

In the Matter of

WING F. FONG

and Yuen Kuen Fong, aka Wendy Fong, dba China Hut Restaurant, Respondents.

Case Number 57-97
Final Order of the Commissioner
Jack Roberts
Issued March 4, 1998.

SYNOPSIS

Where respondents' employee, a cook, sexually harassed complainant, a waitress, but where respondents did not know of the cook's conduct and evidence did not show that they should have known of it, the commissioner held that respondents were not responsible for the acts of sexual harassment. Accordingly, the commissioner dismissed the complaint and specific charges. ORS 659.030(1)(b); *former* OAR 839-07-550, 839-07-555(2), 839-07-565.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 23 to 25, 1997, in the hearings room of the Oregon State Employment Department, 119 North Oakdale Street, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Anita Marlene Carlson (Complainant) was present throughout the hearing. Wing F. Fong (Respondent Wing Fong, or Mr. Fong) and Yuen Kuen Fong, aka Wendy Fong (Respondent Wendy Fong, or Mrs. Fong), were present throughout the hearing and were represented by P. David Ingalls, Attorney at

Law.

The Agency called the following witnesses: Consepacion (Connie) Baker, mother of Walter Baker Ravis and cousin of Josefina Romero, who formerly worked for Respondents; Anita Marlene Carlson, Complainant; Allyson Kelley, former bartender and waitress for Respondents; Walter Baker Ravis, former dishwasher for Respondents; Christy St. Range (formerly Smith), former waitress for Respondents; Vicki Stoner, waitress for Respondents; Sheila Tokar, former host-ess for Respondents; and Barbara Turner, senior investigator in the Civil Rights Division of the Agency.

Respondents called the following witnesses: Peggy Davis, bartender for Respondents; Gayla Dixon, waitress for Respondents; Wing Fong, Respondent; Yuen Kuen Fong, Respondent; Daniel Gan, cook for Respondents; May Gan, cook for Respondents; Rosemarie (Rosie) Hayes, waitress for Respondents; Daniel Kou, Respondents' manager; Mei Ying Kwong, kitchen helper for Respondents; Lesley Laing, compliance specialist in the Wage and Hour Division of the Agency; Nancy Wu Ng, former cashier for Respondents; Dave Norman, an acquaintance of Allyson Kelley; Sharon Pfeiger, bartender and waitress for Respondents; De Sheng (Jimmy) Tan, former cook for Respondents; and Barbara Turner, senior investigator in the Civil Rights Division of the Agency.

Hardy Li and Manuela Marney, appointed by the forum and under proper affirmation, acted as interpreters for several witnesses called by the Agency and Respondents.

Administrative exhibits X-1 to X-16, Agency exhibits A-1, A-3, and A-4, and Respondents' exhibit R-1 were offered and received into evidence. The Agency withdrew exhibit A-2. The record closed on September 25, 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 April 19, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondents discriminated against her because of her sex and race in that she was sexually harassed by Respondents' cook, De Sheng (Jimmy) Tan, throughout her employment, she was treated differently by Respondents because of her race, and on January 26, 1996, Respondent Wendy Fong terminated her because of her race.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices by Respondents.

3) On around May 20, 1997, the Agency prepared and duly served on Respondents Specific Charges alleging that, with Respondents' knowledge, Respondents' employee, De Sheng Tan, sexually harassed Complainant, and that Respondent Wendy Fong treated Complainant differently and discharged her from employment because of her race. The Specific Charges alleged that Respondents' actions violated ORS 659.030(1)(a) and (b).

4) 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 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.

5) On June 3, 1997, Respondents' attorney requested a postponement of the hearing because it conflicted with a previously scheduled circuit court trial. On June 10, 1997, the forum granted the request. An amended Notice of Hearing was issued to the participants setting the hearing for September 23, 1997.

6) On June 6, 1997, Respondents filed an answer in which they denied the allegations of discrimination mentioned above in the Specific Charges and stated two affirmative defenses.

7) On July 7, 1997, the Agency and Respondents filed a joint motion for an order allowing them to depose the Complainant and Respondents. On July 10, 1997, the ALJ granted the motion.

8) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondent each filed a Summary of the Case. The Agency filed a supplement.

9) On September 15, 1997, Respondents' attorney moved for a discovery order directing the Agency to produce notes of interviews with witnesses. Some of the notes were made by an investigator from the Civil Rights Division at the direction of the Agency case presenter. Other notes were made by the case presenter. The ALJ granted the motion with respect to notes made by the investigator. The ALJ found that the Agency voluntarily produced its investigative file to Respondents, the file contained investigative interview notes, and the additional interview notes made by the investigator, even at the case presenter's direction, should be produced in this case. The ALJ found no reason to treat these notes differently than interview notes made by the investigator earlier in the process. The ALJ denied the motion with respect to the case presenter's notes of interviews with witnesses. In his ruling, the ALJ stated:

"The public interest in encouraging frank communications between the case presenter and Agency staff outweighs the public interest in the disclosure of those communications. ORS 192.502(1); *In the Matter of Albertson's, Inc.*, 10 BOLI 199, 203-04 (1992), *reversed and remanded on*

other grounds, Albertson's, Inc. v. Bureau of Labor and Industries, 128 Or App 97, 874 P2d 1352 (1994). The case presenter may not be examined as to public records that are exempt from disclosure under ORS 192.501 to 192.505. ORS 40.270 (ORE 509).

"Likewise, there is a strong public interest in protecting the case presenter's communications with a complainant and other witnesses at a contested case hearing.

'ORS 183.450(7) allows a state agency to be represented at contested case hearings by agency employees with the consent of the Attorney General. The Attorney General has given this consent to the Bureau, and the Bureau has designated individual employees as case presenters to perform this function. At a contested case hearing, the case presenter is authorized to perform every function related to litigation that the Attorney General would perform except presenting legal argument. ORS 183.450(8), OAR 839-50-230. An essential component of litigation is that the attorney or case presenter representing the client communicate candidly with the client regarding all facts within the client's knowledge that are relevant to the case. Here, although the client is technically the agency, the real party in interest is the Complainant. It is the Complainant who was subjected to the alleged discriminatory conduct and the Complainant who will be the beneficiary of any award of damages, not the agency. It is illogical to assume that the legislature and the Attorney General intended for an agency employee to perform all the essential functions of an attorney except for presenting legal argument and simultaneously intended to place this employee in the untenable position of being subject to examination, either by deposition or during a contested case hearing, as to the substance of any conversations between the employee and the Complainant whose case is being heard. This interpretation of the law would effectively hamstring the agency case presenter in performing the very task the legislature delegated to the case presenter to perform.' * * * *In the Matter of Thomas Myers*, 15 BOLI 1, 15-16 (1996).

"The forum believes that this rationale concerning conversations between the case presenter and a complainant also applies to conversations between the case presenter and other witnesses. The case presenter must be able 'to perform all the essential functions of an attorney except for presenting legal argument,' without being placed 'in the untenable position of being subject to examination, either by deposition or during a contested case hearing, as to the substance of any conversations between the' case presenter and witnesses who were interviewed in preparation for the contested case hearing.

The forum adopts that ruling.

10) On September 18, 1997, the Agency moved that the allegations of discrimination based on Complainant's race be dismissed, along with the prayer for back pay. The ALJ granted the motion at the beginning of the hearing on September 23, 1997.

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

12) 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.

13) At the start of the hearing, Respondents submitted a hearing memorandum.

14) Before opening statements, Respondents raised a question about the issue of Respondents' knowledge of Jimmy Tan's alleged conduct. In the Specific Charges, the Agency alleged that "Respondents were aware, or should have been aware, of Tan's conduct [of a sexual nature directed at Complainant because of her sex] and took no action to stop it[.]" Respondents argued that this allegation was specific to Respondents and did not include any alleged knowledge of agents or supervisors. They claimed they were not prepared to defend against an allegation involving the knowledge of their agents or supervisors. The Agency contended that the language in the Specific Charges was broad enough to permit it to offer evidence of Dan Gan's alleged knowledge, because he was in a unique position as a bilingual person whom Respondents and employees relied on to communicate. Although the Agency acknowledged that Gan was not Respondents' supervisor or manager, the Agency claimed that Gan was an "agent," for purposes of *former* OAR 839-07-555(2), because

he was a person through whom the English-speaking employees had to communicate with Respondents.¹ It was the Agency's position that Respondents were aware of the alleged sexual harassment and that Dan Gan or others in supervisory positions were informed of Jimmy Tan's alleged sexual harassment of Complainant or others. The ALJ ruled that the Agency could offer evidence of Gan's duties and knowledge, so that the forum could decide whether he was an agent under *former* OAR 839-07-555(2). Before the Agency rested its case, it moved to amend the Specific Charges to encompass this theory of liability. The ALJ granted the motion and permitted Respondents to request a continuance if necessary to meet the new theory and evidence. When the hearing resumed on September 25, 1997, the Agency withdrew its claim that Dan Gan was Respondents' "agent" as that term is used in *former* OAR 839-07- 555(2).

15) On February 10, 1998, the ALJ 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) Respondents owned and operated China Hut Restaurant (China Hut or restaurant) at all times material herein. They were employers in Oregon who engaged or utilized the services of one or more employees, subject to the provisions of ORS 659.010 to 659.435.

2) Respondent Wing Fong is a native of China. He speaks Chinese and English. He had received no complaint of sexual harassment before Complainant's. He learned of her complaint from a letter from the Agency after Complainant left employment. Mr. Fong never saw inappropriate sexual conduct at the restaurant. No one ever told him about sexual harassment involving De Sheng (Jimmy) Tan. He did not remember a complaint by Josefina Romero involving Tan.

3) Respondent Wendy Fong came to the US from Hong Kong in 1976. She speaks Chinese and English. Mrs. Fong learned of Complainant's complaint from a letter from the Agency after Complainant left. Mrs. Fong never saw Tan sexually harass anyone at the restaurant.

4) At all times material, Respondents managed the restaurant and did not employ a manager. One of the Respondents was usually at the restaurant. Respondents employ 45 to 50 employees.

5) Complainant is a female who worked as a waitress for Respondents from on or about February 28, 1995, through January 26, 1996.

6) Complainant normally worked five days, 18 to 21 hours per week. She worked with Tan.

7) Jimmy Tan came to the United States from the Peoples Republic of China in 1986. Respondent Wing Fong hired him in 1993. Tan worked as a cook for Respondents. While employed by Respondents, Tan lived in an apartment above the restaurant. Tan spoke Chinese and a little English. He could not read English, but understood the restaurant menu. He could understand and respond to greetings in English. From July 4 to September 15, 1995, Tan was traveling and was not at Respondents' restaurant.

8) Tan got along with most employees. Some employees argued with him about food orders. Respondent Wendy Fong regularly told Tan to get back into the kitchen because he was wandering around the restaurant or drinking coffee and not doing his job. She thought he was a little lazy and a little slow sometimes with his side work. She had no other problems with Tan.

9) Some employees, including Complainant and Tan, engaged in horseplay in the kitchen area. They joked around and employees touched each other. Some

employees touched Tan on the head, which, according to superstition, was supposed to bring him bad luck. At times Complainant was friendly with Tan and touched him on the head.

10) Occasionally Complainant went into the bar at China Hut for a couple of beers after work. Occasionally she asked Tan to buy her a drink. He did. They sat and talked together at the bar.

11) Complainant was friendly and outgoing. She occasionally put her arm around other employees, including Tan when she was drinking.

12) Tan flirted with some female employees. He touched their hair and touched them on the arm and hand. He told one waitress that she was very beautiful that day and, on another day, he asked her to be his girlfriend. Some of the female employees complained to each other about Tan's conduct toward them.

13) Other employees either never heard of or saw or experienced any inappropriate conduct involving Tan.

14) Josefina Romero worked for Respondents until April 1994. She spoke Spanish and was in Honduras at the time of hearing. While she was employed by Respondents, she complained to her relative, Concepcion Baker, about Tan coming up behind her and touching her on the breast. Baker and Romero went to China Hut one morning and talked about this to a Chinese man who opened the restaurant and spoke good English. He said Tan would never do it again. At that time, Respondents did not employ a manager; they managed the restaurant.

15) About two years before hearing, Dan Gan, a cook, overheard a conversation in the kitchen between Respondent Wendy Fong and an employee, Rachell Cortez Puga. The conversation was about Josefina Romero's complaint about Tan's conduct. Mrs. Fong was aware of the complaint.

16) Nancy Wu Ng worked as a cashier for Respondents from 1991 to 1995. She quit employment with Respondents because of a fight with Tan over a remark he made questioning her honesty. She did not quit because of any sexual conduct by Tan.

17) When waitresses changed customer's orders, the cooks, including Tan, sometimes said, "\$10" or "\$20" or "\$50." This was a joke and not sexual.

18) During the time Complainant and Tan worked together, Tan touched Complainant's hair and arms. He took Complainant's hand when she reached for a plate. At times Tan said to Complainant that she was "very beautiful" and "be my girlfriend." When business was slow, Tan followed Complainant around in the restaurant. Sometimes, Complainant did not object to Tan's conduct. They joked around or engaged in horseplay and Complainant laughed. At times she told Tan to stop what he was doing, but she was smiling. Other times, Complainant told him to "stop it" and to "leave me alone." He said sexual things to Complainant in English. He wagged his tongue at Complainant in a "nasty, evilish gesture, like as if 'I'd like to do this to ya.'" Occasionally, Tan called Complainant's name although her order was not ready, and then he would stick out his tongue or say sexual things to her. He did this when it appeared no one was watching. Tan touched Complainant's buttocks. On one occasion while Complainant was cleaning a table in the banquet room, Tan came up behind her, put his hands on top of her head, put his mouth on Complainant's, and would not let her go. One evening when Complainant was at her car getting ready to leave, Tan came from behind a wall, grabbed Complainant, put his hands on her breast and crotch, and wouldn't let Complainant shut her car door.

19) Tan's conduct made Complainant "feel like a piece of meat." She felt "dirty" and "upset" because Tan was constantly "pawing" her. At times she was afraid of Tan.

20) Complainant never complained to Respondents about Tan's conduct.

21) At times Respondent Wendy Fong yelled at Complainant and told her to go back to work. Complainant had problems working with Mrs. Fong, and she felt that Mrs. Fong treated her harshly much of the time. Generally, Mrs. Fong's comments to Complainant were negative.

22) Complainant complained about Tan's unwelcome conduct to other employees in the restaurant.

23) She told Walter Baker Ravis, a dishwasher and cleanup man, that while she was setting up tables, Tan came up behind her in such a way that she could not move away and he flashed money at her. Ravis never told Respondents about this.

24) Vicki Stoner, a waitress, saw Tan act in a sexual way toward Complainant. She saw him touch Complainant's hair, stroke her arm, try to put his arm around Complainant, stick his tongue out at Complainant, wag his tongue at her, and grab her by the arm and restrain her. Complainant told Stoner about Tan's conduct, including a time when Tan tried to kiss Complainant in a walk in refrigerator, and another time when Tan put his hands on Complainant in the Banquet Room. Stoner told Complainant that if she wanted Tan to stop, she had to say it and mean it. Stoner thought Complainant was sweet but naive.

25) While Complainant was still employed, Stoner told Respondent Wendy Fong that Tan was acting out of line and that Respondents would get into trouble if Tan didn't stop. Stoner did not mention sexual harassment or Complainant's name. She assumed Mrs. Fong knew what she was talking about. Mrs. Fong said it was nothing, not to worry about it.

26) On Complainant's last day of employment with Respondents, she had a loud argument with Wendy Fong. The argument involved Complainant's refusal to take

a new table of customers near the end of her shift. Mrs. Fong said that if she was not going to take any more tables, she was to get out. Complainant was upset. She said she had had it. She did not mention Tan or sexual harassment during the argument with Mrs. Fong.

27) Complainant's testimony was not all reliable. The ALJ carefully observed her demeanor at hearing and concluded that at times she tailored her testimony to bolster her claim. Some of her testimony was contradicted by credible evidence, including the testimony of Agency witnesses. Some of it was inconsistent and she exaggerated. She was biased against Respondents because of what she saw as harsh treatment by Mrs. Fong. Accordingly, the forum believed her testimony only when it was supported by other credible evidence.

28) Respondent Wendy Fong's testimony was credible with one exception. She denied knowing of the complaint from Josefina Romero about Tan. Ravis and Baker testified credibly that Romero made this complaint to someone at the restaurant, and Dan Gan testified credibly that he overheard a conversation between Mrs. Fong and an employee about the complaint. There was no reason to find that Gan, who was employed by Respondents at the time of hearing, would concoct such a story. Respondents attempted to show that Gan somehow misunderstood the questions or testified incorrectly due to some limited ability to speak English. The forum, however, found that Gan responded appropriately and clearly in English, and that he had attended college in Oregon. The forum presumes his college classes were conducted in English. Thus, Gan's testimony was not affected by some limited ability with English, and the forum believed him on this point. Accordingly, the forum disbelieved Mrs. Fong.

29) Respondent Wing Fong's testimony was credible.

30) Allyson Kelley's testimony was not credible. She made conflicting

statements at hearing and before hearing to others. Her testimony was contradicted by other credible testimony. She was biased against Respondents. Accordingly, the forum did not believe her testimony except when it was corroborated by credible evidence.

31) Christy St. Range's testimony was not altogether credible. Some of her testimony was corroborated by other credible evidence. Other parts of her testimony were inconsistent and contradicted by other evidence. Regarding the important issue of whether Respondents knew of Tan's inappropriate sexual conduct, St. Range testified that she heard Mrs. Fong tell Tan many times in English not to touch or talk to the waitresses, and to stay in the kitchen and cook. The forum found this testimony incredible for several reasons. The first language of Tan and Mrs. Fong was Chinese. Tan had limited ability to speak English. Evidence suggests that Respondents often spoke Chinese to those employees who understood it. Thus, the forum finds it incredible that Mrs. Fong would repeatedly give this direction to Tan in English. In addition, no other evidence in the record corroborates St. Range's testimony on this point. Therefore, the forum does not believe this testimony. For the reasons given above, the forum gave little or no weight to St. Range's testimony except when it was corroborated by other credible evidence.

32) Vicki Stoner's testimony was credible. The ALJ carefully observed her demeanor at hearing, and on that basis found her testimony reliable. Like other witnesses, Stoner's memory had faded. Having taken that into account, however, the forum was still impressed that Stoner tried to testify truthfully, even when she perceived her testimony to be against her own interests.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondents employed one or more persons within the state of Oregon.

- 2) Respondents employed Com-plainant.
- 3) Complainant is female.
- 4) Respondents' employee, Jimmy Tan, engaged in verbal and physical conduct of a sexual nature directed at Complainant because of her sex.
- 5) Tan's conduct was offensive and unwelcome to Complainant.
- 6) Tan's conduct had the effect of creating an intimidating and offensive working environment.
- 7) Respondents did not know of Tan's conduct directed at Complainant. There is no sufficient basis upon which to find that Respondents should have known of Tan's conduct.
- 8) Complainant suffered distress and impaired human dignity because of Tan's conduct.

CONCLUSIONS OF LAW

- 1) At all times material herein, Respondents were employers subject to the provisions of ORS 659.010 to 659.110.
- 2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.
- 3) ORS 659.030(1) provides:
"For the purposes of ORS 659.010 to 659.110, 659.227, 659.330, 659.340, and 659.400 to 659.460 and 659.505 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 employ- ment."

Former OAR 839-07-550 (BL 1-1986) provided in part:

"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:

" * * * * *

"(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."

Former OAR 839-07-555(2) (BL 1- 1986) provided:

"An employer is responsible for acts of sexual harassment by an employee against a co-worker where the employer, its agents, or supervisory employees knew or should have known of the conduct, unless it can be shown that the employer took immediate and appropriate corrective action."

Former OAR 839-07-565 (BL 1-1986) provided:

"Generally an employee subjected to sexual harassment should report the offense to the employer. Failure to do so, however, will not absolve the employer if the employer otherwise knew or should have known of the offensive conduct."

Respondents did not violate ORS 659.030(1)(b).

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

OPINION

The Agency alleges that while Complainant was employed by Respondents, Respondents' employee, Jimmy Tan, sexually harassed her. It alleges that Respondents were aware or should have been aware of Tan's conduct and took no action to stop it.

Respondents deny that Tan sexually harassed Complainant and deny that they knew or should have known of that conduct.

PRIMA FACIE CASE OF SEXUAL HARASSMENT BY AN EMPLOYEE

The Agency has the burden of proving unlawful discrimination. *In the Matter of Motel 6*, 13 BOLI 175, 186 (1994). Here, a prima facie case of sexual harassment will

be established if the forum finds a preponderance of evidence showing:

1. Respondents were employers as defined by statute;
2. Complainant was employed by Respondents;
3. Complainant is a member of a protected class (sex);
4. Respondents' employee made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature directed at Complainant because of her sex;
5. The employee's conduct had the purpose or effect of creating an intimidating, hostile, or offensive working environment;
6. Respondents knew or should have known of the offensive conduct and failed to take immediate and appropriate corrective action;
7. Complainant was harmed by the conduct. *Former* OAR 839-05- 010(1) (BL 9-1982), 839-07-550, 839-07-555, and 839-07-565; *In the Matter of Kenneth Williams*, 14 BOLI 16, 24 (1995); *In the Matter of Fred Meyer, Inc.*, 15 BOLI 77, 92-94 (1996).

The participants stipulated to facts establishing the first three elements of the test. The preponderance of credible evidence established that Jimmy Tan engaged in unwelcome verbal and physical conduct of a sexual nature directed at Complainant because of her sex, and that this conduct had the effect of creating an intimidating and offensive working environment for her. Credible evidence also established that Complainant was harmed by Tan's conduct.

ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF ACTS OF HARASSMENT

The remaining issue is whether Respondents knew or should have known of Tan's offensive conduct, the sixth element of the prima facie case. Respondents would be liable for Tan's conduct if they knew or should have known of it and failed to take immediate and appropriate corrective action. *Former* OAR 839-07-555(2), 839-07- 565; *In the Matter of Fred Meyer, Inc.*, 15 BOLI 77, 92-94 (1996).²

"The initial inquiry should be whether the employer knew or should have known of the alleged sexual harassment. If actual or constructive knowledge exists, and if the employer failed to take immediate and appropriate corrective action, the employer

would be directly liable." (Footnote omitted.) EEOC: Policy Guidance on Sexual Harassment (March 19, 1990), 8 FEP Manual 405:6695 (BNA 1990).

In this case, the preponderance of credible evidence does not establish that Respondents knew or should have known of the offensive conduct.

Actual Knowledge or Notice

Complainant and Respondents agree that Complainant never reported Tan's acts of harassment to Respondents. Respondents denied knowing of Complainant's complaints or any offensive conduct by Tan directed at Complainant until after Complainant's employment ended. There is no evidence that they actually heard or saw acts of harassment. Of the other witnesses, three gave testimony that would show actual knowledge by Mrs. Fong of Tan's conduct.

First, Allyson Kelley testified that she complained to Respondents many times about Tan's conduct directed at her. She once suggested that her complaints also referred to Tan's conduct directed at Complainant. The forum found Kelley's testimony not credible, except when it was corroborated by other evidence. No credible evidence corroborates her alleged complaints to Respondents. Thus, the forum disregarded her testimony on this issue.

Second, Christy St. Range testified that more than once she heard Mrs. Fong tell Tan not to touch or talk to the waitresses. For the reasons given in Finding of Fact -- The Merits 31 above, the forum did not believe this testimony.

Third, Vicki Stoner testified that she told Mrs. Fong that she (Mrs. Fong) needed to talk to Tan because his conduct was out of line and would get Respondents in trouble. Stoner assumed Mrs. Fong would know that Stoner was talking about Tan's acts of harassment. Her credible, sworn testimony was that she did not mention sexual harassment or Complainant's name when she talked to Mrs. Fong. The conversation

between Stoner and Mrs. Fong was brief and interrupted, and Stoner said that Mrs. Fong just "blew [her] off." Stoner repeated this testimony several times.

The Agency presented evidence that, in interviews with an Agency investigator, Stoner made statements that were inconsistent with her testimony. In one interview, Stoner said she told Mrs. Fong that Tan's conduct was out of line and was sexual harassment. In another interview, she said she told Mrs. Fong that Tan's conduct was against the law. The Agency also presented evidence that Stoner felt pressured by Respondents to write statements supportive of their case.

The inferences the Agency urged, of course, were that: (1) Stoner told Mrs. Fong that Tan was sexually harassing Complainant, (2) Stoner's pre-hearing statements to the investigator were true, and (3) she testified to the contrary because of pressure from Respondents and out of fear for her job. The forum declines to draw those inferences. This is because the forum found Stoner's sworn testimony at hearing credible, it was consistent with Mrs. Fong's testimony, and her prior two hearsay statements were inconsistent and less reliable.

For the reasons given above, the forum cannot find a preponderance of credible evidence showing that Respondents had actual notice of Tan's conduct directed at Complainant.

Constructive Knowledge or Notice

Respondents would still be responsible for Tan's conduct if they should have known of it, that is, if they had constructive knowledge or constructive notice of it. *Former OAR 839-07-555 (2), 839-07-565; 1 Lindemann and Grossman, Employment Discrimination Law 822-23 (3rd ed. 1996). "Constructive knowledge" means*

"If one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact; e.g. matters of public record. * * * See also Constructive notice."

"Constructive notice" means

"Such notice as is implied or imputed by law * * *. Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing. That which the law regards as sufficient to give notice and is regarded as a substitute for actual notice." *Black's Law Dictionary* 314 (6th ed. 1990).

No final order of the Commissioner has addressed the issue of when constructive knowledge or notice may be held to exist. In one Oregon case, summary judgment for the employer was reversed by the Court of Appeals where the employee's evidence, "if credited, show[ed] that [a supervisor] created a pervasive atmosphere of sexual harassment, that he was the subject of an earlier sexual harassment claim that the Bureau of Labor and Industries investigated, that he was notorious within the company and that [the employer] condoned the activity." *Mains v. Il Morrow, Inc.*, 128 Or App 625, 635, 877 P2d 88, 93-94 (1994). The forum found no other Oregon case addressing the issue.

Because Oregon's Fair Employment Practices Law contained in ORS 659.010 to 659.110 is analogous to Title VII of the Civil Rights Act of 1964, federal court decisions are instructive and entitled to great weight on analogous issues in Oregon law. *Mains v. Il Morrow, Inc.*, 128 Or App 625, 634, 877 P2d 88, 93 (1994); *In the Matter of School District No. 1*, 1 BOLI 1, 15 (1973), *aff'd in part, rev'd in part (on other grounds), and remanded, School District No. 1, Multnomah County v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975).

Some federal courts have addressed this issue under Title VII.

"Constructive notice ('should have known') may be held to exist by some courts where management was aware of clues such as pervasive graffiti or other offensive material throughout the premises, or an employee's history of harassing behavior. Other courts, however, have required a more rigorous showing of notice, perhaps under the theory that the plaintiff by a specific complaint could have easily put the employer on actual notice." 1 Lindemann and Grossman, *Employment Discrimination Law* 823 (3rd ed. 1996) (footnotes omitted).³

"The initial inquiry in determining employer liability in hostile environment sexual harassment cases is the employer's knowledge of the situation, because an employer is liable when it knew, or '*upon reasonably diligent inquiry should have known*' of the harassment." (Emphasis added.) EEOC: Policy Guidance on Sexual Harassment, 8 FEP Manual 421:465 (quoting *Yates v. Avco Corp.*, 819 F2d 630, 636, 43 FEP Cases 1595 (6th Cir 1987)).

"[E]vidence of the pervasiveness of the harassment may give rise to an inference of *knowledge* or establish constructive knowledge. *Henson v. City of Dundee*, 682 F2d 897, 905, * * * [29 FEP Cases 787] (11th Cir 1982)[.] Employers usually will be deemed to know of sexual harassment that is openly practiced in the workplace or well-known among employees. This often may be the case when there is more than one harasser or victim. *Lipsett [v. University of Puerto Rico]*, 864 F2d 881, 906 (1st Cir 1988)] (employer liable where it should have known of concerted harassment of plaintiff and other female medical residents by more senior male residents)." EEOC: Policy Guidance on Sexual Harassment, 8 FEP Manual 405:6696.

Here, evidence to show constructive knowledge or notice includes Stoner's statement to Mrs. Fong, discussed above, and Mrs. Fong's knowledge of Romero's complaint against Tan. (Romero's complaint was made before she left Respondents' employment in April 1994.) In addition, several employees were aware of Tan's behavior directed at Complainant and had experienced his unwelcome conduct.

That evidence must be balanced with credible evidence that some employees never witnessed or experienced Tan's offensive conduct, and had not heard complaints of it. While many of these witnesses were still employed by Respondents and had reasons to be biased in Respondents' favor, the forum still found much of that testimony credible. The conclusion to be drawn from this conflicting evidence is *not* that the

offensive conduct did not occur; the preponderance of evidence shows that it did. The conclusion is that many of Tan's acts of harassment toward Complainant were performed so that no one else would see them. For example, there was evidence that Tan acted sexually toward Complainant near her car, in a walk-in freezer, in a banquet room, and from the kitchen when no one else was watching. In addition, there was credible evidence that some of Tan's conduct involving Complainant was consensual, such as the horseplay and Complainant touching Tan and asking him to buy her drinks.

Considering all the credible evidence on the whole record, the forum cannot find that Respondents had constructive notice of Tan's acts of harassment. While Mrs. Fong was aware of one complaint of a sexual nature against Tan, the complaint was made at least many months before Complainant's employment. The evidence does not show what Mrs. Fong knew of Tan's conduct relative to that complaint. No evidence shows whether Respondents took immediate and appropriate corrective action related to that complaint.

While some employees were aware of Tan's conduct, others were not. I cannot find that his conduct was practiced openly or was as pervasive and notorious as the Agency contends. And while Stoner told Mrs. Fong that Tan was acting out of line, she did not mention sexual harassment or Complainant. Thus, despite the earlier complaint against Tan involving a sexual act, the forum does not believe that Stoner's vague complaint to Mrs. Fong was such that she should have known Tan was sexually harassing Complainant or should have so inquired. In sum, the preponderance of credible evidence does not show that Respondents should have known of Tan's sexual harassment of Complainant.

Accordingly, the Agency has not met its burden of proof. The complaint and specific charges against Respondents must be dismissed. Respondents' affirmative

defenses do not require discussion.

ORDER

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

=====

¹Former OAR 839-07-555(2) (BL 1-1986) provided, "An employer is responsible for acts of sexual harassment by an employee against a co-worker where the employer, its agents, or supervisory employees knew or should have known of the conduct, unless it can be shown that the employer took immediate and appropriate corrective action."

²Federal EEOC Sex Discrimination Guidelines set the same requirements. Concerning sexual harassment, 29 CFR 1604.11(d) provides:

"With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."

³Some examples from federal cases cited in *Employment Discrimination Law* are: *Hansel v. Public Serv. Co.*, 778 F Supp 1123, 1132-33, 57 FEP 858 (D. Colo. 1991) (sexually explicit graffiti throughout the plant was literally the "handwriting on the wall" serving as notice of the sexual harassment); *Keran v. Porter Paint Co.*, 575

NE2nd 428, 434, 63 FEP 570 (Ohio 1991) (notice was imputed to the employer where plaintiff's predecessor testified that she had complained to management at least four separate times about harassing behavior and another company employee testified that the company manager responded to her complaint by suggesting that she take the harassing employee out to "get his rocks off"); but compare *Ulrich v. K-Mart Corp.*, 858 F Supp 1087, 1092 (D. Kan. 1994) (co-worker case involving multiple incidents of unwanted touching; summary judgment granted; that the employer earlier was aware of the harasser's prior consensual relationship with a co-worker did not put the employer on notice that he was a harasser); *Kirkland v. Brinias*, 944 F2d 905 (unpublished opinion), 1991 WL 174195, at *1-2 (6th Cir) (no constructive notice where the employer knew of the rumors concerning sexual harassment but never received any formal complaints, even though the plaintiff alleged that at least one incident took place in front of the employer); *Heflin v. Daly*, 742 F Supp 515, 517, 53 FEP 1223 (C.D. Ill. 1990) (no constructive notice even though the plaintiff filed an EEOC charge, where the charge failed to allege harassment).