

**In the Matter of**  
**Income Property Management**  
**Case No. 54-08**

**Final Order of Commissioner Brad Avakian**

**Issued January 6, 2010**

**SYNOPSIS**

Respondent denied Complainant Oregon Family Medical Leave (“OFLA”) by terminating her while she was absent from work due to an OFLA qualified health condition. The forum determined that Respondent should pay Complainant \$15,000 for mental suffering she experienced as a result of the denial. ORS 659A.183; OAR 839-009-0230.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (“ALJ”) by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 19, 2009, in the W. W. Gregg Hearing Room, located in the State Office Building, Suite 1045, 800 NE Oregon Street, Portland, Oregon.

Case presenter Chet Nakada, an Agency employee, represented the Bureau of Labor and Industries (“BOLI” or “Agency”). Jenny Davis (“Complainant”) was present throughout the hearing and was not represented by counsel. Attorney David J. Riewald represented Income Property Management Co. (“Respondent”). Nancy Henderson was present throughout the hearing as Respondent’s corporate representative.

The Agency called as witnesses: Donna Meredith, Senior Investigator, BOLI Civil Rights Division (telephonic); Candace Cobb, Complainant’s daughter; and Complainant.

Respondent called as witnesses: Mary Daggett, Respondent’s Human Resources Market Specialist and Nancy Henderson, Payroll and Human Resources Supervisor.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-27;
- b) Agency exhibits A-1 through A-12 (filed with the Agency's case summary), A-25, A-26 (submitted during the hearing); and
- c) Respondent exhibits R-1 through R-32, R-34 through R-36, R-41 through R-53, and R-55, R-56 (filed with Respondent's case summary), and R-62 (submitted during the hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, 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 January 25, 2007, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging Respondent violated provisions of ORS 659A.183.

2) On February 4, 2009, the Agency filed formal charges against Respondent alleging Respondent denied or constructively denied Complainant use of OFLA leave for a serious health condition and terminated or, in the alternative, retaliated against her because she inquired about OFLA, submitted a request for OFLA leave, or invoked the provisions of ORS 659A.150 to 659A.186. Along with the formal charges, the Agency filed a request for hearing.

4) On February 5, 2009, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on April 14, 2009. With the Notice of Hearing, the forum included the formal charges, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

5) On or about February 6, 2009, Respondent was served with the formal charges and notice of hearing.

6) On February 24, 2009, Respondent's counsel timely filed a notice of appearance.

7) On February 24, 2009, after receiving permission from the ALJ, Respondent, through counsel, fax-filed a letter requesting an extension of time to file an answer to the formal charges. The request for additional time was granted on February 26, 2009 and Respondent was given until March 2, 2009, to file an answer.

8) On February 27, 2009, Respondent timely filed an answer to the formal charges, admitting some of the allegations and denying the remainder. Additionally, Respondent alleged several affirmative defenses.

9) On March 9, 2009, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; for the Agency only, a brief statement of the elements of the claim and any damage calculations; and, for Respondent only, a brief statement of its defenses to the charges. The ALJ ordered the participants to submit their case summaries by April 3, 2009, and notified them of the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued an order reiterating the rules pertaining to fax filings, timelines for filing motions, and service of documents.

10) On March 25, 2009, Respondent filed a motion for discovery order compelling Complainant and the Agency to produce all medical information and documents Respondent requested through an informal discovery request. On April 1, 2009, the Agency filed an objection to Respondent's motion based on relevance. The

ALJ granted Respondent's motion and issued a discovery order on April 7, 2009, compelling the Agency to produce Complainant's medical and psychological records and provide them to Respondent. On the same date, the ALJ issued a protective order governing the classification, acquisition, and use of Complainant's medical and psychological records.

11) On April 3, 2009, the Agency timely submitted a case summary. On the same date, Respondent filed a motion to extend the case summary due date to April 7, 2009.

12) On April 6, 2009, Respondent notified the ALJ that the Agency case presenter did not oppose Respondent's motion to extend the case summary due date.

13) On April 7, 2009, at the Agency's request, the ALJ conducted a prehearing conference to discuss the Agency's oral motion to postpone the hearing. Respondent did not oppose the Agency's request for postponement and the Agency's motion was granted. After the participants submitted their available dates for hearing, the ALJ issued an order resetting the hearing for May 19, 2009, and extending the case summary due date to May 8, 2009.

14) On April 9, 2009, the Agency filed a motion to extend the time for complying with the April 7, 2009, discovery order and represented that Respondent's counsel did not oppose extending time to the date requested. On April 14, 2009, the ALJ issued an order granting the Agency's motion.

15) On April 20, 2009, the Agency provided the ALJ with documentation supporting the Agency's motion to postpone hearing.

16) On May 8, 2009, the Agency timely filed an addendum to the case summary filed on April 3, 2009.

17) On May 9, 2009, Respondent timely submitted a case summary.

18) The Agency filed a second addendum to its case summary on May 11, 2009.

19) On May 15, 2009, the Agency filed a list of exhibits covered by the protective order, and on May 18, 2009, filed a third addendum to its case summary.

20) At the start of hearing, the ALJ verbally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

21) During the hearing, Respondent, citing specific case law, moved to dismiss the formal charges based on ERISA preemption. After a brief recess to review the cited cases, the ALJ denied Respondent's motion. At the close of hearing, Respondent renewed the motion to dismiss and moved to amend its answer to affirmatively allege that Complainant's testimony during the hearing implicated ERISA and that the issue was removable to federal court. The participants were given until June 15, 2009, to submit briefs addressing the issues raised in Respondent's motions.

22) On May 27, 2009, the ALJ issued an order withdrawing the request for briefs stating, in pertinent part:

"During the contested case hearing held on May 18-19, 2009, Respondent's counsel moved to dismiss the above-entitled case on the ground that the Employee Retirement Income Security Act ("ERISA") preempts Complainant's state claims under the Oregon Family Leave Act ("OFLA"). Respondent argued Complainant's testimony that she believed she was terminated partly because Respondent did not want its insurance carrier to pay for her back surgery raised a federal issue under ERISA. The motion initially was denied because the Agency's formal charges do not contain an allegation related to Complainant's health care benefits. At the close of hearing, Respondent renewed the motion to dismiss and moved to amend its answer to affirmatively allege that Complainant's testimony during the hearing implicated ERISA and that the issue belonged in federal court. The participants were given until June 15, 2009, to submit briefs addressing the issues raised in Respondent's motions.

“After reviewing the record, I find briefing unnecessary to enter a ruling in this matter. Therefore, my order requiring briefs is withdrawn and the following ruling will be incorporated in the proposed order.

**“Ruling on Motions**

“Respondent acknowledged that its affirmative defense was waivable, but argued that the defense was not viable until Complainant gave specific testimony that implicated ERISA. However, the Agency did not move to amend its pleading “to conform to the evidence and to reflect issues presented” as required under OAR 839-050-0140. Consequently, the only issues properly before this forum are the ones raised in the Agency’s formal charges and none of those issues relate to or are in any way connected with ERISA.<sup>i</sup> Without an amended charging document, Complainant’s brief testimony does not constitute a proper claim for relief. Respondent has no viable basis for amending its answer and raising an additional affirmative defense.

“Accordingly, Respondent’s motions to amend the answer and to dismiss the formal charges are **DENIED**.

**“IT IS SO ORDERED.”**

23) The ALJ issued a proposed order on November 4, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions to the proposed order.

**FINDINGS OF FACT – THE MERITS**

1) At times material, Respondent was a domestic corporation providing property management services in Oregon and was an employer utilizing the personal services of 25 or more persons.

2) At times material, Nancy Henderson was Respondent’s payroll and human resources supervisor. Mary Daggett was a human resources specialist and her duties included assisting Henderson with interviewing, disciplining and terminating employees.

3) On July 8, 2005, Respondent hired Complainant to work as a desk clerk and janitor for the Patton Home, a residential care facility in Portland, Oregon, that provides low income housing for persons with drug and alcohol problems, mental health issues, and income challenges.

4) Complainant worked the graveyard shift from 10 p.m. to 6:30 a.m., five days per week. Initially, she earned \$9 per hour but after 30 days her pay was raised to \$10 per hour. On September 1, 2005, Complainant became eligible for and received medical and dental insurance coverage as part of her employment benefits. Chris Tracy was Complainant's immediate supervisor.

5) Complainant signed an employment agreement with Respondent on July 8, 2005, that included a provision addressing Respondent's "no call, no show" policy, stating that "[e]mployees who do not call in for three consecutive work days may be considered to have voluntarily terminated their employment." On the same date, Complainant received a copy of Respondent's Policy Manual that reiterates the "no call, no show" policy, stating that "[a]n employee absent for three (3) consecutive scheduled working days without notification to the Company will be considered to have voluntarily quit by job abandonment." Complainant acknowledged by her signature that she received the Policy Manual and that she understood it was her responsibility to read the manual and contact her supervisor if she had questions or needed help understanding the information in the manual.

6) When she was hired, Complainant informed Julie Hovorak during a routine drug screening that she was taking medication for a preexisting back condition. Later, in or around August or September 2005, Complainant told Tracy that she was scheduled for an epidural test related to her back condition. During that time, "on a few occasions," she saw a doctor about her back.

7) On August 11, 2005, Respondent sent Complainant a Notice of COBRA Rights informing Complainant that if her employment should end, she would be entitled to continue her health care benefits with no break in coverage. Federal law requires employers who provide employees with medical coverage to notify newly hired

employees of their right to continuing health care coverage and Respondent sends all employees the COBRA notice when they are hired.

8) Sometime before or in early December 2005, Complainant told Tracy she may need back surgery and asked “about paperwork for going on sick leave.” On December 2, 2005, Tracy gave Complainant a handwritten note stating, in pertinent part:

“I spoke w/downtown today about your being off for surgery. You need to call Nancy Henderson at 503-223-6327 when you have the specific time. They have special paperwork for you to fill out. (?) I’m not quite sure what it entails. I also need the dates for scheduling.”

“ \* \* \* \* \*

“Thank you very much!

“Chris Tracy”

The term “downtown” refers to Respondent’s headquarters. A copy of the note was placed in Complainant’s personnel file.

9) On December 12, 2005, Daggett informed Henderson that Complainant had called and would be in that afternoon to pick up the medical leave paperwork. Henderson planned to be out in the afternoon and prepared a packet of information that included Respondent’s FMLA/OFLA policy, FMLA/OFLA Employer Notice to Employee, and forms for Complainant and her physician to complete and return. She gave the packet to Daggett with instructions about how to explain each document to Complainant. Complainant came in earlier than expected and Henderson met with Complainant, gave her the packet, and “walked her through each document.” Complainant asked Henderson if there was “any money involved in it” and Henderson explained that the leave was unpaid but Complainant would be allowed to use her vacation or sick leave in lieu of the unpaid leave. On the same day, per her practice, Henderson mailed another packet of identical documents to Complainant, along with a cover letter stating, in pertinent part:

“Dear Jenny:

“Today you requested information that you may need a leave of absence, which may qualify as family medical leave under the law. On behalf of the company, I wish to extend to you our support and at the same time I want to stress how important it is for you and the company to communicate throughout this process. Today, on December 12, 2005, you advised the company that you were considering a leave of absence. Under our policy/practice, leaves of absence that qualify for family medical leave under state or federal law run concurrently with other types of leave. Leave such as workers compensation leave, leave for a non-industrial injury or illness (including paid leave such as sick leave or short-term disability leave). Leave as a reasonable accommodation for a qualified individual with a disability, and paid vacation used for a family-leave qualifying reason. Leave that qualifies as family medical leave will be counted against an employee’s annual family leave entitlement or, if applicable, OFLA pregnancy disability leave.

“At this time, we understand the purpose of your requested leave qualifies as family medical leave under state and/or federal law. This means, such leave will [provisionally] be counted against your annual family medical leave entitlement. Attached are two forms: **IPM/HOF FMLA/OFLA Company Policy** and **Employer Family and Medical Leave Notice to Employee**, which contains other information for you regarding your family medical leave rights. Also attached is a **Medical Certification Form** which you must have your health care provider complete. These are the same forms given to you today during our meeting. *It is your responsibility to return the completed form to me within 15 days; otherwise your protected leave may be revoked.* If your absence is not protected, it may be counted as an incident of absenteeism and discipline may follow for excessive absenteeism.

“Sincerely,

“Nancy K. Henderson, Payroll/Human Resources

“Enclosures: IPM/HOF FMLA/OFLA Policy, Employer Family and Medical Leave Notice to Employee, Medical Certification Form.” (Emphasis added)

Complainant never returned the medical certification forms.

10) After requesting and receiving a workers compensation packet from Respondent, Complainant turned in a Report of Job Injury or Illness (“801 form”) on January 6, 2006, to Respondent claiming she had suffered an upper and lower back injury due to the “nature of the work.” In response to the first question on the 801 form

about the date of injury, Complainant wrote “over the period of the job.” She described the job as consisting of “heavy lifting (extensive), extensive walking, extensive bending and stooping, extensive heavy pushing, highly stressful environment, heavy workload sometimes very stressful, [and] lots of [illegible], push/pulling, stooping, bending, crouching.”

11) When Complainant turned in the 801 form on January 6, 2006, she also submitted the Employee’s Report of Incident in which she stated, in pertinent part:

“Over a period of several months on the job extensive heavy work load. (at times doing other job as well as my own.) Heavy lifting, pushing, pulling, walking, bending, stooping. 9-10 hours at times of work condensed into 8. At times very stressful.”

She indicated on the form that the date of incident was “over period of the job” and that the resulting injury was that she “need[ed] surgery.”

12) On January 6, 2006, Dan Webber submitted a Supervisor’s Accident Investigation Report to Respondent that described an incident that occurred on December 28, 2005, when Complainant called in sick. Webber was acting as Complainant’s supervisor in place of Tracy, who was not working that day. His report stated, in pertinent part:

“Jenny told me that she went to the doctor and they did some tests on her back. She said that after she got out of the hospital she was having back pains. She did not mention an on-site injury.”

13) On January 9, 2006, Daggett and Angie Henry exchanged email communications discussing Complainant’s time off from work due to her alleged on-the-job injury. Henry asked Daggett whether Respondent should request a doctor’s note stating Complainant “is to be off work” and whether Tracy could hire a temporary employee to fill in for Complainant while she was off work. Daggett’s response confirmed that Respondent needed “a doctor’s note with a description of her need for

limited duties or time off” and that if a temporary worker was hired to fill in for Complainant, Respondent “must let [the worker] know this is a temporary position.”

14) On January 9, 2006, Tracy gave Complainant a note stating:

“You need to fill out a time-off sheet. It needs to state how long you are planning to be out. We also need a doctor’s note with a description of your need for limited duties or the time off you have requested.

“Thank you,

“Chris Tracy”

Subsequently, Complainant gave Respondent a Return to Work Information form that her doctor had filled out and signed on January 9, 2006. Her doctor indicated that she was not medically stationary, that she was to perform “no work until reevaluation on 2/9/06” and that she “will be eval’d for back surgery Jan 24<sup>th</sup>, 2006.” The doctor also noted that she was taking “narcotics” that could interfere with her duties while on the job.

15) Complainant left work on January 9, 2006, and did not perform work for Respondent after that date. On January 15, 2006, Complainant signed and turned in a time card that shows she worked eight hours per day from Monday, January 2, through Friday, January 6, 2006, and on Monday, January 9, 2006. The time card also shows Complainant was on sick leave from Tuesday, January 10 through Friday, January 15, 2006.

16) After Complainant filed her workers’ compensation claim, Daggett interviewed Tracy, Webber and Complainant in separate interviews about when and how the injury occurred. Daggett documented each interview. Her notes from the Tracy interview show that Tracy was on vacation when Complainant notified Respondent of her injury. Tracy told Daggett that Complainant had mentioned a preexisting condition when she was hired, but had said it would not affect her job. Tracy also told her that Complainant had mentioned the possibility of back surgery in

September 2005 but did not say that it was work related. Daggett's notes from the Webber interview show that Webber was acting as supervisor at the time Complainant reported the injury. Webber told Daggett that on December 27 or 28, 2005, Complainant told him that she could not move around and that "she had hurt since her tests because they shot dye into her." Webber also told Daggett that Complainant had never stated she was hurt on-site. The interviews with Tracy and Webber occurred before Complainant's interview.

17) Complainant's interview took place at Respondent's corporate office on January 20, 2006. Henderson was present for the interview. Daggett's notes from the interview are prefaced with the parenthetical statement:

*"(The interview with Jenny Davis happened on January 20, 2006 at 11 a.m. due to the employee being off work for the injury. She came in to the corporate office and is off work until an unknown date. Nancy Henderson sat in on the interview as well)."*

Primarily, the notes document a lengthy discussion about Complainant's workers' compensation claim, her work load, and her recommendations about "how to improve the situation." Daggett's notes further state, in pertinent part:

"Nancy Henderson asked Jenny when she notified her supervisor of her injury and Jenny couldn't remember. Nancy asked her if she was aware of the instructions regarding On the Job Injuries that were explained in both her employment agreement and her employee handbook she received stating she needs to notify her supervisor immediately of an injury and the proper documentation must be filled out and turned in within 24 hours after the injury. Jenny stated she didn't know.

"I asked her about her time off stating that I understood her surgery was scheduled for January 24<sup>th</sup> and she was scheduled to return to work on February 4<sup>th</sup> [sic]. Jenny corrected me stating that she was being evaluated on the 24<sup>th</sup> not having her surgery. She didn't know when she was going to return to work.

"As we were wrapping up the interview, I told Jenny that I had heard congratulations were in order. She looked at me curiously and smiled as I told her I had heard she was getting married this weekend. She said she was getting married next Saturday (1/28) not this Saturday but thanked

me. I told her I didn't even know she was engaged and she said it was happening quickly. I congratulated her again."

After the meeting, Henderson gave Complainant a second FMLA/OFLA packet containing the same information that she was given on December 12, 2005.

18) The only doctor's note Respondent received from Complainant was the one she brought in on January 9, 2006, stating that Complainant was not to work until she was reevaluated on February 9, 2006. Respondent expected Complainant either to return to work on that date or provide another doctor's note updating her status. Complainant did not return to her employment on or after February 9, 2006. She did not call Respondent or provide a new doctor's note releasing her from work for an additional period.

19) On February 2, 2006, SAIF Corporation denied Complainant's claim for workers compensation benefits based on her back condition.

20) Daggett called Complainant on February 10 and February 13, 2006, but Complainant did not answer her telephone. Daggett did not leave a message because she was worried about privacy issues as a result of the new HIPA regulations. Henderson also made attempts to reach Complainant and on one occasion spoke with "a male" who answered the telephone. Henderson left her name and telephone number, but Complainant did not return the call.

21) On February 16, 2006, Daggett, Henderson, Tracy, and Henry met to discuss Complainant's job status. Based on Complainant's failure to return to work or to communicate with Respondent about her medical status, Daggett and Henderson determined that Complainant had abandoned her job which was grounds for termination under Respondent's existing employment policies. For that reason and after considering Complainant's prior reprimands in October and November 2005 for chronic tardiness, they made a joint decision to terminate Complainant's employment.

22) Daggett drafted a letter for Henderson's signature that was mailed to Complainant on February 16, 2006, and stated, in pertinent part:

"Dear Jenny,

"Following your recent back injury, you completed the necessary paperwork and turned in a doctor's report stating that you would be off work until February 9<sup>th</sup>, at which time you would be reviewed for possible back surgery. We have not received any additional paperwork from your physician outlining time loss or limited work status, nor have we received any communication from you to clarify your work status.

"According to your employment agreement:

"13. Injury on the Job. Employee shall immediately report in writing all on-the-job injuries as soon as practicable after the injury to the supervisor named on Exhibit A, but in no event later than 24 hours after the injury. An incident report should be filled out on every incident, whether the employee was injured or not. Employee must also complete a post accident drug screen within 24 hours of the incident. This reporting requirement shall not alter any of the Employee's rights under the Workers Compensation law of the State of Oregon. **All post accident paperwork should be turned into the HR Department in a timely manner following each Doctor's appointment.**' and

"4. Attendance and Punctuality. Employee should be at job assignment ready for work at time scheduled; return from breaks and lunch on time; and not leave work before scheduled time off. Absence or tardiness should be reported to supervisor or person on duty as soon as possible and preferably before the start of the workday. To report tardiness or absent shift:

- a. Call supervisor or the Human Resources Manager as soon as possible.
- b. Give name and the reason for absence or tardiness and the approximate day or time of return.
- c. Upon return to work, report to your supervisor before starting work.

"**Unreported absence or tardiness, reported absence or tardiness for unacceptable reasons, or a pattern of absences or tardiness may result in disciplinary action up to and including termination from the company. Employees who do not call in for three consecutive working days may be considered to have voluntarily terminated their employment.** Being absent for three or more days due to an illness, injury, or family emergency may require a signed release or document from the attending physician to return to work.'

"We have no other choice but to believe you have abandoned your position as we have not received any word from you for a week. Enclosed is a copy of your separation notice. Please turn in any items that were given to you by Patton Home including keys.

"Sincerely,

"Nancy Henderson"

Henderson sent Complainant a final paycheck dated February 17, 2006.

23) On or about February 17, 2006, Complainant called Respondent inquiring about her medical insurance. Henderson returned the call and told Complainant that her insurance benefits were paid through February 28, 2006, but she could elect to continue her coverage by enrolling in COBRA. During the telephone conversation, Complainant asked what she could do to "remedy the situation" and Henderson told her there was nothing she could do at that point. Complainant told Henderson that she thought it was her doctor's responsibility to notify Respondent about her continuing medical condition. Henderson told her that it was Complainant's responsibility to keep Respondent informed.

24) On February 20, 2006, Henderson sent Complainant a COBRA Enrollment Form and Rate Sheet, a Change of Address form, Exit Interview, and a stamped, self-addressed envelope. The cost to Complainant to continue her health insurance without a break in coverage was \$460.34 per month. The coverage can be continued up to 18 months without interruption or cancelled at any time without penalty. The insurance carrier, Ceridian, sent a separate COBRA notification to Complainant and subsequently notified Respondent that it had not received a completed enrollment form from Complainant. Complainant has not returned any documents to Respondent since it sent the February 20, 2006, letter.

25) Several of Respondent's employees have "voluntarily" terminated their employment by "abandoning" their positions. At least two employees abandoned their jobs before Complainant's employment ended and at least six have done so since.

26) On June 20, 2006, a hearing was held on Complainant's back claim. On July 5, 2006, an ALJ found Complainant's back claim was not work related. Following Complainant's appeal, the Workers Compensation Board upheld the ALJ's order on February 27, 2007, concluding that Respondent did not cause Complainant's back condition.

27) On July 26, 2006, Complainant's doctor released her for light duty.

28) On November 28, 2006, Complainant filed an EEOC complaint against Respondent claiming she was discriminated against based on her religion. EEOC later dismissed the complaint finding no evidence of religious discrimination.

29) After Complainant filed an OFLA complaint with BOLI in January 2007, civil rights investigator Meredith initially determined that "Complainant was terminated only after she had failed to contact Respondent or provide any additional notice that she was continuing her protected leave. OFLA requires an employee to provide notice to the employer of taking or continuing protected leave; Complainant failed to meet the requirements of OFLA and was terminated pursuant to Respondent's policy. Therefore, this case should be dismissed." In the dismissal memorandum, Meredith found that "Complainant admits she did not communicate with Respondent about continuing her OFLA leave and did not provide any additional documentation from her doctor." Meredith also noted that Complainant stated she worked another week for Respondent after she was off work starting on January 9, 2006. Meredith changed her mind about the case after she received additional information pertaining to Respondent's January 20, 2006, meeting with Complainant. In her interview notes, Meredith noted that Complainant told her that Respondent terminated her because of her religious beliefs.

30) In or around August 2008, Complainant filed for Social Security disability benefits. She represented to the Social Security Administration that she became

disabled on December 30, 2007. She also stated that she worked “pretty consistently from 2005 through 12/2007 in a combination of employment and self employment” and that she “stopped working in 12/2007 due to [her] condition and [has] not worked since that time.” In or around January 2009, the Social Security Administration notified Complainant that she did not qualify for benefits and her claim was denied.

31) When Complainant’s employment ended, she was angry, frustrated and mad, and had no back-up plan. She was upset about having no income and that she had to rely on her children to help her with the rent. She had “very bad” back problems and needed surgery. Her newly wed husband “flaked out” and added to the difficulty. Complainant was “very unhappy and stressed.”

32) Complainant earned “some dollars” after she left her employment by looking for housekeeping jobs on Craig’s List. She was self employed for a period and provided cleaning services for various homeowners.

33) In 2005, Complainant reported earnings of \$7,849 to the Internal Revenue Service (“IRS”). Her W2 shows earnings totaling \$7,848.89 while in Respondent’s employ in 2005. In 2006, she reported earnings of \$3,944 to the IRS, approximately two thirds of which was classified as “business income.”

34) In 2007, Complainant earned approximately \$10,450 by doing housecleaning and providing childcare for her grandchildren. She did not file income tax returns in 2007 or 2008.

35) Complainant has not had surgery on her back since her employment ended and her back continues to get worse over time. In April 2009, she was in an automobile accident and it will be another six months before her doctor allows her to work anywhere. Her “present accident” has added additional stress.

36) Complainant had other stressors in her life during 2006, including worries about her children and a separation from her new husband that ended in divorce. In 2006, one of her daughters went to boot camp and was ultimately deployed. All in that same year, Complainant separated from her husband, he filed for divorce, and the divorce became final. Complainant complained about many stressors related to her children and other events to her doctors before her employment ended, but did not complain to her doctors about her work. Before she worked for Respondent, Complainant reportedly was suffering from severe depression. After her employment ended, Complainant saw her doctor three times and though she reportedly complained about all the other stressors in her life, she never mentioned that she lost her job.

37) As of May 15, 2009, Complainant owed medical bills totaling \$4,691.94 for medical services received in 2004 and before and during her employment in 2005 and 2006. None of the services occurred after her insurance coverage terminated.

38) Complainant testified that she had taken morphine for back pain before coming to hearing. Throughout her entire testimony she exhibited a very poor memory. Also, she was evasive, defensive and sometimes argumentative during cross-examination and was not responsive to many of counsel's questions. As a result, most of her testimony was unreliable.

For instance, she testified on cross-examination that she worked a few extra days after the doctor took her off work on January 9, 2006. She stated she continued to work because she wanted to make sure Respondent found someone to replace her. Seconds later, she testified that it could have been no more than one or two days that she worked after January 9. After consulting a calendar provided by counsel, she changed her testimony and stated she worked less than a full shift on January 10, "maybe a couple of hours." Her internally inconsistent testimony conflicts with her

sworn statement in her BOLI complaint that “[d]espite this release I continued to work for at least another week. I then went off of work because of my back injury.” She told BOLI investigator Meredith that she stopped working on January 15 or 16. Under oath in an unemployment hearing on July 13, 2006, she testified that she continued to work until late January. None of her conflicting statements, under oath or otherwise, are consistent with the time card she signed on January 15 that shows her last work day was January 9 and that she was on sick leave every day thereafter.<sup>ii</sup> Her explanation that the events occurred a long time ago and the “technicalities” of “exact days or whatever may have been off” was not credible given that she signed her time card on January 15, 2006, that showed January 9 as her last day worked and six months later in her unemployment hearing she swore that she worked for Respondent until late January.

Her testimony that she was not offered any COBRA insurance contradicted her earlier statement to her doctor that she was eligible for COBRA and wanted the surgery. Her testimony that she continued to mitigate her damages by looking for work throughout 2008 contradicted her statement to the Social Security Administration that she was totally disabled and unable to work after December 18, 2007. Her testimony that Henderson did not give her a packet containing OFLA information in December 2005 was not consistent with her statement to civil rights investigator Meredith that Henderson did give her a packet of information related to OFLA leave. Overall, Complainant’s testimony was not helpful and was credited only when it constituted a statement against interest or an admission, or was corroborated by other credible evidence.

39) Candace Cobb was a credible witness. Although she was Complainant’s daughter, she did not demonstrate undue bias toward her mother. Her testimony

generally was straightforward and confined to her own observations and perceptions of Complainant's emotional and physical distress following Complainant's termination. She was not impeached and the forum credits her testimony in its entirety.

40) For the most part, Nancy Henderson's testimony was forthright and believable. On cross-examination she exhibited some confusion about how many OFLA packets she gave Complainant and when she gave them to her, but the forum concludes that her confusion likely resulted from questions by the Agency case presenter that were themselves confusing and the case presenter's misquotes about dates already in the record. Henderson's testimony otherwise was not impeached and is credited in its entirety.

41) Mary Daggett generally was a credible witness. Except for her testimony that she told Complainant to keep Respondent informed about her work status at the January 20, 2006, meeting, which was not corroborated by her contemporaneous notes, the forum credited Daggett's testimony in its entirety.

42) Donna Meredith's testimony was credible. Although at first she was reluctant to acknowledge that she initially recommended dismissing Complainant's case, she was straightforward about why she changed her mind. Her relevant testimony was not impeached and the forum credits that testimony.

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

1) At all material times, Respondent employed 25 or more persons in Oregon and was subject to the Oregon Family Leave Act.

2) At all material times, Complainant was Respondent's employee and was eligible to take OFLA leave.

3) At all material times, Complainant had a back condition that qualified her for OFLA leave.

4) Respondent maintains a uniformly applied absentee policy providing that any employee absent for more than three consecutive scheduled working days without notifying Respondent will be considered to have voluntarily quit by job abandonment. Complainant knew or should have known of the policy which was contained in both the employment agreement Complainant signed and the policy manual for which she acknowledged receipt by her signature.

5) Respondent's notice requirement for employees using OFLA leave states that an employee must give Respondent 30 days notice of the need for leave if it is foreseeable and if unforeseeable, the employee must give oral notice within 24 hours after the leave begins and provide written notice within three days of the employee's return to work.

6) Respondent's employees are required to provide medical certification of a serious health condition within 15 days after Respondent sends the eligibility letter with the enclosed certification form. While on leave, employees are required to furnish Respondent with periodic status reports every three days, including the employee's intent to return to work. When the leave ends, employees are required to present a fitness for duty certificate prior to being restored to employment.

7) On or about December 12, 2005, Complainant told her supervisor that she was anticipating back surgery and asked for "sick leave" paperwork. She was directed to Human Resources and was subsequently given an OFLA packet that included Respondent's OFLA leave policy, medical certification forms for Complainant and her doctor to fill out, and a letter to Complainant dated December 12, 2005, stating she had notified Respondent of her need for medical leave and informing her that she must complete and return the enclosed medical certification within 15 days of the date of the letter. She also was informed that she must furnish a status report every three days

while on leave and that she would be required to present a fitness for duty certificate prior to being restored to employment. An identical OFLA packet also was mailed to Complainant on the same date.

8) Complainant never returned the medical certification forms to Respondent.

9) On or about December 28, 2005, Complainant told the acting supervisor that she was having back pain and could not come to work that day. She did not tell the supervisor that she had an on-the-job injury.

10) On January 6, 2005, Complainant filed a workers compensation claim alleging she injured her back over a period of time during her employment.

11) On January 9, 2006, Respondent asked Complainant to fill out a time off sheet indicating how long she planned to be off work and furnish a doctor's note with a description of her need for limited duties or the requested time off.

12) On January 9, 2006, Complainant provided Respondent with a doctor's note stating that she was not to work until February 9, 2006, and would be "eval'd for surgery January 24, 2006."

13) As of January 20, 2006, Respondent knew Complainant was going to be evaluated for surgery on January 24 and that she did not know when her surgery would take place or when she would return to work. Other than providing Complainant with a packet of OFLA information, Respondent did not inquire further about Complainant's anticipated need for additional leave.

14) On February 2, 2006, SAIF Corporation denied Complainant's workers compensation claim. Complainant appealed the denial, but the denial was ultimately upheld.

15) Complainant's leave expired on February 9, 2006, and she did not return to work or give Respondent an updated medical release. Complainant did not call her

supervisor or anyone from Respondent to report her medical status or her intent to return to work.

16) After unsuccessful attempts to reach Complainant by telephone, Respondent, through its human resources representatives, decided to terminate her employment. Because Complainant had not contacted Respondent or provided any medical documentation showing a need for additional leave, Respondent considered Complainant as having abandoned her employment

17) On February 16, 2006, Respondent sent Complainant a letter notifying her that her employment was terminated and giving the reasons for the termination.

18) Complainant's medical insurance expired on February 28, 2006. Complainant did not elect to continue her coverage through COBRA.

19) Complainant had many stressors in her life that existed before and during her employment with Respondent. After her employment ended, she experienced anger, frustration and sadness due to the unanticipated loss of her job.

20) Complainant was released for light duty on July 26, 2006 - seventeen weeks after her OFLA leave would have expired on March 31, 2006.

#### **CONCLUSIONS OF LAW**

1) At times material herein, Respondent was a covered employer as defined in ORS 659A.150(1) and 659A.153.

2) At times material herein, Complainant was an eligible employee as defined in ORS 659A.156.

3) The actions, inaction, and motivations of Mary Daggett and Nancy Henderson properly are imputed to Respondent.

4) 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 practices found. ORS 659A.800.

5) Complainant's back condition constituted a "serious health condition" as defined in ORS 659A.159(1)(c) and OAR 839-009-0210(14).

6) By terminating Complainant for violating Respondent's absentee policy, Respondent denied Complainant OFLA leave in the manner required by ORS 659A.150 to 659A.186 and committed an unlawful employment practice in violation of ORS 659A.183.

7) Respondent did not apply its absentee policy against Complainant because Complainant inquired about family leave, submitted a request for family leave, or invoked any OFLA provisions and did not therefore commit an unlawful employment practice in violation of ORS 659A.183.

8) Respondent did not terminate Complainant because she inquired about family leave, submitted a request for family leave, or invoked any OFLA provisions and therefore did not commit an unlawful employment practice in violation of ORS 659A.183 or OAR 839-009-0230(2).

### **OPINION**

OFLA regulates two distinct areas of employer behavior with regard to employee leaves of absence. First, OFLA establishes an entitlement providing that eligible employees working for covered employers are entitled to OFLA leave for the purposes set out in the statute, and job protection during that leave. Second, OFLA prohibits retaliation or discrimination against any employee based on inquiry about or use of OFLA. This distinction is important because the analysis of whether or not unlawful practices occurred is different in each area. *In the Matter of Roseburg Forest Products*, 20 BOLI 8, 27 (2000).

The Agency alleges Respondent denied Complainant OFLA leave to which she was entitled by terminating her before she had used her full entitlement. The Agency also alleges Respondent retaliated or discriminated against Complainant in the terms

and conditions of her employment or retaliated or discriminated against her by terminating her for invoking or using OFLA leave. For these two types of alleged unlawful practices, the Agency seeks lost wages “in excess of \$56,000” and mental suffering damages “estimated to be at least \$50,000.”

Respondent denies it denied Complainant OFLA leave, or retaliated or discriminated against her or terminated her based on her inquiring about, invoking or using OFLA leave. Respondent contends Complainant was terminated because she had abandoned her job by failing to return to work when her authorized leave expired and by failing to provide additional medical documentation extending her leave.

**A. Unlawful Denial of OFLA Leave – ORS 659A.183(1)**

Under the OFLA, it is an unlawful employment practice for an employer to deny an eligible employee leave to recover from or seek treatment for a serious health condition “in the manner required by ORS 659A.150 to 659A.186.” To prevail, the Agency must prove by a preponderance of credible evidence that: 1) Respondent was a covered employer as defined in ORS 659A.153(1); 2) Complainant was an eligible employee, i.e., she was employed by a covered employer at least 180 calendar days immediately preceding the date her medical leave began; 3) Complainant had a “serious health condition” as defined in OAR 839-009-0210(14)(e); 4) Complainant used or would have used OFLA leave to recover from or seek treatment for her serious health condition; and 5) Respondent did not allow Complainant to use OFLA leave to which she was entitled in the manner required by ORS 659A.150 to 659A.186. *In the Matter of Gordy’s Truck Stop LLC*, 26 BOLI 234, 247 (2005); *In the Matter of Magno-Humphries, Inc.*, 25 BOLI 175, 192 (2004), *citing In the Matter of Centennial School District*, 18 BOLI 176, 192-93 (1999).

Respondent does not dispute that it was a covered employer, that Complainant was an eligible employee, or that Complainant had a serious health condition. The issue is whether Respondent denied Complainant use of OFLA leave to which she was entitled by enforcing its absentee policy after Complainant failed to return to work or call her supervisor for more than three days after her OFLA leave expired, or, in the alternative, provide Respondent with updated medical information that would extend her OFLA leave. There is no dispute that Complainant failed to return to work on February 9, 2006, and that she failed to call her supervisor or provide Respondent with updated medical information at that time or anytime thereafter. Additionally, Complainant did not deny that the employment agreement she signed and the policy manual, the receipt of which she acknowledged, specifically put her on notice of Respondent's policy stating that an employee who is absent for three consecutive days without notifying Respondent will be considered to have voluntarily quit by job abandonment.<sup>iii</sup> The question is whether Respondent enforced its policy unlawfully thereby denying Complainant leave to which she was entitled.

OAR 839-009-0250(1)(d) speaks directly to the facts in this case and provides:

“An employee on OFLA leave who needs to take more leave than originally authorized should give the employer reasonable notice prior to the end of the authorized leave, following the employer's known, reasonable and customary procedures for requesting any kind of leave. However, when an authorized period of OFLA leave has ended and an employee does not return to work, an employer having reason to believe the continuing absence may qualify as OFLA leave must request additional information, and may not treat a continuing absence as unauthorized unless requested information is not provided or does not support OFLA qualification.”

There is no dispute that Complainant was on authorized OFLA leave between January 9 and February 9, 2006. There is no dispute that Respondent knew on January 20, 2006, that Complainant was “off work until an unknown date.” Respondent also knew that on January 24 Complainant was going to be evaluated for possible back surgery

that could entail a longer leave period. Respondent knew all of this because on January 20, Complainant gave Respondent verbal notice that she did not know when she was going to return to work, i.e., that she may need more leave than originally authorized. There is nothing in Respondent's policy manual or OFLA leave policies that suggests Complainant was not following Respondent's "known, reasonable and customary procedures" when she verbally indicated she may need additional leave.

Even if her statement did not constitute sufficient notice, and the forum finds that it did, Respondent had more than enough reason to believe that Complainant's continuing absence after February 9 qualified as OFLA leave and at that point had a duty to request additional information and treat the continuing absence as authorized unless Complainant failed to provide the requested information. Instead of requesting additional information, Respondent waited for a few days after Complainant's release expired and applied its "no call, no show" policy to end Complainant's employment. Respondent's argument that Complainant had notice she was required to submit medical verification when her release expired is inconsistent with the law. Merely handing Complainant a packet of OFLA papers in December 2005, without any follow-up, and expecting her to determine what her obligations are under OFLA does not satisfy Respondent's obligation to provide her with *written notice each time* Respondent requires her to provide medical verification and of the *consequences* if she fails to do so. OAR 839-009-0260(3).

Notably, even if Complainant had told Respondent that she had no intention of returning to work after her leave expired, she was still entitled to complete her OFLA leave. OAR 839-009-0270(8)(a) provides, in pertinent part:

"If an employee gives unequivocal notice of intent not to return to work from OFLA leave:

"(a) The employee is entitled to complete the approved OFLA leave, providing that the original need for OFLA leave still exists. The employee

remains entitled to all the rights and protections under OFLA, including but not limited to, the use of vacation, sick leave and health benefits pursuant to OAR 839-009-0270 and 839-009-0280; except

“(b) The employer’s obligations under OFLA to restore the employee’s position and to restore benefits upon the completion of leave cease, except as required by COBRA; and

“(c) The employer is not required to hold a position vacant or available for the employee giving unequivocal notice of intent not to return.”

In this case, Complainant did not show any intent to abandon her employment; instead she conveyed to Respondent that she may need additional leave due to her anticipated back surgery. Respondent violated OAR 839-009-0250(1)(d) by failing to request additional information when it had reason to believe her continuing absence qualified as OFLA leave. Respondent ended Complainant’s employment by applying its absentee policy in a manner that was not consistent with OFLA provisions, and by abruptly ending Complainant’s employment, Respondent denied Complainant the use of the OFLA leave to which she was entitled under ORS 659A.150 to 659A.186.

**B. Retaliation or Discrimination – ORS 659A.183**

ORS 659A.183 provides, in pertinent part:

“It is an unlawful employment practice for a covered employer to:

“(2) Retaliate or in any way discriminate against an individual with respect to hire or tenure or any other term or condition of employment because the individual has inquired about the provisions of ORS 659A.150 to 659A.186, submitted a request for family leave or invoked any provision of [the Oregon Family Leave Act].”

To establish a prima facie case of retaliation or discrimination for purposes of ORS 659A.183, the Agency must show that: 1) Complainant invoked a protected right under the OFLA; 2) Respondent made an employment decision that adversely affected Complainant; and 3) there is a causal connection between the Complainant’s protected OFLA activity and Respondent’s adverse action. *In the Matter of Magno-Humphries*, 25 BOLI 175, 196 (2004). The first two elements are undisputed. The only issue is

whether Respondent ended Complainant's employment because she inquired about or was using OFLA leave.

Proof of a causal connection may be established through evidence that shows Respondent knowingly and purposefully discriminated against Complainant because she engaged in protected activity ["specific intent" test] or by showing that Respondent treated Complainant differently than her co-workers who were not engaged in the same protected activity ["different treatment" test]. *In the Matter of Roseburg Forest Products*, 20 BOLI 8, 28-31 (2000); OAR 839-005-0010(1). While specific intent may be established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. *See In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 61 (2002), *citing In the Matter of Sierra Vista Care Center*, 9 BOLI 281, 296-97 (1991) ("[E]vidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is [the] Forum's task to decide which inference to draw. Thus, the absence of direct evidence of [respondent's] specific intent is not determinative because such intent may be shown by the circumstantial evidence referred to herein"). (citations omitted) *See also Boynton-Burns v. University of Oregon*, 197 Or App 373, 380-381, 105 P3d 893, 897-898 (2005), *quoting DeCintio v. Westchester County Medical Center*, 821 F2d 111, 115 (2d Cir), *cert. den.* 484 U.S. 965, 108 S.Ct. 455 (1987)("Proof of a causal connection can be established [1] *indirectly*, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or [2] *directly*, through evidence of retaliatory animus directed against a [complainant] by the [respondent]"). The Agency, at all times, has the burden of proving that Complainant was terminated or otherwise discriminated against for unlawful reasons. *Wal-Mart* at 61.

In this case, there is no direct or circumstantial evidence of discriminatory intent on Respondent's part. There is no evidence that management or other supervisory employees made any adverse statements about Complainant's use of OFLA leave. There is no evidence Respondent concocted the absentee policy to apply exclusively to Complainant because she invoked OFLA provisions. In fact, Respondent produced credible evidence that its absentee policy was uniformly applied to all employees and the Agency has not proffered any evidence to the contrary.

Although the forum has found that Respondent's application of the absentee policy effectively denied Complainant full use of her OFLA leave, the Agency has not established that the policy was enforced because Complainant was using her OFLA leave. Instead, the entire record shows Respondent's policy was applied to Complainant only because she failed to communicate with Respondent in any manner after her OFLA leave expired. Absent any evidence to the contrary, the forum concludes there is no causal connection between Complainant's invocation or use of OFLA and the application of Respondent's absentee policy to Complainant.

## **DAMAGES – DENIAL OF OFLA LEAVE**

### **A. Lost Wages, Benefits and Out of Pocket Expense**

The Agency alleged Complainant lost wages, benefits and out of pocket expenses estimated to be \$56,000 due to Respondent's unlawful practices. Credible evidence established that Complainant was not released to return to work until she was released for light duty on July 26, 2006, well after her entitlement to OFLA leave had expired on or about March 31, 2006. She had no lost wages up until July 26 and there is nothing in the record that shows Respondent would have employed Complainant beyond that date. Also, there is no credible evidence that she sought employment in

2006 after she was released for light duty. Therefore, the forum concludes Complainant lost no wages as a result of being denied her remaining weeks of leave.

As to Complainant's lost benefits and out of pocket expenses, credible evidence established that Respondent and the insurance carrier notified Complainant she was entitled to continue her medical benefits, uninterrupted, when her employment ended. She had an option to continue her insurance coverage that she did not pursue.<sup>iv</sup> Although apparently Complainant accrued medical bills in 2004, 2005, and 2006 that remained unpaid as of May 19, 2009, none of those bills accrued after her employment and insurance coverage ended. Notwithstanding there is no evidence that the bills are related to the medical condition that caused her need for OFLA leave, most of the bills accrued in 2004 and 2005 before Respondent employed her. Consequently, Respondent is not liable for Complainant's out of pocket medical expenses. The Agency presented no evidence showing the value of any benefits Complainant would have been paid had she continued the remaining seven weeks of OFLA leave and without such evidence, Complainant has no claim.

**B. Mental Suffering Damages**

While the record is replete with evidence that Complainant suffered from many stressors unrelated to her employment before and after her employment ended, her daughter's credible testimony corroborated Complainant's testimony that for a period of time she was upset and unhappy that her employment had abruptly ended. Although Cobb often referred to the other stressors in Complainant's life, she credibly testified that Complainant was worried and concerned about the sudden loss of income to the family and was embarrassed about asking her children to help out with the rent. The financial stress of losing her job lessened in 2007 as evidenced by her tax return for that year that shows she made well over what she earned in 2005 while working for

Respondent. However, for the emotional distress she suffered over the sudden loss of her job, Complainant is entitled to compensatory damages. The forum concludes that \$15,000 is an appropriate amount to offset the effects of Respondent's unlawful practice.

### ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), to eliminate the effect of Respondent's unlawful employment practices, and as payment of the damages assessed for its violation of ORS 659A..183, the Commissioner of the Bureau of Labor and Industries hereby orders **Income Property Management Co.** to:

- 1) Deliver to the Bureau of Labor and Industries, 800 NE Oregon Street, Suite 1045, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant Jenny Davis** in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice, plus interest at the legal rate on the sum of \$15,000 from the date of the final order until paid; and
- 2) Cease and desist from denying any employee the use of the Oregon Family Leave Act provisions.

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<sup>i</sup> By moving to amend its answer, Respondent concedes that none of the allegations in the formal charges implicate ERISA. Even if the Agency's allegations had included an ERISA related issue, Respondent waived that defense when it filed its answer to the charges. See OAR 839-050-0130(2) ("The failure of a party to raise an affirmative defense in the answer is a waiver of such defense.")

<sup>ii</sup> See Finding of Fact – The Merits 15.

<sup>iii</sup> See Finding of Fact – The Merits 5.

<sup>iv</sup> Had she continued her insurance coverage, she would have been entitled to recover the amounts paid out for COBRA continuation coverage. See *In the Matter of Magno-Humphries*, 25 BOLI 175, 198 (2004) (finding the sums the complainant expended on insurance premiums would have been available for Complainant's use but for Respondent's denial of OFLA leave and that an award for her out of pocket expenses for her insurance coverage was justified to compensate her fully for the effects of the respondent's unlawful employment practice).