

In the Matter of
TOMKINS INDUSTRIES, INC.,
Respondent.

Case Number 71-97
Final Order of the Commissioner
Jack Roberts
Issued October 29, 1998.

SYNOPSIS

Respondent, which operated a manufacturing facility, employed Complainant and required her to work with lacquer thinner in a manner that posed a risk of serious injury. When Complainant refused to continue working with the lacquer thinner, Respondent laid her off. Respondent's discharge of Complainant constituted retaliation and discrimination against Complainant for opposing unsafe working conditions, and was an unlawful employment practice that violated ORS 654.062 (5)(a). The Commissioner awarded Complainant \$2,098.11 in lost wages and \$10,000.00 for the mental suffering caused by the unlawful employment practice. ORS 654.062(1), (5); OAR 839-006-0020.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on November 5, 1997, in the conference room of the Bureau of Labor and Industries, 3865 Wolverine Street NE, Salem, Oregon. The Civil Rights Division (CRD) of the Bureau of Labor and Industries (the Agency) was represented by Alan

McCullough, an employee of the Agency. Respondent Tomkins Industries, Inc., a corporation, was represented by Calvin Keith and Jay Nusbaum, Attorneys at Law, Portland. Carol Oeder, of the corporate Respondent, was present throughout the hearing. The Complainant, Mary D. Koon, was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses, in addition to Complainant, OR-OSHA industrial hygienist Penny Wolf-McCormick, Respondent employees Joel Piki and Carol Oeder, and former Respondent employee Bernice Richards.

Respondent called as witnesses Respondent employees Rondeeda Magby, Angela Cruz, Adam Slusser and Carol Oeder, and former Respondent employee Robert A. Young.

The ALJ admitted into evidence Administrative Exhibits X-1 through X-13, Agency Exhibits A-1, A-3, A-5, A-8 through A-18, and by stipulation A-2, A-4, A-19 and A-20, and Respondent's Exhibits R-1 through R-3, R-6 through R-8, R-13, R-14, and R-19.

Having fully considered the entire record in this matter, I, Jack Roberts, 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 December 20, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that she suffered serious medical problems from breathing lacquer thinner fumes when she worked in the frame area of Respondent's manufacturing facility. Complainant further alleged that, after she informed her supervisors and Respondent's Human Rights Director about the medical

problems and asked to be transferred, Respondent gave her the choice of continuing in the frame area or taking a "voluntary lay off due to work reduction." Complainant asked if she should finish out the day of work and was told "no." Complainant stated her belief that Respondent laid her off because of her opposition to the health hazard presented by exposure to the lacquer thinner fumes.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice by Respondent in violation of ORS 654.062.

3) On June 18, 1997, the Agency requested a hearing.

4) On July 16, 1997, the Agency duly served on Respondent Specific Charges which alleged that Respondent had laid off Complainant from employment for opposing unsafe and/or unhealthy conditions in the workplace, in violation of ORS 654.062(5)(a).

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth 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.

6) The Notice of Hearing stated that Respondent's answer was due 20 days from the receipt of the notice and that, if Respondent did not timely file an answer, it could be held in default.

7) On August 8, 1997, Respondent's corporate attorney informed the Forum and the Agency that Respondent would be filing an answer to the Specific Charges within the next ten days.

8) On August 11, 1997, the Agency filed a Notice of Intent to File a Motion for Default, stating that it would file a motion for default if the Agency did not receive an answer by August 21, 1997.

9) Respondent filed its answer on August 15, 1997. In that answer, it admitted the allegations in Paragraphs I and II of the Specific Charges and denied the allegations in Paragraphs III and IV of the Specific Charges. Respondent also asserted three affirmative defenses.

10) On October 3, 1997, the ALJ issued a discovery order to the Agency and Respondent directing them each to submit a summary of the case, including a list of witnesses to be called and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0200 and 839-050-0210. The summaries were due by October 22, 1997. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200 (8), for failure to submit the summary. The Agency and Respondent each submitted a timely summary. On October 22 and 23, 1997, the Agency submitted first, second, and third addenda to its case summary, which the Forum accepted for filing. Those addenda included Exhibits A-19, A-20, and A-21. The Agency identified Exhibits A-19 and A-20 as updated versions of Exhibit A-4.

11) On October 23, 1997, the Agency filed substitutes for Agency Exhibits 7 and 21. At the hearing, the Agency marked those substitutes as Exhibits A-24 and A-25, respectively. The forum did not receive any of these exhibits (A-7, A-21, A-24, or A-25) as evidence.

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

13) Pursuant to ORS 183.415(7), the ALJ then 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.

14) In the Specific Charges, the Agency initially requested \$2500.00 in back wages. During the hearing, the Agency moved to amend the claim for back wages to \$2098.11, the amount Complainant calculated she had lost as a result of being laid off. Respondent did not oppose the motion, which the ALJ granted.

15) On October 1, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. Both the Agency and Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) At all times material herein, Respondent was an employer in Oregon. Several products were manufactured at Respondent's Stayton, Oregon facility, including mobile home doors, house doors, vinyl products, aluminum windows, and screens.

2) Counsel for Respondent explained in his opening statement that Philips Products, a name that appears on several exhibits, is a division of Respondent Tomkins Industries, Inc. No party has claimed otherwise, and Counsel's statement is consistent with the testimony of Robert Young and Rondeeda Magby that they worked for Philips Products. Consequently, the Forum has accepted Counsel's statement that Philips Products is a division of Respondent as an admission by Respondent.

3) In March 1996, Respondent hired Complainant to work at Respondent's manufacturing facility. In April 1996, Complainant was given a permanent assignment to work on door frames in the Mobile Home Doors (MHD) Department. Complainant's duties included cleaning newly manufactured painted door frames with lacquer thinner.

She did this by soaking paper towels or discarded cloth gloves with lacquer thinner and using those materials to wipe down the door frames. Complainant used lacquer thinner in this manner throughout the work day. She sometimes also applied spray paint to door frames to cover scratches and weld marks.

4) Complainant's immediate supervisor in the MHD Department was Adam Slusser; Robert Young was Slusser's supervisor. Joe Piki was a group leader in the MHD Department; Young was also his supervisor.

5) Nobody at Respondent's facility told Complainant that she should take any precautions while using the lacquer thinner or spray paint. Nobody in management ever said anything to Complainant about whether the chemicals were safe to use. Gloves were available in the facility, but nobody told Complainant to use them. Complainant testified that, if she wore gloves, she could not clean the inside corners of the door frames.

6) Because Complainant used lacquer thinner throughout the day and did not wear gloves, the lacquer thinner frequently came into contact with her hands. Complainant testified credibly that her hands were "soaking" in the lacquer thinner when she worked on painted door frames. Complainant was able to wash the lacquer thinner off her hands at lunch, during breaks, and when she used the restroom.

7) While Complainant worked in the door frame area, she suffered from severe headaches, dizziness, confusion, nausea, and blurry vision. On May 31, 1996, she went to a physician, who did not find a specific cause for her problems.

8) On one day that Claimant worked in a different area (fabrication) where lacquer thinner was not used, she did not feel as bad. Complainant suspected that the lacquer thinner was causing her medical problems and read the label on the 55-gallon

drum in which the chemical was stored. The label stated that the lacquer thinner could cause health problems, including damage to the liver, kidneys, and nervous system.

9) Other employees told Complainant that the lacquer thinner also bothered them.

10) After she visited the doctor in May 1996, Complainant started telling her supervisors, including Robert Young, Adam Slusser, and Joe Piki, that she could not work with the lacquer thinner because it made her feel terrible. Young was cooperative and reassigned Complainant to other work in the MHD Department that did not involve the direct use of lacquer thinner.

11) After Complainant complained about the lacquer thinner fumes, Respondent provided two fans, but they were not sufficient to ventilate the work area. Exhaust fans on the wall of the manufacturing facility did not always work.

12) Even though Complainant no longer was cleaning door frames, she continued to become ill when she was assigned to apply parts to door frames that had just been cleaned, or was assigned to other work that had to be done in close proximity to the wet door frames. When Complainant told Young that she still was having problems, he had Complainant trade jobs with other employees in the MHD Department. Those employees would work in the door frame area when the wet frames came through, and Complainant performed the other employees' jobs. Piki also arranged for Complainant to switch tasks with other employees, including Angela Cruz.

13) In September 1996, Complainant quit work, but asked to be reinstated two days later. Respondent rehired Complainant. At the time Complainant was rehired, she already had complained that the fans did not provide adequate ventilation.

14) On November 21, 1996, the employees who usually filled in for Complainant when wet door frames came through were absent, and nobody was

available to switch tasks with Complainant. Consequently, Slusser assigned Complainant to apply materials to freshly cleaned door frames that were wet with lacquer thinner. Complainant did that, became ill, and told Slusser that she could not perform that job any longer.

15) After her morning break on November 21, Complainant spoke with Rondeeda Magby, an assistant in the Human Resources Department. Complainant was very upset and told Magby that she needed to be transferred to an area where lacquer thinner was not used. Complainant did not tell Magby that she needed to be transferred out of the MHD Department altogether. Complainant also told Magby that she wished to speak with Carol Oeder, the head of Human Resources.

16) After speaking with Magby, Complainant started working in the fabrication area in the MHD Department. At about 11:00 a.m., Complainant met with Robert Young and Carol Oeder in the Human Resources office. Complainant explained that the lacquer thinner made her ill when she worked with painted door frames, and asked to be transferred to another area where lacquer thinner was not used. Complainant did not ask to be transferred out of the MHD Department; nor did she tell anybody that she would not work anywhere in that department. Oeder told Complainant that this was the time of year when Respondent typically had to lay off employees, and said there were no openings for work in other areas. Young also stated that there were no openings. Complainant pointed out that she had just been working in the fabrication area and believed that work was available. Oeder then told Complainant that she could either work with the door frames or take a "voluntary layoff." Oeder told Complainant how to apply for unemployment benefits and said that Respondent probably would hire Complainant back in the spring.

17) Later that day, either Young or Slusser told Piki that Complainant's layoff was permanent and she would not be returning.

18) An "EMPLOYEE STATUS FORM" with an effective date of November 21, 1996, indicated that the reason for Claimant's termination was a reduction in work force (RIWF). The December 3, 1996, "EMPLOYEE SEPARATION REPORT" that Rondeeda Magby later completed stated that Complainant had been permanently laid off because of a "lack of work."

19) Complainant testified credibly that she felt she had to take the layoff instead of returning to work on door frames because the lacquer thinner had serious adverse effects on her health. Complainant asked Oeder if she should finish out the work day, and was told that she should not.

20) When Complainant was laid off, she was earning \$7.50 per hour, was regularly scheduled to work 40 hours per week, and occasionally worked overtime. Complainant calculated that she lost \$2098.11 in gross wages she would have earned from November 21, 1996, through January 10, 1997. Claimant acknowledged that she had received unemployment benefits totaling \$402.00 during that time.

21) Complainant's calculation of lost wages includes \$28.11 for the three and three-quarter hours she did not work on the afternoon of November 21, 1996. Oeder testified that Complainant was paid for the entire day even though she did not work eight hours. Respondent did not, however, provide any documentary evidence to support that claim.

22) Complainant's calculation of lost wages includes \$90.00 in regular and overtime pay that Complainant believes she would have earned had she worked on November 23, 1996, a Saturday on which she had been scheduled to work eight hours

of overtime. Respondent produced no evidence suggesting that Complainant would not have worked overtime on November 23 had she not been laid off.

23) When Oeder informed Complainant that she would have to either continue working in the door frame area or accept a layoff, Complainant felt helpless and angry because she believed she would jeopardize her health if she continued to work with the lacquer thinner. During the seven weeks she was laid off, Complainant was unhappy, very depressed, and extremely angry. She had to rely on charity to feed her children and provide them with Christmas presents.

24) A few days after she was laid off, Complainant contacted the Agency, which sent her a questionnaire that she completed and returned. Complainant said that Respondent had made her choose between working in the frame area or taking a voluntary layoff. Complainant asserted that Respondent laid her off because of her opposition to a health hazard. Complainant also contacted the Oregon Occupational Safety and Health Division (OR-OSHA).

25) On November 25, 1996, OR-OSHA received a complaint concerning potential safety/health hazards at Respondent's Stayton facility. The complaint related to employees' exposure to a paint thinner.

26) By letter dated November 27, 1996, Penny Wolf-McCormick, an OR-OSHA regional health manager and industrial hygienist, urged Respondent to investigate the situation and make any necessary corrections. Wolf-McCormick also asked Respondent to advise OR-OSHA within 20 days of any responsive action it had taken. Wolf-McCormick further advised Respondent "that Oregon law prohibits discriminatory actions by employers against employees who make such complaints."

27) On December 6, 1996, Respondent sent the Material Safety Data Sheet (MSDS) for the lacquer thinner to an environmental consultant called Med-Tox

Northwest, explaining that it wanted Med-Tox to conduct an exposure analysis for this chemical. The MSDS stated that the lacquer thinner contained several hazardous ingredients, including toluene and methanol. The MSDS listed several health hazards and health effects associated with the lacquer thinner, including the following:

"ACUTE HEALTH EFFECTS:

"EYE CONTACT: Material is a severe eye irritant. Direct contact with the liquid or exposure to vapors or mists may cause stinging, tearing, redness, swelling and eye damage.

"INHALATION: Breathing high concentrations of vapors or mists may cause irritation of the nose or throat and signs of nervous system depression.

"INGESTION: Ingestion of excessive quantities may cause irritation of the digestive tract, and signs of nervous system depression (headache, drowsiness, dizziness, loss of coordination, and fatigue).

"SKIN CONTACT: This material is a skin irritant. Direct contact may cause redness or burning, drying and cracking of the skin.

* * *

"CHRONIC HEALTH EFFECTS:

Laboratory studies have shown that petroleum distillates may cause kidney, liver, or lung disease. Reports have associated repeated and prolonged over-exposure to solvents with permanent brain and nervous system damage. Not listed as a carcinogen by the NTP, IARC, or OSHA."

The MSDS also stated that respirators should be worn when the airborne concentration of the lacquer thinner exceeded 100 ppm and that neoprene or rubber gloves should be worn if prolonged skin contact was likely. The MSDS stated that lacquer thinner produced vapors heavier than air that could travel long distances.

28) In December 1996, Complainant asked Oeder for a copy of the MSDS for lacquer thinner to take to a doctor's appointment. Oeder told her superiors that Complainant was asking for documentation on the lacquer thinner. The next day, Complainant received a letter from Oeder stating that Respondent would not accept responsibility for any condition Complainant then was experiencing because she had

not been in the facility since November 21, 1996. Oeder stated that Respondent "would actively deny any claim for a work related injury." Complainant did not file a Workers' Compensation claim based on exposure to lacquer thinner.

29) Oeder's letter to Complainant stating Respondent would deny a claim for a work-related injury was dated December 19, 1996. According to Oeder, Respondent stopped using lacquer thinner that same day because Med-Tox personnel had reported verbally that the levels of lacquer thinner were too high.

30) By letter dated January 7, 1997, Oeder informed OR-OSHA that Respondent was waiting for written results from air testing conducted on December 18, 1996. In the interim, Oeder stated, Respondent had removed all lacquer thinner from the building and was testing possible substitute metal cleaners. Oeder's letter also stated that "[t]he employee complaining of headaches was temporarily reassigned." At the hearing, Oeder testified that the employee referred to in the letter was Complainant. She further testified that she had written the letter at the direction of her former manager, Lyle Haas, and had used the wording he specified.

31) On January 9, 1997, Oeder sent Complainant a letter stating that Respondent had an opening in production, and asking Complainant to return to work on January 13. Oeder testified that she sent the letter because Respondent's production had increased and it was adding staff to the MHD line.

32) In a February 3, 1997, letter, Respondent's plant manager informed OR-OSHA that Respondent had removed lacquer thinner from its facility. Wolf-McCormick deemed the letter to be a satisfactory response. She sent Respondent a letter dated February 10, 1997, stating that no on-site inspection was then planned.

33) Wolf-McCormick testified regarding the health hazards posed by exposure to toluene, which is a component of the lacquer thinner used by Respondent. Toluene

exposure can occur four ways: absorption through skin; inhalation; ingestion; and contact with the eyes or mucus membranes. Most exposure comes through skin contact, not through inhalation. Symptoms of exposure to toluene include irritation to the eyes and nose, fatigue, weakness, confusion, euphoria, dizziness, headache, dilated pupils, tearing of the eyes, nervousness, muscle fatigue, insomnia, dermatitis, and kidney/liver damage. Most of these symptoms (except eye/nose irritation) can be caused by any of the four types of exposure. One study has indicated that toluene is absorbed more quickly into the skin when it is combined with methanol. Wolf-McCormick also testified that it is the employer's responsibility to determine whether chemicals in the workplace present a hazard, and to supply any necessary protective equipment.

34) The National Institute of Occupational Safety and Health ("NIOSH") has recommended that the short-term exposure limit for toluene in the air be set at 150 ppm over 15 minutes. OSHA has set a permissible exposure limit at 200 ppm, based on an 8-hour time-weighted average; it also has set an instantaneous exposure limit at 300 ppm. According to NIOSH, a toluene level of 500 ppm presents an immediate danger to life or health. Studies indicate that five to ten minutes of skin exposure to toluene is equivalent to eight hours of exposure to air containing 100 ppm of the chemical.

35) In a document dated January 20, 1997, Med-Tox reported the results of its December 18, 1996, analysis of the air in the frame assembly and cleaning areas of Respondent's MHD Department. Med-Tox's tests indicated that toluene exposure levels exceeded the permissible exposure limit of 200 ppm. Peak readings for toluene exposure were as high as 2,000 ppm.

36) Wolf-McCormick testified that, if she observed workers getting lacquer thinner on their hands throughout the day, with the opportunity to wash it off only during

breaks, she probably would cite the workers' employer for a serious violation of OSHA rules. In Respondent's case, there was no on-site investigation, and Respondent was not cited for exposing its workers to toluene.

37) Complainant returned to work at Respondent's facility on January 13, 1997. Complainant went back to work in the door frame area, where lacquer thinner no longer was being used. Complainant still was bothered by the spray paint used in the door frame department; she eventually was transferred to the screen department and also has worked in the shipping area. Complainant now is on light duty work pursuant to a Workers' Compensation claim.

38) Respondent's business typically slows down during the winter months, resulting in some layoffs. At all material times, Respondent's policy was to base layoffs and recalls on seniority, with two exceptions: 1) employees would not be placed in jobs they were not physically capable of performing; and 2) employees with prior training might be recalled a day or two before others. Respondent's Product Teammember Handbook (dated 1996) stated:

"If you are displaced as a result of a lay-off, you would normally be allowed to exercise your seniority to replace the least senior employee in the plant, provided you have the skill, ability, and training necessary to perform the essential functions of that position. In no instance may you bump another employee from a job occupation of higher pay rate. In all cases you must be capable of learning the work within a reasonable length of time."

39) Oeder testified that Complainant was given the first permanent, long-term position that had opened in the MHD Department since Complainant's layoff. She also testified that Respondent hired no new employees from November 21, 1996, through January 13, 1996.

40) Respondent's records demonstrate that it transferred two employees (Jesse Smith and Erik Kvistad) with less seniority than Complainant into the MHD

Department on January 6, 1997. Respondent's records also indicate that another employee with less seniority than Complainant (Kay Martinez) quit working in MHD in December 1996 and was rehired into MHD starting on January 10, 1997. In addition, three MHD employees with less seniority than Complainant were not laid off during the winter of 1996-1997. After explaining these records, Oeder testified that Complainant's layoff was not based on seniority, it was based on her refusal to work in the MHD line.

41) During the duration of Complainant's layoff, Respondent also shifted several employees from other departments into the MHD Department to work on a day-to-day basis; this occurred almost every day.

42) Complainant's testimony regarding the use of lacquer thinner at Respondent's facility was corroborated by several other witnesses, including Joe Pikel, who, at the time of the hearing, had been employed by Respondent for just under ten years. He worked in the MHD Department as a group leader while Complainant worked there. Pikel, too, used lacquer thinner to clean door frames. The lacquer thinner came into contact with his skin; he did not use gloves because Respondent did not have gloves that would fit his hands. Before Complainant was laid off, nobody in management instructed Pikel to take any precautions while using the lacquer thinner. Nor did management personnel inform Pikel that the lacquer thinner could cause health problems.

43) Pikel got headaches and became a little "spaced out" when using lacquer thinner. At times, he complained to Robert Young about this. Pikel also heard many other employees complain to Young, Slusser, and himself about the lacquer thinner. The Forum has accepted Pikel's testimony, and its determination that the testimony is credible is not swayed by Slusser's testimony that Pikel was demoted about two years

prior to the hearing. No evidence was presented that Piki resented Respondent or had a motivation to misrepresent facts during the hearing.

44) Bernice Richards started working for Respondent in May 1995 and worked in the door frame department with Complainant. Richards' duties included using lacquer thinner to wash down door frames; she did not wear gloves while performing that job and got lacquer thinner on her hands every time she used it. Richards testified credibly that nobody in management ever said that employees should take precautions while using lacquer thinner or spray paint. After Complainant was laid off, a safety meeting was held and Oeder told employees that they should wear gloves. Richards testified that, after the safety meeting, employees used gloves "at first."

45) While Richards worked in the door frame department, she suffered from headaches and diarrhea. After Complainant was laid off, Richards was assigned to clean door frames. She told Slusser that she did not want that job because it made her sick. Slusser did not respond. Richards quit working for Respondent in December 1996; at that point, Respondent had stopped using lacquer thinner.

46) The forum found Complainant's testimony to be credible in all material respects. Her testimony regarding the adverse effects of lacquer thinner was confirmed by the testimony of several other witnesses, including Richards, Piki, and Wolf-McCormick, as well as the MSDS sheets for that compound. In addition, Complainant did not appear to embellish her complaint about Respondent, readily acknowledging that, until November 21, 1996, Respondent's supervisory employees had accommodated her desire not to work with or around the lacquer thinner. Throughout the hearing, Complainant testified in a forthright and straightforward manner.

47) Not all of Carol Oeder's testimony was credible, and she sometimes seemed to be straining to rationalize the actions she had taken. For example, Oeder's

testimony regarding Complainant's November 21, 1996, request for a transfer was internally inconsistent and, at times, appeared designed to protect Respondent's interests rather than to provide an accurate description of events. Specifically, Oeder testified that, although Complainant had asked only for a transfer to somewhere that lacquer thinner was not used, she believed Complainant's use of the word "transfer" meant that she wanted to be transferred out of MHD, and would not accept a job anywhere in that department. Oeder also testified both that Complainant was laid off because she did not want to work anywhere in the MHD Department and, more narrowly, that Complainant would not have been laid off if she had not refused to clean door frames. In addition, Oeder wrote a highly misleading letter to OR-OSHA, stating that Complainant had been "temporarily reassigned" after she complained of headaches when, in fact, Complainant had been laid off. In her testimony regarding that letter, Oeder attempted to rationalize what she had written, claiming the letter was not entirely inaccurate because Complainant *had* been temporarily reassigned, albeit to layoff status. Given the inconsistent, evasive, and defensive nature of much of Oeder's testimony regarding the material facts, the Forum has given it little weight except where it was corroborated by other credible evidence.

48) The testimony of Rondeeda Magby was not wholly credible. She testified that she had no doubt that Complainant had stated that she needed to be transferred out of the MHD Department immediately. However, the notes that Magby wrote during her conversation with Complainant state only that Complainant said she was bothered by fumes when painted doors (the ones that were cleaned with lacquer thinner) came through, and that she wanted a transfer. The notes do not reflect any statement by Complainant that she could not work anywhere in the MHD Department. Magby and Oeder both testified that the Human Resources Department generally became involved

with employee work assignments only when an employee wanted to be transferred from one department to another, and not when an employee wanted only to switch job assignments within a particular department. Given the severe health problems Complainant had suffered, however, the Forum finds credible Complainant's testimony that she asked Magby and Oeder for assistance in getting a job assignment that did not involve working with or around lacquer thinner, whether that job was in the MHD Department or elsewhere. The Forum gives no weight to Magby's testimony to the contrary.

49) One of Respondent's current production employees, Angela Cruz, testified for Respondent. Cruz stated that she worked with lacquer thinner and wore gloves all the time. Cruz testified that she never complained to her supervisors about the lacquer thinner and never had heard anybody else complain. On cross-examination, Cruz acknowledged that she had been provided with gloves, but had not been told why she might want to wear them. Cruz was not told that there were health hazards associated with getting lacquer thinner on her skin. The Forum gave little weight to Cruz's testimony that she never had heard anybody complain about lacquer thinner, in light of Complainant's, Richards, and Piki's credible testimony that several employees complained about the chemical.

50) Robert Young was Respondent's production supervisor for many years. In that position, he was responsible for training employees on safety matters. He was aware that employees could be exposed to lacquer thinner by inhalation and by absorption through the skin; he also was aware of the risks of exposure. At the time that Complainant worked with lacquer thinner, Young was not aware whether the level of lacquer thinner fumes in the plant was hazardous.

51) Young's testimony regarding safety matters and the events leading up to Complainant's layoff was not wholly credible. Young testified that employees who worked with lacquer thinner were supposed to wear gloves and were reprimanded when they did not. Young could not, however, remember the name of any employee he had reprimanded for not wearing gloves. In addition, no non-supervisory employee confirmed Young's testimony on this point, and even Respondent's own witness, Angela Cruz, testified that she was only told that she could wear gloves if she chose to. Young's testimony about what happened on November 21, 1996, also was not credible. He testified that Complainant had told Slusser that lacquer thinner fumes were bothering her throughout the MHD Department. Complainant testified to the contrary that she had complained to Slusser only when she was assigned to work with or near the door frames because the employees who normally handled that task for her were absent from work. Complainant's testimony on this point is supported by her uncontroverted statement that, after she refused to work on door frames, she started helping out in the MHD fabrication area, and would have kept working there had Oeder not told her that she had to choose between working with door frames or taking a voluntary layoff. Complainant also testified credibly that there were several areas within the MHD Department where the lacquer thinner did not bother her. Finally, the Forum has given no weight to Young's testimony that Complainant stated specifically in the November 21 meeting that she could not work anywhere in the MHD Department; nor has the Forum given any weight to Young's hand-written note containing a similar assertion. Young's testimony and note are not corroborated by any other credible evidence. Even Oeder testified only that she *interpreted* Complainant's statements to mean that she did not want to work in the MHD Department; she admitted that Complainant had not stated directly that she would not work there. For these reasons,

the Forum has given no weight to Young's testimony regarding these matters except where it was corroborated by other credible evidence.

52) The testimony of Adam Slusser, who was Complainant's production supervisor in 1996, was not wholly credible. Slusser testified that the company held daily safety meetings in 1996, and that the safety meetings included training on use of lacquer thinner. He also testified that all workers at Respondent's facility were aware of short- and long-term health hazards posed by the lacquer thinner. He, like Young, testified that all workers were supposed to wear gloves at all times. No non-supervisory employee corroborated Slusser's testimony on these matters, and Piki, Complainant, Richards, and Cruz gave credible testimony to the contrary. Slusser testified that, on November 21, Complainant stated that she no longer could work anywhere in the MHD Department. He included the same assertion in a hand-written note. The Forum has given no weight to Slusser's testimony or note, given the uncontroverted and credible testimony of Complainant that, after complaining about the lacquer thinner fumes on November 21, she assisted other employees in the fabrication area in the MHD Department. Had Complainant believed she could not safely work anywhere in MHD, she would not have continued working in fabrication.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was a corporation that had one or more employees within the State of Oregon.

2) In early 1996, Respondent employed Complainant to work in the MHD Department of its Stayton, Oregon manufacturing facility.

3) Employees working in the door frame area of Respondent's MHD Department used lacquer thinner on a regular basis. Exposure to lacquer thinner (through skin absorption, inhalation, ingestion, or contact with the eyes or mucus

membranes) can cause serious short- and long-term medical problems. Complainant and other employees suffered at least some of those adverse health effects when they worked with the chemical.

4) On November 21, 1996, Complainant informed her supervisor and Respondent's Human Resources Director that she no longer would work in the door frame area because she was made ill by the lacquer thinner. Complainant asked to be transferred to any other area in Respondent's facility where lacquer thinner was not used.

5) Respondent refused Complainant's request to be transferred to an area where lacquer thinner was not used. Respondent ordered Complainant to either work in the door frame area or take a "voluntary layoff."

6) Complainant reasonably believed she would suffer serious adverse health effects if she returned to work in the door frame area, and refused to do so. Respondent laid Complainant off work because of her refusal to work in the hazardous environment present in the door frame area.

7) Respondent rehired Complainant on January 13, 1997.

8) At the time Complainant was laid off, Respondent had employees working both inside and outside the MHD Department who had less seniority than Complainant.

9) During the period of Complainant's layoff, Respondent gave other employees temporary assignments in the MHD Department.

10) Complainant's final rate of pay was \$ 7.50 per hour. She was regularly scheduled to work 40 hours per week, Monday through Friday, and occasionally worked overtime. From November 21, 1996 (a day on which Complainant lost 3 3/4 hours of pay), to January 10, 1997, Complainant lost wages of \$2098.13, comprised of \$2008.13 in regular pay (\$7.50 per hour times 8 hours per day equals \$60.00 per day; November

22, 1996, to January 10, 1997, was a period that included 33 week days, not including Thanksgiving, Christmas, and New Year's Day; 33 days times \$60.00 per day equals \$1980.00, plus \$7.50 per hour times 3 3/4 hours lost on November 21, 1996, equals \$2008.13) and \$90.00 for the 8 overtime hours that Complainant had been scheduled to work on November 23, 1996.

11) Complainant suffered financial distress, prolonged unemployment, depression, and anger because of the lay-off based on her refusal to work in hazardous conditions that posed a serious threat to her health.

CONCLUSIONS OF LAW

1) At all material times, Respondent was an employer and a person subject to the provisions of ORS 654.001 to 654.295, including ORS 654.062. ORS 654.005(5), (7).

2) Complainant was an employee of Respondent entitled to the protections of ORS 654.001 to 654.295. ORS 654.005(4).

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 654.062(5)(b); ORS 659.040 *et seq.*

4) ORS 654.062(5)(a) provides, in pertinent part:

"It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because such employee has opposed any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780 * * *."

ORS 654.010 provides:

"Every employer shall furnish employment and a place of employment which are safe and healthful for employees therein, and shall furnish and use such devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably necessary to render such employment and place of employment safe and healthful, and shall do every other thing reasonably necessary to protect the life, safety and health of such employees."

ORS 654.015 provides:

"No employer or owner shall construct or cause to be constructed or maintained any place of employment that is unsafe or detrimental to health."

OAR 839-006-0020 provides:

"(1) ORS 654.062(5) prohibits discrimination against an employee because the employee "opposed" health and safety hazards in the workplace. OSEA does not specify to whom or in what manner an employee can oppose health and safety hazards and be protected. Therefore, what constitutes opposition covers a broad range of activities. For example, an employee may oppose health and safety hazards in a discussion with co-workers that is overheard by management, in a letter to a newspaper read by management or by written protest given to the employer. The concern of ORS 654.062(5) is not with how the opposition is made but with the employer's reaction to the opposition.

"(2) Although OSEA does not specify the manner of opposition, the protection of ORS 654.062(5) does not cover an employee who opposes health and safety hazards by refusing to work or by walking off the job, ***except where an employee may be confronted with a choice of either refusing to do assigned tasks or risking serious injury or death because of a hazardous condition at the workplace, not inherent in the job.***"

(*Emphasis added*). By giving Complainant the choice of either continuing to work with lacquer thinner in the door frame area or taking a "voluntary" layoff, Respondent violated ORS 654.062(5). Respondent also violated ORS 654.062(5) by laying off Complainant rather than giving her a different assignment (not involving the use of lacquer thinner) and laying off a less senior employee.

5) The actions, inactions, statements, and motivations of Carol Oeder, Robert Young, Adam Slusser, and Joe Piki are properly imputed to Respondent.

6) Pursuant to ORS 654.062, 659.010(2), 659.040, and 659.060(3), 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 appropriate exercises of that authority.

OPINION

Unlawful Employment Practice

ORS 654.062(5) prohibits employers from discharging or otherwise discriminating against employees who oppose or complain about practices forbidden by the Oregon Safe Employment Act. To prove a violation of ORS 654.062(5), the Agency need not establish that the employee opposed conditions that actually violated a statute or an OR-OSHA rule. *Butler v. Dept. of Corrections*, 138 Or App 190, 201, 909 P2d 163 (1995). Rather, the Agency need prove only "retaliation for a reasonable refusal to work due to safety concerns * * *." *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61, 83 (1982); see *Butler*, 138 Or App at 201 ("if plaintiff can establish that he suffered discrimination at his employment because he made a complaint 'related to' safe and healthful working conditions, he has met the elements necessary to establish a claim under ORS 654.062(5)(a)").

In this case, Complainant's fears about working with the lacquer thinner, which contained toluene, were objectively and subjectively reasonable. On December 18, 1996, Med-Tox determined that the concentration of toluene fumes in the door frame area sometimes was as high as 2000 ppm -- four times greater than the level that presents an immediate danger to life or health. No evidence in the record suggests that toluene levels were significantly higher on December 18, 1996, than they had been on November 21, 1996, the day on which Complainant refused to continue working in the door frame area. The protection of ORS 654.062(5) extended to Complainant because she was confronted with a choice of either refusing to work in the door frame area or

risking serious injury from exposure to lacquer thinner. See OAR 839-006-0020(2); *In the Matter of Rare Construction Incorporated*, 12 BOLI 1, 10 (1993); *Snyder Roofing*, 11 BOLI at 83.

Respondent argues that it may have violated OR-OSHA rules, but that its discharge of Complainant did not constitute retaliation against her for opposing an unsafe working condition. According to Respondent, it was entitled to lay off Complainant when she refused to work in the MHD Department because there were no job openings in other areas of Respondent's facility.

Respondent's argument fails both on the facts and on the law. First, the Forum has accepted Complainant's testimony that she did not refuse to work in all areas of the MHD Department; she refused only to work in those positions that involved exposure to lacquer thinner. Evidence in the record demonstrates that, during the period of Complainant's layoff, Respondent shifted employees from other areas of its facility to work in the MHD Department. The Forum infers from this evidence that Respondent could have kept Complainant employed within the MHD Department, and could have continued its previous practice of having other employees work in the door frame area when lacquer thinner was used. Respondent presented no evidence to the contrary.

In addition, it is clear that Respondent retained employees with less seniority than Complainant when it discharged her for refusing to work in the door frame area. Respondent's employee handbook states that, when layoffs occur, senior employees are entitled to displace junior employees in other positions. Respondent's failure to offer Complainant a position held by an employee with less seniority confirms that it retaliated against Complainant for opposing unsafe working condition.¹

Moreover, even if Respondent could not have employed Complainant elsewhere in its facility, it violated ORS 654.062(6) by insisting that she either work with door

frames or take a "voluntary layoff." It is well established that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an employee who refuses to work in hazardous conditions, not inherent in the job, that the employee reasonably believes present a risk of serious injury or death. See ORS 654.062(5); OAR 839-006-0020 (2); *Rare Construction*, 12 BOLI at 9-10 (1993). The employee's refusal to work in unsafe conditions is "[t]he ultimate form of remonstrance or opposition" to the hazard, *Rare Construction*, 12 BOLI at 9, and the discharge constitutes the ultimate form of discrimination.

Timeliness of Complaint

As its second affirmative defense, Respondent asserted that "Complainant's claim is barred by the applicable statute of limitations." Respondent did not pursue that defense at hearing, and the Forum finds it to be without merit. Respondent laid off Complainant on November 21, 1996. Complainant filed her Complaint on December 20, 1996, within the 30 days specified by ORS 654.062(5)(b). See Exhibit A-1.

Damages

Back wages

The Forum has accepted Complainant's evidence regarding the number of hours she would have worked, and the rate at which she would have been paid, had she not been laid off. The Forum's calculation of lost wages is set forth in paragraph 10 of the Ultimate Findings of Fact. The Forum has accepted Complainant's testimony that she had been scheduled to work overtime on November 23, 1996, because no evidence controverted either that testimony or Complainant's testimony that she had worked overtime on previous occasions. Accordingly, the calculation of back wages includes the \$90.00 that Complainant would have received had she worked the scheduled overtime. The calculation also includes \$28.13 in lost wages for three and three-quarter

hours that Complainant would have worked on November 21, 1996, had Respondent not laid her off. The credible evidence submitted by Complainant indicates she was not paid for those hours. Although Oeder testified to the contrary that Complainant was paid for eight hours of work on November 21, Respondent offered no documentation supporting her assertion. The Forum has found Oeder's testimony not to be credible in several respects, and will not rely on it to reduce Complainant's damage award. In sum, the Forum calculates that Complainant lost \$2098.13 in wages. It has reduced that amount by two cents to comport with the amount claimed in the Agency's complaint, as amended by motion at the hearing.

As its first affirmative defense, Respondent claimed that Complainant had failed to mitigate her damages. Respondent did not pursue that claim at the hearing, and no evidence in the record suggests that Complainant did not seek other employment during the period she was laid off. Indeed, Complainant received unemployment benefits, and this Forum "has previously observed that continued eligibility for ongoing unemployment benefits requires that the claimant actively seek work." *Snyder Roofing*, 11 BOLI at 83. Respondent did not meet its burden of proving that Complainant failed to mitigate her damages.

Mental suffering

In determining damages for mental suffering, the Commissioner considers "the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused." *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 21, 27 (1997). The Commissioner also considers "a complainant's vulnerability due to such factors as age and work experience." *Id.*

Here, Respondent retaliated against Complainant for her well-founded opposition to severe health hazards. The unlawful practice endured for seven weeks -- the time during which Respondent did not rehire Complainant and continued to utilize the services of less senior employees. Complainant testified credibly and persuasively that she became very angry and depressed as a result of being laid off for her refusal to work in hazardous conditions, and also suffered from feelings of helplessness. Before being laid off, Complainant's only reliable source of income had been her wages from Respondent. After the layoff, she had to rely on charity to feed her children and to provide them with Christmas gifts. On these facts, the Forum finds \$10,000.00 to be an appropriate amount to compensate Complainant for the mental distress she suffered as a result of Respondent's unlawful employment practice.

Exceptions

The Agency's exceptions

In its first and second exceptions, the Agency suggests that the order should include additional detail regarding the lacquer thinner's adverse health effects. The Forum agrees, and has amended Factual Findings Nos. 27 and 33, although not to the extent proposed by the Agency. In its fourth exception, the Agency suggests that the Ultimate Findings should reflect the fact that lacquer thinner may be harmful whether inhaled, ingested, absorbed through the skin, or brought into contact with the eyes or mucus membranes. The Forum agrees, and has amended Ultimate Finding of Fact No. 3 to include that information.

In its third exception, the Agency states that a quotation of the OR-OSHA administrative rule defining a "serious violation" should be added to the factual findings. The Forum disagrees. It was not necessary for the Agency to prove that Respondent's actions constituted a "serious violation" of OR-OSHA rules, and the administrative rule

defining that term need not be included in the order. The Agency's third exception is denied.

The Forum also denies the Agency's fifth exception, in which it asks the Forum to include the word "anxiety" in Ultimate Finding of Fact #11 as a description of one aspect of Complainant's mental suffering caused by Respondent's unlawful employment practice. After reviewing the relevant portions of Complainant's testimony, the Forum has determined that the evidence does not support such a finding.

Finally, the Agency states that Complainant should be awarded \$20,000.00 in damages for mental suffering, rather than only \$10,000.00. In support of that argument, the Agency relies on both the evidence in the record and descriptions of other recent cases in which the Commissioner awarded damages for mental suffering.

As an initial matter, it is important to note that the Commissioner's previous decisions regarding damages for mental suffering are merely determinations of *fact* -- the degree to which particular complainants experienced mental anguish as the result of particular employment practices. Consequently, those prior awards may not be relied upon as binding "precedent." To imply otherwise suggests, incorrectly, that the Commissioner imposes mental suffering awards to punish employers, not to compensate victims. As the Court of Appeals has explained:

"Damages for humiliation and mental suffering are damages for actual harm. They are not awarded as a penalty for unlawful discrimination. Whether the Employer acted unreasonably and in bad faith may be relevant in assessing such damages, but the evidence must support a finding of humiliation and mental anguish before an award can be made."

Montgomery Ward and Co. v. Bureau of Labor, 42 Or App 159, 600 P2d 452, 454 (1979) (citations omitted), *rev den* 288 Or 81.

It is true that prior cases serve as examples of the types of awards that are within the Commissioner's range of discretion. They also may serve to remind the

Commissioner of the amounts of money he previously has determined sufficient to compensate individuals who have experienced particular types of mental or emotional difficulties as the result of unlawful employment practices. Nonetheless, because damages for mental suffering are purely compensatory, the amount to be awarded in any given case is completely dependent upon the facts proved. Two individuals subjected to the same unlawful employment practice might suffer mentally to very different degrees, depending on their ages, prior experiences in the workplace, emotional vulnerability, and other factors.

The Forum has reviewed the evidence regarding Complainant's mental suffering in light of the Agency's sixth exception. As noted above, the Forum has rejected the Agency's argument that Complainant experienced "great anxiety" as the result of Respondent's unlawful employment practice. Complainant did experience depression, financial distress, and anger. The Forum adheres to its determination that \$10,000.00 adequately compensates Complainant for that suffering and denies the Agency's exception.

Respondent's exceptions

In its first and second exceptions, Respondent takes issue with the Forum's credibility findings. After considering Respondent's arguments, the Forum declines to change its determinations regarding the various witnesses' credibility, which are explained in the factual findings and opinion, *supra*. The exceptions are denied.

In its third exception, Respondent reasserts its argument that Complainant requested a transfer out of the Mobile Home Door Department. For the reasons set forth in earlier portions of this Opinion and in Findings of Fact Nos. 15, 16, 47, 48, 51, and 52, the Forum denies this exception.

The Forum also denies Respondent's fourth exception, in which it appears to argue that, because the Agency did not present medical evidence supporting the claim of mental suffering, the Forum was not entitled to find that Complainant suffered depression and anger. "[A] lack of medical consultation or a failure to seek counseling goes to the severity of mental suffering, not necessarily to its existence." *In the Matter of Katari, Inc.*, 16 BOLI 149, 161 (1997), *aff'd without opinion* 154 Or App __ (1998). Respondent also suggests that Complainant's seven-week layoff was "short-term" and that Complainant did not suffer financial distress because she received unemployment benefits during that time. The Forum rejects this argument. It is sufficient to note that Complainant was forced to rely on charity to feed her children and provide them with Christmas gifts.

Respondent asserts, in its fifth exception, that "[c]urrent and former employees of respondent were uniform in their testimony that employees were to wear gloves at all times in handling lacquer thinner." That is not correct. Current employee Joe Piki and former employee Bernice Richards both testified that they had not worn gloves when they worked with lacquer thinner, and that, before Complainant's layoff, they had *not* been instructed to take any precautions while working with the chemical. The exception is denied.

In its sixth exception, Respondent asserts that the evidence does not support Complainant's claims for lost wages for three and three-quarter hours of work on November 21, 1996, and eight hours of overtime on November 23. The exception is denied. Complainant's testimony regarding Respondent's failure to pay her for an entire day of work on November 21 was credible. Complainant also testified credibly that she had been scheduled to work overtime on November 23. Respondent offered no

evidence to the contrary; nor did it provide evidence that overtime work would not have been available to Complainant on that day.

In its seventh exception, Respondent asserts that it had no obligation to provide Complainant with work outside the Mobile Home Door Department and lay off a less senior employee. Respondent further claims that there is no evidence that it discriminated against Complainant in failing to provide her with a position outside that department. The exception is denied. First, the Forum has determined that Complainant did *not* request a transfer outside the Mobile Home Door Department, and that Respondent discriminated against Complainant by laying her off instead of continuing its practice of having her switch jobs with other employees when lacquer thinner was being used in the door frame area. However, even if Complainant had requested a transfer outside the Mobile Home Door Department, Respondent's own policy would have required it to lay off a junior employee so that Complainant could take that transfer. Respondent's witnesses testified that Complainant's request for a transfer was not granted because there were no job openings, due to a seasonal decrease in business. Respondent's employee handbook provided that, in the event of layoffs, senior employees generally would be entitled to replace, or "bump," less senior employees. Respondent's discriminatory animus toward Complainant is evidenced by its failure to give her this opportunity. Finally, as explained in the opinion, *supra*, this Forum consistently has ruled that it is unlawful for an employer to force employees to choose between working in hazardous conditions or being fired. Respondent's seventh exception is denied.

In its eighth exception, Respondent challenges the award of damages for mental suffering. The Forum has reassessed its award in light of exceptions from both Respondent and the Agency, and adheres to its determination that \$10,000.00

appropriately compensates Complainant for the depression, anger, and financial distress she suffered. The exception is denied.

Finally, Respondent generally challenges the Proposed Order as not being supported by facts in the record or by applicable law. Based on the factual findings, legal conclusions, and opinion set forth above, the exception is denied.

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 654.062(5)(a), as well as to protect the lawful interest of others similarly situated, the Commissioner of the Bureau of Labor and Industries hereby orders TOMKINS INDUSTRIES, 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 Mary D. Koon in the amount of:

a) TWO THOUSAND NINETY-EIGHT DOLLARS AND ELEVEN CENTS (\$2,098.11), less appropriate lawful deductions, representing wages Complainant lost from November 21, 1996, through January 10, 1997, as a result of Respondent's unlawful practice found herein; plus

b) Interest at the legal rate on said wages from January 10, 1997, until paid, computed and compounded annually; plus

c) TEN THOUSAND DOLLARS (\$10,000.00), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice found herein; plus

d) Interest on said damages for mental suffering at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any employee because that employee has reported or opposed unsafe practices in the work place.

3) Post in a conspicuous place on the premises of Respondent's manufacturing facility in Stayton, Oregon, a copy of ORS 654.062, together with a notice that anybody

who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

=====

¹The evidence on this point also defeats Respondent's third affirmative defense, that "Complainant was laid off for a legitimate, nondiscriminatory reason." Exhibit X-5.