654.062(5)(a), ORS 659A.820 through ORS 659A.850.

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

Respondent was served with the Notice of Hearing and Formal Charges and was held in default. Respondent was relieved of default when the Agency issued amended Formal Charges, but again did not file an answer and then failed to appear at the hearing, was found in default, and did not request relief from 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 engaged the personal services of one or more persons in Oregon; (2) Complainant was a worker who opposed any practice forbidden under or related to the Oregon Safe Employment Act (OSEA); (3) Respondent discharged Complainant; and (4) Complainant's opposition to practices forbidden under or related to OSEA was a substantial factor in Respondent's decision to discharge Complainant.

RESPONDENT WAS COMPLAINANT'S EMPLOYER

Document evidence obtained from the Corporations Division established that Respondent was registered as a limited liability company in 2003. Complainant's credible testimony and pay stubs issued by Respondent established that Respondent, though Couch, hired Complainant and used his services between April 28 and May 8, 2003. This evidence establishes that Respondent was Complainant's employer.

COMPLAINANT WAS A WORKER WHO OPPOSED ANY PRACTICE FORBIDDEN UNDER OR RELATED TO THE OREGON SAFE EMPLOYMENT ACT (OSEA)

On May 8, 2003, Complainant was acting as Respondent's foreman, as well as installing pipe for fire sprinklers. As foreman, he supervised Wes Truelove, an employee whose experience and skill level were similar to those of a union apprentice. When Truelove completed the inventory work Couch had assigned to him, he needed to use an extension ladder to perform the only work available, which was installation of pipe approximately 15' above the floor.

Complainant had received extensive safety training, including training on ladder use, as a union apprentice and from OR-OSHA, and had been taught that an extension ladder must be "footed" by a person on the ground or tied to a support with a rope at its

top. Complainant was particularly concerned in this instance because the floor was wet and he or Truelove would be working at a height of 15' above a cement floor. A fall under those conditions would most likely cause serious injury. With this in mind, Complainant called Couch and discussed the ladder situation with him. Couch's response was to let him know that he and Truelove would be fired if both of them were involved in using the extension ladder at the same time and that Complainant should "just forget about all that OSHA crap."

Complainant told Truelove about his conversation with Couch and Truelove became so upset that he left work. Knowing that he would have to use an extension ladder to complete the work, Complainant became concerned about his own personal liability in the event an accident occurred while he or Truelove used the extension ladder without the safety precautions Complainant had been taught. Complainant handwrote a note to Couch asking him to clarify that Respondent's extension ladder safety policy was the same as what Couch had told him over the phone – only one man would work from an extension ladder at a time. Couch's reaction was immediate. Within two minutes after receiving the fax, Couch called Complainant and told him to come in and pick up his check.

The purpose of the OSEA, as stated in ORS 654.003, is to:

"assure as far as possible safe and healthful working conditions for every working man and woman in Oregon, to preserve our human resources and to reduce the substantial burden, in terms of lost production, wage loss, medical expenses, disability compensation payments and human suffering, that is created by occupational injury and disease."

To prove a violation of ORS 654.062(5)(a), the agency need not establish that a complainant opposed conditions that actually violated a statute or an OR-OSHA rule. *In the Matter of Tomkins Industries, Inc.*, 17 BOLI 192, 206 (1998). The Agency only needs to prove that the complainant was discharged for expressing safety concerns "under or related to" the OSEA. The Complainant's concerns over ladder safety, given

that the potential consequences of ladder slippage, fall within safety concerns related to the OSEA. As such, Complainant's opposition to Couch's cavalier reaction to his expression of those concerns was activity protected under ORS 654.062(5)(a) and OAR 839-004-0004.

RESPONDENT DISCHARGED COMPLAINANT

There is no dispute over the fact that Couch discharged Complainant on May 8, 2003.

COMPLAINANT'S OPPOSITION TO RESPONDENT'S LADDER SAFETY PRACTICE WAS A SUBSTANTIAL FACTOR IN RESPONDENT'S DECISION TO DISCHARGE COMPLAINANT

The evidence is undisputed that Complainant received no disciplinary warnings prior to his discharge. Couch's use of Complainant as a foreman creates an inference that Couch was satisfied with Complainant's work. In retaliation cases involving discharge, the Commissioner has previously held that a short intervening time between the act alleged to have caused the retaliation and the retaliatory act may be an indicator of retaliation. See *In the Matter of German Auto Parts, Incident.*, 9 BOLI 110, 124-27 (1990), *aff'd German Auto Parts, Inc. v. Bureau of Labor and Industries*, 11 Or Application 522, 826 P2d 1026 (1992) (complainant filed a complaint with OSHA and was fired the day after OSHA fined respondent); *In the Matter of LeeBo Line Construction, Inc.*, 1 BOLI 210, 214 (1979) (complainant was fired immediately after requesting additional safety equipment). In this case, Complainant was discharged within two minutes of opposing Respondent's ladder safety practices. Given Respondent's immediate response to Complainant's opposition and the absence of any performance problems on Complainant's part, the forum concludes that Complainant's opposition to Couch's directive about extension ladder safety was not only a substantial

factor in Respondent's decision to discharge Cp, but was the only reason for Complainant's discharge.

DAMAGES

In its Formal Charges, the Agency sought "[l]ost wages in an amount to be proven at hearing and currently estimated to be approximately \$9,200 and \$5,000 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. *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 documentary evidence and the credible testimony of Complainant, the Agency established Complainant was working eight hours per day, 40 hours per week at the wage rate of \$28.84 per hour, for total average earnings of \$230.72 per day and \$1153.60 per week. His employment was expected to continue until Respondent

completed the Eagle Point and White City projects, which continued until at least the end of August 2003. Cp credibly testified that he sought work until July 3, 2003, when he was hired as a sprinkler fitter at another company, where he continued to work until one month prior to the hearing. He was paid \$23.50 per hour by his new employer and worked 40 hours a week. Because Complainant earned less at his new job, the forum has calculated his lost wages from May 9 until August 31, 2003, as shown in Finding of Fact 29 – The Merits. The forum has cut off Complainant’s lost wages as of August 31, 2003, because there is no evidence as to how long Respondent’s work on the Eagle Point and White City projects continued past that date. In sum, the Agency established that Complainant would have earned an additional \$10,749.60 in wages, had he not been discharged by Respondent.

In previous cases, the forum has held that when a respondent employer is in default, the forum’s award of damages for lost wages is limited to the amount alleged in the charging document “because that is the figure of which Respondent employer had notice prior to default.” *See In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 124, 140 (1997). In this case, the amended Formal Charges sought “[l]ost wages in an amount to be proven at hearing and currently estimated to be approximately \$9,200[.]” Because Respondent had notice of the approximate amount of lost wages and that the Agency intended to prove the specific amount of lost wages at the hearing, the forum has the authority to award Complainant the amount of lost wages actually proven at the hearing. That amount is \$10,749.60.

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 the testimony of Complainant and his wife to establish emotional distress damages. Complainant credibly testified that his discharge caused him significant emotional and financial stress in his life until at least July 3, 2003, when he obtained subsequent work. Complainant had never been fired before, and this upset and embarrassed him. He had received extensive safety training as a union apprentice and was shocked at being fired "for trying to work safe." He was the sole support of his family and had no income for four weeks after his discharge because Respondent fired him and he had to contest the Employment Department's initial denial of his unemployment benefits. His wife testified that he talked constantly about how Respondent had fired him, became more irritable the longer he was out of work, and had a hard time focusing on his family relationships. 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 awards Complainant the \$5,000 emotional distress damages award sought by the Agency. The forum notes that the evidence presented

supported a larger award than \$5,000. However, in a default situation, where a specific amount of damages for emotional distress is sought, the charging document sets the limit on the relief the forum can award. *In the Matter of Kenneth Williams*, 14 BOLI 16, 26 (1995).

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of Respondent's violation of ORS 654.062(5)(a), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Rogue Valley Fire Protection, LLC** to:

- 1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for Complainant Forest Wilson in the amount of:
 - a) TEN THOUSAND SEVEN HUNDRED FORTY NINE DOLLARS AND SIXTY CENTS (\$10,749.60), less appropriate lawful deductions, representing wages lost by Forest Wilson between May 9 and September 1, 2003, as a result of Respondent's unlawful practices found herein, plus interest at the legal rate on that sum from August 31, 2003, until paid, plus
 - b) FIVE THOUSAND DOLLARS (\$5,000), 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 opposition to any practice forbidden under or related to the Oregon Safe Employment Act (OSEA).

ⁱ Complainant referred to Couch as Respondent's "owner." Corporation Division information received into evidence shows that Couch was the registered agent of Respondent and a "member."