

**In the Matter of**

**STATE ADJUSTMENT, INC.**

**Case No. 54-01**

**Final Order of the Commissioner Jack Roberts  
(Amended)**

**Issued March 21, 2002**

**SYNOPSIS**

Where a female Complainant was employed by Respondent corporation and was sexually harassed by Respondent's corporate officer, the forum found Respondent liable for Complainant's resulting mental suffering and awarded Complainant mental suffering damages totaling \$10,000. ORS 659.030(1)(b). The forum found no basis for determining that Complainant was constructively discharged in violation of ORS 659.030(1)(a).

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 5, 2001, at the Salem office of the Bureau of Labor and Industries located at 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon.

David K. Gerstenfeld, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Rhonda Shanafelt ("Complainant") was present throughout the hearing and was not represented by counsel. James J. Susee, Attorney at Law, represented State Adjustment, Inc. ("Respondent"), whose corporate officer, Chris Zurfluh, was present throughout the hearing.

In addition to Complainant, the Agency called as witnesses: Gregg Merrill, Employment Department Adjudicator; Pam Lomax, process server; Larry Lomax, process server; Juneka Torres, former Respondent employee; Joseph Tam, a BOLI senior civil rights investigator; and Jamie Bellwood, Complainant's daughter.

Respondent called as witnesses: Thomas E. Fleming, process server; Michael Knapp, Respondent's corporate attorney; Traci Coyle, Respondent's former employee; Charles Anderson, Respondent's courier service; Paul Conner, drywall finisher; and Chris ("Phil") Zurfluh, Respondent's owner.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-19;
- b) Agency exhibits A-1 through A-5 (submitted prior to hearing); A-8 (submitted at hearing)
- c) Respondent exhibits R-1 and R-3 (submitted prior to hearing).

Having fully considered the entire record in this matter, the Administrative Law Judge hereby makes the following Proposed Findings of Fact (Procedural and on the Merits), Proposed Ultimate Findings of Fact, Proposed Conclusions of Law, Proposed Opinion, and Proposed Order.

#### **FINDINGS OF FACT – PROCEDURAL**

1) On November 18, 1999, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of the unlawful employment practices of Respondent. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations of the complaint.

2) On March 14, 2001, the Agency submitted to the forum Specific Charges alleging Respondent discriminated against Complainant by subjecting her to a course of conduct by its corporate officer, Chris Zurfluh, designed to harass, embarrass, humiliate and intimidate her which conduct was offensive and unwelcome, creating a hostile and intimidating work environment because she was female, in violation of ORS 659.030(1)(b). The Agency further alleged that Complainant was compelled to quit her

employment due to the intolerable working conditions created by Respondent, in violation of ORS 659.030(1)(a). The Agency also requested a hearing.

3) On March 14, 2001, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth August 28, 2001, in Salem, Oregon, as the time and place of the hearing in this matter; b) a notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On March 21, 2001, Respondent, through counsel, filed a timely answer to the Specific Charges.

5) On June 18, 2001, Respondent requested that the hearing be postponed until September 5 or 6, 2001. The Agency did not oppose Respondent's motion and on June 19, 2001, the forum issued an order granting the motion and reset the hearing date for September 5, 2001.

6) On July 11, 2001, the Agency moved for a discovery order. Respondent filed no objections to the motion and on July 29, 2001, the ALJ granted the Agency's motion and ordered Respondent to produce all of the items sought to the Agency no later than July 30, 2001.

7) On July 25, 2001, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damage calculations (for the Agency only). The ALJ ordered the participants to submit

case summaries by August 24, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

8) On August 28 and August 29, 2001, the Agency and Respondent filed their respective case summaries.

9) On August 30, 2001, the Agency filed a supplemental case summary and Respondent filed an addendum to its case summary.

10) At the start of hearing, the participants stipulated to the admission of Agency exhibits A-1 and A-2 and further stipulated that Complainant's rate of pay during her employment was \$7.00 per hour.

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

12) On January 30, 2002, 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. Respondent did not file exceptions to the proposed order. The Agency filed timely exceptions. The typographical error in Finding of Fact – The Merits 23 has been corrected and Finding of Fact – The Merits 19 has been adjusted to include an additional point regarding Zurfluh's credibility in response to the Agency's exceptions.

13) On March 6, 2002, the final order issued with an omission in the Order section. The final order is hereby amended to include a provision ordering interest at the legal rate on the compensatory damages awarded herein from the date of the amended final order until Respondent complies herewith.

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

1) At all times material herein, State Adjustment, Inc. ("Respondent") was engaged in the business of debt collection in Oregon and was an employer utilizing the personal services of one or more persons.

2) At all times material herein, Chris ("Phil") Zurfluh was Respondent's chief executive officer, corporate secretary, and manager of Respondent's sole office in Salem, Oregon. Prior to their divorce, Zurfluh's wife, Diane, was the only other corporate officer and shareholder. In May 1999, Zurfluh's maintenance man, Paul Conner, replaced Zurfluh's wife as president of the corporation. Conner has no financial interest in the business, but attends corporate meetings and is "as active as [Zurfluh] requires [him] to be."

3) In late March 1999, Complainant, a female, was hired by Zurfluh to perform clerical work for Respondent. She was the only employee and Zurfluh was her immediate supervisor.

4) Complainant's duties included typing the paperwork for lawsuits and garnishments, filing, and answering the telephone. Zurfluh did not formally train Complainant for any of her job responsibilities and Complainant had no prior experience preparing garnishments or other legal documents. Someone named Nick Watts showed her how to operate the computer and Respondent's corporate attorney, Michael Knapp, showed Complainant how to fill out the preprinted garnishment forms and how to properly calculate the fees and interest. When Complainant had difficulty preparing a form, Knapp assisted her, usually by telephone. Complainant sent the garnishments that she prepared to Knapp for review and he frequently returned them to her for correction. Knapp charged Respondent for his legal assistance and each time Knapp had to handle Complainant's mistakes, it cost Respondent money. There were one to five garnishments per week during Complainant's employment.

5) Initially, Complainant worked five days per week, from 8 a.m. to 5 p.m. Her pay rate was \$7.00 per hour. Her hours were reduced after one month due to lack of work. Zurfluh was gone most of the time because of his divorce and there was no

work for her to do. Zurfluh would say to her “let’s call it a day” and send her home early each day.

6) Complainant’s desk was located in a small (16’ by 25’) outer office, approximately 10 feet from Zurfluh’s desk, which was located in a smaller (12’ by 12’) inner office adjacent to Complainant’s. The entire office space included the two offices and a small (10’ by 12’) file room. At all times, Complainant was within earshot of Zurfluh while he was at his desk and she overheard his telephone conversations. From the beginning of her employment, while working at her computer, Complainant regularly overheard Zurfluh using profanity and telling “dirty jokes” to people who came into the office and while on the telephone. The subject matter of his jokes primarily involved oral sex. Complainant also heard Zurfluh refer to women as “fucking bitches” and “god damn sluts.” When she overheard his profanity or one of his jokes, Complainant either ignored it or walked away.

7) Shortly after Complainant began working for Respondent, Zurfluh began calling Complainant into his office regularly to talk about his divorce, his ex-wife, and other particulars about his personal life. During the first two weeks of her employment, Complainant spent much of each workday in Zurfluh’s office listening to details about his divorce. Complainant did not find these conversations sexually offensive, and throughout the period that Zurfluh was preparing for his divorce, Complainant helped him gather pertinent information to send to his attorney.

8) Zurfluh frequently invited Complainant to lunch, telling her that he did not like to go to lunch by himself. She sometimes accepted his invitations and they usually ate at the Elk’s Club. She declined his invitations on occasion because she did not want to take an hour-long lunch.

9) After the first two weeks, Zurfluh began calling Complainant at home to offer her a ride to work. She rode with him about three days each week. They often stopped for donuts and occasionally Zurfluh would stop at the post office or run personal errands while on the way to work. Complainant rode the bus on the days she did not ride with Zurfluh. While riding to work, the topic of conversation was primarily his divorce and how he was going to hide his money from his ex-wife.

10) One time, after Zurfluh had dropped Complainant off at work, Complainant went into Zurfluh's office to do her filing and found his office in shambles with magazines and papers strewn on the floor. As she moved some of the papers, she came across a publication with a naked woman on the cover and kicked it under Zurfluh's desk. She later told Zurfluh what she had found and what she had done with it and he laughed and said, "well, yeah, I was here all weekend." She stumbled upon publications of the same genre in his office, always just after the weekend, three more times. Zurfluh did not leave the magazines out in plain sight and Complainant's discovery each time was by happenstance.

11) After she was employed two weeks, Complainant began to feel "like just one of the guys." Zurfluh began talking to her freely and frequently about his lunch visits to "strip clubs," and offered Complainant details about particular "girls" and how adept certain ones were at "climbing up and down the pole." One time, he suggested to her that the problems she was having with her fiancé might be related to the fiancé's desire for someone less calm than Complainant and more like the "girls" at the strip club. Complainant told Zurfluh that she did not want to hear about it. However, Zurfluh continued thereafter to detail his experiences after each strip club excursion.

12) Zurfluh also began telling Complainant about the women he was seeing socially and describing the oral sex he was receiving from them, referring to the women

as his "\$20 dates." During his conversations with Complainant, Zurfluh sometimes mentioned his ex-wife, whom he described to Complainant as having a condition called "TMJ" and due to the condition could not give him, in his words, "a blow job."

13) Complainant became increasingly uncomfortable with Zurfluh's topics of conversation. As a result, she began to distrust her fiancé and became suspicious if he came home from work more than ten minutes late, recalling that Zurfluh had said he could "get everything taken care of" in one half hour. Complainant also tried to change her appearance by wearing longer skirts and baggy jeans because she did not want to be noticed or talked about in the same manner Zurfluh talked about other women.

14) In June 1999, Zurfluh became upset about a garnishment Complainant had prepared and called her a "god damn fucking slut." He told her that maybe she was not happy working for Respondent and said to her "maybe this is not your type of work." Complainant told Zurfluh that she was happy with the work, but also said to him, "you're right, I'll give you my notice." Zurfluh asked Complainant to run an advertisement for her job in the newspaper and thereafter interviewed a woman to replace Complainant. The woman declined Zurfluh's job offer. Complainant was, in the meantime, experiencing increased difficulties with her fiancé who was planning to move out the following month. She could not support her daughter financially without him and was having no success finding employment elsewhere. Complainant told Zurfluh that she was having problems at home, that she liked the work, and that if she could spend more time working she would stay in her job. Zurfluh agreed to remove the advertisement for Complainant's job from the newspaper and he continued to employ her. Complainant and her fiancé worked out their differences and her fiancé did not move out in July as previously planned.

15) At the end of September 1999, Complainant quit her employment. In early December 1999, Claimant began working for Holiday Inn Express, earning \$6.75 per hour for 32 hours per week. Within three months her pay rate changed to a salary basis and she was earning more than she did while employed by Respondent.

16) Between April and September 1999, Respondent contracted with Pam and Larry Lomax, husband and wife, to serve legal papers and to help set up a computer program. Both had been process servers for many years. While working for Respondent, both were frequently in the business office at the same time as Complainant and Zurfluh. Larry Lomax was in the office at least five times per week. Pam Lomax was in the office once or twice per week, though not every week. Neither Lomax knew Complainant or Zurfluh before their business relationship. Neither Lomax has seen Complainant since her employment with Respondent ended.

17) Pam Lomax credibly testified that she heard Zurfluh "swear quite a bit" when she was present at Respondent's business office. While she could not remember specific words, she testified that he often referred to women's anatomy and that she purposely limited the number of her office visits because of Zurfluh's vulgar language. She also credibly testified that Zurfluh made, in her presence, an untoward comment about a younger woman that he wanted to date. The comment included sexual references to the woman's body and breasts and was also made in the presence of Complainant and Zurfluh's daughter who responded by asking her father when he intended to grow up. Additionally, Lomax observed two magazines with unclad women on the covers in Zurfluh's office. The magazines had fallen out of a cabinet and Zurfluh quickly picked them up and put them away. Lomax never heard Zurfluh direct any of his profanity or sexual innuendo to Complainant. Complainant told Lomax that she was concerned about Zurfluh's conduct in the workplace, that Zurfluh talked about \$20

prostitutes, yelled at her several times, and called her incompetent and a “fucking bitch.” Complainant also told Lomax that she liked her job but was concerned that she did not know how to do the work and was not being properly trained. Pam Lomax’s testimony was credible in every respect. Her answers to questions were straightforward and showed no bias. The forum credits her testimony in its entirety.

18) Larry Lomax credibly testified that Zurfluh used profanity in the workplace as “part of his vernacular” and that it frequently included references to female anatomy. Lomax further testified that Zurfluh regularly talked about his visits to strip clubs and women’s “body parts” and did so when Complainant was present or within earshot. During Complainant’s employment, Zurfluh repeatedly asked Lomax if he thought Complainant was using drugs and appeared to want Lomax to agree that she was using drugs. Lomax could not recall if he had told Complainant about Zurfluh’s questions about her possible drug use. Lomax showed no bias toward or against Zurfluh during his testimony and readily acknowledged that Zurfluh attempted to tone down his language when Pam Lomax was present out of respect for the Lomaxs’ religious beliefs. The ALJ carefully observed Larry Lomax’s demeanor and based on his straightforward and unbiased testimony credits his testimony in its entirety.

19) On key facts, Chris Zurfluh’s testimony was internally inconsistent and conflicted notably with other credible testimony. For instance, Zurfluh initially testified emphatically that he never used profanity at all, never kept magazines with naked women on the covers in the workplace, never went to strip clubs during the lunch hour on workdays, and never solicited a prostitute. Later in his testimony, he acknowledged that he used profanity, but only outside the workplace, that he did have “Playboy or Penthouse” type magazines in the workplace on occasion, and that he did go to strip clubs during his lunch hour, but only for the “free buffet.” Moreover, evidence shows

Zurfluh entered a guilty plea to the crime of prostitution on November 13, 2000.<sup>i</sup> The ALJ observed that Zurfluh's demeanor, memory, and manner of answering questions could be consistent with possible effects of a severe head injury he incurred in a 1980 automobile accident. His memory was selective, however, and he recalled events with more conviction during his direct testimony, while during cross-examination his memory lapses occurred more markedly. Finally, Pam and Larry Lomax's credible testimony contradicts Zurfluh's testimony and corroborates Complainant's allegations. At best, Zurfluh's testimony was unreliable and was believed only when corroborated by other credible testimony.

20) Tom Fleming's testimony was generally credible. Although he has worked as one of Zurfluh's process servers since 1982 and they have maintained a long-term friendship, Fleming's demeanor was direct and nonevasive. He acknowledged that Zurfluh was loud and that he used profanity in the workplace, although he did not consider Zurfluh's language vulgar. His testimony that he was present when Complainant quit her employment in September 1999 and that he overheard her tell Zurfluh she was quitting was believable. He testified that Complainant had just hung up the telephone when Fleming arrived at the office and that she called Zurfluh a "son of a bitch" and accused him of telling Larry Lomax that she was a drug addict. According to Fleming, Complainant was very upset and told Zurfluh that she was quitting her employment and intended to sue him. Fleming's testimony is bolstered by Larry Lomax's credible statement that Zurfluh had asked him on more than one occasion about whether Complainant was using drugs. Where it differed from Complainant's testimony, the forum has relied on Fleming's version of events.

21) Michael Knapp testified in an objective and straightforward manner. He readily acknowledged that he had probably heard his client "curse" in the workplace and

that Zurfluh used profanity during telephone conversations. He was aware that Pam Lomax was offended by Zurfluh's use of profanity. His testimony has been credited in its entirety.

22) Paul Conner's testimony demonstrated his bias as Zurfluh's business associate and was contradicted by other evidence. His claim that Zurfluh never used profanity was contrary to every other witness who testified, except Zurfluh, who first denied ever using profanity, and then admitted to using it but not in the workplace. Conner's assertion that Zurfluh was concerned only about Complainant's inappropriate attire, i.e., short dresses, and not her clerical work, was contradicted by his earlier statement to the Agency that at "corporate meetings" Zurfluh was "really upset" with Complainant's work performance, especially the garnishments that were returned by Zurfluh's attorney. Conner's testimony was disingenuous and clearly calculated to enhance Respondent's case. Except for Conner's representation of his status in Respondent's corporate hierarchy, which was confirmed by Zurfluh, the forum has given no weight to Conner's testimony.

23) Charles Anderson's testimony about his knowledge of Zurfluh's use of profanity and Complainant's mode of dress in the workplace, i.e., short skirts, low cut tops, and slacks, was not believable. In an earlier statement to the Agency he claimed to be at Zurfluh's business "on almost a daily basis." During cross-examination, he acknowledged he was not in the office much when Complainant worked there and that he did most of his work for Respondent as a process server when Zurfluh's ex-wife was involved in the business. The forum has given no weight to Anderson's testimony.

24) Juneka Torres testified credibly that she worked for a brief time for Respondent after Complainant left her employment and heard Zurfluh use "a lot" of profanity. She stated she was surprised at the number of times he used "fuck" as an

expression and, although the profanity was never directed toward her, she was offended by it and wanted Zurfluh to treat her “like a lady.” Torres also stated that during her employment, Zurfluh referred to Complainant as a “bitch” while complaining that Complainant had “left him.” Torres did not know Complainant and her testimony was straightforward. There is no reason not to credit her testimony in its entirety.

25) Complainant’s testimony was not altogether credible. Credible evidence corroborated some of her testimony, particularly her statements about Zurfluh’s conduct in the workplace. Other parts of her testimony, however, were inconsistent or contradicted by other evidence. She initially testified that in June 1999, Zurfluh became angry with her about a garnishment she had prepared, called her a “god damn fucking slut,” and suggested she was not suited for that type of work. She did not agree with his assessment, but agreed to place an advertisement in the newspaper for her replacement. She then testified that in September 1999, Zurfluh became upset with her about “another” garnishment she had prepared and again called her a “god damn fucking slut.” During cross-examination, while she acknowledged having a discussion with Zurfluh about her performance problems, she denied he ever mentioned garnishments to her in June 1999. She claimed to have given him two weeks notice because they were “not happy with each other” and “just couldn’t get along.” Later on redirect, she stated flatly that Zurfluh had never discussed any aspect of her work performance with her during her employment. When she testified about her reason for leaving her employment in September 1999, Complainant stated it was the argument about the garnishment and Zurfluh’s name calling that prompted her to pick up her purse and leave. Only after prompting from the Agency case presenter did she agree that Zurfluh’s sexual comments influenced her decision to leave. The forum found this testimony incredible for several reasons. First, Complainant never volunteered that

Zurfluh's conduct had anything to do with her quitting her employment. In fact, her emphasis each time the issue was raised was always on their disagreement about how the garnishment should have been handled. Even the name he called her at the time was not first and foremost on her mind. Second, Zurfluh's conduct during the last three months of her employment was exactly as it was during the first three months of her employment. According to her, she was quitting in June because they did not get along, but she ultimately stayed on because she convinced Zurfluh that her fiancé was moving out and she needed the money. At no time did she ever suggest that Zurfluh's sexual comments influenced her initial decision to leave, which is consistent with how she described her reason for leaving in September before she was prompted to include the discriminatory reason. Third, Fleming credibly testified that he observed Complainant on her last day of work and that she quit after accusing Zurfluh of telling Larry Lomax that she was on drugs. For those reasons, the forum does not believe Complainant's testimony regarding her reason for leaving her employment. However, the forum does believe her testimony about Zurfluh's conduct and how it impacted her work environment because it was corroborated by the credible testimony of others.

26) The testimony of Joseph Tam and Gregg Merrill was credible.

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

1) At times material herein, Respondent State Adjustment, Inc. was an Oregon employer with one or more employees.

2) At times material herein, Chris Zurfluh was Respondent's chief executive officer and corporate secretary.

3) Respondent employed Complainant.

4) Complainant is a female.

5) Between March and September 1999, Chris Zurfluh engaged in verbal conduct of a sexual nature directed at Complainant because of her sex.

- 6) Zurfluh's conduct was offensive and unwelcome to Complainant.
- 7) Zurfluh's conduct created an offensive work environment that was made a term or condition of Complainant's employment.
- 8) Complainant voluntarily terminated her employment for reasons other than the offensive work environment created by Zurfluh.
- 9) Complainant suffered distress and impaired personal dignity because of Zurfluh's conduct.

### **CONCLUSIONS OF LAW**

- 1) At times material herein, Respondent corporation was an employer subject to the provisions of ORS 659.010 to ORS 659.110. ORS 659.010(6).
- 2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659.022; ORS 659.040; ORS 659.050.
- 3) ORS 659.030(1) states, in pertinent part:
  - "For the purposes of ORS 659.010 to 659.110 \* \* \* it is an unlawful employment practice:
    - "(a) For an employer, because of an individual's \* \* \* sex \* \* \* to refuse to hire or employ or to bar or discharge from employment such individual.  
\* \* \*
    - "(b) For an employer, because of an individual's \* \* \* sex \* \* \* to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

OAR 839-005-0030 provides in pertinent part:

- "(1) Sexual harassment is unlawful discrimination on the basis of gender and includes the following types of conduct:
  - "(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's gender.
    - "(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or
    - "(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.

“(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment.

“(2) The standard for determining whether harassment based on an individual’s gender is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.

By subjecting Complainant to unwelcome sexual conduct directed toward Complainant because of her gender, Respondent, through its corporate officer, created a hostile, intimidating, and offensive work environment contrary to OAR 839-005-0030, and made that environment an explicit term or condition of Complainant’s employment with Respondent, in violation of ORS 659.030(1)(b). Respondent did not violate ORS 659.030(1)(a).

(4) OAR 839-005-0035 states:

“Constructive discharge occurs when an individual leaves employment because of unlawful discrimination. The elements of a constructive discharge are:

“(1) The employer intentionally created or intentionally maintained discriminatory working conditions related to the individual’s protected class status;

“(2) The working conditions were so intolerable that a reasonable person in the complaining individual’s circumstances would have resigned because of them;

“(3) The employer desired to cause the complaining individual to leave employment as a result of those working conditions, or knew or should have known that the individual was certain, or substantially certain, to leave employment as a result of the working conditions; and

“(4) The complaining individual left employment as a result of the working conditions.”

Complainant did not leave her employment as a result of discriminatory working conditions. Respondent did not violate OAR 839-005-0035.

(4) OAR 839-005-0030(3) states in pertinent part:

“Employer proxy: A [*sic*] employer is liable for harassment when the harasser’s rank is sufficiently high that the harasser is the employer’s proxy, for example, the respondent’s president, owner, partner or corporate officer.”

The actions, inaction, knowledge and motivations of Chris Zurfluh, Respondent’s corporate officer, are properly imputed to Respondent.

### **OPINION**

The Agency alleges Respondent unlawfully discriminated against Complainant in the terms and conditions of her employment by subjecting her to sexual harassment by and through its corporate officer, Chris Zurfluh, and that as a result of the sexual harassment, Complainant was forced to quit her employment. The Agency seeks \$5,750 in back wages and \$15,000 in mental suffering damages.

### **TERMS AND CONDITIONS OF EMPLOYMENT**

In order to prevail, the Agency is required to prove the following elements:

- (1) Respondent is an employer defined by statute;
- (2) Complainant was employed by Respondent;
- (3) Complainant is a member of a protected class;
- (4) Respondent, through its proxy, engaged in conduct of a sexual nature toward Complainant because of her gender;
- (5) The conduct created a hostile, intimidating, or offensive work environment;
- (6) Complainant was harmed by the conduct.

OAR 839-050-0030.

There is no dispute that Respondent was an employer who employed Complainant, a female, at times material. Nor is Chris Zurfluh’s status as Respondent’s owner and corporate officer at issue. As Respondent’s corporate officer, Zurfluh’s conduct is automatically imputed to Respondent and Respondent is liable for any unlawful harassment. OAR 839-005-0030(3).

The elements in dispute are threefold: (1) whether Respondent's corporate officer engaged in unwelcome sexual conduct directed toward Complainant because of her gender; (2) whether the conduct was sufficiently pervasive or so severe as to create a hostile, intimidating, or offensive work environment; and (3) whether Complainant suffered harm as a result of the unlawful conduct.

#### **A. Unwelcome Sexual Conduct**

##### ***Sexual Conduct***

Evidence shows Zurfluh engaged in a pattern of verbal conduct that included regular remarks to Complainant about his sexual exploits, including accounts of his lunches at strip clubs, his "\$20 dates" with prostitutes, and "blow jobs" he claimed to receive regularly. Evidence further shows Zurfluh often referred to women as "fucking bitches" or "god damn fucking sluts" within Complainant's earshot, and at least once during her six-month employment called her a "god damn fucking slut." Moreover, due to the proximity of their respective desks, Complainant regularly overheard Zurfluh relate sexually explicit jokes, usually involving oral sex, to others over the telephone. Additionally, Complainant was required to perform some of her job duties in Zurfluh's office and several times came across publications depicting unclad women on the covers. While there is no evidence that Zurfluh intended anyone to see the publications, he was, at best, indifferent to their detection because even process server Pam Lomax observed magazines with "naked women" on the covers falling off a cabinet shelf at least once. Complainant's account of Zurfluh's conduct in the workplace was consistent with other credible witnesses who had heard Zurfluh's use of profanity and jokes demeaning to women. While most of the profanity and jokes were not specifically aimed at Complainant, they were prolific and contributed to the overall atmosphere that

the forum finds was particularly offensive to women and, therefore, directed at Complainant, his only employee, because of her gender.

### ***Unwelcome***

Despite Respondent's suggestion that Complainant wore inappropriate clothing during her employment, there is no evidence that Complainant engaged in any conduct that would invite the obscenity that pervaded Complainant's work environment. There is no evidence that she used vulgar language in the workplace or initiated any sexually oriented conversations with Zurfluh or anyone else. There is evidence that Complainant told Zurfluh at least once that she was not interested in hearing about his sexual exploits. She also expressed concern to Pam Lomax about Zurfluh's language, his accounts of his "\$20 dates" with prostitutes, and his reference to her as a "fucking bitch." The forum finds there is sufficient evidence in the record to conclude that Complainant found Zurfluh's verbal conduct unwelcome.

### **B. Hostile, Intimidating, or Offensive Work Environment**

The standard for evaluating whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in the Complainant's particular circumstances. OAR 839-005-0030(2). In this case, Zurfluh's conduct, while only verbal, consisted of ongoing sexual slurs and jokes, repeated remarks to Complainant detailing his sex life, and at least one reference to Complainant as a "fucking slut" during the six months she was employed. Complainant was the only employee and a captive audience to his ongoing behavior that occurred in relatively close quarters. The forum finds Zurfluh engaged in a pattern of offensive conduct that particularly demeaned women and that from the perspective of a reasonable person in

Complainant's circumstances, it was sufficiently pervasive as to create an offensive working environment.

### **C. Complainant's Harm**

Zurfluh's conduct and demeanor during Complainant's employment caused her enough discomfort that she complained to Pam Lomax about it and at least once told Zurfluh she wasn't interested in hearing about his sexual exploits. As a result of her continued exposure to Zurfluh's sexual exploits and anti-female comments during her six months of employment, Complainant found herself becoming increasingly suspicious of her fiancé's activities, attributing to him some of Zurfluh's qualities, which affected the quality of their relationship. Additionally, Complainant began to change her outward appearance by wearing baggy clothing and long dresses and skirts in order to go unnoticed because she was fearful that men would talk about her the way Zurfluh talked about other women.

This forum has continuously held that mental suffering awards reflect the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, the type and duration of the mental distress, and vulnerability of the victim. *In the Matter of A.L.P., Incorporated*, 15 BOLI 211 (1997), *aff'd*, *A.L.P. Inc. v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999). In this case, Zurfluh's offensive conduct was frequent and pervasive, but of relatively short duration. Complainant obtained a job earning more money at the Holiday Inn Express within a short period of leaving her employment and there is no evidence that she suffered any ill effects as a result of Zurfluh's conduct thereafter. Considering the duration and type of distress Complainant suffered and in the absence of any evidence that Zurfluh's conduct was based on any reason except Complainant's gender, the forum finds \$10,000 serves to eliminate the effects of Respondent's unlawful practice.

## **CONSTRUCTIVE DISCHARGE**

Respondent is liable for a constructive discharge only if it is established that Respondent (1) intentionally created or maintained discriminatory working conditions related to Complainant's gender that were (2) so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them, and (3) Respondent desired to cause Complainant to leave her employment as a result, or knew or should have known that Complainant was certain, or substantially certain, to leave her employment as a result of the working conditions, and (4) that she left her employment as a result of the working conditions. OAR 839-005-0035. The Agency failed to establish those elements by a preponderance of the credible evidence.

Evidence shows that when Complainant agreed to leave her employment for the first time in June 1999, after three months, the agreement was mutual and for reasons other than Zurfluh's pattern of discriminatory conduct that had already developed by that time. Credible evidence suggests that Complainant's voluntary quit three months later in September 1999 was more likely than not related to Complainant's anger at Zurfluh for telling Larry Lomax that she was allegedly using drugs, rather than Zurfluh's continued conduct. From the totality of the circumstances surrounding Complainant's quit, including Complainant's own testimony, the forum concludes that Complainant did not leave her employment as a result of the discriminatory working conditions.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and to eliminate the effects of Respondent's violation of ORS 659.030(1)(b), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **State Adjustment, 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 Rhonda Shanafelt in the amount of:

- a) TEN THOUSAND DOLLARS (\$10,000), representing compensatory damages for mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; plus
  - b) Interest at the legal rate on the sum of \$10,000 from the date of the Amended Final Order until Respondent complies herewith; plus,
- 2) Cease and desist from discriminating against any current or future employee because of the employee's gender.

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<sup>i</sup> According to Zurfluh's sworn statement in his Petition to Plead Guilty, he offered a plainclothes police officer "\$20" after she asked him if he "wanted a date."