

In the Matter of

**WESTERN STATIONS CO., WSCO PETROLEUM CORP., and
WESTERN HYWAY OIL CO.,**

Case Number 04-99
Final Order of the Commissioner
Jack Roberts
Issued February 26, 1999

SYNOPSIS

Where the Agency failed to establish by a preponderance of the evidence that Complainant, a female, had been subjected to harassment because of her sex, or that Respondents discharged Complainant for complaining about alleged sexual harassment, the commissioner dismissed the complaint and specific charges. ORS 659.030(1)(b), (f); OAR 839-007-0550.

The above-entitled contested case came on regularly for hearing before Erika L. Hadlock, 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 January 6 and 7, 1999, in the conference room of the Oregon State Employment Department, 846 S.E. Pine Street, Roseburg, Oregon. The Civil Rights Division ("CRD") of the Bureau of Labor and Industries ("the Agency") was represented by Linda Lohr, an employee of the Agency. Respondents were represented by Karen O'Kasey of Schwabe, Williamson & Wyatt, P.C., Portland. Glen Zirkle (phonetic) and Greg Tripp (phonetic) were present as Respondents' representatives and did not testify. The Complainant, Kathy J. Hamilton, was present and was not represented by counsel.

The Agency called as witnesses, in addition to Complainant: Opal Darlene Maxey and Jeff McClellan (former employees of Respondents) and Cassandra Kendall (Complainant's daughter). Respondents called as witnesses: Charles Pryor, Patrick White, and Phyllis Nelson (current employees of Respondents).

The ALJ admitted into evidence: Administrative Exhibits X-1 through X-6; Agency Exhibits A-1 to A-4; and Respondents' Exhibit R-1.

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 or about February 20, 1997, Complainant filed a verified complaint with the Civil Rights Division of the Agency. Complainant alleged that she was sexually harassed and subjected to a hostile work environment when she worked for Respondents. Complainant further alleged that Respondents terminated her employment in retaliation for her complaints about the sexual harassment and/or because of her alleged disability (depression).

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence that Complainant had been subjected to sexual harassment and a hostile work environment, had suffered retaliation for complaining about that harassment, and was terminated on the basis of her opposition to an unlawful employment practice. The Agency found no substantial evidence that Respondents had terminated Complainant because of a disability.

3) In August 1998, the Agency requested a hearing in this matter.

4) On September 17, 1998, the Agency served on Respondents Specific Charges alleging they had subjected Complainant to a hostile, offensive, and intimidating work environment and had retaliated against her for opposing the sexual harassment by terminating her employment, in violation of ORS 659.030(1)(b) and (f). The Agency sought damages of \$22,500.00 for mental suffering.

5) With the Specific Charges, the Forum served on Respondents 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. The Notice of Hearing stated that Respondents' answer was due 20 days from receipt of the notice and that, if Respondents did not timely file an answer, they could be held in default.

6) Respondents filed their answer on or about September 30, 1998. Respondents generally denied they had engaged in any unlawful employment practices. For their first affirmative defense, Respondents alleged that Complainant did not take advantage of Western Stations' policy prohibiting sexual harassment and requiring employees to report any such harassment. For their second and third affirmative defenses, Respondents alleged that the demand for compensatory damages was barred by the statute of limitations and by the substantive remedies and limitations provided for under ORS Chapter 659.

7) On December 3, 1998, the Forum issued a case summary order requiring Respondents and the Agency to submit a list of persons to be called as witnesses, copies of documents to be offered into evidence, and a statement of any agreed or stipulated facts. The participants submitted timely case summaries.

8) At the start of the hearing, counsel for Respondents stated that her clients had received the Notice of Contested Case Rights and Procedures and that she had no questions about it.

9) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) On February 4, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. The Forum received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) Respondents all are Oregon corporations and employers in Oregon that utilize the personal services of one or more employees.

2) In 1995, Respondent Western Stations Co. operated Astro Station #234 in Winston, Oregon ("the service station"). Respondent WSCO Petroleum Corp. is a successor in interest to Western Stations Co.¹ There is no evidence in the record that Complainant ever was employed by Respondent Western Hyway Oil. Throughout the remainder of this order, the term "Respondents" refers only to Western Stations Co. and WSCO Petroleum Corp.

3) At material times, Patrick White was manager of the service station, Jeff McClellan was assistant station manager, and both were employees of Respondent Western Stations Co.² Charles ("Chuck") Pryor was Respondents' area supervisor and visited the service station about once every two weeks.

4) In November 1995, McClellan, acting for Respondent Western Stations Co., hired Complainant to work as an attendant at the service station. Complainant is female.

5) At all material times, Respondents had an employee handbook that included a policy forbidding sexual discrimination and harassment. The written policy defined sexual harassment and stated that incidents of harassment should be promptly reported to a supervisor or to "the next higher level of management." Respondents' general practice was to have new employees review and sign the handbook, but there is no evidence in the record that this happened with Complainant.

6) At the beginning of Complainant's employment, Phyllis Nelson, another attendant, was Complainant's shift supervisor. Relatively soon after Complainant was hired, Nelson quit work for a brief period of time. After Nelson returned, her shift overlapped with Complainant's shift for about five hours per day. During that time, Complainant served as Nelson's shift supervisor. White's shift ended when Complainant's shift started; he generally stayed an hour later completing paperwork and, therefore, was at the station for about an hour each day during the time that both Complainant and Nelson were present.

7) In January 1996, Opal Darlene Maxey was hired to work as an attendant at the service station. She frequently worked at the same time that both Complainant and Nelson were working. Maxey lived with McClellan throughout the time she worked at the station; they are now engaged but disagree about whether they were engaged at the time Maxey was hired. Maxey and Complainant are close friends.

8) At the time Complainant worked at the service station, at least half of the people who worked there were women.

9) At material times, a small enclosure called the "dog house" was located in the middle of the gasoline pumps at the service station. A cash register was located in the dog house and attendants would go there to control the gas pumps, ring up sales, make change, and get cigarettes for customers. The dog house was only about three

feet square. Two employees could fit into the enclosure with some difficulty, but would touch each other unless they made a conscious effort not to.

10) When White was in the dog house with other employees, he sometimes would touch them on the hips, back, or shoulders to let them know he was there, or to get them to move. White did not do this in a sexual manner or with sexual intent. White did occasionally tell "off-color" jokes at work but directed no sexual comments toward Complainant. Complainant never told Maxey that she thought White said or did things that were inappropriate. Maxey was not offended by White's jokes and never told him she thought they were inappropriate. Nelson was not offended by White's jokes.

11) Complainant received telephone calls from her children at least once each day. Other employees received personal telephone calls, but not as often as Complainant did. Nelson frequently "needled" and "harangued" Complainant about the number of telephone calls she received from her children. White told Complainant several times that she should not receive so many calls.

12) Complainant and Nelson did not get along; they bickered and argued constantly. Each employee felt that she worked much harder than the other. As White put it, the two employees had a "work ethic conflict." Nelson frequently made insulting and offensive remarks about Complainant's children. She also resented the time Complainant spent talking on the telephone and complained to White about that. Complainant complained to McClellan about Nelson's general hostility toward her and Nelson's negative comments about Complainant's children. McClellan told White about some of those complaints.

13) When White received Nelson's and Complainant's complaints about each other, he instructed McClellan to handle the situation by telling the employees to calm down and get along.

14) Nelson sometimes asked the service station customers whether they "liked it hard or soft." Although Nelson asked that question to determine whether customers wanted cigarettes in hard packs or soft packs, her words and demeanor carried a sexual connotation. One regular customer at the station had a truck with dual fuel tanks that were located one behind the other. The front tank had a leak, so the station attendants needed to fill the rear tank. Nelson sometimes joked with this customer by asking him whether he "liked it in the rear."

15) Nelson daily made jokes and comments about sex to customers, which sometimes included references to spitting or swallowing semen. Many of these jokes could be heard by other employees at the station because Nelson usually shouted them as she walked through the gas pump area. Nelson also sometimes talked about her sex life. Once, Nelson asked Complainant if she preferred to spit or swallow semen. One other time, she asked Complainant if she liked it "in the mouth." Nelson asked similar questions of other employees, and did not address her two questions to Complainant because of Complainant's sex. Nor were Nelson's workplace jokes or her questions to Complainant motivated by a general hostility toward women in the workplace. Rather, Nelson genuinely believed that her jokes were funny and that her customers and coworkers, including Complainant, were amused by them. Moreover, the nature of Nelson's comments and jokes -- under the circumstances in which they were made -- did not objectively suggest hostility toward women.³

16) In fact, Complainant was somewhat offended by Nelson's jokes, comments, and questions, and suffered a minimal amount of mental distress as a result. Complainant told Maxey several times that she was bothered by Nelson's jokes and comments but did not tell that to Nelson. Complainant herself sometimes used profanities at work and occasionally told jokes with sexual content, but she did not talk

about sexual matters nearly as often as Nelson did. Other service station employees, including Maxey, McClellan, and White, also sometimes made jokes with sexual content but much less frequently than Nelson. No credible evidence in the record suggests that Complainant was offended by these jokes.

17) Maxey found some of Nelson's sexualized comments offensive, but "blew it off" and did not say anything to Nelson.

18) Nelson, like White, sometimes bumped into or brushed against other employees while they were working in the dog house. Complainant testified that Nelson also intentionally rubbed her breasts against Complainant in a sexual manner. The Forum does not believe that testimony, which was not credible. Nor does the Forum accept Complainant's unsupported testimony that, when Nelson occasionally touched her crotch area through her clothing, she did it with sexual intent. Nelson's testimony that she was scratching an itch was far more credible. Nelson once invited Complainant and Maxey to spend the night at her house, but did not suggest that they engage in sex.

19) The Agency did not establish, by a preponderance of the evidence, that Complainant ever complained to McClellan specifically about any sexual harassment by Nelson. Complainant did, on one occasion, mention the sexual remarks while complaining generally to McClellan about her *other* problems with Nelson. There is no credible evidence, however, that Complainant told McClellan that she believed *she* was the victim of sexual harassment. Rather, the preponderance of evidence suggests that Complainant considered Nelson's sexual remarks in the presence of customers to be unprofessional and inappropriate, and told that to McClellan during one of her many complaints about Nelson's generally obnoxious behavior. McClellan did not pass that aspect of Complainant's complaint on to White, Pryor, or any other managerial

employee. By Complainant's own admission, she never complained directly to White, Pryor, or any other managerial employee about any sexual harassment.

20) To some extent, customers complained about virtually all the employees at the service station. There were few or no customer complaints about Maxey and only a few about another attendant, Nick Delgadi (phonetic). White sometimes would talk to the complained-of employees; the complaints rarely, if ever, were memorialized in writing.

21) During late 1996, the number of customer complaints about Complainant increased and, during that time, customers complained about her more frequently than they did about other employees. At least some of these complaints related to Complainant yelling or cursing at customers. Nelson sometimes apologized to customers for Complainant's behavior. Nelson complained two or three times to White about having to do that. White talked to Complainant about the complaints but her negative interactions with customers continued.

22) In January 1997, White fired Complainant because of her poor working relationship with Nelson and because of the frequent customer complaints about her. McClellan believed Complainant was fired because she had asked a regular customer for identification when she purchased cigarettes.

23) On January 31, 1997, White fired Maxey and McClellan because they kept talking to customers about what they perceived to be Respondents' unfair treatment of Complainant.

24) For several reasons, the Forum finds much of Complainant's testimony not to be credible. Certain aspects of her testimony simply were unbelievable. For example, Complainant testified that she never joked around at work and never had uttered a profanity or other "bad word" the entire time she worked at the service station.

Even Complainant's best friend, Maxey, acknowledged that Complainant used profanities, sometimes when customers could hear. Similarly, although Complainant acknowledged that her children called her at work every day,⁴ she insisted that Nelson had never indicated that she was bothered by the telephone calls. Maxey and McClellan testified more credibly that Nelson frequently told Complainant to get off the telephone and that Nelson constantly "needled" or "harassed" Complainant about the calls. Complainant's testimony also was internally inconsistent. For example, Complainant initially insinuated that Nelson asked every day whether she spit or swallowed semen. On cross-examination, Complainant clarified that Nelson asked her that question only once.

25) In addition, Complainant's story changed significantly over time. In the complaint she initially filed with the Agency, at a time when she was represented by counsel, she did *not* allege that White had sexually harassed her in any way. The Specific Charges, however, include an allegation that White "repeatedly made remarks of a sexual nature to Complainant, including, but not limited to telling her that what she needed was a good `piece of ass.'"⁵ The Charges also allege that White "grabbed Complainant by the waist and pushed his crotch against Complainant's rear end." Then, at the hearing, Complainant described only two sexual comments that White allegedly made toward her: that White thought her "butt" was the right size; and that the only use White had for another woman was to bend her over in the back room. Complainant did not state that White had made repeated comments to her of a sexual nature or that he had said anything about her needing a good "piece of ass."⁶ The Forum did not believe Complainant's shifting allegations regarding White's alleged comments and behavior.

26) For the reasons set forth above, the Forum has found Complainant's testimony regarding the material allegations generally not to be credible and has given it little weight. Complainant did appear to testify more honestly on cross-examination, and the Forum has given some weight to that testimony, particularly where it was corroborated by that of more credible witnesses.

27) The testimony of Kassandra Kendall, Complainant's daughter, was almost completely unbelievable. Her manner of testifying was unconvincing and she appeared unwilling to say anything that might reflect negatively on Complainant. She said she heard Nelson ask Complainant if she liked threesomes, saw her mother burst into tears a couple of times after Nelson asked her sexual questions, and *twice* saw White rub his crotch against Complainant's backside. Complainant testified to neither of the first two events and stated repeatedly that White had rubbed his crotch against her only once. On cross-examination, after having described all these events she allegedly observed, Kendall admitted she had gone to the station only about once every other week, and had spent only about 15 minutes there each time she visited. The Forum has given no weight to Kendall's testimony.

28) Nor did the Forum believe much of the testimony of McClellan on the subject of sexual harassment, which was slanted in favor of Complainant's allegations. For example, McClellan testified that he observed Nelson ask Complainant whether she liked threesomes, something about which Complainant did not testify. He also testified that he observed Nelson ask Complainant *seven or eight times* whether she liked oral sex or wanted to participate in a threesome. On cross-examination, Complainant had acknowledged that Nelson asked her the former question only once and *never* asked her the latter question. Not only was McClellan biased in favor of Complainant, he clearly had bad feelings toward Respondent. After he was fired, he filed a complaint

with BOLI, which the Agency found no substantial evidence to support. McClellan's testimony was belligerent, accusatory, and defensive. He seemed more interested in telling a story than in answering specific questions put to him. McClellan's testimony that he reported Complainant's allegations of sexual harassment to White was particularly unconvincing; White's testimony to the contrary was much more credible. On matters not related to the alleged harassment and complaints about it, McClellan's testimony was a bit more credible, and the Forum has relied on it to some extent, particularly when it was corroborated by credible testimony from other witnesses.

29) Compared to the testimony of some other witnesses, Maxey's testimony was relatively credible despite her friendship with Complainant and despite White having fired her. She acknowledged facts that were not helpful to the Agency's case as well as those that supported the harassment allegation. Maxey did, however, give some testimony that exaggerated the facts in Complainant's favor. For example, she stated that Complainant frequently complained about how Nelson "constantly" asked her whether she liked to spit or swallow semen. Although Complainant, too, initially suggested that Nelson asked her this question on a daily basis, on cross-examination, she admitted that Nelson had asked her the question only once. For this reason, as well as Maxey's bias in favor of Complainant, the Forum has not found her testimony sufficiently credible to establish -- by itself -- any element of the discrimination claim. However, where Maxey's testimony comported with Complainant's, appeared inherently credible, and was uncontradicted by credible testimony from any other witness, the Forum has given it weight.

30) Nelson's testimony was not wholly credible, in that she appeared to exaggerate Complainant's faults. For example, she testified that Complainant's children sometimes called every 10 or 15 minutes; no other witness who worked at the station

testified that the children called that frequently. In other respects, Nelson's testimony was credible. She admitted making sexual jokes and comments, talking about oral sex, and scratching her crotch area. She also frankly acknowledged that she does not like Complainant and did not like dealing with telephone calls and visits from Complainant's children. In general, Nelson's testimony was blunt and forthcoming. For these reasons, the Forum finds her testimony to be more credible than that of Complainant, McClellan, and Kendall, and has found the facts in accordance with her testimony if those witnesses provided the only evidence to the contrary. The Forum also finds Nelson's denials of sexual intent toward Complainant and Maxey more persuasive than Complainant's and Maxey's testimony that they had inferred -- for reasons they were unable to identify -- that Nelson wanted to have sex with them.

31) The testimony of Pryor was credible. He readily admitted that, prior to January 1999, Respondents had given their area supervisors no formal training in the area of sexual harassment. He also admitted that sexual harassment had not been a "real subject of conversation" between himself and upper-level management. Because of his limited contacts with the station, however, Pryor had little information directly relevant to Complainant's allegations. Pryor did testify credibly that White had informed him, about two weeks before firing Complainant, that he thought that might be necessary because of the number of complaints he had received from customers. The Forum has accepted that testimony, which corroborates Respondents' asserted reasons for firing Complainant, as fact.

32) White's demeanor was forthright and his testimony was believable. He readily acknowledged that his practice was to allow employees to work out their own differences, which did not work in this case, as the conflicts between Nelson and Complainant continued. White also admitted that employees at the station, including

himself, teased each other and used profanities. The Forum generally has found White's testimony to be credible. Where it differed from the testimony of Complainant or McClellan, the Forum has relied on White's version of events.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondents each had one or more employees within the State of Oregon.

2) Complainant is female and worked for Respondents Western Stations Co. and/or WSCO Petroleum Corp. from November 1995 until January 1997.⁷

3) Throughout Complainant's employment, a female coworker, Nelson, made frequent jokes and comments about sex, most often with the service station's customers. Nelson did not direct those comments and jokes toward Complainant and did not make them because of Complainant's sex. Nor did she utter the comments and jokes for Complainant's benefit, or with the intent that the sexual talk would have any particular effect on Complainant. In making the sexual remarks, Nelson was not motivated by any hostility toward women in the workplace. Nor did the jokes, which Nelson usually shouted toward customers as she walked through the gas pump area, objectively suggest that Nelson or Respondents were hostile toward women.

4) Twice, Nelson asked Complainant questions related to oral sex. Those two questions were not directed at Complainant because of her sex, were not motivated by and did not evince a hostility toward women, and were not sufficiently pervasive to create a hostile, offensive, or intimidating work environment.

5) Complainant was not subjected to any physical contact of a sexual nature by Respondents' employees, whether welcome or unwelcome. Nor was she subjected to any other type of intimidating physical contact.

6) In December 1996, Respondents' agent, Patrick White, terminated Complainant's employment because of her poor working relationship with Nelson and because of customer complaints. White was not aware that Complainant had made any complaints about sexual harassment, and the termination was not based on Complainant's opposition to actual or alleged sexual harassment.

CONCLUSIONS OF LAW

1) At all material times, Respondents Western Stations Co. and WSCO Petroleum Corp. were "employers" for purposes of ORS 659.030. See ORS 659.010(6).

2) 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 659.022; ORS 659.040 *et seq.*

3) ORS 659.040(1) requires complaints of unlawful employment practices to be filed within one year of the alleged practices. Complainant's complaint was timely filed.

4) ORS 659.030 outlines what acts constitute unlawful employment practices. It states, in pertinent part:

"(1) For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340 and 659.400 to 659.545, it is an unlawful employment practice:

"* * * * *

"(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."

The Agency's administrative rules further define what constitutes sexual harassment that violates ORS 659.030(1)(b). From 1986 until March 1996, *former* OAR 839-07-550 provided:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome

sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

"(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

From March 1996 through December 1998, *former* OAR 839-007-0550 provided, in pertinent part:

"Sexual harassment is unlawful discrimination on the basis of gender. Unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward a person because of that person's gender, and:

"* * * * *

"(3) Such conduct has the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive working environment (referred to as hostile environment harassment).

"(4) Whether particular conduct directed towards a person constitutes sexual harassment will be determined by the Civil Rights Division. The standard will be viewed from the perspective of the reasonable person in the circumstances of the person alleging harassment.

"(5) In quid pro quo harassment cases, an employer is liable for acts of sexual harassment by its agents or supervisory employees against an employee. In hostile environment harassment cases, an employer is liable for acts of sexual harassment by its agents or employees against another employee where the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action * * *."

OAR 839-007-0550 now provides, in pertinent part:

"(1) Sexual harassment is unlawful discrimination on the basis of gender. Sexual harassment 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; and

"(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 such 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 an intimidating, hostile, or offensive working environment.

"(2) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating, or offensive working environment is whether a reasonable person in the circumstances of the complainant would so perceive it.

"* * * * *

"(4) Harassment by Supervisor, No Tangible Employment Action: Where sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred by no tangible employment action was taken:

"(a) The employer is liable if the employer knew of the harassment unless the employer took immediate and appropriate corrective action.

"(b) The employer is liable if the employer should have known of the harassment. The Civil Rights Division will find that the employer should have known of the harassment unless the employer can demonstrate:

"(A) That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and

"(B) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

"(5) Harassment by Co-Workers or Agents: An employer is liable for sexual harassment by any of the employer's employees or agents who do not have immediate or successively higher authority over an offended individual where the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action. * *
*"

Respondents did not violate ORS 659.030(1)(b) because Nelson's workplace jokes, comments, and questions were not directed at Complainant because of her sex, were

not motivated by hostility toward women, and did not evince hostility toward women. Nor were the two questions that Nelson directed to Complainant sufficiently pervasive to create an objectively hostile, intimidating, or offensive work environment. White did not direct unwelcome comments or conduct of a sexual nature at Complainant; the few sexual jokes he told did not create a working environment that was either objectively offensive, hostile, or intimidating or subjectively offensive, hostile, or intimidating to Complainant.

5) ORS 659.030(1)(f) provides that it is an unlawful employment practice for an employer to "discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by this section * * *." Respondents did not terminate Complainant's employment because she had opposed unlawful sexual harassment, and did not violate ORS 659.030(1)(f).

6) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

Sexual Harassment

This case involves allegations of sexual harassment of one woman by another. This Forum has long recognized that same-sex sexual harassment may constitute a violation of ORS 659.030(1)(b), whether or not the harassment is motivated by sexual desire. See *In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 253 (1995). The United States Supreme Court more recently has reached the same conclusion regarding claims under Title VII. *Oncale v. Sundowner Offshore Services*, 523 US ___, 118 S Ct 998 (1998). The legal analysis is the same as in any other sexual harassment

case: to meet its burden of proving that Respondents sexually harassed Complainant, the Agency had to produce evidence establishing the following elements:

- 1) Respondents were employers subject to ORS 659.010 to 659.110;
- 2) Respondents employed Complainant;
- 3) Complainant is female;
- 4) Respondents, through their agents, engaged in unwelcome verbal or physical conduct directed at Complainant because of her sex;
- 5) The unwelcome conduct had the purpose or effect of creating an intimidating, hostile or offensive working environment;
- 6) Respondent knew or should have known of the conduct; and
- 7) Complainant was harmed by the conduct.

See *In the Matter of Executive Transport, Inc.*, 17 BOLI 81, 92 (1998). "In determining whether conduct has created an `intimidating, hostile or offensive working environment,' [the adjudicator applies] an objective standard, that is, [it] determine[s] whether a reasonable person would arrive at that conclusion." *Fred Meyer, Inc. v. BOLI*, 152 Or App 302, 307, 954 P2d 804 (1998).

In this case, the first three elements are not contested, at least with regard to Respondents Western Stations Co. and WSCO Petroleum Corp. The Agency also has established the fifth, sixth, and seventh elements of its case: Nelson's jokes and comments about sex were sufficiently pervasive to render the workplace environment offensive to a reasonable person; the pervasiveness was such that Respondents knew or should have known that the offensive environment existed; and Complainant was somewhat offended by the comments and suffered some minimal level of emotional distress because of them.⁸

The remaining question is whether Nelson's sexual jokes and comments were directed at Complainant "because of * * * [her] sex. ORS 659.030(1)(b); see *Executive Transport*, 17 BOLI at 92 (conduct must be "directed at Complainant"). Cf. *Fred Meyer*,

Inc. v. BOLI, 152 Or App 302, 309, 954 P2d 804 (1998) (noting, in affirming Agency finding of unlawful sexual harassment, that unwanted sexual comments and behavior were "directly targeted at complainant" and "were not merely part of a general milieu of good-natured banter"). In deciding this question, it is important not to interpret the phrase "directed at" too narrowly. An employer may violate ORS 659.030(1)(b) by allowing unwanted sexual words or conduct to be directed at women *as a class*, even if it cannot be established that a particular female complainant is the target of the harassment. For example, an unlawful work environment could be created through the pervasive posting of signs suggesting hostility, disrespect, or a demeaning attitude toward women even in the absence of evidence that the employees who posted the signs acted with animosity (or sexual desire) toward a specific female employee.⁹ Such hostility could take many forms, such as assertions that women cannot or should not perform certain jobs, implications that women should act in a pliable or docile manner around men, or insinuations that women's worth should be judged primarily by their sexual attractiveness. Even supposedly friendly jokes could be so pervasive and degrading to women that an employer's tolerance of them could, by itself, lead to an inference that the employer was hostile to women in the workplace.

This, however, is not such a case. Nelson's jokes and comments, although objectively and subjectively offensive, were not directed at Complainant *because she is female*.¹⁰ Nor did Nelson make the jokes for Complainant's benefit, hoping they would adversely affect her.¹¹ And Nelson did not direct her remarks against women as a class; although the comments and jokes were explicitly sexual in nature, they were not inherently demeaning or belittling to women -- at least not more than they were to men. In using vulgar language and referencing sex, Nelson was not motivated by a hostility toward women in the workplace; nor did the comments evince any such hostility.

In other words, although Nelson's behavior was vulgar and offensive, it did not constitute sexual harassment of Complainant. As the United States Supreme Court recently explained:

"Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at `discriminat[ion] . . . because of . . . sex.' We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. `The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.

"* * * * *

"A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility toward the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, **he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted `discrimina[tion] . . . because of . . . sex.'**"

Oncale v. Sundowner Offshore Services, 523 US ___, 118 S Ct 998, 1002 (1998) (quoting *Harris v. Forklift Systems, Inc.*, 510 US 12, 21 (1993)) (bracketed material and ellipses in original; boldface added).¹² Here, Nelson's comments and jokes were not phrased in "sex-specific and derogatory terms * * * as to make it clear that [Nelson was] motivated by general hostility toward the presence of women in the workplace." *Oncale*. In short, Nelson's sexual comments did not constitute discrimination against Complainant "because of * * * [her] sex." ORS 659.030(1)(b).

The fact that Nelson twice directed questions toward Complainant does not change this result. Again, although the questions were sexual in nature, they were not objectively demeaning or hostile *toward women*, and they were not directed at Complainant *because of her sex*. In any event, even if Nelson had directed the

comments at Complainant because of her sex, they were not sufficiently pervasive to create an objectively hostile, offensive, or intimidating working environment.¹³

Employers should not view this order as holding that it is permissible for employees to make jokes and comments similar to those made by Nelson. The Forum's determination that Nelson's jokes did not evince hostility toward women is highly dependent on the circumstances in which she made them: outside, in a busy working environment, with *no* evidence that the jokes targeted or were directed at women more than men. It also is significant that Nelson directed only two comments toward Complainant and that Complainant was Nelson's supervisor. If Nelson had made the comments behind closed doors, used a threatening tone, touched Complainant in a sexual or intimidating manner, demonstrated a general hostility toward female coworkers, combined the jokes with unwelcome sexual advances toward Complainant, or held a position of power over Complainant, the result of this case probably would have been different.

Discharge

The Agency's second theory of unlawful employment practices was that Respondents discharged Complainant because of her complaints about sexual harassment, in violation of ORS 659.030(1)(f). As discussed above, the Forum has found that Complainant never complained to White about Nelson's sexual comments and, to the very limited extent she made such a complaint to McClellan, he never passed it along to White. Because White had no knowledge that Complainant ever had complained about Nelson's sexual comments, he could not have fired Complainant in retaliation for having made those complaints. Consequently, Respondent's termination of Complainant's employment did not violate ORS 659.030(1)(f).

ORDER

NOW, THEREFORE, as Respondents have not been found to have engaged in any unlawful practice charged, the Complaint and the Specific Charges filed against Respondents are hereby dismissed according to the provisions of ORS 659.060(3).

¹No evidence in the record indicates when this succession took place. Although the Agency alleged that WSCO Petroleum Corporation "purchased Respondent Western Stations Co. on or about December 31, 1997," Respondents admitted only that WSCO Petroleum had succeeded in interest to Western Stations Co., not when that occurred. Respondents further admitted in their case summary (Exhibit X-6) that WSCO Petroleum employed Complainant at some point in time, suggesting that the succession must have taken place quite a bit earlier than December 31, 1997, since Complainant was fired in January of that year. Given the ultimate outcome of this case, there is no need to resolve this question.

²Depending on when WSCO Petroleum Corporation succeeded in interest to Western Stations Co., White, McClellan, and other employees referenced in this order may also have been employed by WSCO Petroleum.

³Certainly the same comments could be highly intimidating and hostile if, for example, they were made one on one, behind closed doors.

⁴Complainant conceded this fact only on cross-examination. During her direct testimony, she denied that her children repeatedly called the station and implied that they called only when there was an emergency.

⁵The Forum presumes that allegations in the Specific Charges that describe conduct and comments directed specifically toward the Complainant are based on Complainant's assertions to the Agency.

⁶Complainant did repeat her charge that White once rubbed his crotch against her rear end in a sexual manner.

⁷See footnote appended to Factual Finding No. 2, *supra*.

⁸Although other employees also made sexual jokes, they did so much less frequently than Nelson. Moreover, there is no credible evidence that these other employees' jokes were either objectively offensive or subjectively offensive to Complainant. As noted above, the Forum does not believe Complainant's allegation that White once said to her that the only use he had for some other woman was to bend her over in the back room. That type of comment certainly could be said to be objectively offensive and to demonstrate hostility toward women.

⁹In bringing a case on behalf of a particular complainant the Agency would, of course, have to prove that the complainant was subjectively offended, intimidated, or made fearful by the workplace environment.

¹⁰As outlined in the factual findings, the Forum disbelieves Complainant's charges that White and Nelson made unwelcome sexual contacts or advances toward her. If those facts had been proved, this would be a very different case.

¹¹The Forum has found no evidence to support any suggestion that Nelson made the comments as part of a campaign to drive Complainant out of the workplace.

¹²This holding is pertinent because federal cases interpreting Title VII of the 1964 Civil Rights Act are instructive in construing ORS 659.030, the statute alleged to have been violated here. *Mains v. II Morrow, Inc.*, 128 Or App 625, 634, 877 P2d 88 (1994). The Oregon appellate courts have cited with apparent approval federal holdings outlining the elements of sexual harassment claims. See, e.g., *Holien v. Sears, Roebuck and Co.*, 298 Or 76, 89, 689 P2d 1292 (1984); *Fred Meyer*, 152 Or App at 309-10; *Mains*, 128 Or App at 734-35. The Forum is unaware of any Oregon case or BOLI ruling holding that some sexual harassment claims are cognizable under ORS 659.030 even though they would not pass muster under Title VII.

¹³Again, it is possible that sexual conduct in the workplace not directed at a particular employee could constitute sexual harassment if it evinced or was motivated by hostility toward employees of a particular sex. In a close case, the fact that a small number of sexual comments were directed at an employee of

that sex *combined with the sexual conduct elsewhere in the workplace* might push the case over the line between a merely offensive environment and an environment that constitutes unlawful discrimination.

This is not such a case.