

**In the Matter of**  
**VISION GRAPHICS AND**  
**PUBLISHING, INC.,**  
**Respondent.**

Case Number 18-97  
Final Order of the Commissioner  
Jack Roberts  
Issued April 17, 1997.

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**SYNOPSIS**

Complainant, a kitchen manager/ cook, in good faith brought a civil proceeding against Respondent (who operated a restaurant in Eugene) by reporting Respondent's health code violations to the county health department. Respondent discharged complainant the next day expressly because he complained to the health department, which inspected the restaurant and found several critical violations. The department had the authority to revoke respondent's food service facility license. The Commissioner held that Respondent violated Oregon's "whistleblower" law, and awarded Complainant \$1,917 in back pay and \$20,000 for mental suffering. ORS 659.550(1); OAR 839-010-0140.

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The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 14, 1997, in Suite 220 of the State Office Building, 165 East Seventh Avenue, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan

McCullough, an employee of the Agency. Michael Duffy (Complainant) was present throughout the hearing. Vision Graphics and Publishing, Inc. (Respondent), after being duly notified of the time and place of this hearing, failed to appear through a representative.

The Agency called the following witnesses: Marie Beck, Complainant's former coworker; George Classen, sanitarian for Lane County; Laurie Duffy, Complainant's former wife; Michael G. Duffy, Complainant; and Kristina Mammen, Complainant's former coworker.

Administrative exhibits X-1 to X-17 and Agency exhibits A-1 to A-7 were offered and received into evidence. The record closed on January 14, 1997.

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 March 26, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that Respondent discriminated against him when, on March 12, 1996, Respondent's owner, Cal [sic] Thomas, terminated him after he reported a health hazard at Respondent's restaurant to the county health department on March 11, 1996.

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 659.550.

3) On November 12, 1996, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent had discharged Complainant

from employment because he complained to the health department sanitarian and the sanitarian inspected Respondent's premises. The Specific Charges alleged that Respondent's action violated ORS 659.550.

4) 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 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. On November 18, 1996, the Agency moved for and the ALJ granted a postponement of the scheduled hearing.

5) As of December 2, 1996, and through the date of hearing, the forum had not received a responsive pleading from Respondent as required by OAR 839-050-0130.

6) On December 20, 1996, the Administrative Law Judge issued to Respondent a "Notice of Default," which notified Respondent that its failure to file a responsive pleading within the required time constituted a default to the Specific Charges, pursuant to OAR 839-050-0330. The notice advised Respondent that it had 10 days in which to request relief from the default. As of the date of hearing, January 14, 1997, no such request was received by the forum.

7) Pursuant to OAR 839-050-0210 and the Administrative Law Judge's order, the Agency filed a Summary of the Case. The Agency later submitted an addendum to its case summary.

8) Pursuant to ORS 183.415(7), the Administrative Law Judge verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) At the beginning of the hearing, the Agency made a motion to amend the Specific Charges to add a paragraph inadvertently omitted which gave the date Complainant filed his complaint with the Agency and recited that the Agency found substantial evidence of an unlawful employment practice on the part of Respondent. The motion was made pursuant to OAR 839-050-0140. The Administrative Law Judge granted the motion.

10) On April 2, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

#### **FINDINGS OF FACT -- THE MERITS**

1) Respondent, doing business as Seventh Street Family Restaurant, operated a restaurant in Eugene and employed one or more employees in Oregon. Respondent held a Lane County food service facility license. Kalayil Thomas was the corporation's co-owner, president, and secretary. He managed the restaurant.

2) Respondent employed Complainant as a cook on January 9, 1996. Respondent later promoted him to kitchen manager and paid him \$1,500 per month, with no benefits. He worked seven days per week.

3) On February 15, 1996, George Classen, a sanitarian for Lane County, inspected Respondent's restaurant following complaints by two former employees. The Oregon Health Division delegated authority to Classen's county department to license and inspect food service facilities in Lane County. Classen had the authority to initiate the county's license revocation process or seek injunctive relief under ORS chapter 624. He found over a dozen specific problems, including problems with the restaurant's grills, refrigerators, and freezers. Several of the problems were critical -- that is, they were possible health hazards -- and violated the health code. Failure to immediately correct

critical violations could result in the closure of the restaurant and in denial, suspension, or revocation of Respondent's license. A closure order would have the effect of an immediate revocation of Respondent's license. Classen reinspected the restaurant on March 5, 1996, and found the critical violations had been corrected.

4) Complainant worked to correct the problems identified in the health inspection. He was familiar with sanitation requirements and had passed a food handlers test. When Complainant talked with Thomas about needed repairs and code violations, Thomas laughed and refused to make some repairs. He told Complainant just to tell Classen that equipment was on order.

5) On March 11, 1996, Complainant asked Classen to reinspect Respondent's restaurant. Complainant complained about the restaurant's refrigeration units and the roof leaking. Pieces of the ceiling had fallen onto the cooking area and, on one occasion, a piece of the ceiling fell and hit a customer. Classen inspected the restaurant that day. He found roof leakage in the dining area, freezer malfunctions, and water seeping into a walk-in freezer. Complainant accompanied Classen and cooperated with him during the inspection. Classen again found critical violations and scheduled a reinspection on March 12, 1996. He advised Complainant that he might lower the restaurant's sanitation rating. Complainant, in turn, told this to Thomas.

6) Before March 12, 1996, Thomas learned from Classen that Complainant had called Classen and complained about the restaurant.

7) On March 12, 1996, Thomas told Harley Eastburn, a cook at the restaurant, that he (Thomas) had to get rid of Complainant because Complainant had called the health inspector and was trying to shut the restaurant down. Thomas also threatened to "kick [Complainant's] ass." When Complainant came to work that morning, Thomas cussed at him, pushed him, threatened his family, and fired him.

Later, Thomas told waitresses Marie Beck and Kristina Mammen that he had fired Complainant because Complainant had called the Health Division.

8) After he was fired, Complainant was very angry and shocked. He felt his discharge was unjustified and it lowered his self esteem. He gained weight, had trouble sleeping, and lost his temper with his wife and their children. He was afraid to say why he was fired when he applied for work. He became withdrawn and less assertive. The loss of employment caused financial hardship and stress on Complainant and his family. He was upset by the discharge for two to three months following the discharge.

9) Complainant looked for work after the discharge. He applied at a dozen restaurants for work. On April 20, 1996, he accepted a job at another restaurant with wages superior to those he received from Respondent.

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

1) During times material herein, Respondent was an employer in the State of Oregon that engaged or utilized the personal services of one or more employees.

2) Respondent employed Complainant from January 9 to March 12, 1996.

3) On March 11, 1996, Complainant in good faith made a complaint to the county health department that prompted the department to inspect the restaurant and threaten to lower its sanitation rating. The county health department is a regulatory, licensing agency authorized to bring a civil proceeding or seek injunctive relief against Respondent. Thomas knew of Complainant's complaint before March 12, 1996.

4) Respondent discharged Complainant on March 12, 1996.

5) Respondent discharged Complainant because he complained in good faith to the county health department and Thomas believed a civil proceeding was initiated by the regulatory agency.

6) Complainant suffered lost wages and mental distress due to the

discharge.

### **CONCLUSIONS OF LAW**

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.550.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.550.

3) ORS 659.550(1) provides in part:

"It is an unlawful employment practice for an employer to discharge \* \* \* or \* \* \* retaliate against an employee \* \* \* for the reason that the employee \* \* \* has in good faith brought a civil proceeding against an employer \* \* \*."

Respondent violated ORS 659.550(1).

4) Pursuant to ORS 659.550(1) and 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a cease and desist order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.550(1), to perform any act or series of acts reasonably calculated to carry out the purposes of said statute, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

### **OPINION**

#### **PRIMA FACIE CASE**

Respondent was found in default, pursuant to OAR 839-050-0330(1)(a), for failing to file a timely answer to the Specific Charges. In default cases, the Agency must present a prima facie case in support of the Specific Charges to prevail. ORS 183.415(6); OAR 839-050-0330(2).

A prima facie case in this matter consists of the following elements:

1) Respondent is an employer as defined by statute;

- 2) Respondent employed Complainant;
- 3) Complainant in good faith brought a civil proceeding against Respondent;
- 4) Respondent discharged Complainant;
- 5) Respondent's action (discharging Complainant) was taken because Complainant in good faith brought a civil proceeding against Respondent;
- 6) Complainant was harmed by Respondent's action.

ORS 659.550(1); OAR 839-010- 0100(1)(d); 839-005-0010(1); *In the Matter of Earth Science Technology, Inc.*, 14 BOLI 115, 122 (1995).

The Agency established the first, second, fourth, and sixth elements of its prima facie case with documents and witness testimony. The third element requires an interpretation of the statutory language.

ORS 659.550(1) requires that an employee must have "in good faith brought a civil proceeding against an employer." Complainant testified credibly that he knew the conditions in Respondent's restaurant were not up to the sanitation code. He worked to correct the violations, but Respondent (through Thomas) refused to make some necessary repairs. Complainant's complaint to the county health department was made because of his concerns about the code violations and the uncorrected problems (such as the roof leaking) at the restaurant. This evidence establishes that Complainant's complaint was made in "good faith." The question, then, is whether his complaint against Respondent to the county health department constitutes having "brought a civil proceeding."

In *Earth Science Technology*, this forum reviewed the legislative history of ORS 659.550 and concluded that "the language 'brought a civil proceeding' was intended to encompass good faith complaints made by employees against their employers that result in an administrative agency bringing a civil proceeding against that employer." *Id.*, at 124. In that case, the employee made a good faith complaint against his employer to

the Department of Environmental Quality, which in turn brought a civil proceeding against the employer to revoke its license and assess civil penalties. The forum found that this satisfied the third element of the prima facie case.

Here, Complainant made a complaint to a regulatory agency that was charged with licensing Respondent and that had the authority to bring civil proceedings and seek injunctive relief against Respondent. As a result of his complaint, the regulatory agency inspected Respondent's restaurant and found critical violations, which, if not immediately corrected, could result in the agency suspending or revoking Respondent's license. Thomas knew that an inspection had resulted from this complaint, that critical violations were found that could jeopardize Respondent's license, that another inspection was scheduled for the following day, and that Respondent's sanitation rating could be lowered. Complainant's complaint initiated this civil proceeding process.

Making a complaint to a regulatory agency that is the licensing agency or that can bring a civil proceeding or obtain injunctive relief against the employer will invoke the protection of ORS 659.550. OAR 839-010-0140(2). The legislative history of the statute is clear that the intent of the law was to protect workers who complained to or cooperated with law enforcement agencies, including agencies supervising the certification or licensure of the employer. In testimony before the Senate Labor Committee, Representative Rijkkin stressed the sponsors' intent that a worker be protected when cooperating with civil or criminal law enforcement in any way. She used an example of a terminated worker who had been involved in a police investigation as a witness, but had not brought charges or begun legal proceedings. *Earth Science Technology*, 14 BOLI at 123-24. Likewise, OAR 839-010-0140 provides in part:

"(2) Civil proceedings include those before regulatory agencies as well as courts:

"(a) Regulatory agencies include licensing agencies of any type;

"(b) If the complaint is before a regulatory agency, civil proceedings and penalties or injunctive relief must be possible in order to invoke protection by ORS 659.550.

"(3) The employer must know or believe that a civil proceeding was initiated."

ORS 659.550 is a remedial statute, and remedial statutes are to be construed broadly so as to effectuate the purposes of the statute. *Earth Science Technology*, 14 BOLI at 125. The public interest is furthered by having employees come forward with complaints of violations of the law without fear of retribution. *Id.* (citing *In the Matter of G & T Flagging Service, Inc.*, 9 BOLI 67 (1990)). Retaliation is a particularly insidious form of discrimination, and there is a public interest in discouraging retaliation to insure the free flow of information to law enforcement agencies. *Earth Science Technology*, 14 BOLI at 125 (citing *In the Matter of Richard Niquette*, 5 BOLI 53 (1986)). Based on these considerations and the intent of the legislature that workers be protected when cooperating, in good faith, with civil or criminal law enforcement in any way, the forum concludes that "civil proceeding" should not be construed to mean a formal contested case hearing or civil court action. In a great many cases, such as this one, such a construction would result in no statutory protection for the employee, would not effectuate the purposes of the statute, would frustrate public policy, and would be contrary to the intention of the legislature. To bring a civil proceeding, as used here, it is enough that an employee complains to or cooperates with a regulatory agency that has the authority to initiate enforcement action (such as license revocation, civil penalties, or injunctive relief) against the employer. See OAR 839-010-0140(2).

Again, Complainant's complaint before a regulatory agency initiated the civil proceeding process, and clearly Thomas was aware it had been initiated. I conclude that the Agency has established the third element of the prima facie case.

The fifth element of the prima facie case requires a showing of a causal

connection between Complainant's protected class status (having brought about a civil proceeding in good faith) and Respondent's adverse action against Complainant (the discharge). The facts show that Thomas knew of Complainant's complaint and the possible consequences from the health inspection before March 12. The unrebutted credible evidence proves that Thomas's express reason for discharging Complainant was his complaint to the regulatory agency and Thomas's belief that Complainant was trying to get the restaurant shut down. The preponderance of evidence establishes the causal connection between Complainant's protected class status and his discharge by Respondent. I conclude that the Agency has established the fifth element of the prima facie case.

## **DAMAGES**

### Back Wages

At the time of discharge, Complainant was earning \$1,500 per month and was working seven days per week. He was discharged on March 12, 1996, (before beginning work) and found employment with superior wages (which cut off the time for measuring back pay) beginning April 20, 1996. During March, Complainant lost \$48.39 per day (\$1,500 divided by 31 days) for 20 days (March 12 to 31), for a total of \$967.80. During April, he lost \$50 per day (\$1,500 divided by 30 days) for 19 days (April 1 to 19), for a total of \$950. Thus, Complainant's total gross lost wages equal \$1,917.80.

### Mental Suffering

In determining mental distress awards, 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. Also considered is a complainant's vulnerability due to such factors as age and work experience. *In the Matter of Pzazz Hair Designs*, 9 BOLI 240, 256-57 (1991) (citing *Fred*

*Meyer Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, 571-72 (1979), *rev den* 287 Or 129 (1979)).

Complainant and his former wife testified credibly that he suffered mentally and physically due to his unlawful discharge by Respondent. He experienced the trauma of a sudden and unexpected discriminatory termination. He felt anger, shock, and reduced self esteem. He gained weight, had trouble sleeping, and lost his temper with his wife and their children. He became withdrawn and less assertive. He met with the anxiety, uncertainty, and financial hardship connected with the loss of employment. These types of mental distress are all compensable. Complainant's mental suffering lasted two to three months.

Based on the foregoing, the forum is awarding Complainant \$20,000 to help compensate him for the mental distress he suffered as a result of Respondent's unlawful employment practice.

#### **ORDER**

NOW, THEREFORE, as authorized by ORS 659.550, 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, VISION GRAPHICS AND PUBLISHING, INC. is hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Michael Duffy, in the amount of:

a) ONE THOUSAND NINE HUNDRED SEVENTEEN DOLLARS AND EIGHTY CENTS (\$1,917.80), less appropriate lawful deductions, representing wages Complainant lost between March 12 and April 20, 1996, as a result of Respondent's unlawful practice found herein; plus

b) Interest at the annual rate of nine percent (9%) on said wages from May 1,

1996, until paid, computed and compounded annually; plus

c) TWENTY THOUSAND DOLLARS (\$20,000), 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 in good faith brings a civil proceeding against Respondent.

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