

# BOLI ORDERS

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Final Orders Issued By The Commissioner  
Of The Oregon Bureau of Labor and Industries

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VOLUME 10

Cited: 10 BOLI

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# BOLI ORDERS

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## TABLE OF CONTENTS

Introductory Note .....	iv
Table of Final Orders .....	v
BOLI Final Orders .....	1

## INTRODUCTORY NOTE

This tenth volume of BOLI ORDERS contains all of the Final Orders of the Commissioner of the Oregon Bureau of Labor and Industries that were issued between August 15, 1991, and May 15, 1992.

Each Final Order is reported in full text under the official title of the order. Preceding each Final Order is a synopsis, which provides immediate identification of the subject matter of the case and of the primary rulings contained in the order. In the caption of each case the charged party is referred to as the "Respondent." Within the body of some cases the charged party is referred to as the "Employer," the "Contractor," or the "Applicant."

A complete table of the Final Orders in this volume begins on page v. For each Final Order the table shows the page at which the order begins in this volume.

The Bureau of Labor and Industries Digest of Final Orders contains an outline of classifications for BOLI ORDERS. Case holdings and points of Wage and Hour and of Civil Rights law are arranged under classification numbers. The Digest contains a table of the Final Orders and a subject index for the complete set of BOLI ORDERS volumes.

## TABLE OF FINAL ORDERS

In the Matter of

10 BOLI

Albertson's, Inc. (1992) .....	199
Azul Corporation, Inc. (1992) .....	156
Chalet Restaurant and Bakery (1992) .....	183
Chem-Ray Company (1992) .....	163
Espinoza, Miguel (1991) .....	96
Klinger, Victor (1991) .....	36
Meltebeke, James (1992) .....	102
Panda Pizza (1992) .....	132
Rainbow Auto Parts and Dismantlers (1991) .....	66
Schamp, Lee (1991) .....	1
Tire Liquidators (1991) .....	84
Washington County (1992) .....	147
West Linn School District, 3JT (1991) .....	45
Wild Plum Restaurant (1991) .....	19
Ybarra, Amalia (1991) .....	75
Z and M Landscaping, Inc. (1992) .....	174

**In the Matter of  
LEE SCHAMP,  
dba Dominico's Red Vest Pizza  
Parlour, Respondent.**

Case Number 13-91  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued August 15, 1991.

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**SYNOPSIS**

Female Complainant was subjected to unwelcome and offensive sexual touching, comment, and behavior by Respondent, and resigned due to the intolerable working conditions. Finding that Respondent's behavior caused Complainant severe mental and emotional distress, and that the loss of employment caused additional stress as well as economic loss, the Commissioner awarded Complainant \$10,298.25 in lost wages and \$7,000 for mental distress. ORS 659.030(1)(a) and (b); 659.050; OAR 839-07-550(1) and (3).

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The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was conducted on April 16, 17, and 18, 1991, in a conference room of the Bureau of Labor and Industries, Room 311, State Office Building, 1400 SW

Fifth Avenue, Portland, Oregon. Judith Bracanovich, Case Presenter with the Civil Rights Division (CRD) of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses, and introduced documents. Edna Sandra Kenyon (Complainant) was present throughout the hearing. Beverly D. Richardson, Attorney at Law, McMinnville, Oregon, was present throughout the hearing as counsel to Complainant. Loris Lee Schamp (Respondent) was represented by Eric L. Hanson, Attorney at Law, McMinnville, Oregon. Counsel for Respondent presented a Summary of the Case, argued the law and facts, interposed objections, examined the witnesses, and introduced documents. Respondent was present throughout the hearing.

The Agency called as witnesses the following, in addition to Complainant: CRD Investigative Supervisor Patricia Blank; Complainant's co-workers Ramona Flores, Hector Martinez, Sally Sanchez, and Lynn Slater; Dominico's customer Todd Smith; and CRD Senior Investigator David Wright.

Respondent called as witnesses the following, in addition to Respondent: Respondent's current or former employees Susan Musselman, Deborah Ann Lawson, Randy Trudo, Theresa Mancilla, Sandra Saurer, and Deanna Smith; Dominico's customer Rodney Land; and Respondent's step-daughter Shantell Pursely.

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\* Complainant was referred to throughout the testimony by the nickname "Sandi" and at times by her prior married name of Daniels.

\*\* Under OAR 839-30-058, Complainant counsel's role in this Forum is advisory only.

Having fully considered the entire record in this matter, I, Mary Wendy 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 January 23, 1990, Complainant filed a verified complaint with the Civil Rights Division alleging that she was the victim of an unlawful employment practice of Respondent.
- 2) After investigation and review, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint that Respondent had engaged in sexual harassment of Complainant, his employee, in violation of ORS 659.030.
- 3) Thereafter, efforts by the Civil Rights Division to resolve the case by conciliation failed.
- 4) On January 16, 1991, the Agency prepared and the Forum served on Respondent by certified mail Specific Charges which alleged that Respondent as Complainant's employer subjected her to unwelcome and offensive conduct of a sexual nature because of her female gender, resulting in a hostile and offensive working environment in violation of ORS 659.030(1)(b). The charges further alleged that the hostile and offensive discriminatory environment thus created caused the Complainant's involuntary resignation, a constructive discharge, in violation of ORS 659.030(1)(a), and that the Complainant as a result lost earnings estimated at \$15,000, and suffered damages for mental distress and impairment of personal dignity in the amount of \$20,000.
- 5) With the Specific Charges Respondent received 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 (OAR) regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.
- 6) Respondent through counsel timely filed his answer, admitting his status as Complainant's employer, denying the discriminatory conduct alleged, and asserting that Complainant quit voluntarily. By way of further defense, Respondent alleged that the practices prohibited by ORS 659.030(1)(a) were not applicable to the facts alleged by the Agency.
- 7) Pursuant to OAR 839-30-071, the participants each timely filed a Summary of the Case on or about April 8, 1991.
- 8) Prior to commencement of the hearing, the Hearings Referee and the participants held a pre-hearing conference at which certain stipulations, incorporated throughout this Order, were agreed upon. Pursuant to the Agency's motion, not opposed by Respondent,

the dates in the Specific Charges were amended by interlineation to read: "Between June, 1989 and November 7, 1989, \* \* \*"

9) At the commencement of the hearing, counsel for Respondent stated that he had received the Notice of Contested Case Rights and Procedures accompanying the Specific Charges and had no questions about it.

10) Pursuant to ORS 183.415(7), the participants were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) During the hearing, the Hearings Referee found that a witness, Claudia Wolner, was unavailable in the State of Oregon at time of hearing. Her prior statement to the Agency investigator was admitted into evidence.

12) The Proposed Order, which included an Exceptions Notice, was issued on June 10, 1991. Exceptions, if any, were to be filed by June 20, 1991. No exceptions were received.

13) On June 27, 1991, Respondent filed a motion to re-open the record herein. Respondent's motion was based on evidence obtained following the closure of the record on April 18, 1991. It consisted of the report of an investigator employed by Respondent regarding his findings in connection with Complainant's job search. The Hearings Referee re-opened the record for a period of seven days for the purpose of accepting and evaluating the proffered evidence, and thereafter accepted the report in evidence. The Agency submitted its view of

Respondent's motion and submission thereunder. In a written ruling, the Hearings Referee declined to modify or amend the Proposed Order.

#### FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was the owner and operator of Dominico's Red Vest Pizza Parlour (Dominico's), an assumed business name for an eating and drinking establishment in McMinnville, Oregon, and utilized the personal service of one or more individuals, reserving the right to control the means by which such service was performed.

2) Complainant, female, was employed as a waitress by Respondent from January to September 1988 and from March to November 7, 1989. Respondent was her direct supervisor.

3) The restaurant building was rectangular, with the front and back being the longer sides. From the front entrance, the dining areas were to the left and right of the entrance, with a fireplace in the left end. Across the back wall of the building, from left to right, were the back kitchen, a storage area, a walk-in cooler, Respondent's office and the men's rest room. The pizza kitchen was between the back kitchen and the fireplace portion of the dining area. The wall between the back kitchen and the pizza kitchen had a doorway at the left end and a pass through window at about its midpoint. A wall with a swinging door at about the middle separated the pizza kitchen from the dining area. To the left of the swinging door was an order window or counter and to the right was a pick-up window. There was a wall on the right end of the pizza kitchen with a doorway where it met the front wall of the

\* "Participant" or "participants" includes the charged party and the Agency. OAR 839-30-025(17).

back kitchen. To the right of that was the bar area, which was located approximately in front of the storage area and walk-in cooler. The bar itself was "L" shaped, with the long leg toward the building front and the short leg running from the right end back to the cooler wall. To the right of the bar was a supply room, then a hallway and the women's restroom. Located against the right outside wall, in front of the women's restroom was the dough room. Next to it on the right wall was an exit. A half wall, or partition, which did not run the entire width of the building, was parallel to the long, or front, side of the bar and partly separated the bar area from the dining area. In the extreme left rear corner of the back kitchen area was an employee restroom, and between the back kitchen and the storage area was a back exit. Several short sets of steps gave access to those portions of the dining area which were at a different level from the rest of the building.

4) Job or position assignments at Dominico's included back cook, pizza cook, and waitress-bartender. The back cook worked in the back kitchen cooking menu items other than pizza, such as hamburgers. The pizza cook worked in the pizza kitchen, cooking pizzas to order. The daytime pizza cook (usually Respondent) prepared the pizza dough. Respondent also baked bread for the restaurant. Waitresses took and delivered pizza and back kitchen orders on the floor, bussed tables, and served beer and other beverages from the bar.

5) Dominico's was open 11 a.m. to 11 p.m. or midnight. The waitresses worked during that time in three shifts,

according to the anticipated need for help: opening, from 9 a.m. or 10 a.m. to 3 p.m.; split, from 12 noon to 1 p.m. or later as needed, returning for 3 p.m. to 7 p.m. or as needed; closing, from 6 p.m. to 11 p.m. or midnight, as needed.

6) On week days the pizza cook, usually Respondent, came in at 8 a.m. The relief or night pizza cook went on at 3 p.m. The daytime back cook began work around 9 a.m. and the evening back cook went on around 6 p.m.

7) On the days that Respondent worked, he was generally on the premises from 8 a.m. to 3 p.m. or later. He usually started before 9 a.m. by making bread and preparing pizza crusts ("skins"). He left around 2:30 or 3 p.m., did banking and other errands and returned around 4 p.m. He left again between 4:30 and 5:30 p.m. He sometimes returned after 5:30 p.m. if there was a busy evening scheduled.

8) Beer and wine were served at Dominico's. There was a bar or tavern atmosphere about conversation and jokes. At times material, Respondent told jokes that some, including Complainant, thought "off color," crude, or in poor taste; whether a joke was offensive depended on the sensitivity of the listener. Complainant may have laughed at some jokes, but had difficulty remembering and repeating them.

9) Complainant first worked at Dominico's from January to September 1988 when she quit because she was also working at a mobile home sales job. She returned to Dominico's in March 1989. In both periods of employment she worked the evening or closing shift, filling in occasionally on days. In June 1989 she was assigned

to the "split." She then worked more frequently with Respondent than she had on the closing shift.

10) Ramona Flores worked at Dominico's from 1988 to June 1989 as back cook on the closing shift. She returned to that shift around mid-September 1989 and soon thereafter was placed on the opening shift as back cook, replacing Susan Musselman.

11) Sally Sanchez worked at Dominico's from September to December 1989. She worked as a night back cook from 5 to 11 p.m. She sometimes worked days on weekends with Respondent. She didn't work regularly with Complainant.

12) Respondent had a spray bottle containing water which he used to spray on the top of risen bread loaves.

13) At times material, Respondent sprayed the contents of the spray bottle at or onto his employees.

14) Some of the female employees were sprayed in the chest area and on the buttocks, and in the genital area if they weren't wearing an apron. This did not happen every day, but was as frequent as two to three times each week.

15) When the water soaked the shirts of the sprayed female employees, it outlined their breasts and nipples.

16) Respondent repeatedly spoke about women's breasts, referring to "titties" or "boobs." He often referred to the breasts of the individual female employees, and was heard to comment to Sanchez about her "big boobs." He was heard to say he liked hugging girls with big breasts.

17) The walk-in cooler along the back wall of the building between the back kitchen and the storage area and behind the bar was used to cool beer. Respondent would comment when a female employee would come out of the walk-in cooler. "You've been in the walk-in; your nipples are standing at attention." On an occasion when Flores came out of the walk-in cooler, Respondent told her she had "nice nipples" and that she should "go in the cooler more often."

18) Respondent at times snapped the back strap of the brassieres of some of the female employees. He snapped the back strap of Complainant's bra. He did the same to Flores.

19) Complainant was sprayed by Respondent after she began working days in June 1989. The spraying did not occur every day, but was frequent, being more than once a week. It happened most often when Complainant was in the pizza kitchen, reaching up for orders at the pass-through window from the back kitchen. She told Respondent not to spray her.

20) There was a telephone on the right wall of the pizza kitchen, next to the access to the bar area. It was used to take pizza orders, and was usually answered by a waitress. Passage behind the person using this phone was narrow. Often, when Complainant was bent slightly to write down an incoming order, Respondent would pass behind her, thrusting his lower body against her backside.

21) Respondent also habitually placed his hands on Complainant's hips when passing behind her at the ice machine in the bar area.

22) When Flores used the telephone in the pizza kitchen, Respondent would grab her bottom. He rubbed himself against her, his lower front to her buttocks. It was not a mere casual or incidental bumping.

23) Debbie Lawson had worked for Respondent for six years at the time of hearing and functioned as head waitress at times material. She usually worked from 9:30 or 10 a.m. to middle or late afternoon. She did not normally work nights.

24) Complainant told Lawson about Respondent's unwanted touching and spraying; Lawson told her to ignore it because that was how Respondent was.

25) Flores complained to Complainant and to Lawson about Respondent snapping her bra. She told Lawson about Respondent's actions in October 1989. Lawson said to ignore it.

26) While working with the pizza and bread dough, Respondent, with flour on his hands, would sometimes pat female employees on the buttocks, leaving a handprint outlined in flour.

27) Respondent's spray bottle was "notorious." His behavior toward the female employees was frequently the subject of discussion among the female employees. After June, when both Complainant and Flores began working at the same time as Respondent, Flores came to Complainant three times crying over Respondent's behavior toward her. Flores wanted Complainant to "get him to leave me alone." Sanchez told Complainant she wouldn't work in back when Respondent was there due to his actions.

Slater told Complainant to avoid Respondent. The female employees, including Saurer, referred to him as a "pervert."

28) Flores came in at 9 a.m. when she worked opening shift. The opening or day waitress (usually Lawson) came in around 10 a.m. for an 11 a.m. opening.

29) On an occasion after Flores began working days when she went to Respondent's office to speak with him, he touched her breast; she told him to stop. He acted as if he were joking and playing around. He said she had nice breasts and expressed a desire for sex with her. His actions were not welcome and were offensive to her. She "didn't feel too great at all" about it.

30) Respondent hugged Flores "a lot" prior to May 1989. She stated then that she did not like it. Respondent had made sexual comments to her. Flores had told Saurer and Deanna Smith about Respondent's actions during her first period of employment.

31) Respondent and Complainant attended Alcoholics Anonymous (AA), where they met. Friendly hugs are one means of demonstrating support, affection, and understanding between AA members.

32) Sanchez, Slater, and an employee who worked briefly in the fall of 1989 named Tina Parks were touched either on the breasts or buttocks by Respondent. Deanna Smith was sprayed and touched by Respondent on the breast and buttocks.

33) When Flores told Respondent to quit spraying her, he would laugh and make a joke of it.

34) Flores asked in November 1989 to be returned to the evening shift, Respondent refused. She then gave two weeks notice. When she gave notice, Respondent treated it as if she were joking.

35) Flores liked her job, but things were "getting out of hand" with Respondent and she was tired of being grabbed. She had wanted to quit before, but her boyfriend, Todd Smith, wanted her to work. She had not told him about Respondent's conduct toward her because she was afraid of Smith's reaction. During what would have been her final two weeks, she had child care problems. Respondent discharged her on or about November 22, 1989, stating that she hadn't called in.

36) Todd Smith, at times material, visited his girlfriend Flores at Dominico's when she worked nights and later when she worked days. He was not an employee. He and Flores were the parents of one child. He noted when he was on the premises that Respondent often hugged female employees and patted them on the buttocks. He didn't see a sexual connotation at the time. He acknowledged that he had a rage problem and had several convictions and/or arrests for substance violations and assaultive behavior. He was in jail but on work release in the fall of 1989 when Flores wanted to change back to night shift. He thought they needed her income from a full shift. Respondent was Todd Smith's AA sponsor. Respondent assisted Todd Smith in attending therapy for Smith's "rage problem." Smith was upset with Respondent, whom he considered a friend, when Flores finally

told him about Respondent's conduct toward her.

37) Flores and Complainant had discussed Respondent's sexually harassing conduct on the job during both periods that Flores was employed at Dominico's. Flores had also discussed it with Deanna Smith and Sanchez.

38) Complainant found Respondent's conduct embarrassing and humiliating. His behavior made her feel like less of a woman. It was very humiliating to have to walk around in wet clothing and explain to customers without accusing Respondent. She had loved her job and enjoyed the people. She had protested the physical touching and the spraying to Respondent and asked him not to do it, but he continued. She practiced avoidance, trying to stay away from the crowded spaces when he was around, and trying to avoid the water bottle. In this way her work was affected; it became more difficult. She dreaded going to work. It became a "headache proposition" because of the tension. She felt much tension.

39) Complainant attempted to get back on the night or closing shift. She repeatedly asked both Lawson and Respondent. Both refused. After they had interviewed several others without success, Claudia Wolner was hired for the closing shift. Complainant resented not being returned to nights.

40) On November 7, 1989, Complainant worked the "split." Respondent was also working, and again used the spray bottle on Complainant. Again, Flores was crying and told Complainant she was tired of walking away from her duties in order to walk away from Respondent. Complainant

was notified sometime before 4 p.m. that there would be two groups to serve, in addition to a large group benefit, and that she would be the only waitress until the closing shift arrived at 6 p.m. There were volunteers helping with the benefit group, but they could not legally serve alcohol, and keeping them from behind the bar was a problem, together with serving the orders from the three groups. It became an extremely busy day.

41) Complainant resented Respondent's unwelcome conduct toward her and had witnessed or had been informed of Respondent's repeated conduct toward other female employees. She had worked in an understaffed situation before and not quit because she was her own sole support. While this was still true, she knew she could not get the night shift back. She knew she would have to continue working with Respondent and enduring his conduct toward herself and other female employees. She had protested his conduct both directly and indirectly without result. She knew that if she stayed she would continue to be embarrassed, intimidated, and humiliated by that conduct and by the upset it caused to her and to other female employees. She saw her only alternative was to quit and attempt to find other work.

42) Complainant called Lawson and told her she was quitting because she resented the sexual harassment and attitude. Complainant was also upset by the inconsiderate overbooking. Complainant offered to finish that week. Lawson told her that if it bothered her that much, not to come to work the next day.

43) Susan Musselman had worked for Respondent a total of seven years. In the spring and summer of 1989 she worked days ("opening") as a back cook. She was employed elsewhere at time of hearing. She was once a sister-in-law of Respondent's wife, Sheila Schamp, and had remained close to her. She stated that she wouldn't knowingly hurt Sheila. She worked with Slater and Complainant, but not with Flores. She did not know Sanchez. She saw Respondent hug employees, but saw no sexual touching or spraying, and heard no suggestive comments from Respondent. She denied ever being sprayed by Respondent. She testified that "everybody" told dirty jokes at work.

44) Randy Trudo worked for Respondent for seven years. At the time of hearing, as well as at times material, he was a night pizza cook. He worked part time, two nights one week and three nights the next. He usually did not work with Respondent. He sometimes replaced Respondent on days, or came in early while Respondent was there. He had seen Respondent hug his female employees, but he saw no rubbing or sexual touching of female employees by Respondent, and heard no sexual or suggestive comments to them by Respondent. He stated that both Complainant and Respondent exchanged off-color jokes with him.

45) At times material, Claudia Wolner was a waitress at Dominico's who worked the closing shift. She was present on November 7, 1989, when Complainant had been handling a large crowd by herself and appeared "stressed out" and mad. She

confirmed that Complainant worked her full shift and did not walk off the job.

46) Wolner had heard rumors before November 7, 1989, that Complainant was claiming that Respondent was sexually harassing her. Wolner was told by Flores that Respondent was also bothering her, but Wolner thought Flores was just going along with Complainant. Wolner experienced no behavior that she saw as sexual harassment.

47) Rod Land was a long-time customer and personal friend of Respondent. He came into Dominico's for coffee daily, in the morning before it was open to the public, between 8:30 and 11 a.m. At time of hearing, Complainant's ex-husband lived at Land's home. Land said that Respondent hugged his employees but not in a sexual manner. Land never saw Respondent do any sexual touching or spray any employees. He said that he, Respondent, and employees including Complainant told off-color jokes. Land said that he came in evenings once in a while at times material, and that he saw Complainant in conversation with Slater, Flores, and one other female perhaps twice after Complainant had quit. He could not fix an exact date of either occurrence.

48) Hector Martinez worked as a pizza cook at Dominico's during the summer of 1989. He worked mostly in the evenings, starting at 3 or 3:30 p.m. He sometimes worked with Respondent, but usually relieved him. Sanchez was his girlfriend at times material and never told him, while she worked there, that Respondent was bothering her. Respondent sprayed Hector Martinez once on the stomach,

while they were "goofing around." He saw Respondent spray his sister Gracie on the shirt once. He stated he never saw others sprayed. He was a hesitant witness.

49) Lynn Slater worked at Dominico's as a waitress from 1987 through the end of June 1989, when Respondent discharged her. She worked the "split," and worked with Complainant during June. She had also worked with Complainant when their shifts overlapped. Respondent was moody. He had a joke about his "trick shoulder." He would ask a female employee to feel his trick shoulder and then mock grabbing at her genital area when she touched the shoulder. He often rubbed against female employees in crowded spaces, such as the telephone area, although his duties did not involve his being in the dining or bar areas. He often moved her by placing his hands on her waist or hips from behind. He was a touching person and touched females frequently. He made sexual quips and undertone remarks and always talked about her breasts or someone else's breasts. Slater had accused a previous employer of sexual harassment and told Respondent to leave her alone or she would hit him. Respondent engaged in "high jinx" every day, including the flour hands, spray bottle, off color comments, and poor taste jokes. She did not like Respondent's alleged jokes and playful activity.

50) Theresa Mancilla was employed by Respondent after times material. Her children, Hector and Gloria Martinez, worked for Respondent during the summer of 1989. Another daughter, Esmeralda, worked there in

1990. Mancilla saw no harassing activity by Respondent and her children did not mention such a thing to her.

51) Sandra Saurer, Respondent's sister-in-law, worked at Dominico's for approximately eight years before leaving in May 1989. She was acquainted with Flores, Sanchez, and Slater, and had worked evenings with Complainant. She acknowledged that the work space by the telephone was crowded and narrow, and stated that there could have been some unintended bumping together of persons attempting to go through there. She admitted calling Respondent a "perverted asshole," stating that it was meant in jest. She denied seeing Respondent spray anyone and suggested that no spraying occurred because she would have seen it. She denied seeing wet shirts on employees, or seeing any inappropriate touching. She never heard Respondent ask a female employee who she was sleeping with.

52) At times material, Martinez was the boyfriend of Sanchez. Respondent suggested to Sanchez that she go to bed with Martinez when she and Martinez had a fight. Respondent wondered to Sanchez who Flores was with "tonight," because Flores's boyfriend was in jail. Respondent told Sanchez that if he had a chance he would be with Flores.

53) Respondent touched Sanchez often, putting his hands on her back and shoulders. This caused her to believe that Respondent tried to unhook her bra, since she had seen Respondent snap Flores's bra and because Flores told her that Respondent had unhooked her bra. She also saw him spray Flores and wet her breasts.

Respondent sprayed Sanchez on the chest. When Sanchez told Respondent not to touch her, he would stop for that day, then begin again the next time she worked. She was offended by his touching.

54) From June 1987 through times material, Respondent had listed Dominico's for sale as a business opportunity with the Yamhill County Multiple Listing Service, Inc. The price varied from \$100,000 to \$140,000 during times material.

55) Complainant continuously searched for work after leaving Dominico's, principally at restaurants and grocery stores. She had no experience in nursing care, but applied at a care center. Her search was generally confined to McMinnville because of transportation difficulties and expense. During her job search she ran into rumors attributed to Dominico's that she was overbearing and undependable. She was embarrassed when she met old customers in town.

56) Complainant's cessation of employment was devastating for her. She used up her small savings and drew unemployment following a hearing on her eligibility. She lost her \$250 per month apartment in January 1990. In order to live, she sold her personal property, including a television, a video player, her rings, and a fur jacket. Following the loss of the apartment, she stayed three months with a friend. She remained eligible for unemployment compensation until it ran out in May 1990. From about May to August 1990, she stayed in a tiny metal shed without utilities on a farm near Dayton.

57) In August she moved into the main farmhouse as a sort of caretaker

at the request of the mortgage holder, the property was in litigation. She sold her car. The farm was located 6½ miles from town. It was 1½ miles to a grocery. In exchange for rent, Complainant removed garbage and debris, washed walls and floors, disinfected, painted, and did repairs such as window sills. She also did yard maintenance and rebuilt the chimney and smokepipe. There was no agreement between Complainant and the mortgage holder as to the dollar value of the rent or the dollar value of her work.

58) There was little heat in the farm house. There were frozen pipes at the farmhouse that winter. She had no money for food after the unemployment ran out. That fall, she made and sold afghans for \$35 each after paying between \$18 and \$22 for the yarn in each. She made Christmas ornaments, which sold for \$2.00 each. She lost a great deal of weight. She had never been unemployed for so long. She was forced to contact helping agencies such as the Elks and the Seventh Day Adventist Church to receive food baskets, and occasionally received plates of food from neighbors. She received no offers of employment.

59) During times material, Complainant was interested in owning Dominico's. She was aware that Respondent was interested in selling, but he would not discuss it with her, or identify his broker. She was not aware that it was a multiple listing. She expressed an opinion that she could run Dominico's, and was understood to have said that she would own Dominico's one day.

60) Complainant visited Dominico's after she quit, once to return keys and

once to pick up her check. She spoke with Flores there, and may have spoken with Slater and Sanchez if they were present. They discussed whether she had filed for unemployment. They did not discuss the allegations of harassment.

61) David Wright was a Senior Investigator with the Agency with nine years total experience in the position at time of hearing. He had participated in professional training from the Agency and from federal agencies including training in investigation and civil rights law. He was an active member of the Oregon State Bar. In 1989, he processed 103 cases, 73 of which were full investigations. In 10 of those he found substantial evidence of an unlawful practice. In 1990, he processed 75 cases, 54 of which were full investigations. In 6 of those he found substantial evidence of an unlawful practice. When interviewing a witness, he took handwritten notes of the interview and typed a narrative of the interview as soon thereafter as practicable. The narrative was a summary of the interview and was not verbatim, but he did indicate by quotation marks those statements that were direct quotes. He followed this procedure in his interview of Deanna Smith (known to him at the time as Peterson) as well as with the other witnesses interviewed during his investigation of Complainant's charges. The Agency offered into evidence the original handwritten notes of Wright's telephone interview of March 21, 1990, with Smith. Wright did not confuse her with any other witness, and at no time did he tell her or anyone that he had. Wright testified credibly and was not cross examined.

62) Deanna Smith worked at Dominico's as Deanna Peters from May 1988 to May 1989. She was misidentified by Slater to investigator Wright as "Deana Peterson." She was the same person whom he interviewed on March 21, 1990, by telephone as Deana Peterson. Deanna Smith testified that her interview with Wright, as recorded and entered into evidence, was incorrect. She stated that she worked with Complainant, Slater, and Flores while at Dominico's, and that she at times worked at the same time as Respondent. Despite statements to Wright to the contrary, she stated she never saw or heard about Respondent's spray bottle or his use of it, that she never saw or heard about him snapping bras, or any of the other sexually demeaning conduct described in Wright's typed report of the interview. She confirmed that she had heard from an unnamed waitress that Respondent had spread drug rumors about her. She said that Respondent's rumor was the reason she told Wright things that were not true. She denied that Respondent had made her feel uncomfortable at work by bothering her, hugging her, or talking about her breasts, or that she had been sprayed or embarrassed. She said she quit because she was overworked and frustrated. She testified that Wright told her before the hearing that he may have confused her with another witness. She was a hesitant witness who made little eye contact with the Hearings Referee. The Forum finds that her testimony was not credible except in those few instances where it was verified by other credible evidence in the record.

63) Ramona Flores was a reluctant, hesitant witness, but her testimony was very credible. She was nervous testifying about her former employer. Her testimony was obviously unrehearsed. She was embarrassed by repeating the nature of Respondent's conduct. She was emphatic in denying that Respondent's repeated crowding and touching was accidental or unintended on his part.

64) Sally Sanchez testified hesitantly, and stated she was fearful that she might lose other employment opportunities if Respondent retaliated. She had previously called Respondent for a written reference and he refused, telling her to have her new boss telephone. She denied seeing or experiencing any impropriety by Respondent until confronted with her prior statement to the investigator. She acknowledged that the statements she made to the investigator were true. She said that part of her was glad she was testifying because "He did it to me; I don't want it to happen to anybody else." Standing with her back to the Hearings Referee, she demonstrated by reaching behind her the manner in which Respondent touched her back bra strap. The Forum found credible those portions of her testimony which were consistent with her prior statement and which were confirmed by other credible evidence on the record.

65) The Forum found the testimony of Todd Smith credible where it corroborated other credible evidence in the record.

66) The testimony of Respondent was not entirely credible. He denied that he touched Complainant or any other female employee in a sexual

manner. He denied that it was his habit to spray anyone, stating that the spray bottle was used in the early morning and was on the shelf by the time the restaurant opened. He denied snapping anyone's bra, or intentionally rubbing against Complainant or any other female employee in a sexual manner. He denied touching Complainant's or any employee's breasts. He denied asking Complainant or anyone who they were sleeping with. He stated he was a moral person who knew the limits of conduct toward employees. He admitted that he joked and laughed with employees and that some off-color jokes were exchanged, but stated that he was a friend to employees and they weren't offended. He acknowledged that he may have sprayed Martinez in mutual horseplay. He attempted to explain away or discount the testimony of those witnesses he perceived as accusatory. He described Complainant as a competent waitress, but questioned her integrity, and said that he moved her from closing shift to split because he needed someone on days and because of a problem he had heard about Complainant serving a customer named Ed Rose without collecting for it. He said that Complainant differed with him over staffing levels (which he considered to be none of her business) because she was kept too busy to stand around talking to customers. He said that Flores was terminated for attendance problems, that Slater was angry with him because he fired her over alleged dishonesty and drugs (which he acknowledged he could not prove), and that Sanchez worked only part time for a brief period and was young and untrained. He said that Deanna Smith

quit in sympathy after he fired her boyfriend for taking beer from the premises. He denied giving any negative references on Complainant, but stated that he knew the restaurant owners in McMinnville and that there were multiple jobs available in the area at times material, suggesting that there were openings at Izzy's, Pizza Hut, and others. He testified that he referred Complainant to the Realtor when she expressed interest in buying the restaurant. He said that Complainant left before the end of her shift. Because so much of his testimony was controverted by more credible evidence, the Forum found credible only those portions of his testimony that was verified by other credible evidence on the record.

67) The testimony of Deborah Lawson was not entirely credible. She denied seeing Respondent grab or rub against female employees in a sexual manner, and denied that any female employees, including Complainant and Flores, complained to her about such grabbing or rubbing. She suggested that the pelvic rubbing claimed was not possible due to Respondent's protruding stomach. She stated she never saw Respondent snap anyone's bra, or touch or rub against Sanchez or Flores in a sexual manner. She said she didn't remember that Complainant told her that Respondent picked on Complainant verbally or that she told that to the Employment Division representative. She testified that Complainant's only complaint to her was "about how the place was ran." She testified she did not remember hearing Respondent ask Complainant with whom she was sleeping. Lawson initially denied

seeing Respondent spray female employees, denied hearing about such activity from employees, denied seeing female employees with wet shirts, and denied being sprayed herself. She did acknowledge being interviewed by the Agency investigator in April 1990 and admitted that her memory of events was probably more accurate at that time than at hearing. She didn't remember telling him that Complainant complained to her near the end of her employment about sex harassment by Respondent, but said she would have remembered if she said it. She acknowledged telling the investigator that Respondent had sprayed her, and testified that had happened once. She stated she didn't remember telling him that Complainant complained about being sprayed. She didn't recall telling the investigator that Respondent discussed with her who in AA Complainant was dating, and suggested she didn't say that because Complainant wasn't dating anyone in AA. She did recall hearing that Flores was considering sex harassment charges, as she told the investigator, but did not recall the source. She told the investigator that she didn't know why Complainant quit, but she told the Employment Division that Complainant called her and quit because there wasn't enough help, but she gave a written reference in which she characterized Complainant as willing, dependable, friendly, and kind. Because of inconsistencies and the manner in which she testified, the Forum found credible only those portions of her testimony that were supported by other credible evidence on the record.

68) Complainant's earnings at Dominico's averaged \$137.31 per week when she worked the split in the five months before November 7, 1989. Had she remained employed there, she would have earned \$10,298.25 up to the time of hearing (75 weeks x \$137.31).

#### ULTIMATE FINDINGS OF FACT

1) At times material, Respondent operated an eating and drinking establishment in McMinnville, Oregon, and utilized the personal service of one or more employees.

2) Complainant, female, was employed by Respondent as a waitress between January and September 1988 and from March 1989 to November 7, 1989. Respondent was Complainant's direct supervisor.

3) During her 1989 employment, Respondent subjected Complainant to unwanted touching of a sexual nature, to comments of a sexual nature about her body and about the bodies of other female employees, and to spraying with water which was intended make her clothes covering her breasts and private parts transparent.

4) Respondent subjected other female employees to similar unwanted touching, comments, and spraying, which was either seen by or reported to her.

5) Respondent's unwanted touching, comments, and spraying were intentionally directed toward Complainant and the other female employees because of their sex, and occurred at the work site during working hours on an almost daily basis.

6) Respondent's unwanted touching, comments, and spraying were

offensive and unwelcome to Complainant, and to the other female employees to whom they were directed, adversely affected her work, and created a hostile, offensive, and intimidating work atmosphere.

7) Respondent's conduct toward Complainant, as well as his conduct toward the other female employees, and the work atmosphere created thereby caused her severe mental and emotional distress.

8) Complainant found the working conditions created by Respondent's behavior intolerable, and she resigned on November 7, 1989. A reasonable person in the same circumstances would have found the same working conditions intolerable and would have resigned.

9) After resignation, the economic situation had an adverse effect on Complainant's emotional state. She sold her personal property, including her car. She could not afford rent and lived with a friend, and later camped in a shed. She did maintenance work on a farm in exchange for a place to live.

10) Complainant diligently sought other employment without success through the time of hearing.

11) Complainant lost wages in the amount of \$10,298.25.

#### CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and OAR 839-07-500 to 839-07-565.

2) Complainant was an employee employed in Oregon by Respondent.

3) The Commissioner of the Bureau of Labor and Industries has

jurisdiction over the persons and subject matter herein under ORS 659.010 to 659.110, together with the authority to eliminate the effects of any unlawful practice found.

4) ORS 659.030 provides, in pertinent part:

"(1) For the purposes of ORS 659.010 to 659.110, \* \* \* it is an unlawful employment practice:

"(a) For an employer, because of an individual's \* \* \* sex \* \* \* to bar or discharge from employment such individual. \* \* \*

"(b) For an employer, because of an individual's \* \* \* sex \* \* \* to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

OAR 839-07-550 provides, in pertinent 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 \* \* \* verbal or physical conduct of a sexual nature constitute[s] sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

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

"(2) \* \* \*

"(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."

Respondent directed unwelcome sexually abusive and intimidating physical touching, conduct, and comment toward Complainant because of her gender, and within her knowledge toward her female co-workers because of their gender, creating an intimidating, hostile, and offensive working environment adversely affecting her work, and thereby committed an unlawful employment practice in violation of ORS 659.030(1)(b).

5) Respondent's creation of an intimidating, hostile, and offensive working environment through unwelcome sexually abusive and intimidating physical touching, conduct, and comment toward Complainant and her female co-workers because of their gender was deliberate and intentional, but was not done with the intent that Complainant terminate her employment. Complainant's resignation was a constructive discharge, and Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(a).

#### OPINION

##### Respondent's Legal Defense

Paragraph V of Respondent's answer to the Specific Charges reads in part:

"That the practices prohibited by ORS 659.030(1)(a) are inapplicable to the facts alleged in the specific charges or to be proven at hearing. \*\*\*"

During the Hearings Referee's opening of the hearing, the Hearings Referee inquired of Respondent's counsel whether Paragraph V meant that Respondent questioned the Forum's ability to find a constructive

discharge under a statute prohibiting discharge on the basis of sex (or on the basis of any protected status). Counsel responded affirmatively. Thereafter, Respondent counsel made a brief opening statement, the Agency having chosen to waive its opening. Counsel's opening remarks did not address how the practices prohibited by the statute were inapplicable to the facts alleged.

In closing, the Agency Case Presenter, in anticipation of the meaning of Respondent's defense, acknowledged that there were court cases to the effect that constructive discharge based on intolerable working conditions requires that the employer intend, in imposing the intolerable conditions, that the employee quit. The Case Presenter distinguished cases of intentional discrimination and particularly those involving sexual harassment and argued that such a standard was totally inappropriate for such cases. She suggested that the nature of the offense was such that the offender, far from wishing to be rid of the victim, needed the victim's presence in order to gratify the power need demonstrated by the harassing activity. In his final argument, counsel commented that Respondent had already objected to the constructive discharge allegation, but did not elaborate further on his position.

In short, the Forum is left to speculate on Respondent's argument. Counsel may have been referring to *Sheets v. Knight*, 308 Or 220, 779 P2d 1000 (1989) and *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989), both of which hold that the intolerable working conditions leading to

a constructive discharge must be created by the employer with the intent that the employee resign in order for the employee to recover. But these cases both involved the tort of wrongful discharge, and not the administrative enforcement of a statutory employment discrimination claim. The subjective intent standard of *Sheets* and *Bratcher* is entirely reasonable when applied to an intentional tort, but it is wholly unsuited to the employment discrimination context or to the remedies available to the Commissioner of the Bureau of Labor and Industries in enforcing Oregon's Civil Rights Law. Applied to unlawful employment practices, the *Bratcher* standard would produce results totally at odds with the remedial purposes of the civil rights statutes. This forum has consistently held, with some apparent approval, that the test for constructive discharge is an objective one based on intolerable working conditions brought about by the employer's statutory prohibited practice or conduct which leave no reasonable alternative to resignation. *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion*, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983); *In the Matter of Rich Manufacturing Company*, 3 BOLI 137 (1982), *aff'd without opinion*, *Rich Manufacturing Company v. Bureau of Labor and Industries*, 64 Or App 855, 669 P2d 843 (1983); *In the Matter Tim's Top Shop*, 6 BOLI 166 (1987); *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989); *In the Matter of City of Umatilla*, 9 BOLI 91 (1990); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206 (1991).

#### The Merits

In reaching a decision in this matter, it was necessary for the Forum to analyze and weigh a great deal of conflicting testimony. Complainant worked for Respondent in 1988. She was subjected to unwanted conduct of a sexual nature during that time, but it did not approach the intensity or severity she experienced once she was working with him frequently and directly. She worked the closing shift in 1988, and for a time after her return in March 1989. Her contact with him was limited. Beginning in June 1989, she worked while he did and became the subject of or a witness to recurrent conduct of a sexual nature. The repetition of such conduct eroded the workplace atmosphere.

Witnesses asserted that Respondent repeatedly snapped the bra straps of female employees, squirted water onto female employee's breasts and buttocks, crowded against female employees in a sexual manner, touched female employees on the breast and buttocks, and commented on female breasts and on female employee's private lives. While she worked days, Complainant was frequently subjected to each of these activities, saw them happening to others, and had other victims report them to her.

Respondent denied that any of the described activity or anything close to it occurred. Witnesses presented by Respondent also denied seeing any of the conduct described. Some of those same witnesses admitted that the squirting incidents happened, but only once. Some of those witnesses either did not recall or recanted previous

statements they had made during the investigation. Some were simply not present at the time of day the activity occurred, or were no longer employed at Dominico's when the most frequent incidents happened.

Respondent's counsel suggested that the Agency's witnesses engaged in a conspiracy, and that the scenario of harassment was possible, but not probable. Given the testimony and demeanor of all the witnesses, it was the conspiracy that was possible, but not probable.

The Forum has found that Complainant, as well as other female employees of Respondent, were subjected to sexual harassment by Respondent. There can be no doubt that the conduct described was sexually oriented. The physical touching went far beyond supportive hugs or good natured horseplay. Agency evidence combined with inconsistency in Respondent's presentation to form a preponderance in the Agency's favor.

#### Remedy

The Agency has alleged a constructive discharge based on intolerable working conditions caused by sexual harassment. The Forum has found that frequent, severe, and pervasive sexual harassment occurred with Complainant as one of the victims. Complainant's choice was to continue to endure the harassment or to quit. She chose the latter when she was convinced by Respondent's continuation of his conduct that the harassment would continue and that she could not even obtain the partial relief of a different shift. The Forum has found that Complainant's resignation was a constructive discharge. An employer is

liable for any wage loss to the employee due to a discharge attributable to an unlawful employment practice. Complainant did not obtain alternate employment. The Forum has found that she made a diligent job search. Respondent presented no evidence of a failure to mitigate, such as the availability of suitable employment. Complainant is therefore entitled to recover the wages she would have earned but for the unlawful practice.

Complainant also testified convincingly to the emotional upset and mental suffering brought on by Respondent's unlawful employment practice. She was embarrassed and humiliated and demeaned. Her work was adversely affected and she dreaded going to work. After she quit, she continued to be upset by her experience and had the added stress of economic deprivation. Her living situation was entirely changed. Her emotional distress during employment was severe. The anxiety caused by the loss of employment income and the uncertainties of unemployment when attributable to an unlawful practice are also compensable. *In the Matter of German Auto Parts, Inc.*, 9 BOLI 110 (1990); *In the Matter of Spear Beverage Company*, 2 BOLI 240 (1982); *In the Matter of the City of Portland*, 2 BOLI 41(1980). All of her mental distress was attributable to Respondent's unlawful employment practice. The Forum is awarding \$7,000 to compensate Complainant for the mental suffering imposed.

#### ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice

found, Respondent, LORIS LEE SCHAMP is hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for EDNA SANDRA KENYON, in the amount of:

a) TEN THOUSAND TWO HUNDRED NINETY-EIGHT DOLLARS AND TWENTY FIVE CENTS (\$10,298.25), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) EIGHT HUNDRED SIXTY-TWO DOLLARS AND SEVENTY CENTS (\$862.70), representing interest on the lost wages at the annual rate of nine percent accrued on each week thereof between the date that week's wage would have been due had she remained employed and June 30, 1991, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between July 1, 1991, and the date Respondent complies with the Final Order herein, to be computed and compounded annually; PLUS,

d) SEVEN THOUSAND DOLLARS (\$7,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order herein and the date Respondent complies therewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any female employee contrary to ORS 659.030.

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**In the Matter of  
WILD PLUM RESTAURANT  
and Pie Shop – Eugene, Inc., and  
Jack Kuykendall, Respondents.**

Case Number 53-90  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued August 16, 1991.

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#### SYNOPSIS

Where some male restaurant managers were paid more than Complainant, a female restaurant manager, the Commissioner found that the difference in pay was due to the skill, effort, and responsibility exercised by the respective manager and not due to Complainant's sex. Finding further that Complainant's resignation was not attributable to any unlawful practice, the Commissioner dismissed the specific charges and the complaint. ORS 659.030(1)(a), (b) and (g); OAR 839-30-075(2)(a), (b) and (c).

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The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries for the

State of Oregon. The hearing was conducted on November 27, 28, 29, and 30, 1990, in the conference room of the office of the Bureau of Labor and Industries, Room 220 State Office Building, 165 East Seventh Avenue, Eugene, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division (CRD) of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined the witnesses and introduced documents. Shirley A. Meads\* (Complainant) was present throughout the hearing and was not represented by counsel. Wild Plum Restaurant and Pie Shop—Eugene, Inc., a corporation (Respondent Wild Plum), and Jack Kuykendall, an individual (Respondent Kuykendall),\*\* were both represented by Janice C. Goldberg, Attorney at Law, Eugene, who presented a Summary of the Case, argued the law and the facts, interposed objections and motions, examined the witnesses, and introduced documents. Respondent Kuykendall was present throughout the hearing.

The Agency called as witnesses the following, in addition to Complainant: Wild Plum employees Jean Borke and Yvonne Moon; CRD Senior Investigator Alan McCullough; Complainant's former employer Dorothy Reynolds; Wild Plum

bookkeeper Jean Rutledge; former Wild Plum Medford manager Charles Wiley; and former Wild Plum trouble-shooter G. Andrew Zimmerman.

Respondents called as witnesses the following, in addition to Respondent Kuykendall: former or current Wild Plum employees Rick Day, Mark V. Dickenson, Cary Drinkwater, and Letha Hedgepeth; retired Square Deal employee Estelle Keller; and Respondent's wife Madelyn Kuykendall.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Rulings on Motions, Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

#### RULINGS ON MOTIONS

During the Respondents' case, after the testimony of Jack Kuykendall, the Agency submitted Amended Specific Charges in writing and moved to amend the Specific Charges to conform to the proof adduced. The Agency sought to join Jack Kuykendall as an additional Respondent as an aider and abettor under ORS 659.030(1)(g). The motion, if granted, would hold Kuykendall personally liable, together with the corporation, for any unlawful practice found herein. OAR 839-30-075 allows for an amendment to conform\*\*\*.

\* Complainant was referred to throughout the testimony as "Shirl."

\*\* See Rulings on Motions, *infra*.

\*\*\* 839-30-075(2) provides:

"After commencement of the hearing:

"(a) Issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is expressed or implied consent of the Agency and party. Consent will be implied where there is no objection to the introduction of such issues and evidence or where the

Respondent's counsel opposed the amendment. The Hearings Referee took the motion under advisement to be ruled on in the Proposed Order, and asked that the advocates for both participants address the requested amendment in their respective closing remarks, should they so choose. For reasons set out at more length in the Opinion section, the Agency's motion to amend is granted, and Jack Kuykendall is added as a named Respondent herein.

At the close of the Agency's case in chief, counsel for Respondents moved to dismiss that portion of the Specific Charges dealing with constructive discharge and any mental suffering damages alleged to be attributable to the termination of Complainant's employment. The motion was based on the Agency's alleged failure to adduce evidence that Respondent had deliberately refused Complainant's request for salary parity. The motion was also based on *Sheets v. Knight*, 308 Or 220, 779 P2d 1000 (1989) and *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989), which counsel

argued stood for the principal that a constructive discharge exists only where the employer creates intolerable working conditions with the motive and intent to force the employee's resignation. Because he could only propose dismissal by way of a Proposed Order, the Hearings Referee reserved ruling on the motion until the Proposed Order, as a practical matter, the hearings presentation then proceeded as if the motion had been denied. For reasons set out at more length in the Opinion section, Respondents' motion to dismiss the issue of constructive discharge at the close of the Agency's case in chief is denied.

#### FINDINGS OF FACT – PROCEDURAL

1) On November 29, 1988, Complainant, female, filed a verified complaint with the Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent Wild Plum.

2) After investigation and review, the Civil Rights Division issued an Administrative Determination finding

Agency or the responding party addresses the issues. The Hearings Referee may address and rule upon such issues in the Proposed Order. Any party raising new issues must Motion the Hearings Referee to amend its pleadings to conform to the evidence and to reflect issues presented.

"(b) Charging Documents may be amended to request increase [sic] damages, or where appropriate, penalties, to conform to the evidence presented at the contested case hearing.

"(c) If evidence is objected to at the time of the hearing on the grounds that it is not within the issues raised by the pleadings, the Hearings Referee may allow the pleadings to be amended, and shall do so freely, when the presentation of the merits of the action or defense will be served thereby, and the objecting participant fails to satisfy the Hearings Referee that the admission of such evidence would prejudice the objecting participant in maintaining the action or defense upon the merits. The Hearings Referee may grant a continuance to enable the objecting participant to meet such evidence."

substantial evidence supporting the allegations of the complaint and finding Respondent Wild Plum in violation of ORS 659.030(1)(a) and (1)(b).

3) Subsequent to the issuance of the Administrative Determination, the Civil Rights Division initiated conciliation efforts between the Complainant and Respondent Wild Plum. That conciliation failed and the case was referred to CRD's Quality Assurance Unit for further action.

4) On July 17, 1990, the Agency prepared and served on Respondent Wild Plum, through its registered agent Respondent Kuykendall, Specific Charges alleging that Respondent Wild Plum discriminated against her on the basis of sex by failing to compensate her at the same rate as males performing substantially similar work, creating an intolerable and offensive working environment which led her to resign her position on or about August 15, 1988, a constructive discharge, all in violation of ORS 659.030(1)(a) and (1)(b).

5) With the Specific Charges, the following were served on Respondent Wild Plum in the manner described: 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.

6) On or about July 30, 1990, Respondent Wild Plum timely filed an answer to the Specific Charges, and on October 16, 1990, said Respondent filed its amended answer, in order to correct a typographical error in the original answer. Both the answer and the amended answer substantially denied the Agency's allegations of discriminatory compensation based on sex. They also interposed three affirmative defenses: that Respondent Wild Plum did not own and operate the Medford and Albuquerque Wild Plum restaurants, that any difference in Complainant's compensation was due to a bona fide occupational requirement, and that Complainant's compensation was determined by nondiscriminatory merit policies and job performance.

7) Pursuant to OAR 839-30-071 the Agency on November 16, 1990, timely filed its Summary of the Case, and Respondent Wild Plum on November 14, 1990, timely filed its Summary of the Case.

8) At the commencement of the hearing, Respondent's counsel stated that she had read the Notice of Contested Case Rights and Procedures and had no question about it.

9) Pursuant to ORS 183.415(7), the participants\* were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) At the commencement of the hearing, the Hearings Referee on his own motion removed from

consideration in the case the second affirmative defense that the pay differential alleged was due to a bona fide occupational requirement, ruling that such defense was inappropriate.

11) During the hearing, counsel for Respondents voluntarily withdrew the first affirmative defense that salary comparisons among the four restaurants were inappropriate because Respondent Wild Plum Restaurant and Pie Shop - Eugene, Inc. owned and operated only the Eugene and Springfield Wild Plum Restaurants, and the Medford and Albuquerque restaurants were owned and operated by a separate independent corporation.

12) The Proposed Order, which included an Exceptions Notice, was issued on June 10, 1991. Exceptions, if any, were to be filed by June 20, 1991. No exceptions were received.

#### FINDINGS OF FACT - THE MERITS

1) At all times material herein, Respondent Wild Plum Restaurant and Pie Shop-Eugene, Inc., was an Oregon corporation of which Respondent Jack Kuykendall, an individual, was the president, operational manager, and principle owner. Said Respondents were engaged in the restaurant business in Eugene and other locations, and utilized the personal service of one or more employees, controlling the means by which such service was performed. Respondent Kuykendall was the ultimate decision maker for all of the Wild Plum restaurants ("shops" or "stores") at times material.

2) At times material Respondent Wild Plum had no corporate salary administration or periodic salary review policy for restaurant managers.

Respondent Kuykendall set salaries. At hire, he considered relevant education, training, and experience, and negotiated from the candidate's stated requirements. In awarding increases (or in terminating managers) he considered demonstrated profitability, store appearance, employee retention, and frequency of customer complaints regarding service, in short, whether the manager was doing "a good job."

3) Complainant is a female who originally began working in 1980 at Respondent Wild Plum's Springfield restaurant as a cook. She progressed to kitchen manager, and took over as Springfield restaurant manager in October 1984.

4) Complainant had two years of community college. She had worked in the A&W restaurant of William and Dorothy Reynolds in the Eugene area over a period of 14 years on a seasonal basis before working for Respondent Wild Plum. She did some cooking and hired, fired, trained, and scheduled employees, and handled customers and receipts. She managed the restaurant when the owners were out of the country. Thereafter she had worked a year as head galley cook for the Gingerbread House, where she had no management duties.

5) As manager of the Springfield Wild Plum, Complainant was responsible for the day-to-day operation of the restaurant. This included the general cleanliness and appearance of the facility, the procurement, storage, and preparation of food, the scheduling and training of staff, local advertising, menu preparation and accuracy, selection and preparation of specials, and

\* "Participant" or "participants" includes the charged party and the Agency. OAR 839-30-025(17).

preparation of cream pies and other baked goods. She was responsible for assuring that food costs and labor costs did not exceed 25 percent and 29 percent, respectively, of the gross receipts for the restaurant.

6) The Springfield Wild Plum had a seating capacity of 65 to 80, a banquet room for 40, and employed between 20 and 24, including two assistant managers. Gross sales were \$547,376 in 1984, \$551,643 in 1985, \$586,599 in 1986, \$495,246 in 1987, and \$532,895 in 1988.

7) Charles Wiley, male, graduated from the University of Oregon in finance, with a minor in accounting. When he left college, Wiley opened his own restaurant in Eugene, which he operated for three years, seven days a week. He had 15 to 20 employees in three shifts for breakfast, lunch, and dinner. Wiley hired and fired the employees. He did not hire any managers or assistant managers, but had an experienced head waitress, who taught him about the business and who took care of things when he was absent. Wiley sold the restaurant and went to work for Portland Wholesale Company (later known as CFS Continental) as a sales representative on straight commission. His job was to call on restaurants and write sales of the company's products, which consisted of institutional groceries, meat, and food service equipment. His duties included assisting his accounts in maintaining inventory and suggesting his company's products where they fit the account's menu. The Eugene and Springfield Wild Plums were among his accounts.

8) Cary Drinkwater, male, had no formal education beyond high school. He started in the restaurant business with Sambo's restaurants in Salem and Eugene in 1971, advancing to restaurant manager. He then worked for El Torrito as general manager over three managers and 90 to 110 employees. In 1981 he was hired as manager of the Eugene Wild Plum. In 1985, in order to coordinate the opening of the Medford Wild Plum, Respondent Kuykendall made him area supervisor or district manager. That position was eliminated in January 1986, when he resumed managing the Eugene Wild Plum. He quit May 1 and at the time of hearing had been a salaried management employee of Taco Time, Inc. for 4½ years.

9) Wiley learned of the plan to open a Medford Wild Plum from Drinkwater on a call at Eugene, and expressed interest. They eventually discussed salary, and Drinkwater introduced Wiley to Respondent Kuykendall. Respondent Kuykendall offered Wiley \$2,000 per month plus a bonus on volume, and an additional 15 percent on the net profit as shown by a final monthly profit and loss (P & L) statement. He was hired in October 1984.

10) As manager of the Medford Wild Plum, Wiley was responsible for the day to day operation of the restaurant. This included the general cleanliness and appearance of the facility, the procurement, storage, and preparation of food, the scheduling and training of staff, local advertising, menu preparation and accuracy, selection and preparation of specials, and preparation of pies and other baked goods.

The Medford operation made its own double crust pies. He was responsible for assuring that food costs and labor costs did not exceed 25 percent and 29 percent, respectively, of the gross receipts for the restaurant. In addition, he was present during the building phase, and assisted with the placement of equipment. He hired the initial staff for the Medford restaurant. Together with NCR personnel, he observed the installation of and was trained on the NCR cash register-guest check system. It was the first such installation in the Wild Plum group.

11) The Medford Wild Plum had a seating capacity of 160, including a banquet room for 40, and employed between 45 and 60, including eventually three assistant managers. It opened in early 1985. Gross sales were \$1,265,028 in 1986, \$1,268,160 in 1987, and \$1,287,389 in 1988.

12) Wiley and his kitchen manager were trained at Springfield by Complainant. Wiley also trained at Eugene on the pie machine. When Medford opened, Complainant assisted with the opening for several days in Medford.

13) In May 1986 Complainant became manager of the Eugene Wild Plum restaurant. She remained manager of the Eugene Wild Plum until she resigned effective August 15, 1988.

14) As manager of the Eugene Wild Plum, Complainant was responsible for the day-to-day operation of the restaurant. This included the general cleanliness and appearance of the facility, the procurement, storage, and preparation of food, the scheduling and training of staff, local advertising, menu preparation and accuracy, selection

and preparation of specials, and preparation of pies and other baked goods. The Eugene operation made double crust pies for Eugene and Springfield. She was responsible for assuring that food costs and labor costs did not exceed 25 percent and 29 percent, respectively, of the gross receipts for the restaurant.

15) The Eugene Wild Plum had a seating capacity of 125, a small banquet area for 12 to 16, and employed between 38 and 42, including two assistant managers. Gross sales were \$1,005,328 in 1984, \$982,820 in 1985, \$1,020,981 in 1986, \$914,895 in 1987, and \$970,713 in 1988.

16) While she was manager of the Springfield restaurant, Complainant was assigned to food quality control by Respondent Kuykendall for the Oregon Wild Plum restaurants. This involved assuring that the items offered were uniform throughout the system by checking the preparation, portions, and plate presentation of each menu item in each restaurant. At first, this required monthly on-site visits to Eugene and Medford. After she became Eugene manager, her visits to Medford were lessened to every other month. She did not make regular visits of this type to the New Mexico restaurant. No portion of Complainant's salary was identifiable as attributable to this duty.

17) James Moore, male, was the first Albuquerque Wild Plum manager. He was brought to Eugene and to Medford for training by both Complainant and Wiley. His salary was \$2,000 per month from March through June 1987. He was fired on opening day and replaced on an interim basis at \$1,800 per month by Rose Bonzi, a

female assistant manager with no Wild Plum operating experience.

18) John Heintz, male, had worked for Wild Plum for over six years when he was assigned to Albuquerque as manager. He had worked two years at Springfield and two years at Eugene as a cook or baker. He had worked for two years for Wiley in Medford as an assistant manager when Respondent Kuykendall sent him to New Mexico about August 1987.

19) As manager of the Albuquerque Wild Plum, Heintz was responsible for the day-to-day operation of the restaurant. This included the general cleanliness and appearance of the facility, the procurement, storage, and preparation of food, the scheduling and training of staff, local advertising, menu preparation and accuracy, selection and preparation of specials, and preparation of pies and other baked goods. The Albuquerque operation made its own double crust pies. He was responsible for assuring that food costs and labor costs did not exceed 25 percent and 29 percent, respectively, of the gross receipts for the restaurant.

20) The Albuquerque Wild Plum had a seating capacity of 194, including a "good sized" banquet room, and eventually employed between 35 and 40, including two assistant managers, and opened in June 1987. Gross sales were \$576,008 in 1987, and \$783,402 in 1988.

21) When Albuquerque opened in 1987, Complainant headed a contingent of Oregon Wild Plum personnel who assisted. With her were Heintz, a baker, and two waitresses from the Eugene restaurant. They worked with

the Albuquerque cooks, bakers, and waitresses, training them under Complainant's direction in food and pie preparation and floor service. Complainant spent 25 days there training the managers and other employees in kitchen operation and procedures, in general operation of a Wild Plum restaurant, and in the use of the NCR system.

22) Wiley knew that Drinkwater's area supervisor position had been eliminated, allegedly as a cost cutting measure. Respondent Kuykendall told Wiley that it might be re-instituted in one or two years, and that he might be a logical choice. Wiley resigned prior to the actual filling of that position because he thought that the business office in Eugene was deliberately tardy in generating P & L statements from which his bonus could be calculated. He had discussed the absence of the P & L statements with Complainant. At the time of hearing, he believed he was owed money by Respondents.

23) Respondent Kuykendall had been in the restaurant business 23 years at the time of hearing. He had owned 12 restaurants, including the Wild Plum group and a separate group called "Mr. K." restaurants. He also had started Square Deal Lumber of Eugene in 1947, and had been involved in a carpet wholesale business and a construction business. He had employed hundreds of individuals of both sexes and believed he had treated them fairly.

24) Respondent Kuykendall considered Complainant to be a strong manager. She was a hard worker and drove herself as well as those who worked for her. He had some

reservations about customer and employee relations, but he kept her as a manager because she delivered the "bottom line," i.e., operated at a profit. He was surprised by her resignation.

25) Complainant's greatest strengths as a restaurant manager lay in the food preparation area, the kitchen or "back end" of the operation, where her skills were outstanding. She was at least adequate regarding the customer service or "front end" of the operation.

26) The Wild Plum managers rotated development of "manager specials" each month. Complainant checked the recipes, portions, and presentations before ordering the table placards for all the restaurants for the specials. Respondent was unaware she did this.

27) Complainant compiled or originated written materials such as recipe booklets, a menu manual, training manuals, and manager responsibility lists while working for Wild Plum. They were used throughout the chain both before and after she quit.

28) Respondent Kuykendall lived in Eugene, about a mile from the Eugene Wild Plum. He was in that restaurant frequently, much more than any of the other Wild Plum shops. He often ate there. He met people there on business.

29) The Wild Plum restaurants used the same name, logo, and menu. There was a conscious effort to make the appearance of the facility and the appearance and price of the product as consistent and uniform as possible among the shops. All Oregon prices were the same; Albuquerque started

with the same pricing, but changed due to costs.

30) Complainant was seen by some who worked for or with her as rigid and unyielding. At least two Eugene employees whom Complainant had disciplined complained to Respondent Kuykendall. He backed Complainant.

31) Respondent Kuykendall was concerned with the profitability of each restaurant. He believed that was derived from customer satisfaction. He wanted his restaurant managers "on the floor," i.e., out front greeting and seeing to the service of customers, instead of doing book work in the restaurant office. He wanted them interacting with customers and staff well over half the time they were on duty. He wanted them and their floor staffs to be pleasant and cheerful to customers. He spoke to Complainant several times at Eugene about smiling more and about spending less time in the office.

32) Respondent Kuykendall was concerned about the pricing, presentation, and promotion of the food, and was at least equally concerned about the appearance of the facility and its staff and the quality of service. He held the store manager responsible for customer complaints of slow service regardless of whether the manager was on the premises. He fretted about the level of window blinds and the state of the rain gutters.

33) At times material Jean Rutledge worked as book keeper in the Eugene business office of Respondent Kuykendall's multiple corporations. These included J & B Investments, Wild Plum corporation, B & J Properties, and JR Foods. The latter was

"Mr. K" restaurants. J & B built the Medford and Albuquerque Wild Plum restaurants. Respondent Wild Plum operated the four Wild Plum restaurants. As the Albuquerque shop lost money and the Eugene shop needed repairs, payroll was sometimes a concern. Corporate operations were "tangled." Rutledge saw Complainant frequently in the office with Eugene accounting data, and thought her to be a competent manager.

35) Andrew Zimmerman, a CPA, was hired by Respondent Kuykendall for consultation concerning the financial condition of Respondent Kuykendall's enterprises. He worked in the headquarters office from October 1987 to January 1988. He saw or talked to Complainant several times a week. She questioned him as to his findings. He formed the opinion that she was a capable and respected manager.

36) Drinkwater was paid \$2,000 per month initially at Eugene in 1981. His base had increased to \$2,300 by 1985. Wild Plum's records place him at \$2,500 as area supervisor, a salary he retained upon his return to Eugene in January 1986 until he terminated in May 1986.

37) At the time she became manager at Springfield, Complainant was paid \$1,300 per month. She was making \$1,848 per month there when she became manager at Eugene in May 1986. In July her salary was raised to \$2,048 per month, and in January 1987 she began receiving \$2,248 per month.

38) Complainant was succeeded at the Springfield restaurant by James Cowles, male, who had been an assistant manager there. He had some

prior management experience with another pie shop chain. His initial salary was \$1,350 per month. His salary was increased to \$1,500 per month in January 1987, to \$1,600 in June 1987, and to \$1,800 in May 1988.

39) Complainant was succeeded at the Eugene restaurant by Yvonne Moon, female, who had been an assistant manager. Her initial salary was \$1,800 per month from August through December 1988. She in turn was succeeded by Charlotte Gorney, female, who had managed the Albuquerque Wild Plum. Gorney's salary at Eugene was \$2,250 in January and February 1989.

40) By May 1985 Wiley was paid \$2,350 per month. He received a raise to \$2,450 in October 1986 and to \$2,550 in December. In May 1987 his salary was raised to \$2,650. At least one of the raises was in response to his specific request to Respondent Kuykendall.

41) In August 1987, Heintz moved from Oregon to become Albuquerque manager at \$2,100 per month. Unlike other managers, Heintz had no P & L bonus potential. In March 1988 he began receiving \$2,250 per month until termination in August 1988, when Charlotte Gorney, female, became Albuquerque manager at \$2,333 per month. Her successor, Gilbert Gonzales, a male former assistant manager began as manager in January 1989 at \$1,800 per month.

42) Theresa Knutson, female, succeeded Wiley as Medford Wild Plum manager in April 1988. She had been assistant manager since the opening of the Medford restaurant in 1985. She had a degree from Southern

Oregon State College and three years of management experience with North's Chuck Wagon before working for Wild Plum. As manager she began at \$2,000 per month, received a raise to \$2,100 in August 1988 and a subsequent raise to \$2,250 in February 1989. She, like Wiley, was to receive a 15 percent P & L bonus.

43) Complainant was paid additional salary for the Medford and Albuquerque openings.

44) In early 1988, based on her conversations with Zimmerman and Wiley, Complainant believed Wild Plum was in chaos and disorganized. She discussed the P & L statement problem and related concerns with Wiley, and learned that he planned on leaving. She had no intention of leaving, but was concerned that the company might fail. She realized there were no written records or evaluations of her accomplishments. She solicited letters of recommendation, and tentatively explored the job market.

45) Wiley quit in March 1988. In about April, Complainant went to Medford to assist the new manager, Knutson. In assessing labor costs for the Medford shop, Complainant learned that Wiley had been paid \$2,650 per month. She confirmed that with Wiley and learned that his P & L bonus, which he said was still owed, was 15 percent. Complainant's P & L bonus was 10 percent.

46) Upon her return from Medford, Complainant asked Respondent Kuykendall why Wiley had been paid so much more than she. He responded to the effect that "you've got to pay good people." She felt devalued; she had no chance to respond because

Respondent Kuykendall had to leave. Complainant had never previously asked for a raise. Pay raises just happened, with Respondent Kuykendall coming to her and saying she was doing a good job.

47) Respondent Kuykendall was concerned about the financial drain represented by the Albuquerque shop, which Heintz was managing. In mid-May he sent Complainant there with a written list of items to check. She was there a week, assessing percentages, inventory, supply, and waste. She trained Heintz further on NCR, placated creditors, costed menus, and checked employee records. She learned that Heintz was paid \$2,250 per month. She received expenses for the trip.

48) Respondent Kuykendall filled the area supervisor position in May 1988 with Carl Schmidt. Respondent Kuykendall wanted Schmidt to take over details such as the hiring and firing of managers, helping managers hire assistants, and generally oversee training, pricing, purchasing, cleanliness, and respond to any complaints for all of the Wild Plum restaurants plus Mr. K restaurants in Portland, Bend, and Eugene. Schmidt had 14 years of employment with the Black Angus restaurants, seven or eight of them as district manager. He had a background of Swiss chef school and many management courses, and had restaurant experience in New York, Los Angeles, and Palm Springs. He had owned and operated a restaurant in Sisters, Oregon. Respondent Kuykendall valued his wide experience and hoped to develop new recipes. Schmidt began at

\$2,500 per month, following negotiations with Respondent.

49) When Complainant returned from Albuquerque, she approached Respondent Kuykendall to report on her findings and activities there. It was at this point he told her about Schmidt's hire as supervisor over the Wild Plum restaurants and the Mr. K restaurants. They talked about that rather than Albuquerque. Complainant told him that they needed to discuss her position in the company. He said they would at some time in the future.

50) Respondent Kuykendall introduced Complainant to Schmidt around June 1. There was no opportunity at that time for Complainant to raise the issue of her position or pay. Sometime between then and June 28, and again around June 28, she said she wanted a meeting. Respondent Kuykendall said each time that he would let her know within the next few weeks.

51) Complainant wrote a letter to Heintz summarizing her findings and suggestions in Albuquerque. A copy went to either Schmidt or Respondent Kuykendall.

52) Schmidt gave Complainant written instructions in July. She continued to be responsible for Eugene, and had no food quality duties.

53) Around July 1, Complainant resumed exploring the job market for management positions. She had liked and lived her job, but felt discouraged or worse. She contacted a management recruiter as to possibilities outside the restaurant business.

54) Respondent Kuykendall set up a meeting with Complainant for July 28. He had a list of concerns he

wanted Complainant to address, including the trimming of bushes outside the Eugene restaurant, removal of weeds from the gutters, the need for Complainant to smile more on the floor, and the loss of a long-time employee, Barnes. He wanted Complainant to persuade Barnes not to quit.

55) Respondent Kuykendall stated he was ready to listen. Complainant reminded him of his "pay good people" remark and her request for discussion. She pointed out that a few weeks had become 2½ months. He pointed out Wiley's prior related experience; Complainant argued. She stated that Heintz with no manager experience was making more than she. She reminded him of all she had done with NCR, written manuals, and food quality. He said to take care of the list, then they would talk. She felt discouraged, degraded, and demoralized.

56) Respondent Kuykendall did not meet with female employees alone. His wife was with him on July 28. She believed that Complainant wanted the area supervisor job, and thought that her husband needed to explain the hire of Schmidt to Complainant. Complainant was tense, and appeared upset about Wiley's salary. Respondent Kuykendall wanted the listed conditions met, and said there would then be a salary review. Complainant did not ask specifically for a raise, and had not done so in the past.

57) Following the July 28 meeting, Complainant discussed her situation with Schmidt. She did not think she would get an increase. She did not work on the list Respondent Kuykendall had presented because some things, such as the bushes and

gutters, were already done and others, such as talking Barnes into staying, could not be done. On August 1 she submitted her resignation to Schmidt, effective August 15, 1988.

58) Between July 28 and August 15, Respondent Kuykendall and Complainant had no further discussion regarding her salary or future. He was surprised and upset by the resignation.

59) Complainant continued her job search after leaving Wild Plum. She avoided restaurant jobs because she didn't want to chance getting into another "unstructured" situation. Complainant felt ignored, degraded, devalued, and hurt by the lack of acknowledgment of her efforts. She felt humiliated and found job interviews difficult because of lowered self-esteem and self-confidence. She found employment with First Interstate Bank on October 25, 1988. At the time of hearing, she still earned less per month than she had at Wild Plum.

60) Respondent Wild Plum was registered in New Mexico in 1987 as the corporate proprietor of a full service restaurant at the address of the Albuquerque Wild Plum.

61) Respondent Kuykendall's testimony was mostly credible. He testified in a rambling manner, interspersing peripheral material of a self-serving nature into answers to direct questions. It was difficult to keep his testimony focused or relevant, and his memory was at times selective. He resented the accusation of sex discrimination. Because of the manner and content of his testimony, the Forum has accorded more credence to other witnesses in those few instances where there was conflict.

#### ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Wild Plum was engaged in business and was a person having one or more employees in Oregon. Respondent Jack Kuykendall was Respondent Wild Plum's president and chief executive officer.

2) Respondent Jack Kuykendall was the ultimate decision maker for Respondent Wild Plum at times material. Respondent Wild Plum had no corporate salary administration or periodic salary review policy for restaurant managers at times material. Respondent Kuykendall set managers' salaries based on relevant education, training, experience, and performance.

3) Complainant, a female, was employed as a restaurant manager by Respondent Wild Plum from October 1984 to May 1986 at its Springfield restaurant, and from May 1986 to August 1988 at its Eugene restaurant. Complainant's salary at Springfield ranged between \$1,300 per month and \$1,848 per month. Complainant's salary at Eugene ranged between \$1,848 per month and \$2,248 per month, plus a 10 percent bonus on net profit.

4) Charles Wiley, a male, was employed as a restaurant manager by Respondent Wild Plum from October 1984 to March 1988 at its Medford restaurant. Wiley's salary at Medford ranged between \$2,000 per month and \$2,650 per month, plus a 15 percent bonus on net profit.

5) John Heintz, a male, was employed as a restaurant manager by Respondent Wild Plum from August 1987 to August 1988 at its Albuquerque, New Mexico, restaurant. Heintz's

salary at Albuquerque ranged between \$2,100 per month and \$2,250 per month, with no net profit bonus.

6) James Cowles, a male, was employed as a restaurant manager by Respondent Wild Plum from May 1986 to July 1988 at its Springfield restaurant. Cowles's salary at Springfield ranged between \$1,350 per month and \$1,800 per month.

7) Managing Eugene, because it was larger and had a larger sales volume than Springfield, required more skill, effort, and responsibility than managing Springfield.

8) Managing Medford, because it was larger and had a larger sales volume than Eugene, required more skill, effort, and responsibility than managing Eugene.

9) Managing Albuquerque, which was larger than Eugene and had a smaller sales volume, but was more isolated from corporate headquarters and had a different cost and pricing structure, required approximately the same skill, effort, and responsibility as managing Eugene.

10) Complainant had performance problems in complying with Respondent Kuykendall's standards for customer attention. She had received a few customer complaints. A few employees complained about her method of supervision. Overall, she was a capable manager.

11) The record does not reflect that Wiley had any performance problems. Heintz and Cowles were discharged for performance problems.

12) Complainant resigned as Eugene manager after a male was appointed area supervisor. Complainant

believed she was paid less than male managers because of her sex.

13) Complainant suffered emotional upset, embarrassment, and financial distress as a result of the termination of her employment. Complainant lost income as a result of the termination of her employment.

#### CONCLUSIONS OF LAW

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

2) At all times material herein, Complainant was an employee employed in Oregon by Respondent Wild Plum.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein under ORS 659.010 to 659.110, together with the authority to eliminate the effects of any unlawful practice found.

4) ORS 659.030 provides, in pertinent part

"(1) For the purposes of ORS 659.010 to 659.110, \* \* \* it is an unlawful employment practice:

"(a) For an employer, because of an individual's \* \* \* sex \* \* \* to bar or discharge from employment such individual. \* \* \*

"(b) For an employer, because of an individual's \* \* \* sex \* \* \* to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

\* \* \* \*

"(g) For any person \* \* \* to aid, abet, incite, compel or coerce the

doing of any of the acts forbidden under ORS 659.010 to 659.110, \* \* \* or to attempt to do so."

Respondent Wild Plum compensated Complainant for her restaurant manager duties at a rate of pay which was different from the rates of pay said Respondent paid to males for their restaurant manager duties. The rates of pay paid to said Respondent's restaurant managers were based on factors other than sex. Said Respondent did not commit an unlawful employment practice in violation of ORS 659.030(1)(b).

5) Respondent Wild Plum's compensating of Complainant for her restaurant manager duties at a rate of pay which was different from the rates of pay said Respondent paid to males for their restaurant manager duties was deliberate and intentional. Complainant's resignation was not a constructive discharge, and said Respondent did not commit an unlawful employment practice in violation of ORS 659.030(1)(a).

6) Respondent Kuykendall did not aid, abet, incite, compel, or coerce the employer to do acts forbidden under ORS 659.010 to 659.110, or attempt to do so.

#### OPINION

##### Agency Motion to Amend to Conform

By the time of the Agency's motion, it was clear that Respondent Kuykendall was more than a mere agent of the corporate Respondent. Evidence had been offered and received without objection detailing his involvement in and

direction of the operations of each of the corporate Respondent's restaurants. This included in particular the setting of salaries, the granting of salary increases, and the imposition of his standards for doing so. If there was a violation by the corporate employer, that employer was assisted and facilitated by his urging and instigation. This issue was decided in the Agency's favor in *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232 (1985). Acknowledging that the term "aid and abet" most often refers to criminal activity, this forum cited the *Black's Law Dictionary* (5th ed 1979) definition of the term and adopted it, substituting "unlawful employment practice" for "a crime." and going on to say:

"This forum has previously ruled that a corporate president and sole owner may be held liable for aiding and abetting his or her corporation in the commission of an unlawful employment practice"

citing *In the Matter of N. H. Kneisel, Inc.*, 1 BOLI 28 (1976) and *Sterling v. Klamath Forest Protective Association*, 19 Or App 383, 388, 528 P2d 574 (1974). In *Sapp's*, the forum found the corporate sole owner and president subject to former ORS 659.030(1)(e), now ORS 659.030(1)(g).

##### Respondents' Motion to Dismiss Constructive Discharge

At the time of Respondents' motion, the Agency had established that persons of different gender had received different compensation for arguably substantially similar positions. There was also evidence that upon discovery

\* "Help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission."

of this disparity, Complainant remonstrated with Respondent Kuykendall without success. There was evidence that this created for Complainant an intolerable work condition and as a result she determined to resign. Unequal pay based on gender which continues after the employee's demand for parity will, in this forum, support a claim of constructive discharge. *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion*, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983).

Counsel also argued that the intolerable working conditions leading to a constructive discharge must be created by the employer in order to force the employee to resign, citing *Sheets v. Knight*, 308 Or 220, 779 P2d 1000 (1989) and *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989). The subjective intent standard of *Sheets* and *Bratcher* is entirely reasonable when applied to an intentional tort, but it is wholly unsuited to the employment discrimination context. Applied to unlawful employment practices, the *Bratcher* standard would produce results totally at odds with the purpose of our civil rights laws.

#### The Merits

The inquiry encompassed by a charge of disparate compensation based on sex involves a multi-pronged evaluation of the facts found. Initially, the fact-finder must determine:

a) Does a disparity in pay exist between employees of different gender?

b) If so, is the sex of the subject employees the sole determiner, i.e., is

the disparity attributable to a factor (or factors) other than sex?

In resolving b), it is necessary to analyze whether the positions in question involve substantially similar work calling for the exercise of substantially similar skill, effort, and responsibility under similar working conditions. The employer violates the statute where the differences in the duties compared are so minor as to be insignificant. *In the Matter of the City of Portland*, 2 BOLI 110 (1981), *aff'd*, *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475 (1984).

The Agency focused for the most part on the disparity in compensation between Complainant and Wiley. It cannot be said that the differences in the skill, effort, and particularly the responsibility exercised were insignificant. Complainant and Wiley were each the manager of one of Respondents' restaurants. The facility managed by Wiley was larger, consistently had higher gross receipts, and required a larger crew than that managed by Complainant. Wiley's initial salary was negotiated with the expectation that his experience would be beneficial in the start of a new facility. His subsequent raises were based on the success of the enterprise, and in one instance upon his demand. Respondent Kuykendall's claim that he gave increases based on "a good job" appeared credible.

But there was another comparator, Cowles, which the Agency did not cite. He assumed a position previously held by Complainant (Springfield) at substantially less than she had been paid, and two years later had still not equaled her salary in the position.

That situation failed to confirm a pattern of sex-based manager salaries on the part of Respondents.

The other comparator that was cited by the Agency was Heintz. He earned the same salary as Complainant (within two dollars a month), with much less time as a restaurant manager for Respondents. His facility was larger, but did not gross in accordance with its size and crew. But the working conditions were dissimilar. Heintz was isolated in New Mexico, where he had moved in order to take the job, and dealt, albeit not successfully, with a different price structure and community, far from the support and assistance of the headquarters office.

Respondent Kuykendall's continued concerns about what he perceived as Complainant's lack of smiling friendliness toward customers, inattention to immediate service, and spending too much time in the office were acknowledged by Complainant as ongoing. Any adverse evaluation by Respondent Kuykendall in these areas was the result of his frequent presence, and possibly of her devaluation of their importance, and not of her sex.

Complainant had extra duties, principally the food quality supervision. Because she acquired them while still at Springfield, and retained them when she managed Eugene, and because of her acknowledged skills in the "back end" of the business, it is not reasonable to assume that they were not included in her base salary. Because these duties encompassed "checking the back end" (her words) of the other restaurants less than once a month, the Forum will not assume that they equaled in effort or responsibility the

ongoing management of the Medford facility.

Complainant also did other things from which Respondents may have benefited. She said she did them to help the business grow. But they were voluntary, and not specifically noted to Respondent Kuykendall. The Forum accepted that Complainant compiled recipes, developed training, and wrote procedures used by others. She also did not limit herself to the "back end" of the operation at other restaurants. It is possible that her contributions went unrewarded. Complainant testified that she never asked for a raise until she learned what others were making. But there was no evidence to suggest that a male accomplishing the same things would have been compensated. It is not the function of this forum to restructure the salary schedule of an employer to achieve equality and fairness between similarly situated employees unless the inequality in the salary structure is the result of a prohibited criteria such as the sex of those employees. It was not in this case.

#### ORDER

NOW, THEREFORE, neither of the Respondents having been found to have engaged in the unlawful employment practice charged, the Specific Charges and the Complaint against Respondent Wild Plum, as well as the Specific Charges against Respondent Kuykendall, are hereby dismissed according to the provisions of ORS 659.060(3).

**In the Matter of  
VICTOR A. KLINGER,  
dba Lexington Chevron,  
Respondent.**

Case Number 19-91  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued September 6, 1991.

**SYNOPSIS**

Rejecting as immaterial Respondent's purported defense involving unfair competition by card lock gasoline stations and the state's responsibility therefor, the Commissioner found that Respondent willfully failed to pay all wages due Claimant following termination of the employment. The Commissioner specifically found that any purported agreement by Claimant to delay his claim for overtime was contrary to law and awarded Claimant \$2,816.32 in unpaid wages and \$1,650 in penalty wages. ORS 183.310 (2)(a)(A); 652.140(2); 652.150; 652.360; 653.055(1)(a) and (c), (2); 653.261(1); OAR 839-20-030; 839-30-060(2); 839-30-070(6).

The above-entitled matter came on regularly before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. Judith Bracanovich, Case Presenter for the Bureau of Labor and Industries (the Agency), represented the Agency. Ronald Whalen was the wage claimant (Claimant). Victor A. Klinger (Respondent) represented himself.

Having fully considered the entire record in this matter, I, Mary Wendy 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 May 22, 1990, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay overtime wages earned and due to him.

2) At the same time that he filed the wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On November 9, 1990, the Commissioner of the Bureau of Labor and Industries served on Respondent an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Respondent owed a total of \$2,816.82 in wages and \$1,650 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

4) On November 29, 1990, Respondent filed an answer to the Order of Determination and a request for a contested case hearing in this matter. Respondent's answer denied the factual allegations in the Order of Determination (paragraphs II and III), and

further set forth the defense that Respondent and Claimant had an agreement regarding overtime wages. Respondent alleged that, with regard to a lawsuit involving the State Fire Marshall's enforcement of regulations of retail filling stations and card lock dealers, he explained to the Claimant that if "any damage settlements were awarded that overtime would be paid as worked and any back overtime due would be paid." He asserted that he had acquired a court order that affirmed that a problem existed concerning the Fire Marshall's enforcement of its regulations, and attached a copy of the order as evidence that he "has been forced to take the actions that has [sic] resulted in the Wage and Hour Division's order before us now." He alleged that two court cases, apparently regarding the State Fire Marshall's regulations, "will determine whether or not the [Respondent] would be able to continue to operate his business and be able to pay attendants over time wages and the wages referred to in paragraphs II and III [of the Order of Determination]."

5) On January 24, 1991, the Agency sent the Hearings Unit a request for a hearing date. On February 4, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the Hearings Unit sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200.

6) On February 20, 1991, the Hearings Referee notified the participants that the Case Presenter assigned to the case had been changed.

7) On May 6, 1991, the Hearings Unit Manager sent the Agency and Respondent a notice that the hearing date had to be reset to August 6, 1991. The manager asked whether any participant objected to the change of dates. Neither the Agency nor Respondent responded.

8) On July 11, 1991, the Agency filed a motion for summary judgment with supporting exhibits.

9) On July 12, 1991, the Hearings Referee wrote a letter to Respondent regarding the motion for summary judgment. Because Case Summaries were due to be filed on July 29, the Hearings Referee required the Respondent to respond to the motion by July 22.

10) On July 26, 1991, the Agency filed two additional exhibits as an addendum to its motion for summary judgment. The exhibits were the Claimant's wage claim form with attachments, and his assignment of wages form.

11) As of July 26, 1991, the Hearings Unit had not received a response from Respondent concerning the motion for summary judgment. The Hearings Unit issued a Proposed Order.

12) On July 29, 1991, Respondent called the Hearings Referee. Respondent said he had just received the Hearings Referee's letter dated July 12, 1991. The Hearings Referee advised Respondent to send in his response to the motion for summary judgment, along with an explanation

why his response was late, by August 1, 1991. The Hearings Referee also advised Respondent that a Proposed Order had been issued. The Hearings Referee indefinitely postponed the hearing, and advised Respondent that he did not need to file exceptions to the Proposed Order until further advised.

13) On August 5, 1991, the Hearings Unit received Respondent's response to the motion for summary judgment, postmarked August 1, and his reason why the response was late.

14) On August 7, 1991, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Amended Proposed Order in this matter to all persons listed on the Certificate of Mailing, including the Respondent. Participants had 10 days to file exceptions to the Proposed Order.

15) On August 16, 1991, Respondent called the Hearings Referee to request an extension of time in which to file exceptions to the Amended Proposed Order. The Hearings Referee granted the extension. On August 27, 1991, the Hearings Unit received Employer's exceptions, postmarked August 23. Respondent's exceptions are addressed in the Opinion section of this Final Order.

#### FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Respondent did business as Lexington Chevron, a retail gasoline service station located in Lexington, Oregon. He employed one or more persons in the State of Oregon.

2) From around February 2, 1988, to around May 12, 1990, Respondent

employed Claimant as a service station attendant and mechanic.

3) In discussions both before and after Claimant was hired, Respondent and Claimant entered into an oral agreement that Respondent would not hire an additional attendant, and that Respondent would pay Claimant back wages for any overtime he worked if Respondent was awarded any "damage settlements" from a lawsuit involving the State Fire Marshall.

4) Claimant performed work for \$4.50 per hour from the date of hire until May 31, 1988. He performed work for \$5.00 per hour from June 1, 1988, to October 15, 1988. He performed work for \$5.50 per hour from October 16, 1988, to May 12, 1990.

5) Claimant's pay statement records for the period of April 15 to May 31, 1988, reveal the following information, which is accepted as fact: he worked a total of 324.5 hours at the rate of \$4.50 per hour, of those 324.5 hours, 240 were hours worked up to 40 per week (straight time hours) and 84.5 were hours worked over 40 per week (overtime hours); he was paid \$1,460.25 in wages (324.5 hours x \$4.50 = \$1,460.25).

6) Claimant's pay statement records for the period of June 1 to October 15, 1988, reveal the following information, which is accepted as fact: he worked a total of 1,004.25 hours at the rate of \$5.00 per hour, of those 1,004.25 hours, 720 were straight time hours and 284.25 were overtime hours; he was paid \$5,021.25 in wages (1,004.25 hours x \$5.00 = \$5,021.25).

7) Claimant's pay statement records for the period of October 16, 1988, to May 15, 1990, reveal the following information, which is accepted as fact: he worked a total of 2,766.25 hours at the rate of \$5.50 per hour, of those 2,766.25 hours, 2,069.5 were straight time hours and 696.75 were overtime hours; he was paid \$15,214.38 in wages (2,766.25 hours x \$5.50 = \$15,214.38).

8) Pursuant to OAR 839-20-030 (Payment of Overtime Wages) and Agency policy, the agency calculated the total earnings of Claimant to be \$24,512.70. The total reflects the sum of the following:

240 hours @ \$4.50 per hour	\$ 1,080.00
720 hours @ \$5.00 per hour	3,600.00
2069.5 hours @ \$5.50 per hour	11,382.25
84.5 hours at the overtime rate of \$6.75 (the additional one-half over the \$4.50 agreed rate)	570.38
284.25 hours at the overtime rate of \$7.50 (the additional one-half over the \$5.00 agreed rate)	2,131.88
696.75 hours at the overtime rate of \$8.25 (the additional one-half over the \$5.50 agreed rate)	5,748.19
TOTAL EARNED: \$24,512.70	

9) Claimant quit on May 12, 1990.

10) Civil penalty wages were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: average rate of pay equaled \$5.00 per hour; average number of hours per day equaled 11; average daily rate of pay equaled \$55.00 (11 hours times \$5.00 per hour). This figure of \$55.00 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$1,650.00. This

figure is set forth in the Order of Determination.

#### ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person doing business in the State of Oregon, and employed one or more persons in the operation of that business.

2) Respondent employed Claimant.

3) During the wage claim period April 15, 1988, to May 12, 1990, Respondent and Claimant had an oral agreement whereby Claimant's rate of pay was \$4.50, then \$5.00, and finally \$5.50 per hour. Respondent agreed to pay Claimant at an overtime rate of pay for Claimant's overtime hours worked if Respondent was awarded a "damage settlement" from a lawsuit against the State Fire Marshall.

4) Claimant quit employment with Respondent on May 12, 1990.

5) Claimant earned \$24,512.70 for his work for Respondent. Respondent paid Claimant \$21,695.88. Respondent owes Claimant \$2,816.82 in earned and unpaid wages.

6) Respondent willfully failed to pay Claimant all wages earned and unpaid immediately upon or within 48 hours of his quitting. More than 30 days have elapsed from the due date of those wages.

7) Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, equal \$1,650.00 (Claimant's average daily rate, \$55.00, continuing for 30 days).

#### CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and

Claimant was an employee, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405, and ORS chapter 653.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein.

3) The Forum informed the Respondent of his rights as required by ORS 183.413(2).

4) ORS 653.261(1) provides that the Commissioner may issue rules prescribing minimum conditions of employment, including an overtime rate of pay of one and one-half times the regular rate of pay. OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay. Respondent was obligated by law to pay Claimant one and one-half times his regular hourly rate for all hours worked in excess of 40 hours in a week. Respondent failed to so pay Claimant in violation of ORS 653.261 and OAR 839-20-030.

5) ORS 652.140(2) provides:

"When any such employee, not having a contract for a definite period, shall quit employment, all wages earned and unpaid at the time of such quitting shall become due and payable immediately if such employee has given not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of an intention to quit employment. If such notice is not given, such wages shall be due and payable 48 hours, excluding Saturdays, Sundays and holidays, after such

employee has so quit employment."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid at the time he quit employment, or within 48 hours, excluding Saturdays, Sundays, and holidays, after Claimant quit employment.

6) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee who is discharged or who quits employment, as provided in ORS 652.140, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

7) ORS 653.055 provides that:

"(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:

"(a) For the full amount of the wages, less any amount actually paid to the employee by the employer;

\*\*\*

"(c) For civil penalties provided in ORS 652.150.

"(2) Any agreement between an employee and an employer to work at less than the wage rate required by ORS 653.010 to 653.261 is no defense to an action under subsection (1) of this section."

In addition, ORS 652.360 provides that:

"No employer may by special contract or any other means exempt the employer from any provision of or liability or penalty imposed by ORS 652.310 to 652.405 or by any statute relating to the payment of wages \*\*\*"

Therefore, an agreement between Claimant and Respondent to avoid or postpone the payment of overtime wages is no defense to this action to collect Claimant's earned, due, and payable wages. Respondent is liable for the full amount of the wages due, and for civil penalties provided in ORS 652.150.

8) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

#### OPINION

Pursuant to OAR 839-30-070(6), the Agency filed a motion for summary judgment on its Order of Determination. It asserted that no issue of genuine fact existed and the Agency was

entitled to judgment as a matter of law as to the charges in the charging document. Subsection (c) of OAR 839-30-070(6) provides that, where the Hearings Referee recommends that the motion for summary judgment be granted, the recommendation shall be in the form of a Proposed Order, and the procedure established for issuing Proposed Orders shall be followed. This Final Order grants the Agency's motion and has been issued according to that procedure.

In his answer, Respondent denied the factual allegations contained in the Agency's Order of Determination. In its motion, the Agency argued that Respondent would be estopped from denying the hours, rates of pay, and total computed wages owing because they were based upon Respondent's own pay statements, and he had refused to make time records available for inspection and transcription by the Agency. The Agency also argued that Respondent raised no legal defense cognizable under ORS chapters 652 or 653, citing ORS 653.055(2). The Agency further argued that Respondent's lawsuit regarding the Fire Marshall's regulation of card lock gasoline station operators "is entirely independent of the unqualified duty to pay the minimum wage for overtime" pursuant to ORS 653.261 and OAR 839-20-030.

In his response to the motion, Respondent suggested that a genuine issue of fact existed "regarding the statutory mode of operation by owners and operators of gasoline dispensing facilities under ORS 480.310 to 480.340 . . ." He alleged that there were 350 self service gasoline

dispensing facilities in the state operating without employees, "promoting unfair competition and effecting employers ability to meet wage and hour requirements to pay overtime."

Respondent also alleged that a hearing was necessary to determine if his rights under Article 1, section 20, of the Oregon Constitution would be violated if the Agency required Respondent to pay overtime wages "without requiring other gasoline dispensing facility owners \* \* \* to also meet the same statutory requirements of employment and wage and hour requirements." Respondent also wanted to use the contested case hearing process to

"determine possible alternative payment of [the] wage claim by State, County and City agency [sic] for violation of due process, by denial of Oregon State Police and Morrow County police officers procedures to sign a \* \* \* complaint form and effect arrest of persons responsible for violations of ORS 480.330 and 480.340 and Morrow County Justice Court refusal to allow Employer Victor Klinger [to] file complaints, constituting obstruction of justice."

Finally, Respondent asserted that he

"in good faith has attempted to meet the statutory requirements of the wage and hour division and protect the interest of employe [sic] Ron Whalen, and employers business interest. But due to City, County and State responsible officials employer Victor Klinger at the present time has not obtained a remedy [sic] by due course of law,

and attempts currently pending are trying to be achieved."

Respondent requested subpoenas for 17 persons, including the Commissioner, the State Fire Marshall, the Morrow County District Attorney and Sheriff, a Justice Court judge, various Oregon Gasoline Dealers representatives, and the Speaker of the Oregon House of Representatives.

This Forum agrees with the Agency's position stated in its motion. Respondent's answer acknowledges that he was an employer and Claimant was his employee. He referred to an agreement he reached with Claimant regarding payment for overtime hours worked, and that such payment would be made if he received some settlement from his dispute with the Fire Marshall. The Agency provided documentary proof in the form of Respondent's pay statements to Claimant that Claimant worked overtime hours, for which he was paid only his regular rate of pay. The evidence, including the Agency's calculations, permits the reasonable conclusion that Claimant has earned wages that Respondent has failed to pay.

Respondent has not asserted any facts to dispute the Agency's evidence of wages due to the Claimant. The only issue of fact that Respondent raised in his response to the motion concerned the "mode of operation by owners and operators of gasoline dispensing facilities under ORS 480.310 to 480.340" and assertions that there are self-service gasoline stations operating without employees. Evidence concerning such facts would be immaterial to the issues in this case.

Pursuant to ORS 653.261, OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half the regular rate of pay. Respondent is obligated by law to pay Claimant one and one-half times his regular hourly rate for all hours worked in excess of 40 hours in a week. ORS 653.055(1) provides that

"[a]ny employer who pays an employee less than the wages to which the employee is entitled under ORS \* \* \* 653.261 is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer, \* \* \* and (c) For civil penalties provided in ORS 652.150."

ORS 653.055(2) states that

"[a]ny agreement between an employee and an employer to work at less than the wage rate required by ORS \* \* \* 653.261 is no defense to an action under subsection (1) of this section."

Credible evidence based on the whole record establishes that Respondent failed to pay Claimant at an overtime rate for all hours worked in excess of 40 hours in a week. The agreement between Respondent and Claimant regarding overtime is no defense.

Respondent's assertion in his answer that his lawsuit against the Fire Marshall somehow excuses his failure to pay Claimant his earned and unpaid overtime wages is without merit. Similarly, the claims in his response to the motion are simply outside the scope of the matter before this Forum. Respondent cannot attempt to cure his alleged

denial of due process and violations of his Oregon Constitutional rights by other state or county officers in this contested case hearing on his failure to pay overtime to an employee. Whatever the merits of his claims about the Fire Marshall's failure to enforce its regulations, such matters are immaterial to Respondent's duty to comply with this state's wage and hour laws.

Awarding a civil penalty turns on the issue of willfulness. The Attorney General has advised the Commissioner that willful, under ORS 652.150, "simply means conduct done of free will." A.G. Letter Opinion No. Op. 6056 (9/26/86).

Willful does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency. *State ex rel Nilsen v. Johnston et ux*, 233 Or 103, 377 P2d 331 (1962). Willfulness only requires that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

"A financially able employer is liable for a penalty when it has willfully done or failed to do any act which foreseeably would, and in fact did, result in its failure to meet its statutory wage obligations." A.G. Letter Opinion, above.

The Respondent in this case must be deemed to have acted willfully under this test. The evidence established that Respondent knew he was required to pay an overtime wage rate to Claimant for his overtime hours, and intentionally failed to pay those wages. There was no evidence that

Respondent was not a free agent. Thus, Respondent's action or inaction was willful under ORS 652.150.

The Agency has established a prima facie case. The record establishes that Respondent has violated ORS 652.140 as alleged and that he owes Claimant civil penalty wages pursuant to ORS 652.150.

#### Respondent's Exceptions

In his exceptions to the Amended Proposed Order, Respondent argued that he was entitled to a contested case hearing. As authority, he cited the definition of a contested case in ORS 183.310(2)(a)(A). He also cited ORS 652.250(7). This Forum disagrees.

First, the definition statute, ORS 183.310(2)(a)(A), does not create any rights to a hearing. Second, there is no statute numbered ORS 652.250(7).

ORS 652.250 deals with public employees who take part in search and rescue operations, so the Forum can only speculate about which statute Respondent intended to rely upon. Third, pursuant to ORS 652.332(3), the Commissioner has adopted rules for contested case proceedings such as this. As described at the outset of this opinion, those rules permit a participant to move for summary judgment of a case before hearing. As here, when summary judgment is granted, no hearing is required.

Respondent argued that the Proposed Order contained errors. His arguments, boiled down, were that various public agencies (and the Commissioner) have failed to properly enforce ORS 480.310 to 480.340 (regarding self-service gas stations),

and as a result he was at a competitive disadvantage. This, he asserted, made it impossible for him to pay overtime wages. He took exception to the Hearings Referee's finding that he acted willfully, and suggested that his failure to pay overtime was "an act of survival." In effect, Respondent argued that he was financially unable to pay the wages. Respondent alleged facts not in the record regarding the number of service stations that have gone out of business and the number of jobs that have been lost due to the operation of card lock self-service stations. He attached affidavits from three service station operators describing the hardships they encountered due to the operation of such stations and their "unfair competition."

The Forum has already found that, whatever the merits of Respondent's claims regarding the enforcement of ORS 480.310 to 480.340, such claims are immaterial to the issues in this case. His assertion that the Commissioner has a duty to enforce those statutes is wrong; the Forum knows of no statutory authority for the Commissioner to do so.

Regarding the claim of financial inability, ORS 652.150 provides in part that "the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued." The employer has the burden of proving an inability to pay wages at the time the wages accrued. *In the Matter of Mega Marketing*, 9 BOLI 133, 138 (1990); *In the Matter of Sheila Wood*, 5 BOLI 240, 255 (1986). As stated in the Order of Determination, Respondent was required in his answer to:

"affirmatively allege a short and plain statement of each affirmative defense which the employer will assert at the contested case hearing. For example, the affirmative defense of the financial inability to pay the wages or compensation at the time they accrued must be included in the written 'Answer.'"

Respondent did not raise that defense in his answer. OAR 839-30-060(2) provides in part that the "failure of the party to raise an affirmative defense in the Answer shall be deemed a waiver of such defense." Accordingly, Respondent's defense of financial inability has been waived and Respondent will not be allowed to raise it in his exceptions. The new evidence that Respondent submitted with his exceptions will not be received into the record. *In the Matter of Peggy's Cafe*, 7 BOLI 281, 288 (1989).

In one incomprehensible paragraph in his exceptions, Respondent claimed that his rights under Article 1, section 20, of the Oregon Constitution had been violated. Assuming his claim here is the same one he raised in response to the motion, and which was discussed beginning at the fourth paragraph of this opinion, it is outside the scope of the issues involved in this case.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders VICTOR A. KLINGER to deliver to the Business Office of the Bureau of Labor and Industries, 305 State Office Building, 1400 SW Fifth Avenue, PO Box 800,

Portland, Oregon 97207-0800, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR RONALD E. WHALEN in the amount of Four Thousand Four Hundred Sixty Six Dollars and Eighty Two Cents (\$4,466.82), representing \$2,816.82 in gross earned, unpaid, due, and payable wages; and \$1,650 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$2,816.82 from June 1, 1990, until paid, and nine percent interest per year on the sum of \$1,650 from July 1, 1990, until paid.

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#### In the Matter of WEST LINN SCHOOL DISTRICT, 3JT, Respondent.

Case Number 04-91  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued October 31, 1991.

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#### SYNOPSIS

Finding that Respondent's alleged reasons for transferring and demoting Complainant from his position as a groundskeeper were pretextual, the Commissioner held that Complainant was demoted and transferred in retaliation for his reporting a violation of the Oregon Safe Employment Act to

OR-OSHA. The Commissioner ordered Respondent to reinstate Complainant to his former position with all pay, benefits, and seniority, and awarded Complainant the appropriate wage differential of \$3,312 plus employer retirement pick-up on said wages, and \$2,000 for mental suffering. The Commissioner further ordered Respondent to make a copy of the Final Order part of Complainant's personnel file. ORS 654.005(5) and (7); 654.062(5)(a) and (b); 659.030(1)(f); OAR 839-06-005(1)(b); 839-06-025(1) and (2).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on May 14, 15, and 16, 1991, in Room 311, of the State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. Judith Bracanovich, Case Presenter with the Civil Rights Division, Bureau of Labor and Industries (the Agency), presented a Summary of the Case, argued Agency policy and the facts, interposed motions and objections, examined witnesses, introduced documents, and submitted written closing argument. West Linn School District, 3JT (Respondent) was represented by James P. Martin, Attorney at Law, Portland, Oregon. Counsel for Respondent presented a Summary of the Case, argued the law and the facts, interposed motions and objections, examined witnesses, introduced documents, and submitted written closing argument and written rebuttal

to the Agency's closing. Robert Lawer (Complainant) was present throughout the hearing. Sam Nutt, Director of Support Services for Respondent, was present throughout most of the hearing.

The Agency called the following witnesses in addition to Complainant: Ray Hertenstein, Karen Woodward, Patricia Rice, Roland W. Knowles, Douglas Nimrod, Leon Mosier, and Richard Donovan, employees of Respondent at times material; Ron Stewart, Complainant's former supervisor; Leota Clark, Oregon School Employees Association Field Representative; and Penny Wolf-McCormick, Industrial Hygienist with the State of Oregon Department of Insurance and Finance Occupational Safety and Health Division (OR-OSHA).

Respondent called the following witnesses in addition to Sam Nutt: John P. Allen, Maintenance Manager; Dealous (Dea) Cox, District Superintendent; and Mark Touhey, Head Groundskeeper.

Having fully considered the entire record in this matter, I, Mary Wendy 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 October 19, 1988, Complainant filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment practice of Respondent based upon

his opposition to an unsafe place of employment.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint and finding Respondent in violation of ORS 654.062(5).

3) The Agency initiated conciliation efforts between Complainant and Respondent, conciliation failed, and on August 21, 1990, the Agency prepared and served on Respondent Specific Charges, alleging that Respondent had demoted Complainant for opposing unsafe practices and working conditions in violation of ORS 654.062(5)(a).

4) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On September 10, 1990, Respondent timely filed its answer, post-marked September 6, 1990.

6) On September 18, 1990, the Forum notified the participants of a change of Hearings Referee. On October 30, 1990, the Forum notified the participants of a change of hearing date from December 4, 1990, to February 19, 1991. On January 7, 1991,

the Forum again notified the participants of a change of Hearings Referee. On February 12, 1991, the Forum notified the participants of a change of hearing date from February 19, 1991, to May 14, 1991. On February 15, 1991, the Forum was notified of and in turn notified the participants of a change of Agency Case Presenter.

7) On April 22, 1991, Respondent filed a motion to postpone the hearing. On April 24, 1991, the Hearings Referee requested further information on the postponement.

8) Under date of April 25, 1991, the Agency submitted the requested information. Under date of April 26, 1991, Respondent submitted the requested information. On May 1, 1991, the Hearings Referee denied the postponement.

9) Pursuant to OAR 839-30-071, on May 6, 1991, the Agency and Respondent each timely filed a Summary of the Case.

10) At the commencement of the hearing, counsel for Respondent stated that he had read the Notice of Contested Case Rights and Procedures accompanying the Specific Charges and had no questions about it.

11) Pursuant to ORS 183.415(7), Respondent and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) At the commencement of the hearing, the Agency moved to amend the Specific Charges to include

\* "Participant" or "participants" includes the charged party and the Agency. OAR 839-30-025(17).

Complainant's making a complaint concerning unsafe practices and working conditions. Respondent did not object and the amendment was allowed by interlineation.

13) On the final day of hearing the Agency Case Presenter, citing illness, asked that the participants be allowed to submit their respective closing arguments in writing. The Hearings Referee allowed the motion and at the close of hearing gave the participants until June 3, 1991, to simultaneously submit their respective closing arguments, and until June 10, 1991, to submit any rebuttal to the opponent's closing argument. Submissions under this schedule were filed timely and the record herein closed on June 10, 1991.

14) The Proposed Order, which included an Exceptions Notice, was issued on August 23, 1991. Respondent requested and received an extension of time for filing exceptions. Respondent's exceptions, denominated "Respondent's Objections to Findings of Fact and Conclusions of Law," were timely received on September 13, 1991, and are dealt with in the Opinion section of this Final Order and, where appropriate, in the Finding or Conclusion objected to.

#### FINDINGS OF FACT – THE MERITS

1) At times material, Respondent operated and maintained public schools in West Linn, Oregon, and engaged or utilized the personal service of one or more employees and reserved the right to control the means by which such service was performed.

2) Complainant was employed by Respondent as a custodian beginning in 1973. He then worked as a

groundskeeper to sometime in 1977, and was again employed as a District groundskeeper in April 1979. He worked in that capacity until September 1988, when he was transferred to West Linn High School as night custodian.

3) As groundskeeper, Complainant worked out of the Respondent's central administrative office, traveling to individual school campuses to cultivate, plant, spray, weed, mow, and trim. He also worked on irrigation piping, and the construction, leveling, and marking of athletic fields. He worked a 40 hour week.

4) Throughout his employment with Respondent, Complainant was a bargaining unit employee and an active member of Oregon School Employees Association (OSEA). He had served as chapter vice president of the union, had been a representative to union conferences, and was involved in peer review and the collective bargaining team. He was viewed as a union advocate.

5) In 1988, members of the district maintenance staff met on a regular basis each morning for coffee in the lunchroom of the administration building prior to beginning work.

6) At times material herein, Richard Donovan was the district painter, working out of Respondent's administration building.

7) At times material herein, Ray Hertenstein was a district maintenance foreman, working out of Respondent's administration building. He retired in November 1989 after 17 years with Respondent.

8) On July 12, 1988, Complainant, Hertenstein, and Donovan were present in the lunchroom about 6:30 to 6:45 a.m. Complainant made coffee. Hertenstein became upset because Complainant had not also provided hot water for Hertenstein's tea. He called Complainant an "inconsiderate bastard" and a "son of a bitch."

9) Complainant picked up a chair and shoved it toward Hertenstein, striking his arm and knocking him off balance. Hertenstein did not strike back. The situation calmed, and the three finished their beverages and went to work.

10) None of those present on July 12 made any official report of the incident. There was no effort to hide the incident. They continued having coffee together each morning thereafter.

11) Employees in the administration building learned of the lunchroom incident the same day, upon arriving at work, but did not discuss it with administration. None who heard about the incident at the time considered it serious.

12) At times material herein, Dea Cox was Respondent's Superintendent. His office was in Respondent's administration building.

13) In the summer of 1988, Respondent was remodeling Willamette Middle School. Dea Cox was the supervisor in charge of the remodeling effort. As work progressed, he became aware that there was a possibility of asbestos in the area. An earlier check some years before, involving pipe insulation, had shown no asbestos risk at that time.

14) The remodeling effort involved removing walls and ceilings, including cutting into the wallboard and ceiling material. It was extremely dusty work. The weather was hot and a large fan was used to circulate air within the remodel area. The dust was blown about and out of the area.

15) Complainant had assisted in the removal of walls and ceiling material and in clean-up for two to three days in July. At least seven other permanent or temporary employees of Respondent also worked at demolition and removal, including Dave Baer, temporary employee Ron Cox, Doug Nimrod, custodians Mosier and Espinoza, and two high school students.

16) At times material herein, Sam Nutt was Respondent's Director of Support Services. Under his control were maintenance and janitorial, business functions, and food services. His office was in Respondent's administration building.

17) At times material herein, John Allen managed Respondent's maintenance section and was Complainant's direct supervisor. He in turn reported to Nutt.

18) Douglas E. Nimrod was head custodian at Willamette Middle School. He assisted with the demolition work at Willamette Middle School in July 1988.

19) At times material, Penny Wolf-McCormick was an industrial hygienist with the State of Oregon Occupational Safety and Health Division of the Department of Insurance and Finance (OR-OSHA, formerly known as the Accident Prevention Division or APD). On Tuesday, July 26, 1988, she

conducted an inspection of the work site at Willamette Middle School.

20) Asbestos is a mineral substance used extensively in construction, particularly between 1940 and 1979, for fireproofing, soundproofing, insulation, and the like. It was often used in school construction because of its fireproofing and soundproofing qualities. It resists chemicals and wear. When contained and intact it is essentially non-hazardous, but once it becomes broken, cracked, torn, or otherwise damaged it becomes friable<sup>\*</sup> and is easily airborne. In this state it is an extreme breathing hazard, causing asbestosis, lung cancer, and mesophelioma, all of which have an ultimately fatal result. In 1988, the acceptable workplace level for asbestos was .2 fibers per cubic centimeter of air. At time of hearing, the acceptable level was scheduled to be revised to a lesser concentration.

21) Dea Cox told Wolf-McCormick that work in the demolition area had been shut down on July 20 when he suspected asbestos.

22) Only sawing and cutting of the ceiling in the science rooms stopped on July 20. Workers remained in the area installing framing, which involved hammering into the suspect material, and cleaning up. Dea Cox told Allen on July 22 in the afternoon to pull the crew from the demolition area, which Allen did at the end of the day.

23) On July 25, Lake Oswego Insulation representatives were on site for a clean up bid. They told Allen that the demolition area should be

contained until sampled. Nimrod was present in street clothes. They provided materials and instructions and gave Nimrod safety clothing. Nimrod was in the demolition area, wearing the safety clothing, when Wolf-McCormick arrived on July 26. He was the only Respondent employee so equipped. He was not the only Respondent employee in the building.

24) Lake Oswego Insulation recommended sealing off the entire building. Dea Cox believed that the asbestos was detected "in time" and that only one end needed to be sealed. In fact, the entire building was contaminated because the ventilation system and the large floor fan had been running while the sawing and framing had progressed.

25) Wolf-McCormick interviewed district employees present on July 26. None of the district employees working on the Willamette Middle School remodel were given training by Respondent about asbestos, none were furnished with protective clothing by Respondent, and none except Nimrod had proper protective gear. No employee had a card attesting to asbestos hazard training.

26) Respondent's workers and Respondent's administrators were not aware of the hazards attendant to cutting, breaking, pounding, or otherwise disturbing asbestos material, or of measures such as wetting with water, which could reduce the spread of dust and fiber. There was no awareness of the breathing hazards associated with friable asbestos.

27) Wolf-McCormick held an opening conference on July 26. Complainant was present as an OSEA representative, along with Allen and Dea Cox. Wolf-McCormick instructed all to whom she spoke during her employee interviews and at the opening conference that they were not to enter the demolition area due to the asbestos risk. The area was to be sealed with duct tape and visqueen, and posted with warning signs. She specifically told Dea Cox to either voluntarily keep everyone out of the building or she would "red tag" it. The "red tag" would carry with it a \$10,000 fine for violation, i.e., any entry. Dea Cox chose to voluntarily shut down the school.

28) Following the closure of the Willamette Middle School building at the request of OR-OSHA, Complainant twice re-entered the building at Respondent's bidding. In the first instance, Nutt gave Complainant a note for a teacher who was still in the building; the note told the teacher that the building was closed and the teacher was to leave.

29) On the second occasion, on July 27, Complainant was trimming shrubs at the administration building when he was called into the office and told by Allen to procure some sealable containers and meet Allen at Willamette Middle School. Allen intended to get further samples for asbestos testing from the sealed area.

30) Complainant stopped by his home, obtained two sandwich baggies with zip-lock closures and met Allen at the school. They both entered the remodel area and Complainant obtained 2 to 3 spoonful of ceiling material in

each baggie, using a six-foot step-ladder and Complainant's pocket knife. Allen held the ladder.

31) Before entering the remodel area, Complainant asked about protective clothing. Allen said it wasn't necessary. Complainant did not feel he could refuse to assist in getting the samples.

32) Complainant delivered the samples to the laboratory while Allen returned to the administration building. Complainant then called Wolf-McCormick at OR-OSHA to report the entry for samples and that he was denied protective equipment.

33) Wolf-McCormick immediately called Dea Cox and remonstrated concerning the unauthorized entry. She also returned to re-inspect the site. She did not advise Dea Cox how she had learned of the unauthorized entry.

34) Complainant resumed trimming and was soon confronted by Nutt in front of the administration offices. Nutt told Complainant that he should have discussed the matter with administration before calling OR-OSHA. Nutt appeared angry and raised his voice.

35) Karen Woodward was a food service employee of Respondent and president of the West Linn School District OSEA chapter in 1988. She was present outside Respondent's administration building on union business on July 27 when she heard Nutt confronting Complainant. From his raised voice and his "body language" she saw that Nutt was angry. She did not hear all of his remarks, but was nearby when Nutt said to Complainant that he didn't understand why Complainant had called and talked to "them." Nutt

\* "friable," adj. means easily crumbled or crushed into powder. Webster's New World Dictionary, Second College Edit. (1986).

further told Complainant that he should have come to Nutt or someone in the District directly instead of calling OR-OSHA.

36) On or about July 27, Dea Cox told Complainant that he wished that Complainant had come to him rather than calling OR-OSHA.

37) Patricia Rice had been maintenance secretary for Respondent since 1978. She worked for Allen at the administration building offices. She was present in July 1988 when Allen ordered Complainant to take some asbestos samples at Willamette Middle School. Later the same day, when an agency called about employees going into the school after it had been marked off as having asbestos, the administrators were mad that Complainant had reported the entry.

38) On August 9, Wolf-McCormick held a closing conference in Allen's office in which she discussed the violations found, the corrections needed, and the potential penalties. Complainant and Allen were present throughout; Nutt had another appointment.

39) Allen stated to Wolf-McCormick that the District was angry with Complainant for calling her and that "he's in trouble." She told Allen that it was illegal to discriminate against employees for making complaints to OSHA.

40) In a telephone conversation with Wolf-McCormick after the August 9 conference, Dea Cox appeared not to understand the penalties. About August 16 Wolf-McCormick held a second closing conference which was attended by Dea Cox, Nutt, and an asbestos removal contractor. Dea Cox

appeared upset with Complainant, stating that Complainant should have talked with management first. He was visibly upset and expressed concern that the penalty assessed would come out of Respondent's book budget. Both Nutt and Dea Cox appeared agitated and were loud and argumentative.

41) At times material herein, R. William Knowles was Respondent's accounting supervisor. He was a management employee in the business office, which was in Respondent's administration building.

42) Knowles had known about the lunchroom incident, which he characterized as a "scuffle" over coffee or tea, since arriving at work on July 12. He was told of it by two business office employees, Gwen Eisenbraun and Julie Kusher. The incident had not been described to him as a prolonged battle or fight, and he did not think it was serious. Sometime in August (the witness actually testified to "a couple of months later"), Knowles chanced to comment to Allen regarding the July 12 lunchroom incident. He was surprised that Allen appeared not to have heard of it previously.

43) About a week after the closing conference of August 9 that he attended, Complainant learned from Allen that the incident with Hertenstein was under investigation.

44) Allen interviewed Complainant in mid-August, saying that he was investigating an "extremely dangerous" incident involving Complainant. Allen interviewed Hertenstein the following day, and later told Complainant that he wanted to speak with him. Allen did not interview Donovan. On August 22,

Complainant and Hertenstein went together to meet with Allen. Complainant wanted Hertenstein to be present as his union representative. Allen would not allow this and was upset. Doris Dorsey was present with Complainant and Allen and took notes.

45) Allen stated he had only recently heard about the lunchroom incident. He said Complainant had knocked Hertenstein down and injured his arm. Allen said he had asked Hertenstein to fill out a workers' compensation accident report (801 form) and see a doctor and when Hertenstein had not done so, Allen filled out an 801 for Hertenstein's signature which Hertenstein had not yet signed.

46) Complainant disagreed with the version of the incident stated by Allen, and pointed out that the date given for the occurrence, July 18, was also incorrect. Complainant expressed his opinion that Allen was "making a mountain out of a molehill" and that the incident would not have been discussed except for the "asbestos situation". Allen stated that had nothing to do with "this problem." He also stated at least three times that Complainant's position as an officer of the union had nothing to do with it.

47) Allen cited a prior performance evaluation of Complainant as supporting his opinion that Complainant's attitude was negative and violent. He told Complainant he had recommended to Nutt that Complainant be discharged, and that Nutt had decided to do his own investigation and would meet with Complainant later that week.

48) When Allen asked Hertenstein to fill out an 801 on the lunchroom incident, Hertenstein was reluctant to do

so because he had not up to that time sought medical attention and didn't intend to do so. He had a slight bruise and some soreness, but had not considered himself hurt. The situation was embarrassing to him in a way because of the language he had used. He did not sign the 801 that Allen had drafted because it made the situation sound more serious than it actually was. He was told that he could change the form.

49) During and after their respective investigations of the July 12 incident both Allen and Nutt urged Hertenstein to see a doctor. Both telephoned him at home in that regard, with Allen calling at least twice.

50) On August 25, OR-OSHA issued its citation describing the violations found and the penalties resulting from the July inspection. On August 26, OR-OSHA issued its amended citation.

51) The penalties assessed were enhanced due to the unauthorized entry being made after the initial inspection, because Respondent then had knowledge of the hazard and the risk.

52) Ron Stewart was the head custodian at West Linn High School in 1988. At time of hearing he was district custodial supervisor for the Oregon City School District.

53) Ron Stewart became aware that asbestos was possibly a problem at Willamette Middle School at the time the District tested for it and began treating the project as if there were a hazard. In the summer of 1988, he spent from 4 to 10 hours per week with Allen. Allen expressed upset with Complainant for having called in

government agencies before first telling the administration of his concerns. Allen thought Complainant may have called the federal Environmental Protection Agency, the state Department of Environmental Quality, and OR-OSHA.

54) On August 26, Complainant met with Nutt. Also present were Donovan, Hertenstein, and Leota Clark. Nutt interviewed Complainant, Hertenstein, and Donovan. Nutt decided that dismissal was not appropriate and determined to transfer Complainant to West Linn High School as night custodian, 11 p.m. to 7 a.m., effective September 1, 1988. Nutt confirmed the involuntary transfer in a letter to Complainant dated September 2, 1988. The transfer also resulted in changing his job class from Groundskeeper II to Custodian I, and freezing his pay at \$9.27 an hour until his Custodian I pay equaled or exceeded that amount.

55) Combining the lunchroom incident, which Nutt referred to as occurring on July 18, with items in Complainant's previous performance evaluations, Nutt perceived "a tendency on [Complainant's] part to respond to personal frustration and imitation at the behavior and statements of other people in an aggressive and physical manner." Nutt stated that the transfer was to reduce what Nutt saw as the possibility of Complainant's reactive physical aggression against students and adults by reducing his contact with them. Complainant was also instructed to attend counseling with CAPE Counseling Services, Inc., an employee assistance contractor, regarding anger control.

56) Notes prepared by Allen for a grievance proceeding after the events of July-August 1988 outlined a number of Complainant's deficiencies as seen over a period of 13 years by Allen, including intimidation of temporary labor and subordinates, complaints from other staff, absenteeism, poor staff relationships, negative attitude, unsatisfactory use of time, leaving early, production below supervisor's expectations, poor initiative, and not being dependable. There was one official warning of neglect of duty. None of Complainant's previous evaluations noted any instance of physical assault or the threat of physical assault.

57) Complainant's October 1987 evaluation, prepared and signed by Allen, noted a need to improve staff relations and cited a "negative attitude," lack of leadership, and poor use of time. In the evaluation Allen recommended that Complainant continue employment and stated that Allen wanted to see increased production, a positive attitude, and good communication with Allen and fellow workers. Complainant was marked as needing improvement in staff relations and six other areas. There was no "unsatisfactory" quality marked.

58) On September 12, 1988, a few days after Complainant's involuntary transfer, Allen gave him an evaluation Allen had prepared for the period July 1, 1987, to September 1, 1988. It found Complainant "unsatisfactory" in "staff relations" and in 9 of 11 other qualities such as dependability, judgment, etc. It contained recitations of generalized problems including absence of initiative, general inactivity, unessential travel between locations,

leaving work sites early, and curt, argumentative responses showing a lack of respect to supervisors and the District. It mentioned the "confrontation" with Hertenstein (still placing it on July 18) as "gross misconduct" and included the following:

"Your behavior in the period ranging from late July to August involving serious problems the district was having regarding asbestos at Willamette Middle School displayed a personal attempt to embarrass the West Linn School District, its managers, and the superintendent. I cite your personal notification to DEQ and your statements to SAIF as direct attempts to embarrass and discredit the integrity of others. \* \* \*

59) Nutt directed Allen to reprimand Hertenstein and on September 13, 1988, Hertenstein received a written reprimand signed by Allen and dated September 6 concerning the "July 18, 1988 incident." Allen stated that Hertenstein's temper had been a problem in the past and warned him against "further incidents of temperament and insulting language." Allen prepared a performance evaluation on Hertenstein for the period July 1, 1987, to December 1, 1988, and signed it February 7, 1989. Hertenstein was marked as "needs to improve" in staff relations and judgment. All other qualities were marked as either "meets expectations" or "exceeds expectations."

60) Complainant disagreed with the evaluation dated September 12, but did not express his disagreement to Allen. He filed his complaint with the Agency on September 19, 1988. The Agency notified Respondent of the

complaint by letter dated September 22, 1988.

61) Allen prepared a revised evaluation of Complainant dated October 7, 1988, covering the same period as the one dated September 12. Four of the qualities previously marked "unsatisfactory" (dependability, planning, scheduling, and judgment) were upgraded to "needs to improve." The paragraph containing the language quoted in Finding 58 was excised at Nutt's direction.

62) Ron Stewart first worked with Complainant in 1983 at a grade school where Stewart was a night custodian and Complainant was a groundskeeper. He worked as a groundskeeper for Complainant the following summer. He was next custodian at a grade school where Complainant worked as groundskeeper. He later became a custodian at West Linn High School and worked with Complainant on a groundskeeping project there. Beginning in September 1988 he supervised Complainant at West Linn High School until November 1989. As a supervisor, he did not have hire/fire authority.

63) Complainant's relationships with other employees were sometimes good and sometimes strained. Ron Stewart had input into Complainant's 1989 performance evaluation as a custodian wherein Complainant was rated as meeting expectations in pupil relations and staff relations and as improved overall. He found that Complainant asked for and worked better with structured duties, and had a tendency to challenge direction. He never observed Complainant doing or

threatening to do violence. He thought highly of Complainant as an employee.

64) Ron Stewart had observed over several years that Complainant and Hertenstein did not always get along. He became aware of the lunchroom incident from Allen about two or more weeks after it happened. Allen said at the time that he intended to investigate the matter and have Hertenstein go to the doctor.

65) Woodward was acquainted with Complainant for approximately 10 years prior to hearing. She saw him at work periodically during that time, depending upon the location of his work. He was union vice president when she was president. She never observed him being violent.

66) Rice had known Complainant since 1979; she saw him daily, at the beginning and end of the work day when he was a groundskeeper. She didn't consider him violent. She was also acquainted with Hertenstein, who could be rude and abrupt, but was not violent.

67) Complainant turned in a set of keys to Rice when the transfer became effective. Rice initiated a conversation with Allen about why Complainant was being transferred. Allen commented in Rice's presence "that's the last straw," but Rice was unable to recall whether that referred to the asbestos incident or the July 12 altercation.

68) Mark Touhey worked as a groundskeeper with Complainant prior to September 1, 1988. At time of hearing he was head groundskeeper. He found Complainant to be a difficult co-worker who "ran others into the

ground." He didn't get along with Complainant.

69) At time of hearing, Leo Mosier was custodian at Wilsonville Elementary School. He had been a custodian at West Linn High School when Complainant was night custodian there. He got along with Complainant; he saw Complainant on breaks and had no problem with Complainant.

70) Donovan had known Complainant for approximately 18 years at time of hearing, and had known Hertenstein for a similar time. He did not work directly with either one, but worked around both and met them regularly for morning coffee. He did not consider either of them to be violent.

71) Complainant initiated a grievance, under the OSEA-Respondent collective bargaining agreement, concerning his involuntary transfer. He did not include specifically the reprimand or requirement for counseling which accompanied the transfer. The grievance moved through the various prescribed levels of supervisor (Allen), department head (Nutt), superintendent (Dea Cox), and school board.

72) Woodward took notes of the superintendent level meeting on Complainant's grievance over his transfer.

73) At the superintendent level, Dea Cox refused to hear or consider whether Complainant's report to OR-OSHA of the entry into the asbestos area was a motivating factor in transferring Complainant.

74) At times material, Leota Clark had been a field representative for OSEA, the bargaining agent for Respondent's bargaining unit employees,

for over three years. Nutt initiated his investigation at her request. Complainant's grievance was the first such dispute up to that time upon which Nutt would not negotiate.

75) Complainant's involuntary transfer was upheld at all levels, and his grievance resulted in an arbitration hearing as provided in the collective bargaining agreement. Respondent's position was that the transfer was not a demotion and not disciplinary. The arbitrator found in April 1989 that the transfer was a disciplinary demotion, which was based on "just cause" arising out of the lunchroom incident and denied the grievance.

76) At arbitration, while acknowledging the likelihood that Complainant's role (in calling OR-OSHA) "was on the minds of District administrators at the time they decided upon reprimand and demotion," the arbitrator held that the involuntary transfer would have been assessed regardless of any "partially discriminatory motive." Part of the arbitrator's reasoning was based on the failure to grieve the reprimand aspect and the counseling requirements of Respondent's September 2 transfer letter.

77) The arbitrator found as fact that the inspection, the Complainant's entry into the building at Allen's direction, his report of the entry to Wolf-McCormick, Wolf-McCormick's call to Dea Cox, and Nutt's remonstrance with Complainant over calling OR-OSHA all occurred on July 26, and that Wolf-McCormick's opening conference occurred thereafter on July 27.

78) As groundskeeper, Complainant had worked a five day week, 7 a.m. to 3:30 p.m. at several schools in

the south end of Respondent's district. The teaching staff began arriving around 7:30 a.m. and the students arrived shortly thereafter. He had little interaction with students or staff, generally limited to spoken greetings.

79) In the custodial position at West Linn High School, Complainant worked from 10:15 p.m. to 6:45 a.m., Sunday night through Friday morning when school was in session. He sometimes was required to be in earlier in order to prepare the gym for a basketball game. He worked a 7 a.m. to 3:30 p.m. shift when there was no school. His duties were to clean offices, hallways, and restrooms.

80) There was also a security aspect to Complainant's custodial duties. When he arrived at work at night, he determined the location of any staff or students working late, asked them to advise him when they left, and assured that the building was locked. In the morning, the building engineer arrived about 6:30 a.m. Students and teachers sometimes arrived as early as 5:30 a.m. for sports practices. Other than the communication necessary for these duties, his interaction with others was generally limited to spoken greetings. His duties did not include ejecting unauthorized or unruly persons. He could call the police for that.

81) The position of night custodian at West Linn High School provided the incumbent with more public contact with students than did the District groundskeeper position.

82) Dea Cox recalled few details of the events of July through September 1988 regarding Complainant, the asbestos incident, and Complainant's grievance. He stated it was a long time

ago. He was unable to recall the date of his suspicion of asbestos risk or his actions other than eventually shutting down the project. He did not recall that both OR-OSHA and the Oregon Department of Environmental Quality levied fines. He did not recall saying he was upset with Complainant, and doubted he would have said it. He stated he had left the handling of the lunchroom incident to Nutt. He did recall thinking that the OR-OSHA fine was unjustified. He recalled that Complainant grieved his involuntary transfer and that he heard the grievance at the superintendent level. He testified that his concern at that hearing was whether Nutt was authorized to make the transfer, whether Nutt was justified in ordering the transfer, and whether the investigations by Nutt and Allen met due process standards. In this regard, he did not believe the asbestos situation was involved in Complainant's transfer. Due to the lapses in this witness's memory, the Forum has necessarily credited the testimony of other witnesses and the content of pertinent exhibits as to his statements and actions at times material over his testimony.

83) Following his transfer, Complainant's working hours on the graveyard shift negatively affected his sleeping habits, his home and family life, and his health. After becoming employed with Respondent, Complainant had obtained an associate degree in horticulture at Clackamas Community College, and prior to his transfer he operated a private landscape maintenance business in his off-duty time.

His available time for that venture was curtailed by the transfer, and he lost income from that source in an unspecified amount. He found it difficult to continue with a horticultural association to which he had belonged because of the changed hours and because he was no longer working in that occupational field. He believed that his professional abilities as a groundskeeper were negatively viewed by others because he was demoted back to the custodial field where he had started.

84) Had Complainant remained at his Groundskeeper II pay rate, he would have earned \$9.27 an hour between September 1, 1988, and March 31, 1989 (152 work days); \$9.55 an hour between April 1, 1989, and June 30, 1989 (65 work days); \$9.85 an hour between July 1, 1989, and June 30, 1990 (260 work days); and \$10.10 an hour between July 1, 1990, and May 14, 1991, the date of hearing (226 work days). As West Linn High night custodian, under terms of his transfer, Complainant earned \$9.27 an hour between September 1, 1988, and May 14, 1991. The Custodian I pay grade did not exceed the \$9.27 rate until July 1, 1991, when it rose to \$9.515 an hour. There was little or no overtime in either position.

85) The differential between Complainant's actual earnings and what he would have earned except for the transfer was \$145.60 from April through June 1989, \$1,206.40 from July 1989 through June 1990, and \$1,500.64 from July 1990 to the date of hearing, for a total of \$2,852.64. Respondent's additional Public

\* "work days" in this context includes Monday through Friday, and holidays and vacation days falling thereon.

Employees Retirement System (PERS) pick-up for each of those periods would have been \$8.74, \$72.38, and \$90.04 respectively.

86) Assuming that Complainant remained employed at the Custodian I rate since the hearing, the wage differential and PERS pick-up from that date to July 1, 1991, were \$232.40 and \$13.94, respectively. As of July 1, 1991, the pay for Custodian I became \$9.515 an hour and the pay for Groundskeeper II became \$10.375 an hour. The wage differential between Custodian I and Groundskeeper II was then \$6.88 per work day, and the PERS pick-up for that differential was \$4.128 per work day.

#### ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an Oregon school district operating and maintaining public schools, which engaged or utilized the personal service of one or more employees, reserving the right to control the means by which such service was performed.

2) At all times material herein, Complainant was employed by Respondent.

3) On July 26, 1988, OR-OSHA inspected one of Respondent's buildings which was being remodeled. The presence of friable asbestos, which creates an extreme, potentially toxic breathing hazard, was suspected. Respondent agreed with OR-OSHA's demand to close the building to all personnel. Respondent was advised by

OR-OSHA that there would be fines for violations which had already occurred.

4) Respondent ordered Complainant on July 27 to enter the closed building, without protective clothing or equipment, to obtain samples of the suspect material. Complainant reported the entry to OR-OSHA by telephone.

5) On or about September 1, 1988, Respondent transferred and demoted Complainant.

6) Respondent's claim that Complainant's transfer and demotion were due to his involvement in a July 12, 1988, altercation with a co-worker was pretextual.

7) Respondent transferred and demoted Complainant because Complainant called OR-OSHA to report entry into the closed building.

8) Complainant lost wages and suffered emotional upset, embarrassment, and financial distress as a result of the transfer and demotion.

#### CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110, ORS 654.001 to 654.295 and 654.750 to 654.780.

2) ORS 654.005 provides, in pertinent part:

"(5) 'Employer' means any person who has one or more employees, \*\*\*

"(7) 'Person' \*\*\* includes the state, state agencies, counties, municipal corporations, school

\* The bargaining agreement between Respondent and OSEA provided that Respondent pay the 6 percent employee contribution required by ORS 237.071.

districts and other public corporations or subdivisions."

ORS 654.062(5) provides, in pertinent part:

"(a) It is an unlawful employment practice for any person to \* \* \* discriminate against any employee \* \* \* because such employee has \* \* \* made any complaint or instituted or caused to be instituted any proceeding under or related to ORS 654.001 to 654.295 and 654.750 to 654.780 \* \* \*

"(b) Any employee \* \* \* who believes that the employee has been \* \* \* discriminated against in compensation, or in terms, conditions or privileges of employment, by any person in violation of this subsection may \* \* \* file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659.040. Upon receipt of such complaint the Commissioner shall process the complaint and case under the procedures, policies and remedies established by the ORS 659.010 to 659.110 and the policies established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the Commissioner if the complaint involved allegations of unlawful employment practices based upon race, religion, color, national origin, sex or age under ORS 659.030(1)(f). \* \* \*"

ORS 659.030(1)(f) provides that it is unlawful employment practice for an employer to retaliate against an

employee for opposing the employer's unlawful employment practice or for filing a complaint, testifying or assisting in a proceeding regarding the employer's unlawful employment practice, or for attempting to do so.

The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and the subject matter herein related to the alleged violation of ORS 654.062.

3) OAR 839-06-005 provides, in pertinent part:

"(1) ORS 654.062(5) of the Oregon Safe Employment Act [the Act] generally provides that no person can \* \* \* discharge \* \* \* or otherwise discriminate against an employee \* \* \* in compensation terms, conditions, or privileges of employment because that employee:

"(a) \* \* \*

"(b) Made any complaint under or related to [the Act];"

OAR 839-06-025 provides, in pertinent part:

"(1) 'Made any complaint' \* \* \* refers to the process by which an employee \* \* \* brings a health or safety hazard to the attention of the Accident Prevention Division (APD). \* \* \*

"(2) An employee \* \* \* who makes such a complaint is protected from discrimination under ORS 654.062(5). \* \* \*"

Complainant was entitled to the protection of ORS 654.062.

4) The conduct of West Linn School District, 3JT in transferring and

demoting Complainant on or about September 1, 1988, was a violation of ORS 654.062(5).

5) The actions, inaction's, statements and motivations of John Allen, Dea Cox, R. William Knowles, and Sam Nutt are properly imputed to the Respondent herein.

6) Pursuant to ORS 654.062, 659.010(2), and 659.060(3), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this record to award to this Complainant reinstatement to his former position and to award to this Complainant money damages for wage loss and emotional distress sustained, and to protect the rights of Complainant and of others similarly situated. The reinstatement, the sums of money awarded, and the other actions required of Respondent in the Order below are appropriate exercises of that authority.

#### OPINION

Complainant's involuntary transfer and resultant demotion was disciplinary in nature. This forum's task was to determine whether it was imposed as a permissible sanction for a breach of the employer's rules, in this instance fighting or assault, or was imposed because Complainant called OR-OSHA to report Respondent's breach of OR-OSHA's directive. On this record, the Forum concludes that the latter was the case.

#### The Lunchroom Incident

At the time of the confrontation between Complainant and Hertenstein, there was no effort on the part of either of them or on the part of Donovan, the only witness, to deny or hush up the

occurrence. It was known to several occupants of the administration building on the day it happened, including at least one manager (Knowles). No inquiry or action was initiated then. It was not until after the OR-OSHA inspection and after Respondent's administration was aware that Complainant had reported his entry into the closed building that the lunchroom incident became the purported cause of negative action toward him.

Complainant worked for Respondent for 13 years altogether up to the time of the events of the summer of 1988. He was not always a perfect employee. He was disciplined at least once, and evaluated as needing improvement in several areas. But perfection is not a prerequisite for statutory protection. None of his shortcomings triggered concerns for the Respondent's liability to students, co-workers, or patrons until the belated inquiry into the lunchroom incident.

Respondent asserts that an assault on a fellow worker is a serious disciplinary matter and points out that its rules and the bargaining agreement provide for immediate dismissal for such activity. The Forum agrees that assaulting behavior on the job is intolerable and should have serious consequences. But the altercation of July 12 occurred on off-duty time over who should have prepared hot water in what sequence. It did not impress those who were involved or those who learned of it that day, including at least one manager, as cause for serious concern. Respondent's sole connection to the incident was its geographic location. No product or program of Respondent's was disrupted, canceled, or delayed.

Complainant, Hertenstein, and Donovan continued to meet for coffee without further incident. It was over as soon as it began, and well before Respondent's administration chose to make it a vehicle for disciplining Complainant.

#### Respondent's Unlawful Motive

Respondent's administrators failed to recognize and acknowledge the extreme hazard attendant to asbestos removal, and were embarrassed by OR-OSHA's inspection and directives, as well as by the actions of other regulators. As a consequence, Allen, Nutt, and Dea Cox all reacted negatively upon learning that Complainant had called OR-OSHA following the inspection.

Allen stated that Complainant was in trouble for calling OR-OSHA, and was warned against retaliation by Wolf-McCormick. Thereafter, he investigated the July 12 incident without interviewing the eyewitness, and recommended that Complainant be discharged. He subsequently prepared a performance evaluation which demonstrated his pique over Complainant's part in the negative scrutiny of Respondent's policies and actions in regard to asbestos hazards. After Allen was directed to do so, he excised that portion of the evaluation and upgraded several performance indicators. He saw Complainant's past disagreeable attitude as a symptom of eventually aggressive behavior.

Nutt, in front of a witness, upbraided Complainant for calling OR-OSHA instead of coming to administration with his concerns. Nutt testified that he was not upset about Complainant reporting the entry for the samples

because he didn't know about that. Nutt stated that he thought that Complainant had reported to OR-OSHA the delivery of the note to the teacher who was to leave the building, and that he thought Complainant should have expressed his concerns to Nutt first. But either incursion violated OR-OSHA's directive and was reportable, and such a report was a protected activity. After Respondent had received notice of Complainant's filing with the Agency, Nutt directed Allen to revise Complainant's September 12 evaluation by removing the language regarding Complainant's part in reporting asbestos violations. He agreed with Allen that Complainant's attitude might ripen into violence against others, and used the lunchroom incident as an example. The transfer to West Linn High School was ostensibly intended to lessen the likelihood of Complainant confronting students, staff, or public. In fact, Complainant's contact with others was greater at the high school, a circumstance well within Nutt's knowledge and experience at the time of transfer.

Dea Cox expressed upset that Complainant had called OR-OSHA instead of bringing his concerns to Respondent's administration. He later refused even to consider that the recommended discipline might have been retaliatory.

Based upon this record, the Forum concludes that Complainant's report to OR-OSHA on July 27, 1988, played a key role in Respondent's decision to transfer and demote him, and that Respondent's assertion that the transfer resulted from the July 12 altercation was pretextual.

#### The Arbitration

The Commissioner's assessment of whether a violation of statute has occurred is not affected by the result of an arbitration under a collective bargaining agreement dealing with the same set of facts. The arbitrator is necessarily evaluating the factual context from the standpoint of the labor contract, recognizing the rights of the employer and the employee as parties to that contract, and acknowledging precedent from other arbitrations which were similarly limited to a labor agreement. The Agency is not a party to the contract or the arbitration. The arbitrator, by the nature of his or her office, decides a contractual issue; the Commissioner decides a statutory issue.

The Commissioner's determination of statutory violation is paramount. Otherwise, the statutes would afford little protection in any instance where the employer's mixed or conflicting motives could arguably justify discipline against a member of a protected class, even though class membership was the reason for the adverse employment action. An employer may discipline for cause and not violate statutory discrimination provisions, but the employer may not impose discipline if the motivation is discrimination prohibited by statute. Such discipline is not "for cause." *Vaughn v. Pacific Northwest Bell Telephone Company*, 289 Or 73, 611 P2d 281 (1980).

In this case, not only did the issues of contractual just cause and statutorily prohibited retaliation differ, but the evidence available to the respective factfinders also varied. Evidence presented to and accepted as

preponderant by the Forum clearly led to a different sequence of occurrences than that found by the arbitrator. For this reason, as well as for the reason of dissimilar issues, the result of the arbitration of Complainant's grievance over his transfer and demotion have no preclusive effect in this forum.

#### Respondent's Exceptions

Respondent objected to the Hearings Referee's overall conclusion that Complainant's involuntary transfer was in retaliation for Complainant having notified OR-OSHA of safety violations. The objection is grounded principally on the premise that the individual imposing the sanction (Nutt) was unaware of Complainant's entrance with Allen into the sealed off portion of the building to gather samples. Respondent admits Nutt may have been upset because he thought Complainant had called OR-OSHA about having to notify the teacher to leave the building, but since in fact Complainant did not call for that reason, Nutt was not upset over a protected activity and therefore not improperly motivated. Respondent posits a distinction without a difference. As stated earlier, any report of unauthorized entry was protected. Even if Nutt was unaware on July 27 that Complainant reported an entry for samples to OSHA, it is inconceivable that he was still ignorant of that fact on August 26, when the transfer was announced.

Respondent objected specifically to a number of Proposed Findings. I find that all were accurate reflections of the evidence, including inferences therefrom. *Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991); *City of*

*Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475 (1984). Two findings have been modified to improve accuracy: 37 (Rice's correct first name was Patricia) and 48 (Hertenstein acknowledged that he was told he could change the 801). Respondent's other objections are without merit.

#### Remedy

Having found that Complainant's transfer and resultant demotion were tainted by Respondent's discriminatory motive, the Commissioner is authorized to eliminate the effects of the unlawful practice. Those effects include Complainant's loss of position, his economic loss, and the mental and emotional distress resulting therefrom. The statutes also authorize the Commissioner to protect the rights of Complainant and of others similarly situated. See ORS 659.010(2).

Complainant is entitled to reinstatement to the position of Groundskeeper II, effective September 1, 1988. He is similarly entitled to the lost pay differential, including PERS contributions, from that date until he is reinstated in compliance with the Order below. Because he suffered emotional distress as a result of the unexpected demotion, I am awarding the sum of \$2,000 to compensate for that distress. I am also directing that a copy of the Final Order herein be included as part of Complainant's personnel file with Respondent, and that Respondent cease and desist from discriminating against any employee exercising that employee's rights and obligations under Chapter 654, Oregon Revised Statutes, the Oregon Safe Employment Act.

#### ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondent, WEST LINN SCHOOL DISTRICT, 3JT, is hereby ordered to:

1) Reinstate ROBERT LAWER to the position of Groundskeeper II with all pay, benefits, privileges, and seniority as if he had continued in that position and classification from September 1, 1988;

2) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for ROBERT LAWER, in the amount of:

a) SEVEN HUNDRED FORTY-EIGHT DOLLARS AND EIGHTY CENTS (\$748.80), representing wages Complainant lost between April 1 and December 31, 1989, as a result of Respondent's unlawful practice found herein; PLUS,

b) ONE HUNDRED THIRTEEN DOLLARS AND SEVEN CENTS (\$113.07), representing interest on the lost wages in subsection a) at the annual rate of nine percent accrued between January 1, 1990, and August 15, 1991, computed and compounded annually; PLUS,

c) ONE THOUSAND FOUR HUNDRED SIXTY-SIX DOLLARS AND FORTY CENTS (\$1,466.40), representing wages Complainant lost between January 1 and December 31, 1990, as a result of Respondent's unlawful practice found herein; PLUS,

d) EIGHTY-TWO DOLLARS AND EIGHT CENTS (\$82.08), representing interest on the lost wages in subsection c) at the annual rate of nine percent accrued between January 1, 1990, and August 15, 1991, computed and compounded annually; PLUS,

e) ONE THOUSAND NINETY-SEVEN DOLLARS AND TWELVE CENTS (\$1,097.12), representing wages Complainant lost between January 1, 1991, and August 15, 1991, as a result of Respondent's unlawful practice found herein; PLUS,

f) SIX DOLLARS AND EIGHTY-EIGHT CENTS (\$6.88) per day between August 16, 1991, and the date Respondent complies with the reinstatement portion of the Final Order herein; PLUS,

g) Interest on the foregoing, at the legal rate, accrued between August 16, 1991, and the date Respondent complies with the Final Order herein, to be computed and compounded annually; PLUS,

h) TWO THOUSAND DOLLARS (\$2,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

i) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order herein and the date Respondent complies therewith, to be computed and compounded annually.

3) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries confirmation that the employer's contribution on the wages in subsections 2) a), c), e), and f)

above required by Chapter 237, Oregon Revised Statutes, and the employer "pick-up" on the wages in subsections 2) a), c), e), and f) above required by bargaining agreement have been paid to the credit of the account of ROBERT LAWER with the Public Employee's Retirement System, together with appropriate interest on the "pick-up" portion which said funds would have earned in said account if paid into said account as if no reduction from Groundskeeper II had occurred.

4) File a copy of the Final Order herein in the personnel file of ROBERT LAWER maintained by Respondent.

5) Cease and desist from discriminating against any employee exercising that employee's rights and obligations under Chapter 654, Oregon Revised Statutes, the Oregon Safe Employment Act.

**In the Matter of  
Merwyn (aka Mirwyn) Andruss and  
Judith Bales, Partners, fdba  
RAINBOW AUTO PARTS  
AND DISMANTLERS,  
and fdba Rainbow Auto Recycling,  
Respondents.**

Case Number 24-91  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued October 31, 1991.

**SYNOPSIS**

Respondents operated an automobile wrecking yard where Claimant pulled parts, waited on customers, and resided on the premises for security. The Commissioner held that Claimant was an employee entitled to overtime, and that the facilities furnished were for the Respondents' benefit. Finding that Respondents failed to pay Claimant all wages due upon termination, the Commissioner awarded Claimant \$3,010 in unpaid wages and \$1,284 in penalty wages. ORS 652.140(2); 652.150; 653.035; 653.045; OAR 839-20-025; 839-20-030.

The above-entitled matter came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 20, 1991, in Suite 220 of the State Office Building, 165 East Seventh, Eugene, Oregon. The Bureau of Labor and Industries (the Agency) was

represented by Judith Bracanovich, an employee of the Agency. Merwyn (aka Mirwyn) Andruss and Judith Bales, Respondents, did not attend the hearing. Respondent Andruss telephoned the Hearings Referee at the commencement of the hearing. Respondent Bales, in writing prior to the hearing and with the assistance of counsel, specifically waived her right to hearing. Wage Claimant Clarence Russell "Larry" Fitzpatrick (Claimant), was present throughout the hearing.

The Agency called the following witnesses, in addition to Claimant: Orrella Snyder, Richard Engelhorn, Leslie A. Wright, Edward Dale Duke, Jr., and Agency employees Mary Schaack, June Miller, Eduardo Sifuen- tez, and Mary Erikson.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –  
PROCEDURAL**

1) On March 6, 1990, Claimant filed a wage claim with the Agency alleging that he had been employed by Rainbow Auto Recycling at 25850 Tidball Lane, Veneta, Oregon, owned by Merwin Andrews [sic] and Judy Burns [sic] between July 15, 1989, and February 3, 1990, and that said employers had failed to pay wages earned and due to him.

2) At the same time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor

and Industries, in trust for Claimant, all wages due from the employers.

3) Claimant's wage claim was brought within the statute of limitations (six years).

4) The Agency's investigation found that Rainbow Auto Parts and Dismantlers was an assumed business name of Larry Logsdon at the Veneta address, and that the true names of the persons for whom Claimant worked were Merwyn (aka Mirwyn) Andruss and Judith Bales.

5) On June 19, 1990, the Agency served on Respondent Larry L. Logsdon, dba Rainbow Auto Parts and Dismantlers, an Order of Determination No. 89-256. On October 31, 1991, the Agency served on Respondent Judy Ann Bales, Partner, dba Rainbow Auto Recycling, an Order of Determination No. 89-256. On November 3, 1990, the Agency served on Respondent Mirwyn Andruss, Partner, dba Rainbow Auto Recycling, an Order of Determination No. 89-256. Order of Determination No. 89-256 was based upon the wage claim filed by Claimant and upon the Agency's investigation.

6) The Order of Determination found that Respondents owed Claimant a total of \$3,010 in wages. The Order of Determination further found that Respondents' failure to pay Claimant was willful, that more than 30 days had elapsed since the wages became due and owing, and that Respondents owed Claimant \$1,284 as penalty wages. The Order of Determination required that, within 20 days, Respondents either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

7) Thereafter, Respondent Logsdon through his attorney John C. Fisher, Eugene, filed an answer to the Order of Determination and requested a contested case hearing. On December 3, 1990, Respondents Andruss and Bales through their attorney John R. Parrott, Eugene, filed an answer to the Order of Determination and requested a contested case hearing.

8) Respondent Logsdon's answer denied that he owed Claimant any unpaid wages, and further set forth the affirmative defense that Respondent Logsdon had sold his interest in Rainbow Auto Parts and Dismantlers (Rainbow Auto Parts) and in Rainbow Auto Recycling to Respondents Bales and Andruss.

9) The answer of Respondents Bales and Andruss acknowledged that Respondent Logsdon was the previous owner of Rainbow Auto Parts and was the landlord for Rainbow Auto Recycling, but otherwise was not involved with Claimant. The answer further denied that Respondents Bales and Andruss were partners and alleged that Respondent Bales was the proprietor of Rainbow Auto Parts, that Respondent Andruss was the proprietor of Rainbow Auto Recycling, that Claimant had agreed as an independent contractor to split profits with Respondent Andruss and had no employment relationship with Respondent Bales, and that no wages were owed. The answer further alleged that Claimant was indebted to Respondent Andruss for rental of a mobile home and for storage of Claimant's vehicles.

10) On March 20, 1991, the Agency sent the Hearings Unit a request for a hearing date, and on May

7. 1991, the Hearings Unit issued a Notice of Hearing to each Respondent and to his or her counsel, to the Agency, and to the Claimant indicating the time and place of the hearing. With the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200.

11) The Notice of Hearing and the described attachments were addressed in separate mailings on May 7 to Respondent Andruss at 2580 [sic] Tidball Lane, Veneta, Oregon, 97487, and at 1926 24th Street, Florence, Oregon, 97439, as well as to attorney Parrott.

12) The mailings for Respondent Andruss to Veneta and Florence were returned undelivered by the US Postal Service. On May 22, 1991, the Hearings Unit issued a Notice of Hearing together with the previously described attachments to Respondent Andruss in Kenai, Alaska, 99611. That mailing was not returned.

13) On June 10, 1991, the Hearings Unit notified the participants\* of a change in Hearings Referee. The Notice of Change of Referee was mailed to each Respondent and to his or her counsel, to the Agency, and to the Claimant. It repeated the time and place of the hearing. A Notice of Change of Referee was mailed on June 10 to Respondent Andruss in Kenai, Alaska, 99611, as well as to attorney Parrott.

14) The Agency advised the Forum on August 8, 1991, that the participants had agreed that the proceeding should be dismissed as to Respondent Logsdon. On August 8 the Forum advised attorneys Fisher and Parrott that the Forum intended to dismiss as to Respondent Logsdon on August 15 unless written objection to doing so was received.

15) Pursuant to OAR 839-30-071, on August 12, 1991, the Agency timely filed a Summary of the Case.

16) On August 13, 1991, attorney Parrott advised the Forum that he no longer represented Respondent Andruss but continued to represent Respondent Bales, and that a settlement was pending between the Agency and Respondent Bales.

17) On August 14, 1991, the Agency advised the Forum that the Agency had entered into a settlement with Respondent Bales.

18) On August 16, 1991, Respondent Bales signed a Consent Order herein, acknowledged by the Agency on August 20, expressly waiving her right to contested case hearing, and agreeing to pay a sum in settlement of the Agency's claim against her.

19) At or near 9 a.m. on August 20, 1991, at the commencement of the hearing, Respondent Andruss reached the Hearings Referee by telephone in the hearings room in Eugene. The conversation was recorded as part of the record herein with the express permission of Respondent Andruss, who was not under oath.

20) Respondent Andruss stated that he was calling from Valdez, Alaska, that he had been unable to arrange transportation from Alaska in order to attend the hearing, and that he would be available after October 20, 1991, for the purpose of resolving this matter. He acknowledged that attorney Parrott no longer represented him, and stated further that he had retained unnamed counsel in Salem, Oregon to represent him.

21) The Hearings Referee treated Respondent Andruss's statements as an application for postponement of the hearing. The Hearings Referee orally found that Respondent Andruss had received timely notice of the hearing, which statement was not disputed by said Respondent. The Hearings Referee further advised Respondent Andruss that his application was untimely, that in no event could the case be delayed to or after October 20 because of other matters on the Hearings Unit's docket. The Hearings Referee told Respondent Andruss that the hearing would proceed, that the Hearings Referee would render a Proposed Order based on the evidence presented, and that Respondent Andruss would receive a copy of the Proposed Order and have opportunity to file exceptions thereto, pursuant to the rules of the Forum.

22) Based on the foregoing, the Hearings Referee found Respondent Andruss in default for non-attendance pursuant to OAR 839-30-185(1)(b) and (c). Said Respondent was granted ten days from the date of the Proposed Order herein to apply for relief from default by submitting a written request to the Hearings Referee accompanied by

a written statement, together with appropriate documentation, setting forth facts supporting Respondent's claim of good cause for said relief.

23) At the commencement of the hearing, pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

24) At the commencement of the hearing, the Hearings Referee approved the Agency's request to dismiss Respondent Logsdon and ruled that reference to Respondent Logsdon in the title of the case be eliminated. The title was changed to that appearing on the first page of this Final Order.

25) The Proposed Order, which included an Exceptions Notice, was issued on September 16, 1991. Exceptions, if any, were to be filed by September 26, 1991. Any request for relief from the Hearings Referee's finding of default against Respondent Andruss were to be filed by September 26, 1991. No exceptions were received. No request for relief from default was received.

#### FINDINGS OF FACT – THE MERITS

1) From May 1966, Rainbow Auto Parts and Dismantlers was an assumed business name of Larry Logsdon, Veneta, Oregon, for an automobile wrecking yard he ran on property near his home. Due to a stroke, Logsdon could not operate the business after 1985.

2) Ordella Snyder was a caregiver to Logsdon following his stroke. He continued to own the property upon which the business was located at

\* "Participant" or "participants" includes the charged parties and the Agency. OAR 839-30-025(17).

25850 Tidball Lane, Veneta, and continued to reside on another portion of the property.

3) In September 1987, Respondents Bales and Andruss entered into an agreement with Logsdon to operate under his "business license" as "Rainbow Auto Wreckers" under agreed payments and conditions which effectively disposed of all of Logsdon's interest in the business. The agreement was intended as a sale.

4) In 1989, the Agency obtained and docketed a default judgment on the wage claim of Anthony J. Chancellor against Merwin Anderess, aka Merwin Andruss, dba Rainbow Auto Parts.

5) During the Agency's investigation of the Chancellor wage claim, Respondent Andruss acknowledged an ownership interest in Rainbow Auto Parts.

6) Claimant was hired to work at the wrecking yard by Respondent Andruss in July 1989. Respondent Andruss usually instructed Claimant in his duties, although at times Respondent Bales issued directions. Claimant worked there until he quit in early February 1990.

7) During the Agency's investigation of Claimant's wage claim, Respondent Bales stated that Claimant was the employee of Respondent Andruss.

8) During the Agency's investigation of Claimant's wage claim, Respondent Andruss stated that Claimant was an independent contractor to be paid a percentage of the profits of the business. Respondent Andruss supplied no evidence of payment or of any such agreement.

9) Respondent Andruss stated to others that Claimant was his employee.

10) Claimant's duties included driving the fork lift, cutting up metal scrap, "pulling" parts, selling parts, answering the business telephone, clean-up, and acting as night watchman. He was not authorized to hire or direct others. All tools and equipment, except Claimant's personal hand tools, were supplied by Respondents.

11) Richard Engelhorn was hired in 1989 by Respondent Andruss to do some caterpillar work. He also worked in the wrecking yard, and at times acted as foreman over Claimant as agent of Respondent Andruss.

12) In early 1989, Respondents Bales and Andruss lived at the business address in premises above the office. After Claimant was hired, Respondent Andruss asked Claimant to live in a mobile home on the property and act as watchman. Respondents Andruss and Bales then lived away from the business in Florence, Oregon, but stayed at the Tidball Lane address occasionally.

13) At times material, Leslie A. Wright lived on Tidball Lane on property next to the wrecking yard. He helped Claimant move in when Claimant was assigned the watchman duties. He helped Claimant move out and provided him with a place to stay after Claimant quit.

14) Respondent Andruss operated the business and Respondent Bales did the books.

15) Claimant had permission from Respondents to keep his own vehicles on the property without a fee for

storage. He was not expected to pay rent for the mobile home or to pay for utilities or firewood. He did not use any fencing materials.

16) Respondents did not establish regular paydays for Claimant. He was paid in cash upon request by either Respondent Andruss or Respondent Bales. Such payments never equaled the amount they owed him, and were usually accompanied by promises of more money later.

17) Claimant mentioned to several people that he was not paid regularly for his services.

18) Claimant was promised \$6.00 per hour by Respondent Andruss. Claimant kept a calendar of hours worked and noted cash payments made by Respondents. He gave this information to the Agency when he filed his wage claim.

19) Based on his diary of hours worked and notations of cash payments received, Claimant was owed \$3,010 by Respondents when he quit on February 3, 1990. Said amount was not paid 48 hours later on February 5, 1990, or at any time thereafter. Claimant had never received a W-2 form.

20) There was no evidence that Respondents kept accurate or any record of the hours worked by Claimant or of the payments made to Claimant.

21) After Claimant quit, Respondent Andruss tried to get rid of Claimant's wage claim either by giving him someone else's vehicle or through intimidation.

22) More than 30 days have passed since February 5, 1990.

23) Claimant's average daily wage during the period July 1989 to February 1990 was \$42.81.

#### ULTIMATE FINDINGS OF FACT

1) From 1987 to and after February 1990, Respondents Judith Bales and Merwyn Andruss (aka Merwin or Mirwyn Andruss or Anderess) owned and operated an auto wrecking and salvage business known variously as Rainbow Auto Parts and Dismantlers and/or Rainbow Auto Recycling located at 25850 Tidball Lane, Veneta, Oregon.

2) Between July 1989 and February 1990, Claimant rendered personal services in this state to Respondents, who agreed to pay Claimant at a fixed rate of \$6.00 per hour worked. Respondents controlled his services and the means by which they were performed.

3) Claimant resided in facilities furnished by Respondents Bales and Andruss for the benefit of Respondents Bales and Andruss.

4) Respondents failed to pay wages owed to Claimant in the amount of \$3,010, including overtime, within 48 hours after he quit.

5) Respondents' failure to pay said sum when due was willful, and said sum has remained unpaid for more than 30 days.

6) Claimant's average daily wage during the period July 1989 to February 1990 was \$42.81.

#### CONCLUSIONS OF LAW

1) During all times material herein, Respondents were employers and Claimant was an employee subject to the provisions of ORS 652.110 to

652.200, 652.310 to 652.405, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.405 and 653.010 to 653.261.

3) Prior to the commencement of the contested case hearing, the Forum served the Respondents with information informing them of their rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants present at the start of the hearing.

4) Respondents Bales and Andruss operated a wrecking yard and salvage business at Veneta, Oregon as partners where they employed Claimant.

5) OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay. Respondents were obligated by law to pay Claimant one and one-half times his regular hourly rate of \$6.00, for all hours worked in excess of 40 hours in a week. Respondents failed to so pay Claimant.

6) ORS 652.140(2) provides:

"When any such employee, not having a contract for a definite period, shall quit employment, all wages earned and unpaid at the time of such quitting shall become due and payable immediately if such employee has given not less than 48 hours' notice, excluding Saturdays, Sundays and holidays,

of an intention to quit employment.

Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within 48 hours, excluding Saturdays, Sundays and holidays, after Claimant quit employment on February 3, 1990.

7) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee who is discharged or who quits employment, as provided in ORS 652.140, then, as a penalty for such non-payment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondents are liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

8) ORS 653.035 allows employers to deduct the fair market value of facilities or services furnished by the employer for the private benefit of the employee. OAR 839-20-025 provides that facilities or services furnished by the employer as a condition of employment shall not be considered to be for the private benefit of the employee. The mobile home occupied by

Claimant as part of his duties was not for his private benefit. Claimant was not, as a matter of law, indebted to Respondents for rent or maintenance of the premises he occupied for their benefit.

9) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

10) Respondents Bales and Andruss are indebted to Claimant in the amount of \$3,010 in unpaid wages, including overtime, with interest thereon from February 5, 1990, until paid, and in the amount of \$1,284 in penalty wages (30 days x \$42.81) with interest thereon from March 7, 1990, until paid.

#### OPINION

Respondent Andruss failed to appear at the hearing, and thus has defaulted as to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. See *In the Matter of Mega Marketing*, 9 BOLI 133 (1990); *In the Matter of Rogelio Loa*, 9 BOLI 139 (1990); *In the Matter of Judith Wilson*, 5 BOLI 219 (1986); *In the Matter of John Cowdrey*, 5 BOLI 291 (1986); *In the Matter of Art Farbee*, 5 BOLI 268 (1986). See also OAR 839-30-185.

Where a respondent submits an answer to a charging document and

fails to appear at hearing, the Forum may review the answer to determine whether the respondent has set forth any evidence or defense to the charges. *In the Matter of Richard Niquette*, 5 BOLI 53 (1986); *In the Matter of Jack Mongeon*, 6 BOLI 194 (1987). In a default situation where the respondent's total contribution to the record is his or her request for a hearing and an answer which contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by any credible evidence on the record. *Mongeon, supra*.

ORS 653.045 requires an employer to maintain payroll records. Where the Forum concludes that a claimant was employed and was improperly compensated, it is incumbent upon the employer to produce all appropriate records to prove the precise amounts involved. Where the employer produces no records, the Forum may rely on the evidence produced by the Agency "to show the amount and extent of [claimant's] work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate." *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96 (1989). Thus, the Forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimant.

The Agency has established a prima facie case. A preponderance of credible evidence on the whole record showed that Respondents employed Claimant during the period of the wage claim, and willfully failed to pay him all

wages, earned and payable, when due. That evidence, which established that Respondents owe Claimant \$3,010, was credible, persuasive, and the best evidence available, given Respondents' non-appearance. Considering all the evidence on the record, the prima facie case was not effectively contradicted or overcome.

Willfulness only requires that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Here, Respondents' admissions when paying money to Claimant, that they owed and would pay him more, established that Respondents knew they owed Claimant wages and intentionally failed to pay those wages. There was no evidence that Respondents were not free agents. Thus, their action or inaction was willful under ORS 652.150.

In his answer, Respondent Andruss contended that Claimant was not an employee, but was hired as an independent contractor. Oregon statutes do not define "independent contractor" for purposes of wage claim law. See *In the Matter of Kevin McGrew*, 8 BOLI 251 (1990); *In the Matter of Wayton & Willies, Inc.*, 7 BOLI 68 (1988); *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264 (1982), and the Oregon cases cited therein. Oregon case law holds that the primary determiner is the extent to which the employer has the right to control and direct the details and manner of performance of the worker's work. In this case, the evidence on the record establishes that

Respondents had the right to and did control and direct the details and methods of Claimant's work.

Claimant provided services which were an integral part of Respondent's business, was hired for an indefinite period of time, worked exclusively for Respondents on an hourly basis, used only Respondent's equipment and supplies, and derived no benefits other than wages for his work. This clearly established that Claimant was an employee.

Respondent Andruss contended that he was entitled to a counter-claim or offset for rent of the mobile home occupied by Claimant while Claimant worked at the wrecking yard. Several witnesses verified that Claimant was required to live there to provide security for the yard. This was plainly for the owner's benefit and not for the "private benefit of the employee." ORS 653.035, OAR 839-20-025.

The uncontroverted evidence was that Respondents took over the business from Logsdon together, that both directed Claimant's activities, that both paid him sums on the wages owed, and that both exercised dominion over the business enterprise. As to liability for Claimant's wages, Bales and Andruss were partners, and were jointly and severally liable.

The record establishes that Respondents violated ORS 652.140 as alleged, and that they owe Claimant civil penalty wages pursuant to ORS 652.150.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and

Industries hereby orders MERWYN (aka MIRWYN or MERWIN) ANDRUSS and/or JUDITH BALES, PARTNERS, to deliver to the Business Office of the Bureau of Labor and Industries, 305 State Office Building, 1400 SW Fifth Avenue, PO Box 800, Portland, Oregon 97207-0800, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR CLARENCE RUSSELL FITZPATRICK in the amount of FOUR THOUSAND TWO HUNDRED NINETY-FOUR DOLLARS (\$4,294), representing \$3,010 in gross earned, unpaid, due, and payable wages, less legal deductions previously taken by the Respondents; and \$1,284 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$3,010 from February 5, 1990, until paid and nine percent interest per year on the sum of \$1,284 from March 7, 1990, until paid.

In the Matter of  
AMALIA YBARRA,  
dba A A Unlimited,  
Respondent.

Case Number 33-91  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued October 31, 1991.

#### SYNOPSIS

Respondent, a farm labor contractor, failed to acknowledge on her license application that both her brother and her father had financial interests in her business, failed to accurately list her home and business addresses, and failed to supply accurate information about motor vehicles used in her operation. Finding that such information was substantive and influential on the decision to grant a farm labor contractor license, the Commissioner denied Respondent's license application. ORS 658.405; 658.415(1); 658.420(1) and (2); 658.440(3)(a); OAR 839-15-520(1)(a), and (3)(a) and (h).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on August 22, 1991, in Room 311 of the State Office Building at 1400 SW Fifth Avenue, Portland, Oregon. Lee Bercot, Case Presenter for the Wage and Hour Division of the Bureau of Labor and Industries (the Agency), appeared on behalf of the Agency.

Amalia Ybarra (Respondent) did not appear at the hearing in person or through a representative.

The Agency called the following witnesses (in alphabetical order): Lee Bercot, William Pick, Compliance Specialist for the Agency; and Vasilie Shimanovski, Field Representative for the Agency.

Having fully considered the entire record in this matter, I, Mary Wendy 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 January 23, 1991, the Agency issued a "Notice of Proposed Denial of a Farm Labor Contractor License" to Respondent. The notice informed Respondent that the Agency intended to deny her application for a farm labor contractor's license. In the notice, the Agency cited two bases for the denial. First, it charged Respondent with two violations of making a misrepresentation, false statement, and/or willful concealment in the application for a license. The Agency alleged that Respondent listed on her application an incorrect home phone number, and failed to list an address that she used in her business. Second, the Agency charged Respondent with two violations of failing to list all persons financially interested in her operations as a farm labor contractor. The Agency alleged that Respondent had received saws and other reforestation equipment from her brother, Roberto Cantu, without receiving

payment for those assets. It also alleged that Respondent had used or planned to use two trucks owned by her father, Salvador Cantu, to transport workers in her business. The notice was served on Respondent on January 24, 1991.

2) By a letter dated March 21, 1991, Respondent requested a hearing on the Agency's intended action.

3) On March 26, 1991, the Agency gave Respondent an extension of time to file an answer to the "Notice of Proposed Denial of a Farm Labor Contractor License." On April 2, 1991, the Agency received the Respondent's answer. She denied the charges of misrepresentation, and stated:

"When I applied for my license I was moving to 34712 S. Meridian Rd. and was hoping to rent or sell my home. I did move but I left my business telephone connected with an answering service because I had that number on my business cards. I was unable to rent or sell my [home] so I have since moved back into 330 S Persing [sic]. I did leave my vehicle parked at 330 S Pershing since it was still my home and I still didn't have a business going since I couldn't get my license."

Respondent also denied that her brother and father were financially interested in her business, stating:

"My brother Roberto Cantu and Salvadore [sic] Cantu have never or will ever have and [sic] financial interest in my business. I have paid my brother for the chain saws and nothing else was ever exchanged, he was to be an

employee of my company and he was to get paid for his hours worked. Salvadore [sic] Cantu never said nor gave permission, nor was ever asked by the investigator in regards to using his two trucks for my business. Roberto Cantu said the trucks were never discussed with the investigators since they were not his trucks to discuss. Roberto Cantu was to be an employee for my company and he had no knowledge of my plans for my company."

4) On June 13, 1991, the Agency requested a hearing date from the Hearings Unit. Along with the request, the Agency filed a motion to amend its notice.

5) On July 2, 1991, the Hearings Unit issued to the Contractor and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent to the Contractor a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process -- OAR 839-30-020 through 839-30-200.

6) On June 28, 1991, the Agency withdrew its motion to amend the "Notice of Proposed Denial of a Farm Labor Contractor License."

7) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file. Although permitted to do so under the provisions of OAR 839-30-071, Respondent did not submit a Summary of the Case.

8) On August 12, 1991, Respondent requested a postponement of the hearing that was set to begin on August 13. The reason for the request was that Respondent's grandmother in Texas was ill, and Respondent needed to go to Texas to get her son and bring him back to Oregon. The Hearings Referee found that the Respondent had shown good cause for the postponement, because the illness of her grandmother and the need to retrieve her son were circumstances over which Respondent had no control, citing OAR 839-30-070(7) and 839-30-025(11). Respondent agreed to a postponement of the hearing until August 22, 1991.

9) The Proposed Order, which included an Exceptions Notice, was issued on September 11, 1991. Exceptions, if any, were to be filed by September 23, 1991. No exceptions were received.

#### FINDINGS OF FACT – THE MERITS

1) On October 3, 1989, Respondent applied for a Farm Labor Contractor Certificate of Registration from the US Department of Labor. She listed her "Permanent Place of Residence" as 330 S. Pershing, Mt. Angel, and her phone number as 845-6715. She listed PO Box 707, Mt. Angel as a mailing address. She indicated that transportation would not be provided to workers.

2) In November 1990, Respondent submitted to the Agency a completed farm labor contractor license application dated November 2, 1990. On the basis of the application, the Agency issued to Respondent a temporary permit on November 29, 1990. That permit expired 60 days later.

3) On the farm labor contractor license application, at question number 4, Respondent entered as her home address: "34712 S. Meridian Rd, Woodburn, Marion, Or 97071." She listed her home phone number as "845-6715." She listed the exact same information at question number 8 as her business address and business phone number. At question number 10, for her mailing address Respondent entered "P.O. Box 707, Mt. Angel, Marion, OR 97362." At question 13, where applicants are to list "all other permanent/temporary addresses the applicant uses or will use and corresponding telephone numbers," Respondent checked "None." At question number 14a, Respondent listed the following vehicles as those she used in the operation of her farm labor contracting business: (1) a 1984 GMAC Jimmy (without a license number or serial number), registered to her at the post office box above; (2) a 1978 Dodge Colt (without a license number or serial number), registered to her at the post office box above; and (3) a 1976 Chevrolet Suburban, Oregon license number QDV 273, serial number CCL 266F179215, registered to her at "330 S. Pershing, Mt. Angel, Or 97262." She checked that the Colt and the Suburban would be used to transport workers. At question number 18, which asks "What percentage of the company or business do you own?", Respondent entered "100%." At question 19, which asked for information about "all persons financially interested, whether as partners shareholders, associates or profit-sharers, in the applicant's proposed operations as a labor contractor," Respondent entered "none."

4) During times material, the property located at 34712 S. Meridian Road, Woodburn, Clackamas County, Oregon belonged to Salvador Cantu.

5) On November 2, 1990, Respondent filled out a business financial statement for a bank. She listed her business address as PO Box 707, Mt. Angel, OR 97362, and her telephone number as 845-6715. Respondent listed her assets as \$5,000 in cash, \$13,000 in "Machinery, Equip., Fixtures," and \$6,900 in "Autos, Trucks, Etc."

6) On November 2, 1990, Respondent filled out an individual financial statement for the bank. Among other assets, Respondent showed cash of \$4,000, receivables (not due) of \$6,800, her "residence" at 330 S. Pershing worth \$53,000, and a 1984 Chevrolet Blazer worth \$7,800. She showed her home phone as 845-6715, and her occupation as "Realty."

7) On November 2, 1990, Respondent executed a contract bond application with the Bond Experts. She listed her company address as 330 S. Pershing, Mt. Angel, Oregon 97362, with telephone number 845-6715. For her "residence address," Respondent listed PO Box 707, Mt. Angel, Oregon 97362. She listed Roberto Cantu as her foreman, with nine years of experience, and nine years "with the firm." Respondent answered "yes" to the question, "Do you own adequate equipment to process your jobs?" And to the question "Are you contemplating buying any significant equipment in the next year," Respondent answered "I don't anticipate buying right away."

8) On a commercial auto insurance application, dated November 16,

1990, Respondent listed as her business address: "PO Box 707, Mt. Angel, Marion, OR 97362." For her phone number, she listed "503 845-6715." Under the heading "Garaging Address If Different," she entered "330 So. Pershing St., Mt. Angel, OR 97362." The vehicle to be covered by the insurance was a "76 Chevy Suburban," vehicle I.D. number "CCL266F179215."

9) On around November 29, 1990, Respondent applied for a farm labor bond from The Bond Experts. She listed her business address as 330 S. Pershing, Mt. Angel, Oregon 97362. The obligee was the Agency. On around that same date, she also applied for another farm labor bond, with the State of Washington as the obligee. She listed her business address as 330 S. Pershing, Mt. Angel, Oregon 97362, and her phone as 845-6715.

10) In early December 1990, Respondent executed bid bonds for two US Forest Service contracts, listing her business address as 330 S. Pershing, Mt. Angel, Oregon 97362.

11) On December 12, 1990, Respondent visited Compliance Specialist Bill Pick in response to a letter he had sent her regarding her license application. She told Pick that she was the sole owner of PO Box 707 in Mt. Angel. She said that the home at 34712 S. Meridian Road in Woodburn, which she listed as her home and business address on her application, was her parents' home. She said the 330 So. Pershing address was a home she owned but was renting to her sister. She said that telephone number 845-6715 was at her home on Pershing. She garaged the 1976

Suburban at that address, and admitted that she should have listed that address at question 13 of the application. She said she had sold the 1978 Colt listed on the application, and agreed to call in the license and I.D. numbers for the 1984 GMAC Jimmy. She said she intended to transport workers only in the Suburban, and that was why it was the only vehicle listed in the commercial auto insurance application. She said she was a part-time real estate salesperson. She said she had no experience as a farm labor contractor, but planned to employ her brother, Roberto Cantu, who had worked in the business for many years in Washington. She told Pick that she had about \$15,000, which included a vehicle, to put into the business. She said she had received some saws and other reforestation equipment from her brother, but had not paid him for it. She said Roberto Cantu would have no financial interest in the business, and that she had about \$10,000 cash to work with. She said her brother would work for her as a crew foreman and her authorized contract representative. She denied any business connection with Demetrio Ivanov, but said Ivanov was a friend of her father's.

12) The Commissioner denied Demetrio Ivanov a farm labor contractor license on April 11, 1988.

13) According to Pick, "it would be extremely difficult without considerable previous experience in reforestation work" to place bids "in a fashion that would give you any chance of receiving the contracts."

14) On December 12, 1990, Respondent took an examination necessary to become a licensed farm labor

contractor. From her correct answers on the examination, the Forum finds that Respondent knew that: (1) if her address changed or if circumstances under which a license was issued changed, she was required to immediately notify the Agency; and (2) she was required to identify to the Agency all motor vehicles used by her in her operation as a farm labor contractor.

15) On January 4, 1991, Bill Pick and Vasilie Shirmanovski went to 34712 So. Meridian Road in Woodburn. They met Roberto Cantu, who told them that the telephone number at that address was 634-2622. Roberto Cantu said he did not have any investment in Respondent's business, but worked as her foreman. He said he had worked for the past 10 years for his father, Salvador Cantu, who did brush piling for a contractor in Washington. He said he knew Demetrio Ivanov, but denied any business relationship with him. He claimed to know nothing about a van parked at that address. The license plate on the van, LBV 978, did not exist in the computers of the Motor Vehicles Division. It had been issued to a passenger car, and had been replaced by plate number LPG 975, which had not been valid since 1984. Roberto Cantu said that two pickup trucks at that address were used to transport workers for Respondent's business. He provided the registration forms for them. The vehicles were: (1) a 1982 Chevrolet Pickup, Oregon license number QRQ 659, vehicle I.D.# 2GCGK24M1C1209788; and (2) a 1989 Chevrolet Pickup, Oregon license number PSJ 401, vehicle I.D.# 1GBHV34NXKJ101818. Both vehicles were registered to and owned

by Salvador Cantu. Motor Vehicle Division records showed that the correct license plate number for the 1982 Chevrolet Pickup should have been KTR 087.

16) According to Agency policy, a financially interested associate in an applicant's operation includes anyone who has put up money, any kind of equipment, the equitable use of equipment, or anything that generally would be considered capitalization of a business; if an individual had done so, that individual would have a financial interest in the business.

17) Pick found no evidence of any security interest or other protection of a loan with respect to Roberto Cantu's reforestation equipment that Respondent was using in her operation. Pick found no evidence of any security interest or other protection of a loan with respect to Salvador Cantu's two pickup trucks that Respondent was using in her operation. He found no "arms length transaction" between Respondent and Roberto or Salvador Cantu with respect to Respondent's use of their equipment or trucks.

18) Pursuant to ORS 658.415 (1)(a), an applicant for a farm labor contractor license is required to provide:

"The applicant's name, Oregon address and all other temporary and permanent addresses the applicant uses or knows will be used in the future."

Compliance with this requirement is a substantive matter that is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license.

#### ULTIMATE FINDINGS OF FACT

1) During all material times herein, Respondent was a farm labor contractor, as defined by ORS 658.405, doing business in the State of Oregon.

2) In November 1990, Respondent was living at 34712 S. Meridian Road, Woodburn, Oregon. The telephone number for that address was 634-2622.

3) Respondent owned a home at 330 S. Pershing, Mt. Angel, Oregon. The telephone number for that address was 845-6715. Sometime after November 1990, Respondent moved to this address from the Meridian Road address. Respondent used 330 S. Pershing as a business address, and stored vehicles used in her operation at that address.

4) Respondent's brother, Roberto Cantu, had a financial interest in Respondent's operation as a farm labor contractor.

5) Respondent's father, Salvador Cantu, had a financial interest in Respondent's operation as a farm labor contractor.

6) Respondent made assertions on her license application which were not in accord with the facts. She knew or should have known the truth of the matters asserted. She asserted that the "Home Phone" number at 34712 S. Meridian Road was 845-6715, when in fact it was 634-2622. She failed to list her home at 330 S. Pershing as an address that she used or would use in her business, when in fact she was so using that address for business purposes. She failed to list her brother and father as persons financially interested in her operation as a labor

19) Pursuant to ORS 658.415 (1)(b), an applicant for a farm labor contractor license is required to provide:

"Information about all motor vehicles to be used by an applicant in operations as a farm labor contractor including license number and state of license, vehicle number, and the name and address of vehicle owner for all vehicles used."

Compliance with this requirement is a substantive matter that is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license.

20) Pursuant to ORS 658.415 (1)(d), an applicant for a farm labor contractor license is required to provide:

"The names and addresses of all persons financially interested, whether as partners, shareholders, associates or profit-sharers, in the applicant's proposed operations as a farm labor contractor, together with the amount of their respective interests, and whether of not, to the best of the applicant's knowledge, any of these persons was ever denied a license under ORS 658.405 to 658.503 and 658.830 within the preceding three years, or had such a license denied, revoked or suspended within the preceding three years in this or any other jurisdiction."

Compliance with this requirement is a substantive matter that is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license.

contractor, when in fact her brother had invested \$13,000 worth of reforestation equipment in the business, and her father permitted her to use his two pickup trucks.

7) An applicant's name and Oregon address, and all other temporary and permanent addresses the applicant uses or knows will be used in the future, are substantive facts which are influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license.

8) Information about all motor vehicles to be used by an applicant in operations as a farm labor contractor, including license number and state of license, vehicle number, and the name and address of the vehicle owner for all vehicles used, is substantive information which is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license.

9) The names and addresses of all persons financially interested, whether as partners, shareholders, associates or profit-sharers, in an applicant's proposed operation as a farm labor contractor, together with the amount of their respective interests, are substantive facts which are influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license.

#### CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein.

2) As a person applying to be licensed as a farm labor contractor with

regard to the reforestation or reforestation of lands in the State of Oregon, the Respondent was and is subject to the provisions of ORS 658.405 to 658.475.

3) Respondent failed to provide on her application information required by ORS 658.415(1). Respondent violated ORS 658.440(3)(a) by making misrepresentations in her application for a license to act as a farm labor contractor.

4) Respondent's violations of ORS 658.440(3)(a) demonstrate her unfitness to act as a farm or forest labor contractor. ORS 658.420; OAR 839-15-520(1)(a) and (3)(a) and (h).

5) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may deny a license to the Respondent to act as a farm/forest labor contractor.

#### OPINION

Respondent failed to appear at the hearing, and thus defaulted to the charges set forth in the Notice of Proposed Denial of a Farm Labor Contractor License. Her only contribution to the record was her answer and a request for a hearing. In default cases the task of this Forum is to determine if a prima facie case supporting the Agency's notice has been made on the record. ORS 183.415(6); *In the Matter of Rogelio Loa*, 9 BOLI 139, 146 (1990), *In the Matter of Michael Burke*, 5 BOLI 47, 52 (1985). See also OAR 839-30-185.

The Agency alleged that Respondent made misrepresentations, false statements, or willful concealment's in her license application. A "misrepresentation" is an assertion made by a

license applicant which is not in accord with the facts, where the applicant knew or should have known the truth of the matter asserted, and where the assertion is of a substantive fact which is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license. *In the Matter of Raul Mendoza*, 7 BOLI 77, 82-83 (1988). The Forum has applied the clear and convincing evidence standard to the Agency's allegations. *Loa, supra* at 146.

Based on the uncontroverted evidence produced at the hearing, the Forum finds that the Agency has established a prima facie case. The evidence was "free from confusion, fully intelligible and distinct and for which the truth of the facts asserted is highly probable." *Loa, supra*. The evidence, which established Respondent made assertions which were not in accord with the facts, and which showed that she knew or should have known the truth of the matters asserted, was credible, persuasive, and the best evidence available, given Respondent's failure to appear at the hearing.

The legislature, in passing ORS 658.415(1), indicated that certain information is required to be provided by applicants for a license on the application. In order to properly administer and enforce the Farm Labor Contractors Law, the Commissioner must know whom she is licensing, and what addresses they use. ORS 658.415(1)(a). She must have information about all motor vehicles used by applicants to transport workers, and about whether there is sufficient vehicle insurance. ORS 658.415(1)(b) and (2). And she must know whom is

financially interested in an applicant's proposed operations as a contractor. ORS 658.415(1)(d). As found in Findings of Fact numbers 18 to 20, this information concerns substantive matters that are influential in the Commissioner's decision to grant or deny a license. *Loa, supra* at 145, 147.

Where a respondent submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. *In the Matter of Richard Niquette*, 5 BOLI 53, 60 (1986); *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987). In a default situation, where the respondent's total contribution to the record is his or her request for a hearing and an answer that contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome whenever they are controverted by other credible evidence on the record. *Mongeon, supra*. Having considered all the evidence on the record, I find that the Agency's prima facie case has not been effectively contradicted or overcome.

The Agency's charges were aggravated by evidence that showed that Respondent moved back to 330 S. Pershing in Mt. Angel. No evidence showed that she notified the Agency that she had changed address, as required by ORS 658.440(1)(b). Such evidence, while not necessary to reach the conclusion that Respondent made misrepresentations in her application, is nonetheless relevant in determining the appropriate sanction for her violations.

ORS 658.420(1) requires the Commissioner to "conduct an investigation of each applicant's character, competence and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct or has conducted operations as a farm labor contractor." Under ORS 658.420(2), the Commissioner shall issue a license "if the commissioner is satisfied as to the applicant's character, competence and reliability." Under the administrative rules applicable here, the Commissioner has determined that a willful misrepresentation, false statement, or concealment in an application for a license demonstrates that the applicant's character, reliability, or competence make the applicant unfit to act as a farm or forest labor contractor. OAR 839-15-520(3)(h). Further, OAR 839-15-520(1) provides that:

"The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny \*\*\* a license application \*\*\*:

"(a) Making a misrepresentation, false statement or certification or willfully concealing information on the license application[.]"

Based upon the uncontroverted evidence presented, the Forum is not satisfied as to Respondent's character, competence, and reliability, and finds her unfit to act as a farm or forest labor contractor. The Order below is a proper disposition of her application for a license.

#### ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, the

Commissioner of the Bureau of Labor and Industries hereby denies AMALIA YBARRA a license to act as a farm or forest labor contractor, effective on the date of this Final Order.

**In the Matter of  
Stephen W. Brown, dba  
TIRE LIQUIDATORS,  
Respondent.**

Case Number 09-91  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued November 8, 1991.

#### SYNOPSIS

Respondent sold his tire business to an buyer that then engaged in the same business, under the same name, at the same location, and utilized the same employees. When the buyer ceased doing business and failed to pay wages to Claimants, Respondent exercised his security interest, repossessed the business, and reopened under a different name with the same suppliers and market, the same products and services, and the same employees as the defaulting buyer. The Commissioner held Respondent liable as a successor employer for the unpaid wages, totaling \$6,725, payable to the Wage Security Fund. Ch 409, sec. 7, Oregon Laws 1985; Ch 412, Oregon Laws 1987; Ch

554, Oregon Laws 1989; ORS 652.140(1); 652.310(1).

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 9, 1991, in Room 311 of the State Office Building in Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Steven W. Brown (Respondent) was represented by Stephen Petersen, Attorney at Law. Mr. Brown was present throughout the hearing.

The Agency called the following witnesses (in alphabetical order): Wage Claimants Douglas Collins, Lon Paul Gover, Carl Hoard, Walter Jessen, and Alan Wilson (Claimants).

The Respondent called the following witnesses: Respondent Steven Brown and Claimant Neil Harkleroad.

Having fully considered the entire record in this matter, I, Mary Wendy 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) Between June 1989 and December 1990, Claimants Collins, Gover, Harkleroad, Hoard, Jessen, and Wilson filed wage claims with the Agency. They alleged that they had been employed by Performance Tires,

Inc. (Performance Tires) and that it had failed to pay wages earned and due to them.

2) At the same time they filed their wage claims, Claimants assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from their employer.

3) The wage claims of the six Claimants were brought within the statute of limitations (six years).

4) On January 24, 1990, the Agency served on Respondent an Order of Determination No. 89-206 based upon the wage claims filed by Claimants Gover, Harkleroad, Hoard, Jessen, and Wilson, and upon the Agency's investigation. The Order of Determination found that Respondent, as a successor employer, owed Claimants a total of \$4,725 in wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

5) On February 5, 1990, Respondent, through his attorney, filed an answer to Order of Determination No. 89-206, and requested a contested case hearing. Respondent's answer denied that he was a successor in interest to Performance Tires, denied that he owed the Claimants \$4,725 in unpaid wages, and further set forth the affirmative defense that Respondent did not purchase any assets or succeed in any interest of Performance Tires.

6) On November 20, 1990, the Agency sent the Hearings Unit a request for a hearing date. The

Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200.

7) On December 17, 1990, the Agency requested a postponement of the hearing because the Agency's Case Presenter assigned to the case had resigned from the Agency, and a newly-assigned Case Presenter would have insufficient time before hearing to prepare. Respondent agreed to the postponement. The Hearings Referee found that the Agency had shown good cause for a postponement, granted the motion, and issued an amended Notice of Hearing.

8) On February 20, 1991, the Hearings Unit manager notified the participants that, due to a conflict on the hearings docket, it was necessary to reschedule the hearing. He requested from the participants alternative dates that they would be available for hearing. The Agency and Respondent responded with available dates, and on March 5, 1991, the Hearings Unit manager issued a notice of hearing to the participants.

9) On February 22, 1991, the Agency notified the Hearings Unit that the case had been reassigned from one Case Presenter to another.

10) On February 27, 1991, the Agency submitted to the Hearings Unit a motion to amend Order of Determination No. 89-206. The amendments

reflected that the Claimants (except Collins) were entitled to and had received payment from the Wage Security Fund, and that the Commissioner, pursuant to subsection (2) of section 7, chapter 409, Oregon Laws 1985, was entitled to recover from Respondent the amounts paid from the fund. Respondent did not object to the amendment, and the Agency's motion was granted.

11) On June 10, 1991, the Agency filed a motion to consolidate an additional wage claim against Respondent with the then existing hearing case number 09-91. Attached to the motion were Order of Determination No. 90-230 (concerning Douglas Collins' wage claim), service documentation, and Respondent's answer to that order. The Order of Determination found that Respondent, as a successor employer, owed Claimant Collins a total of \$2,000 in wages. The order said that Claimant was entitled to and had received payment from the Wage Security Fund in the amount of \$2,000, and that pursuant to subsection (2) of section 7, chapter 409, Oregon Laws 1985, the Commissioner was entitled to recover from Respondent the amount paid from the fund. Respondent's answer denied that he was a successor in interest to Performance Tires, denied that he owed Claimant Collins \$2,000 in unpaid wages, and further set forth the affirmative defense that Respondent did not purchase any assets or succeed in any interest of Performance Tires. On June 20, Respondent requested that his answer be amended to reflect the correct order number and claimant name, and did not object to the Agency's motion to

consolidate the claims. On June 25, the Hearings Referee granted the Agency's motion, because there existed common questions of law and fact in the original and new claims. The Hearings Referee also granted Respondent's request to amend his answer to order number 90-230.

12) Pursuant to OAR 839-30-071, Respondent and the Agency each submitted a Summary of the Case.

13) Respondent and the Agency stipulated to certain facts, which were admitted into the record by the Hearings Referee at the beginning of the hearing.

14) At the start of the hearing, Respondent's attorney said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

15) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

16) The Proposed Order, which included an Exceptions Notice, was issued on July 23, 1991. Exceptions, if any, were to be filed by August 2, 1991. No exceptions were received.

#### FINDINGS OF FACT – THE MERITS

1) From 1984 to October 1988, Respondent owned and operated a business called Rainier Tire & Auto Center (Rainier Tire), located at 75936 Rock Crest Street, Rainier, Oregon. In 1986 Respondent purchased the land and two metal buildings at that location. One building, built in 1976 or 1977, housed Rainier Tire. The building was designed to be a tire and auto

repair business; it had tire mounting machines, tire balancers, and several racks (also called hoists or lifts) built in or bolted to it. All but two of the racks were designed only for servicing tires, in that they rose only about three feet off the ground. The building had extensive storage space for tires. Respondent used the other building as a tire warehouse.

2) At times material, Respondent operated a wholesale tire distribution business called Pro Tire Distributors. He sold primarily Dunlop, Cooper, Kléber, Cavalier, and Tribune brand tires, along with a small number of 10 or 12 other brands, to retail tire dealers in Oregon and Washington. He stored most of tires for that business in his warehouse next to Rainier Tire, and stored some in a warehouse in Portland.

3) Respondent offered the following retail services at Rainier Tire: tire and wheel sales; tire repair, mount and balanced, and installation; general auto repair; exhaust system repair; front end repair and alignment; brake repair; lubrication and oil changes; transmission repair; and new autoparts sales. Tire and wheel sales and service made up 75 to 80 percent of the business, with the balance in auto repair.

4) At Rainier Tire Respondent sold automotive goods and services to the public, who were his customers.

5) Claimant Gover worked as store manager for Respondent when he was doing business as Rainier Tire.

6) Claimants Harkleroad, Jessen, and Wilson worked for Respondent when he was doing business as Rainier Tire.

7) In October 1988, Respondent sold the Rainier Tire business — along with his inventory, fixtures, equipment, other assets including goodwill, and a covenant not to compete — to Performance Tires. Performance Tires assumed Respondent's business name, and thereafter did business as Rainier Tire & Auto Center, located at 75936 Rock Crest Street, Rainier, Oregon. Respondent leased the building and adjacent parking area to Performance Tires for a ten year period with options to renew.

8) Performance Tires granted Respondent a security interest in the equipment and fixtures to secure payment of the asset sale price, and an additional security interest in inventory to secure the payment of the inventory sale price.

9) Respondent terminated the employment of all of his employees when the sale of the business closed. The sale agreement provided that "Seller [Respondent] shall hold Buyer [Performance Tires] harmless from any claims made by Seller's employees against Buyer relating to pre-closing obligations of Seller." Performance Tires hired most of Respondent's former employees.

10) Performance Tires, Inc. was an employer who engaged the personal services of Claimant employees within the State of Oregon.

11) Claimant Collins began working for Performance Tires in December 1988 as the service manager.

12) Claimant Gover worked for Performance Tires as store manager during the entire period that it did business in Rainier.

13) Claimant Harkleroad worked for Performance Tires as the assistant manager, the same job he had done for Respondent at Rainier Tire.

14) Claimant Hoard began working for Performance Tires in March 1989 as a tire technician. He mounted, balanced, repaired, and installed tires on customers vehicles.

15) Claimant Jessen worked for Performance Tires during the entire period that it did business in Rainier. He performed lube and oil services, and worked as a mechanic.

16) Claimant Wilson worked for Performance Tires as a tire technician.

17) Performance Tires employed around seven employees.

18) The Wage Claimants rendered personal services in this state to an employer, Performance Tires, Inc., who agreed to pay each Claimant at a fixed rate.

19) The Claimants had fixed-rate biweekly wage agreements with Performance Tires, Inc. as follows:

a. Gover	\$1,250
b. Harkleroad	\$ 900
c. Hoard	\$ 450
d. Jessen	\$ 600
e. Wilson	\$ 625
f. Collins	\$1,000

20) Performance Tires offered the following retail services: sold tires and custom wheels; repaired, mounted, balanced and installed tires; repaired exhaust systems; repaired and aligned front ends; repaired brakes and suspensions; changed oil and lubricated cars; general auto repair, repaired transmissions; and sold new autoparts. Performance Tires offered "basically"

the same services and products as Respondent had offered in the Rainier Tire business.

21) Performance Tires used tire mounting machines, tire balancers, front end alignment rack, exhaust rack, a two-post lift, an oil rack, and another rack. The racks were bolted to the floor. The equipment was the same that Respondent, doing business as Rainier Tire, had used.

22) Performance Tires sold goods and services to the public, who were its customers. It sold mostly Summit tires, but also Cooper, Dunlop, Kléber, B.F. Goodrich, and other tires.

23) For around 45 days after it bought Rainier Tire, Performance Tires bought tires on credit from Respondent's Pro Tire Distributors. Thereafter, Respondent stopped selling tires on credit to Performance Tires because it had not paid its bills. Gover usually had to get tires from the Pro Tire warehouse in Portland, not Rainier, because the Portland warehouse had staff who could accept Performance Tires' payment by check.

24) On three or four occasions during February to April 1989, Performance Tires allowed Respondent to take inventory from its business "in lieu of payments" on its debts to Respondent. The inventory removed was inventory Performance Tires had bought from Respondent. Respondent took the inventory to his Rainier and Portland warehouses. After that time, Performance Tires had little inventory to sell.

25) In March 1989, Performance Tires had hundreds of tires in stock. Between March and May 1989, inventory of tires and other auto parts

declined. During April and May, Performance Tires' main supplier was California Tire, which sold mostly Summit brand tires. During April, Performance Tires was ordered to return inventory to California Tire to pay its bill. Performance Tires was put on a "cash only" basis by its suppliers; in other words, Performance Tires had no credit with its suppliers and could only purchase products with cash. Beginning around the first of May 1989, Performance Tires had no new tires, wheels, or other products in stock. When customers ordered tires or other parts, an employee would travel to Portland the next morning to buy the products. Customers would return in the afternoon and purchase them. Business dropped off tremendously.

26) Performance Tires ceased doing business at the Rainier Tire & Auto Center around May 31, 1989.

27) Claimants were not paid wages for work performed by them for Performance Tires, Inc. during the following periods:

a. Gover	May 19 - 31, 1989
b. Harkleroad	May 1 - 31, 1989
c. Hoard	May 16 - 27, 1989
d. Jessen	May 16 - 31, 1989
e. Wilson	May 22 - 26, 1989
f. Collins	May 1 - 31, 1989

28) The amounts of unpaid wages owed by Performance Tires, Inc. for the periods in Finding of Fact 27 are as follows:

a. Gover	\$1,250
b. Harkleroad	\$1,800
c. Hoard	\$ 450
d. Jessen	\$ 600
e. Wilson	\$ 625

f. Collins \$2,000

29) Performance Tires, Inc. failed to pay the wages owed the Claimants (set out in Finding of Fact 28) immediately upon termination of employment.

30) Claimants have been paid from the Wage Security Fund in the following amounts:

a. Gover	\$1,250
b. Harkleroad	\$1,800
c. Hoard	\$ 450
d. Jessen	\$ 600
e. Wilson	\$ 625
f. Collins	\$2,000

31) Respondent reentered the Rainier Tire building the day after Performance Tires closed its business. There were up to 20 tires and wheels scattered around the store. The only machinery and equipment in the building were those that were bolted down or fixed to the building, such as tire machines, racks, and the alignment machine.

32) Respondent contacted Harkleroad and Wilson to work for him. Harkleroad helped Respondent find people to work for him. Respondent hired Harkleroad, Gover, and Wilson to help remodel the Rainier Tire building. Harkleroad's wage agreement with Respondent was different than the agreement he had with Performance Tires. Gover reached a wage agreement with Respondent for the period of time the building was being remodeled, and another wage agreement for employment after the business opened.

33) Respondent told Gover to contact Performance Tires' employees about working for Respondent. Respondent knew those men were un-

employed and were qualified for the work.

34) During the remodeling, the office, customer waiting room, and restrooms were relocated. One wall was removed, and new counters, wall coverings, and floors were installed in the showroom and office areas. The service bays were cleaned and repainted. Some tire storage racks were rebuilt. The Rainier Tire sign was removed and a Tire Liquidators sign was attached to the building. Respondent restocked the building with auto supplies, tires, and wheels. Some tires came from Respondent's Pro Tire Distributors, but most came from the Cooper tire factory. Around 90 percent of the tires in stock were Cooper tires. New computers and other office equipment were brought in.

35) On June 19, 1989, Respondent opened a business called Tire Liquidators - Rainier (Tire Liquidators) at 75936 Rock Crest Street, Rainier, Oregon. Respondent ran advertisements to inform the public that Tire Liquidators was opening; no reference was made to Performance Tires. Respondent changed the name of the business in part because he did not want to become liable to Performance Tires' creditors.

36) Since 1987, Respondent had operated another Tire Liquidators store in Salem. The products and services offered at Respondent's two Tire Liquidators stores were the same.

37) When Respondent opened Tire Liquidators, all six employees had been Performance Tires employees. Gover was involved with hiring. The wage agreements that Respondent reached with the employees were

based upon the agreements he had with them at Rainier Tire, and upon what they had earned from Performance Tires. He did not want the employees to take a cut in pay from what they had earned from Performance Tires.

38) Respondent was not aware when he hired the Claimants that they were owed wages by Performance Tires.

39) Claimant Collins worked for Respondent, doing business as Tire Liquidators, as service manager.

40) Claimant Gover worked for Respondent, doing business as Tire Liquidators, as store manager.

41) Claimant Harkleroad worked for Respondent, doing business as Tire Liquidators, as assistant manager.

42) Claimant Hoard worked for Respondent, doing business as Tire Liquidators, from June 1989 to October 1990.

43) Claimant Jessen worked for Respondent, doing business as Tire Liquidators, from June 1989 to October 1989.

44) Claimant Wilson worked for Respondent, doing business as Tire Liquidators, from June 1989 to October 1989. He did the same job (tire technician) as he had done for Performance Tires.

45) Respondent offered many of the same products and services that Performance Tires had, but did not repair transmissions. He sold mainly Cooper tires, but also B.F. Goodrich, Dunlop, Kléber, and other tires. Respondent did not sell Summit tires, and offered some different brand-name wheels and tires than Performance

Tires had. The business repaired, mounted, balanced, and installed tires, offered lube and oil changes, and sold auto parts and repair.

46) Respondent's bookkeeping practices were different than Performance Tires'. Respondent did not assume any of Performance Tires' contractual obligations. No assets were transferred from Performance Tires to Respondent's Tire Liquidator business.

47) Respondent used the same tire mounting machines, balancing machines, alignment machine, and racks that Performance Tires had used. That equipment stayed in the building when Performance Tires left.

48) Respondent's customers were the public.

49) Different retail tire stores may carry similar or different brands of tires. Over time, stores change the brands of products they carry.

50) Respondent was operating Tire Liquidators in Rainier at the time of the hearing in this case.

#### ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person who employed one or more persons in the State of Oregon.

2) From 1984 to October 1988, Respondent owned and operated a business called Rainier Tire & Auto Center in Rainier, Oregon. Respondent owned the land and two metal buildings at that location. In October 1988, Respondent sold the Rainier Tire business, including the inventory, other assets, and goodwill to Performance Tires, Inc. Performance Tires did business as Rainier Tire & Auto

Center. Performance Tires granted Respondent a security interest in the equipment, fixtures, and inventory to secure the payment of the sale price. Performance Tires hired most of Respondent's former employees, and conducted essentially the same business as Respondent had.

3) Performance Tires employed the Claimants within the State of Oregon.

4) Performance Tires ceased doing business at the Rainier Tire & Auto Center around May 31, 1989.

5) Performance Tires, Inc. failed to pay wages owed to the Claimants immediately upon termination of employment in the following amounts:

a. Gover	\$1,250
b. Harkleroad	\$1,800
c. Hoard	\$ 450
d. Jessen	\$ 600
e. Wilson	\$ 625
f. Collins	\$2,000

6) Claimants have been paid from the Wage Security Fund in the following amounts:

a. Gover	\$1,250
b. Harkleroad	\$1,800
c. Hoard	\$ 450
d. Jessen	\$ 600
e. Wilson	\$ 625
f. Collins	\$2,000

7) Respondent repossessed the Rainier Tire building the day after Performance Tires closed its business. After extensive remodeling of the building, on June 19, 1989, Respondent opened a business called Tire Liquidators at the same location. Respondent operated the business using one of the same suppliers (Pro Tire Distributor),

serviced the same market (the general public) with the same products and services (tire sales and service and auto repair), and employed the same employees (the Claimants) as Performance Tires had. Respondent was still operating the business at the time of the hearing. In sum, Respondent conducted essentially the same business as his predecessor, Performance Tires.

#### CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) Prior to the commencement of the contested case hearing, the Forum informed the Respondent of his rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

4) Respondent is a "successor" within the meaning of ORS 652.310(1), and therefore is subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. *In the Matter of Anita's Flower & Boutique*, 6 BOLI 258, 267-68 (1987).

5) Respondent, as a successor employer, is liable for Performance Tires' failure to pay Claimants all wages earned and unpaid immediately upon their termination from employment. ORS 652.140(1).

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries may recover from Respondent amounts paid to the Claimants from the Wage Security Fund. Subsection (2) of section 7, chapter 409, Oregon Laws 1985, as amended by chapter 412, Oregon Laws 1987, and chapter 554, Oregon Laws 1989.

#### OPINION

The issue in this case is whether Respondent was a successor employer to Performance Tires and thus liable for the Claimants' wages paid from the Wage Security Fund.

ORS 652.310(1) defines, in pertinent part, "Employer" as

"any person who \* \* \* engages personal services of one or more employees and includes any producer-promoter, and any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full."

Thus, an employer includes:

A) any producer-promoter, and

B) 1) any successor to the business of any employer, so far as such employer has not paid employees in full; or

2) any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full.

As the language of the statute shows, a "successor" employer may be "any successor to the business of any employer," or "any lessee or purchaser of any employer's business property for the continuance of the same business." That language clearly recognizes two kinds of "successor" employers. *Anita's Flowers, supra*.

To decide whether an employer is a "successor," the test is whether it conducts essentially the same business as the predecessor did. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision. *Anita's Flowers, supra*; and see *N.L.R.B. v. Jefferies Lithograph Co.*, 752 F.2d 459 (9th Cir 1985).

In brief, the evidence in this case revealed the following facts, most of which were undisputed. Respondent sold the Rainier Tire business to Performance Tires. Performance Tires ran the business using the same business name, at the same location, without any lapse of time in its operation during the change of ownership, using most of Respondent's former employees, offering the same services that Respondent had offered, and using the same equipment that Respondent had used. In other words, Performance Tires conducted essentially the same

business as Respondent had. Performance Tires ran the business for about eight months, but could not make its payments. Respondent repossessed much of Performance Tires' inventory, pursuant to his security interest. Business dropped off, and on May 31 Performance Tires walked away from the business. Respondent stepped in the next day, rehired several of the same employees, and for around 18 days remodeled the building. He then opened Tire Liquidators on June 19 at the same location. He employed the same workforce that Performance Tires had employed. He offered virtually the same services that Performance Tires had offered, and used much of the same equipment that Performance Tires had used. The Forum concludes from those facts that Respondent conducted essentially the same business as its predecessor, Performance Tires, conducted.

Applying the facts found in this case to the test described above, the Forum has concluded, as a matter of law, that Respondent was a "successor" within the meaning of ORS 652.310(1).

Respondent argued that he never purchased any assets or succeeded in any interest of Performance Tires. He argued that he opened Tire Liquidators using his own assets and none of Performance Tires', and that he never intended to succeed to any interest or assume any of Performance Tires' obligations.

He relied, in part, on *Nilsen v. Ben Jacques Chevrolet Buick, Inc.*, 16 Or App 552, 520 P2d 366 (1974). In that case, a claimant was owed wages from an employer that sold its assets to

Ben Jacques. Jacques then transferred those assets to Ben Jacques Chevrolet Buick, Inc., which thereafter operated the auto dealership formerly operated by the employer. The issue in that case was whether the Bulk Transfer Law (and the statute of limitations contained therein) applied to bar the wage claim. The court held that it did not, and said that, by "virtue of ORS 652.310(1), one who succeeds to the business of an employer who had failed to pay his workman wages due, assumes and becomes personally obligated under the employment contract." The court held that Ben Jacques Chevrolet Buick, Inc. was a successor to the business of the employer.

Respondent apparently reads *Ben Jacques* for the proposition that a sale of assets is required in order to find that "one who succeeds to the business of an employer" is a successor employer under ORS 652.310(1). The Forum finds no such requirement.

First, the statute defines "any lessee or purchaser of any employer's business property for the continuation of the same business" as an employer. And second, the statute defines "any successor to the business of any employer" as an employer. In order to give meaning to both parts of the statute, it is reasonable to conclude that no lease or purchase of assets is required to find that "any successor to the business of any employer" is a successor employer. The court in *Ben Jacques* found that Ben Jacques Chevrolet Buick, Inc., who had purchased the employer's assets from Jacques, was a successor. Nothing in the case suggests that a purchase of assets is

required before successorship can be found. While a sale of assets is a factor that can be considered when determining whether a business is a successor, it is not a required element of the test, under ORS 652.310(1), with regard to "any successor to the business of any employer." Accordingly, the Forum finds that the absence of a purchase of assets is not determinative in this case.

It is evident that Respondent believed that his sale and lease agreements with Performance Tires were breached. He repossessed the building and, in effect, the business. Although evidence showed that Respondent remodeled the building before reopening the business, changed the business name (in part, in an attempt to avoid assuming Performance Tires' obligations), sold different brands of tires, and had different bookkeeping methods than Performance Tires had, the Forum finds that, when all the facts are considered together, he conducted essentially the same business as Performance Tires did.

Regarding Respondent's lack of intent to succeed to any interest or to assume any obligations of Performance Tires, the Forum finds that a respondent's intentions may be considered when deciding the issue of successorship; but, they will be considered along with all of the other facts. It should be noted that in cases like this — where a seller of a business regains possession of it when a buyer walks away, and the seller then continues to operate essentially the same business — the seller's intention to avoid the liabilities of the buyer will carry little weight with regard to the issue of

successorship. As the Agency argued at hearing, a buyer and a seller of a business are in a position, as they negotiate the terms of their contract, to protect themselves from unforeseen events rising from their deal. Employees cannot protect themselves. The legislature, in ORS 652.310(1), expressed the public policy of protecting employees, and decided to hold successor employers liable for the unpaid wages of a predecessor's employees. In this case, Respondent's intention to avoid that liability is not determinative.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and subsection (2) of section 7, chapter 409, Oregon Laws 1985, as amended, the Commissioner of the Bureau of Labor and Industries hereby orders Steven W. Brown to deliver to the Business Office of the Bureau of Labor and Industries, 305 State Office Building, 1400 SW Fifth Avenue, PO Box 800, Portland, Oregon 97207-0800, the following:

A certified check payable to the Bureau of Labor and Industries — Wage Security Fund in the amount of SIX THOUSAND SEVEN HUNDRED TWENTY FIVE DOLLARS (\$6,725), representing \$6,725 in gross earned wages that were paid to Claimants Collins, Gover, Harkleroad, Hoard, Jessen, and Wilson from the Wage Security Fund; plus interest at the rate of nine percent per year on the sum of \$6,725 from the date the Final Order is issued until paid.

**In the Matter of  
MIGUEL ESPINOZA,  
dba M and LE Reforestation,  
Respondent.**

Case Number 09-92  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued December 3, 1991.

**SYNOPSIS**

Where Respondent, a farm labor contractor, employed workers in reforestation without having a valid farm labor contractor license, employed more workers than allowed while he had an "exempt" license, and failed to file certified payroll records as required, the Commissioner determined that the violations reflected adversely on Respondent's character, competence, and reliability, and denied him a license to act as a farm labor contractor. ORS 658.405(1)(d); 658.410(1); 658.415(1), (3); 658.417(1), (3); 658.418(1), (2), (3); 658.420; OAR 839-15-130(14), (15); 839-15-145(1)(g); 839-15-300; 839-15-520(1)(k), (3)(a), (4); and 839-30-070(6).

The above-entitled matter came on regularly before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. Lee Bercot, Case Presenter for the Wage and Hour Division of the Bureau of Labor and Industries (the Agency), appeared on behalf of the Agency. Miguel Espinoza (Respondent) represented himself.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –  
PROCEDURAL**

1) On June 20, 1991, the Agency issued a "Notice of Proposed Denial of Farm Labor Contractor License" to Respondent. The notice informed Respondent that the Agency intended to deny his application for a farm labor contractor's license. The notice cited the following bases for the denial: (1) acting as a farm labor contractor without a valid license; (2) acting as a farm labor contractor without having obtained a full, un-exempt license; and (3) failing to provide to the Commissioner certified true copies of all payroll records for work performed in reforestation.

2) On August 22, 1991, the Agency received Respondent's timely request for a hearing on the Agency's intended action, and Respondent's answer to the notice. In his answer, Respondent admitted the first two bases noted above in Finding of Fact number 1, and claimed mitigating factors. Regarding the third basis for denial, Respondent said that he did not understand the requirement to provide certified payrolls as required, and when he became aware of the requirement, he employed a bookkeeper and payroll records were completed. Records were attached to Respondent's answer.

3) On August 28, 1991, the Agency requested a hearing from the Hearings Unit.

4) Along with its request for a hearing, the Agency filed a motion for summary judgment, with appendices.

5) On September 6, 1991, the Hearings Unit issued to Respondent and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent to Respondent a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 through 839-30-200.

6) On September 10, 1991, the Hearings Referee wrote a letter to the Respondent regarding the motion for summary judgment, and required his response to the motion by September 30, 1991. As of October 16, 1991, Respondent had not responded.

7) The Proposed Order, which included an Exceptions Notice, was issued on October 17, 1991. Exceptions, if any, were to be filed by October 28, 1991. No exceptions were received.

**FINDINGS OF FACT – THE MERITS**

1) Between March 14 and April 25, 1991, Respondent employed reforestation workers to labor upon Bureau of Land Management Contract No. H110-P-1-5011 in the Medford district, when at all material times, Respondent did not possess a valid farm labor contractor license with a forestation indorsement.

2) Between April 25 to on or about June 1, 1991, Respondent possessed an "exempt" reforestation license. He employed more than two workers to assist in work performed upon Bureau of Land Management Contract Nos. H952-C-1-2041 and H110-P-1-5031, reforestation contracts in the Medford district.

3) Between on or about March 14 and June 1, 1991, Respondent provided crews to perform reforestation labor on Bureau of Land Management Contract Nos. H110-P-1-5011, H952-C-1-2041, and H110-P-1-5031. Respondent did not provide to the Commissioner at least once every 35 days certified true copies of all payroll records for work done as a farm labor contractor when he paid employees directly.

**CONCLUSIONS OF LAW**

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of Respondent herein.

2) By acting as a farm labor contractor with regard to the forestation or reforestation of lands without a valid license issued to him by the Commissioner, Respondent violated ORS 658.410(1), 658.415(1), and 658.417(1).

3) By acting as a farm labor contractor engaged in the forestation or reforestation of lands, with an exemption from the Commissioner from the provisions of ORS 658.415(3) and 658.417(3), and by employing more than two individuals in the performance of work on contracts performed in the license year, Respondent violated ORS

658.418(3), 658.415(3), and 658.417(3).

4) By failing to provide to the Commissioner a certified true copy of all payroll records for work done as a farm labor contractor when he paid employees directly, Respondent violated ORS 658.417(3) and OAR 839-15-300.

5) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may deny a license to Respondent to act as a farm/forest labor contractor.

#### OPINION

Pursuant to OAR 839-30-070(6), the Agency filed a motion for summary judgment on its Notice of Proposed Denial of a Farm Labor Contractor License. It asserted that no issue of genuine fact existed and the Agency was entitled to judgment as a matter of law as to the violations alleged in the charging document. Subsection (c) of OAR 839-30-070(6) provides that, where the Hearings Referee recommends that the motion for summary judgment be granted, the recommendation shall be in the form of a Proposed Order, and the procedure established for issuing Proposed Orders shall be followed. This Order grants the Agency's motion and has been issued according to that procedure.

Respondent expressly admitted that he acted as a contractor without a valid license issued by the Commissioner, and he expressly admitted that he employed more than two workers on contracts when he had an "exempt" license. He admitted, in effect, his

failure to provide certified payrolls to the Commissioner at least once every 35 days as required by claiming he "did not understand the requirement," and when he "became aware of this requirement, after he was served with the Notice herein, he located a bookkeeper" and completed payroll records, which he attached to his answer. Respondent claimed a number of mitigating factors.

ORS 658.410(1) provides in part:

"[N]o person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries. No person shall act as a farm labor contractor with regard to the forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1)."

ORS 658.415(1) provides in part:

"No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.503 and 658.830."

ORS 658.417 provides in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries

on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands."

Based upon his own admissions, Respondent violated ORS 658.410(1), 658.415(1), and 658.417(1) by acting as a contractor without a valid license and indorsement.

ORS 658.418 provides:

"Upon written application from a farm labor contractor engaged in forestation or reforestation of lands, the Commissioner of the Bureau of Labor and Industries may exempt the farm labor contractor from the provisions of ORS 658.415(3) and 658.417(3) for the license year if the commissioner finds that the farm labor contractor meets all of the following requirements:

"(1) The farm labor contractor operates as a sole proprietor.

"(2) The farm labor contractor engages in forestation or reforestation activities pursuant to contracts for less than \$25,000.

"(3) The farm labor contractor employs two or less individuals in the performance of work on all contracts performed in the license year."

ORS 658.415(3) provides:

"Each applicant shall submit with the application and shall continuously maintain thereafter, until excused, proof of financial ability to promptly pay the wages of employees and other obligations specified in this section. The proof required in this subsection shall be

in the form of a corporate surety bond of a company licensed to do such business in Oregon, a cash deposit or a deposit the equivalent of cash. \* \* \*

ORS 658.417 provides in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

\* \* \*

"(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such times and shall contain such information as the commissioner, by rule, may prescribe."

Based upon his admission that he employed more than two employees at a time that he possessed an "exempt" license, Respondent violated ORS 658.418(3). Having lost the exemption, Respondent was required to comply with ORS 658.415(3) and 658.417(3). Again, based on his admission that he did not provide certified payrolls to the Commissioner, Respondent violated ORS 658.417(3).

In his answer, Respondent claimed mitigating circumstances. First, he claimed that he "originally only worked small projects with his family." In certain circumstances, the definition of "farm labor contractor" does not

include an individual who performs work, other than recruiting, supplying, soliciting, or employing workers to perform labor for another, alone or only with the assistance of the individual's spouse, son, daughter, brother, sister, mother, or father. ORS 658.405(1)(d); OAR 839-15-130(14) and (15). As such, Respondent would be "exempt" from the requirements of the law. However, with regard to the contracts at issue in this case, Respondent's records submitted with his answer show that he employed workers that were not members of his family. Thus, the family "exemption" described above did not apply to Respondent at times material here. The fact that Respondent may have once been exempt does not mitigate his failure to obtain a license when he began employing non-family members.

Respondent next claimed that "when he was given a large contract by BLM, it became critical to meet the contract deadline for work being completed. This necessitated hiring some non-family workers." The Commissioner has previously found that the urgencies of contract bidding or completion do not excuse a failure to obtain a license before acting as a contractor. See, for example, *In the Matter of Efim Zyryanoff*, 9 BOLI 82, 86, 88 (1990). Neither do such urgencies mitigate such a failure. As the Agency argued in its motion, such urgencies "can never mitigate a violation, otherwise it will act as [an] incentive to violate the law simply by Applicants undertaking 'time pressure' contracts at times they are unlicensed then pleading mitigation, an absurd result." The law and the Agency provide a

process for issuing temporary licenses quickly to accommodate such situations. See ORS 658.425, OAR 839-15-150.

Respondent next claimed BLM employees were pleased with Respondent's progress on and completion of his contracts, and they never mentioned that he was working "illegally." He claimed that he "misunderstood BLM's acquiescence in his work as approval from the Bureau of Labor and Industries, a totally separate entity." While I understand Respondent's position, this Forum can not give mitigating weight to such a misunderstanding. When Respondent got into the farm labor contractor business, he had a duty to find out what the legal requirements were for engaging in it. His ignorance of the law does not excuse or mitigate the violations. *In the Matter of Francis Kau*, 7 BOLI 45, 54 (1987).

With regard to his failure to submit certified payrolls, Respondent claimed he did not understand those requirements or how to complete payroll records. Again, such ignorance does not mitigate the violation. *Kau, id.* He claims that when he became aware of the requirements, which was after he received the Notice of Proposed Denial of Farm Labor Contractor License, he hired a bookkeeper, completed the payroll records, and submitted them with his answer. Absent other facts, the Forum would find that, where a contractor prepares and submits certified payroll records promptly after discovering he or she was so required (as here, where Respondent lost his exemption under ORS 658.418), that action would mitigate a violation of failing to file them on time. But the Forum

takes official notice that applicants for licenses receive copies of the pertinent statutes and rules, and swear on the application that they will conduct their farm labor contractor business in accordance with those regulations. Accordingly, I cannot believe that Respondent became aware of the payroll submission requirements only after he received the notice in this case charging him with violations of the regulations. Contrary to Respondent's position, I find that his claim aggravates the violation, in that it reflects badly on his competence to conduct operations as a farm labor contractor.

Finally, as a mitigating factor, Respondent claims that he only employed family members from April 1 to 5, 1991. Since the Agency's charge covers the period of March 14 to June 1, 1991, the short period that Respondent claims to have only employed family members is of little consequence. Even if Respondent was exempt from licensing for that five day period, he was required to be licensed during times before and after, and to be submitting certified payrolls during those times. I find no mitigation in Respondent's last claim.

ORS 658.420 provides that the Commissioner shall conduct an investigation of each applicant's character, competence, and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor. The Commissioner shall issue a license if she is satisfied as to the applicant's character, competence, and reliability.

In making that determination, the Commissioner considers whether a person has violated any provision of ORS 658.405 to 658.485. OAR 839-15-145(1)(g), 839-15-520(3)(a). Here, Respondent has violated several of those provisions. Acting as a farm labor contractor without a license is a violation that the Commissioner considers to be of such magnitude and seriousness that she may propose to deny a license application. OAR 839-15-520(1)(k).

Based upon the whole record of this matter, the Forum is not satisfied as to Respondent's character, competence, and reliability, and finds him unfit to act as a farm or forest labor contractor. The Order below is a proper disposition of his application for a license.

#### ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, I, the Commissioner of the Bureau of Labor and Industries, hereby deny MIGUEL ESPINOZA a license to act as a farm or forest labor contractor, effective on the date of the Final Order. MIGUEL ESPINOZA is prevented from reapplying for a license for a period of three years from the date of denial, in accordance with ORS 658.415(1)(c) and OAR 839-15-520(4).

**In the Matter of  
JAMES MELTEBEKE,  
Painting Contractor,  
Respondent.**

Case Number 29-90  
Amended Final Order of  
the Commissioner  
Mary Wendy Roberts  
Issued February 4, 1992.

**SYNOPSIS**

Respondent repeatedly told Complainant that he was a sinner and was going to hell because he was not attending church and was sleeping with his fiancée. Respondent told Complainant that he had to be a good Christian to be a good employee, and that Respondent wanted to work with a Christian. Respondent repeatedly invited Complainant to attend his church. Respondent's comments were directed at Complainant because of Complainant's religious beliefs, were unwelcome to Complainant, were sufficiently pervasive so as to alter the conditions of employment, and had the effect of creating an intimidating and offensive working environment. The Commissioner held that Respondent's actions constituted religious harassment, in violation of ORS 659.030 (1)(b), and rejected Respondent's argument that an element of proof in the test for religious harassment is that he knew or should have known that his actions were creating an intimidating, hostile, or offensive work environment. The Commissioner also rejected Respondent's defenses based on the Oregon and federal constitutions'

protections of religious freedom and free speech. The Commissioner awarded Complainant \$3,000 for his mental suffering. ORS 659.020(2), 659.030(1)(b); OAR 839-07-555.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 24 and 25, 1990, in Room 311 of the State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. Linda Lohr, Case Presenter with the Quality Assurance Unit of the Civil Rights Division of the Bureau of Labor and Industries (the Agency), presented a Summary of the Case for the Agency, argued Agency policy and the facts, examined witnesses, and introduced documents. Donald W. Katzenberger (Complainant) was present throughout the hearing and was not represented by counsel. Kelly E. Ford, Attorney at Law, appeared on behalf of James Victor Meltebeke (Respondent), presented a Summary of the Case, argued the law and facts, made objections and motions, and examined witnesses. Mr. Meltebeke was present throughout the hearing.

The Agency called the following witnesses (in alphabetical order): Complainant; Toni Katzenberger, Complainant's wife; Linda M. McConaughy, Complainant's mother; and David Wright, Senior Investigator with the Agency.

Respondent called the following witnesses (in alphabetical order): Hugh Barton, an evangelist at Respondent's

church; Jeff Hood, Respondent's stepson and former employee; Ben Jaquith, Pastor; and Respondent.

On February 4, 1991, the Commissioner of the Bureau of Labor and Industries issued Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order in this matter. Thereafter, Respondent herein petitioned the Court of Appeals for Judicial Review of the Commissioner's February 4, 1991, decision. Subsequent to Respondent's filing of the petition for review and prior to the date set for hearing thereof, the Commissioner filed with the Court of Appeals a withdrawal of the original decision in this matter for the purpose of reconsideration pursuant to ORS 183.482(6) and was granted a period of time within which to affirm, modify, or reverse said decision. It was the Commissioner's intent to more fully address Respondent's objections to the harassment analysis applied in this case.

Having fully considered the entire record in this matter, I, Mary Wendy 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, Amended Opinion, and Order.

**FINDINGS OF FACT –  
PROCEDURAL**

1) On September 6, 1988, Complainant Donald W. Katzenberger filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging he was the victim of an unlawful employment practice of Respondent.

2) The Agency conducted an investigation and found substantial evidence of an unlawful employment practice on the part of Respondent. Attempts to resolve the matter by conference, conciliation, and persuasion were unsuccessful.

3) On February 14, 1990, the Agency prepared and duly served on Respondent Specific Charges which alleged that Respondent had discriminated against Complainant on the basis of religion. The Specific Charges alleged that Respondent's action violated ORS 659.030.

4) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On March 1, 1990, Respondent's attorney called the Hearings Unit to request an extension of time in which to file an answer. The Hearings Referee granted an extension of 10 days.

6) On March 8, 1990, Respondent filed an answer in which he denied the allegation mentioned above in the Specific Charges and stated numerous affirmative defenses.

7) Pursuant to OAR 839-30-071, the Agency and Respondent each filed a Summary of the Case.

8) A pre-hearing conference was held on April 24, 1990, at which time the Agency and Respondent stipulated to certain facts. Those facts were read into the record by the Hearings Referee at the beginning of the hearing.

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

10) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) Before opening statements, Respondent moved to dismiss the Specific Charges because they failed to state ultimate facts sufficient to constitute a claim for relief under Oregon law. Specifically, Respondent said that the Agency failed to allege that Respondent knew or should have known that his conduct was unwelcome by Complainant and created an intimidating, hostile, and offensive working environment in violation of ORS 659.030. The Hearings Referee denied the motion, ruling that Respondent's knowledge was not an ultimate fact.

12) Pursuant to OAR 839-30-155, the Hearings Referee requested post-hearing briefs from Respondent and the Agency. The record of the hearing was left open until May 4, 1990, for those briefs. Respondent submitted a timely brief, which is hereby admitted to the record.

13) The Proposed Order, which included an Exceptions Notice, was

issued on June 19, 1990. The Hearings Unit received Respondent's timely exceptions on July 12, 1990. Extensions of time were allowed for issuance of the Proposed Order and the exceptions. Respondent's exceptions are addressed throughout this Final Order.

#### FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent operated a sole proprietorship painting business in St. Helens, Oregon, and was an employer in this state utilizing the personal services of one or more employees, subject to the provisions of ORS 659.010 to 659.435.

2) Ben Jaquith, a Pastor at Westgate Baptist Church in Tigard, believes the Bible teaches that

"we have a responsibility to tell others about God, tell others about the truths that God has given in the word of God, and are central truths. \* \* \* A Christian, then, would have a responsibility, as well as a privilege, to share the good news of the fact that we can have forgiveness for our sins. And a Christian's responsibility is to share those truths as a way of life. \* \* \* [It's] a direct commandment, found in a number of places – Matthew Chapter 28, verses 19 through 20; Mark Chapter 16; scattered throughout the Book of Acts. There are references to the nature of Christians directly sharing their faith and being commanded of God to share their faith, out of concern and regard for the eternal state of others."

The terms "evangelism," "witnessing," and "soul winning" appropriately label

the process of sharing the Christian faith with non-Christians. Being an evangelist "is a direct command of God to every Christian, whether lay or clergy \* \* \*." The Scriptures do not delineate times to witness and times not to witness. Jaquith believes that witnessing is a way of life, and a person should do it on and off the job "out of obedience to Scripture."

3) Evangelistic Christians, rather than the people they contact, usually initiate discussions about religion. The responses of persons contacted vary from interest and receptivity to "intense antagonism." A common response is something like "Not now, maybe later." "They're often seemingly disturbed" by the discussion. The evangelist is "touching the very nerve center of the person's being." At times, evangelists believe it is appropriate to point out that, based on elements of a person's life style, "they are a sinner." Even after a person's response indicates no interest or desire to receive the evangelist's message, "given the mandate of Scripture," the evangelist has a high duty to contact the person again "in an appropriate manner." An evangelistic employer has a "mandate" to continue to witness to an employee who has shown disinterest in the employer's witnessing. Some people become interested in the evangelist's message after repeated contacts. In his contacts with non-Christians, Pastor Jaquith made it his practice to invite them to church.

4) At all times material, Hugh Barton was an evangelist and the corporate president of the church that Respondent attended, The Church at 295 S. 18th, St. Helens. The basics of his faith include that the Bible is the

inspired word of God, and so all beliefs and practices must come from the Scriptures.

"We are commanded in Matthew 28:18 to go into all the world and preach the Gospel. \* \* \* Therefore, the mandate from God is to preach."

In his church Mr. Barton preaches that people "to be faithful to God, to make it to heaven and avoid hell, must be speaking the word." He believes Respondent is commanded by God to preach. If Respondent did not preach, "he would be lost," under Mr. Barton's understanding of Scripture. "On a practical basis, we do choose" the time and place to witness. "There is a sense of when it's right and when it's wrong" to preach. Regarding "a person that I think there's hope for, there's no limit" on when, how, and where Mr. Barton would talk to that person about religion. Based on Acts Chapter 8, Mr. Barton believes that

"in order to be faithful to Christ and to be saved, [the Apostles] had to keep speaking whether they were charged by religious or civil authority. They must keep preaching the Gospel. It doesn't give any justification for disobeying other laws, but \* \* \* the things that God has spoken on must be done. \* \* \* "We must obey God rather than men." When it comes to speaking our faith, we have no choice but to speak under any and all circumstances."

"Any and all circumstances" includes when "an individual doesn't want to hear." Mr. Barton calls sharing the Gospel "preaching," "testimony or testifying," and "witnessing." He does not

believe in converting people to his faith against their wills. He believes Christians are commanded to go to church. He has no financial motive for witnessing.

5) Mr. Barton has witnessed to thousands of people. He usually starts the witnessing conversation with non-Christians.

"We would have no church if we waited for others to initiate the discussion. We would have no church if we only pursued those who expressed interest. There would be no church in St. Helens. I suspect there would be no church in the world."

6) Mr. Barton believes it is no signal to stop preaching when a person indicates no interest.

"We've had everything, even hostile reactions, where people have been converted. But I think that the thing that you have to determine is whether it's truly this person's conviction and desire, and that's a subjective call. Sometimes you guess wrong and you have somebody that is angry at you after that, and sometimes you're correct. \* \* \* The response at the time doesn't tell what the future will be. \* \* \* Nobody would ever be persuaded \* \* \* if you quit just because of a lack of appearance of interest."

7) Normally, witnessing is done in a "sensitive" way; however, when an evangelist knows that someone

"is in danger of eternal punishment, the penalty is so severe that, in order to try to help them be saved, I would warn them. Just as

if the building were on fire, I'd rush in and not be quite as polite as I would at other times. Sometimes there's a need to kind of shock people into a situation of realization."

8) Around 1983, Respondent started attending The Church at 295 S. 18th, St. Helens. Respondent agreed with the religious beliefs expressed by Mr. Barton. See Findings of Fact 4 to 7. Respondent believes that Matthew 28:18-20 mandates that he witness

"to all the world. And that's \* \* \* wherever each of us lives, that's our world. And my painting business takes a lot of my time."

In the last seven years, Respondent "always" talked to his employees about religion and invited them to church. He felt a duty, as a Christian, to witness to his employees and encourage them to attend church.

"When I go into the bank I talk to the teller about Jesus Christ and invite them to church. When I go to pay a bill I talk to the person that I pay a bill to. I feel I have that right. I go to a lawyer, I tell him. I go to a doctor, I tell him. And I don't see anything wrong with that. I mean they can take it or leave it. That's up to them. But I plant the seed. And that's what we're mandated to do."

"And if I see someone living in what I know is sin - cause the Bible directly says, hey, the only bed that is sanctified is the marriage bed, no other, any other is sin - so, when I see that I just tell them, hey, you're going to hell the way you're going. And the only way to

get right is come to church, learn the word, and then you'll see what you have to do \* \* \* to make changes in your life to become a Christian and be saved, not go to hell."

"I want them to be saved, I don't want them to be lost. So, I want to warn them."

Respondent believes, based on Hebrews 10:25, that Christians are mandated to attend church on Sundays.

9) Complainant was employed by Respondent as a painter between June 27 and July 27, 1988.

10) Complainant was age 22 at the time of hearing. He had completed tenth grade in 1984. Complainant has a learning disability. After leaving school, but before working for Respondent, Complainant worked for his father on a commercial fishing boat in Alaska. Later he worked at a fruit stand in Washington, where he lived with his mother. After that and until 1986, Complainant was unemployed and moved back and forth between his mother in Washington and his father in Alaska. During 1986, Complainant again worked for his father on the fishing boat. In December 1986, he enrolled in a Job Corps program in Oregon for one and one-half years, learning the painting trade. While in the Job Corps, Complainant was issued Bibles and he would "just throw them in the garbage. I didn't want to mess with it." He was a "loner."

11) During times material, Complainant lived in St. Helens with his mother, his stepfather, a brother, and his fiancée (now his wife), Toni Katzenberger. He had recently moved to St.

Helens and thought it was difficult to find a job there. Complainant married Toni Katzenberger after the period of his employment with Respondent.

12) During times material, Complainant did not go to church. He attended Sunday school when he was "very little" and went to kindergarten in a church. He sometimes went to church on Christmas Eve with his mother. He had not gone to church regularly since he was in kindergarten.

13) Complainant's job duties included preparation work, sanding, painting, and clean-up.

14) Complainant was very enthusiastic about going to work for Respondent because it was his first job after completing the Job Corps training.

15) Respondent was Complainant's direct supervisor.

16) Respondent worked near Complainant from four to eight hours per day.

17) Respondent did not say anything to Complainant about religion when he hired Complainant.

18) Two days after Complainant was hired, Respondent asked Complainant if he went to church. Complainant responded "no." Respondent told Complainant he should go to church and asked him if he wanted to go. Complainant said, "I can't make it \* \* \* and I'd think about it." Respondent gave Complainant a business card from Respondent's church that showed the address and times of services, and he invited Complainant to attend a service at 7 o'clock that evening. Complainant said that he could not make it.

19) Respondent's church held prayer meetings every Wednesday night. Each Wednesday, Respondent told Complainant about the prayer meetings and invited him to come. The church held two services on Sundays. Each Friday, Respondent invited Complainant to come to church on the following Sunday. Respondent invited Complainant to church a total of eight times during the month of his employment. Complainant repeatedly told Respondent that he could not make it to church, and he would think about it. Complainant never attended the church.

20) Respondent told Complainant that he had to be a good Christian to be a good painter and that he should go to church to be a good painter. He told Complainant that

"we worked in people's homes, inside repainting, and I want somebody that's a Christian person \*\*\* with me that wouldn't be stealing stuff \* \* \*"

Respondent told Complainant that he was a sinner because he did not go to church. Respondent said there were two places Complainant could go, heaven and hell, and Complainant was going to hell because he did not go to church. Respondent said this often enough to "bug" Complainant and make him "very uncomfortable." Respondent never expected Complainant to go to church.

21) At Longfellows Inn, where Respondent and Complainant were painting, Respondent asked Complainant if he was sleeping in the same bed with his fiancée, Toni. When Complainant said "yes," Respondent said that Complainant and Toni were sinners and

were going to hell because they should be married and they did not go to church.

22) A few days after Complainant started working for Respondent, Toni Katzenberger arrived to pick up Complainant at Longfellows Inn. While she was waiting in the parking lot, Respondent walked over to her, introduced himself, and asked her if she and Complainant were going to church with him that Wednesday night. She told him that they could not come because they already had plans. Respondent told her that there are two places where people go when they died, and asked her if she knew where people go if they did not go to church. He said they go to hell. He "witnessed to her about living in sin." Ms. Katzenberger did not say anything because she did not want to be rude to Complainant's boss. She told Complainant about her conversation with Respondent. The conversation embarrassed Complainant.

23) Respondent could not recall any statements or physical expressions by Complainant that would indicate Complainant found Respondent's religious comments offensive. Complainant always gave excuses for not going to church. It never occurred to Respondent that Complainant might be upset by Respondent's religious comments and invitations to church.

24) Complainant never informed Respondent that he felt offended, harassed, or intimidated by anything Respondent said to him or to anyone else.

25) Complainant did not want to complain to Respondent about the "preaching" because

"you don't say that to your boss. I mean, at least I don't."

"I told him I couldn't make it all the time. He should have got the hint, and I ain't a rude person that tells someone that's his religion, that's not mine."

Complainant thought his job might be affected by his unwillingness to go to church.

26) If Complainant had told Respondent to quit asking him to attend church, Respondent

"might have ceased for awhile, but I would check him out again sometime later on if he had been a good employee and stayed with me."

27) During lunch hours, Respondent and Patrick Kendall, an employee of Respondent's, prayed before they ate, read their Bibles, and often discussed religious subjects. Complainant sat away from Respondent and Kendall to eat his lunch. It did not bother Complainant that Respondent and Kendall prayed before they ate.

28) After about one week of employment, Complainant's attitude began to change. He would come home from work angry. He told his mother and fiancée that Respondent was pushing God down his throat, and he did not want to have anything to do with it. He often told his family about Respondent's religious comments before he left for work in the morning. He was reluctant to go to work each morning. He did not know what to do because Respondent was his boss. His mother advised him that, because Respondent felt so strongly about preaching to him about religion, Complainant

could lose his job if he told Respondent to stop.

29) At Respondent's house one day, while Ms. Katzenberger waited to pick up Complainant from work, Respondent invited her and Complainant to church. She told Respondent they could not make it.

30) On one occasion when he invited Complainant to church, Respondent got the impression that Complainant might come. That evening, Respondent called Complainant's house to encourage Complainant and Toni Katzenberger to come. Linda McConaughy, Complainant's mother, told Respondent that Complainant and Toni were not there, and she did not think they were on the way to church. Respondent then talked with Ms. McConaughy about church and invited her and her husband to church. Ms. McConaughy told Respondent that she and her husband had their own religious preferences and chose not to go to church. Respondent quoted Scripture from the Bible. He told her that everyone on earth was a sinner. Ms. McConaughy and her husband told Complainant about Respondent's call. Complainant was embarrassed about the call and apologized for it.

31) Complainant continued to complain to his family members about Respondent's "preaching." His mother, stepfather, brother, and fiancée got tired of hearing the complaints. They advised Complainant to ignore Respondent's comments. Complainant and his fiancée got into fights about the trouble Complainant was having at work and his threats to quit before finding another job. Ms. Katzenberger

was upset that Complainant wanted to quit because they were planning to get married and get their own place to live.

32) After two weeks of employment with Respondent, Complainant began looking for other work because he was so uncomfortable about Respondent's religious comments.

33) Respondent's stepson and employee, Jeff Hood, age 29, worked with Complainant on two jobs. Complainant told Mr. Hood that Respondent's invitations to church bothered him. Mr. Hood told Complainant to talk to Respondent about it.

34) During that time, Respondent regularly invited Mr. Hood to church and discussed religion. The invitations and discussions occurred both on and off the job. Mr. Hood always said he had other things to do and never attended church. He hoped Respondent would get the idea that he did not want to go to church and hoped Respondent would stop asking him. It bothered him "a little bit" that Respondent talked about religion and invited him to church. At the time, Mr. Hood had never told Respondent that he (Mr. Hood) was not interested in going to church. At some time after July 1988, Mr. Hood realized that giving excuses "wasn't getting me no where," so he "stood up" to Respondent and told him he was not interested. Subsequently, Respondent occasionally invited Mr. Hood to church. Mr. Hood told Respondent he was not interested on those occasions. Respondent is stubborn, and "he won't take 'no' for an answer." Mr. Hood felt that Respondent was concerned about him.

35) Respondent never criticized any religion by name to Complainant.

Respondent never called Complainant any religious slur.

36) Respondent discharged Complainant based upon Complainant's poor work performance.

37) At the time of his discharge, Complainant thought the reason he was fired was that he had not gone to church. Respondent had told him he was slow.

38) Respondent's comments to Complainant regarding church and Respondent's beliefs made Complainant feel "very uncomfortable." He felt humiliated by Respondent's "preaching" and by being told he was going to hell. He "felt out of place cause I didn't go to church and he did." Complainant thought Respondent intended to annoy him. The comments affected his work performance and gave him a bad attitude. When he went home with his bad attitude and complained to his family about Respondent's religious comments, he upset his family. His mother told Complainant to move out and find his own place to live.

39) Around the time of his discharge, Complainant moved out of his mother's house at his mother's request. Ms. McConnaughy and her husband were trying to become foster parents and "needed things to be in a very smooth way." Complainant was putting a strain on Ms. McConnaughy's marriage because he was coming home after work and "basically exploding."

40) Some time after he was discharged by Respondent, Complainant went into a church to deliver some clothes. He felt "very uncomfortable" walking into the church, and it made

him feel "cold." Respondent's comments caused Complainant to hate churches. Now he "can't stand looking at them." "They're building one every day, it seems like." Before his employment with Respondent, Complainant and Ms. Katzenberger talked about religion. Since that time, he "can't stand" to talk about religion. He "gets upset" whenever religion is mentioned.

41) Complainant's testimony was credible. On some points where his memory was deficient or he gave inconsistent answers, his testimony was unreliable. When that occurred, his testimony did not form the basis of findings of fact unless the testimony was corroborated by other credible evidence on the record. The Forum finds that the inconsistencies in Complainant's testimony were caused by failures of his memory or by misunderstandings of the questions rather than any intention to deceive the Forum.

42) Respondent's testimony was credible. His demeanor was calm and forthright. He responded to questions without hesitation and made no effort to avoid any issue.

43) The testimony of the other witnesses was credible. The Hearings Referee observed the demeanor of each witness and found each to be forthright and direct in his or her answers. Each witness's answers were, on important points, consistent with the answers of the other witnesses as well as the documentary evidence.

#### ULTIMATE FINDINGS OF FACT

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

2) Complainant was employed by Respondent.

3) Over the course of one month, Respondent repeatedly told Complainant that he was a sinner and was going to hell because he was not attending church and he was sleeping with his fiancée. Respondent made similar remarks to Complainant's fiancée and mother. Respondent attempted to call Complainant at home to encourage him to attend church. Respondent told Complainant that he had to be a Christian to be a good painter and that Respondent wanted to work with a Christian. Respondent invited Complainant to church eight times.

4) Respondent's conduct was directed at Complainant because of Complainant's religious beliefs.

5) Respondent's religious comments and invitations, as summarized in Ultimate Finding of Fact 3, were unwelcome and offensive to Complainant.

6) Respondent's conduct, as summarized in Ultimate Finding of Fact 3, was sufficiently pervasive so as to alter the conditions of employment and had the effect of creating an intimidating and offensive working environment.

7) Respondent's comments to Complainant regarding church and Respondent's beliefs made Complainant feel very uncomfortable, humiliated, out of place, embarrassed, and annoyed. Respondent's conduct upset Complainant and his family. Respondent's conduct caused Complainant to hate churches and to become upset whenever religion was discussed.

## CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110. ORS 659.010(6).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.040, 659.050.

3) ORS 659.030(1) provides, in part:

"For the purposes of ORS 659.010 to 659.110 \* \* \* it is an unlawful employment practice:

\* \* \*

"(b) For an employer, because of an individual's \* \* \* religion, \* \* \* to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Respondent violated ORS 659.030 (1)(b).

4) For the reasons stated in sections 4 and 5 of the Opinion, which are incorporated herein by this reference, Respondent has not proved any of his affirmative defenses.

5) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an

unlawful practice found, and to protect the rights of others similarly situated.

## AMENDED OPINION

### 1. Test for Religious Harassment.

The Commissioner has adopted the following test for religious harassment:

"Harassment on the basis of religion is a violation of ORS 659.030. Unwelcome religious advances and other verbal or physical conduct of a religious nature constitute religious harassment when:

"(1) submission to such conduct is made, either explicitly or implicitly, a term or condition of the subject's employment;

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

"(3) such conduct has the purpose or effect of unreasonably interfering with the subject's work performance or creating an intimidating, hostile or offensive working environment." *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232, 273 (1985).

In adopting the religious harassment test, the Commissioner emphasized that

"this forum does not mean to state that general expressions of religious beliefs at the work place, by themselves, constitute a violation of ORS 659.030." *Sapp's*, 4 BOLI at 273.

Oregon's Fair Employment Practices act is modeled after Title VII of the Civil Rights Act of 1964, as amended, and the Commissioner has often

looked to judicial interpretations of Title VII for guidance in interpreting and applying Oregon's law. See, e.g., *In the Matter of Albertson's, Inc.*, 7 BOLI 227 (1988). The religious harassment test above was derived from the US Equal Employment Opportunity Commission's Guidelines for sexual harassment. *Sapp's*, 4 BOLI at 272-73. The EEOC's Guidelines define two types of harassment: "quid pro quo" and "environmental." "Quid pro quo" means "something for something." *Black's Law Dictionary* 1415 (rev 4th ed).

Under the religious harassment test above, "quid pro quo" harassment occurs when "submission to [unwelcome] religious] conduct is made, either explicitly or implicitly, a term or condition of the subject's employment," or when "submission to or rejection of such conduct by the subject is used as the basis for employment decisions affecting the subject."

"Unwelcome" religious conduct that "unreasonably interfer[es] with the subject's work performance," or creates "an intimidating, hostile or offensive working environment" constitutes "environmental" religious harassment, even if it leads to no tangible or economic job consequences.

The Commissioner recognized both forms of harassment in *Sapp's*. In this case the participants correctly identified the type of harassment claimed as "environmental," there being no allegation in the Specific Charges of "quid pro quo" harassment. The Agency must prove its case by a preponderance of the evidence.

Respondent argued that the "sexual harassment paradigm" is inappropriate and should not be followed in a

religious environmental harassment case involving evangelism because of the constitutional protections surrounding the speech and opinions involved, and because the motivations in a sexual harassment case are different from the motivations in a religious harassment case like the one here. The Forum disagrees. Respondent's constitutional rights will be addressed by determining whether ORS 659.030 can be constitutionally applied to him in this case, rather than by inserting constitutional elements into the harassment test or creating a new test. Regarding Respondent's motives, the Forum finds no case that suggests that an employer's "good" motives are a defense to a religious harassment claim. Instead, there are religious harassment cases that involve employers holding devotional meetings or Bible studies for employees on the job. Those employers' "good motives" did not affect the harassment analysis. See, e.g., EEOC Decision No. 72-0528, 4 FEP Cases 434 (1971); *Young v. Southwestern S & L Assn.*, 10 FEP Cases 522 (1975 5th Cir); and *State of Minnesota v. Sports & Health Club*, 37 FEP Cases 1463 (1985).

### 2. Unwelcome Religious Conduct.

Religious conduct in the work place becomes unlawful only when it is unwelcome. The challenged conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive." *Henson v. City of Dundee*, 682 F2d 897, 903, 29 FEP 787, 792 (11th Cir 1983).

The evidence was undisputed that Respondent invited Complainant to

church eight times over the course of the month of employment. The evidence was undisputed that Respondent told Complainant he was a sinner for not attending church and for sleeping with his fiancée. Respondent called Complainant at home to encourage him to attend church. Respondent told Complainant that he had to be a Christian to be a good painter and that Respondent wanted to work with a Christian. The evidence was undisputed that Respondent talked with Complainant's mother at home and with Complainant's fiancée at the work place about attending church, and told them they were sinners. The evidence was inexact as to the number of times Respondent talked to Complainant about religion and Complainant's life style. It was not established that those conversations occurred only together with Respondent's invitations to attend church. Complainant testified that, although the conversations did not take place every day, they occurred often enough to make him very uncomfortable. Given Respondent's beliefs and commitment to witnessing or preaching, it is reasonable to infer that not all of the conversations occurred in connection with the eight invitations to church.

There was no evidence that Complainant engaged Respondent in or initiated any conversation about religion. There was no evidence that Complainant found Respondent's conduct welcome. Complainant's credible testimony was clear that he found Respondent's religious comments and overtures undesirable and offensive. He complained to his family and Mr. Hood about Respondent's preaching.

There was evidence suggesting that Complainant was indifferent toward Respondent's conduct, namely: Complainant's repeated responses that he could not make it to church, but would think about it; and his failure to complain to Respondent that Respondent's comments were unwelcome. That evidence, however, must be weighed against Complainant's testimony that he did not complain to Respondent because Respondent was his employer, and he did not wish to be rude or insubordinate. He hoped that his repeated excuses for not going to church would give Respondent the message that he was not interested.

"While a complaint or protest is helpful to charging party's case, it is not a necessary element of the claim. Indeed, the Commission recognizes that victims may fear repercussions from complaining about harassment and that such fear may explain a delay in opposing the conduct." EEOC: Policy Guidance on Sexual Harassment (October 17, 1988), 8 FEP Manual 405:6685 (BNA 1990).

The example that EEOC gives regarding the policy above involves a complainant who did not complain to management about the harassment she was suffering. She feared that complaining would cause her to lose her job. There was no evidence that she ever welcomed the conduct. When the harassment became more severe, she complained to EEOC. Her failure to complain to her management did not foreclose her claim. This Forum adopts EEOC's policy as stated above: While a contemporaneous complaint or protest is persuasive

evidence of a complainant's claim that conduct is unwelcome, it is not a necessary element of the case.

Here, the great weight of the evidence — Complainant's credible testimony and the credible testimony of Ms. Katzenberger, Ms. McConnaughy, and Mr. Hood that Complainant complained to them about Respondent's conduct — is persuasive and establishes that Respondent's religious conduct occurred and was unwelcome to Complainant.

**3. Such conduct has the purpose or effect of creating an intimidating, hostile, or offensive working environment.**

For religious conduct to violate ORS 659.030, it must be sufficiently severe or pervasive to alter the conditions of the complainant's employment and create an intimidating, hostile, or offensive work environment. In making this determination, this Forum evaluates the totality of the circumstances. This Forum has previously examined the frequency, duration, and severity of harassing conduct to determine if it created a hostile working environment. See, e.g., *Sapp's, supra*, and *In the Matter of Lee's Cafe*, 8 BOLI 1 (1989).

The standard applied in this determination is objective and is directed to the reasonableness of the complainant's reaction to the work environment.

"In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a 'reasonable person.' \* \* \* Thus, if the

challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found." EEOC: Policy Guidance on Sexual Harassment (October 17, 1988), 8 FEP Manual 405:6689 (BNA 1990) (citations omitted).

This is not to say, however, that the specific circumstances of the complainant play no role in determining how a reasonable person would be affected by the work environment. All objective aspects of a complainant's situation will be relevant to the reasonableness of complainant's reaction to the work environment, including characteristics of the complainant. Youth and inexperience, for example, are appropriately considered in evaluating the environment's impact on complainant.

"[T]he trier of fact must adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances. \* \* \* The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior." *Id.*

Here, Respondent's harassing conduct occurred because Complainant did not share Respondent's religious beliefs. Respondent's conduct occurred at least twice per week. It occurred for a month, which was the entire length of Complainant's employment with Respondent. It occurred both on and off the job, and invaded not only Complainant's personal life, but the personal lives of his fiancée and mother. Respondent made it clear that he wanted to work with Christians, and repeatedly reminded Complainant

that Respondent considered him a sinner because his lifestyle did not conform to Respondent's religious beliefs. Respondent's invitations to church were repeated regularly at work, and there was no indication that his comments would stop. From the perspective of a 20-year-old employee with Complainant's education and experience, and in a situation where he worked closely with his harasser/ employer, Respondent's religious conduct was sufficiently pervasive to alter the conditions of the employee's working environment and had the effect of creating an intimidating and offensive working environment.

In his exceptions, Respondent referred to the testimony of Jeff Hood, Benjamin Jaquith, and Hugh Barton to assert that Respondent's proselytizing at the workplace did not create an objectively offensive work environment. While relevant, that testimony was not dispositive because of the differences between their perspectives and "the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances." EEOC: Policy Guidance on Sexual Harassment, *supra*. Mr. Hood was older and more experienced than Complainant, and was Respondent's stepson. Messrs. Jaquith's and Barton's experience with witnessing was virtually all gained outside of the employment context. Their perceptions were given little weight because door-to-door witnessing – to use an example that both men described – involves an entirely different environment than that involved in an employment relationship.

Complainant had the right to hold religious beliefs that were different from

Respondent's, or the right to hold no religious beliefs. Employees have the right under ORS 659.030 to work in an environment free from harassment. Here, Respondent's conduct violated Complainant's rights and the statute.

#### 4. Respondent's Lack of Knowledge that His Conduct Created an Intimidating and Offensive Work Environment.

The evidence was undisputed that (1) Complainant never complained to Respondent about his religious comments, and (2) Respondent did not know that his comments were unwelcome or offensive to Complainant. Respondent argues that, in this case, an additional element of proof should be incorporated into the test for harassment: that Respondent knew or should have known that his actions were creating an intimidating, hostile, or offensive work environment. Respondent asserted that an objective standard should be used to judge this element and that here a reasonable evangelical Christian should be the objective standard. In other words, Respondent argued that in order to find a violation of the statute, the Forum would have to find that a reasonable evangelical Christian would have known or should have known that his actions (Respondent's actions) were creating an intimidating, hostile, or offensive work environment. Similarly, in his exceptions to the Proposed Order, Respondent argued that the statute should be construed to include this element in the test for harassment to avoid constitutional concerns. While he acknowledged that adding this element to the test would not eliminate serious constitutional difficulties in all

cases, Respondent correctly observed that it would decide this case without the necessity of resorting to constitutional analysis. This Forum declines to add this element to the harassment test for the reasons given below.

Respondent suggested in his Memorandum of Law that the law "requires proof that the employer was placed on notice that the employee finds the conduct offensive," and quoted from *Meritor Savings Bank v. Vinson*, 477 US 57, 106 S Ct 2399, 2406, 40 FEP Cases 1822, 1827 (1986), that, "the correct inquiry is whether [the complainant] by her conduct indicated that the alleged sexual advances were unwelcome." However, a closer reading of the *Vinson* case makes it clear that the issue the US Supreme Court was addressing in that portion of the opinion was whether the sexual conduct complained of was unwelcome to the employee in the face of evidence that the employee had engaged in the sexual conduct voluntarily.

"The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' \* \* \* While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determination committed to the trier of fact, the District Court in this case erroneously focused on the 'voluntariness' of [the complainant's] participation in the claimed sexual episodes. The correct inquiry is whether [the complainant] by her conduct indicated that the alleged sexual advances were unwelcome, not

whether her actual participation in sexual intercourse was voluntary." *Vinson*, 40 FEP Cases at 1827 (citation omitted).

Thus, the court was focusing on an issue of proof, on the kind of evidence that would prove unwelcomeness given the apparent consent of the plaintiff to sexual activity. As stated in part 2 of this Opinion,

"[w]hile a contemporaneous complaint or protest is persuasive evidence of a complainant's claim that conduct is unwelcome, it is not a necessary element of the case." EEOC: Policy Guidance on Sexual Harassment, *supra* (emphasis added).

In other words, a complaint by an employee to his or her harasser about the harasser's conduct is not a requirement of the test. *Vinson* does not support Respondent's conclusion that the law requires "that Complainant adequately communicat[e] to Mr. Meltebeke that his message was not only not welcome, but that he considered his environment to be abusive and offensive as a result of its presentation."

OAR 839-07-555(4) provides that

"[a]n employer may be responsible for its acts or acts of its agents, supervisory employees, or co-workers with respect to sexual harassment of an individual employee, even if the acts complained of were of the kind previously consented to by that individual employee, if the employer knew or should have known that the offended employee had withdrawn his or her consent to the otherwise offensive conduct."

Concerning the issue of whether sexual conduct is unwelcome, the EEOC has stated:

"A more difficult situation occurs when an employee first willingly participates in conduct of a sexual nature but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment. Here the employee has the burden of showing that any further sexual conduct is unwelcome work-related harassment. The employee must clearly notify the alleged harasser that his conduct is no longer welcome."<sup>11</sup>

<sup>11</sup> In Commission Decision No. 84-1, CCH Employment Practices Guide 6839, the Commission found that active participation in sexual conduct at the workplace \* \* \* may indicate that the sexual advances complained of were not unwelcome. Thus, the Commission found that no harassment occurred with respect to an employee who had joined in the telling of bawdy jokes and the use of vulgar language during her first two months on the job, and failed to provide subsequent notice the conduct was no longer welcome. \* \* \* See also *Loftin-Boggs v. City of Meridian*, 633 F.Supp. 1323, 41 FEP Cases 532 (S.D. Miss. 1986) (plaintiff initially participated in and initiated some of the crude language that was prevalent on the job; if she later found such conduct offensive, she should have conveyed this by her own conduct and her reaction to her co-worker's conduct)." EEOC: Policy Guidance on Sexual Harassment (October 17, 1988), 8 FEP Manual 405:6686-87 (BNA 1990)."

From the administrative rule and the EEOC Guideline it is clear that, if a complainant has previously willingly participated in conduct that he or she later complains about, the complainant has a duty to notify the harasser that the conduct is unwelcome, and the employer may be liable for the harassment if it knew or should have known that the employee had withdrawn his or her consent to the offensive conduct. However, this Forum knows of no statute, administrative rule, EEOC Guideline, harassment court case, or Final Order regarding any protected class that (1) states that a complainant has some duty to notify his or her harasser that the conduct complained of is unwelcome and is creating a hostile work environment, or (2) requires proof that the harasser knew or should have known that the conduct complained of was unwelcome and created a hostile work environment. Accordingly, the Forum rejects Respondent's view on those issues.

Moreover, it is not exactly clear what it is that Respondent is suggesting be done to modify the harassment analysis. Respondent's citation to *Vinson* indicates that the employee must expressly notify the employer that the employer's conduct is unwelcome. However, Respondent's references to the employee's specific subjective response to the employer's conduct indicates that the employee must notify the employer that the employee considers the employer's conduct hostile, intimidating, or offensive, or just generally abusive. Finally, it also seems that Respondent is suggesting that the employee must notify the employer that the employee considers the work

environment created by the employer's conduct to be hostile, intimidating, or offensive. Although these may sound like theoretical quibbles, in fact they are critical distinctions between the subject matter of the subjective and objective elements of the harassment analysis.

Whether the conduct of the employer creates a hostile, offensive, or intimidating work environment is an objective issue, judged from an objective viewpoint, not from the subjective perspective of the employee. If the employee's subjective evaluation of the employer's conduct or the environment it creates were sufficient to establish harassment, then there might be good reason to require that the employee notify the employer of his or her reaction. But the employee's opinion of either the employer's conduct or the work environment is not sufficient. "[T]he trier of fact must adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances." *Id.*

The only subjective fact of relevance to the analysis is whether or not the conduct, not the work environment, was welcomed by the employee. Where the employee's previous participation in the offending conduct creates the appearance of consent, the law demands that the employee make clear that consent to the conduct is withdrawn. But where there is no basis for assuming consent, the employee cannot be presumed to welcome conduct which a reasonable person would find produces a hostile, intimidating, or offensive environment.

The constitutional values cited by Respondent are already adequately protected by the objective element of

the analysis applied in this case. An inquiry as to whether a reasonable person would find the work environment to be hostile, intimidating, or offensive is functionally equivalent to the test Respondent urges on this Forum: whether or not the employer knew or should have known that his conduct was creating a hostile or intimidating work environment. While it is not inconceivable that an employer-oriented standard might produce a different result than the more general "reasonable person" standard, it would be the rare case indeed where the judgment of a reasonable person would depart from that of a reasonable employer. It is the Forum's conclusion that layering a reasonable employer test on top of the existing reasonable person test adds nothing of consequence to the analysis.

Moreover, even assuming for purposes of argument that Respondent's additional test was constitutionally necessary, it would be of no comfort to Respondent in this case. The Forum finds that a reasonable employer would or should know that the conduct at issue here is sufficiently severe and pervasive so as to create a hostile, intimidating, or offensive work environment. No reasonable employer could fail to appreciate the intimidation and offensiveness injected into the work environment by forceful and repeated proselytism, by the confrontation of family members and sweethearts with their own "sinfulness," by warnings to them and the employee of eternal damnation, and by the explicit evaluation of an employee's worth and honesty on the basis of the employee's religious beliefs.

Respondent's further suggestion, that an objective standard should embody the viewpoint of the reasonable evangelical Christian employer, would effectively eviscerate the law of religious harassment. As Respondent's own witnesses characterize this viewpoint, obedience to God requires unrelenting "witnessing," regardless of its welcomeness to the employee or the command of civil authority. On the basis of this record, it seems unlikely if not impossible that a reasonable evangelical Christian employer could ever view "soul winning" conduct, the object of which is the salvation of the employee's immortal soul, as hostile or intimidating or offensive.

#### 5. Constitutional Issues.

In his answer, Respondent raised the following three affirmative defenses: (1) he was engaged in the exercise of religious beliefs and worship as protected by Article I, section 2, of the Oregon Constitution,<sup>1</sup> and by the First Amendment to the US Constitution;<sup>2</sup> (2) he was engaged in the exercise of his right to express religious opinion as protected by Article I, section 3, of the Oregon Constitution;<sup>3</sup> and (3) he was engaged in the exercise of

free speech protected by Article I, section 8, of the Oregon Constitution<sup>4</sup> and by the First Amendment to the US Constitution.<sup>5</sup> Although he conceded that ORS 659.030 is constitutional, he asserted that application of it in a manner that prohibits those protected activities is unconstitutional.

#### a. Oregon Constitution, Article I, Sections 2 and 3.

The Forum agrees that applying ORS 659.030 to on-the-job evangelism raises serious constitutional questions under both state and federal law. Oregon's guarantees of religious freedom must be interpreted independently from those in the US Constitution. See *Salem College & Academy, Inc. v. Employment Division*, 298 Or 471, 695 P2d 25 (1985); *Smith v. Employment Division*, 301 Or 209, 721 P2d 445, 447 (1986), *vacated on other grounds*, *Employment Division v. Smith*, 485 US 660, 108 S Ct 1444, 46 FEP Cases 1061 (1988); *Cooper v. Eugene School District No. 4J*, 301 Or 358, 723 P2d 298, 307 (1986), *appeal dismissed*, 480 US 942 (1987).

Respondent argued that ORS 659.030 is not a statute of general application that is neutral toward religion,

<sup>1</sup> Oregon Constitution, Article I, section 2, provides: "All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences."

<sup>2</sup> US Constitution, Amendment I, provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech \* \* \*."

<sup>3</sup> Or Constitution, Article I, section 3, provides: "No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience."

<sup>4</sup> Or Constitution, Article I, section 8, provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

<sup>5</sup> See footnote 2, *supra*.

but one that, as applied, directly regulates constitutionally protected religious speech.

Although the statute names "religion" as an employee's protected class, the object of the statute is not to burden the exercise of employers' religious conduct. The purpose of the statute is to

"encourage the fullest utilization of available manpower by removing arbitrary standards of race, religion, color, sex, marital status, national origin or age as a barrier to employment of the inhabitants of this state; to insure human dignity of all people within this state, and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of discrimination of any kind based on race, religion, color, sex, marital status or national origin." ORS 659.022.

The statute applies equally to all employers and is not specifically directed at employers' religious practices. It does not attempt to regulate religious beliefs or to single out any particular religious belief for adverse treatment. It is a concededly constitutional statute, and a general regulation, neutral toward religion on its face and in its policy. See *State of Minnesota v. Sports & Health Club*, 37 FEP Cases 1463, 1468 (1985) (Minnesota Human Rights Act, which made discrimination on the basis of religion an unlawful employment practice, held to be a facially-neutral regulation). Cf. *Cooper v. Eugene School District No. 4J*, 301 Or at 368, 723 P2d at 305 (law singled out teachers' religious dress because it was religious and prohibited wearing

religious dress while performing duties as a teacher).

In *Smith v. Employment Division*, *supra*, the Oregon Supreme Court sustained Oregon's unemployment benefits standards against attack under the Oregon Constitution. In that case, the plaintiff was discharged from employment for using peyote in a religious ceremony. After he was denied unemployment benefits under a law disqualifying employees discharged for work-related "misconduct," he challenged the unemployment benefits standards. The court found that the unemployment law was a general regulation, neutral toward religion on its face and in its policy. The court cited *Salem College & Academy*, where a religious school contended that the state could not compel it to pay unemployment taxes because to do so would infringe upon the school's free exercise rights under the Oregon Constitution. The court

"rejected that contention, holding that the state had not infringed upon the school's right to religious freedom when all similarly situated employers in the state were subjected to the same tax." *Smith*, 721 P2d at 447.

"Just as employers may be required to pay unemployment taxes regardless of their religious affiliations, employees discharged for misconduct may be denied unemployment benefits regardless of their motivation for committing the misconduct. All discharged employees in this state are subject to the same standards, and the definition of misconduct does not speak at all to religious motivations

for the misconduct." *Smith*, 721 P2d at 448.

Here, Respondent is prohibited from discriminating against employees because of religion, just as all similarly situated employers in the state are so prohibited. Employers may be liable for religious harassment regardless of their motivation for committing the harassing acts; the prohibition against religious harassment does not speak at all to religious motivations for the prohibited acts. As stated earlier in this Opinion, "this Forum does not mean to state that general expressions of religious beliefs at the work place, by themselves, constitute a violation of ORS 659.030." *Sapp's*, 4 BOLI at 273. Employers are not prohibited from witnessing. They are prohibited from creating an unwelcome and objectively offensive atmosphere at work that constitutes religious harassment of their employees. Such conduct "results in acts offensive to the positive law." *Sapp's*, at 281, quoting from *U.S. Bank of Portland v. Snodgrass*, 202 Or 530, 538, 275 P2d 860, rehearing den (1954). Accordingly, this Forum finds that the application of ORS 659.030 to Respondent's conduct does not violate Article I, sections 2 and 3, of the Oregon Constitution.

In his exceptions to the Proposed Order, Respondent argued that the Agency failed to show "that [Respondent's] religious expression contravenes his role or function as a private employer beyond any realistic means of accommodation," relying on *Cooper v. Eugene School Dist. 4J*, 301 Or at 372, 723 P2d at 307. The court in *Cooper* was dealing with a statute in which "the religious significance of the

teacher's dress [was] the specific target of this law." *Cooper*, 301 Or at 369, 723 P2d at 306. The statute was "not a general regulation, neutral toward religion on its face and in its policy \* \* \*." *Cooper*, 301 Or at 368, 723 P2d at 305. The Forum has found ORS 659.030 to be a general regulation, neutral toward religion on its face and in its policy, and thus the analysis Respondent cites from *Cooper* is not appropriate here.

Assuming, however, that ORS 659.030 is a law that targets the religious significance of Respondent's conduct, the Forum finds that it is valid. The court in *Cooper* said, "[i]f such a law is to be valid, it must be justified by a determination that religious dress necessarily contravenes the wearer's role or function at the time and place beyond any realistic means of accommodation." *Cooper*, 301 Or at 372, 723 P2d at 307. Here, the law would have to be justified by a determination that Respondent's conduct necessarily contravened his role or function as an employer beyond any realistic means of accommodation. Employers are prohibited from discriminating against employees because of the employees' religion. Said another way, employees have a right to work in a harassment-free workplace. ORS 659.030 helps protect the "free exercise, and enjoyment of religious [sic] opinions, \* \* \* [and] the rights of conscience" of employees whose opinions differ from those of their employers. To paraphrase *Cooper*, laws like ORS 659.030 respect and contribute to the employee's right to the free exercise and enjoyment of his or her religious opinions or heritage, untroubled by

being out of step with those of the employer. *Cooper*, 301 Or at 376, 723 P2d at 310. The law does not prohibit an employer's religious conduct outright, nor does it prohibit an employer's on-the-job religious conduct outright. Rather, it makes it unlawful for such conduct to become so severe or pervasive that it creates an intimidating, hostile, or offensive work environment. Once Respondent's conduct created that environment, the Forum finds that his conduct necessarily contravened his role and function as an employer beyond any means of accommodation. Application of ORS 659.030 to these facts does not impose an impermissible restriction on employers.

**b. Oregon Constitution, Article I, Section 8.**

"[A]rticle I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences. \* \* \* [L]aws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end." *State v. Robertson*, 293 Or 402, 416, 649 P2d 569 (1982).

With regard to regulations that

"do not foreclose expression entirely but regulate when, where and how it can occur[,] \* \* \* even free speech activities 'are not immune from regulations imposed for reasons other than the substance of their particular message.'" *City*

*of Hillsboro v. Purcell*, 306 Or 547, 554, 761 P2d 510 (1988) (quoting *City of Portland v. Tidyman*, 306 Or 174, 182, 759 P2d 242 (1988)).

The law in this case, ORS 659.030, focuses on proscribing the accomplishment of the unlawful employment practice of discrimination because of, among other things, religion. Religious harassment is a recognized form of religious discrimination. The statute does not focus on the content or substance of speech or writing. This law, on its face, is valid. However, speech is implicated by this application of it.

The Forum finds that, as applied, ORS 659.030 is not overbroad. It does not prohibit all religious speech for any purpose at any time. See *Purcell*, 306 Or at 556. It regulates only employers' unwelcome advances or verbal or physical conduct that has the purpose or effect of creating an intimidating, hostile, or offensive working environment. The constitutional right to speak, write, or print freely, guaranteed in Article I, section 8, was not meant to immunize words that result in unlawful employment harassment, including religious, racial, sexual, age, and national origin harassment.

**c. Federal Constitution, First Amendment, Free Exercise Clause.**

The Free Exercise clause of the First Amendment commands that "Congress shall make no law \* \* \* prohibiting the free exercise [of religion]." In *Cantwell v. Connecticut*, 310 US 296 (1940), the US Supreme Court held that this prohibition applies to the states by incorporation into the Fourteenth Amendment, and forbids government regulation of religious beliefs.

As the court said in *Cantwell*, 310 US at 303-04, the First Amendment "embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Quoted in *Sapp's*, 4 BOLI at 280. Respondent argued that his conduct was speech, rather than acts, and was thus constitutionally protected. Although Respondent and his witnesses did not want to characterize their activities as proselytizing, the facts are that their activities were intended to persuade and convert listeners to Christianity. (See, e.g., Findings of Fact 6 and 8.) "Proselyte" means "to try to convert (a person), esp. to one's religion" and "to persuade to do or join something, esp. by offering an inducement." *Webster's New World Dictionary* (2d college ed 1986). "[T]he 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: [for example] proselytizing \* \* \*." *Employment Division v. Smith*, \_\_\_ US \_\_\_, 110 S Ct 1595, 1599, 52 FEP Cases 855 (1990), *reh'g den*, 110 S Ct 2605 (1990). Respondent was performing acts, which may be regulated.

"[T]he freedom to act, even when the action is in accord with one's religious conviction, is not totally free from legislative restrictions \* \* \* [L]egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion." *Braunfeld v. Brown*, 366 US

599, 603-04 (1961) (quoted in *Sapp's*, 4 BOLI at 280).

Respondent argued that to restrict his proselytizing would be unconstitutional, citing *Employment Division v. Smith*, 110 S Ct at 1599:

"It would be true, we think (though no case of ours has involved the point), that a state would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts [proselytizing] or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."

Neither ORS 659.030 nor the application of it in this case seeks to ban such acts.

As stated earlier, ORS 659.030 is a concededly constitutional statute and a general regulation, neutral toward religion on its face and in its policy. The US Supreme Court in *Smith* said:

"Respondents \* \* \* contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the

collection of a general tax, for example, as 'prohibiting the free exercise [of religion]' by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as 'abridging the freedom . . . of the press' of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

"\* \* \* We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. \* \* \*

"Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Division v. Smith*, 110 S Ct at 1599-1600 (citations omitted; emphasis supplied).

Here, prohibiting or regulating Respondent's free exercise of religion is not the object of the antidiscrimination law.

Respondent's religious beliefs are incidentally affected by application of the statute. Accordingly, the First Amendment has not been offended.

The court in *Smith* noted that only in "hybrid" situations — that is, when application of a neutral, generally applicable law to religiously motivated action involves "the Free Exercise clause in conjunction with other constitutional protections, such as freedom of speech" — has it held that the First Amendment bars the law's application. When First Amendment freedom of speech protections are involved, and in cases prior to *Smith* involving free exercise of religion, courts have followed a three-step analysis to determine whether a constitutional exemption from the statute is required: (1) whether the statute imposes a burden upon the free exercise of those rights; (2) if so, whether the imposition of that burden is justified by a compelling government interest; and (3) whether the questioned statute is the least restrictive means to achieve the state's goals. See, e.g., *State of Minnesota v. Sports & Health Club*, 37 FEP Cases 1463, 1469 (1985).

The record shows that Respondent acted according to his sincere religious beliefs. ORS 659.030 imposes a burden on Respondent's free exercise of his religious beliefs. As discussed in part 5d of this opinion, the abridgment of Respondent's beliefs is justified by the state's compelling interest in eliminating discrimination in employment.

Respondent seeks an exemption from the statute, which would be a less restrictive alternative. The Oregon Civil Rights law contains an exception, under certain conditions, that allows a

"bona fide church or sectarian religious institution" to prefer an employee or applicant for employment from one religious sect or persuasion over another. ORS 659.020(2). Respondent is neither a bona fide church nor a sectarian religious institution; he is engaged in a private painting business for profit.

"By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs. The state's overriding compelling interest of eliminating discrimination based upon sex, race, marital status, or religion could be substantially frustrated if employers, professing as deep and sincere religious beliefs as those held by appellants, could discriminate against the protected classes. Other employers in the state engaged in secular business activities would be bound by the law, but those professing such convictions would not. We agree with the Commissioner that the state's overriding interest permits of no exception to appellants in this case. Notwithstanding the fact the Minnesota Human Rights Act as applied here infringes upon sincerely held religious beliefs and imposes upon the free exercise thereof, when appellants entered into the economic arena and began trafficking in the market place, they have subjected themselves to the standards the legislature has prescribed not only for the benefit of prospective and existing employees, but also for the benefit of the citizens of the state as a

whole in an effort to eliminate pernicious discrimination." *Sports & Health Club*, 37 FEP Cases at 1470.

This Forum agrees with the reasoning of the Minnesota Supreme Court just quoted and finds that Oregon's compelling interest permits no exemption to Respondent.

In his exceptions, Respondent argued that this Order has "the effect of prohibiting proselytizing only because it is done for religious reasons and for the religious belief it displays." He asserts that such an effect is unconstitutional according to *Smith*, and also contradicts the Commissioner's policy stated in *Sapp's* that the Bureau does not intend to prohibit expressions of religious opinions in the workplace.

Respondent's argument overstates the effect of this Order. ORS 659.030 does not prohibit proselytizing in the workplace, just as it does not proscribe all conduct of a sexual nature in the workplace. Occasional expressions of religious opinions in the workplace would probably not establish an offensive environment, just as "sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment." EEOC: Guidance on Sexual Harassment, *id.* at 405:6689. Employers are responsible to exercise control over their proselytizing so that it does not cross the line to become unlawful harassment.

**d. Federal Constitution, First Amendment,<sup>6</sup> Freedom of Speech Clause.**

The First Amendment provides: "Congress shall make no law \* \* \* abridging the freedom of speech \* \* \*". Employers and employees enjoy First Amendment rights. *NLRB v. Gissel Packing Co.*, 395 US 575, 617-19, 89 S Ct 1918, 1941-42, 71 LRRM 2481 (1969). However, not all statements made by them are constitutionally protected. For instance, fraudulent, libelous, and obscene statements are not protected. Statements that amount to "conduct" may be regulated and prohibited under certain employment circumstances. Statements by an employer containing "threats of reprisal or force or promise of benefits" may constitute an unfair labor practice and be prohibited under section 8(c) of the National Labor Relations Act. 29 USCA 158(c). *Gissel Packing*, 395 US at 616-18, 89 S Ct at 1941-42.

The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 US 640, 101 S Ct 2559, 2564, 69 L Ed 2d 298 (1981). In *Heffron*, the respondents asserted that a state fair rule — which prohibited the sale or distribution of any merchandise, including printed or written material, except from a duly licensed location on the fairgrounds — suppressed the practice of Sankirtan, a religious ritual that commands its

members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion. The court recognized that the respondent's activities were subject to reasonable time, place, and manner restrictions.

"We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." *Heffron*, 101 S Ct at 2564 (citations omitted).

In his exceptions, Respondent argued that the application of ORS 659.030 in this case adversely affects Respondent's religious speech on the basis of the content of that speech, and such an application violates the free speech component of the First Amendment. However, as noted above in part 5b of this Opinion, the focus of this statute is *not* on the content of Respondent's speech. It is on proscribing the accomplishment of a forbidden result, namely religious harassment in the workplace.

As stated at the beginning of this Opinion, the Commissioner has often looked to judicial interpretations of Title VII for guidance in interpreting and applying Oregon's Fair Employment Practices Act. The US Supreme Court wrote that under Title VII "verbal \* \* \* conduct of a sexual nature" may be

<sup>6</sup> The First Amendment was made applicable to the states by incorporation through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 US 652, 45 S Ct 625, 69 L Ed 1138 (1924); *Palko v. Connecticut*, 302 US 319, 58 S Ct 149, 82 L Ed 288 (1937).

prohibited if it "has the purpose or effect of unreasonably interfering with an individual's work performance or create[s] an intimidating, hostile, or offensive working environment." *Meritor Savings Bank v. Vinson*, 477 US 57, 106 S Ct 2399, 2405, 40 FEP Cases 1822, 1826 (1986). The court said that "sexual harassment" resulting from such conduct "which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Id.*, 106 S Ct at 2406, 40 FEP Cases at 1827 (quoting *Henson v. Dundee*, 682 F2d 897, 902, 29 FEP Cases 787 (11th Cir 1982)). The court declared that its conclusions regarding sexual and racial harassment were based on the fact that the reach of Title VII's prohibition against discrimination is broad, covering all "terms, conditions, or privileges of employment," and that this broad phraseology evinces a congressional intent to strike at the entire spectrum of discrimination in employment. *Vinson*, 106 S Ct at 2404, 40 FEP Cases at 1826. The reasoning of *Vinson* regarding claims of racial and sexual discrimination under Title VII is also applicable to a claim of religious discrimination under ORS 659.030.

In the *Sports & Health Club* case, *supra*, the Minnesota Supreme Court reviewed numerous federal court decisions, including *Hishon v. King and Spaulding*, 104 S Ct 2229, 34 FEP Cases 1406 (1984).

"In *Hishon* a law associate sued her former employer alleging that sex-biased discrimination caused the decision denying her elevation

to partnership status in a law firm. In holding that Hishon's complaint stated a claim cognizable under Title VII, the court rejected the law firm's defense that application of Title VII would infringe upon the rights of expression and association. In doing so the majority stated:

'Moreover, as we have held in another context, "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union.'

"*Id.* at 2235 (citations omitted). Justice Powell, in concurrence, emphasized that laws banning discrimination may well infringe upon first amendment rights:

'The Court's opinion properly reminds us that "invidious private discrimination \* \* \* has never been afforded affirmative constitutional protections." This is not to say, however, that enforcement of laws that ban discrimination will always be without cost to other values, including constitutional rights. Such laws may impede the exercise of personal judgment in choosing one's associates or colleagues.'

"*Id.* at 2236, n. 4 (Powell, J., concurring) (citations omitted and emphasis added). An examination of the foregoing cases clearly

demonstrates that the government has an overriding compelling interest in prohibiting discrimination in employment \* \* \*. In a pluralistic and democratic society, government has a responsibility to insure that all its citizens have equal opportunity for employment, promotion, and job retention without having to overcome the artificial and largely irrelevant barriers occurring from gender, status, or beliefs to the main decision of competence to perform the work." *Sports & Health Club*, 37 FEP Cases at 1469-70 (emphasis in original).

The court concluded "that the Human Rights Act [was] not facially unconstitutional and that the state's overriding compelling interest in prohibiting discrimination in employment, while it does infringe upon the appellant's exercise of religious beliefs, [was] constitutionally permissible." *Sports & Health Club*, 37 FEP Cases at 1469, 1471.

Likewise, Oregon has a compelling interest in enforcing its laws that prohibit harassment and discrimination based upon the protected classes listed in ORS chapter 659. As applied in this case, the restrictions imposed by the law "serve a significant governmental interest." *Heffron*, at 2564.

Alternative forums exist for expression of Respondent's protected speech, despite the effects of ORS 659.030. The law does not prohibit his proselytizing outside of the workplace, nor does the law prohibit it in the workplace if it does not have the purpose or effect of creating an intimidating, hostile, or offensive working environment.

ORS 659.030, as applied here, does not unnecessarily limit or violate Respondent's free speech rights. As described throughout this Opinion, Respondent's proselytizing had the effect of creating an offensive working environment for Complainant. Such actions were not constitutionally protected, and fall within the prohibition of ORS 659.030.

## 6. Damages.

Respondent argued that mental suffering damages were not recoverable under ORS chapter 659, citing *Holien v. Sears, Roebuck and Co.*, 298 Or 76, 689 P2d 1292 (1984).

As the Commissioner wrote in *In the Matter of Harry Markwell*, 8 BOLI 80 (1989):

"It is well settled that the Commissioner may award compensatory damages for mental suffering as an administrative remedy under the Oregon civil rights law. *Williams v. Joyce*, 4 Or App 482, 504, 479 P2d 513, 523, 524, *rev den* (1971); *School District No. 1 v. Nilssen*, 271 Or 461, 484-86, 534 P2d 1135, 1146 (1975); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, 569-70, *rev den* (1979); *Gaudry v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668, 670-71 (1980); *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475, 484 (1984); *Schipcoreit v. Roberts*, 93 Or App 12, 760 P2d 1339, 1342-43, *rev allowed* (1988). See also OAR 839-03-090.

"As the court stated in *Schipcoreit*, the legislative history of

ORS 659.121, which provides for civil suits in circuit court, does not show.

'any intention to abrogate the previously existing powers of the Commissioner recognized in *Williams v. Joyce*, *supra*. In *Holien*, the Supreme Court concluded that the 1977 legislation did not eliminate or reduce existing administrative remedies, including damages, in employment discrimination.' 93 Or App 12, 760 P2d at 1341.

"Thus, Respondent's reliance on *Holien* is misplaced. The Supreme Court has specifically recognized the Commissioner's power to award mental suffering damages under the Oregon civil rights law. \*\*\*

"The Commissioner has the authority to fashion a remedy adequate to eliminate the effects of discrimination. In *Fred Meyer* the court said,

'[t]he wide variety of forms which discrimination may take, the broad range of circumstances in which it occurs, and the differences in the impacts it has on particular individuals require that the Commissioner's remedial powers be broad and flexible.' 592 P2d at 570." *Markwell*, at 82.

As summarized in Ultimate Finding of Fact 7, "Respondent's comments to Complainant regarding church and Respondent's beliefs made Complainant feel very uncomfortable, humiliated, out of place, embarrassed, and annoyed. Respondent's conduct upset

Complainant and his family. Respondent's conduct caused Complainant to hate churches and to become upset whenever religion is discussed." Although he was employed by Respondent for only one month, Complainant was a 20-year-old man with very little prior employment experience aside from working with his dad on a fishing boat. His employment with Respondent was his first job after a Job Corps program in painting. As a result of his youth and inexperience, the effects of Respondent's harassment were significant and ongoing. The Forum has awarded Complainant \$3,000 to help compensate him for the mental distress he has suffered from the religious harassment by Respondent.

#### 7. Respondent's Exceptions to the Proposed Order.

Respondent's exceptions to the Proposed Order have been addressed throughout this Final Order. Many of his exceptions to Findings of Facts were without merit because he was objecting to an assortment of possible, incorrect implications or inferences that he believed might be drawn from those findings. The basic Findings of Facts are supported by a preponderance of the evidence, and such facts will not be altered only because one might draw an incorrect inference or implication from them.

Respondent argued that Findings of Facts concerning comments he made to Complainant's mother and fiancée should be limited, because they occurred outside the employment setting and did not involve the Complainant, and thus could not have any effect on Complainant or his environment at work. Respondent argued that such

conversations were outside the scope of ORS chapter 659, and were protected by the state and federal constitutions. The Forum found that such conversations were relevant to this case. In determining whether a respondent's comments are unwelcome and create an intimidating, hostile, or offensive working environment, the Commissioner evaluates the totality of the circumstances. An employer's off-the-job conduct that directly affects an employee may be relevant in evaluating whether an intimidating, hostile, or offensive working environment has been created. In *the Matter of G & T Flagging Service, Inc.*, 9 BOLI 67, 78 (1990); *In the Matter of Colonial Motor Inn*, 8 BOLI 45, 52 (1989). Here, Respondent's contacts with Complainant's family were a direct extension of Respondent's comments and invitations to Complainant, and occurred directly as a result of Complainant's employment with Respondent. Complainant was affected by those contacts. Those Findings of Facts were properly considered when evaluating the issues presented in this case.

With regard to Respondent's numerous exceptions based on relevance or credibility, the Commissioner disagrees with his arguments where no change has been made between the Proposed Order and this Final Order.

Respondent suggested that several Findings of Fact needed to be added to the Final Order. Some of those suggested findings involved Respondent's knowledge of the effects of his conduct. Since the Forum has rejected Respondent's position that an element of proof in this case is that he

knew or should have known that his actions were unwelcome and were creating an intimidating, hostile, or offensive working environment (see part 4 of this Opinion), Respondent's suggested findings are immaterial. Other suggested findings either refer to events that did not occur (for example, Complainant did not suffer nightmares, nor did he seek professional help for his mental distress) or suggest conclusions of fact. The Forum declined to make such findings either because such findings would not affect the determinations in this Order or because the Forum found the conclusions were unsupported by the evidence.

#### ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondent, JAMES MELTEBEKE, is hereby ORDERED to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 305 State Office Building, 1400 SW Fifth Avenue, Portland, Oregon 97201, a certified check, payable to the Bureau of Labor and Industries in trust for Don W. Katzenberger, in the amount of:

a) THREE THOUSAND DOLLARS (\$3,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

b) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of

the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any employee on the basis of religion.

3) Post in a conspicuous place at each of Respondent's worksites a copy of ORS 659.030, together with a notice that anyone who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

**In the Matter of  
Tyler Corporation, dba  
PANDA PIZZA,  
Respondent.**

Case Number 34-91  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued February 13, 1992.

**SYNOPSIS**

Respondent employed four minors as pizza delivery drivers. One minor was killed in an auto accident while delivering pizza. The Commissioner held that OAR 839-21-104, which incorporates federal regulations on hazardous occupations for minors, prohibits employing a minor as a motor vehicle driver or outside helper on any public road or highway. Respondent also employed 17 minors without checking

for work permits or filing employment certificates, and failed to keep required records on the minor employees. The Commissioner found that Respondent was not regulated under the Fair Labor Standards Act, did not find the violations to be willful or repeated, and imposed civil penalties totaling \$9,400. ORS 653.340; 653.370(1); OAR 839-19-020; 839-19-025(2), (4), (5); 839-19-100(1)(c), (2); 839-21-104; 839-21-170(1); 839-21-220(1)(a) and (b), (3).

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 5, 1991, in Suite 220 of the State Office Building, 165 East Seventh Avenue, Eugene, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judy Bracanovich, an employee of the Agency. Tyler Corporation (Respondent) was represented by James W. Spickerman, Attorney at Law. Christopher T. Johnson, Respondent's authorized representative, was present throughout the hearing. Respondent called Christopher Johnson as its witness.

Having fully considered the entire record in this matter, I, Mary Wendy 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 June 3, 1991, the Agency served on Respondent a Notice of Intent to Assess Civil Penalty (charging document).

2) On June 13, 1991, the Agency received Respondent's request for a contested case hearing and its answer to the charging document. On June 24, 1991, the Agency received Respondent's amended answer.

3) On June 20, 1991, the Agency sent the Hearings Unit a request for a hearing date. On July 2, 1991, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency indicating the time and place of the hearing. Together with the Notice of Hearing, the Hearings Unit sent a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-30-020 to 839-30-200.

4) On July 22, 1991, the Agency filed a motion to strike Respondent's affirmative defense, which alleged that the charging document failed to state a claim upon which relief could be granted. The Agency argued in its motion that such a defense is more properly a prehearing motion against the pleadings. The Agency requested that the Hearings Referee treat the affirmative defense as such, and issue an order requiring Respondent to set forth the basis for the defense. On August 2, the Hearings Unit received Respondent's timely response to the motion.

Respondent argued that OAR 839-30-060 required it to set forth in its answer "each relevant defense to the allegations" in the charging document, and to raise affirmative defenses. It argued that the hearing rules were silent on what were affirmative defenses, and relied on ORCP 21 to argue that it should have the option of raising a "failure to state a claim" defense in its answer or by motion to dismiss.

5) On July 22, 1991, the Hearings Referee denied the Agency's motion to strike. The Hearings Referee found that it was appropriate for Respondent to raise its "failure to state a claim" defense in its answer, especially since a respondent in a wage and hour case such as this does not receive a copy of the hearings rules (OAR chapter 839, division 30) until after it files its answer and a request for hearing.<sup>1</sup> The Hearings Referee noted that, under OAR 839-30-070(1), a motion to dismiss may be based upon "[f]ailure to state a claim upon which relief can be granted." That motion must be filed within 10 days after issuance of the charging document, so "that such issues [will] be raised and addressed early." The Hearings Referee reasoned that "if the motion is granted, the matter may be dismissed and unnecessary preparations for hearing avoided, or the pleadings can be amended without delaying the hearing," citing OAR 839-30-075 regarding amendments to the pleadings. For the same reasons, the Hearings Referee directed Respondent to file a brief setting forth the basis of its affirmative

<sup>1</sup> In Civil Rights contested cases and in some Wage and Hour licensing contested cases, the hearings rules are included with the charging document that is served on the respondent.

defense, along with its points and authorities.

6) On August 19, 1991, the Hearings Unit received Respondent's motion for partial summary judgment, with an affidavit from Respondent's president, Christopher Johnson, and a memorandum of law.

7) After an extension of time, on September 20, 1991, the Agency filed a cross-motion for partial summary judgment, along with a memorandum in response to Respondent's motion for summary judgment and in support of the Agency's cross-motion for partial summary judgment.

8) After an extension of time, Respondent filed a timely response to the Agency's cross-motion and to the Agency's memorandum in response to Respondent's motion for partial summary judgment.

9) On October 17, 1991, the Hearings Referee denied Respondent's motion for summary judgment and granted the Agency's cross-motion for partial summary judgment.

10) On October 28, 1991, the Agency timely submitted a Summary of the Case.

11) On October 29, 1991, the Agency requested that the Hearings Referee direct Respondent to file a Summary of the Case and requested a prehearing conference.

12) On October 29, 1991, the Agency filed a second motion for partial summary judgment.

13) On October 31, 1991, the Hearings Referee directed Respondent to comply with the requirements of OAR 839-30-071, the Summary of the Case rule, by November 1, 1991.

The Hearings Referee also scheduled a prehearing conference for November 1.

14) On October 31, 1991, Respondent filed by fax a Summary of the Case and an objection to an Agency subpoena duces tecum. Respondent did not attach to its Summary of the Case any documents it intended to offer at hearing.

15) During a prehearing conference on November 1, 1991, the Agency moved to amend the charging document. Respondent did not object, and the Hearings Referee granted the motion. Respondent and the Agency agreed that only two facts were in dispute. Respondent did not dispute the factual matters alleged in the Agency's second motion for partial summary judgment, and the Hearings Referee granted the Agency's motion. The Hearings Referee deferred ruling on discovery issues until hearing.

16) At the start of the hearing, Respondent's attorney said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

17) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing. The Hearings Referee notified the participants that, during the course of a hearing on a contested case involving Albertson's, Inc., case number 01-91, he had heard testimony and had received the Agency's investigative file regarding Respondent's case. Respondent was given notice of its right to rebut on the record the

substance of the ex parte communication.

18) Before any evidence was offered at the hearing, Respondent conceded the remaining facts in dispute, except for facts concerning the issues of mitigation and the computation of civil penalties.

19) Respondent offered no documentary evidence, and accordingly the Hearings Referee did not rule on motions and objections surrounding an Agency subpoena and Respondent's case summary.

20) The Proposed Order, which included an Exceptions Notice, was issued on December 3, 1991. Respondent timely filed exceptions on December 13, 1991. The exceptions are addressed in the Opinion.

#### FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent was an Oregon corporation engaged in the restaurant business. Christopher Johnson was Respondent's president. From 1986 until he incorporated Respondent in January 1990, Johnson operated a Panda Pizza parlor in Cottage Grove as a sole proprietor. He employed minors during that entire period, including minors employed as delivery drivers. In early March 1990, Respondent opened a second Panda Pizza parlor in Creswell. Respondent employed persons under 18 years of age (minors).

2) During February and March 1990, Respondent employed Colby Lewis as a pizza delivery driver for Respondent's pizza parlor in Creswell. Lewis's date of birth was October 17, 1973. He was 16 years old during

times material. On March 19, 1990, while operating his car on a public road or highway to deliver pizza in the course of his employment with Respondent, Lewis was killed in a car accident.

3) As of March 19, 1990, Respondent had employed Jeff Bishop, Mark D. Helgeson, Kevin Kinkade, and Colby Lewis as motor vehicle delivery drivers. Bishop, Helgeson, Kinkade, and Lewis were each hired by Respondent as delivery drivers prior to their 18th birthdays. The minors drove during hours of darkness and spent half of their working hours driving. Respondent never instructed the minor drivers to use seatbelts.

4) As of March 19, 1990, Respondent employed 17 minors under age 18. Respondent did not verify the minors' ages by requiring the minors to produce Work Permits prior to being employed or permitted to work.

5) As of March 19, 1990, Respondent had not filed employment certificates for 17 minor employees within 48 hours after hiring each of the minors.

6) On March 20, 1990, the Agency began an investigation of Lewis's accident. Compliance Specialist Eduardo Sifuentez advised Johnson that he had to immediately discontinue the practice of allowing 16- and 17-year-old minor employees to drive motor vehicles to deliver pizza. Sifuentez also advised Johnson that Respondent had to verify the age of minors by requiring that they have work permits, and that Respondent must submit employment certificates for each minor employee. Sifuentez discussed laws regarding the employment of minors with Johnson and gave him work permit and

employment certificate applications, a minimum wage poster, and Employment of Minors brochures. On March 21, Johnson told Sifuentez that Johnson had stopped allowing minor employees to drive. Johnson began acquiring the minors' work permits and agreed to file employment certificates. Johnson was at all times cooperative.

7) Johnson was unaware that employees under age 18 were prohibited from driving motor vehicles on public roads and highways. Johnson was unaware of the requirement to file employment certificates for minor employees. He assumed that Respondent's minor employees had work permits because some of them had been referred to Respondent by Creswell High School; Johnson assumed that the school ensured that the minors had work permits.

8) Respondent's records did not show the sex of five minor employees, did not show the time of day and day of the week on which six minors' work weeks began, and did not show the dates of birth of three minor employees.

9) The Agency interpreted OAR 839-21-104 to mirror the interpretation by the US Department of Labor (USDOL) of Hazardous Order number 2, 29 CFR part 570.52,

"to prohibit the occupations of driver and outside helper as particularly hazardous for the employment of minors where the motor vehicle is operated on public roads or highways or on private roads or highways in or about mines, logging and sawmill operations, or identified excavations."

10) At times material, Respondent's sales did not exceed \$280,000. USDOL advised the Agency that it would not regulate the hazardous order violations alleged in this case, because the minors would not be under its jurisdiction.

#### ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an Oregon corporation engaged in the restaurant business. Christopher Johnson was Respondent's president. Respondent employed persons under 18 years of age (minors) in Oregon.

2) Respondent employed Jeff Bishop, Mark D. Helgeson, Kevin Kinkade, and Colby Lewis as motor vehicle pizza delivery drivers prior to their 18th birthdays. The minors drove on public roads or highways, drove during hours of darkness, and spent half of their working hours driving. Respondent never instructed the minors to use seatbelts.

2) Lewis was 16 years old at times material. Lewis was killed while operating a motor vehicle in the course of his employment with Respondent.

4) Respondent employed 17 minors under age 18. Respondent did not verify the minors' ages by requiring the minors to produce work permits prior to being employed or permitted to work.

5) Respondent failed to file employment certificates with the Agency for 17 minor employees within 48 hours after hiring each of the minors.

6) Respondent's records did not show the sex of five minor employees, did not show the time of day and day of the week on which six minors' work

weeks began, and did not show the dates of birth of three minor employees.

#### CONCLUSIONS OF LAW

1) At all times material, Respondent was subject to the provisions of ORS 653.305 to 653.370 and the administrative rules adopted thereunder.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein. Respondent was not regulated under the Fair Labor Standards Act. ORS 653.370(1); OAR 839-19-100(1)(c), (2).

3) Before the start of the contested case hearing, the Hearings Referee informed Respondent of its rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing. The Hearings Referee complied with ORS 183.462 and OAR 839-30-101 by notifying the participants of an ex parte communication, and of their right to rebut the substance of the communication on the record.

4) The actions or inactions of Christopher Johnson, an agent or employee of Respondent, are properly imputed to Respondent.

5) The occupation of motor vehicle driver on any public road or highway is prohibited for minors between 16 and 18 years of age, with some exceptions not applicable here. Hazardous Occupations Order No. 2, 29 CFR part

570.52, OAR 839-21-104. By permitting four employees under age 18 to drive motor vehicles on public roads or highways, Respondent committed four violations of OAR 839-21-104.

6) By failing to verify the age of 17 minors by requiring those minors to produce work permits before being employed or permitted to work, Respondent committed 17 violations of OAR 839-21-220(1)(a).

7) By failing to file a completed employment certificate form with the Agency within 48 hours after hiring each of 17 minors, or permitting each of 17 minors to work, Respondent committed 17 violations of OAR 839-21-220(1)(b) and (3).

8) By failing to maintain and preserve records containing the sex of five minor employees, the time of day and day of the week on which six minors' work weeks began, and the dates of birth of three minor employees, Respondent committed one violation of OAR 839-21-170(1).

#### OPINION

This case is a tragic reminder of why child labor laws exist and why they must be obeyed. A child's death could and would have been avoided if the law had been followed by this Respondent.

In the amended charging document, the Agency alleged that Respondent employed four minors in a hazardous occupation (motor vehicle driver), in violation of OAR 839-21-104,<sup>2</sup> that Respondent failed to

<sup>2</sup> OAR 839-21-104 provides: "No employer shall employ a minor between 16 and 18 years of age in any occupation declared particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health or well-being, except under terms and conditions specifically set

verify the ages of 17 named minor employees at the time of hire by requiring the minors to produce work permits, in violation of OAR 839-21-220(1)(a);<sup>3</sup> that Respondent failed to file employment certificates for 17 named minor employees, in violation of OAR 839-21-220(3);<sup>4</sup> and that Respondent failed to maintain proper records on 11 named minor employees, in violation of OAR 839-21-170(1)(a)-(g).<sup>5</sup> The Agency alleged aggravating circumstances, including the death of one 16-year-old minor employee, Colby Lewis, while

driving a motor vehicle to deliver pizza for Respondent, and proposed to assess a civil penalty in the amount of \$9,400 for the violations.

#### Hazardous Occupation

As an affirmative defense, and later as a motion for partial summary judgment, Respondent alleged that in paragraph one of the charging document the Agency failed to state a claim upon which relief could be granted. Respondent argued that the occupation its minor employees engaged in was not an occupation listed in 29 CFR part 570.52,<sup>6</sup> which is incorporated by

forth by rules of the Wage and Hour Commission. Those occupations set out in Title 29 of the Code of Federal Regulations, Part 570.51 to and including Part 570.68 are hereby adopted as occupations particularly hazardous for the employment of minors between 16 and 18 years of age or detrimental to their health and well-being and the regulations pertaining to these occupations set out in Title 29 of the Code of Federal Regulations, Part 570.50 to and including Part 570.68 are hereby adopted and incorporated by reference herein and are attached as Appendix 1."

<sup>3</sup> OAR 839-21-220(1) provides: "Unless otherwise provided by rule of the Commission, no minor 14 through 17 years of age shall be employed or permitted to work unless the employer: (a) Verifies the minor's age by requiring the minor to produce a work permit and (b) Complies with the provisions of this rule."

<sup>4</sup> OAR 839-21-220(3) provides: "Within 48 hours after the hiring of a minor, or of permitting a minor to work, an employer shall file a completed employment certificate form by taking or mailing the completed form to any office of the Bureau of Labor and Industries."

<sup>5</sup> OAR 839-21-170(1) provides: "Every employer employing minors shall maintain and preserve records containing the following information and data with respect to each minor employed:

"(a) Name in full, as used for social security recordkeeping purposes and on the same record, the minor's identifying symbol or number if such is used in place of name on any time, work or payroll records; "(b) Home address, including zip code;

"(c) Date of birth;

"(d) Sex and occupation in which the minor is employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss or Ms.);

"(e) Time of day and day of week on which the minor's workweek begins;

"(f) Hours worked each workday and total hours worked each workweek;

"(g) Date the minor became employed by the employer and date employment was terminated."

<sup>6</sup> 29 CFR Part 570.52(a) provides: "Finding and declaration of fact. Ex-

reference in OAR 839-21-104. Respondent argued that

"it is not all vehicle operation in employment that is prohibited for minors 16 to 18 years. It is rather vehicle operation in proximity to certain dangerous industries or conditions. The agency has simply misread the regulations."

Respondent argued that the prohibition in part 570.52 concerns operating a vehicle on a public highway near a mine, logging or sawmill operation, or excavation. Respondent also argued that to construe the regulation to prohibit all delivery driving by persons under 18 years of age would cause it to conflict with ORS 653.340,<sup>7</sup> which regulates the hours and ages of minors employed by telegraph, messenger, and delivery companies.

The Agency argued in its cross-motion for summary judgment that the

Wage and Hour Commission had adopted the federal hazardous orders, and had consistently interpreted 29 CFR part 570.52 as it had been interpreted by the US Department of Labor: to prohibit the occupations of driver and outside helper as particularly hazardous for the employment of minors, where the motor vehicle is operated on public roads or highways or on private roads or highways in or about mines, logging and sawmill operations, or identified excavations. The Agency cited a line of federal cases adopted by the commission "in which the occupation of motor vehicle driver and outside helper for 16 to 18 year old minors has been considered, the prohibition has applied to all driving and outside helper occupations where the motor vehicle is operated on public roads and highways, whether or not those roads or highways are in or about a mine, logging or sawmill operation, or an

cept as provided in paragraph (b) of this section, the occupations of motor vehicle driver and outside helper on any public road, highway, in or about any mine (including open pit mine or quarry), place where logging or sawmill operations are in progress, or in any excavation of the type identified in 570.68(a) are particularly hazardous for the employment of minors between 16 and 18 years of age."

Paragraph (b) provides exceptions for incidental and occasional driving, and for school bus driving. Paragraph (c) contains definitions. "Motor vehicle" is defined to include automobiles and trucks. Respondent never argued that the exception for incidental and occasional driving applied in this case. The exception's requirements were not met here; the exception applies when (among other things) driving is restricted to daylight hours, it is occasional and incidental to the child's employment, the child holds a valid state driver's license and has completed a state approved driver education course, the vehicle is equipped with a seat belt, and the employer has instructed each child that belts must be used. See Finding of Fact (the Merits) 3.

<sup>7</sup> ORS 653.340 provides:

"(1) No person under the age of 18 years shall be employed or permitted to work as a messenger for a telegraph or messenger company or anyone engaged in such a business in the distribution, transmission or delivery of goods or messages before 5 a.m. or after 10 p.m.

"(2) No person under the age of 16 years shall be employed or permitted to work in the telegraph, telephone or public messenger service."

identified excavation." *Lenroot v. Interstate Bakeries Corp.*, 146 F2d 325 (CA 8 1945) (minor helpers on trucks delivering bulk milk, flour, and sugar); *Goldberg v. Fritschy*, 198 F Supp 743 (DC NC 1961), *rev'd on other grounds*, 309 F2d 152 (minor helper on truck hauling scrap metal for sale to local dealers); *Mitchell v. Howard*, 37 CCH Lab Cases 65554 (DC Ga 1959) (minor helper on trucks delivering chicken feathers and ice); *Wirtz v. Lundsford*, 54 CCH Lab Cases 31837 (DC Tenn 1966), *aff'd on this point, rev'd on other grounds*, 404 F2d 693 (minor driver and helper on trucks delivering oil for oil distribution company); and *Schultz v. McBride*, 62 CCH Lab Cases 32332 (DC Tex 1970) (minors driving motor trucks to perform janitorial services at client business locations).

The Agency argued further in its memorandum that its interpretation of the federal regulation was not in conflict with ORS 653.340, because that statute

"regulates the hours of work of minors employed as messengers and delivery persons (whether by motor vehicle, bicycle, or foot); OAR 839-21-104 incorporates the conditions of labor of minors as, in this case, delivery persons." (Emphasis in original.)

By admission in the affidavit of Respondent's president that Mark Helgeson, Kevin Kinkade, and Colby Lewis were employed by Respondent as 16 and 17 year olds to deliver pizza by driving motor vehicles, the Agency claimed it was entitled to summary judgment on paragraph one of the charging document as to those three minors.

The Hearings Referee found, and the Forum hereby finds, that the language of 29 CFR part 570.52 makes the occupations of motor vehicle driver and outside helper on any public road or highway particularly hazardous for the employment of minors between 16 and 18 years of age. The regulation lists several places where those occupations are hazardous: (1) on any public road, (2) on any highway, (3) in or about any mine, (4) in or about any place where logging or sawmill operations are in progress, or (5) in any excavation of the type identified.

Respondent's conclusion — that because in the regulation there is no "or" between the words "highway" and "in or about any mine," the regulation only makes driving hazardous on public roads or highways located near mines, etc., — is not compelled by the language of the regulation and is not supported by the federal cases. The Forum finds that the Agency's and the Wage and Hour Commission's interpretation of the regulation is reasonable and supported by the case law. The Hearings Referee granted partial summary judgment to the Agency on that issue and made that recommendation in the Proposed Order. OAR 839-30-070(6). Respondent took exception to that ruling in the Proposed Order, citing the authorities and arguments set forth in its motion for summary judgment. The Forum hereby confirms the Hearings Referee's ruling.

#### Other Violations

The Agency also moved for summary judgment regarding (1) Respondent's failure to require that the 17 named minors produce work permits prior to hire, and (2) Respondent's

failure to file employment certificates concerning the 17 named minors. Respondent did not dispute those facts, and the Hearings Referee granted the Agency's motion. That ruling is incorporated herein by this reference and confirmed by the Forum. OAR 839-30-070(6).

Regarding the allegation that Respondent failed to maintain records in compliance with OAR 839-21-170, Respondent conceded that issue at hearing.

#### Civil Penalties

Pursuant to ORS 653.370(1),

"the Commissioner of the Bureau of Labor and Industries may impose upon any person not regulated under the Federal Fair Labor Standards Act who violates ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder, a civil penalty not to exceed \$1,000 for each violation."

Respondent is not regulated under the Fair Labor Standards Act for the violations found here. See Finding of Fact (the Merits) 10 and Conclusion of Law 2. The Agency has adopted rules, OAR chapter 839, division 19, to regulate civil penalties for child labor violations. A "violation" means a transgression of any statute, rule, or order, or any part thereof and includes both acts and omissions. OAR 839-19-004 (9). Each violation is a separate and distinct offense. OAR 839-19-015. For certain violations, the Agency has

established minimum penalties. OAR 839-19-025. The actual amount of the penalty depends on all the facts and any mitigating and aggravating circumstances. OAR 839-19-025(1). For all other violations, the Commissioner determines the amount of the civil penalty after considering a number of circumstances, including: the history of the employer in taking all necessary measures to prevent or correct violations of statutes and rules; prior violations, if any, of statutes and rules; the magnitude and seriousness of the violation; the opportunity and degree of difficulty to comply; whether a minor was injured while employed in violation of the statute and rules; and all mitigating and aggravating circumstances. Notwithstanding those factors, in the case of a serious injury to or death of a minor while employed in violation of the statutes and rules, the Commissioner may impose the maximum penalty allowed by ORS 653.370, which is \$1,000. OAR 839-19-020(4), 839-19-025(6).

#### Willful and Repeated

OAR 839-19-025(5) provides:

"Willful and repeated violations of the provisions of ORS 653.305 to 653.370 or OAR 839-21-001 to 839-21-500 are considered to be of such seriousness and magnitude that no less than \$500 for each willful or repeated violation will be imposed when the Commissioner determines to impose a civil penalty."<sup>6</sup>

<sup>6</sup> Note that the rule begins with "Willful and repeated violations," but later refers to "willful or repeated violation." (Emphasis added.) Respondent took exception to the referee's reading of the rule, which views the operative language as disjunctive, by arguing that it "arbitrarily determines that the two specifications are alternatives." Respondent argued that it would be "more rea-

"Willful" means intentional and includes a failure to act. "A person commits a willful act when the person knows what she/he is doing, intends to do what she/he is doing and is a free agent." OAR 839-19-004(10). This standard is very familiar to the Agency. Under ORS 652.150, an employer is liable for a civil penalty if it "willfully fails to pay" wages due to an employee, as provided in ORS 652.140. The Oregon Supreme Court has held that "willfully" for the purpose of ORS 652.150 means that "the person knows what he is doing, intends to do what he is doing, and is a free agent." *Sabin v. Willamette-Western Corp.*, 276 Or 1083, 1093-94, 557 P2d 1344 (1976).

Unlike ORS 652.150 and the language interpreted by the *Sabin* court, however, OAR 839-19-025(5) is addressed to "[w]illful ... violations," not a willful act that constitutes a violation. Thus, in ORS 652.150, the statute prescribes penalties for an act: the intentional failure to pay wages due. OAR 839-19-025(5), on the other hand, sets a minimum penalty by reference to a violation of law and requires that the violation be willful. Here, Respondent

sonable" to construe the rule to intend that only those acts that are both willful and repeated be punished by this substantial penalty." (Emphasis in original.) The Forum has ruled that a statute should be read to give effect to every word, phrase, sentence, and section where possible. *In the Matter of Mini-Mart Food Stores, Inc.*, 3 BOLI 262, 274 (1983). This is consistent with the general rule of statutory construction that, when construing a statute, a "judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. These rules also are appropriate to the construction of OAR 839-19-025(5). In order to give meaning to every word in the rule section (and not omit the word "or"), the Forum construes the rule to mean that willful and repeated violations of certain statutes and rules are both considered to be of such seriousness and magnitude that a minimum civil penalty will be imposed (when the Commissioner determines to impose a civil penalty), and, a minimum penalty will be imposed for each willful or repeated violation.

knowingly and intentionally hired minors or permitted them to work. It knowingly and intentionally maintained records with certain information and data with respect to each minor employed. Respondent knowingly and intentionally allowed some of the minors to work in a hazardous occupation. Respondent similarly failed to file employment certificates, failed to verify ages of minors by checking work permits, and failed to maintain records in compliance with OAR 839-21-170. No evidence suggests that Respondent was not a free agent. However, there also is no evidence that Respondent intended to violate the law in the sense that Respondent had actual or constructive knowledge of the law's requirements but violated them anyway. The Forum reads OAR 839-19-025(5) to require an element of actual or constructive intent to violate the law.

The Proposed Order in this matter correctly asserted that ignorance of the law is no bar to prosecution for its violation. Ignorance of the law is no defense to penalties associated with willful, read "intentional," acts, such as a failure to pay wages or minimum

wage rates. See *In the Matter of Country Auction*, 5 BOLI 256, 267 (1986) (employer argued that he could not be found to have willfully failed to pay the minimum wage rate because he was unaware that the law imposed a minimum wage rate requirement on him; the Commissioner held that the employer, "like all employers, is charged with knowing the wage and hour laws governing his activities as an employer. In other words, even if he did not actually know, he is charged under the law with knowing of this requirement. Accordingly, the Employer cannot escape liability for penalty wages with this defense.") However, where, as in OAR 839-19-025(5), consequences flow not from the intentional doing of an act but rather from the intentional violation of the law, it is reasonable to predicate such consequences on actual or constructive knowledge of the law's requirements. "Constructive knowledge" in this context means knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person has constructive knowledge of a thing if the person has the means to inform himself or herself but elects not to do so. See OAR 839-15-505(1).

"Repeated" is not defined by the rules. The ordinary dictionary meaning of "repeated," as an adjective, is "said, made, done, or happening again, or again and again." Webster's New World Dictionary 1205 (2d college ed 1986). "Again" means "once more; a second time; anew." "Again and again" means "often, repeatedly."

Webster's, at 25. "Often" means "many times, repeatedly, frequently." Webster's, at 988. Here, Respondent failed to verify the ages of, and to file employment certificates for, 17 named minors. Respondent argued that all of the violations were "simultaneous" and a "first offense," because Respondent had not been previously cited for these violations.

The Forum agrees that the 17 violations at issue here, while still 17 separate and distinct offenses, do not amount to "repeated violations" for purposes of OAR 839-19-025(5). Much like "willful . . . violations," the Forum concludes that this portion of the rule is addressed to genuinely recalcitrant employers, employers who are repeat violators in the sense of having been cited for noncompliance in the past. There is no need in such cases to rely on actual or constructive knowledge of the law in order to justify minimum penalties. The fact of a prior citation for the same offense makes notice of the law's potential application a foregone conclusion, and the Forum need not dwell in such cases on questions of knowledge and intent. Cf OAR 839-15-510(2) (civil penalty minimums for repeat violations of farm/forest labor contractor statutes by licensees not contingent on proof of prior citation or other indication of willfulness or knowing violation). See ORS 658.412 and OAR 839-15-170 to 839-15-195 (license examination requirements).

#### Amounts of Civil Penalties To Be Imposed

Pursuant to OAR 839-19-025(4),<sup>9</sup> when a minor incurs a serious injury or dies while employed in violation of

<sup>9</sup> OAR 839-19-025(4) provides: "When a minor incurs a serious injury or

certain statutes and rules, the violation is considered to be of such magnitude and seriousness that the maximum penalty will be imposed when the Commissioner determines to impose a civil penalty. Here, Colby Lewis died while employed in a hazardous occupation for minors (driving a motor vehicle on a public road or highway) in violation of OAR 839-21-104. Accordingly, the Forum imposes the maximum civil penalty of \$1,000 for that violation, pursuant to OAR 839-19-025(4)(d).

With regard to the three other violations of OAR 839-21-104, the Forum finds that while they were neither willful nor repeated violations, they are aggravated by several circumstances relevant under OAR 839-19-020(1): First and foremost among these aggravating circumstances is, of course, Lewis's death. OAR 839-19-020(4). Second, they are aggravated by the inherent hazardousness of the activity. OAR 839-19-020(1)(c). Third, they are aggravated by the amount of time spent in this hazardous occupation, approximately half the minors' working hours. *Id.* Fourth, and finally, the hazardous occupation was performed during evening or nighttime hours, thereby increasing the risk of already hazardous work. *Id.*

As mitigating circumstances, Respondent argued that Mr. Johnson was ignorant of the child labor laws,

dies while employed in violation of any of the following statutes and rules, the violation is considered to be so serious and of such magnitude that the maximum penalty will be imposed when the Commissioner determines to impose a civil penalty:

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"(d) Employment of a minor in violation of OAR 839-21-102 or OAR 839-21-104."

and that Lewis's "negligence" had "nothing to do with Mr. Johnson." The Commissioner has previously held and the Forum finds that ignorance of the law is not a mitigating circumstance. *In the Matter of Miguel Espinoza*, 10 BOLI 96, 100 (1991); *In the Matter of Francis Kau*, 7 BOLI 45, 54 (1987). And to suggest that Lewis's death had nothing to do with Respondent only demonstrates Respondent's failure to understand the purposes behind the child labor laws. The Wage and Hour Commission has ruled that certain occupations are hazardous for minors, and employers are prohibited from employing minors in those jobs. Motor vehicle driving is one of them. If Respondent had educated itself about the child labor laws, then supposedly Respondent would not have employed Lewis in that hazardous job, and Lewis would not have been killed while doing that job. If Respondent had filed an employment certificate listing Lewis's job duties as a driver, then presumably the Agency would have denied the certificate, and Respondent would have terminated Lewis's employment or changed his job duties to nonhazardous ones. OAR 839-21-220(6), (7). In short, Lewis's death had a great deal to do with Respondent, and his death aggravates the fact that Respondent employed other minors in the same hazardous occupation.

The Forum considers Respondent's prompt correction of those

violations (that is, stopping the use of minors as drivers) and its cooperation with the Agency's investigation as mitigating circumstances. OAR 839-19-020(1)(e). Based upon the aggravating and mitigating circumstances, the Forum imposes a \$1,500 civil penalty (\$500 for each of the three violations) as proposed by the Agency.

OAR 839-19-025(2) provides:

"When the Commissioner determines to impose a civil penalty for the employment of a minor without a valid employment certificate, the minimum civil penalty shall be as follows:

"(a) 100 for the first offense;

"(b) \$300 for the second offense;

"(c) \$500 for the third and subsequent offenses." (Emphasis added.)

The charging document proposed civil penalties for these violations as follows: \$1,000 for Lewis, \$500 each for two other minor drivers<sup>10</sup>, and \$100 each for the remaining 14 minors employed without employment certificates. Again, the death of Colby Lewis aggravates one of these violations, and the employment of minors approximately half-time, at night, and in a hazardous occupation aggravates two more of the violations. OAR 839-19-020(4), (1)(c). Mitigating the violations are Respondent's cooperation with the Agency and Mr. Johnson's assurances of future compliance.<sup>11</sup> OAR 839-19-020(1)(e). However, some evidence in the record suggests that, in July 1990, Respondent was still not in complete compliance with employment certificate and recordkeeping requirements. Penalties of \$1,000 for the failure to file an employment certificate for Lewis,<sup>12</sup>

<sup>10</sup> Although Bishop, Helgeson, Kinkade, and Lewis were all found to be minors employed in a hazardous occupation, the Agency requested aggravated penalties for only Lewis, Helgeson, and Kinkade.

<sup>11</sup> Respondent argued that the Forum failed to consider as mitigating factors the history of Respondent, the absence of past violations, and Respondent's "immediate correction of the situation upon being appraised of the law." The Forum has noted that Respondent had only been in business three months (from January to March 1990) when the violations herein were discovered. What little history there is can only be inferred from Mr. Johnson's past business operations. He admitted that he had employed minors for years and had employed them in a hazardous occupation. He admitted that he did not know of the employment certificate and work permit requirements and hence could not have been in compliance with them. The Forum finds no mitigation in Respondent's history. The facts suggest a history of violations, albeit uncited. And the facts, as mentioned in the Opinion above, suggest that Respondent had not obtained full compliance with the child labor laws months after assurances of future compliance. Respondent did not provide convincing proof of these mitigating circumstances. See OAR 839-19-020(2).

<sup>12</sup> Respondent argued that a \$1,000 civil penalty was neither compelled nor appropriate in view of the imposition of that penalty for the violation of employing a minor in a hazardous activity, and that Respondent was being punished with the maximum penalty twice for the same offense. Respondent is correct that OAR 839-19-025(4) is not applicable here, and it has not been applied

and \$500 each for Helgeson and Kinkade would be appropriate. The remaining 14 certificate violations should be penalized at the minimum rate of \$100 each for first time violations. See OAR 839-19-025(2)(a).

With regard to the 17 violations of OAR 839-21-220(1)(a) for failing to verify minors' ages by requiring them to produce work permits, one violation is aggravated by Lewis's death, and two violations<sup>13</sup> are aggravated by the other minors employed half-time, at night, in a hazardous occupation. These violations are aggravated because one of the purposes of checking a minor's age before hire is to ensure that the minor is employed under proper working conditions and with proper hours for that specific age. Failure to verify a minor's age reduces the employer's ability to safely and legally employ the minor. The violations are mitigated by Respondent's cooperativeness and efforts to correct the violations.<sup>14</sup> Penalties of \$1,000 for the failure to verify Lewis's age and \$500 each for Helgeson and Kinkade would

be appropriate. OAR 839-19-020(1)(c) and 839-19-020(4). The remaining 14 failures to verify should be penalized at a rate of \$100 each. OAR 839-19-020(1)(c), (d).

The Forum finds that Respondent's failure to maintain proper records was one violation of OAR 839-21-170(1), in spite of the fact that there were 11 specific omissions found in Respondent's records. Considering the aggravating and mitigating circumstances described above in this Opinion, and considering that the maximum civil penalty has already been imposed for three of the violations, the Forum imposes a \$100 civil penalty for this recordkeeping violation, which is the amount requested by the Agency in the amended charging document. *Id.*

#### ORDER

NOW, THEREFORE, as authorized by ORS 653.370, and as a civil penalty for violating the rules outlined above, TYLER CORPORATION is hereby ordered to deliver to the Business Office of the Bureau of Labor and

here. OAR 839-19-025(1) and (2) apply. Section (2) sets out minimum civil penalties for these violations. Section (1) sets out the maximum penalty for each violation, with consideration of mitigating and aggravating circumstances. Mr. Lewis's death aggravates each violation of the child labor law committed by Respondent in connection with the employment of Lewis. The civil penalties were determined in accordance with those sections.

<sup>13</sup> See footnote 10.

<sup>14</sup> Respondent suggested that a "significant mitigating factor which should be considered" was that Respondent and Mr. Johnson had been involved in business for several years "and on no occasion were [they] made aware of the law," and that there was "no evidence in the record that Mr. Johnson or the Respondent corporation should have been aware of the restrictions and requirements applicable to 16- and 17-year olds." The Forum finds this suggestion has no merit. Employers have a legal duty to know and comply with the law. The Agency makes educational materials and seminars available to employers. Employers cannot sit back and wait for someone to come out and train them, and then claim mitigation when no one has done so. Again, the duty is on employers to become aware of the laws that apply to them.

Industries Suite 1010, 800 NE Oregon St., # 32, Portland, Oregon 97232, the total amount of NINE THOUSAND FOUR HUNDRED DOLLARS (\$9,400), representing \$2,500 for four violations of OAR 839-21-104, \$3,400 for 17 violations of OAR 839-21-220(1)(a), \$3,400 for 17 violations of OAR 839-21-220(3), and \$100 for one violation of OAR 839-21-170(1).

#### In the Matter of WASHINGTON COUNTY, Respondent.

Case Number 20-91  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued March 11, 1992.

#### SYNOPSIS

Respondent refused to allow Complainant to use his accrued sick leave during his parental leave, in violation of ORS 659.360(1)(a) and (3), and OAR 839-07-850(1). Finding that Complainant's mental distress arose from his general apprehension about using parental leave and his fear of retaliation, and not from Respondent's unlawful employment practice, the Commissioner awarded no damages, but ordered Respondent to deduct 172 hours from Complainant's accrued sick leave and add them to his accrued vacation leave, which he used during the

parental leave. ORS 659.360; OAR 839-07-850.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 17, 1991, in Room 710 of the State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. Alan McCullough, Case Presenter with the Civil Rights Division of the Bureau of Labor and Industries (the Agency), represented the Agency. Steven Alberts (Complainant) was present throughout the hearing. John M. Junkin, Attorney at Law, appeared on behalf of Washington County (Respondent). Mike Maloney, Operations Maintenance Division Manager, was present throughout the hearing as Respondent's representative.

The Agency called the following witnesses: Complainant Steven Alberts and Edith Alberts, the Complainant's wife. Respondent called Mike Maloney, Operations Maintenance Division Manager.

Having fully considered the entire record in this matter, I, Mary Wendy 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 October 10, 1989, Complainant filed a verified complaint with the Civil Rights Division of the Agency.

He alleged that Respondent denied him use of his accrued sick leave time for parental leave.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice by Respondent in violation of ORS 659.360.

3) The Agency and Respondent attempted but failed to effect a settlement of the complaint through conciliation.

4) On July 18, 1991, the Agency prepared and duly served on Respondent Specific Charges that alleged that Respondent had denied Complainant the use of all but 13 accrued sick time hours during his parental leave. The Specific Charges alleged that Respondent's action violated ORS 659.360(1)(a) and (3).

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a 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.

6) On August 8, 1991, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges and stated affirmative defenses.

7) On around October 1, 1991, Respondent filed a motion for the production of documents. After an

extension of time, the Agency responded to the motion. On October 15, 1991, the Hearings Referee granted, but limited, one of Respondent's requests, denied a second request, and acknowledged that the Agency had agreed to comply with Respondent's third request.

8) On October 22, 1991, the Agency filed a motion for partial summary judgment on the issue of liability. After extensions of time, on November 25 Respondent filed its response to the Agency's motion for summary judgment and filed its motion for summary judgment on the same legal issue. On December 4, 1991, the Hearings Referee granted the Agency's motion and denied Respondent's motion.

9) Pursuant to OAR 839-30-071, the Agency and Respondent each filed a Summary of the Case.

10) A prehearing conference was held on December 17, 1991, at which time the Agency and Respondent stipulated to certain facts. Those facts were admitted into the record by the Hearings Referee at the beginning of the hearing.

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

12) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) At the close of the hearing, the Hearings Referee advised the participants that, due to workload, he would

request an extension of time to issue a proposed order in this matter. The Hearings Referee made that request, and on December 18, 1991, the administrator of the Support Services Division granted the Hearings Referee an extension of time until February 28, 1992, to issue the order.

14) The Proposed Order, which included an Exceptions Notice, was issued on February 13, 1992. Exceptions, if any, were to be filed by February 24, 1992. No exceptions were received.

#### FINDINGS OF FACTS – THE MERITS

1) At all times material, Respondent was a local government in Oregon, and a public employer in this state utilizing the personal services of 25 or more employees, subject to the provisions of ORS 659.010 to 659.435.

2) Complainant was employed by Respondent in March 1978, and at all times material he held the position of sign maintenance man as a regular, permanent employee.

3) Complainant was anticipating the birth of his child in July 1989.

4) Complainant made a timely request for parental leave on or about June 8, 1989, through the provisions of ORS 659.360, for the period covering July 20 through August 31, 1989.

5) Complainant had, on July 20, 1989, accrued approximately 300 hours of available sick time.

6) The period of July 20, 1989, through August 31, 1989, was within the interval between the anticipated birth of Complainant's infant and the time the infant reached 12 weeks of age.

7) Complainant requested of Respondent to use 185 hours of his accrued sick time during his parental leave.

8) Complainant asked to use sick leave instead of vacation leave in order to keep a balance in the amount of each kind of leave he had accrued.

9) Respondent's sick leave policy, and specifically section 7.3.3, permitted the use of sick leave when the employee was

"unable to perform by reason of personal illness or injury, pregnancy, necessity of medical or dental care, exposure to contagious disease or critical illness in the employee's immediate family, requiring the attendance of the employee."

10) Complainant took parental leave from July 26 to September 1, 1989. He felt that he bonded well with his new daughter. He also spent time with his other two children.

11) On or about August 22, 1989, Respondent denied Complainant the use of all but 13 hours of accrued sick time during his parental leave. The 13 hours of sick leave allowed covered the time used during the birth of Complainant's baby.

12) Respondent did not require Complainant to use accrued vacation time. Respondent denied Complainant's request to use accrued sick time. Complainant elected to use 172 hours of accrued vacation time in order to have his period of parental leave paid.

13) On August 22, 1989, Complainant received a telephone call from Don Duncan, a project manager for Respondent. Duncan was above

Complainant's supervisor in the management. Duncan told Complainant that, according to policy, Respondent would not allow Complainant to "burn" his accrued sick time during his parental leave and that Complainant could decide whether to use his accrued vacation time. Duncan wanted to know if Complainant would be coming back to work the next Monday.

14) Duncan's call made Complainant "uneasy" because, before he went on leave, he had not received an answer about whether his parental leave request was granted. He was uneasy about taking the leave, not about whether he could use accrued sick leave. Complainant was bothered by Duncan's use of the word "burn." He thought Duncan thought Complainant was wasting his sick time. Complainant was not surprised by Duncan's call, because Complainant was the first person in the Public Works Department to request parental leave. Complainant felt some pressure to go back to work before the end of his leave. He called an attorney, his union, and the Agency to find out about his rights.

15) Complainant read information from the Agency and newspaper articles about parental leave and the "PGE case," which led him to think that the use of paid sick leave during parental leave was permissible.

16) Complainant took the entire parental leave as planned. The entire leave was paid.

17) When Complainant returned to work, he felt uneasy. He worked in the sign shop for one week before returning to the duties he had before going on leave. Bill Wise, Complainant's supervisor at the time, told Complainant

that Duncan did not appreciate Complainant taking the leave. Complainant felt that Respondent appreciated him.

18) Mike Malorey, Respondent's operations maintenance division manager, was unaware before hearing that Complainant worked in the sign shop for one week after he returned from parental leave. Given the work scheduling, it was not surprising that Complainant was not immediately returned to the specific duties he was performing before he left. Complainant had just returned from an extended leave, and Respondent had filled in with a temporary employee during Complainant's absence.

19) Complainant did not receive a written performance evaluation in 1989 or 1990 from Wise. Wise was later demoted due to unsatisfactory performance, including a failure to consistently do performance evaluations of the employees under his supervision. Complainant was at the top step in his salary range. An evaluation would not affect his salary. Complainant's 1991 evaluation was, in Complainant's word, "good," which was what previous evaluations had been. Maloney reviewed all performance evaluations and observed Complainant's work performance. Maloney characterized Complainant's performance both before and after August 1989 as "very competent."

20) Sometime after his parental leave, Complainant took a two-week paid vacation. The transfer of 172 hours from Complainant's accrued vacation time to his accrued sick time (as a result of Respondent's sick leave policy) did not affect Complainant's ability to take vacation.

21) Complainant suffered apprehension about taking parental leave and about filing the complaint in this case. He suffered sleepless nights and felt withdrawn from his family. He became short-tempered and bit his fingernails. He was apprehensive that taking the leave might cause problems at work; he was afraid of alienating his employer. He was apprehensive about going to the hearing.

22) Malorey personally supported the concept of parental leave, and, before 1989, had expressed that opinion and the position of Respondent to the management staff. Respondent supported the use of parental leave, and Respondent's rules provide for the leave. Malorey thought the employees under him were aware of the parental leave law.

#### ULTIMATE FINDINGS OF FACTS

1) At all times material, Respondent was a local government in Oregon and a public employer in this state utilizing the personal services of 25 or more employees.

2) Complainant was employed by Respondent, and at all times material he was a regular, permanent employee.

3) Complainant was anticipating the birth of his child in July 1989. Complainant made a timely request for parental leave on or about June 8, 1989, through the provisions of ORS 659.360, for the period covering July 20 through August 31, 1989.

4) The period of July 20 through August 31, 1989, was within the interval between the anticipated birth of Complainant's infant and the time the infant reached 12 weeks of age.

5) Complainant asked to use 185 hours of his accrued sick time during his parental leave. Complainant had, on July 20, 1989, accrued approximately 300 hours of available sick time.

6) Respondent's sick leave policy, and specifically section 7.3.3, permitted the use of sick leave when the employee was

"unable to perform by reason of personal illness or injury, pregnancy, necessity of medical or dental care, exposure to contagious disease or critical illness in the employee's immediate family, requiring the attendance of the employee."

7) Complainant took parental leave from July 26 to September 1, 1989.

8) Respondent denied Complainant the use of all but 13 hours of accrued sick time during his parental leave. Complainant elected to use 172 hours of accrued vacation time in order to have his period of parental leave paid. Complainant took parental leave as planned. The entire leave was paid.

9) Complainant suffered apprehension about taking parental leave and about filing the complaint in this case. He suffered sleepless nights and felt withdrawn from his family. He became short-tempered and bit his fingernails. He was apprehensive that taking the leave might cause problems at work; he was afraid of alienating his employer. He feared Respondent might retaliate because he took the leave. He was apprehensive about going to the hearing.

### CONCLUSION OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.435.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.040, 659.050.

3) ORS 659.360 provides, in part:

"(1) It shall be an unlawful employment practice for an employer to refuse to grant an employee's request for a parental leave of absence for:

"(a) All or part of the time between the birth of that employee's infant and the time the infant reaches 12 weeks of age

" \* \* \*

"(3) The employee seeking parental leave shall be entitled to utilize any accrued vacation leave, sick leave or other compensatory leave, paid or unpaid, during the parental leave. The employer may require the employee seeking parental leave to utilize any accrued leave during the parental leave unless otherwise provided by an agreement of the employer and the employee, by collective bargaining agreement or by employer policy."

Respondent violated ORS 659.360 (1)(a) and (3).

4) Pursuant to ORS 659.365 and 659.060, and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist

Order requiring Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

### OPINION

The facts in this case were stipulated to, except with respect to mental suffering damages. On the issue of whether Respondent's actions violated the statute, the Hearings Referee granted summary judgment in favor of the Agency. The Hearings Referee found:

"The legal issue is whether Respondent's action — namely, denying Complainant's request to use accrued sick leave during his parental leave — was an unlawful employment practice under ORS 659.360. As Respondent put it, the issue is whether it is an unlawful employment practice for an employer, subject to ORS 659.360 *et seq.*, to deny an employee's request to use accrued sick time for a period of parental leave when use of accrued sick time for that purpose is in contravention of the employer's employment policies."

"ORS 659.360 provides that it is an unlawful employment practice for an employer of 25 or more employees to refuse to grant the request of an employee, who is employed on a non-temporary basis for over 90 days, for parental leave for all or part of the time between the birth of the employee's

infant and the time the infant reaches 12 weeks of age.

"ORS 659.360(3) reads:

"The employee seeking parental leave shall be entitled to utilize any accrued vacation leave, sick leave or other compensatory leave, paid or unpaid, during the parental leave. The employer may require the employee seeking parental leave to utilize any accrued leave during the parental leave unless otherwise provided by an agreement of the employer and the employee, by collective bargaining agreement or by employer policy."

"OAR 839-07-850(1) reads:

"The statute anticipates unpaid parental leave, but gives the employee the right to use accumulated leave of any kind. It also provides that the employer may require the parent to use accumulated leave in accordance with a bargaining agreement or established policy."

"The above rule is valid as written. *Oregon Bankers Association v. Bureau of Labor and Industries*, 102 Or App 539, 796 P2d 366, 368 (1990).

"The Agency relies on a prior Order of the Commissioner, *In the Matter of Portland General Electric Company*, 7 BOLI 253 (1988), to resolve the legal issue in its favor. Respondent requests that the Forum follow the advice of the Attorney General, in opinion 8195 (August 18, 1988), to resolve the issue in its favor.

"The pertinent portion of the Attorney General's opinion suggests that paid sick leave is available during parental leave only if the employee could take sick leave anyway, that is, because the employee is ill or incapacitated. The Commissioner has held otherwise:

"The Agency further asserts that the intent of the unambiguous language of subsection (3) of ORS 659.360 is restated in OAR 839-07-850 and gives the employee-parent the right to use accumulated leave of any kind during the parental leave.

" \* \* \* It is the Respondent's position that the refusal to grant to Complainant the use of paid sick leave for the portion of his parental leave during which he would not be disabled by illness or injury was not unlawful in that it did not violate ORS 659.360. \* \* \* Respondent cites Attorney General Opinion No. 8195 as supporting Respondent's argument.

"The Commissioner concludes that the Agency's interpretation is correct." *Portland General Electric*, at 263-64.

"Opinion 8195 assumes that the second sentence of ORS 659.360(3) modifies the employee's right described in the first sentence. That is the Attorney General's interpretation. Fifth Question Presented, Opinion 8195. The Commissioner, on the other hand, took a different view in *Portland General Electric*, at 266:

"Subsection (3) does not restrict the employee's right to paid leave, rather it limits the employee's option to choose unpaid leave. This enables the employer to control the length and frequency of absence, and the attendant disruption of the work force, by reducing the likelihood that an employee could be gone for the parental leave period and later utilize accrued leave for an additional absence. If the intent were that the policy, contract or collective bargaining agreement control the unqualified employee right to use any kind of accrued leave, paid or not, the two sentences would have been combined to that purpose.'

"As observed later in *Portland General Electric*, at 269, the qualifying language of the second sentence contains express reference 'to the employer's right to require the use of accrued leave.' (Emphasis in the original.) See also OAR 839-07-865, which allows the employer to count a period of vacation, sick or other leave taken during parental leave as parental leave.

"As to Opinion 8195, the Commissioner said in *Portland General Electric*, at 270:

"The undisputed advisory nature of the Attorney General's opinion makes it unnecessary to embark on a delineation of legal and policy spheres of authority in order to decide this case, and no portion of this Order is dependent on such

delineation. Suffice to say, the Commissioner cannot accept the reasoning of the Attorney General's opinion regarding the parental leave law. To the extent that the statute poses genuine issues of interpretation, they are matters left by the Legislature in the first instance to the rulemaking and decisional authority of the Commissioner. In the final analysis, of course, it is the judiciary which must eventually pass on the validity of the Commissioner's rules and action.'

'The Agency's motion for partial summary judgment is granted, and Respondent's motion is denied. The Hearings Referee concludes, and will recite in a Proposed Order, that Respondent's refusal to allow Complainant to use accrued sick leave during his parental leave was a violation of ORS 659.360(1)(a) and (3) and of OAR 839-08-850(1), and was an unlawful employment practice.

"In accordance with this ruling, Respondent's first, second, and fourth affirmative defenses are not proven. With regard to Respondent's third affirmative defense — that, to the extent the parental leave rules allow an employee to use accrued sick leave in contravention of the employer's personnel policy, the rules are in error and were promulgated outside the authority of the Agency, and are invalid and unenforceable — the Forum finds that the rules, and OAR 839-07-850(1) in particular (*Oregon Bankers, supra*), are

valid, and the Commissioner's interpretation of them, as described in *Portland General Electric*, is a reasonable one."

The Forum hereby confirms and adopts the ruling on summary judgment in accordance with OAR 839-30-070(6).

At hearing, the issue in dispute was whether Complainant suffered mental distress from Respondent's unlawful employment practice. The preponderance of credible evidence on the whole record persuades the Forum that Complainant's mental distress sprang from his general apprehension about using parental leave and his fear of retaliation. The Agency did not charge that Respondent retaliated, nor does the evidence on this record show retaliation. Although Respondent's notification of Complainant that it would not permit him to use his accrued sick leave during the parental leave added to his uneasiness, the Forum does not find that it is compensable because the underlying apprehension was not caused by Respondent's unlawful employment practice.

Complainant's mental distress attributable to filing a complaint and going to hearing is not compensable.

"The inconvenience and frustration caused by filing an administrative complaint and participating in the complaint process is experienced by all litigants, and is not compensable." *In the Matter of German Auto Parts, Inc.*, 9 BOLI 110, 132 (1990), *aff'd*, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 384, 812 P2d 1026 (1992).

Embarrassment or discomfort caused by a contested case hearing is not compensable. *In the Matter of Baker Truck Corral, Inc.*, 8 BOLI 118, 139 (1989).

#### ORDER

NOW, THEREFORE, as authorized by ORS 659.365, 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, Respondent WASHINGTON COUNTY is hereby ORDERED to:

- 1) Deduct from Steven R. Alberts's accrued sick leave 172 hours, and add 172 hours to his accrued vacation leave.
- 2) Cease and desist from refusing to allow employees to utilize accrued leave of any kind, and particularly sick leave, when requested in connection with parental leave for which they otherwise qualify.

**In the Matter of  
AZUL CORPORATION, INC.,  
Respondent.**

Case Number 28-92

Final Order of the Hearings Referee

Wamer W. Gregg

Issued March 13, 1992.

**SYNOPSIS**

Respondent, a licensed farm labor contractor, failed to comply with a Consent Order that its president signed in settlement of a proceeding to revoke its license and assess civil penalties. Because the Consent Order provided for immediate license revocation and additional civil penalties for its breach, the Forum revoked Respondent's license and assessed a \$1,000 civil penalty in addition to the amounts agreed to in the Consent Order. Respondent and its four principals were prevented from applying for a farm labor contractor license for three years. ORS 658.415(1)(c); 658.417(3); 658.440(1)(d) and (3)(e); 658.445(1) and (3); 658.453(1)(c) and (e); OAR 839-15-520(4); 839-33-050(4).

The above-entitled matter came on regularly on March 3, 1992, before Wamer W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon, in the Bureau of Labor and Industries hearing room 1004, 800 NE Oregon Street, Portland. Case Presenter Lee Bercot appeared on behalf of the Wage and Hour Division of the Bureau of Labor and Industries (the

Agency). Bobby J. Shannon, Attorney at Law, Salem, represented Azul Corporation, Inc. (Respondent). Fred Larionov, majority shareholder, president and authorized representative of Respondent, was present throughout the hearing.

This proceeding was brought by the Agency under Oregon Administrative Rules 839-33-000, *et seq.*, *Expedited Contested Case Hearing Rules for Certain Licensing Matters*, under which the Commissioner of the Bureau of Labor and Industries authorizes the Hearings Referee to issue a Final Order. Having fully considered the entire record in this matter, the Hearings Referee makes the following Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –  
PROCEDURAL**

1) On February 7, 1992, the Agency issued a "Notice of Intent to Revoke a Farm Labor Contractor License and To Assess Civil Penalties" ("Notice of Intent") to Respondent. The notice informed Respondent that the Agency intended to revoke its farm labor contractor license and to award wages and assess civil penalties against Respondent in the amount of \$6,084.10. The Agency based its intent to revoke on ORS 658.445(1) and (3) and upon a Consent Order entered *In the Matter of Azul Corporation*, case number 16-92, and based its award of wages and assessment of civil penalties upon said Consent Order and upon ORS 658.453(1).

2) On February 11, 1992, the Hearings Unit issued to Respondent through Fred Larionov as registered

agent and as corporate president, to Bobby J. Shannon, attorney, and to the Agency a "Notice of Hearing," which set forth the time and place of a hearing concerning the Notice of Intent, and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent to Respondent a copy of the Notice of Intent, a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the expedited contested case process – OAR 839-33-000 through 839-33-095.

3) On February 20, 1992, the Agency filed its motion for summary judgment. Attached in support of the Agency's motion, in addition to a copy of the Notice of Intent herein, was a copy of the Consent Order *In the Matter of Azul Corporation, Inc.*, case number 16-92, and the affidavit of the Agency's Judgment Unit Clerk to the effect that no sum had been paid under the Consent Order when due on January 15, 1992, nor thereafter through February 20, 1992.

4) On February 27, 1992, the Hearings Referee denied the Agency's motion. Noting that summary judgment is appropriate where there is no factual dispute, the Hearings Referee stated that he was unaware of Respondent's factual defense, if any, since there was no written answer or other response to the Notice of Intent. The Referee found that the purpose of the expedited contested case process was to obtain a swift result while still affording a respondent an opportunity to be heard, and that the hearing was set

very soon after notice was served and there was no provision for an answer.

5) At the commencement of the hearing on March 3, 1992, pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

6) At the commencement of the hearing, counsel for Respondent stated that he had read the Notice of Contested Case Rights and Procedures accompanying the Notice of Intent and had no questions about it.

7) At the hearing, Respondent, through counsel and its authorized representative, acknowledged entering into the Consent Order in case number 16-92, and further admitted its failure to abide by the terms thereof.

8) During the hearing, the Hearings Referee without objection from Respondent requested that the Agency provide evidence of all persons financially interested in Respondent as licensee. That evidence, consisting of Respondent's license application, was provided later on March 3, 1992, and admitted into evidence.

**FINDINGS OF FACT – THE MERITS**

1) Respondent Azul Corporation is an Oregon corporation which was issued a farm labor contractor license with forestation endorsement by Temporary Permit April 2, 1991, with licensure April 22, 1991.

2) On November 27, 1991, the Forum issued a Notice of Hearing for December 19, 1991, together with the Agency's Notice of Intent to Revoke License and Assess Civil Penalties in case number 16-92. Both of said

notices were served upon Respondent.

3) Thereafter, hearing was reset for December 27, 1991, at which time the participants placed an alternative resolution on the record, and on January 10, 1992, the Agency filed a Consent Order signed by Respondent on January 6, which disposed of case number 16-92.

4) The Consent Order in case number 16-92, omitting title and caption, provided:

"WHEREAS, the Commissioner of the Oregon Bureau of Labor and Industries ('Commissioner'), after investigation, determined to revoke the Farm Labor Contractor License and to assess civil penalties against Azul Corporation, Inc. ('Contractor'), and informed Contractor thereof and the reasons therefore by duly serving a Notice of Intent to Revoke a Farm Labor Contractor License and to Assess Civil Penalties ('Notice') upon Contractor; and

"WHEREAS, Contractor has made timely Answer and Request for a Contested Case Hearing and now no longer desires said hearing, and, after consulting with legal counsel, waives his right thereto and expressly admits that

"1. Contractor subcontracted US Forest Service contract 252-04T1-1-32C ('32C') in the Umpqua National Forest near Tiller, Oregon to Roberto C. Ochoa, d/b/a RCO Reforesting ('Ochoa') of Mt. Shasta, California between March 7, 1991, and May 24, 1991, when at all material times, Ochoa

had not first been licensed by the Commissioner, thereby assisting Ochoa to act in violation of ORS 658.405 to 658.503, a violation of ORS 658.440(3)(e); and that

"2. Contractor performed US Forest Service contract 252-0M00-1-2 ('1-2') in the Siskiyou National Forest near Cave Junction, Oregon, directly employing the workers upon this contract and failing to make any timely submissions of certified true copies of its payroll records for 1-2, when four such submissions were due on this contract, beginning on or about February 13, 1991, a violation of ORS 658.417(3); and

"WHEREAS, Contractor agrees to pay the total sum of \$5,084.10 as and for wages and civil penalties in satisfaction of the matter of *Bureau of Labor and Industries vs. Fred Larionov, d/b/a Azul Forestry*, Order No. 90-166, which full sum shall be paid over to and received by the Commissioner in her Portland, Oregon offices not later than 5:00 p.m., Wednesday, January 15, 1992, and further agrees that failure to make payment when due or any check or other instrument returned for insufficient funds shall be a breach of this agreement with the Commissioner; and

"WHEREAS, Contractor promises and represents that it and its principals and agents will comply with Chapter 658 Oregon Revised Statutes, the Commissioner's rules adopted pursuant thereto and the terms, conditions and representations of this Consent Order, and

further understands and agrees that any violation of any of the terms, conditions or representations of this Consent Order shall be a breach of a legal and valid agreement entered into with the Commissioner, the penalty for which Contractor stipulates, in addition to the aforementioned sum for wages and penalties, shall be a civil penalty in the amount of \$1,000, together with the immediate revocation of Contractor's farm labor contractor license, without further proceeding based upon the admissions contained herein, which revocation shall, for a period of three years from the date of such revocation, operate to bar any application for a farm labor contractor license by Contractor, principals Fred Larionov, Nick Larionov, Peter Larionov and/or Michael Larionov and/or their agents; and

"WHEREAS, in consideration of Contractor's compliance with the terms, conditions and representations of this Consent Order, Chapter 658, Oregon Revised Statutes and the Commissioner's rules, the Commissioner will forego further administrative action on her Notice; and

"WHEREAS, the Commissioner has determined that Contractor's promise of compliance with the terms, conditions and representations of this Consent Order, Chapter 658, Oregon Revised Statutes and the Commissioner's rules, together with timely payment of the sum of \$5,084.10, is consistent with Chapter 658, Oregon

Revised Statutes and the Commissioner's rules;

"NOW THEREFORE, ENTRY OF THIS ORDER IS CONSENTED TO BY:

"AZUL CORPORATION, INC.  
"/s/ by: Fred Larionov, Majority Shareholder and Authorized Representative

"Dated this 6 day of Jan, 1992.

"IT IS HEREBY ORDERED: Pursuant to ORS 183.415(5), the terms and conditions of this Consent Order are hereby imposed and implemented.

"MARY WENDY ROBERTS, COMMISSIONER, Bureau of Labor and Industries

"/s/PAUL R. TIFFANY, Administrator, Wage and Hour Division

"Dated this 10th day of January, 1992."

5) Respondent made no payment under the Consent Order on or before January 15, 1992, or at any time thereafter up to the time of hearing.

6) In addition to majority shareholder and authorized representative Fred Larionov (51 percent), persons financially interested in Respondent's operations as a labor contractor at times material were:

Nick Larionov, 1260 Johnson St., Woodburn, OR 97071, 16.33 percent;  
Peter Larionov, 373 Palm Ave., Woodburn, OR 97071, 16.33 percent;  
Mike Larionov, 273 E. Lincoln, Woodburn, OR 97071, 16.33 percent.

#### CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the

State of Oregon has jurisdiction over the subject matter and of Respondent herein.

2) ORS 658.440 provides, in pertinent part:

"(1) Each person acting as a farm labor contractor shall:

\*\*\*\*

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor.

\*\*\*\*

"(3) No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

\*\*\*\*

"(e) Assist an unlicensed person to act in violation of ORS 658.405 to 658.503 and 658.830."

ORS 658.417 provides in pertinent part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

\*\*\*\*

"(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such times and shall contain such

information as the Commissioner, by rule, may prescribe."

By failing to comply with the terms, conditions, and representations of the Consent Order entered in a previous case, Respondent violated ORS 658.440(1)(d).

3) ORS 658.453 provides, in pertinent part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries, in the same manner as provided in ORS 183.310 to 183.550 for a contested case proceeding, may assess a civil penalty not to exceed \$2,000 for each violation by:

\*\*\*\*

"(c) A farm labor contractor who fails to comply with ORS 658.440(1) \* \* \* or (3).

\*\*\*\*

"(e) A farm labor contractor who fails to comply with ORS 658.417 \* \* \* (3) \* \* \* .

By failing to comply with the terms, conditions, and representations of the Consent Order entered in a previous case, Respondent incurred a penalty of \$1,000 in addition to the agreed amount of \$5,084.10 from the Consent Order.

4) ORS 658.445 provides, in pertinent part:

"The Commissioner of the Bureau of Labor and Industries may revoke \* \* \* a license to act as a labor contractor upon the Commissioner's own motion \* \* \* if.

"(1) The licensee or agent has violated or failed to comply with

any provision of ORS 658.405 to 658.503 \* \* \* ; or

\*\*\*\*

"(3) The licensee's character, reliability or competence makes the licensee unfit to act as a farm labor contractor."

By failing to comply with the terms, conditions, and representations of the Consent Order entered in a previous case, and thus violating ORS 658.440(1)(d), Respondent and its principals incurred immediate revocation of Respondent's farm labor contractor license and deprivation of the ability of Respondent and its principals to apply for a farm labor contractor license for a period of three years from said revocation.

5) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may revoke Respondent's license to act as a farm/forest labor contractor and may impose civil penalties as provided by statute.

OPINION

Pursuant to OAR 839-33-050(4), the Agency filed a motion for summary judgment on its Notice of Intent to Revoke a Farm Labor Contractor License and To Assess Civil Penalties. It asserted that no issue of genuine fact existed and that the Agency was entitled to judgment as a matter of law as to the violation of the Consent Order from a prior case alleged in the charging document. I denied the motion prior to the hearing because Respondent had not addressed the charging document,

nor was it required to do so prior to hearing.

At hearing, Respondent admitted that it had not complied with the Consent Order. Respondent through counsel sought to establish mitigation based upon Respondent's allegedly unforeseen financial inability to conform to the payment provisions of the Consent Order. Even if Respondent had adduced evidence to establish its financial inability to make payment under the Order when it became due, such inability would not form a partial defense or mitigation of Respondent's failure to abide by its agreement under the circumstances outlined by Respondent.

Respondent argued that it entered into the Consent Order to avoid litigation and that it anticipated at the time that it would be receiving funds from a completed federal forestation contract adequate to discharge the Consent Order obligation. Respondent posited that, at the time of the agreement to the Consent Order, it was unaware that the US Department of Labor would initiate an investigation involving the federal contract, which had the effect of freezing payment during the pendency of the investigation, and further that it was unable to borrow funds sufficient to make payment.

The Agency argued that Respondent could have anticipated the possibility of the federal government withholding all or part of a contract payment, because whether Respondent would satisfactorily complete the contract and/or fully pay all of its employees thereunder (failure of either being among reasons for the withholding of payment under the federal Service

Contract Act) was peculiarly within Respondent's knowledge. The Agency argued further that the Consent Order had settled the prior case and that the Agency had, in settlement, reduced the enhanced penalty sought from \$20,000 to the amount ordered, and had agreed to withhold revocation of Respondent's license, both in exchange for Respondent's assurances of compliance.

I suggested at hearing that under the circumstances the Agency might renew its motion for summary judgment. However, I then noted that there was no proof beyond the recitation of the Consent Order of the interest in Respondent held by all of the principals named therein. Respondent's counsel suggested that if anyone was to be deprived of the future ability to make application, even in view of what he seemed to regard as Respondent's unavoidable and unintended failure to pay, it should be limited to the majority shareholder, particularly since one of the principals named in the Consent Order had no current interest in Respondent and another merely did office work. Accordingly, I asked that the Agency furnish evidence in this regard, which it did in the form of Respondent's license application and the addendum to it. That constituted the Commissioner's record of the interest of each principal in Respondent. If any change has occurred since the license was issued, it was not communicated to the Commissioner and will not be considered. ORS 658.440(1)(e). This Order is based upon the entire record and not upon the summary judgment motion and submission alone.

Respondent failed to comply with its agreement embodied in the Consent Order. The Consent Order clearly provided what the sanction would be should such failure occur. Imposition of that sanction in the Order below is a proper disposition of this matter.

#### ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503 and by OAR 839-33-095, for the Commissioner of the Bureau of Labor and Industries I make the following Order.

1) I hereby revoke the license of Respondent AZUL CORPORATION, INC. to act as a farm or forest labor contractor, effective this date.

2) Respondent AZUL CORPORATION, INC., together with its principals Fred Larionov, Nick Larionov, Peter Larionov, and Michael Larionov and/or their agents are hereby prevented from obtaining or applying for a farm or forest labor contractor license for a period of three years from this date in accordance with ORS 658.415(1)(c) and OAR 839-15-520(4).

3) Respondent AZUL CORPORATION, INC., is hereby ordered to: Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries, in the amount of:

a) SIX THOUSAND EIGHTY-FOUR DOLLARS AND TEN CENTS (\$6,084.10), representing wages awarded and penalties assessed herein based upon the Consent Order and this proceeding; PLUS,

b) Interest thereon at the rate of nine percent per annum, to be computed and compounded annually from

the date of this Order until the date Respondent complies herewith.

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#### In the Matter of CHEM-RAY COMPANY and Ronald D. Kile, Respondents.

Case Number 06-92  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued April 8, 1992.

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#### SYNOPSIS

Respondent terminated Complainant's employment because he totaled a company van while intoxicated, and, several days later, came to work late and unfit for work, and not because he had filed a claim for workers' compensation benefits a month earlier. Finding no unlawful practice, the Commissioner dismissed the complaint and specific charges filed against Respondents. ORS 659.030(1)(g); 659.410.

The above-entitled matter came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 3 and 4, 1992, in Room 220 of the State

Office Building in Eugene, Oregon. Alan McCullough, Case Presenter with the Civil Rights Division of the Bureau of Labor and Industries (the Agency), represented the Agency. Richard L. Stribling (Complainant) was present throughout the hearing and was not represented by counsel. Bruce C. Moore, Attorney at Law, appeared on behalf of Chem-Ray Company and Ronald D. Kile (Respondents). Respondent Kile was present throughout the hearing on behalf of himself and as Respondent's representative.

The Agency called the following witnesses (in alphabetical order): Complainant; Jerilyn Johnson, Employee Benefits Insurance, Inc.; Respondent Kile; and Steve Kile, Respondent Kile's son and former general manager for Respondent.

Respondents called the following witnesses (in alphabetical order): Paul Fedrizzi, an account representative for Du Pont Medical Products; Kenneth Gunn; Respondent Kile; Robert South, Respondent's former employee; and Todd Wisner, Respondent's sales and service manager.

Having fully considered the entire record in this matter, I, Mary Wendy 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 July 27, 1990, Complainant filed a verified complaint with the Civil

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\* Hereafter, Chem-Ray Company will be referred to simply as "Respondent," and Ronald Kile will be referred to as "Respondent Kile."

Rights Division of the Agency. He alleged that Respondent discriminated against him because he had an on-the-job injury and utilized the workers' compensation system in that, following the injury, Respondent Kile terminated Complainant because of his back injury.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice by Respondent in violation of ORS 659.410.

3) Efforts to resolve the complaint by conference, conciliation, and persuasion were unsuccessful.

4) On August 29, 1991, the Agency prepared and duly served on Respondents Specific Charges that alleged that Respondent discharged Complainant from employment "based on Complainant's application for benefits, invoking, and utilizing" the Oregon workers' compensation procedures. The Specific Charges alleged that Respondent's action violated ORS 659.410.

5) With the Specific Charges, the Forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a 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.

6) On September 16, 1991, Respondents filed an answer. They denied the allegations mentioned above in the Specific Charges and alleged legitimate, nondiscriminatory reasons for Complainant's discharge.

7) On December 13, 1991, the Agency filed a motion to amend the Specific Charges. The Amended Specific Charges added an allegation that Respondent Kile aided and abetted Respondent's termination of Complainant, in violation of ORS 659.030(1)(g). After permitting Respondents an opportunity to respond to the motion, the Hearings Referee granted it. On January 29, 1992, the Agency served the Amended Charging Document on Respondents.

8) On January 29, 1992, Respondents filed an amended answer in which they denied the allegations of violations in the Amended Specific Charges.

9) Pursuant to OAR 839-30-071, the Agency and Respondent each filed a Summary of the Case.

10) A prehearing conference was held on March 3, 1992, at which time the Agency and Respondent stipulated to facts which were admitted by the pleadings. In addition, the participants' stipulated to the allegations of paragraph two of the charging document, and Respondents stipulated that "Ronald Kile would be personally and jointly liable with the Respondent Corporation for any order entered in this case." The stipulation was not "an admission of any wrongdoing on Kile's part as substantively alleged."

11) At the commencement 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 Agency and Respondents were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) During the hearing, the Agency made a motion to amend its pleading, the Amended Specific Charges, to conform the back wages and lost benefits damages to the evidence. The motion was made pursuant to OAR 839-30-075. The Hearings Referee granted the motion because the amendments reflected issues and evidence that had been previously introduced into the record without objection from Respondent.

14) The Proposed Order, which included an Exceptions Notice, was issued on March 25, 1992. Exceptions, if any, were to be filed by April 6, 1992. No exceptions were received.

#### FINDINGS OF FACT—THE MERITS

1) At all times material herein, Respondent was an Oregon corporation and an employer in this state that employed six or more persons.

2) At all times material herein, Respondent Kile was president and sole owner of Respondent.

3) Complainant was initially employed by Respondent on or about May 22, 1988, in Respondent's Medford office.

4) Respondent's other office and headquarters were in Springfield.

5) At first, Complainant's duties included sales and service of X-ray processors, which develop X-ray film, and accessories. In October 1989, Complainant was promoted by Respondent Kile to manager of the Medford office. Complainant's rate of pay was \$10.00 per hour. In addition to his previous duties, Complainant also handled the overall operations of the office, handled customer complaints, ordered supplies, and scheduled the work of two employees. Respondent's clients included doctors, hospitals, veterinarians, and others. Complainant's work hours usually began around 5 a.m. and ended from 1 to 4 p.m.

6) During the time Complainant was the manager of the Medford office, his supervisor was Steve Kile, Respondent Kile's son and general manager of Respondent. In the five months between October 1989 and February 28, 1990, Complainant saw Respondent Kile around four times and talked with him by telephone around three times. During that same time, Complainant saw Steve Kile around nine times and talked with him by telephone daily.

7) Complainant had an admitted, long-standing problem with alcohol. He had sought treatment for alcoholism in 1985. Alcoholism had previously caused problems in his life and with his employment.

8) Respondent Kile met Steve Kile and Todd Wisner (Respondent's sales and service manager at times material) after work for drinks "many times" to unwind and discuss company business. Respondent Kile usually picked up the tab for the drinks because he and the employees talked about

\* "Participant" or "Participants" includes the Respondents and the Agency. OAR 839-30-025(17).

business. In 1989, he went out to drink with the Springfield employees around once per week, for around an hour to an hour and a half. They usually would start around 3:30 p.m. and leave around 5 p.m. Respondent Kile and Wisner usually had two to three drinks on each occasion. Steve Kile drank significantly more than Respondent Kile and Wisner, and often became intoxicated. Respondent Kile and the employees always drove separately to and from the bar. They usually drove their own vehicles. Steve Kile sometimes drove a company vehicle. Respondent Kile sometimes set a quota of three drinks, because of the illegality of driving drunk and the consequences. If Respondent Kile felt that he had drunk too much, he took a taxi home. Respondent Kile had an unwritten policy that if an employee drank too much, the employee should call a taxi and put it on the business expense account. Respondent would then reimburse the employee for the taxi. After Complainant was terminated, drinking with the employees "diminished." At the time of hearing, social drinking with the employees happened rarely.

9) Respondent Kile invited Complainant to have drinks and discuss business after work several times. Complainant drove the company van a "couple" of those times. Respondent Kile took Complainant and his wife to dinner in Medford on one occasion. These meetings would last from one to three hours. Complainant drank faster than Respondent Kile, and on occasion Complainant left the bar intoxicated. Respondent Kile offered to get Complainant a taxi "many times." On one occasion after drinking two beers

with Respondent Kile, Complainant drove a company vehicle from Springfield to Medford.

10) Respondent Kile was concerned that Complainant had a drinking problem. On one occasion in January 1990, Respondent Kile invited Complainant out for a drink after work. Respondent Kile thought Complainant drank too much and offered to get Complainant a taxi. On that occasion, the bar manager threatened to "86" Complainant (he could not come back to the bar again) if he left the bar and drove a vehicle. Complainant left and drove away. Later Respondent Kile told Complainant that he had a drinking problem and gave him a "gentle reprimand." Complainant "sloughed it off." Respondent Kile told Steve Kile several times that Complainant had a drinking problem.

11) Complainant claimed that he sprained or strained his lower back on the job when he lifted a barrel of X-ray film on January 22, 1990. Complainant reported the injury to Steve Kile on January 23, 1990, and told Kile that he needed medical attention. Steve Kile asked Complainant to see a doctor and use his personal medical insurance, which Respondent provided. Complainant requested and Respondent provided a workers' compensation insurance report form (801 form). Complainant completed the form on February 2, 1990, and sent it to Respondent in Springfield the next day. Respondent's bookkeeper did not fill out the form until February 14, 1990. Respondent's insurance company, Employee Benefits Insurance Company (EBI), denied Complainant's claim on March 23, 1990. EBI did not

receive Complainant's 801 form until March 30, 1990.

12) Respondent Kile first learned about Complainant's workers' compensation claim when he saw the claim form lying on a secretary's desk around two to three weeks after the accident. He instructed the secretary to "get it moving." It upset Respondent Kile that the claim form had not been processed and that he had not been told about the claim. He did not follow up with the secretary to see that the form was mailed. Respondent Kile was angry at Steve Kile for not reporting the injury to him. Respondent Kile did not hear from EBI concerning the claim until after Respondent had sent in the claim form. Before Complainant was terminated on February 28, 1990, Respondent Kile did not know what doctor Complainant was seeing for the injury.

13) From mid-January through February 1990, Todd Wisner never heard Respondent Kile make any derogatory remarks about workers' compensation insurance or about the workers' compensation claim filed by Complainant. He never heard any discussion of that nature.

14) Prior to Complainant's workers' compensation claim, "a couple" of workers' compensation claims had been filed by Respondent's employees. One of those involved Robert Shannon (phonetic), who "had a couple of back complaints." Respondent "went through the procedures."

15) Complainant sought medical attention for his injury from John Colwell, D.C. Dr. Colwell's diagnosis was "Lumbosacral sprain/strain." Complainant's first treatment was on

January 30, 1990. He received "chiropractic manipulation, ultrasound." He was released for work with no time loss. Complainant and Dr. Colwell completed a "First Medical Report" form (827 form) on February 2. EBI received the 827 form on February 5, 1990.

16) On February 5, 1990, Dr. Colwell advised Complainant to take two weeks off from work. Complainant did not follow that advice and took no time off.

17) Complainant later saw another doctor, John Corson, M.D., for a second opinion about his back. Dr. Corson gave Complainant a pain medication, Anexcia (phonetic), for his back.

18) Complainant drove a 1977 Chevrolet company van for his work. Respondent allowed him to drive the van home at night when he had an early morning appointment the next day.

19) Generally, Respondent did not allow its employees to use company vehicles for their personal use. When employees had early morning appointments at clients' businesses, the employees could drive company vehicles home after work the day before and drive directly to the clients' businesses in the morning. Employees regularly had early morning appointments.

20) Respondent Kile felt it was a "no no" to drive drunk, and told employees that. Respondent had no written policy regarding drunk driving. Respondent Kile had counseled Complainant and Steve Kile about drunk driving. Respondent Kile had never had to fire someone for drunk driving.

21) On February 22, 1990, Complainant used the company van after work to go drinking at a bar, the Hungry Woodsman. Complainant drank more than he normally did. At the time, Complainant was on medication. Complainant was warned that alcohol should not be consumed while he was taking the medication. At around 11:30 p.m., while driving the van to his home near Jacksonville, Complainant had an accident in which the van left the road and rolled over. Complainant was intoxicated. Kenneth Gunn arrived at the accident scene very soon after the accident. The van was upside down and its lights were still on. Another person then drove up and said she would go for help. There was no evidence that any door or window of the van had been opened before Gunn arrived. Gunn yelled and heard Complainant inside the van. Gunn neither saw nor heard anyone outside the van. Gunn helped Complainant out of the van from a back door. It took both Complainant and Gunn, pushing and pulling, to get the door open. When the door opened, "the beer smell was outrageous." Complainant's head was cut and bleeding. He never sought medical treatment for the cut. Gunn was trying to help Complainant back to the road, and to convince Complainant to wait for medical help. Complainant was coherent and wanted to get away from the accident scene. Complainant resisted Gunn's help, jerked away from him, and said he wanted to walk home (about a half mile away). Complainant left the scene. Gunn did not see anyone besides Complainant in the van. Complainant did not tell Gunn about any other person with Complainant in the van. Complainant made no effort

to look for another person. Soon after Complainant left the scene, people from the neighboring houses, who had heard the accident, arrived. Later, a county sheriff arrived. No one at the scene saw a second person from the van. Complainant later told the county sheriff that someone named John was driving the van when the accident occurred. The sheriff knew Complainant, and Complainant told the sheriff that Complainant had worked for the Jacksonville City Police Department. No traffic citation was issued. The van was totaled and could not be driven.

22) Complainant testified that he had several drinks at the Hungry Woodsman, met a man named John, had more drinks, and then let John drive Complainant to his (Complainant's) home in Jacksonville. Complainant testified that John wrecked the van and then was nowhere around after the accident. Complainant did not know how John got out of the van. He testified that he asked the person outside the van (Gunn) if he had seen John. The Forum finds Complainant's testimony unbelievable because it was contrary to other credible evidence on the record. Complainant offered no witness to corroborate his testimony that he met John or that John drove the van.

23) On Friday, February 23, 1990, Complainant called Respondent Kile concerning the accident with the van. Complainant told Respondent Kile that he had been out with the company van, had gotten drunk, and that the van was totaled. Complainant made no mention of another person driving the van. Complainant told Respondent Kile that the police made out an

accident report and that Complainant was not cited for the accident. Respondent Kile was very upset about the van being wrecked and that alcohol was involved. He told Complainant that he (Respondent Kile) would come down to Medford in a few days to find out what happened.

24) On the morning of Wednesday, February 28, 1990, Respondent Kile drove to Medford with Respondent's financial consultant, Martin Mead (phonetic). Respondent Kile went to Medford for the specific purpose of evaluating the circumstances surrounding the accident. When they arrived at the Medford office about 9:30 a.m., Complainant was not there. No one in the office knew where Complainant was or why he was not there. One of Respondent's special clients, the Medford Clinic, had called the office and said that Complainant had not delivered X-ray film that morning, as he had promised the day before. An employee, Robert South, had tried to contact Complainant on Complainant's pager, but Complainant never returned the call. Respondent Kile called the Springfield office and learned that Complainant's wife had called to find out where Complainant was; Complainant had not been home all night.

25) A few minutes later, Complainant came into the front office in his usual work clothes. At that moment, Respondent Kile was the only one in the front office. The consultant and Robert South were in a back room checking inventory. Complainant appeared hungover. He was "bleary-eyed" and unshaven. His eyes were bloodshot and his clothes were disheveled. Respondent Kile told

Complainant that his wife was looking for him and asked him what happened. Respondent Kile was face to face with Complainant, and within two feet of him. Complainant responded with slurred speech, and Respondent Kile detected alcohol on his breath. "He was reeking of alcohol." Respondent Kile said, "Richard, I have no other recourse but to ask you for the keys." Complainant became aggressive and tore a scheduling chart off a wall. Respondent Kile took the chart back. Complainant asked if Respondent Kile would consider laying Complainant off. Respondent Kile inferred that Complainant was begging for unemployment benefits, and Respondent Kile said he would consider the request. Complainant said nothing about his workers' compensation claim. Paul Fedrizzi, an account representative for a medical products company, came into the office, spoke briefly to Complainant, gave some information to Respondent Kile, and left. Complainant went into the back room, told South he had been fired, gathered some personal items, and left.

26) Respondent Kile discharged Complainant because he had not shown up for work and because six days earlier he had wrecked a company van while drunk. Complainant's injury had nothing to do with Respondent Kile's decision to terminate Complainant's employment.

27) Respondent Kile believed it was grounds to fire an employee if the employee drove a company vehicle while legally intoxicated. Steve Kile thought it was improper for an employee to drink alcohol and drive a company vehicle. He thought it would

be grounds to fire an employee if the employee drank and then drove and wrecked a company vehicle.

28) Respondent Kile had never made an employment decision about an employee based upon the employee's health, or whether the employee was hurt, or upon some right the employee had asserted, or upon insurance considerations.

29) Complainant testified that he planned on February 27, to take the day off on Wednesday, February 28, 1990. He testified that he had all of the work scheduled for the other employees to do. The Forum finds this testimony unbelievable because it is contrary to other credible evidence on the record. For example, in addition to the facts found in Finding of Fact 24, Complainant had informed no one that he planned to take the day off. He had never taken an unannounced day off before. Complainant required the employees under him to notify him in advance of their days off. Complainant had, through Steve Kile, previously suspended an employee for failure to advise the company of an absence from work prior to the absence. As part of his job, he was expected to be available for clients without appointments, unless other duties took him away from the office. A few days after he was terminated, Complainant went into the Medford office to collect his personal things. He told South that he had been having personal problems at home the night before he was fired and that was why he was late for work on February 28.

30) Complainant testified that, when Respondent Kile said Complainant was fired, Complainant said,

"you're doing this over the workman's comp claim, aren't you Ron?" Complainant testified that Respondent Kile said, "yea, you filed a claim like this before \* \* \* its bullshit about your bad back." The Forum finds that testimony not credible. When Complainant went into the office a few days after his discharge, he was agitated about his discharge and spoke to South about it. Complainant did not mention anything about his workers' compensation claim in that conversation. Complainant had never mentioned his injury to South or suggested that Respondent wanted to discharge Complainant due to his injury.

31) Complainant testified that he did not drink on the night of February 27, 1990. He testified that he drove to Yreka, California, where he played cards in a casino until 1 a.m. He testified that he stayed in a motel in Yreka that night and drove back to Medford on the morning of February 28. He testified that his bloodshot eyes were due to medication he applied to his eyes for glaucoma. Due to the universal description by the other witnesses that Complainant appeared hungover on February 28, and due to Respondent Kile's credible testimony that he smelled alcohol on Complainant, the Forum finds Complainant's testimony that he had not been drinking on the night of February 27 not credible.

32) About a week after February 28, 1990, Respondent received a copy of the police accident report involving Complainant and the company van. Respondent Kile first learned from the report of Complainant's claim that someone else was driving the van at the time of the accident.

33) Complainant's testimony was not credible. On many important points his testimony was contradicted by witnesses whose testimony was credible. As a result, Complainant's testimony was given no weight whenever it conflicted with other credible evidence on the record. In some cases, his testimony was not believed even when it was not controverted by other evidence.

34) Steve Kile's testimony was not credible. At the time of hearing, Steve Kile had "no relationship" with his father, Respondent Kile, who had disinherited Steve Kile in July 1990. Steve Kile did not like Respondent Kile and was a friend of Complainant. At the time of hearing, he worked for Respondent's business competitor, Northwest X-ray. In November 1989, Respondent hired a consultant to audit its business. Respondent's sales had been increasing, but its profits were decreasing. There was a "cash flow" problem. Respondent's bookkeeper/secretary, Janet Briggs, was charged with stealing, prosecuted, and convicted. Steve Kile was also under suspicion of embezzlement from the company; he was being questioned about his activities and performance on the job. Steve Kile became increasingly agitated as the audit progressed. During January and February 1990, Steve Kile was withholding information from Respondent Kile. He began coming to the office early and purging files. In February 1990, before February 22, Respondent Kile and the consultant met with Steve Kile to discuss the inconsistencies in Respondent's checks. Steve Kile was relieved of "all command at that point." "A major chill"

resulted in the relationship between Respondent Kile and Steve Kile thereafter. Respondent Kile was "devastated" by his suspicion that his son was involved in the theft from the company. Steve Kile reacted violently to the accusations. In April 1990, Respondent Kile caused Steve Kile to be locked out of several offices unless a secretary was present. Steve Kile was "absolutely furious that he was locked out of the office and that he was being questioned." Steve Kile quit on May 3, 1990. On that day, before any of the other employees arrived, Steve Kile entered the office, kicked open the doors of the offices he had been locked out of, and vandalized the offices. Some of Todd Wisner's customer records were missing afterward. Steve Kile denied any involvement with problems with Respondent's accounts receivable. He denied that one area of suspicion was that silver was being sold improperly; "that never came up." The consultant's investigation revealed that silver was missing. Steve Kile once asked Wisner to forge a signature on a customer's invoice for the delivery of silver. This evidence showed that Steve Kile was a biased witness. In addition, his testimony on many points was contradicted by credible evidence on the record. For example, he testified that, before February 28, Respondent Kile learned that his workers' compensation insurance had been canceled. Credible evidence showed that was not true. Steve Kile testified that Respondent Kile said Complainant's chiropractor was a quack. However, credible evidence showed that Respondent Kile did not know who was treating Complainant's injury until after Complainant was fired. As a

result of his bias and contradicted testimony, Steve Kile's testimony was given less weight whenever it conflicted with other credible evidence on the record.

35) Based on the whole record, the Forum found Respondent Kile's testimony credible. His demeanor was calm and forthright, even where his memory was deficient and unsupportive of his position. He responded to questions without hesitation and made no effort to avoid any issue. His testimony was corroborated on many points by other witnesses, who the Hearings Referee had no reason to disbelieve. In addition, his testimony was supported by that of Steve Kile on the important point of Respondent Kile's purpose for going to Medford on February 28.

#### ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent employed six or more persons within the State of Oregon. Respondent Kile was Respondent's owner and president.

2) Complainant was a worker employed by Respondent.

3) On January 22, 1990, Complainant claimed he was injured on the job. On January 23, 1990, Complainant notified Respondent of the injury and sought medical treatment. He applied for benefits under the Oregon workers' compensation procedures for his injury.

4) On February 22, 1990, Complainant drove a company van after drinking at a bar. He totaled the van. Complainant was intoxicated.

5) On February 28, 1990, Complainant went to work late and

hungover. He had missed an appointment with a business client. No one, including his wife, knew where he had been. When he arrived he smelled of alcohol.

6) Respondent terminated Complainant because he drove a company vehicle while drunk and wrecked it, and he came into work late and unfit for work. Complainant's workers' compensation claim played no role in Respondent Kile's decision to terminate Complainant.

#### CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110, and 659.400 to 659.435. See ORS 659.400(3), 659.010(12) and (13).

2) At all times material, Complainant was Respondent's "worker," as that term is used in ORS 659.410. See OAR 839-06-105(4).

3) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein. See ORS 659.435 and OAR 839-06-121.

4) The actions, inactions, and knowledge of Ronald D. Kile, an employee or agent of Respondent, are properly imputed to Respondent.

5) ORS 659.410 provides:

"It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802

to 656.807, or of 659.400 to 659.435 or has given testimony under the provisions of such sections."

Respondent did not violate ORS 659.410 as charged, as Respondent did not discriminate against Complainant with respect to his employment tenure because he had applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.807, or of 659.400 to 659.435.

6) ORS 659.030(1) provides, in part:

"For the purposes of ORS \*\*\* 659.400 to 659.460 \*\*\* it is an unlawful employment practice:

\*\*\*

"(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS \*\*\* 659.400 to 659.460 \*\*\* or to attempt to do so."

Respondent Kile did not violate ORS 659.030(1)(g).

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

#### OPINION

This case was determined by the credibility of Complainant, Steve Kile, and Respondent Kile. Complainant alleged that Respondent Kile made statements about Complainant's workers' compensation claim and the validity of his injury. Those statements, the

Agency alleged, showed Respondent's specific intent to terminate Complainant because of his injury and use of the workers' compensation system.

Respondent denied those allegations and asserted that he terminated Complainant due to his accident in the company van while drunk, and the events that occurred on February 28, when Complainant came to work late.

As the Findings of Fact reveal, the Forum did not believe Complainant's testimony. His testimony was so unbelievable on so many points that the Forum gave no weight to any of his testimony that was controverted by credible evidence. This Forum has previously held that "a witness false in one part of the testimony of the witness is to be distrusted in others," quoting from ORS 10.095(3). *In the Matter of Lee's Cafe*, 8 BOLI 1, 18 (1989). That instruction certainly applies here with respect to Complainant.

Aside from Complainant's testimony, the only testimony that could show Respondent Kile's discriminatory intent to fire Complainant came from Steve Kile. From the evidence showing Steve Kile's bias against Respondent Kile, and from the evidence showing that some of his testimony was inaccurate or false, the Forum has found Steve Kile's testimony not credible whenever it was not supported by other credible evidence.

With respect to Respondent Kile's alleged comments that could show a discriminatory intent, they were always allegedly made when Respondent Kile was alone with either Complainant or Steve Kile. No other evidence suggested that Respondent Kile had a discriminatory intent when he fired

Complainant. Respondent Kile denied that he made any such comments, and Complainant's and Steve Kile's testimony was not credible. Accordingly, the Agency did not prove its case by a preponderance of the evidence, and the Order below is the proper disposition of this matter.

#### ORDER

NOW, THEREFORE, as CHEM-RAY COMPANY and RONALD D. KILE have not been found to have engaged in any unlawful practice charged, the complaint and the amended specific charges filed against them are hereby dismissed according to the provisions of ORS 659.060(3).

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**In the Matter of  
Z AND M LANDSCAPING, INC.,  
Respondent.**

Case Number 01-92  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued April 21, 1992.

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#### SYNOPSIS

Respondent repeatedly acted as a farm labor contractor without a license and made a false statement about having workers' compensation insurance in its application for a license. The Commissioner found that Respondent was unfit to act as a farm labor contractor, denied it a license, and

assessed it a civil penalty of \$2,000 for its false statement on the application. ORS 658.405(1); 658.410; 658.415; 658.417; 658.420; 658.440(3)(a); 658.453; OAR 839-15-145; 839-15-508; 839-15-510; 839-15-520.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on November 19, 1991, in Suite 220 of the State Office Building in Eugene, Oregon. Lee Bercot, Case Presenter for the Wage and Hour Division of the Bureau of Labor and Industries (the Agency), appeared on behalf of the Agency. Z and M Landscaping, Inc. (Respondent) failed to appear at hearing represented by an attorney. Jade Zyzniewski, an owner of Respondent, was present throughout the hearing.

The Agency called the following witnesses (in alphabetical order): Bob Birkenfeld, president of Southern Logging Co., Inc.; Florence Blake, compliance specialist with the Agency; Monty Elder (by telephone); Lucretia Elders, licensing coordinator for the Agency (by telephone); Mike Hughes, former wrestling coach at South Umpqua High School; Jason Patrick Kelley; Patricia Kelley, bookkeeper for SUMO, a student benefit association; Bill Pick, compliance specialist with the Agency; Ken Sorenson, president of Kenneth M. Sorenson Logging, Inc.; and Bob Young, agent for Southern Logging Co., Inc.

Having fully considered the entire record in this matter, I Mary Wendy

Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

#### FINDINGS OF FACT – PROCEDURAL

1) On March 28, 1991, the Agency issued a "Notice of Proposed Denial of Farm Labor Contractor License and Intent to Access a Civil Penalty" (charging document) to Respondent. The charging document informed Respondent that the Agency intended to deny its application for a farm labor contractor license, and assess it a \$2,000 civil penalty. The charging document cited the following bases for the denial: (1) acting as a farm labor contractor without first having been licensed by the Commissioner (three claims); and (2) making a misrepresentation, false statement, and/or willful concealment in the application for a license. The notice was served on Jade Zyzniewski on April 3, 1991.

2) On April 17, 1991, the Agency received Respondent's answer to the charging document. In its answer, Respondent denied the allegations in the charging document and set forth an affirmative defense.

3) On July 1, 1991, the Agency requested a hearing from the Hearings Unit.

4) On July 19, 1991, the Hearings Unit issued to Respondent and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent to

Respondent a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-30-020 through 839-30-200.

5) On August 22, 1991, Respondent, through counsel, requested subpoena forms. The Hearings Unit provided those forms to Respondent on August 29, 1991.

6) On September 26, 1991, Respondent's attorney withdrew from representing Jade Zyzniewski, James Morgan, and Respondent on the case. The attorney advised "[t]he principals, James W. Morgan and Jade A. Zyzniewski" of "the necessity of their obtaining other representation in the now pending matter."

7) On November 5, 1991, the Agency filed a motion to amend the charging document.

8) On November 6, 1991, the Hearings Referee wrote to Jade Zyzniewski and James Morgan and to advise them that Respondent had to be represented by an attorney, citing ORS 9.320 and 9.160, and OAR 839-30-025(7) and (15).

9) On November 13, 1991, the Hearings Referee granted the Agency's motion to amend the charging document. Respondent did not reply to the motion.

10) On November 13, 1991, the Hearings Referee sent the participants prehearing instructions.

11) Pursuant to OAR 839-30-071, the Agency filed a Summary of the Case including documents from the Agency's file. Although required to do

so under the provisions of OAR 839-30-071, Respondent did not submit a Summary of the Case.

12) Jade Zyzniewski attended the hearing, but Respondent was not represented by an attorney. The Hearings Referee found Respondent in default, pursuant to OAR 839-30-057 and 839-30-185(1)(b).

13) No request for relief from default was received by the Hearings Unit.

14) The administrator of the Support Services Division of the Agency granted extensions of time to the Hearings Referee to issue a proposed order.

15) The Proposed Order, which included an Exceptions Notice, was issued on March 11, 1992. Exceptions, if any, were to be filed by March 23, 1992. No exceptions were received.

#### FINDINGS OF FACT – THE MERITS

1) As early as May 1990, Jade Alan Zyzniewski and James W. (Bill) Morgan were working together as Z and M Landscaping. One of them told Ken Sorenson, of Kenneth M. Sorenson Logging, Inc. (Sorenson Logging), in May that they had workers' compensation insurance and all of their "numbers," meaning license, tax identification, and insurance policy numbers, needed to operate. Zyzniewski and Morgan did some work for Sorenson Logging in the summer of 1990.

2) In the summer and fall of 1990, Southern Logging Co., Inc. (Southern) worked on two logging contracts with Roseburg Lumber Company. The contract names were Jewell and Lamont. Zyzniewski and Mike Hughes,

the coach of the South Umpqua High School wrestling team, contacted Bob Birkenfeld, the president of Southern, about hiring wrestling team members to do brush piling on the logging contracts. The team wanted to raise money for its support. Through an organization called SUMO (South Umpqua Mat Organization), the team members and their parents did brush piling and built fire trails on the Jewell contact on weekends during July and August 1990. Zyzniewski's father, Don Zyzniewski, was involved with the SUMO club and had helped the club raise money in the past. SUMO did not have workers' compensation insurance coverage for the students; the parents were asked to have family insurance that would cover the students in the event of an injury. SUMO did not complete work on the Jewell contract because the wrestlers went back to school. On July 3, 1990, Southern paid SUMO \$9,711.85 for work on the Jewell contract. On July 23, 1990, Southern paid SUMO \$7,820. On September 6, 1990, Southern paid SUMO \$3,035.70.

3) On August 15, 1990, Respondent was incorporated. Zyzniewski was its president and treasurer. Morgan was its vice president, secretary, and registered agent. Zyzniewski and Morgan were Respondent's owners.

4) On August 22, 1990, Morgan signed an application for a forest labor contractor license for Respondent. When the Agency provided the application to Respondent, it also provided a packet of information including the farm/forest labor contractor statutes and rules, and other forms. The information informed Respondent's owners

that Respondent needed vehicle and workers' compensation insurance.

5) The application for the forest labor contractor license contained an oath signed by Morgan that the applicant:

"would at all times conduct the business of a farm and/or forest labor contractor in accordance with all applicable laws of the State of Oregon and the rules of the Commissioner of the Oregon Bureau of Labor and Industries \*\*\*"

6) On August 23, 1990, Respondent filed an application for workers' compensation insurance with the National Council on Compensation Insurance (NCCI). Respondent had previously been rejected for workers' compensation insurance by SAIF and Farmers Insurance Company. On September 7, 1990, NCCI rejected Respondent's application for workers' compensation insurance and refunded Respondent's deposit. NCCI directed Respondent's insurance agent, Phil Bay, to resubmit an application with completed information within 15 days in order to bind the coverage. On September 11, 1990, Bay sent a letter to Respondent asking that it fill out, sign, and return a new form to him. NCCI received no response to its letter. NCCI sent Bay a reminder letter. Respondent did not reapply.

7) On September 18, 1990, Morgan submitted to the Agency a certificate of workers' compensation insurance for Respondent. The workers' compensation policy number was shown as 80-9019115.

8) On September 24, 1990, Respondent applied for a contractors

bond. Respondent estimated that it would employ five workers during the next 12 months.

9) During the period that SUMO was working on the Jewell contract, Zyzniewski and a crew (including four or five of the wrestlers) were also performing brush piling work on it during weekdays. Southern paid SUMO for the work that Zyzniewski performed, and then SUMO paid Zyzniewski. Zyzniewski had this arrangement with SUMO because he did not have "his numbers." SUMO paid Zyzniewski \$18,319.35. In September 1990, Zyzniewski and Morgan contacted Birkenfeld about completing the brush piling work on the Jewell contract. Respondent finished the work and assumed the agreed price for the work that SUMO had had with Southern. On September 13, 1990, Southern paid Respondent \$7,820 for work on the Jewell contract. On October 22, 1990, Southern paid Respondent \$1,600 for work on the Jewell contract. On November 28, 1990, Southern paid Respondent \$1,631.45 for work on the Jewell contract.

10) Zyzniewski and Morgan told Birkenfeld that Respondent was applying for a forest labor contractor license and workers' compensation insurance. Sometime before November 30, 1990, Morgan gave Birkenfeld a form showing that Respondent had workers' compensation insurance with Farmers Insurance Group, number 80-9019115, with expiration date September 5, 1991.

11) Respondent did hand piling or built fire trails on the Lamont contract, which began in September 1990. Zyzniewski negotiated the price with

Birkenfeld. Birkenfeld saw three workers from Respondent on the job. On November 27, 1990, Southern paid Respondent \$3,492 for Respondent's work on the Lamont contract. Monte Elder, a crew leader for Wilson, Inc. (a licensed forest labor contractor), saw seven or eight persons that appeared to be a crew working for Respondent on the Lamont contract.

12) During 1990, Southern paid a total of \$20,567.55 to SUMO, and \$14,543.45 to Respondent.

13) In September 1990, Zyzniewski met Bob Young, a purchasing representative for Sorenson Logging. Zyzniewski said he was interested in doing brush piling work. Young called Zyzniewski for a bid on brush piling on a US Forest Service (USFS) contract known as "L.B. Salvage Sale." Young and Zyzniewski viewed the job site, discussed a price, and reached an agreement for Respondent to perform brush piling work. Respondent gave Sorenson Logging a workers' compensation insurance policy number before performing any work. Respondent performed its contract with Sorenson Logging. Young saw Zyzniewski and one or two other workers on the job.

14) During the fall of 1990, Sorenson Logging worked on the following timber sales: Dose Salvage, Cass, West Gem, Now, Dave, and Foreman. Each job required brush piling work. Zyzniewski viewed and bid each job site. Respondent performed brush piling work on all six contracts. Between September 1990 and January 25, 1991, Sorenson Logging paid Respondent \$9,504 for its work. Ken Sorenson saw three persons working for Respondent. Sorenson told the

Agency's investigator that Respondent had crews of from four to six men during September and October. Respondent complained to Sorenson about the high cost of workers' compensation insurance.

15) On November 9, 1990, the Agency contacted James Morgan about his license application. Morgan said that all he needed to obtain the license was a bond. The Agency advised him that Zyzniewski was operating in violation of the law. Morgan said that Zyzniewski was "just a minor partner."

16) As of November 21, 1990, Department of Insurance and Finance records revealed no record of workers' compensation insurance for Respondent.

17) On December 6, 1990, the Agency issued a temporary farm labor contractor permit to James Morgan, dba Z and M Landscaping, Inc. The permit expired February 4, 1991. In issuing the permit, the Agency relied upon the certificate of workers' compensation insurance that Morgan submitted on September 18, 1990.

18) On December 12, 1990, an Agency compliance specialist contacted Phil Bay, who admitted that NCCI had not "placed the coverage" for Respondent. Bay said that policy number 80-9019115 was not a workers' compensation policy; it was a general liability policy number from International Indemnity Company for Respondent.

19) On December 24, 1990, the Agency received a copy of a letter from Phil Bay to NCCI. Bay acknowledged that no workers' compensation

insurance policy had been issued to Respondent due to "communication problems." The Agency also received a copy of NCCI's September 9, 1990, letter rejecting Respondent's insurance application.

20) At no time up to the time of hearing did Jade Zyzniewski, James Morgan, or Respondent ever have a permanent farm or forest labor contractor license issued by the Agency. Respondent was not licensed as either a building contractor or a landscape contractor.

21) Respondent's letterhead, which it used for submitting bids and invoices, stated that Respondent was a "Licensed & Bonded Reforestation Contractor." Respondent used that letterhead beginning no later than October 22, 1990.

22) In March 1991, Respondent again applied to NCCI for workers' compensation insurance.

#### ULTIMATE FINDINGS OF FACT

1) During all material times herein, Respondent was a farm/forest labor contractor, as defined by ORS 658.405, doing business in the State of Oregon. From December 6, 1990, to February 4, 1991, Respondent had a farm/forest labor contractor temporary permit. At no time did Respondent have a farm/forest labor contractor license.

2) Prior to December 6, 1990, Respondent bid upon and performed brush piling work and built fire trails for Southern Logging Co., Inc., on the Jewell contract.

3) Prior to December 6, 1990, Respondent bid upon and performed brush piling work or built fire trails for

Southern Logging Co., Inc., on the Lamont contract.

4) Prior to December 6, 1990, Respondent bid upon and performed seven brush piling contracts for Kenneth M. Sorenson Logging, Inc.

5) On September 18, 1990, Respondent gave the Agency a document showing that it had workers' compensation insurance. At no time did Respondent have such insurance. Respondent's agents, Jade Zyzniewski and James Morgan, knew on September 18, 1990, that Respondent had no such insurance.

6) Respondent was required by law to provide workers' compensation insurance for each individual who performed manual labor in forestation or reforestation activities. ORS 658.417 (4). Proof of such insurance is a substantive matter that is influential in the Commissioner's decision to grant or deny a license.

#### CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of Respondent herein.

2) As a person applying to be licensed as a farm/forest labor contractor with regard to the forestation or reforestation of lands in the State of Oregon, Respondent was and is subject to the provisions of ORS 658.405 to 658.475.

3) The actions, inactions, and statements of Jade Zyzniewski and James Morgan are properly imputed to Respondent.

4) Any person who bids or submits prices on contract offers or

subcontracts with another for the reforestation of lands — including piling of brush and slash, and fire trail building — is a farm/forest labor contractor, as defined in ORS 658.405(1) and OAR 839-15-004(5) and (9). Therefore, pursuant to ORS 658.410, Respondent was required to possess a valid farm/forest labor contractor license issued by the Agency.

5) By acting as a farm labor contractor with regard to the forestation or reforestation of lands without a valid license issued to it by the Commissioner, Respondent violated ORS 658.410(1), 658.415(1), and 658.417(1).

6) By providing information to the Agency showing that Respondent had workers' compensation insurance, when Zyzniewski and Morgan knew that Respondent did not have such insurance, Respondent made a false statement in its application for a license, in violation of ORS 658.440(3)(a).

7) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Respondent. ORS 658.453(1)(a) and (c). The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

8) Respondent's violations of ORS 658.410(1), 658.415(1), and 658.440(3)(a) demonstrate its unfitness to act as a farm or forest labor contractor. ORS 658.420; OAR 839-15-520(1)(a), (j), (k), (2), (3)(a), and (h).

9) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may deny a license to Respondent to act as a farm/forest labor contractor. ORS 658.420.

#### OPINION

Respondent failed to appear at the hearing, and thus defaulted to the charges set forth in the Notice of Proposed Denial of a Farm Labor Contractor License and Intent to Assess a Civil Penalty. Respondent's only contribution to the record was its answer and a request for a hearing. In default cases the task of this Forum is to determine if a prima facie case supporting the Agency's notice has been made on the record. ORS 183.415(6); *In the Matter of Rogelio Loa*, 9 BOLI 139, 146 (1990); *In the Matter of Michael Burke*, 5 BOLI 47, 52 (1985); see also OAR 839-30-185.

ORS 658.410(1) provides in part:

"no person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries. No person shall act as a farm labor contractor with regard to the forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1)."

ORS 658.415(1) provides in part:

"No person shall act as a farm labor contractor unless the person has first been licensed by the

commissioner pursuant to ORS 658.405 to 658.503 and 658.830."

ORS 658.417 provides in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands.

\* \* \*

"(4) Provide workers' compensation insurance for each individual who performs manual labor in forestation or reforestation activities \* \* \*"

The Agency charged Respondent with violations based upon Respondent's work on the Jewell and Lamont contracts with Southern Logging, Inc., and based on the contracts Respondent had with Sorenson Logging, Inc. The undisputed evidence demonstrated that Respondent violated ORS 658.410(1), 658.415(1), and 658.417(1) by acting as a contractor without a valid license and indorsement on those jobs.

ORS 658.440(3) provides:

"No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

"(a) Make any misrepresentation, false statement or willful concealment in the application for a license."

A "false statement" means an incorrect statement made with knowledge of the incorrectness or with reckless indifference to the actual facts and with the intention to mislead or deceive. The "false statement" must be about a substantive matter that is influential in the Commissioner's or the Commissioner's designee's decision to grant or deny a license. *In the Matter of Raul Mendoza*, 7 BOLI 77, 83 (1988).

Here, the statute requires an applicant for a forest labor contractor license to have workers' compensation insurance for its workers. This is a substantive matter that is influential to the Commissioner's decision to grant or deny a license. Zyzniewski and Morgan knew that Respondent did not have such insurance, yet Respondent, through Morgan, submitted a document to the Agency showing that it had insurance. The Forum infers that Respondent so acted with the intention to mislead or deceive the Agency in order to obtain a license. The evidence establishes that Respondent made a false statement to the Agency as part of the application process, and thus violated ORS 658.440(3)(a).

ORS 658.420 provides that the Commissioner shall conduct an investigation of each applicant's character, competence, and reliability, and of any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor. The Commissioner shall issue a license if she is satisfied as to the

applicant's character, competence, and reliability.

In making that determination, the Commissioner considers whether a person has violated any provision of ORS 658.405 to 658.485. OAR 839-15-145(1)(g), 839-15-520(3)(a). Here, Respondent has violated several of those provisions. Acting as a farm labor contractor without a license is a violation that the Commissioner considers to be of such magnitude and seriousness that she may propose to deny a license application. OAR 839-15-520(1)(k). Similarly, making a false statement on a license application is a violation that the Commissioner considers to be of such magnitude and seriousness that she may propose to deny a license application. OAR 839-15-520(1)(a). Such an action by a license applicant demonstrates that the applicant's character, reliability, or competence makes the applicant unfit to act as a farm or forest labor contractor. OAR 839-15-520(3)(h).

Based upon the whole record of this matter, the Forum is not satisfied as to Respondent's character, competence, and reliability, and finds it unfit to act as a farm or forest labor contractor. The Order below is a proper disposition of Respondent's application for a license.

The Agency proposed to assess a civil penalty for Respondent's false statement to the Agency in violation of ORS 658.440(3)(a). The Commissioner may assess a civil penalty not to exceed \$2,000 for this violation. ORS 658.453(1)(c); OAR 839-15-508(1)(k). The Commissioner may consider mitigating and aggravating circumstances

when determining the amount of any penalty to be imposed. OAR 839-15-510(1). It shall be the responsibility of the Respondent to provide the Commissioner with any mitigating evidence. OAR 839-15-510(2). No mitigating evidence was presented. The Forum finds two aggravating circumstances here. First, Respondent's owners knew their representation to the Agency was false. They made other false statements to those they contracted with concerning Respondent's lack of insurance. Second, this type of violation is particularly serious because it frustrates the Commissioner's ability to implement the law's requirements, and the requirement of providing workers' compensation insurance is fundamental for the protection of this state's workers. The Agency requested and this Forum hereby assesses a \$2,000 civil penalty for the violation.

#### ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, I, the Commissioner of the Bureau of Labor and Industries, hereby deny Z and M Landscaping, Inc. a license to act as a farm or forest labor contractor, effective on the date of this Final Order. Z and M Landscaping, Inc. is prevented from reapplying for a license for a period of three years from the date of denial, in accordance with ORS 658.415(1)(c) and OAR 839-15-520(4).

FURTHER, as authorized by ORS 658.453, Z and M Landscaping, Inc. is hereby ordered to deliver to the Bureau of Labor and Industries Business Office, Ste 1010, 800 NE Oregon St #32, Portland, Oregon 97232, a certified check payable to the BUREAU OF

LABOR AND INDUSTRIES in the amount of TWO THOUSAND DOLLARS (\$2,000), plus any interest thereon, which accrues at the annual rate of nine percent, between a date 10 days after the issuance of the Final Order and the date Respondent complies with this Order.

and (b); OAR 839-07-550; 839-07-555; 839-07-565.

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**In the Matter of  
JLG4, Inc., dba  
CHALET RESTAURANT  
AND BAKERY,  
Respondent.**

Case Number 15-91  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued May 5, 1992.

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#### SYNOPSIS

Where Respondent's male manager led female Complainant to believe that she would be treated favorably at work if she would cooperate sexually with him and "created a backdrop of sexual comment and innuendo which permeated the work environment," the Commissioner found that Respondent sexually harassed and constructively discharged Complainant, and awarded her \$2,387 in back wages and \$10,000 for mental distress. ORS 659.030(1)(a)

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on July 16 and 17, 1991, in the Bureau of Labor and Industries conference room, 3865 Wolverine Street NE, Salem, Oregon. Alan McCullough, Case Presenter with the Civil Rights Division, Bureau of Labor and Industries (the Agency), presented a Summary of the Case, argued Agency policy and the facts, interposed motions and objections, examined witnesses, and introduced documents. JLG4, Inc., dba Chalet Restaurant and Bakery (Respondent), was represented by Craig McMillan, Attorney at Law, Salem, who presented a Summary of the Case, argued the law and the facts, interposed motions and objections, examined witnesses, and introduced documents. Shelley R. Nixon (Complainant) was present throughout the hearing. James and Myrna Gulick, owners and corporate officers of Respondent corporation, were present throughout the hearing.

The Agency called the following witnesses in addition to Complainant: Usama Amin, Wendy Amin, Betty Martinez, Mark Sills, Terry Burns (aka Sealy), Kimberly Weis Sullivan, and Michelle Walker, all of whom were

\* Burns was known by his step-father's name at times material and had since adopted his true family name. References to "Sealy" in documents and testimony has been interpreted by the Forum as referring to this witness.

employed by Respondent at times material, and Francis Bates, Senior Investigator with the Agency. Respondent called the following witnesses: Arlene Blake and Jenny Metsker, employees of Respondent at times material, and James Gulick and Myrna Gulick, corporate owners and officers.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Ruling on Motion, Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

#### RULING ON MOTION

At the close of the Agency's case in chief, the Hearings Referee delayed ruling on the Agency's motion to amend the Specific Charges to conform to the evidence presented. The motion was based on OAR 839-30-075 and, if granted, would add the issue of constructive discharge based on an intolerable working environment due to sexual harassment and/or based on Complainant's acceptance or rejection of sexual advances to the issue of discriminatory on-the-job treatment pleaded in the Specific Charges. Respondent opposed the motion. At the time, evidence had been presented from which the fact-finder could infer that Respondent's supervisory employee had created objectively intolerable working conditions to which the Complainant attributed her resignation, and that Respondent's supervisory employee had conditioned Complainant's schedule on her rejection of his advances to which she also attributed her resignation. The testimony regarding the supervisory employee's

conduct and its effect on Complainant were not controverted, and Complainant's testimony that his actions led to her resignation was received without objection. The rule under which the motion for amendment was made is liberally phrased with the objective that claims closely related to the Specific Charges be brought before the Forum where there is evidence presented to support them. The rule is based on *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975), which held that the Specific Charges may encompass discrimination like or reasonably related to the initial complaint. It would be illogical to hold that the Forum could find offensive and hostile working conditions and remedy suffering and upset caused thereby without also being able to remedy a forced resignation caused by the offensive environment. *In the Matter of William Kirby*, 9 BOLI 258 (1991). The amendment sought was closely related to the Agency's initial pleading and the proof offered thereunder. Also, Complainant's administrative complaint alleged an involuntary resignation caused by unlawful discrimination. The Agency's investigation of that complaint resulted in a finding of no substantial evidence on the issue of discharge because Complainant had not reported the supervisor's behavior to Respondent's owner. That rationale for the finding was in error as being contrary to the Agency's own rules. An employer is strictly liable for the acts of its supervisory employee when those acts constitute sexual harassment. The employer cannot insulate itself by claiming ignorance. *In the Matter of G & T Flagging Service, Inc.*, 9 BOLI 67 (1990); *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989);

OAR 839-07-555, 839-07-565. The Agency's motion is allowed.

#### FINDINGS OF FACT – PROCEDURAL

1) At the commencement of the hearing, the participants stipulated to certain facts which are utilized throughout these Findings of Fact.

2) On February 21, 1990, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practice of Respondent based upon sexual harassment by Respondent's manager.

3) After investigation and review, the Agency issued an Administrative Determination, and following reconsideration issued an Amended Administrative Determination, finding substantial evidence supporting the allegations of the complaint and finding Respondent in violation of ORS 659.030.

4) The Agency initiated conciliation efforts between Complainant and Respondent, conciliation failed, and on January 16, 1991, the Agency prepared and served on Respondent Specific Charges alleging that Respondent had through its manager repeatedly engaged in a course of conduct designed to harass, intimidate, and embarrass Complainant because of her sex in violation of ORS 659.030. The Specific Charges further alleged in the alternative that Respondent had through its manager conditioned Complainant's work schedule on Complainant's acceptance or rejection of the manager's sexual advances, which

were based on her sex, in violation of ORS 659.030.

5) With the Specific Charges, the Forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a 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.

6) On January 26, 1991, Respondent timely filed its answer and on May 6, 1991, the Forum notified the participants of a change of Hearings Referee and of a change in hearing date from May 21, 1991, to July 16, 1991. On June 21, 1991, Respondent filed a motion to postpone the hearing to the afternoon of July 16, citing a conflict, and on June 25, 1991, the Hearings Referee set the convenement time for 1:30 p.m. on July 16, 1991.

7) The participants each timely filed a case summary pursuant to OAR 839-30-071.

8) At the commencement of the hearing, counsel for Respondent stated that he had read the Notice of Contested Case Rights and Procedures accompanying the Specific Charges and had no questions about it.

9) Pursuant to ORS 183.415(7), Respondent and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the

\* "Participant" or "participants" includes the charged party and the Agency. OAR 839-30-025(17).

matters to be proved, and the procedures governing the conduct of the hearing.

10) At the close of the Agency's case in chief, the Agency moved to amend the Specific Charges to conform to the evidence presented by alleging an unlawful discharge of Complainant due to intolerable working conditions or, alternatively, due to Complainant's rejection of sexual advances, in violation of ORS 659.030(1)(a). A ruling was delayed until the Proposed Order, wherein the amendment was allowed.

11) The Proposed Order, which included an Exceptions Notice, was issued on September 12, 1991. Exceptions, if any, were to be filed by September 23, 1991. No exceptions were received.

#### FINDINGS OF FACT—THE MERITS

1) At all times material herein, Respondent was a corporation owned by James and Myrna Gulick which operated and maintained eating establishments in Oregon engaging or utilizing the personal service of one or more employees, and which reserved the right to control the means by which such service was performed.

2) At times material Respondent operated five Chalet restaurants, three of which were located in the Salem area: in Keizer on River Road (Keizer), in downtown Salem in the Salem Center near Nordstrom's, and on Market Street at Lancaster Avenue.

3) Complainant began working for Respondent in Keizer on September 15, 1989, as a food waitress. She was hired by Steve Hocking, male, who was the Keizer manager. She worked

the day shift from 7 a.m. to 3 p.m., five days per week. She was paid \$3.85 an hour and averaged \$20.00 per day in tips.

4) Arlene Blake was the head waitress at Keizer at times material. She was off work for surgery during September and October 1989. Complainant was told at the time she was hired that when the head waitress returned to a 5 a.m. to 1 p.m. shift, Complainant's shift might change.

5) Before Blake returned, Complainant was interviewed by another restaurant where she was interested in working because there was no evening shift. Hocking called her in and assured her that she would get an 8 a.m. to 4 p.m. shift when Blake returned if she stayed in the meantime. As a result, she did not follow up with the other restaurant.

6) Shortly after Complainant was hired, Hocking suggested that they might have Chinese dinner and some drinks. Within two weeks of her hire, he began suggesting traveling to the coast, and having drinks together, and said she could have time off for them to go to the coast together. He suggested dancing and drinking. He made comments of this kind almost daily.

7) Complainant was invited to her sister-in-law's birthday party at the Keizer Eagles' Lodge in late September 1989. Hocking told Complainant he would meet her there. Complainant told him he was not invited. She did not attend, and Hocking was mad because he claimed he waited there for her. Because it was a private club, Hocking could not have gained entrance unless a member signed him in.

8) Terry Burns worked for Respondent from August until November 1989. He was a delivery driver, delivering pies to stores in Salem and Tualatin. Hocking usually checked in the pies for Keizer, and Burns had contact with him daily for about 10 minutes at a time around 9:30 a.m.

9) Burns was acquainted with Complainant since childhood through family. After learning in early September that Burns knew her, Hocking questioned Burns about her. He asked how well Burns knew her and whether she liked to drink, party, and dance. Burns told him he didn't know her well, hadn't gone out with her, and didn't know her personal habits. Hocking asked how he could get her into bed. His questioning continued for perhaps two to three weeks.

10) Burns and Complainant attended a family party in late September. He told Complainant that Hocking admitted that he had the "hots" for Complainant, that he thought she had a "nice ass," and had asked Burns how to get her to like him and go out with him and how he could get her into bed. She remembered only "some-what" Burns's conversation because she didn't listen to all he had to say. She asked him to stop the discussion because it made her uncomfortable. She believed what Burns told her.

11) When Burns told Complainant about Hocking, they were at a kitchen table alone. The other adults were in another room. No one joined them or asked him about it afterward. He did not discuss the conversation with any other employee.

12) When Complainant first met Hocking, she had thought he was a

"nice guy" and that he was funny. After hearing from Burns about Hocking's remarks, Complainant was uncomfortable around him and didn't think he was very nice and didn't think he was a very good manager.

13) After Complainant heard of Hocking's remarks from Burns, Hocking came to Complainant's apartment one evening. He brought a Chinese dinner. She was surprised; he had not been invited, and the only way he could know her address was from Respondent's employment records.

14) Hocking's visit made Complainant uncomfortable; she had never had a manager act like that before. Although Hocking had asked her out several times before his visit and she had refused, she hesitated to ask him to leave because he controlled her work hours.

15) Complainant dished up the food, which they shared with her 11-year-old son. All three of them sat on a couch and watched video movies while they ate. Hocking put his arm around her and played with Complainant's hair briefly, and she then rearranged the seating. Shortly thereafter, she asked him to leave, which he did. Hocking was at her apartment about an hour, during which she was extremely uncomfortable.

16) In September and October 1989, Betty Martinez was resident manager of the Campus Court Apartments, Salem, where Complainant lived. Complainant was a good tenant in that she and her child followed the rules. Campus Court was a low-income project, and tenants talked with the resident manager about work and income because the rent was income

driven. Complainant discussed her jobs and financial problems with Martinez. The job with Respondent was favorable to her child care situation.

17) After Hocking left her apartment, Complainant told Martinez about his unwelcome visit. She asked Martinez to watch her apartment and be alert for strange cars. She appeared to Martinez to be concerned about losing her job if she didn't cooperate with Hocking. She was nervous and uneasy about him coming to her home under such circumstances. Martinez was aware of her upset and suggested that she file a complaint with the Agency.

18) Mark Sills was hired at Keizer in June 1989 and was employed there at time of hearing. In 1989, he worked with Hocking as a night cook. Hocking often spoke of females and their bodies. Hocking told him that he wanted to "jump on Jenny," referring to one of the waitresses. Sills heard Hocking make sexual remarks about others while Complainant was employed with Respondent.

19) At approximately the beginning of October, Complainant told Sills about Hocking's visit to her apartment. Sills told her that while he and Hocking cooked, Hocking made comments about getting Complainant into bed. Sills told her that Hocking had said other things which Complainant described as "things that weren't very nice." She believed what Sills told her.

20) While Blake was off work, she came to the restaurant as a customer for two weeks during the lunch period, from about noon to 1:30 p.m. She alternated sitting in the section serviced by Complainant and that assigned to

another waitress. She observed the level of service they provided. Her purpose was to determine which waitress to give a shift change when she resumed work.

21) Blake assigned the shifts at Keizer. Hocking made assignments only while Blake was off for surgery. Blake's own shift was 5:30 a.m. to 1 p.m. There were two other day shifts, 7 a.m. to 2 p.m. and 8 a.m. to 4 p.m. Blake returned to work at the end of October. She put Complainant on a noon to 8 p.m. shift, which she created for Complainant's benefit. It gave Complainant two "tip" meals and the possibility of leaving early on slow nights. Blake did not discuss the shift change with Complainant, either before or after it was done.

22) Blake did not consult Hocking about the shift change. Hocking did not offer any advice or suggestions to Blake about the schedule and had nothing to do with the choice of Complainant for the change or the hours of the shift. Complainant was chosen for the change because Blake did not like her customer attitude, which Blake evaluated as "harsh," with snappy, unsmiling behavior and a negative mood. Complainant never complained to Blake about any treatment she received from Hocking.

23) On October 25, Complainant learned from the posted schedule that her work schedule had been changed to noon to 8 p.m. She assumed it had been changed by Hocking and asked to speak to him. She asked why the schedule had been changed. Hocking told her she knew why. She said she did, and that she didn't have to go out with him or speak with him in order to

have her schedule, and that he was not going to punish her like that. Hocking responded that it could always be changed back, and she said "I quit." She then began to cry, and Hocking gave her a tissue.

24) Complainant's objection to the later shift involved child care problems, including getting off work after her son had retired for the night.

25) Complainant stated that she quit because she didn't think it fair that her schedule was changed because she wouldn't date or have sex with the manager of where she worked. She was not aware of any grievance policy. She filed a complaint with the Agency.

26) Complainant didn't feel she could go to the owners. Before Hocking brought the Chinese food to her apartment, she had told Jenny Metsker, another waitress at work, about his remarks and actions, and understood Metsker to say that the same was happening to her. When Complainant suggested going to the Gulicks, Metsker said that she knew them and it wouldn't do any good. Complainant also believed that Myrna Gulick had been rude to her while she worked at Keizer and that Jim Gulick was not pleasant or friendly on the two occasions she had waited on him.

27) Burns and Sills were the only people who reported to Complainant any remarks of a sexual nature by Hocking about Complainant. She never heard remarks of a sexual nature made to her directly by Hocking. Sills told her that she was not the only female about whom Hocking made such remarks.

28) Complainant never worked the revised shift and did not know what tips would have been available during those times.

29) Complainant's job history included: Bob's Hamburgers, 2 years, quit; Payless, 18 months, quit; Black Angus, 9 months, quit; Bray's, 3 months, fired; Chalet, 2 months, quit; Chelsea's, 7 months, quit.

30) Wendy Ann Amin was employed by Respondent from late July to late September 1989 as a waitress and hostess. She worked at Keizer while Hocking was manager. She left Respondent's employ partly because of his attitude toward female employees. He spoke about females of her age with sexual comment and jokes and reference as "a piece of meat." His sexual comments were frequent, but she did not recall any other specific remarks. She did not see him socially. She did not report him to the Gulicks because she believed that Jim Gulick and Hocking were friends. When she left, she told Hocking that his remarks offended her and he seemed apologetic. He told her that he had been raised on the streets and with that background he didn't hesitate to talk that way.

31) Usama Amin worked for Respondent from late July to late September 1989 as a waiter and host. He trained at Keizer while Hocking was manager. He did not see Hocking socially. Amin worked with waitresses Melissa and Laura. Melissa said "oh, that Steve, isn't he funny?" and "isn't he weird?" Hocking's comments were to other males, but were loud enough for anyone to hear, they were not

whispered. None of the waitresses complained.

32) Hocking commented bluntly on the bodies of the waitresses. He talked about Melissa, making comments about her breasts and body and his desire to have her perform oral sex. About Melissa's boyfriend, he said "boy, is that guy sure lucky; he gets to go to bed with her every night." Usama Amin did not tell Melissa what Hocking said to him.

33) Hocking made sexual comments about female customers. Usama Amin asked him if that was all he thought about. Hocking cited a street background as reason for his bluntness. Hocking's conversations focused on sex.

34) Michelle Walker worked for Respondent as a waitress from 1984 to 1990. She worked at Keizer while Hocking was manager. He made jokes at least weekly about "not getting any" in connection with his sex life. She found his remarks to be offensive and unprofessional. His remarks were not personal to her.

35) Kimberly Weis Sullivan worked at Keizer from May to November 1989 as a hostess and waitress and at another Chalet location from December 1989 to August 1990. Hocking managed Keizer and asked her personal questions in front of other employees. He told her to take in her uniform or fill it out. She told him that offended her. He didn't understand why.

36) Hocking made no comments to Sullivan about dating waitresses, but he talked about Jenny Metsker and Melody. Sullivan did not discuss his comments with them.

37) When Complainant told Martinez that Hocking had made suggestions about dating and it upset her, Martinez suggested that Complainant tell him that she didn't mix business with social life. Complainant told Martinez that Hocking had come uninvited to her apartment with Chinese food and she had let him come in. Complainant told Martinez that her schedule started changing after that and that she quit because she was put on nights.

38) Martinez noticed that Complainant had seemed happy with the job until her problems with Hocking made her nervous and threatened. Martinez suggested to her before she resigned that she file a complaint with the Agency and that she report his actions to the owner. Complainant had no funds for Christmas that year.

39) Martinez left Campus Court in June 1990. Complainant was still a tenant there and still appeared upset about Hocking and her experience at Respondent's restaurant.

40) Sills discussed Hocking's comments with waitresses Jenny Metsker and Melody Rosa. Metsker never complained to Sills about Hocking's comments; she told Sills that Hocking had asked her out. Sills told Metsker of Hocking's remarks about her; he did not tell either of the Gulicks about Hocking's behavior.

41) Jenny Metsker was employed by Respondent at the time of hearing as head waitress at the Albany Chalet. She had worked at Keizer in September and October 1989 as a waitress and worked at times with Complainant. Metsker considered Hocking's asking her for dates to be a joke. She never

dated him. She was aware that he made comments of a sexual nature to others about her. She did not take his reported comments seriously.

42) Hocking's remarks about Metsker were reported to her by Sills. She did not report Hocking to the Gulicks or to Blake. She did not recall whether Blake knew he was attempting to date the waitresses. Metsker knew that Respondent had a sexual harassment policy because she signed a piece of paper about it which was included in her "new hire packet." Whatever the policy was, Hocking explained it at the time of hire. Hocking oriented her as to breaks, smoking, work hours, safety, etc. She did not know of the rule prohibiting managers from dating employees until her roommate, Mary Olheiser, who was manager of another Chalet, told her in about December 1989, when Metsker told Olheiser about Hocking's attempted dating.

43) Between September 15 and October 25, 1989, Complainant discussed her schedule with Metsker. Laura Johnson, another waitress, was present. They were discussing the effect of Blake's return to work, which would cause some schedule change. Complainant said that if she was put on nights, she was going to quit.

44) Metsker and Complainant discussed the fact that Hocking had asked the waitresses out. Hocking was the subject of conversation between Metsker and Complainant perhaps two to three times. Metsker transferred to become head waitress at the Nordstrom location.

45) James Gulick was secretary of Respondent and general manager of operations of the Chalet restaurants.

He and Myrna Gulick were husband and wife. He had been involved in managing Chalet restaurants since 1972. The number of restaurants varied during that time between 5 and 18.

46) James Gulick was not acquainted with Complainant. During his time as a restaurant manager, he had supervised around 15,000 individuals, including between 500 and 1,000 managers. At times material, between 50 and 60 persons were employed at Keizer. There was a high turnover of employees in the business, particularly waitresses or waiters.

47) Steve Hocking was hired by James Gulick to manage Keizer based on his experience and background and Respondent's need for a manager there. Gulick was not acquainted with Hocking prior to learning of his interest in the position. Gulick saw Hocking only at work and did not maintain any social relationship with him. Gulick received no complaints about Hocking prior to December 1989.

48) At the time Hocking was hired, James Gulick went over Respondent's operation and policies, including the prohibition of managers dating employees. Hocking was advised that such fraternization was not only prohibited but also inadvisable in maintaining an efficient work relationship. He was also cautioned against meeting alone behind closed doors with an employee of the opposite sex.

49) Myrna Gulick was president of Respondent at times material. She was also a general manager since 1972, predominately involved with office procedures and management. She interviewed Hocking at Keizer after her husband had interviewed him

and prior to hire. She went over the work rules and immediate dismissal rules, including the prohibitions against fraternization and dating between managers and employees.

50) In December 1989, a Keizer waitress named Patti Benson called James Gulick at home. Benson reported that Hocking had asked her out and that she had refused. She was concerned that Hocking might retaliate for her refusal. Gulick treated the report as true because of the risk involved in ignoring it. He offered either to assign Benson to Blake as her sole immediate supervisor or to transfer her to another Chalet on the same shift. Benson chose to stay at Keizer.

51) Hocking denied Benson's report when James Gulick confronted him with it. Gulick was unaware of Complainant's allegations, and there was no proof that any dating had occurred. Gulick did not discipline Hocking, but cautioned him again against fraternization. Hocking was still employed as manager of Keizer when Complainant filed her administrative complaint with the Agency. At or near the same time, Benson filed a complaint with the Agency against Respondent, alleging sexual improprieties by Hocking. Hocking resigned shortly thereafter.

52) It was the responsibility of a new employee's supervisor to orient the new employee to the operation and rules of Respondent. In addition to the oral orientation given to a new employee by a manager or supervisor, written material comprising an "employee manual" was also made available to the new employee.

53) The specifics of Respondent's employee grievance process and policy on sexual harassment was unknown to many employees.

54) Respondent's employees and ex-employees, including Complainant, signed a written acknowledgment that Respondent's personnel policies were explained to them at hire. Some were aware of the immediate dismissal work rules.

55) Complainant was upset and nervous as a result of Hocking's uninvited evening visit, and she worried about his showing up at her home again. After Complainant quit, she did not think it was fair that she had to leave because Hocking wasn't a normal manager. She became depressed in subsequent job interviews because she had to give harassment as the reason for quitting, and she believed that discouraged prospective employers. She had no money for Christmas that year. Her feelings about her treatment at Chalet continued for a few months. She became employed at Chelsea's at the same rate in January 1990. She still resented being forced to leave Respondent and the fact that she had not done anything about it.

56) Arlene Blake testified that no one told her that Hocking was attempting to date employees. But Michelle Walker brought some of his remarks to Blake's attention, and Blake told Agency investigator Bates that she recalled that waitresses told her about Hocking asking them out. Bates did not recall when Blake received these reports. While these inconsistencies caused the Forum to view Blake's testimony with suspicion, they did not

ultimately detract from those portions of her testimony that were uncontroverted.

57) Jenny Metsker's testimony was found credible only where it was verified by other credible testimony or inference. She testified that Hocking's activities and remarks did not upset her, but she told Agency investigator Bates that it had bothered her, and she complained to her roommate about it. She denied telling Complainant that Hocking had made "inappropriate" sexual remarks to her or that Hocking was doing things to her, and denied telling Complainant that reporting Hocking to the Gulicks would do no good. She said that Complainant told her that Hocking had come to Complainant's house for Chinese food in connection with Complainant losing a football bet, and that Complainant was not upset by his visit, but Complainant denied talking to Metsker at all about Hocking coming to her apartment.

58) Complainant's testimony was not totally credible. She testified that Hocking's repeated attempts to ask her out on dates made her mad and that it embarrassed her when people told her what he was saying about her body while she was working, and when Burns was telling her what Hocking was saying at the barbecue in front of all her family. But Burns and Complainant were alone when he reported Hocking's comments. No one was known to be present when Sills told her about Hocking. Complainant testified that after his visit, Hocking would not speak directly to her at work and that he communicated with her through other employees and questioned her about her "sidework" list, but she

admitted that "Mary, Jenny, and Laura" would not confirm that Hocking was cool to her after the Chinese dinner incident. She did not deny that she had stated she would quit if she were assigned an evening shift. Because of these and other inconsistencies, the Forum has credited Complainant's testimony only where it was supported by other credible testimony or inferences in the record.

59) Complainant became employed at Chelsea's in Salem at the same pay and hours around January 1, 1990. If Complainant had remained employed by Respondent, she would have earned \$1,447.60 in wages and \$940 in tips between October 26, 1989, and January 1, 1990.

#### ULTIMATE FINDINGS OF FACT

1) At times material, Respondent operated eating and drinking establishments in Oregon and utilized the personal service of one or more employees.

2) Complainant, female, was employed by Respondent as a waitress at Respondent's Keizer restaurant from September 15 to October 28, 1989.

3) Steve Hocking was Respondent's manager at Keizer and Complainant's direct supervisor.

5) Hocking engaged in severe and pervasive conduct of a sexual nature directed towards Complainant and other female employees because of their gender.

6) Hocking's sexual conduct was unwelcome to Complainant and to other female employees at whom it was directed. Hocking's sexual comments also were unwelcome to Complainant and other female employees.

7) Hocking's conduct created an intimidating, hostile, or offensive working atmosphere for Complainant.

8) Hocking made submission to his sexual overtures an implicit and explicit condition of a term of Complainant's employment; namely, her work schedule.

9) Hocking's behavior created objectively intolerable working conditions. A reasonable person in the same circumstances as Complainant would have resigned.

10) As a result of Hocking's conduct, Complainant was damaged in the form of lost wages and tips, and mental suffering.

#### CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and OAR 839-07-500 to 839-07-565.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein under ORS 659.010 to 659.110, together with the authority to eliminate the effects of any unlawful practice found.

3) The actions, inactions, statements, and motivations of Steve Hocking, Arlene Blake, James Gulick, and Myrna Gulick are properly imputed to the Respondent herein.

4) ORS 659.030 provides, in pertinent part:

"(1) For the purposes of ORS 659.010 to 659.110, \* \* \* it is an unlawful employment practice:

"(a) For an employer, because of an individual's \* \* \* sex \* \* \* to

bar or discharge from employment such individual. \* \* \*

"(b) For an employer, because of an individual's \* \* \* sex \* \* \* to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

OAR 839-07-550 provides, in pertinent 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:

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

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

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

OAR 839-07-555 provides, in pertinent part:

"(1) An employer \* \* \* is responsible for its acts and those of its agents and supervisory

employees with respect to sexual harassment regardless of whether:

"(a) The specific acts complained of were authorized by the employer; or

"(b) The specific acts complained of were forbidden by the employer; or

"(c) The employer knew or should have known of the occurrence of the specific acts complained of.

OAR 839-07-565 provides:

"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."

5) Respondent, through Steve Hocking, did commit an unlawful employment practice in violation of ORS 659.030(1)(b) by the creation of a hostile, intimidating, and offensive work environment.

6) Respondent, through Steve Hocking, did commit an unlawful employment practice in violation of ORS 659.030(1)(b) by making submission to his sexual overtures an implicit and explicit condition of a term of Complainant's employment; namely, her work schedule.

7) Respondent, through Steve Hocking, did commit an unlawful employment practice in violation of ORS 659.030(1)(a) by constructively discharging Complainant.

#### OPINION

This record plainly illustrates that in September and October 1989, Respondent had in its employ at its Keizer restaurant a manager who would almost inevitably create liability for Respondent. Steve Hocking's apparent preoccupation with sexual comment and suggestion of a kind that would affect the workplace was well established by the credible testimony of a number of employees and ex-employees.

The issues in this specific case are, first, whether Hocking's behavior and comments rose to the level of sexual harassment by creating an offensive, hostile, or intimidating work environment affecting Complainant, and, second, whether he made a quid pro quo proposition to Complainant, offering to exchange her submission to his advances for a more desirable work schedule. The third issue in this case is whether Complainant reasonably resigned her position with Respondent as a result of the work environment and/or Hocking's proposition.

The behavior or activity of an employer or employer's agent creating an offensive, hostile, or intimidating work environment must be sexual in nature, unwelcome to the Complainant, and based on gender. OAR 839-07-550. There is no doubt on this record that Hocking's behavior and comment toward Complainant, other waitresses, and even customers was sexual in nature, unwelcome to Complainant, and based on the gender of the subjects of Mr. Hocking's remarks and actions.

The behavior or activity at issue also must be sufficiently severe and pervasive so as to create what a

reasonable person would consider an offensive, hostile, or intimidating environment. *In the Matter of James Meltebeke*, 10 BOLI 102, 115 (1992). The Forum's approach to this issue recognizes an inverse relationship between the requisite severity and pervasiveness of harassing conduct: As the severity of the conduct increases, the frequency of the conduct necessary to establish harassment decreases. See *EEOC Policy Guidance on Current Issues Of Sexual Harassment*, (October 25, 1988) No. N-915.035, pp. 14-16.

Hocking's conduct included severe forms of harassment. He made an unannounced and unsolicited evening visit to Complainant's home during which, and in the presence of Complainant's 11-year-old son, he put his arm around Complainant, and suggestively played with her hair. The inference drawn by Complainant, that the only way Hocking could have known Complainant's home address was to have examined the company's employment records, is reasonable and underscores the invasive and ominous nature of Hocking's intrusion. Hocking's access to personal information about Complainant reinforces the connection between his status as Complainant's supervisor in the workplace and the harassment he conducted both on and off the job.

Hocking also led Complainant to believe that he was responsible for her move to the evening shift in retaliation for her resistance to his overtures, and that he could change her schedule back in exchange for cooperation with him. Although Hocking did not in fact change Complainant's schedule, and the scheduling of waitresses was

apparently Ms. Blake's responsibility as head waitress, this deception viewed through the eyes of the Complainant amounted to nothing less than sexual extortion. This form of quid pro quo harassment is actionable standing alone, and the Forum finds in this case that it occurred, as discussed below. But in combination with the evening visit and the less severe but more frequent forms of harassment discussed immediately below, Hocking's conduct clearly was sufficiently severe and pervasive to establish what a reasonable person would consider an intimidating, hostile, or offensive work environment.

Respondent's conduct created a backdrop of sexual comment and innuendo which permeated the work environment. Hocking asked Complainant for dates and to take trips with him on nearly a daily basis despite her repeated refusals and evasions, and despite express company policy against such activity. Hocking repeatedly made vulgar sexual comments about Complainant, as well as other female employees and customers, to Complainant's co-workers. Complainant learned that Hocking had made sexual comments and inquiries about her through the reports of male co-workers Burns and Sills.

Hocking's failure to make these comments directly to Complainant does not remove them from Complainant's work environment or negate the impact they had on that environment. Statements of a supervisor contributing to a hostile, intimidating, or offensive work environment need not necessarily be made directly to the Complainant. Depending on the circumstances of each case, statements conveyed to

other employees or to customers may significantly affect the Complainant's work environment. This impact is particularly obvious when Complainant learns of the statements from co-workers, as in this case, and must bear the embarrassment of having a supervisor communicate his sexual desires for her to co-workers. Similarly, sexual comments by Hocking about other employees or customers also influenced Complainant's work environment. Hocking made insulting remarks directly to females and crude sexual comments about females to other male employees, all of which contributed to an atmosphere of vulgar sexual attention toward women.

In addition to its finding of hostile environment harassment, the Forum also believes that Hocking's offer to change Complainant's schedule in exchange for sexual cooperation, standing alone, violates ORS 659.030(1)(b) as a form of quid pro quo sexual harassment. OAR 839-07-550(1) and (2). Although the preponderance of evidence establishes that Ms. Blake, the head waitress, was responsible for Complainant's change of schedule, and that she controlled waitress scheduling generally, the Forum nonetheless finds that Hocking's representation to Complainant that he was responsible and that he would change her schedule in exchange for Complainant's cooperation was both believable and within Hocking's apparent authority as the restaurant's manager. *Id.*, at 24. Indeed, there is evidence in the record from which to infer that Hocking, as Ms. Blake's supervisor, could have directed that Complainant's schedule be changed or, at the very least,

exercised considerable influence over Complainant's scheduling.

The Complainant had ample reason to believe Hocking was responsible for her shift change and that he had the authority to change it again. Hocking had, in fact, done the scheduling during Complainant's entire period of employment. Hocking had told Complainant that he could arrange for her absence from work so that the two of them could go to the coast. Hocking had assured Complainant that she would be able to keep an 8 a.m. to 4 p.m. schedule upon Ms. Blake's return after he learned that Complainant was interviewing for work elsewhere. From Complainant's perspective, Hocking clearly appeared empowered by Respondent to control her schedule and thereby to exchange sexual favors for more favorable treatment on the job.

Regarding the issue of constructive discharge, the Forum finds that the work environment created by Respondent was so intolerable that a reasonable person would have felt compelled to resign. Respondent's defense that Complainant resigned as a result of the change in schedule or that because of the scheduling change she would have resigned in any event is not convincing. The evidence does suggest that Complainant eventually would have sought other work offering a schedule more to her liking. However, there was no evidence that Complainant had determined to quit when she did or that she had any reason to doubt Hocking's connection of the schedule change to her rejection of him. The determinative issue is why she quit when she did, not why she might have done so at some later date

had the Respondent not constructively discharged her when it did. The Forum is convinced that the actual and immediate cause of Complainant's resignation was what she reasonably believed to be a quid pro quo proposition, which conditioned her schedule on acceptance of Hocking's advances. That proposition, standing alone or coupled with the other repeated instances of harassment that she endured, would have compelled a reasonable person to resign.

With regard to damages, the Forum has calculated the wages and tips Complainant would have received in October, November, and December but for her constructive discharge. The Forum also has awarded damages for mental distress in the amount of \$10,000. This amount reflects Complainant's nervousness and concern for her privacy and safety at home; for the embarrassment she suffered in front of co-workers and her son; for the difficulty and embarrassment created for Complainant in applying for employment following her discharge and the accompanying need to explain the reason for her discharge with Respondent; for the anger and depression Complainant suffered following her discharge; and for Complainant's impaired personal dignity.

#### ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, Respondent, JLG4, INC., dba CHALET RESTAURANT AND BAKERY, is hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of

Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for SHELLEY R. NIXON, in the amount of:

a) TWO THOUSAND THREE HUNDRED EIGHTY-SEVEN DOLLARS AND SIXTY CENTS (\$2,387.60), representing wages Complainant lost between October 26, 1989, and January 1, 1990, as a result of Respondent's unlawful practice found herein; PLUS,

b) INTEREST AT THE ANNUAL RATE OF NINE PERCENT on said sum from January 1, 1990, until paid, computed and compounded annually; PLUS,

c) TEN THOUSAND DOLLARS (\$10,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

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

2) Cease and desist from discriminating against any employee on the basis of that employee's sex.

**In the Matter of  
ALBERTSON'S, INC.,  
a Delaware corporation,  
Respondent.**

Case Number 01-91  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued May 15, 1992.

#### SYNOPSIS

Respondent willfully failed to file employment certificates with the Agency within 48 hours after hiring each of 205 minors, willfully failed to verify the ages of 51 minors before hiring them by requiring them to produce work permits, and willfully failed to keep all required records on minor employees in an accessible place and to make the records available for inspection by Agency staff. The Wage and Hour Commission did not exceed its authority in adopting OAR 839-21-170, 839-21-175, or 839-21-220(1). Respondent failed to prove that the Agency breached an agreement with it that it did not need to comply with employment certificate requirements, and that the Agency would provide forms and assistance to each of Respondent's stores, and therefore was equitably estopped from assessing civil penalties for such violations; that ORS 653.370(1) is unconstitutionally vague; that the Agency selectively enforced the employment certificate and work permit requirements; and that the Commissioner was biased and prejudiced against it. ORS 653.307(1); 653.310; 653.370(1), (2); 653.525; OAR 839-19-025(5); 839-19-100(1),

(2); 839-21-170; 839-21-175; 839-21-220(1)(a) and (b), (3), (5).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held from April 22 to May 22, and from August 26 to September 4, 1991, in Room 311 of the State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. Robert Haskins, Assistant Attorney General, represented the Bureau of Labor and Industries (the Agency). Corbett Gordon, Attorney at Law, represented Albertson's, Inc. (Respondent). Bruce Paolini, Respondent's Labor Relations Manager, was present during parts of the hearing as Respondent's representative.

The Agency called the following witnesses: Shirley Barshaw, Work Permit Unit Supervisor, Wage and Hour Division (WHD) of the Agency; Sally Beckfield (formerly Mercier), WHD Compliance Specialist; Jan Bender, Fred Meyer Personnel Manager; Lee Bercot, WHD Case Presenter; Lisa Bledsoe, WHD Compliance Specialist; Rhoda Briggs, WHD Compliance Specialist; Lynne Campbell, WHD Compliance Specialist; Steven Erdmann, Food Employers, Inc. Executive Director; Victor Frye, US Postal Service, Manager of Logistics and Distribution Systems; Richard Gomez, WHD Compliance Specialist; Lora Lee Grabe, WHD Compliance Specialist; Doug Johnson, Bi-Mart Personnel Manager; Rebecca Johnson, WHD Compliance Specialist; Jerome

Kiolbasa, Safeway Inc. Human Resources Manager, Paul Lizundia, Food Employers, Inc. Associate Director, Ken MacKillop, Wage and Hour Commissioner, Alan McCullough, Case Presenter in the Civil Rights Division (CRD) of the Agency; Eduardo Sifuentez, WHD Compliance Specialist; Paul Tiffany, WHD Administrator, Delbert White, Kienow's Personnel Director, and Helen Williams, Meier & Frank Company Director of Associate Relations.

Respondent called the following witnesses: Monte Atkinson, Respondent's former store director in Lake Grove; Shirley Barshaw, WHD Work Permit Unit Supervisor; Estera Bec, former employee of the Agency; Sally Beckfield, WHD Compliance Specialist; Lee Bercot, WHD Case Presenter; Lisa Bledsoe, WHD Compliance Specialist; Judith Bracanovich, former CRD Quality Assurance Manager; Johan Branderhorst, Respondent's Store Director in North Bend; Florence Caisse, WHD employee in the Work Permit Unit; Lynne Campbell, WHD Compliance Specialist; Jeff Clark, former employee of Food Employers, Inc.; Richard Edgington, former Wage and Hour Commissioner; Armonica Gilford, former WHD Case Presenter; Richard Gomez, WHD Compliance Specialist; Lora Lee Grabe, WHD Compliance Specialist; Kelly Hagan, Legal Policy Advisor for the Agency; Debra Hall, an attorney with Respondent's attorney's law firm; Christine Hammond, WHD Deputy Administrator; M. Keith Hamner, legal assistant to Respondent's attorneys; Rebecca Johnson, WHD Compliance Specialist; Theresa Jones (formerly Lutz), former

Fred Meyer employee; Ron Kimmons, WHD Compliance Specialist; John Lessel, WHD Compliance Specialist Supervisor; Ike Mabbott, Respondent's Director of Personnel Services; June Miller, WHD Compliance Specialist; Bruce Paolini, Respondent's Regional Director, Labor Relations; Juanita Parkinson, Respondent's Employee Development Manager; Julye (Bloomgarden) Robertson, WHD employee in the Work Permit Unit; Beverly Russell, CRD Investigative Supervisor; Eduardo Sifuentez, WHD Compliance Specialist; Joan Stevens-Schwenger, the Agency's Public Information Officer; Christie Suss, former WHD Compliance Specialist Manager; Wendi Teague, a former employee of Respondent's attorneys; Paul Tiffany, WHD Administrator; Margaret Trotman, WHD Compliance Specialist; Robert Von Weller, WHD Compliance Specialist; and Lonnie Walter, Respondent's Store Director in Oregon City.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, the 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 June 15, 1990, the Agency issued and served on Respondent's registered agent a Notice of Intent to Assess Civil Penalties, pursuant to ORS 653.370 and OAR 839-19-010 to 839-19-025. The Agency alleged that Respondent failed to maintain, preserve, and make its records available to the Agency, in violation of OAR

839-21-170(1) and (3) and 839-21-175. The Agency cited aggravating circumstances and proposed a civil penalty of \$1,000. The Agency also alleged that Respondent failed to procure and keep employment certificates accessible to the Commissioner within 48 hours after hiring or permitting minors to work, in violation of ORS 653.310 and OAR 839-21-220(3) and (5). The Agency cited 143 such violations and proposed civil penalties of \$71,500. When the notice was served on Respondent it did not have its six exhibits attached. Those exhibits were later served on Respondent.

2) On July 6, 1990, Respondent requested a hearing and filed its answer with the Hearings Unit. Respondent denied the allegations in the Notice of Intent to Assess Civil Penalties and asserted seven affirmative defenses.

3) On July 10, 1990, the Agency requested a hearing from the Hearings Unit.

4) On July 17, 1990, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency, setting the hearing to begin on September 11, 1990. With the Notice of Hearing, the Hearings Unit sent the participants a document entitled "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a copy of the Hearings Unit's contested case hearings rules, OAR 839-30-020 to 839-30-200.

5) On July 20, 1990, Respondent served its first set of requests for production of documents on the Agency. Respondent also began issuing notices of deposition on Agency employees. Such depositions continued up to

and during the time of hearing. In addition, prior to hearing Respondent issued subpoenas to witnesses to appear at the hearing.

6) On August 16, 1990, the Agency requested a postponement of the hearing because discovery would not be complete before the scheduled hearing date. Respondent supported a postponement. On August 21, 1990, the Hearings Referee granted the Agency's motion and issued an amended Notice of Hearing, setting the hearing to begin on November 27, 1990.

7) On September 21, 1990, the Agency filed a request for a ruling on Respondent's objection to one of the Agency's document requests. Respondent filed a response to the Agency's request and requested oral argument.

8) On September 27, 1990, Respondent filed a Notice of Deposition of Mary Wendy Roberts, the Commissioner of Labor.

9) On October 1, 1990, Respondent served its second set of requests for production of documents on the Agency.

10) On October 3, 1990, the Agency notified the Hearings Referee that this case had been transferred to the Department of Justice, and it filed a motion for postponement because of a scheduling conflict of the Assistant Attorney General assigned as counsel for the Agency. The Hearings Referee required the attorney to document the scheduling conflict, which she did. Respondent filed on October 9 a motion opposing the transfer of the case to the Department of Justice. The Agency

and Respondent each filed additional arguments about the transfer. On October 15, Respondent filed a response opposing the Agency's motion for postponement.

11) On October 5, 1990, the Agency, through counsel, filed a motion to quash the notice of deposition of the Commissioner. The Hearings Referee granted the motion because it did not appear that the Commissioner was a material witness in the contested case.

12) On October 8, 1990, the Hearings Referee wrote to the participants to arrange for a prehearing conference concerning unresolved disputes about discovery, including Respondent's second set of requests for production. That conference was later scheduled for October 25.

13) On October 9, 1990, Respondent filed a motion to set aside the order to quash regarding Commissioner Roberts. On October 12, it filed a supplemental brief in support of its motion. On October 19, the Agency filed a response opposing the motion. On October 23, Respondent filed a reply to the Agency's response.

14) On October 23, 1990, Respondent filed motions to compel the production of documents requested in its first and second sets of requests and to compel some testimony from Shirley Barshaw that had been objected to in deposition.

15) On October 25, 1990, a prehearing conference was held regarding discovery and other pending motions. At the conference the Hearings Referee denied Respondent's motion in opposition to the transfer of the Agency's

case to the Department of Justice and granted the Agency's motion for a postponement. Those rulings were later put in writing, and an amended notice of hearing was issued, setting the hearing for February 26, 1991. In addition, the Hearings Referee requested briefs, due on November 15, on the issues of selective enforcement, bias, and prejudice under Oregon law. The Agency agreed to provide certain documents and later did.

16) The Agency and Respondent each submitted timely briefs. The Agency moved to strike one exhibit attached to Respondent's brief. Respondent responded.

17) Respondent served a Notice of Deposition Duces Tecum on Armonica Gilford, WHD's Case Presenter who had previously handled the case, and served a subpoena on the Agency's custodian of records. The Agency moved to quash both the subpoena and Respondent's request for Gilford's personal notes and memoranda regarding this case. Respondent filed responses to the Agency's motions.

18) On November 15, 1990, Respondent filed an amended answer.

19) On December 12, 1990, the Agency served a request for document production on Respondent and served a subpoena duces tecum on Ginny Burdick, a management consultant employed by Pihas, Schmidt, Westerdahl, an advertising and public relations firm. Respondent filed objections to the request for document production, as it related to Burdick's employment by Respondent's attorneys, and filed a motion to quash to subpoena. The Agency filed a response to that motion, and Respondent filed a reply to

the response. The Hearings Referee granted Respondent's motion to quash the subpoena because, to the extent that Burdick's testimony was not protected by the attorney-client privilege and the work product doctrine, it appeared immaterial.

20) On January 7, 1991, the Hearings Referee issued rulings on numerous discovery matters. Respondent was ordered to comply with an Agency document request. Respondent's motion to set aside the order to quash the deposition of the Commissioner was denied. With one exception, all of Respondent's requests for production were granted. Respondent's motion to compel Barshaw's testimony was granted. Respondent's motion to compel Paul Tiffany's testimony was denied. Respondent's motion to compel Christine Hammond's testimony was denied in part and granted in part. The Agency was directed to submit documents to the Hearings Referee for rulings as to whether they were exempt from disclosure under the public records law. The Agency was directed to produce documents from certain Wage and Hour Division and Civil Rights Division case files on Respondent. And the Agency's motion to strike or disregard certain portions of Respondent's brief on selective enforcement, bias, and prejudice was granted. Respondent filed a motion for reconsideration of some of those rulings; the Agency did not respond. The Hearings Referee reconsidered the challenged rulings, but none were reversed.

21) On January 10, 1991, the Agency filed a motion for summary judgment on all but one of

Respondent's affirmative defenses. Respondent filed a response. On January 30, the Hearings Referee issued a ruling in which the Agency's motion was granted on two of the affirmative defenses and denied on five of the defenses. Respondent withdrew one of the defenses.

22) On January 22, 1991, Respondent filed a motion to amend its answer, along with its second amended answer. The Hearings Referee granted that motion.

23) On January 30, 1990, the Agency submitted to the Hearings Referee a document (a copy of a chronology prepared by Armonica Gilford) for a ruling on whether it was exempt from public disclosure under the public records law, ORS 192.502(1). On January 31, the Hearings Referee ruled that it was not exempt and ordered that it be disclosed.

24) On January 31, 1991, the Agency submitted to the Hearings Referee another document prepared by Gilford for a ruling on whether it was exempt from public disclosure under the public records law, ORS 192.502(1). On February 4, the Hearings Referee held that the memorandum was exempt from disclosure because it was a communication with the Agency of an advisory nature and was preliminary to a final Agency action. He also found that, with regard to a case presenter that is preparing a case to present at a contested case hearing, the public interest in encouraging her frank communications with staff within the Agency clearly outweighs the public interest in the disclosure of those communications, notwithstanding allegations of bias or

prejudice, citing ORS 192.502(1). The Hearings Referee ordered that the case presenter could not be examined about the memorandum, citing Oregon Evidence Code 509 (ORS 40.270).

25) On February 1, 1991, the Agency submitted to the Hearings Referee another document (a memorandum dated February 1, 1991) prepared by Gilford for a ruling on whether it was exempt from public disclosure under the public records law, ORS 192.502(1). On February 4, the Hearings Referee held that the memorandum was exempt from disclosure for the same reasons stated in Finding of Fact 24. The Hearings Referee ordered that the case presenter could not be examined about the memorandum, citing Oregon Evidence Code 509 (ORS 40.270).

26) On February 5, 1991, Respondent filed a motion for postponement of the hearing. The reason given was that discovery was not complete due to the Agency's failure to comply diligently with the Referee's rulings on discovery. The Agency did not oppose the motion, and it was granted. The hearing was reset to begin on April 8, 1991.

27) On February 7, 1991, Respondent filed a motion to compel deposition testimony from Shirley Barshaw regarding OAR 839-21-220(2), which says that employment certificate forms may be obtained at all Bureau of Labor and Industries offices and State Employment Division Offices. The Agency responded, and the Hearings Referee denied the motion, finding that the testimony sought was immaterial.

28) On February 11, 1991, Respondent filed a motion to dismiss the case with prejudice because the

Agency's failure to timely comply with the Forum's discovery rulings constituted a failure to prosecute the case without causing Respondent undue prejudice. The Hearings Referee denied the motion, finding that there were legitimate reasons for delays in providing discovery and that since Respondent's motion for a postponement had been granted, there was no basis for Respondent's claim of undue prejudice.

29) On February 12, the Agency notified the Hearings Referee that Respondent had not complied with the Referee's discovery order to produce the name, address, birth date, date of hire, and termination date of each minor employed by Respondent in Oregon since August 14, 1988. Respondent said that it had offered such a report to the Agency, provided the Agency sign a protective order giving confidentiality to the information. The Agency responded that it could not sign such an order, since such information would become a public record subject to disclosure. The Hearings Referee agreed that the information would be a disclosable public record and again ordered Respondent to comply, without condition, with the discovery order.

30) On February 28, 1991, Respondent requested a postponement of the hearing due to the unavailability of one of its crucial witnesses, Bruce Paolini, on the dates then set for hearing. The Agency did not object to the postponement, and the motion was granted. The hearing was reset to begin on April 22, 1991.

31) On March 5, 1991, Respondent served its third set of requests for

production of documents on the Agency.

32) On April 2, 1991, the Agency filed a motion to amend its charging document, the Notice of Intent to Assess Civil Penalties, and filed a copy of the amended notice. Respondent objected to the amendment for numerous reasons. The Hearings Referee heard oral arguments on the motion at a prehearing conference on April 9. On April 10, the Hearings Referee issued a ruling granting the motion and deemed the new allegations denied by Respondent. Respondent was permitted to request a continuance at hearing to enable it to meet evidence of the new allegations.

33) On April 5, 1991, Respondent filed a motion to compel the testimony of Robert Von Weller, a WHD Compliance Specialist, regarding his opinion about the main purpose of the work permit. The Hearings Referee heard oral arguments on the motion at a prehearing conference on April 9. On April 10 the Hearings Referee issued a ruling denying the motion, finding Von Weller's testimony on that subject neither relevant nor material to the Agency's case or to Respondent's defenses.

34) On April 9, 1991, a prehearing conference was held to discuss procedural matters about the hearing and to hear arguments on pending motions.

35) On April 12, 1991, the Agency filed a motion to quash two subpoenas that had been served on the Commissioner. Respondent filed a response to the motion, and on April 16, the Hearings Referee granted the motion, but ordered the Agency to allow Respondent to inspect and copy certain

work permits. The Agency was also ordered to disclose the names of Agency personnel that participated in the decision to amend the charging document and to arrange with Respondent for depositions of those persons.

36) On April 12, 1991, Respondent filed a Petition for Interlocutory Judicial Review with the Court of Appeals. Respondent sought a dismissal of the Agency's proceeding against it or, in the alternative, the appointment of an independent master for the purpose of permitting discovery, taking evidence, and conducting an impartial hearing in the matter. On June 21, 1991, the Court of Appeals determined that it did not have jurisdiction of a petition for interlocutory relief under ORS 183.480(3) and dismissed the judicial review on its own motion.

37) On April 17, 1991, the Agency and Respondent each filed timely Summaries of the Case.

38) On April 18, 1991, the Hearings Unit received Respondent's request for an expedited stay of the Agency's proceedings, pursuant to Attorney General Model Rule OAR 137-03-090. On April 18, the Hearings Referee denied Respondent's request because that rule provides a procedure to stay enforcement of an agency final order pending judicial review; the procedure was not available to Respondent to stay the Agency's contested case hearing prior to a final order.

39) On April 18, 1991, Respondent filed a motion to strike a paragraph in the Agency's case summary dealing with joint and administrative exhibits. That motion was granted at hearing.

40) On April 19, 1991, Respondent filed a motion to compel the testimony of Deputy Commissioner Mike Kaiel about a conversation he had with the Commissioner.

41) On April 19, 1991, Respondent filed its third amended answer.

42) At the commencement of the hearing on April 22, 1991, the attorney for Respondent stated that she had read the Notice of Contested Case Rights and Procedures and had no questions about it.

43) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

44) At hearing, the Agency filed a responsive brief to Respondent's motion to compel the testimony of Deputy Commissioner Mike Kaiel. Following argument, the Hearings Referee denied Respondent's motion because the testimony was about a matter protected by the attorney-client privilege, and the Agency had not waived that privilege.

45) On the first day of hearing, Respondent asked for a continuance of the hearing to meet the Agency's evidence bearing on the new charges in the amended charging document. The Hearings Referee granted that motion. Later in the hearing, Respondent requested a continuance in order to receive discovery that had been sought but not provided. The Hearings Referee granted that motion. On May 17, 1991, at the Hearings Referee's request, Respondent filed a written motion to continue the hearing. At

hearing, the Agency consented to the continuance, and the participants and the Hearings Referee agreed to reconvene the hearing on August 26, 1991. On May 21, the Referee issued a written ruling granting the motion and a notice that the hearing would reconvene on August 26.

46) The Agency requested at hearing that the Hearings Referee reaffirm his ruling on the Agency's motion for summary judgment as to Respondent's second and seventh affirmative defenses in its second amended answer. Those same affirmative defenses were raised in Respondent's third amended answer as its second and ninth affirmative defenses. The Hearings Referee granted that request and granted summary judgment on Respondent's second and ninth affirmative defenses in the third amended answer.

47) On April 22, 1991, Respondent served a subpoena on Commissioner Mary Wendy Roberts to testify at the hearing on April 25, 1991. At hearing on April 24, 1991, the Agency moved to quash that subpoena for the same reasons that earlier deposition subpoenas for the Commissioner's testimony had been quashed. The Hearings Referee reserved ruling on the Agency's motion until after Respondent had presented portions of its case. Near the end of the first phase of the hearing, the Hearings Referee granted the Agency's motion. Respondent asked for reconsideration, which the Hearings Referee granted. At the beginning of the second phase of the hearing, the Hearings Referee confirmed his earlier ruling because

Respondent offered no new arguments in opposition to the Agency's motion.

48) During the hearing, the Agency proposed numerous amendments to the Amended Notice of Intent to Assess Civil Penalties. Some of the amendments corrected information in the notice, but most of the amendments deleted alleged violations. Respondent objected to many of the amendments because Respondent's counsel thought such corrections should have made before hearing, and Respondent was prejudiced by having to prepare to meet the allegations (many of which were new in the amended notice) during the days before hearing. The Hearings Referee allowed the amendments to the charging document because they made it more accurate and deleted allegations. Respondent then moved to strike the amended charging document and return to the original, due to the prejudice to Respondent. The Hearings Referee denied that motion because he had previously considered the alleged prejudice to Respondent – due to the short time to prepare to meet the new allegations before hearing – when he granted the Agency's motion to amend the original charging document and granted Respondent a continuance to meet those allegations. The Hearings Referee found no additional prejudice to Respondent due to the amendments allowed at hearing, since most of the amendments deleted alleged violations.

49) On June 26, 1991, the Agency requested from the Hearings Unit a transcript of portions of the hearing record. The Hearings Referee notified

the Agency that the Hearings Unit did not transcribe the record unless a final order was appealed and advised it that copies of the hearing tapes could be provided. Thereafter, the Agency requested duplicate tapes of portions of the hearing.

50) On the last day of hearing, the Hearings Referee established a due date for post-hearing briefs. After two extensions of time requested by Respondent were allowed, the participants each submitted a timely brief on November 15, 1991. Respondent provided the Hearings Referee with an unofficial transcript of the hearing.

51) On December 9, 1991, the administrator of the Support Services Division of the Bureau of Labor and Industries granted the Hearings Referee an extension of time, pursuant to OAR 839-30-102, to issue the Proposed Order in this case. On January 31, the administrator granted the Hearings Referee an additional extension of time. Respondent objected to the additional extension of time. The administrator reconsidered her decision and found that it was well founded and proper.

52) On February 14, 1992, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to the participants. Respondent had 10 days to file exceptions to the Proposed Order. On February 19, 1992, Respondent filed a motion for an extension of time to file its exceptions. The Forum granted Respondent an extension to March 27, as it requested. On March 25, 1992, Respondent requested an additional extension of time. On March 26, the Forum denied that request

because Respondent failed to show good cause for an extension. On March 30, 1992, the Hearings Unit received Employer's exceptions, post-marked March 27, 1992. Respondent's exceptions are addressed throughout this Final Order. New facts presented and new issues raised in the exceptions were not considered by the Commissioner in preparation of the Final Order. OAR 839-30-165(1).

53) All documents filed with the Hearings Unit after the close of the hearing have been marked as administrative exhibits and are hereby received into the record.

#### FINDINGS OF FACT – THE MERITS

Because of the large number of Findings of Facts on the merits, they have been organized into several groups: the investigation of Respondent, the operation of the Work Permit Unit, other Agency enforcement activities, and miscellaneous findings.

#### Investigation of Respondent

1) On June 21, 1988, the Agency's Medford office received a complaint from a former employee of Respondent's Medford store. The complainant said, in part, that minors employed in the service deli were operating and cleaning the meat slicers and the "hot case."

2) On June 29, 1988, Compliance Specialist (C.S.) Ron Kimmons called the Work Permit Unit to request a search for employment certificates filed by Respondent. Shirley Barshaw, the supervisor of the Work Permit Unit, called him back to report that no employment certificates were found on file for Respondent.

3) On June 30, 1988, Kimmons visited Respondent's Medford store, and spoke with store director Rod Burch. Burch said that no minors were employed in the service deli; some minors were employed to bag and carry out groceries, and to do cleanup work. Kimmons instructed Burch regarding child labor laws, gave him employment certificate forms and Employment of Minors brochures, and "walked through with him what was required on the certificates and how to fill in the blanks." Burch called the "home office," and Kimmons talked with Bruce Paolini, Respondent's regional director for labor relations. Paolini was not familiar with employment certificates and wanted to do some checking.

4) In late June or early July 1988, Ike Mabbott, Respondent's director of personnel services, received a call from Respondent's store director in Medford. C.S. Kimmons had recently finished investigating a complaint at Respondent's Medford store about hazardous work conditions for a minor. Kimmons told the store director that the director needed to file employment certificates for his minor employees. The director did not know about employment certificates and wanted to know if Mabbott knew about them. Mabbott had never heard of employment certificates before.

5) Mabbott was concerned about discriminatory enforcement by the Agency "right from the very start," that is, from the time he was contacted by the Medford store manager. He was concerned because he did not know anything about employment certificates, he "wanted to find out who else was doing it," and "because of the very

narrow profit margin in the grocery industry, it would be unfair to have one grocery chain have to do it and others not. It would reduce our competitiveness."

6) On July 1, 1988, Paolini talked with Mabbott about employment certificates. Mabbott told Paolini that Respondent had never complied with the filing requirements. They decided to ask for the forms.

7) On July 1, 1988, Kimmons had a telephone conversation with Paolini about employment certificates. Paolini said that Respondent had not been filing employment certificates in Oregon and requested that a supply be sent. Kimmons told Paolini that the Agency wanted to help Respondent comply. Kimmons called the Work Permit Unit and asked Barshaw to send employment certificates to Respondent in Boise, Idaho. He also requested that the Work Permit Unit monitor the receipt of the certificates from Respondent. Kimmons advised Paolini by letter dated July 1, 1988, that:

"employers in the State of Oregon are required to insure each minor, persons under 18 years, has a valid Work Permit upon hiring. Within 48 hours of the hiring, an Employer's [sic] Certificate is to be completed and submitted to the Work Permit Unit in Portland, Oregon."

Kimmons advised Paolini that a supply of employment certificates were being sent "to be used in filing on each minor in your employ in Oregon." He requested that Respondent complete these filings "posthaste and notify me upon its completion." Kimmons enclosed an employment certificate and a

copy of an Employment of Minors brochure. He advised Paolini that Respondent was regulated by the State of Oregon for employment certificates, but that the US Department of Labor regulated it for minimum wage and other matters.

8) On July 1, 1988, Kimmons visited the deli supervisor at Respondent's Medford store, Gwen McKellip. They discussed the use of meat slicers by minors, and McKellip said that she had been in the position for two months and no minors had worked in the deli.

9) On July 8, 1988, Kimmons talked with Mabbott, who asked that an additional supply of employment certificates be sent to him, and that a supply of employment certificate forms be sent to Respondent's district office in Portland. On July 11, Kimmons contacted Barshaw, who sent and Mabbott later received 200 employment certificate forms. Barshaw also sent forms to Respondent's Portland office. Kimmons sent and Mabbott received a copy of OAR 839-21-001 to 839-21-500, which are Oregon administrative rules regulating the employment of minors in Oregon. Mabbott did not understand the working hours and working conditions areas of the form.

10) Between July 8 and 13, 1988, Mabbott talked to a woman at the Portland office of the Agency about employment certificates. Mabbott made no notes or reports from that conversation. The woman seemed knowledgeable about employment certificates. She said the Agency was not processing them at that time, and they did not have the staff to process them. She said there was no appropriation with

which to hire staff. The woman knew of no efforts to cause industry-wide compliance with the employment certificate law. Mabbott did not discuss enforcement with the woman. After that conversation, Mabbott did not think Respondent was required to file employment certificates because the Agency was not prepared to process them. Mabbott told Paolini about the conversation. No one from the Agency ever told Paolini that Respondent was not required to file employment certificates.

11) Between July 8 and 13, 1988, Mabbott contacted Jan Bender, Fred Meyer Personnel Manager in Portland, about employment certificates. Mabbott did not know Bender's job title or job duties. Bender said that she did not know anything about any "new forms." Bender later told Mabbott that she had talked with a friend at the Bureau of Labor and Industries and did not learn when the employment certificate regulation had gone into effect.

12) On July 12, 1988, Kimmons visited Respondent's Medford store. There were no minors in the deli.

13) On July 13, 1988, during their second conversation, Kimmons told Mabbott that he (Kimmons) had dismissed the complaint at the Medford store. Kimmons gave Mabbott information about work breaks for minors. Mabbott wanted to find out what employment certificates were "and then about the requirement of doing them, the enforcement of it, and who else was going to be doing it." Mabbott was concerned about complying with the requirement; he wanted to know when the law went into effect and when Respondent was supposed to have

started complying. Kimmons explained the employment certificate requirements and said the law had been on the books since before he became employed by the Agency in 1980. He told Mabbott that everybody was supposed to file the employment certificates and that Respondent was supposed to start completing them. Kimmons explained how to fill out the employment certificate form and told Mabbott to write in "varies" for work hours. Mabbott then understood how to fill out the form. Mabbott told Kimmons that Respondent's management felt that Respondent was being singled out to file employment certificates because no other large employer, such as Fred Meyer, was doing it. He said that the grocery industry was highly competitive, and Respondent should not be singled out. Kimmons informed Mabbott that compliance was required and that a decision not to comply rested solely with the company. Mabbott wanted to know who else in the food industry was complying, because of Respondent's profit margin. Kimmons was not sure how many other grocery stores were filing employment certificates. Mabbott asked Kimmons "isn't it discriminatory to try to get one company to fill out the forms and not have blanket enforcement for all the companies in that industry?" Kimmons said it would be. Mabbott told Kimmons that Respondent "would not be having our employees fill out those forms. We were not going to go [to] the expense of doing that if it was not required of the other grocery stores." In a memo dated July 15, 1988, Mabbott wrote:

"I don't expect to hear any more from the Bureau of Labor and Industries regarding Employment Certificates until we have another complaint on some item and then they will tell us to comply with having the certificates completed. Consequently, I'm going to file all of this away and wait until we hear from them the next time."

On Mabbott's memo, Jerry Rudd, Respondent's senior vice president for human resources, wrote, "Right! We will not comply with this procedure until we are assured it is being enforced on a uniform basis throughout the industry!" (Emphasis in original.) Paolini reported to Rudd.

14) Mabbott told Paolini that no one in Oregon in the grocery industry was filing employment certificates and said he had told the Agency that Respondent would not comply until the rest of the industry did. Mabbott recommended that Respondent should not comply until something was published showing that there was industry-wide enforcement. He thought the Agency should send out a notice of some sort that the industry needed to comply with the law. He thought that Respondent needed "something more than Ron Kimmons's word for it." He never checked with Respondent's legal staff about any rules regarding employment certificates.

15) On July 25, 1988, Kimmons confirmed that Barshaw had sent the employment certificates to Respondent as requested and that none had been returned by Respondent. He also requested that the unit check for any employment certificate filings by Respondent in the past year.

16) On July 27, 1988, the Work Permit Unit advised Kimmons that Respondent had not filed employment certificates in the last two years, that is, since July 1986.

17) On August 9, 1988, Kimmons visited the Medford store and met with store manager Burch. Burch said he had sent, at Paolini's direction, all of the employment certificates that Kimmons had left at the store to Respondent's Boise office for their action. Burch provided records of seven minors employed at the store. There were no minors in the deli. No employment certificates for the seven minors were filed by Respondent.

18) On August 17, 1988, C.S. Kimmons sent a letter to Respondent's president advising him that Respondent was in violation of Oregon law regarding work permits and employment certificates. Kimmons recounted his contacts with Respondent's personnel on the subject and wrote that "Mr. Mabbott indicated a reluctance to comply" with the law. Kimmons wrote that the Agency's records showed that Respondent had filed no employment certificates and that the Agency's:

"intent and interest is to aid business' [sic] in obtaining compliance with the Oregon law without using the legal process. If there is some way that we may, in our capacity, aid you in obtaining compliance in Employment of Minor's [sic], please do no hesitate to call. Otherwise, if employment certificates and Work Permits are not on file for each minor in our Portland Office Work Permit Section by September 1, 1988, it will be necessary for us to use legal

means and penalties to this end. This may include revoking the right to hire minor's [sic]."

19) On August 23, 1988, Paolini got a call from Jerry Rudd, Respondent's head of labor relations. Rudd believed that the Agency was trying to revoke Respondent's right to hire minors and was harassing Respondent. Rudd directed Paolini to write a strong letter to the Agency, with copies to the Oregon Retail Council, the "Director of the Department of Labor," and the governor of Oregon.

20) On August 25, 1988, Paolini wrote a letter to Kimmons. He restated the requirements of ORS chapter 653 and the administrative rules regarding employment certificates. He then wrote:

"However, in the past we have been told by your Department not to file 'employer certificates' as you do not have the administrative resource or funding to process the many thousands of certificates which would be filed weekly by just the retail industry. We believe we have acted properly in accordance with your instruction and are in compliance with Chapter 635 [sic].

"It would be duplicitous for your Department to now attempt to find a violation of a rule with which you previously told us not to comply.

"If it is the desire of your Department that Albertson's now submit 'employer certificates' to you for individuals under the age of 18, we are willing to consider doing so. However, you must assure us that all other employers in the retail industry will be treated in the same

manner and required to comply. We have contacted other companies and found that none of them are being required to submit 'employer certificates' for minors.

"If you now attempt to selectively enforce rules which your Commission previously told us not to follow and take action on your threat to revoke our right to hire minors, you will leave us no alternative but to take legal action. I have submitted your threatening letter to our Legal Department for possible legal action should there be any attempt to interfere with our hiring process."

At the time he wrote the letter, Paolini thought that the statute, ORS 653.310, did not require the submission of employment certificates to the Agency. He thought such submission was a procedure the Agency had implemented. He thought the purpose of submitting employment certificates did not apply to minors working in the grocery industry because minors in Respondent's stores were not allowed to work around hazardous equipment, and Respondent did not hire minors under age 16. He stated in the letter that Respondent had the information that was required to be on the employment certificate on file and accessible at the stores. Paolini was concerned that the Agency was not uniformly enforcing the law.

21) In Paolini's file were a copy of OAR chapter 839, divisions 19 and 21, and two copies of the Employment of Minors brochure.

22) Paolini testified that at around this time he talked with staff at Food Employers, Inc., which was a non-

profit association of employers in the wholesale and retail food industries. Food Employers' staff negotiated and administered labor contracts and performed labor and employee relations services for its member clients. Its members included the major grocery chain stores in the Northwest and many independent stores. It represented 120 employers including Respondent, Fred Meyer, Safeway, Kienow's, Waremart, the "Thriftway group," and the "Sentry group." Steven Erdmann was executive director since 1980. Between 1980 and July 8, 1988, Jeff Clark was the associate director in the office. On November 21, 1988, Paul Lizundia became the associate director. The office had one other staff person, who did receptionist and secretarial work, and who did not answer child labor law questions. Erdmann was familiar in 1988 with Oregon's employment certificate requirements and advised Food Employers' members about them when members inquired about child labor laws. Erdman recalled no conversation with Paolini regarding employment certificates in the summer or fall of 1988. Paolini's testimony is not credible on this point. Erdmann appears to have been the only one in the office that would have answered questions on this point, and he would have answered with his knowledge of the requirements. There is no suggestion in any of the written evidence that such a conversation occurred as early as between June 30 and July 8, 1988, before Clark left. Erdmann had no incentive to be untruthful. Paolini talked to no "other companies" in the retail industry about employment certificates.

23) On August 29, 1988, Kimmons sent a copy of Paolini's August 25 letter to John Lessel, Kimmons' supervisor, asking if Lessel was familiar with Respondent's position.

24) On September 7, 1988, Lessel wrote a memo to Christine Hammond, the deputy administrator of the Wage and Hour Division, regarding the case and Respondent's claims. Lessel recommended

"that a letter be drafted and sent to Mr. Paolini to ask for Albertson's cooperation and continued good public relations throughout Oregon to comply with Oregon laws and rules adopted by the Wage and Hour Commission in the employment of all minors employed in Oregon, that the Bureau of Labor and Industries has never advised any segment of employers not to comply with the laws, especially the retail food industry, where the possibility of accidents occur often in operations of slicers, saws and other prohibited hazardous occupations.

"Our letter should tell Albertsons that the entire Wage and Hour staff is willing and able to assist each and every store manager in compliance of our rules. Our letter should also express the consequence of Albertson's failure to comply (civil penalties or even the Wage and Hour Commission's revocation of their right to hire any minors). I believe this letter should come from my desk, or your desk, and not from C.S. Ron Kimmons. Can we discuss further?" (Emphasis in original.)

Lessel discussed with Christine Hammond whether Agency staff had advised Respondent not to file employment certificates. Hammond was incredulous.

25) On September 22, 1988, Kimmons sent Respondent's investigation file to Lessel in Eugene. In his report, Kimmons found that four of Respondent's minor employees did not have work permits, and Respondent had filed no employment certificates. He reported that "this company has refused compliance by phone conversation of July 13, 1988 with their Director of Personnel Services, Ike Mabbot [sic] and most recently by Bruce Paolini's letter of August 25, 1988." Kimmons recommended "full penalties under ORS 653.370 and revoke the right to hire Minors."

26) On October 6, 1988, John Lessel wrote to Paolini in reply to Paolini's August 25 letter. Lessel wrote, in part:

"The Bureau of Labor and Industries, Wage and Hour Division has never advised any Oregon employer, nor any industry, not to file employer certificates on minors hired. The Division has a separate work unit staffed for the sole purpose of processing work permit applications of minors and processing employer certificates submitted. Last year this unit issued over 32,600 work permits and issued over 10,800 employer certificates submitted by employers hiring minors. Records are kept till each minor reaches age 18.

"The Bureau of Labor and Industries has not, nor ever will, selectively enforce Oregon law and rules. All employers in Oregon

who are found in violation are requested to come into compliance. We ask that Albertson's, Inc. submit employment certificates within 48 hours of hiring minors.

"We offer our resources to assist your management in compliance with forms and, where needed, visits to the local markets.

"The Bureau has no desire to pursue this matter through legal channels. It is our desire to resolve this matter amicably, but we feel very strongly that our priority is enforcement of all Wage and Hour laws, and especially those laws dealing with the employment of minors. Therefore, please be advised that we are prepared to pursue Albertson's, Inc. for compliance with child labor laws. It is within your power to avoid this action. We again offer our resources to assist Albertson's, Inc. Let's begin right away."

Paolini thought some of Lessel's letter was "bureaucratic-type language, that I'm not certain Mr. Lessel really knew about or intended." Paolini did not know if the numbers in the letter were correct, because he thought there were more hirings and terminations than the numbers reflected. He felt that employers were really not filing employment certificates. Paolini felt the Agency was only enforcing parts of its rules; it was not enforcing the 48-hour rule or the rule that required employers to return the employment certificates to the Agency after minors are terminated. Paolini believed that what Lessel had written was not true.

27) In telephone conversations with Paolini, Lessel offered to help

Respondent come into compliance with the child labor laws and rules. Paolini responded that Respondent did not want to be the only company in Oregon that was filing employment certificates. Paolini told Lessel about Respondent's small profit margin and Respondent's need to not do administrative functions that Respondent's competitors were not doing. Lessel said the Agency would get other companies to comply, and he wanted Respondent to comply. Paolini asked for the name of a company that was complying, so he could check with that company. He could then tell his management that Respondent would not be the only company complying with the law and that Respondent should comply "at least for the foreseeable future, a reasonable period of time to get BOLI to get the other companies in the industry to comply as well."

28) Lessel told Paolini more than once that the Agency would assist Respondent with training its managers and supplying them with forms.

29) In an October 21, 1988, letter to Lessel, Paolini wrote:

"As I stated in my August 25, 1988 letter, we have been advised by employees of the Bureau of Labor and Industries not to submit 'employment certificates' due to the administrative burden on the Bureau of processing forms. However, we are willing to consider doing so if you assure us that other retail employers in Oregon will be required to do the same. We have contacted many other retail employers in Oregon and found that none of them are being required to submit 'employment

certificates' for minors. If you will please provide us with a listing of the retail employers who uniformly submit such certificates, we will review such list and advise you of Albertson's position."

Paolini did not think he (Paolini) could get Respondent to comply with the law when the Agency was not requiring any other company in the state to comply.

30) On October 25 or 26, 1988, Lessel referred the file to Hammond with a memo requesting her recommendations for further action.

31) Hammond reviewed the file and discussed the case with Paul Tiffany, the administrator of the Wage and Hour Division. They believed "the next (and maybe only) step left to achieve compliance from the company is to consider assessing civil penalties and/or revoking the right of the corporation to employ minors in this state." Hammond wanted to first determine the extent of noncompliance by Respondent. Hammond told Lessel he did not need to provide a list of retail employers to Respondent.

32) On November 4, 1988, Hammond returned the file to Lessel with a memo. She asked that Kimmons write to Respondent:

"indicating that as a part of the Bureau's investigation, we are requesting a list by store of the names, addresses, birthdates, and dates of employment of all minors employed by Albertson's in this state since January 1, 1987. Ron's letter requesting this information should provide a deadline for providing this information.

"We will determine what further action to take at such time as the information requested is received or Albertson's fails to provide the information."

33) Around November 10, 1988, Lessel sent the file to Kimmons with instructions to send a letter to Respondent according to Hammond's memo.

34) On November 14, 1988, Kimmons sent Paolini a letter in which he wrote:

"As part of this investigation, we are requesting a list by store, the names, addresses, birthdate and date of employment of all minor's [sic] by Albertson's in the State of Oregon since January 1, 1987.

"You are requested to provide the foregoing information by December 1, 1988."

Respondent did not send the requested list to the Agency because Paolini did not believe the request was appropriate. Paolini wanted to talk with Kimmons or Lessel before starting the search for the requested information. He never contacted Kimmons. Kimmons had never asked an employer for a list like the one he requested from Respondent. Lessel had requested such a list from employers in three to five other child labor cases. The Agency had requested such a list in other cases.

35) Respondent maintained at the store level a personnel file on each employee and payroll worksheets that showed when an employee was removed from the schedule. Schedules of hours and timecards also showed when an employee no longer worked for the company. At termination, the

store sent the employee's Employee Personnel Reports (EPR) file to the main office in Boise. The payroll work sheet, hours schedules, and timecards remained at the store. Records that remained at the store would have the employee's name, occupation, date of hire, and date of termination. Addresses might have been available at the stores. Date of birth and date of hire would have been available in the EPR file. Date of birth would not have been available for terminated minors. When, on February 22, 1991, Respondent produced a list of minors employed by it between August 14, 1988, and December 31, 1990, the information was compiled from records located in Boise.

36) On November 23, 1988, Kathy Keene, with the Oregon Retail Council, spoke to the Wage and Hour Commission. She reported that some of the retail grocers were complaining about what they perceived as a change in the law regarding employment certificates and work permits. She reported that some of her clients had been told not to send in employment certificates,

"and now all of a sudden they're hearing, 'you have to send it in,' but it's in an enforcement mode when you happen to be in their workplace because of some violation that you're investigating. So there's a concern among some of our members that there's a selective enforcement going on of the requirement."

Keene said they were concerned about what they thought were new recordkeeping and paperwork requirements.

37) Around November 29, 1988, Paolini heard that the Wage and Hour Commission was preparing to revoke Respondent's right to hire minors. The Oregon Retail Council provided Respondent with information about members of the Wage and Hour Commission and about child labor issues the commission was handling. Paolini had a meeting with Jed Pritchett and Jerry Rudd, and Rudd called Kathy Keene of the Oregon Retail Council to obtain information about the commission and its meeting. The Wage and Hour Commission had not issued any notice or order of any sort to Respondent advising it of any commission intent to revoke its right to hire minors. The commission had a meeting on October 20 and another meeting on November 23, 1988; nothing concerning Respondent's right to hire minors was discussed at either meeting. The commission's next meeting was on December 22, 1988, and nothing concerning Respondent's right to hire minors was on the agenda for that meeting. Richard Edgington, a Wage and Hour Commission member representing labor, had informed a retail workers union that Respondent appeared to have a problem with the child labor law and advised the union of possible penalties, including the revocation of Respondent's right to hire minors. Lessel did not know who Edgington was at that time.

38) As of December 1, 1988, Kimmons had received no response from Respondent, so he referred the file to Lessel for further action. Kimmons again recommended maximum civil penalties and revocation of Respondent's right to hire minors.

39) On December 9, 1988, Lessel spoke with Paolini. Lessel said he wanted to get Respondent into state-wide compliance with the child labor laws and was willing to go to Respondent's management staff meetings to give them supplies and explain how to fill out employment certificate forms. Paolini asked Lessel to write a letter telling Respondent that the Agency sought compliance whenever it discovered violations and that it did not selectively seek out any business or employer for compliance. Paolini said he had difficulty asking Respondent's management to comply when others in the industry were not. Lessel said the Agency was short on staff and could not immediately get all employers to comply with the law. Lessel did not know how many retail employers were complying, but insisted some were. He explained that one of the purposes of the employment certificate requirement was to prevent minors from working in hazardous jobs or around hazardous equipment. Paolini did not believe that retail grocery industry was a hazardous industry and did not think the purpose behind the employment certificates applied to Respondent. Paolini said Respondent was willing to come into compliance for six to eight months and then see if others in the industry were filing employment certificates. Lessel and Paolini agreed that:

- (1) Lessel would write Paolini the letter he asked for.
- (2) Lessel would hold the file until mid-January 1989.
- (3) They would keep the lines of communication open.
- (4) Paolini agreed to present to Respondent's management a

recommendation to seek full compliance, upon receipt of Lessel's letter.

(5) Lessel would provide Respondent with supplies.

Paolini said he would contact Lessel about Respondent's management's decision in January 1989.

40) Lessel offered to Paolini several times that he (Lessel) would go to Respondent's management staff meetings, anywhere in the state, "any date, any time," if Respondent would give him some advance notice so he could "prepare packets" to train its store directors. Lessel and Paolini never discussed a specific date for the training. Paolini never gave Lessel a date or place for training. Lessel understood that Respondent's management staff meetings were held annually or semi-annually, and were attended by store managers and area directors. Lessel told Paolini that if managers were absent from the management staff meeting at which Lessel conducted the training, Lessel was willing to go to those managers' stores to explain the laws and how to fill out employment certificate forms. Lessel never said he would go to all of Respondent's stores.

41) Paolini testified at great length that Lessel had agreed to visit each of Respondent's stores (except those in remote areas of the state) to train its personnel about employment certificates. That testimony is unsupported by the documents that purportedly set out this agreement, and many of those documents were written by Paolini. For example, his January 24, 1989, notes show that Lessel offered "to go to a SD [Store Directors'] meeting to explain all of this." Lessel agreed that

the Agency would "mail or deliver" forms to Respondent's stores. Since Lessel flatly denied agreeing to visit each of Respondent's stores to train its personnel, and Paolini's own records do not support it, I find that Paolini's testimony is not credible.

42) On December 14, 1988, Lessel contacted Hammond to discuss Lessel's proposed letter to Paolini. On December 21, 1988, Lessel referred the file to Hammond for approval of a letter he had drafted.

43) Respondent did business in Klamath Falls as Grocery Warehouse. On December 15, 1988, Kimmons made a routine visit to the Grocery Warehouse store in Klamath Falls. The store manager told Kimmons that there were 10 to 15 minors employed. The store had no employment certificates on file, and the manager said that they were unaware of the employment certificate requirements. Kimmons left 20 employment certificates and an Employment of Minors brochure.

44) On January 3, 1989, Lessel sent Paolini the letter to confirm their December 9, 1988, telephone conversation. He said that the Wage and Hour Division did not pick any industry or employer for selective enforcement. He said most investigations result from public complaints of possible violations of laws that the Agency enforced.

"As you know, a complaint was investigated at your Medford, Oregon store 2542. It was during this compliance contact the Bureau learned of Albertson's noncompliance of OAR [sic] 653 and OAR Chapter 839-21-220 which requires that employers may not hire

minors who do not have valid work permits and complete employer certificates at time of hire of the minor.

"We always seek compliance where we discover violations, and we seek your help in bringing Albertson's into compliance statewide. As we agreed, I will hold your investigative file until you have an opportunity, after the holidays, to discuss compliance with Albertson's management. We agreed that the Wage and Hour Division would provide needed forms and supplies of work permit applications and employer certificate forms and provide assistance in training store managers."

45) On January 4, 1989, Hammond returned the file to Lessel.

46) On January 6, 1989, Lessel sent copies of documents from the file to Ken MacKillop. On January 10, 1989, MacKillop became a member of the Wage and Hour Commission. Lessel was asked to do so by Christine Hammond.

47) On January 24, 1989, Paolini called Lessel. Lessel told Paolini that employment certificates were available in Portland, Salem, Eugene, Medford, and Bend. He said he would take or mail the forms to Respondent's stores. Lessel offered to go to a store directors meeting to explain the forms. After Paolini explained the difficulty in filling out forms for all of Respondent's currently employed minors, Lessel agreed that Respondent could file the forms for newly hired minors only. Lessel asked Paolini not to tell anyone that he had waived filing employment certificates for current employees. Paolini

expressed his concern about selective enforcement and said that "you're going to have to get the rest of the industry in compliance or else any procedure we work out is going to result in our stopping what we're doing, because we want all of the other companies in the industry to comply as well." Lessel said the Agency was seeking compliance from other retail employers. Paolini said he would recommend to Respondent that it come into compliance with the law and that he would send a letter to Lessel with a list of all of Respondent's Oregon stores, and the number of minors employed at each store.

48) Paolini notified the Oregon store directors at a quarterly store directors meeting in January 1989 that they needed to file employment certificates for their minor employees. The store directors were reminded of that requirement in a quarterly store directors meeting in April 1989. Employment certificate requirements were not discussed at the next five meetings, in August and October 1989, and January, April, and July 1990.

49) Paolini believed he reached a settlement with Lessel. The terms of the settlement, according to Paolini, were:

- 1) Respondent would start complying with the employment certificate procedure, "without prejudice" to Respondent's defense later of selective enforcement.
- 2) Respondent would begin to comply only when Lessel provided employment certificates to and did training at the stores.

Paolini thought Lessel had authority to enter into this agreement on behalf of the Agency. Lessel never told Paolini what his authority was to enter into agreements. Lessel told Paolini that he had statewide responsibilities in the Wage and Hour Division.

50) Lessel had no authority to enter into an agreement with Respondent whereby either the Agency would not enforce employment certificate requirements or would not prosecute Respondent for failing to comply with the employment certificate requirements. Compliance specialist supervisors did not possess the authority to enter into such agreements. The Commissioner had not delegated such authority to anyone in the Agency. No one had delegated such authority to Lessel. Agency staff had the authority to make recommendations about actions the Agency should take. Lessel had the authority to enforce the law and bring employers into compliance with it by recommending actions that the Agency would take, such as assessing civil penalties for violations.

51) Compliance specialists had the authority to mediate and close cases. With respect to closing cases, the compliance specialist supervisor had no more authority than the compliance specialist. "If, in the opinion of the compliance specialist, there are no grounds for Bureau action, the compliance specialist in most cases has the authority to close the file and proceed no further." A compliance specialist could close a file in which a violation had been found, but where the employer has given adequate assurances of future compliance. Generally, an employer had to demonstrate that it

was in compliance, or have taken some action toward compliance. If, in the future, a compliance specialist discovered that an employer that had given such assurances was not in compliance, then the compliance specialist could reopen the file and take appropriate enforcement actions. Most cases were not reopened; only a "very small percentage" were reopened — "under 10 percent."

52) Lessel supervised compliance specialists in Eugene, Medford, and the Coos Bay area. At some times material, he also supervised compliance specialists in the Salem and Bend offices. His authority was limited to directing the compliance specialists in those areas. He had the authority to seek statewide compliance with the law by Respondent. He did not have the authority to waive statewide compliance by Respondent. He could recommend to his supervisor that the Agency take administrative action to obtain compliance with the law. During times material, Lessel was supervised by Christie Suss, Hammond, or Tiffany.

53) In February 1989, the Commissioner testified to a US Senate committee about Oregon's parental leave law. Respondent believed the Commissioner misrepresented Respondent's position about the law. Gerald Rudd, Respondent's Senior Vice President of Human Resources, wrote to the Senate committee to correct the Commissioner's statements and sent a copy of that letter to the Commissioner. Thereafter, Paolini believed that "the Bureau's position has changed to a point where they harass Albertson's and myself at every

opportunity. Their charge with regard to 'employment certificates' is just another one of the many where they are simply harassing Albertson's."

54) On February 6, 1989, Paolini told Lessel that he had a letter drafted to the Agency. Paolini said that Respondent reserved its right to review the Agency's actions regarding selective enforcement and that Respondent would provide the Agency with a list of Respondent's stores in Oregon so that the Agency could provide employment certificate forms to the managers by mail or personal delivery.

55) On February 7, 1989, Paolini sent the following memo to all Oregon store directors:

"The Oregon Bureau of Labor and Industries recently found that we are not in compliance with their wage and hour law requirement of submitting 'employment certificates' on new hires who are less than age 18. As a settlement, we have agreed to submit 'employment certificates' on new hires less than age 18 (you need not submit them on minors currently employed).

"The Bureau of Labor and Industries will soon provide to your store employment certificate forms for your use. Once you receive them, you must begin to comply.

"I have enclosed a sample copy of a certificate for your reference. The new hire should complete the form. With respect to the first three questions about hours and shifts, you should instruct the new hire to state 'hours and shifts fluctuate due to business needs.'

You should not list estimated weekly hours or shift times. After the new hire has completed the form, you should sign and date it in the lower left corner and submit it to:

Wage and Hour Division  
Work Permit Unit  
1400 Southwest 5th, Room 306  
Portland, OR 97201

"The Bureau of Labor and Industries will stamp the pink copy of the form and return it to you so it can be placed in the employee's EPR folder.

"The law requires that these forms be submitted within 48 hours of the hiring of an employee less than age 18." (Emphasis in original.)

56) On February 7, 1989, Paolini wrote the following letter to Lessel:

"This is in reply to your letter dated January 3, 1989 and is in follow-up to our telephone conversations on January 24 and February 6.

"As we have discussed, Albertson's will submit "employment certificates" to the Work Permit Unit of the Wage and Hour Division in Portland for new hires less than age 18. We do so pursuant to your agreement that we do not waive any of our rights to claim at any time in the future that the law with respect to employment certificates is being enforced against Albertson's selectively.

"I have enclosed a listing of the store numbers and addresses of all Albertson's stores in Oregon. I understand that you will either

personally deliver or mail to each store a sufficient supply of employment certificates for their use and will follow-up in the future by providing additional certificates as needed.

"I have advised our Oregon store directors to begin to submit the employment certificates upon their receipt of them."

Attached to the letter was a list with Respondent's division office and 44 of Respondent's stores in Oregon identified; five of those stores were either crossed off or had "closed" written across them. Paolini believed that, with this letter, he had settled the dispute with the Agency. Respondent had disputed the Agency's assertion that Respondent should file employment certificates. Paolini thought this letter confirmed his understanding of the discussions he had had with Lessel. Paolini thought there were "conditions, commitments, and understandings" on both sides. Lessel did not study the letter when he received it. He later sent the letter to the Agency's Portland office; he did not keep a copy of it. Lessel thought that Respondent would start complying with the employment certificate filing requirements as soon as it received the forms. On review of the letter at hearing, Tiffany would not have accepted it as an adequate assurance of compliance.

57) When Paolini used the terms "selective enforcement" with Lessel, Paolini "was not fully considering all of the legal ramifications of the word, and what the legal elements might be to prove a case on a selective enforcement theory."

58) Lessel testified that he never agreed with Paolini that Respondent had to file employment certificates only for newly hired minors. However, that testimony is disputed by Paolini's testimony and his memo and letter dated February 7, 1989. In addition, it was refuted by Suss's testimony that Lessel told her that he had a "new hire only" agreement with Paolini, and that, due to the large turnover of minors in the grocery business, even with only new hires Respondent would come into compliance quickly. From the weight of the credible evidence, I find Lessel's denial of the agreement regarding new hires not credible.

59) Paolini and Lessel had discussions about the Agency training Respondent's store directors, and Paolini presumed Lessel understood that others, such as bookkeepers, would get training. However, Lessel never committed to visiting Respondent's stores to train Respondent's store managers. He offered to give assistance to store managers and offered to go to one of Respondent's store managers quarterly meetings. Lessel agreed to deliver or mail to each store a supply of employment certificate forms and to supply more as needed. He never agreed that the Agency would monitor Respondent's submission of employment certificates and supply forms in the future without a request from Respondent. Paolini and Lessel had no agreement regarding what would happen if a store did not get forms or when a store ran out of forms. Paolini thought that Respondent was not obligated to submit employment certificates when a store ran out of forms if the Agency did not automatically

supply the forms, based upon some undiscussed monitoring system. There was no agreement as to the period of time the Agency had to provide the forms to Respondent or to make efforts to bring the retail industry into compliance with the employment certificate requirements. Lessel never agreed with Paolini that he (Lessel) would bring the retail industry into uniform compliance with employment certificate filing requirements as a condition of Respondent's compliance with the child labor laws.

60) On February 13, 1989, Lessel wrote a memo to Hammond in which he summarized enforcement efforts regarding Respondent and noted Paolini's complaint of selective enforcement. Lessel recommended that the Agency seek compliance with the employment certificate and work permit requirements from the retail food industry. In an "update" dated February 17, Lessel offered to send work permits and employment certificates to "all markets." Hammond did not believe Respondent was being singled out, because the Agency was processing Respondent's case like it processed other cases. Hammond did not direct Lessel to send out the work permits and employment certificates.

61) On February 16, 1989, Lessel referred the file to Hammond for review and requested that they discuss it at a meeting on February 27, 1989.

62) On March 14, 1989, Lessel sent a list with 21 of Respondent's stores and its division office to Barshaw with instructions that she send 10 employment certificate applications and 10 work permit applications to each location. Instead of sending

Barshaw the two-page list he got from Paolini, Lessel sent her two copies of one page of the list. Barshaw sent work permit and employment certificate forms to the following 22 locations:

- #547 82nd and Division, Portland.
- #548 Bend.
- #549 Oregon City.
- #550 Bellline and Barger, Eugene.
- #551 East Springfield, Springfield.
- #554 174th and Powell, Portland.
- #555 Albany.
- #556 Gresham.
- #557 Aloha.
- #558 Sunnyview, Salem.
- #559 Greenway and Hall, Beaverton.
- #3500 Division office, Portland.
- #502 Halsey, Portland.
- #504 Cully, Portland.
- #505 Shattuck, Portland.
- #507 West 18th Avenue, Eugene.
- #514 Corvallis.
- #515 Hilyard Street, Eugene.
- #517 Milwaukie.
- #521 Lake Grove, Lake Oswego.
- #522 Grants Pass.
- #524 Klamath Falls.

At some point, Barshaw understood that Respondent had more than 21 stores and reported that to Hammond.

63) On March 28, 1989, Lessel closed the investigative file on Respondent and sent it to Barshaw to file "so we can be sure to retrieve it again at some later date. I don't think we are through with Albertson's!!" At the time he closed the file, Lessel thought he had an agreement with Paolini to comply with the child labor laws. He thought that employment certificates had been sent by the Agency to all of Respondent's Oregon stores. Respondent had not provided the list of minors requested by Kimmons. Lessel did not

waive that request for information; he forgot it was outstanding.

64) On April 10, 1989, C.S. Briggs submitted an investigative report about a minor employee of Respondent in Bend. The minor was injured on the job. She was later terminated for excessive absenteeism unrelated to her injury. Respondent had no employment certificate for the minor. Briggs wrote, "C.S. Lessel is in contact with this employer regarding Employer Certificates for all minors employed by this corporation. Investigation closed."

65) On May 10, 1989, Respondent's store director in North Bend, Johan Branderhorst, called Gaylene Austin, Respondent's contract coordinator in Industrial Relations (she worked with Paolini), to inquire about filing an employment certificate for a new minor employee. He said he had never received forms from the Agency. Austin called the Agency for the forms and instructed Branderhorst to file a photocopy of the sample employment certificate previously sent out with Paolini's February 7 memo, along with a letter stating that he had no certificates. He did that. The Agency sent employment certificates to the store. In May 1989 he got some employment certificates from Respondent's corporate office in Boise. After May 1989, Branderhorst was never prevented from filing timely employment certificates due to a lack of forms. He or his staff filed employment certificates for five minors during May, June, July, and September 1989.

66) In the spring of 1989, Paolini spoke to Respondent's Oregon store managers about the requirement to file employment certificates and instructed

them how to fill them out. He felt that they were capable of filling them out and submitting them after his instructions. He did not instruct the managers on what to do when they ran out of the forms. He did not do any follow-up or monitoring during that year to find out whether Respondent's stores were filing the forms; "if things are not correct, we expect to have them brought to our attention, especially before they become major problems." Respondent did not have the time or resources to follow up and be certain that every instruction was being followed. Paolini relied on government agencies and unions to bring violations to his attention.

67) During all of 1989, only five of Respondent's stores had submitted a total of 16 employment certificates.

68) In early 1990, the Wage and Hour Division was implementing a new enforcement "audit" program, and it had hired 10 new staff. As part of the new procedures, Lessel's team began making random compliance contacts. Before, they had primarily responded to complaints. Lessel decided to reopen Respondent's investigation file because he had the new staff, and he wanted to find out if Respondent was complying with the employment certificate requirements. He was interested in checking up on Respondent because of his earlier personal involvement with the case, and he was skeptical about Respondent being in compliance. No one suggested to him that Respondent's case should be reopened. He assigned Lynne Campbell to make contact with Respondent to see if it was in compliance. The audit uncovered violations.

69) On January 26, 1990, Lessel directed Kimmons and Campbell to start audits of Respondent's stores in their areas. Lessel thought that only two of Respondent's stores in Oregon had filed employment certificates to the Work Permit Unit. The investigative file on Respondent was sent from intake to Lessel at his request.

70) On January 26, 1990, Campbell learned from the Work Permit Unit that, in the computer, only Respondent's Klamath Falls store and one other store had filed employment certificates. Other grocery chains, particularly Safeway and Fred Meyer, were filing employment certificates.

71) On January 26, 1990, Campbell met with store manager Mike Madden at Respondent's store on Hilyard street in Eugene. Madden said that the store employed about 40 to 50 minors under age 21, but he did not know how many were under age 18. Campbell left him a supply of employment certificate and work permit forms, and a Child Labor Bulletin. Campbell informed Madden that minors could not use the "Hobart slicer" or the box crusher. Madden talked with Respondent's director of training, Nita Parkinson, and told Campbell that Parkinson wanted to contact her. Parkinson wanted to work out a plan to bring Respondent's stores into compliance with the law. Madden agreed to bring his store into compliance.

72) On January 29, 1990, Campbell spoke with Nita Parkinson. Campbell agreed to send Parkinson a supply of employment certificates and talked with her about the filing requirements. Parkinson agreed to send the forms to Respondent's 39 store managers and

give them a date for filing the forms. The next day, Campbell arranged for the Work Permit Unit to send 600 employment certificates to Parkinson.

73) On January 30, 1990, Campbell confirmed in a letter her conversation with Parkinson. She wrote:

"It is my understanding that you will contact the managers of the 39 Albertsons stores in Oregon and ask them to submit the employer certificates for the minors they now employ. I understand that you will give the managers approximately one month to bring their stores into compliance with our reporting requirements. Also, you will furnish me with a copy of your correspondence to the store managers and a list of the 39 Oregon stores. I expect that you will be able to do these things by February 16, 1990." (Emphasis added.)

Campbell asked Parkinson to remind the store managers that minors were not to operate meat slicers or box crushers. She informed Parkinson that a supply of 600 employment certificates and 40 Employment of Minors brochures were to be furnished to her. Campbell enclosed with the letter a copy of the statute and rules regarding the reporting requirements for minors, an Employment of Minors brochure, an employment certificate form, and a supply of work permit applications. Campbell instructed Parkinson that a work permit application could be submitted along with an employment certificate form when a minor without a work permit applied for a job. Campbell said that she would be checking after the deadline set by Parkinson whether the stores were filing the

employment certificates. Campbell gave Parkinson Campbell's phone number, the Work Permit Unit's number, and the location of the Agency's offices for obtaining information or more forms.

74) On January 30, 1990, Campbell sent to Kimmons a copy of her letter to Parkinson. She suggested that Kimmons do "some follow-up" at Respondent's stores in Kimmons's area.

75) On January 31, 1990, Lessel sent Respondent's file to Campbell to "review for future possible actions."

76) On February 2, 1990, Campbell got a call from Parkinson regarding Respondent's commitment to file employment certificates. Campbell informed Parkinson of Paolini's February 7, 1989, letter. Parkinson said she would talk to Paolini.

77) Between February 2 and 19, 1990, Parkinson talked to Paolini about employment certificate requirements and Paolini's agreement with Lessel. Paolini directed her to send out a memo. Paolini directed her to state that employment certificates should be submitted only for new hires and to state that "hours and shifts fluctuate due to business needs."

78) On February 19, 1990, Parkinson sent out a memo to all Respondent's Oregon store directors about employment certificates. She wrote that the Agency required the employment certificates "be submitted on all new hires who are less than age 18 (you need not submit them on minors currently employed)." (Emphasis in original.) By new hires, she meant minors hired as of the date of her memo. She enclosed with the memo a copy of

the statutes and rules regarding the employment of minors, an Employment of Minors brochure, and employment certificate and work permit forms. She instructed the directors on how to fill out the forms and where to send them. She also gave them two Agency telephone numbers to call with questions. Parkinson felt she had given the managers enough information to begin filing employment certificates when they received the forms. She expected the store managers to begin filing the forms when they got them, without waiting for training from the Agency. Parkinson sent a copy of the memo to Paolini. After store director Branderhorst received the supply of employment certificates forms with Parkinson's memo, he got more from Respondent when he needed more.

79) When Paul Tiffany read Parkinson's memo, he believed Respondent was not in compliance with the law. The memo did not direct the stores to fully comply with the law; the memo said that employment certificates were to be filed on only new hires. He believed that Campbell's January 30, 1990, letter directed Respondent to file the employment certificates "for the minors they now employ," which to Tiffany meant all minor employees.

80) On February 26, 1990, Campbell received a copy of Parkinson's February 19, 1990, memo. Campbell called Parkinson and asked her why the memo only asked for compliance regarding new hires and not for currently employed minors. Parkinson said she was directed by her supervisor, Paolini, to write the memo "this way." Campbell sent a copy of the memo to Kimmons.

81) On March 2, 1990, Florence Caisse of the Work Permit Unit reported to Campbell that only Respondent's Klamath Falls store and its North Bend store had filed employment certificates, and those were filed during 1989. Caisse agreed to check further.

82) On March 2, 1990, Campbell sent Lessel a memo about Parkinson's memo and Campbell's conversation with Parkinson about why Respondent only asked for employment certificates to be filed on new hires instead of on currently employed minors. In turn, Lessel wrote a memo to Suss on March 2, 1990, that Parkinson's memo did not bring Respondent into compliance. Lessel recommended that a follow-up letter be sent to Parkinson to advise her of the statute's requirements to file employment certificates for all minor employees. No one at the Agency notified Respondent that Parkinson's memo was incorrect.

83) Armonica Gilford, the Wage and Hour Division's case presenter, discussed Nita Parkinson's February 19, 1990, memo with Lynne Campbell. In reviewing the correspondence and telephone calls between Campbell and Parkinson, Gilford found that Campbell had reached an agreement with Parkinson that Respondent would file employment certificates for minors they employed at the time, not just new hires. Gilford did not think Parkinson's memo requiring prospective application of the employment certificate requirement — that is, filing employment certificates only on new hires — was correct.

84) On March 5, 1990, Campbell asked Kimmons to visit some of

Respondent's stores in Medford and Grants Pass to determine how many minor employees were working without employment certificates. She was going to visit stores in Eugene. Campbell wanted "some concrete facts on which to base my ultimate recommendations on this case." Caisse informed Campbell that a manual search (not in the computer) turned up one employment certificate for a minor in Respondent's Albany store, two employment certificates from Respondent's Salem store on Lancaster, and two employment certificates from Respondent's store in Oregon City.

85) On March 8, 1990, Campbell visited five of Respondent's stores in Eugene and Springfield. She discovered 42 high school students working at the stores and estimated that three-quarters of them were under 18. None of the store directors had filed employment certificates on minors. She sent work permit applications to Scott Thomson, Respondent's director of the store on Division in Eugene, and offered further assistance.

86) On March 8, 1990, Kimmons visited Respondent's stores in Medford and Grants Pass to determine if employment certificates had been filed. He spoke with the store manager in Medford, Rod Burch, and the store manager in Grants Pass, Jerry Alderson. Both managers reported employing six minors and that no employment certificates had been filed for them. The managers were aware of Parkinson's February 19, 1990, memo instructing them to file employment certificates on new hires.

87) On March 9, 1990, Caisse reported to Campbell that 17 additional

employment certificates were located. They came from Respondent's stores in Albany, Beaverton, Klamath Falls, North Bend, Oregon City, and Salem. Campbell finished her report on the case.

88) On March 27, 1990, Campbell sent her completed report and the file to Lessel. She estimated that Respondent employed 198 minors without employment certificates. She concluded that:

"It is apparent that the level of compliance with ORS 653.307 and OAR 839-21-220 requiring the filing of employment certificates upon the hiring of minors under age 18 did not improve significantly within the year following the agreement to comply. In fact, most store directors had no knowledge of our laws one year after the agreement."

She recommended that civil penalties be assessed in the amount of \$250 per violation, for a total penalty of \$49,500.

89) On March 30, 1990, Lessel sent the file to Suss for review and referral to Bercot for administrative action.

90) On April 27, 1990, C.S. Campbell wrote Paolini a letter reminding him of Respondent's intent to submit employment certificates, referring to Paolini's February 7, 1989, letter to Lessel. Campbell wrote:

"It remains our intent to enforce all Wage and Hour laws, including those laws that effect [sic] the employment of minors.

"We wish to verify the statutory requirement to submit employment certificates by Oregon store

managers as agreed to in your letter. Please provide my office with the names, addresses, birth dates, dates of hire, and dates of termination for all minors employed by all Albertson's stores in Oregon beginning on February 7, 1989, and continuing through the present. This information, categorized by store, must be in my office no later than 5:00 P.M., Friday, May 11, 1990.

"Failure to supply me with this information by May 11 will result in the Wage and Hour Division taking such further action as is necessary to obtain this information."

Paolini thought that the Agency was trying to harass him.

91) At some time after Campbell's April 27, 1990, letter, in the spring of 1990, Paolini contacted Food Employers regarding industry-wide compliance with the employment certificate requirements. He talked to either Steve Erdmann or Paul Lizundia. Food Employers staff knew about the employment certificate procedures and believed that some small "one or two-store" grocery store owners were not aware of the employment certificate requirements; however, Erdman recalled no conversations with a "major employer" such as Safeway, Fred Meyer, Kienow's, Waremart, Danielson's, or the "multiple-store members" about employment certificates. After his conversation with Food Employers, Paolini believed that there was not "uniform enforcement" of the requirements on the grocery industry. Paolini contacted no other stores at that time to confirm that information.

92) On May 7, 1990, Campbell spoke with Paolini about Campbell's request for information. She said the purpose of the request was to determine compliance. Paolini said the Agency was selectively enforcing the law against Respondent, and wanted to talk with Lessel. Campbell said she would so inform Lessel, but that she still expected Paolini to respond to her request.

93) Paolini testified that he told Campbell, and earlier Lessel, that the information that the Agency was requesting was available at the individual stores. The Forum reviewed the documents surrounding Kimmons's and Campbell's requests for a list, and finds no reference in either the Agency's notes or Paolini's notes stating that he referred the Agency to the stores' files. Paolini's testimony is not credible on this point.

94) On May 8, 1990, Lessel wrote to Paolini and repeated Campbell's request for information, repeating that the information "must be in my office no later than 5:00 p.m., Friday, May 11, 1990." From Paolini's perspective, Lessel's letter was just another instance of "bureaucratic talk."

95) On May 8, 1990, Paolini wrote to Campbell in reply to her April 27, 1990, letter. In part, he wrote:

"As we discussed today, we do not believe it is appropriate to undertake a 40 to 50 hour search and provide such a large quantity of information for the sole purpose of have the Bureau determine whether or not all employment certificates have been submitted. This is especially true in light of the fact that the Bureau has told me

that they do not believe that employment certificates provide any useful or relevant purpose in the grocery industry.

"If there are specific problem areas you are aware of, we are willing to discuss them and try to reach a resolution. However, a request for information covering 46 stores, absent any indication over the prior 15 months that we are not complying, is, we think, at the very least unreasonable.

"In any event, in February 1989 we agreed to begin to submit employment certificates after receiving the Bureau's assurance that all other grocery employers in Oregon would also be required to do the same. My letter dated February 7, 1989 states that we would begin to submit employment certificates under the following condition:

"\* \* \* pursuant to your agreement that we do not waive any of our rights to claim at any time in the future that the law with respect to employment certificates is being enforced against Albertson's selectively."

"I have contacted several retail grocery companies in Oregon and have determined that the Bureau still has not asked other employers to submit employment certificates or produce the information you have requested from Albertson's.

"Also, I have contacted several of our Oregon stores. They advised that the Bureau has not provided them with a sufficient supply of employment certificates,

as the Bureau promised it would do.

"Even though we do not believe it is appropriate to respond to your information request at this point, we are willing to evaluate any legal precedent you have for your position and further consider the matter. Please forward to me all legal precedent for your position."

Lessel knew of no employer that had requested the Agency's legal precedent before complying with an Agency request for information. Gilford believed that the Agency had previously sent a copy of the child labor law and rules to Paolini. She did not send him "precedent." Tiffany and Campbell were not aware of anyone sending the Agency's legal precedent to Paolini. Gilford was not aware of anyone taking any action based on Paolini's comment that the Agency had not provided some stores with a "sufficient" supply of forms. Campbell did not send Respondent more employment certificates. Tiffany believed Paolini's letter showed Respondent's reluctance to fully and unconditionally comply with the requirements of the law.

96) On May 9, 1990, Barshaw gave Gilford a computer list of some stores in Oregon that had filed employment certificates for minors, including Safeway, Kienow's, Fred Meyer, and Albertson's. Based on Respondent's assertions in correspondence, Gilford thought that these stores were Respondent's competitors and were of comparable size. Gilford was aware that Paolini had claimed repeatedly that Respondent had contacted many

other retail grocery companies in Oregon and found that none of them were being required to file employment certificates. The list showed that, since January 1990, the above stores had filed the following numbers of employment certificates: Safeway - 84; Kienow's - 51; Fred Meyer - 136; and Respondent - 17. From this list, Gilford concluded that Respondent's competitors knew about and were complying with the employment certificate requirements.

97) On May 17, 1990, C.S. Lynne Campbell visited Respondent's store on Main Street in Springfield (# 551) to see if minors were employed and if Respondent had filed employment certificates for them. She spoke with the bookkeeper, Jule Eleison, and reviewed an employee roster and personnel files. Eleison was not aware of work permit requirements for 17 year olds and had never filed employment certificates, although she had seen them. Campbell gave her an Employment of Minors brochure and a supply of employment certificate forms. Respondent employed the following minors at the Springfield store:

- a) Kevin E. Andersen; [REDACTED] DOH 9-26-89; [REDACTED]
- b) Jennifer D. Blachly; [REDACTED] DOH 8-28-89; [REDACTED]
- c) Vincent Burroughs; [REDACTED] DOH 4-15-90; [REDACTED]
- d) Aaron Glen Carpenter; [REDACTED] DOH 9-3-88; [REDACTED]
- e) Felecia A. Fletcher; [REDACTED] DOH 4-1-90; [REDACTED]
- f) Joel Patrick Freeman; [REDACTED] DOH 12-9-89; [REDACTED]

- g) Johnathon W. Lester; [REDACTED] DOH 3-5-90; [REDACTED]
- h) Lary L. Meyers; [REDACTED] DOH 6-14-89; [REDACTED]

98) On May 18, 1990, C.S. Campbell visited Respondent's store in Corvallis (#514). She spoke with the store director, Chuck Finlayson, and reviewed a computer listing of employees and information from personnel files. Finlayson did not ask to see work permits when hiring minors and was not aware of employment certificate filing requirements. Campbell gave him an Employment of Minors brochure and a supply of employment certificates. She reviewed the filing requirements and procedures with him. Respondent employed the following minors at the Corvallis store:

- a) Fred J. Kirkpatrick; [REDACTED] DOH 8-29-89; [REDACTED]
- b) Abigail A. McCormick; [REDACTED] DOH 5-20-89; [REDACTED]
- c) Julie E. Shaw; [REDACTED] DOH 4-11-90; [REDACTED]
- d) Scott J. Tomasovic; [REDACTED] DOH 4-1-90; [REDACTED]

99) On May 18, 1990, Paolini talked with Lessel, who said he had sent employment certificates to 26 of Respondent's Oregon stores. Paolini complained about the short time in which to comply with Campbell's request for information. He also said he had checked with Safeway, Fred Meyer, and Northwest Grocers, and said they were not sending in employment certificates. Paolini said he would not be sending in records to Campbell just to allow the Agency to determine violations by Respondent. Lessel said he would pass that information along to Campbell. Paolini said

that, from Lessel's and the Agency's attitude, he felt "there is something personal between you and me." Paolini thought Lessel had changed since the year before. In a follow-up letter on May 22, Paolini said that Respondent had 46 stores in Oregon and provided a list of the stores. He requested that employment certificates be sent immediately to those stores that the Agency did not previously send forms. Paolini again asked for the Agency's legal precedent behind its request for the information set out in Campbell's April 27, 1990, letter. Paolini said he would review the precedent, consider the matter further, and then let Lessel know Respondent's position.

100) Paolini found out later that Lessel never sent out employment certificates to Respondent's other stores. No one from the Agency ever provided Paolini with legal precedent for the information request of April 27.

101) In May 1990, the Commissioner mentioned to Stevens-Schwenger that Respondent was under investigation and there could be a large fine assessed.

102) On June 1, 1990, C.S. Campbell visited Respondent's store on Division street in Eugene (#560). She spoke to store director, Rodney Burch. Burch did not know if employment certificates had been filed for minors employed at the store. He said he would see that employment certificates get filed. Burch would not release employees addresses. Respondent employed the following minors at the Eugene store:

- a) Shawn P. Donaldson; [REDACTED] DOH 2-23-90; [REDACTED]

- b) Jerry Matthew Newell, [REDACTED] DOH 12-4-89; [REDACTED]  
 c) Kelly Gene Peterson, [REDACTED] DOH 5-6-90; [REDACTED]  
 d) Evin Russel Tucker, [REDACTED] DOH 9-5-89; [REDACTED]  
 e) Patrick Chris Moon, [REDACTED] DOH 10-10-89; [REDACTED]

103) On June 4, 1990, Paolini sent a memo to all Oregon store directors reminding them that "in Oregon all 16 and 17-year-olds must complete and submit to the Oregon Bureau of Labor and Industries an 'employment certificate.'" Paolini was afraid the Agency was going to do something to Respondent to harass it.

104) Store director Branderhorst received Parkinson's memo dated February 19, 1990, and Paolini's memo dated June 4, 1990. No one from Respondent's management ever told him not to file employment certificates.

105) Sometime after June 4, Paolini contacted Food Employers again. Erdmann told him that a few small store owners had asked about employment certificates.

106) On June 5, 1990, C.S. Campbell visited Respondent's store on West 18th Avenue in Eugene (#507). She spoke with the store director, Eric Skinner, on the subject of employment of minors and employment certificates. Respondent employed the following minors at the store:

- a) Shelly Ann Adams, [REDACTED] DOH 3-10-90; [REDACTED]  
 b) Curtis Allen Brooks, [REDACTED] DOH 9-18-89; [REDACTED]  
 c) Justin Boyd Burk, [REDACTED] DOH 10-30-89; [REDACTED]

- d) Dennis M. Duncan, [REDACTED] DOH 10-8-89; [REDACTED]  
 e) Ariel Leonardo Malave, [REDACTED] DOH 4-14-90; [REDACTED]  
 f) Misty Lyn McClatchey, [REDACTED] DOH 4-13-90; [REDACTED]  
 g) Kevin M. Peterson, [REDACTED] DOH 6-19-89; [REDACTED]

107) On June 5, 1990, C.S. Campbell visited Respondent's store in the Oakway Mall in Eugene (#531). She spoke with the store director, Dave Pemberton, on the subject of employment of minors and employment certificates. Respondent employed the following minor at the store:

- a) Ronald Volner, [REDACTED] DOH 8-14-89; [REDACTED]

108) On June 5, 1990, C.S. Campbell visited Respondent's store on Echo Hollow Road in Eugene (#550). She spoke with the store director, Stu Baird, on the subject of employment of minors and employment certificates. Baird said he had started filing employment certificates for new hires. He had not filed employment certificates for other minors per directions from Respondent. Respondent employed the following persons:

- a) Brent D. Blair, [REDACTED] DOH 3-19-90; [REDACTED]  
 b) Son Van Bums, [REDACTED] DOH 5-4-89; [REDACTED]  
 c) Christopher Burgess, [REDACTED] DOH 10-14-89; [REDACTED]  
 d) Darrin M. Hausler, [REDACTED] DOH 1-10-89; [REDACTED]  
 e) Terry Rice, [REDACTED] DOH 10-10-88; [REDACTED]  
 f) Robert Robinson, [REDACTED] DOH 9-21-89; [REDACTED]

109) On June 5, 1990, C.S. Campbell visited Respondent's store on

Hilyard street in Eugene (#568). She spoke with the store director, Mike Madden, on the subject of employment of minors and employment certificates. Madden had not filed employment certificates for any minor employees, but said he would for the two minors listed below. Respondent employed the following minors at the store:

- a) Brandy Ann Brooks, [REDACTED] DOH 1-20-90; [REDACTED]  
 b) Michael F. Sumnall, [REDACTED] DOH 5-23-89; [REDACTED]

110) On June 5, 1990, C.S. Campbell visited Respondent's store on N. Fifth Street in Springfield. She determined that employment certificates had been filed on April 25, 1990, for six minors, and Respondent had retained a white portion of the employment certificates for its records. Gilford believed that that store was in compliance on the date of the field visit, and thus did not charge any violations in the original notice for minors employed there.

111) In general, Campbell showed employment certificates to the store directors that she met, and she explained the use of the employment certificates. The store directors were polite and interested. No store director denied her access to records. Campbell found some compliance with the employment certificate requirements at some stores. She did not check other records or check for minors working in prohibited occupations or operating prohibited machines.

112) On June 5, 1990, Gilford wrote a memo to compliance specialist supervisors requesting the assistance of the compliance specialists to review employment certificates and obtain the name, address and phone number,

birthdate, date of hire, and social security number for minors working in Respondent's stores. Gilford was "attempting to assess the extent of Albertson's compliance" with the requirement to file employment certificates for minor employees. She wrote:

"As you are aware, employers are required to maintain, preserve and make the above-noted information available to us pursuant to OAR 831[sic]-21-170 and 175. Although our request should be very nonassertive and nonthreatening, the compliance specialist should take a copy of the regulations with him/her."

113) On around June 8, 1990, Campbell distributed a memo to compliance specialists Kimmons, Gomez, Beckfield, and Miller. In the memo, Campbell briefly described her routine when she visited Respondent's stores. In paragraph eight of the memo, she wrote:

"When I'm done I give the [store] director an Employment of Minors Brochure and some EC's [employment certificates]. Sometimes they want to know if they need to file them which is a problem question to answer. They have been directed by their superiors to file EC's for their new hires - we of course think they should file for everyone - I say something like 'Your employer has told you to begin filing them for your new hires.' Usually, they seem to understand that I haven't answered their question."

During the store visit when a store director asked her if employment certificates needed to be filed for every

minor employee, Campbell said "your employer has told you to begin filing them for your new hires." She also said to the director, "I'd say something different." She did not want to tell the store director to disobey the employer. Campbell felt that store directors knew that she disagreed with Respondent's direction that employment certificates were to be filed for only new hires. She believed that the directors knew they were getting conflicting directions from Respondent and the Agency. No one in the Agency instructed or implied to Campbell that she should not directly answer Respondent's employees' questions.

114) C.S. Beckfield did not have contact with Lynne Campbell about this case before or after Beckfield's visits to Respondent's stores. She read Campbell's June 8, 1990, memo (regarding visiting Respondent's stores) before she made her visits. During her visits, none of Respondent's employees said that they had been directed to or would file employment certificates only for their newly hired minors. If asked, Beckfield would instruct an employer that employment certificates were to be completed and filed for all employed minors, not just for new hires. She never used the information in paragraph eight of Campbell's memo during her visits to Respondent's stores.

115) C.S. Bledsoe never saw Campbell's June 8 memo. She did not talk with Campbell before conducting field visits on Respondent's stores.

116) C.S. Briggs never saw a copy of Campbell's June 8, 1990, memo. Sifuentez never saw a copy of the memo. Nobody ever instructed Briggs

to evade answering any of Respondent's questions. Briggs never talked with Campbell about this case. Sifuentez never talked with Campbell about or encountered any situation like that described in paragraph eight of Campbell's memo. Sifuentez would have instructed an employer that it was required to file employment certificates for all minor employees, not just new hires.

117) Gilford had never seen Lynne Campbell's June 8 memo. She did not know what Campbell was telling Respondent's managers. Gilford advised Campbell to take the regulations with her on field visits and to show them to the managers if requested. Gilford thought the regulations were self-explanatory: If you hire a minor, you must file an employment certificate within 48 hours.

118) C.S. Gomez saw Campbell's June 8 memo, but did not use it as a guideline. Gomez did not discuss paragraph eight of that memo with Campbell.

119) C.S. Grabe read Lynne Campbell's June 8, 1990, memo (regarding visiting Respondent's stores) before she made her visits to Respondent's stores and talked with Campbell about the memo. During her visits, none of Respondent's employees said that they had been directed to or would file employment certificates only for their newly hired minors. If asked, Grabe would instruct an employer that an employment certificate was to be completed within 48 hours after hiring a minor.

120) C.S. Johnson never saw Lynn Campbell's June 8, 1991, memo before the hearing. Johnson was told

to accurately tell Respondent what the law required and about submission of employment certificates. She was never told not to answer any of Respondent's questions.

121) C.S. Kimmons did not use Campbell's June 8, 1990, memo in his work. He never discussed paragraph eight of the memo with Campbell. Kimmons did not understand what Campbell meant in paragraph eight. When Kimmons visited Respondent's Grants Pass store in 1990, he was shown a memo from Respondent's management telling store directors to file employment certificates for newly hired minors. Kimmons advised the store director about the law's requirements and that the store was required to comply with the law.

122) C.S. Miller saw Campbell's June 8, 1990, memo, but did not believe she read paragraph eight, because she already knew how to conduct the field visit. Miller would have handled the situation described in paragraph eight differently than Campbell. She believed employers had to file employment certificates on all minor employees.

123) On June 8, 1990, C.S. Sifuentez visited Respondent's store in Roseburg (#539), spoke with a manager, and reviewed a vacation roster. Respondent employed the following minors:

a) Michael Gwartney, [REDACTED]

b) Chris Michael Truitt, [REDACTED]  
DOH 12-12-89; [REDACTED]

The manager, Curt Leno, said he had never seen an employment certificate. He did not have them for the minors. Sifuentez left Leno an Employment of

Minors pamphlet (which described child labor law requirements), two Minimum Wage posters, some employment certificate application forms, and some work permit applications. Sifuentez was not instructed to and did not check other records, check for minors working in prohibited occupations, or check for minors operating prohibited machines.

124) On June 8, 1990, C.S. Briggs visited Respondent's store in Bend (#548). She was directed by her supervisor, Judy Long, to check how many minors were employed and check for employment certificates. She spoke with the store director, Don Wilson, and the bookkeeper. Briggs reviewed records provided by the bookkeeper. Briggs found no employment certificates. The bookkeeper said she had never heard of employment certificates. Respondent employed the following minors at the store:

a) Daniel Brewer, [REDACTED] DOH unclear, Work Permit Unit record showed 3-2-90, Respondent's record showed 3-17-90, the compliance specialist learned during the field visit that the hire date was "approximately 4-1-89"; [REDACTED]

b) Dori DePreto, [REDACTED] DOH 7-28-89; [REDACTED]

125) On June 8, 1990, C.S. Sally Beckfield visited Respondent's store on Lancaster Drive in Salem (#558). She was directed by her supervisor, John Lessel, to visit that store to determine whether minors were employed and whether employment certificates were completed on those minors. She talked with Allan Prell, the store director, and then was referred to a bookkeeper named Theresa. Respondent employed the following minors:

- a) Joseph D. Wells, [REDACTED] DOH 2-25-90; [REDACTED]  
 b) Warren C. Wilson, [REDACTED] DOH 4-23-90; [REDACTED]  
 c) Brenden D. Wilson, [REDACTED] DOH 1-3-90 or 1-5-90; [REDACTED]

Theresa said the store did not have employment certificates for the minor employees, but the store did check for minors' work permits. Beckfield left a supply of employment certificate applications and an Employment of Minors brochure. She explained the use of employment certificates to Theresa. She said that Respondent could call the Agency's Salem office to get more employment certificate forms.

126) On June 11, 1990, C.S. Campbell visited Respondent's store on Beaverton-Hillsdale Highway in Portland (#505). She spoke with the store director, Paul Gossett, and reviewed the roster of employees. Respondent employed the following minors at the store:

- a) Andrea Ellen Bettger, [REDACTED] DOH 9-9-89; [REDACTED]  
 b) Max S. Cook, [REDACTED] DOH 5-12-89; [REDACTED]  
 c) Jeff M. Martin, [REDACTED] DOH 4-6-90; [REDACTED]  
 d) Heather Lynn Pulley, [REDACTED] DOH 5-8-90; [REDACTED]

127) On June 11, 1990, C.S. Lora Lee Grabe visited Respondent's store in Lake Grove (# 521) to check their records regarding the employment of minors; specifically, she was to check minor employees' dates of birth and dates of hire. She was instructed to make that inspection by Armonica Gilford. Grabe talked with the store's bookkeeper, Terry Smith. She left a supply of employment certificate forms

and an Employment of Minors brochure at the store. Grabe did not check other records or check for minors working in prohibited occupations or operating prohibited machines. Respondent employed the following minors at the Lake Grove store:

- a) Joel T. Hunger, [REDACTED] DOH 2-24-90; [REDACTED]  
 b) Aaron S. Morse, [REDACTED] DOH 2-27-90; [REDACTED]

128) Monty Atkinson, Respondent's store manager in Lake Grove, went to an Employment Division office in Oregon City to get employment certificates. He asked for a "minor's certificate," and the division employee did not know what he was talking about. Another employee talked with Atkinson and thought he wanted work permit forms. Atkinson was referred to the Agency's Salem office.

129) No one from Respondent ever told Atkinson or Lonnie Walter, Respondent's store director in Oregon City, not to file employment certificates or not to comply with Oregon's child labor laws.

130) On June 11, 1990, C.S. Gomez visited Respondent's store on Newmark street in North Bend (#526). He spoke with the store director, Johan Branderhorst, and did an audit of employment certificates. Of the six minors employed at the store, four did not have employment certificates. Branderhorst forgot to file employment certificates for two minors hired in April 1990. Branderhorst filled out employment certificates for the remaining four. At Gomez's instruction, Branderhorst sent them that day to the Wage and Hour Division. Branderhorst was very cooperative. Gomez did not check for

hours or hazardous order violations. Respondent employed the following minors:

- a) Debby June Anderson, [REDACTED] DOH 4-28-90; [REDACTED]  
 b) Tracy R. Diefenbaugh, [REDACTED] DOH 4-22-90; [REDACTED]  
 c) Richard C. Jacobson, [REDACTED] DOH 10-14-88; [REDACTED]  
 d) Jeffrey Lynn Dobbs, [REDACTED] DOH 12-29-89; [REDACTED]

131) On June 11, 1990, C.S. Campbell visited Respondent's store on 10th street in Hillsboro (# 541). She spoke with the store director, Lee Lowery. Respondent employed the following minors at the store:

- a) Rachel Fox, [REDACTED] DOH 3-26-90; [REDACTED]  
 b) Daphne Andresse, [REDACTED] DOH 6-12-89; [REDACTED]  
 c) Daniel Loren Smith, [REDACTED] DOH 2-24-90; [REDACTED]

132) On June 11, 1990, C.S. Grabe visited Respondent's store on McLoughlin Boulevard in Milwaukie (# 543). She talked to store director Gary Cutter. She asked for and looked at Respondent's records regarding their minor employees; she saw no employment certificates. She explained work permit and employment certificate requirements to Cutter. She left a supply of employment certificate forms and an Employment of Minors brochure. Grabe did not check other records or check for minors working in prohibited occupations or operating prohibited machines. Respondent employed the following minors:

- a) Daniel A. Brockway, [REDACTED] DOH 4-5-90; [REDACTED]  
 b) Geoffrey A. Brumage, [REDACTED] DOH 7-14-89; [REDACTED]

- c) Michael A. Carver, [REDACTED] DOH 5-1-90; [REDACTED]  
 d) Deborah Lynn Gold, [REDACTED] DOH 6-20-89; [REDACTED]  
 e) Scott Charles Hanks, [REDACTED] DOH 1-31-90; [REDACTED]  
 f) Lisa LaVohn Moler, [REDACTED]; DOH 7-28-89; [REDACTED]  
 g) Curtis A. Peterson, [REDACTED]; DOH 9-15-89; [REDACTED]

133) On June 11, 1990, C.S. Campbell visited Respondent's store on Cedar Hills Boulevard in Beaverton (# 546). She spoke with the store director, John Simonet Jr. Respondent employed the following minors at the store:

- a) Jared Allen Reid, [REDACTED] DOH 6-9-89; [REDACTED]  
 b) Greg Alan Rich, [REDACTED] DOH 6-15-89; [REDACTED]  
 c) Brenda Inman, [REDACTED] DOH 1-12-90; [REDACTED]  
 d) Aaron Brenneman, [REDACTED] DOH 5-22-90; [REDACTED]

134) On June 11, 1990, C.S. Rebecca Johnson visited Respondent's store at 82nd Avenue and Division Street in Portland (#547) to determine whether employment certificates had been filed for minor employees. She spoke with store director James Hupp and reviewed vacation rosters and personnel files. Hupp said that he was not checking for work permits, because he thought minors over 16 years old did not need them. Hupp had no employment certificates for three minors working at the store, because again he did not believe they were necessary for minors over 16 years old. Johnson left an Employment of Minors brochure and explained the rules regarding work permits and employment certificates.

She told Hupp to contact the Work Permit Unit to obtain more employment certificates. Hupp said he would comply, but would not hire anyone under 18 in the future. Respondent employed the following minors at the Division Street store:

- a) Kevin Jones, [REDACTED] DOH 11-11-89; [REDACTED]
- b) Nathan S. Newitt, [REDACTED] DOH 9-9-89; [REDACTED]
- c) Jason Lee Singer, [REDACTED] DOH 4-29-89; [REDACTED]

135) On June 11, 1990, C.S. Grabe visited Respondent's store in Oregon City (#549). She spoke to the bookkeeper and asked to see Respondent's records regarding the employment of minors. Grabe reviewed those records. She found no employment certificates. She explained work permit and employment certificate requirements, and left a supply of employment certificate forms and an Employment of Minors brochure. Grabe did not check other records or check for minors working in prohibited occupations or operating prohibited machines. Respondent employed the following minors:

- a) Michael G. Clooten, [REDACTED] DOH 6-26-89; [REDACTED]
- b) Kurt M. Smith, [REDACTED] DOH 10-27-89; [REDACTED]
- c) Aaron T. Talbot, [REDACTED] DOH 9-9-89; [REDACTED]
- d) Jason D. Young, [REDACTED] DOH 6-1-89; [REDACTED]

136) Lonnie Walter, Respondent's store director in Oregon City, checked minors' ages by checking drivers licenses or Oregon I.D. cards, and social security card, and the work permit. When Walter became store director in

August 1989, he received no training. He was first aware of the requirement to file employment certificates when he got the memo from Nita Parkinson in February 1990. He had not seen Paolini's February 1989 memo when he became store director.

137) On June 11, 1990, C.S. Rebecca Johnson visited Respondent's store on Powell Boulevard in Portland (#554) to determine whether employment certificates had been filed for minor employees. She spoke with store director Jeff Cichosz and reviewed vacation rosters and personnel files. Cichosz said they were checking for work permits, but did not know they were supposed to file employment certificates. Johnson found no employment certificates for the minor employees. She left an Employment of Minors brochure and employment certificates and told Cichosz to contact the Work Permit Unit to get more employment certificates. She explained that employment certificates needed to be filled out and sent to the Agency within 48 hours of hiring minor employees. Respondent employed the following minors at the Powell Boulevard store:

- a) Luther Arquette, [REDACTED] DOH 2-12-90; [REDACTED]
- b) Jeff Ashenfelder, [REDACTED] DOH 5-17-90; [REDACTED]
- c) Debbie Dropenski, [REDACTED] DOH 9-18-89; [REDACTED]
- d) Tina Guinn McFarland, [REDACTED] DOH 5-22-90; [REDACTED]
- e) Bryan Iverson, [REDACTED] DOH 1-19-90; [REDACTED]
- f) Alicia Lewis, [REDACTED] DOH 3-1-90; [REDACTED]

- g) David Lucas, [REDACTED] DOH 4-26-89; [REDACTED]
- h) Shannon Mostul, [REDACTED] DOH 2-18-90; [REDACTED]
- i) Melissa Sabrowski, [REDACTED] DOH 2-10-90; [REDACTED]
- j) Laura Savidge, [REDACTED] DOH 5-14-90; [REDACTED]
- k) Christa Weaver, [REDACTED] DOH 4-5-90; [REDACTED]
- d) Rebecca Hewitt, [REDACTED] DOH 7-29-89; [REDACTED]
- e) Melinda Marler, [REDACTED] DOH 7-26-89; [REDACTED]
- f) Holly Moore, [REDACTED] DOH 4-9-90; [REDACTED]
- g) Aaron Thyrell, [REDACTED] DOH 6-24-89; [REDACTED]
- h) Patrick Williams, [REDACTED] DOH 11-10-89; [REDACTED]

138) On June 11, 1990, C.S. Rebecca Johnson visited Respondent's store in Gresham (#556) to determine whether employment certificates had been filed for minor employees. She spoke with store director Roy "Spike" Scherer and reviewed vacation roster and personnel files. Scherer said he had a memo from corporate headquarters saying that the Agency would be bringing out employment certificates, and he had been waiting for the Agency to come out. He thought he had to complete employment certificates for new hires. He did not check minors' work permits because he did not think minors over age 16 needed them. Johnson left an Employment of Minors brochure and employment certificates, and explained the requirements for employment certificates. She told Scherer to contact the Work Permit Unit for more employment certificates. Scherer said he would comply. Respondent employed the following persons at the Gresham store:

- a) Paul Davidson, [REDACTED] DOH 12-9-89; [REDACTED]
- b) Brian Day, [REDACTED] DOH 11-17-89; [REDACTED]
- c) Jason Getch, [REDACTED] DOH 5-13-90; [REDACTED]

139) On June 11, 1990, C.S. Campbell visited Respondent's store on 185th Avenue in Aloha (#557). She spoke with the store director, Marvin Taylor. Taylor had only been in the store for five days and did not know if employment certificates had been filed for minor employees. He had a file with a memo dated February 1989 from Bruce Paolini directing the stores to file employment certificates on new hires, and a memo dated June 4, 1990, from Paolini directing stores to file employment certificates for minors due to enforcement action by the US Department of Labor and the Agency. Respondent employed the following minors at the store:

- a) Graham R. Christensen, [REDACTED] DOH 5-2-90; [REDACTED]
- b) Joseph T. Fleischman, [REDACTED] DOH 1-26-90; [REDACTED]
- c) Nicole Lynn Franklin, [REDACTED] DOH 6-19-89; [REDACTED]
- d) Bethany Leeanna Hill, [REDACTED] DOH 2-24-90; [REDACTED]
- e) Thomas R. Hoskins, [REDACTED] DOH 4-27-89; [REDACTED]
- f) Lucio Jimenez, [REDACTED] DOH 3-17-90; [REDACTED]
- g) Sarah Jane Keortge, [REDACTED] DOH 5-5-90; [REDACTED]
- h) Laura M. Ledoux, [REDACTED] DOH 7-27-89; [REDACTED]

i) Robert Sammy Padilla, [REDACTED]  
DOH 2-16-89; [REDACTED]

140) On June 11, 1990, C.S. Campbell visited Respondent's store on Hall Boulevard in Beaverton (#559). She spoke with the store director, Roger Cooper. He said the store had started filing employment certificates for newly hired minors. Respondent employed the following minors at the store:

- a) Kelly D. Caufield, [REDACTED]; DOH 7-8-89; [REDACTED]
- b) Leslie B. Cecchetti, [REDACTED] DOH 9-29-89; [REDACTED]
- c) Jose Javier Gonzalez, [REDACTED] DOH 11-18-89; [REDACTED]
- d) Charles C. Mayer, [REDACTED] DOH 10-2-89; [REDACTED]

An employment certificate had been returned by the Agency to Respondent for an employee named Berger, and the store director believed he had filed them for five minor employees not listed above.

141) On June 11, 1990, C.S. Sally Beckfield visited Respondent's store on South Commercial Street in Salem (#561) to determine whether minors were employed, and whether employment certificates were completed on those minors. She talked with store director John Berg, who referred her to Gloria, the bookkeeper. The store did not have employment certificates for the minor employees. Gloria said she had never seen employment certificate forms. Beckfield left a supply of forms and an Employment of Minors brochure, and she instructed Gloria how to complete employment certificates. She said that Respondent could call the Agency's Salem office to get more employment certificate forms.

Respondent employed the following minors:

- a) Darren Anderson, [REDACTED] DOH 5-6-89; [REDACTED]
- b) Steve Shawn Harris, [REDACTED] DOH 4-28-90; [REDACTED]
- c) Nathen Paul Satter, [REDACTED] DOH 4-28-90; [REDACTED]
- d) Kimberly Van Cleave, [REDACTED] DOH 10-28-88; [REDACTED]
- e) Erik Vinas, [REDACTED] DOH 8-3-89; [REDACTED]

142) On June 11, 1990, C.S. Sally Beckfield visited Respondent's store in Keizer (#562) to determine whether minors were employed and whether employment certificates were completed on those minors. She talked with store director Terry Harper, who referred her to Audrey, the bookkeeper-payroll clerk. The bookkeeper said she had filled out employment certificates in the past, but stopped when she ran out of forms. She said she had called someone for more forms but had not received them; she could not recall who she called. She said she would fill out employment certificates for all minors currently employed. Beckfield left around 30 employment certificate applications and an Employment of Minors brochure, and she explained the requirements for employment certificates. She said that Respondent could call the Agency's Salem office to get more employment certificate forms. Respondent employed the following minors:

- a) Lorrie Marie Brown, [REDACTED] DOH 10-2-89; [REDACTED]
- b) Christopher Gauthier, [REDACTED] DOH 5-21-90; [REDACTED]
- c) Dawn Leah George, [REDACTED] DOH 6-25-89; [REDACTED]

d) Daphne Jill Hinrichs, [REDACTED] DOH 5-22-90; [REDACTED]

- e) Jason Dean Howard, [REDACTED] DOH 5-24-90; [REDACTED]
- f) Brian Keith Hudnall, [REDACTED] DOH 5-21-90; [REDACTED]
- g) Daniel John Johnson, [REDACTED] DOH 5-21-90; [REDACTED]
- h) Michele C. Lane, [REDACTED] DOH 5-21-90; [REDACTED]
- i) Christine Obershaw, [REDACTED] DOH 3-31-90; [REDACTED]
- j) Christopher Parkson, [REDACTED] DOH 5-21-90; [REDACTED]
- k) Mathew Scheidegger, [REDACTED] DOH 3-24-90; [REDACTED]
- l) Cainen Lorne Steele, [REDACTED] DOH 1-18-90; [REDACTED]
- m) Bret T. Taylor, [REDACTED]; DOH 5-22-90; [REDACTED]
- n) Tami Lynn Tomblason, [REDACTED] DOH 4-14-90; [REDACTED]
- o) John C. Tumbow, [REDACTED] DOH 5-22-90; [REDACTED]
- p) Justin Blaine Walker, [REDACTED] DOH 5-19-90; [REDACTED]
- q) Gregory Glenn Watson, [REDACTED] DOH 5-22-90; [REDACTED]
- r) Jennifer J. Wright, [REDACTED] DOH 5-16-90; [REDACTED]

143) C.S. Beckfield was not instructed to and did not check for minors working in prohibited occupations or operating prohibited machines, or inspect for violations of regulations on wages or hours.

144) On June 11, 1990, C.S. Rebecca Johnson visited Respondent's store at Division and 122nd in Portland (#563) to determine whether employment certificates had been filed for minor employees. She spoke with store director Rick Parker and reviewed the vacation roster and personnel. Parker

said he did not know Respondent had to complete employment certificates, and none were on file at the store. He thought only minors under age 16 had to have work permits. His store did not hire anyone under age 16, so they did not check for work permits. Johnson explained that Respondent must check for work permits for all minors and must complete an employment certificate within 48 hours of hiring a minor. Respondent employed the following minors at the store:

- a) Keith Jones, [REDACTED] DOH 5-7-90; [REDACTED]
- b) Jason Horn, [REDACTED] DOH 5-22-90; [REDACTED]
- c) Jessica Waldrop, [REDACTED] DOH 5-5-90; [REDACTED]

145) On June 11, 1990, C.S. Campbell visited Respondent's store on Pacific Highway in Tigard (#565). She spoke with the store director, Kim Hoffman, who supplied Campbell with information about the minors that were then employed. The store had not been filing employment certificates. Respondent employed the following minors at the store:

- a) Windee Boyce, [REDACTED]; DOH 3-23-90.
- b) Pattie Marie Davis, [REDACTED] DOH 2-26-90; [REDACTED]
- c) Kendra Jeanne Garde, [REDACTED] DOH 3-11-90; [REDACTED]
- d) Brett A. Letourneau, [REDACTED] DOH 7-5-89; [REDACTED]
- e) April C. Mills, [REDACTED] DOH 10-13-89; [REDACTED]

146) On June 11, 1990, C.S. Grabe visited Respondent's store on Oak Street in Milwaukie (#566). She spoke with store director Paul Mazawski and got information about

minor employees from Respondent's records. Mazawski did not know about the requirement to file employment certificates for employees over 15 years old. He remembered a memo about the employment of minors that was sent from Respondent's home office, but could not find it. Grabe explained work permit and employment certificate requirements, and left a supply of employment certificate forms and an Employment of Minors brochure. Grabe did not check other records or check for minors working in prohibited occupations or operating prohibited machines. Respondent employed the following minors:

- a) Christian A. Doyle, [REDACTED] DOH 9-23-89; [REDACTED]
- b) Shawn M. Feather, [REDACTED] DOH 3-17-90; [REDACTED]
- c) Brian Ray Smith, [REDACTED] DOH 3-7-90; [REDACTED]
- d) Daniel Lee Wright, [REDACTED] DOH 4-7-90; [REDACTED]

147) On around June 12, 1990, C.S. Miller visited Respondent's store in Albany (#555) and talked with the grocery manager, Mike Griffen, and examined records. The manager was cooperative. Of seven minor employees, Miller saw a white copy from an employment certificate for two new hires. The bookkeeper said that employment certificates had been filed for the other five minors. Miller believed the store was in compliance on the date of the field visit. Gilford did not charge any violations from that store in the original notice.

148) On June 12, 1990, Gaylene Austin, Respondent's contract coordinator in Industrial Relations, provided to Kimmons a list of minors employed

at Respondent's stores in Grants Pass (#522), Klamath Falls (#524), and Medford (#542). The Grants Pass store was going through some reorganization, and the store director had referred Kimmons to Austin. Austin said she could provide the information Kimmons wanted by doing a "computer run" for all three stores. The list included names, addresses, dates of hire and birth, social security numbers, and the store name and number where the minors were employed. Kimmons had requested employment certificate numbers, but that information was not provided. The list showed 21 minors total; eight at Klamath Falls, six at Grants Pass, and seven at Medford:

- a) Maria Lynn Bennett, [REDACTED] DOH 8-17-89; [REDACTED]
- b) Traisa D. Brockmann, [REDACTED] DOH 5-1-90; [REDACTED]
- c) Stephan A. Fedosky, [REDACTED] DOH 3-19-90; [REDACTED]
- d) Kristina D. Flores, [REDACTED] DOH 9-5-89; [REDACTED]
- e) Joshua Robert Huff, [REDACTED] DOH 8-28-90; [REDACTED]
- f) David R. Johnson, [REDACTED] DOH 4-10-90; [REDACTED]
- g) Todd Allen Kennedy, [REDACTED] DOH 4-8-89; [REDACTED]
- h) Patrick R. McMurtry, [REDACTED] DOH 5-1-90; [REDACTED]
- i) Donny Eugene Mower, [REDACTED] DOH 4-2-90; [REDACTED]
- j) Jeff Scott Nelson, [REDACTED] DOH 2-8-90; [REDACTED]
- k) Shannon Lee Newton, [REDACTED] DOH 1-16-90; [REDACTED]
- l) Bill Gene Reinhard, [REDACTED] DOH 10-9-89; [REDACTED]
- m) Jason William Roach, [REDACTED] DOH 4-8-89; [REDACTED]

- n) Trisha M. Shier, [REDACTED] DOH 11-9-89; [REDACTED]
- o) Dana Gail Skidmore, [REDACTED] DOH 4-30-90; [REDACTED]
- p) Zachariah Steigman, [REDACTED] DOH 5-1-90; [REDACTED]
- q) Monty Sutherland, [REDACTED] DOH 4-11-90; [REDACTED]
- r) Jason Brent Thomas, [REDACTED] DOH 4-30-89; [REDACTED]
- s) Brandon Dean Tilton, [REDACTED] DOH 4-2-90; [REDACTED]
- t) Eric Keith Vitacco, [REDACTED] DOH 5-15-90; [REDACTED]
- u) Steven W. Zingleman, [REDACTED] DOH 9-18-89; [REDACTED]

149) On June 15, 1990, the Agency issued and served on Respondent's registered agent a Notice of Intent to Assess Civil Penalties. Tiffany wanted the charging document to be issued then because the Agency wanted to impress upon Respondent that noncompliance had to stop. He felt that the sooner the notice was issued, the sooner the Agency would achieve its purpose.

150) Tiffany never told the Commissioner about Respondent's allegation that someone at the Agency had told Mabbott that Respondent did not need to file employment certificates. Tiffany did not discuss mitigating factors with the Commissioner. Tiffany told the Commissioner that he did not think Respondent's selective enforcement defense was relevant. Tiffany believed there were other grocery employers in compliance at the time Respondent was served with the original charging document. Tiffany was aware of Lessel's February 1989 understanding with Paolini regarding

compliance with the employment certificate requirements.

151) When Tiffany learned of Respondent's assertion that someone at the Agency told it not to file employment certificates, Tiffany did not believe that assertion. He did nothing to check out if such a statement had been made by Agency staff.

152) On June 20, 1990, the Commissioner held a press conference to announce that the Agency had issued the Notice of Intent to Assess Civil Penalties to Respondent. Paolini attended the conference and presented a response. Respondent had not received with the charging document six exhibits that specified the minor employees for whom employment certificates had not been filed. News stories about the case were carried on several television stations and in newspapers around the state. Paolini knew of no effect on sales due to the publicity of the case, but felt that it hurt Respondent's goodwill. Some of Respondent's customers asked store directors questions about the case after the publicity.

153) Paul Tiffany discussed the charging document with Joan Stevens-Schwenger, the Agency's public information officer, before the Commissioner's news conference. It was Stevens-Schwenger's idea to hold a press conference. Tiffany told Stevens-Schwenger that the investigation was ongoing. He did not think the investigation was completed until there was an indication of compliance, such as an agreement of future compliance. He told her that Respondent had refused to comply with the law, based on the subsequent investigation started in

January 1990. Tiffany learned about the press conference the day before it was held.

154) After publicity about this case came out in June 1990, "a few customers" asked Branderhorst about Respondent "abusing child labor laws." They thought it had to do with hours of work.

155) On June 21, 1990, Paolini sent a memo to all Oregon store directors. He enclosed employment certificates, which he said had to be completed and submitted that day to the Agency "for all current employees who, at the time they were hired, were age 16 or 17."

156) In late June 1990, after publicity of this contested case had occurred, a representative of Respondent called the Work Permit Unit for 1,000 employment certificate applications. The Work Permit Unit sent 1,000 such applications to Respondent's head office.

157) On July 12, 1990, Paolini received copies of "compliance" sheets from Respondent's Oregon stores.

158) On July 13, 1990, Tiffany directed that compliance specialists conduct follow-up compliance contacts at Respondent's stores around the state that had not been contacted during June. He thought there was still non-compliance, and he wanted to find out the extent of it.

159) On July 19, 1990, C.S. Lisa Bledsoe visited Respondent's store in Pendleton (#158). Bledsoe had been directed by her supervisor, Judy Long, to visit the store and gather the names, addresses, phone numbers, dates of birth, dates of hire, termination dates,

social security numbers, and the dates employment certificates were filed for the minor employees. She talked to the store manager, who gave her the information. Bledsoe did not check other records or check for minors working in prohibited occupations or operating prohibited machines. Respondent employed the following minors:

- a) Curtis Cooley, [REDACTED] DOH 5-17-90; [REDACTED]
- b) Janie Emerick, [REDACTED] DOH 4-30-90; [REDACTED]
- c) Bob Gibson, [REDACTED] DOH 5-24-90; [REDACTED]
- d) Travis L. Driskel, [REDACTED] DOH 7-5-90; [REDACTED]
- e) Shelly Lyons, [REDACTED] DOH 3-23-90; [REDACTED]
- f) Joy McGee, [REDACTED] DOH 2-13-90; [REDACTED]
- g) Kris Smith, [REDACTED] DOH 5-16-90; [REDACTED]
- h) Chris Thomas, [REDACTED] DOH 11-7-89; [REDACTED]
- i) David Wimberly or Wimberly, [REDACTED] DOH 6-3-89; [REDACTED]
- j) Erin Storey, [REDACTED] DOH 3-14-90; [REDACTED]
- k) Eric Eidam, [REDACTED] DOH 5-15-90; [REDACTED]
- l) Brian Stewart, [REDACTED] DOH 6-21-90; [REDACTED]

Brian Stewart's employment was terminated on July 12, 1990. Eric Eidam's employment was terminated on July 14, 1990.

160) On July 19, 1990, the Agency issued a media advisory stating that Respondent had requested a hearing on the violations alleged in the charging document and that a hearing date had been set. Several newspapers

picked up the story. The Agency also notified the media when the hearing was later postponed.

161) On July 20, 1990, C.S. Lisa Bledsoe visited Respondent's store in The Dalles (#532). Bledsoe gathered information about minor employees from either a vacation roster or a sick leave roster. She talked to the store director and another person to whom she was sent by the director. She got the names, addresses, social security numbers, dates of birth, and dates of hire of the minors. She also listed the date that an employment certificate was filed by Respondent for each minor. Bledsoe did not check other records or check for minors working in prohibited occupations or operating prohibited machines. Respondent employed the following persons:

- a) Michelle Davis, [REDACTED] DOH 6-10-90; [REDACTED]
- b) Manuel Cisneros, [REDACTED] DOH 5-2-89; [REDACTED]
- c) Christopher S. Bennett, [REDACTED] DOH 12-6-88; [REDACTED]
- d) Raymond Hoff Jr., [REDACTED] DOH 9-13-89; [REDACTED]
- e) Shane Jones, [REDACTED] DOH 12-23-89; [REDACTED]
- f) Ray Ward (Curtis Ray), [REDACTED] DOH 11-29-89; [REDACTED]
- g) James Gehrig, [REDACTED] DOH 11-18-89; [REDACTED]
- h) Sheldon Ayres, [REDACTED] DOH 3-18-89; [REDACTED]
- i) Juan Pinedo, [REDACTED] DOH 11-12-88; [REDACTED]
- j) Travis R. Parker, [REDACTED] DOH 2-18-90; [REDACTED]

162) On July 30, 1990, C.S. Rebecca Johnson visited Respondent's store on Cully Boulevard in Portland

(#504) to determine whether employment certificates had been filed for minor employees. She spoke with store director Roy Hoffman and reviewed records. Respondent employed the following minors at the store:

- a) Angela Marie Brown, [REDACTED] DOH 7-15-90; [REDACTED]
- b) Timothy Craig Fieken, [REDACTED] DOH 4-20-90; [REDACTED]
- c) Jennifer Anne Lewis, [REDACTED] DOH 6-18-90; [REDACTED]
- d) Loren J. McClaskey, [REDACTED] DOH 11-7-88; [REDACTED]
- e) Ben Joseph Monfils, [REDACTED] DOH 8-16-89; [REDACTED]
- f) Mark Jay Pooschke, [REDACTED] DOH 7-10-90; [REDACTED]
- g) Bob William Roberts, [REDACTED] DOH 7-10-90; [REDACTED]
- h) Nathan A. Spears, [REDACTED] DOH 10-1-89; [REDACTED]

163) On July 30, 1990, C.S. Grabe visited Respondent's store on NE 122nd in Portland (#502) and spoke with the store director, Dan Thornton, and reviewed records. Respondent employed the following minor at the store:

- a) Jeffery B. Phelps, [REDACTED] DOH 4-20-90; [REDACTED]

Grabe saw an employment certificate, number 004368, for Phelps at the store.

164) On August 1, 1990, C.S. Briggs visited Respondent's store in LaGrande (#135). She spoke with the store director, Gary Lee. Briggs reviewed records. Lee had employment certificates. He said he had mailed the employment certificates to the Agency, but they had been returned unvaliddated. Briggs requested and Lee agreed that he would send in the

employment certificates. Once Lee promised to send in the employment certificates, Briggs considered the store to be in compliance because it was her first visit to the store. Of the 12 minors listed below, three (Craig, Hendon, and Rainey) had work permits, and the remaining nine had applied for them. Lee asked for additional employment certificates, and Briggs mailed 50 to him. Respondent employed the following minors at the store:

- a) Brandon Craig, [REDACTED] DOH 2-22-90; [REDACTED]
- b) Jeremy Hendon, [REDACTED] DOH 12-1-89; [REDACTED]
- c) Chris Bechiel, [REDACTED] DOH 9-17-89; [REDACTED]
- d) Brian Acevedo, [REDACTED] DOH 6-11-90; [REDACTED]
- e) Nate Sunderman, [REDACTED] DOH 2-12-90; [REDACTED]
- f) Christopher Berg, [REDACTED] DOH 3-2-90; [REDACTED]
- g) Jake Heitz, [REDACTED] DOH 6-7-89; [REDACTED]
- h) Brooke McKinney, [REDACTED]; DOH 12-20-89; [REDACTED]
- i) Michael Moffit, [REDACTED] DOH 6-4-90; [REDACTED]
- j) Steve Pierce Rainey, [REDACTED] DOH 8-25-89; [REDACTED]
- k) Jason Pokomev, [REDACTED] DOH 11-26-89; [REDACTED]
- l) Christy Wing, [REDACTED] DOH 9-6-89; [REDACTED]

165) On August 1, 1990, C.S. Briggs visited Respondent's store in Baker City. She spoke with the store director, Randy Racey. Briggs reviewed records. Of the minors listed below, a copy of an employment certificate was in each employee's file, with

the exception of Winegar, who had been hired the week before Briggs's field visit. Racey said that an employment certificate was being sent in for Winegar. Briggs considered the store to be in compliance with employment certificate requirements at the time of her visit. Respondent employed the following minors at the store:

- a) Shane Holden, [REDACTED] DOH 4-28-90; [REDACTED]
- b) Tom Sissel Kay, [REDACTED] DOH 5-25-90; [REDACTED]
- c) Jeremy Griffith, [REDACTED] DOH 5-26-90; [REDACTED]
- d) Chandra Turner, [REDACTED] DOH 6-20-90; [REDACTED]
- e) Annie Winegar, [REDACTED] DOH 7-25-90 or 7-29-90; [REDACTED]

166) Respondent complied with employment certificate filing requirements for some of its minor employees.

167) Respondent's store employees were polite to Agency compliance specialists during their visits. Respondent's store employees did not deny access to any documents that the compliance specialists asked to see.

168) In October 1990, Gilford prepared an amended Notice of Intent to Assess Civil Penalties in this case. She had added an additional exhibit. Paul Tiffany discussed with AAG Linda Rogers adding "willful" to the allegations of violations. He thought that willfulness had been alleged in the original charging document. Tiffany directed that, in the amended charging document, Respondent should be charged with willful violations.

169) In January or February 1991, Respondent's store director Branderhorst attempted to get employment

certificates from the Employment Division office in Coos Bay. At first they thought he wanted work permits, but after he explained what he wanted, they made a phone call and later sent him some employment certificates. He had not run out of employment certificate forms before that time, so he was not prevented from filing timely certificates.

170) On February 20, 1991, Paolini sent a memo to all Respondent's Oregon store directors, reminding them to submit employment certificates to the Agency on all employees ages 16 and 17 who were hired or terminated within 48 hours of their hire or termination.

171) As amended at hearing, the Agency's charging document alleged that, for each of the 207 minor employees listed below, Respondent willfully and repeatedly failed to file an employment certificate within 48 hours after the hiring of the minor or of permitting the minor to work. The amended charging document also alleged that Respondent willfully and repeatedly employed or permitted to work 52 of those minors (who are identified below by asterisks) without first verifying each minor's age by requiring the minor to produce a work permit. The Agency's records, which the Forum finds are reliable, revealed the following information regarding work permits (for those 52 minors) and employment certificates for each of the named minors:

1. Kevin E. Andersen, DOH 9-26-89: employment certificate #6295, received by the Agency 7-16-90, issued by the Agency 8-3-90.

2. Jennifer D. Blachly, DOH 8-28-89: employment certificate #6294, received 7-16-90, issued 8-3-90.

3. Vincent Burroughs, DOH 4-15-90: employment certificate - none received.

4. Aaron Glen Carpenter, DOH 9-3-88: employment certificate #6914, received 7-16-90, issued 8-16-90.

\* 5. Felecia A. Fletcher, DOH 4-1-90: work permit - none received; employment certificate - none received.

6. Joel Patrick Freeman, DOH 12-9-89: employment certificate #6297, received 7-16-90, issued 8-3-90.

7. Johnathon W. Lester, DOH 3-5-90: employment certificate #6296, received 7-16-90, issued 8-3-90.

\* 8. Larry L. Meyers, DOH 6-14-89: work permit - none received; employment certificate - none received.

9. Fred J. Kirkpatrick, DOH 8-29-89: employment certificate #6360, received 6-29-90, issued 8-3-90.

10. Abigail A. McCormick, DOH 5-20-89: employment certificate #6359, received 6-29-90, issued 8-3-90.

11. Julie E. Shaw, DOH 4-11-90: employment certificate #6358, received 6-29-90, issued 8-3-90.

12. Scott J. Tomasovic, DOH 4-1-90: employment certificate #8138, received 6-29-90, issued 8-28-90.

13. Shawn P. Donaldson, DOH 2-23-90: employment certificate - none received.

\* 14. Jerry Matthew Newell, DOH 12-4-89: work permit - none received; employment certificate received 6-29-90, not validated.

15. Kelly Gene Peterson, DOH 5-6-90: employment certificate - none received.

\* 16. Evin Russel Tucker, DOH 9-5-89: work permit - none received; employment certificate received 6-29-90, not validated.

17. Patrick Chris Moon, DOH 10-19-89: employment certificate received 6-29-90, not validated.

18. Shelly Ann Adams, DOH 3-10-90: employment certificate received, not validated.
19. Curtis Allen Brooks, DOH 9-18-89: employment certificate #8339, received 6-29-90, received second time 8-28-90, issued 8-30-90.
20. Justin Boyd Burk, DOH 10-30-89: employment certificate – none received.
- \* 21. Dennis M. Duncan, DOH 10-8-89: work permit #73930, received 7-2-90, issued 9-13-90; employment certificate received 6-29-90, received second time 8-28-90, not validated.
22. Ariel Leonardo Malave, DOH 4-14-90: employment certificate – none received.
23. Misty Lyn McClatchey, DOH 4-13-90: employment certificate #6393, received 7-20-90, issued 8-3-90.
24. Kevin M. Peterson, DOH 6-19-89: employment certificate – none received.
25. Ronald Volner, DOH 8-14-89: employment certificate – none received.
26. Brent D. Blair, DOH 3-19-90: employment certificate ## 3788 and 16449, filled out first time by Respondent 3-23-90, received first time 3-26-90, received second time 4-6-90, issued first time 5-2-90, duplicate issued 11-21-90.
- \* 27. Son Van Burns, DOH 5-4-89: work permit #73943, received 6-29-90, issued 9-13-90; employment certificate – none received.
- \* 28. Christopher Burgess, DOH 10-14-89: work permit – none received; employment certificate received 6-29-90, not validated.
- \* 29. Darin M. Hausler, DOH 1-10-89: work permit – none received; employment certificate received 6-29-90, not validated.
30. Terry Rice, DOH 10-10-88: employment certificate – none received.
31. Robert Robinson, DOH 9-21-89: employment certificate #6872, received 6-29-90, issued 8-15-90.
32. Brandy Ann Brooks, DOH 1-20-90: employment certificate #6389, received 6-29-90, issued 8-3-90.
33. Michael F. Sumnall, DOH 5-23-89: employment certificate #6384, received 6-29-90, issued 8-3-90.
- \* 34. Michael Gwartney, DOH no later than 6-8-90 (date of field visit): work permit – none received; employment certificate – none received.
35. Chris Michael Truitt, DOH 12-12-89: employment certificate #6450, received 7-2-90, issued 8-6-90.
- \* 36. Daniel Brewer, DOH March 90: work permit #27673, received 9-12-89, issued 9-14-89; employment certificate #5959, received 6-25-90, issued 7-31-90.
37. Dori DePretto, DOH 7-28-89: employment certificate – none received.
38. Joseph D. Wells, DOH 2-25-90: employment certificate #6291, received 6-26-90, issued 8-3-90.
39. Warren C. Wilson, DOH 4-23-90: employment certificate #6290, received 6-26-90, issued 8-3-90.
- \* 40. Brenden D. Wilson, DOH 1-3 -90 or 1-5-90: work permit #71208, received 6-22-90, issued 8-27-90; employment certificate #11482, received 9-28-90, issued 10-5-90.
- \* 41. Andrea Ellen Bettger, DOH 9-9-89: work permit #63784, received 6-26-90, issued 7-10-90; employment certificate #11772, received 8-27-90, issued 10-9-90.
42. Max S. Cook, DOH 5-12-89: employment certificate received but returned, not validated.
- \* 43. Jeff M. Martin, DOH 4-6-90: work permit #64108, received 6-29-90, issued 7-11-90; employment certificate received but returned, not validated.
44. Heather Lynn Pulley, DOH 5-8-90: employment certificate #6202, received 6-25-90, issued 8-2-90.
- \* 45. Joel T. Hunger, DOH 2-24-90; work permit #47026, received 3-26-90, issued 5-3-90; employment certificate received by the Agency first time in March 1990 and again on 4-23-90, issued 5-3-90.

46. Aaron S. Morse, DOH 2-27-90: employment certificate #3792, received 4-23-90, issued 5-3-90.
47. Debby June Anderson, DOH 4-20-90 or 4-28-90: employment certificate #6416, received 6-15-90, issued 8-3-90.
48. Tracy R. Diefenbaugh, DOH 4-22-90: employment certificate #6075, received 6-15-90, issued 8-1-90.
49. Richard C. Jacobson, DOH 10-14-88: employment certificate – none received. Store director Branderhorst sent one to the Agency.
50. Jeffrey Lynn Dobbs, DOH 12-29-89: employment certificate, received 6-15-90.
- \* 51. Rachel Fox, DOH 3-26-90: work permit #71340, received 8-27-90, issued 8-28-90; employment certificate – none received.
52. Daphne Andresse, DOH 6-12-89: employment certificate – none received.
- \* 53. Daniel Loren Smith, DOH 2-24-90: work permit – none received; employment certificate – none received.
54. Daniel A. Brockway, DOH 4-5-90: employment certificate – none received.
55. Geoffrey A. Brumage, DOH 7-14-89: employment certificate – none received.
56. Michael A. Carver, DOH 5-1-90: employment certificate #6412, received 7-16-90, issued 8-3-90.
- \* 57. Deborah Lynn Gold, DOH 6-20-89: work permit #63529, received 6-26-90, issued 7-10-90; employment certificate #19321, received 10-1-90, issued 1-10-91.
58. Scott Charles Hanks, DOH 1-31-90: employment certificate #6072, received 6-27-90, issued 8-1-90.
59. Lisa LaVohn Moler, DOH 7-28-89: employment certificate #6413, received 6-27-90, issued 8-3-90.
60. Curtis A. Peterson, DOH 9-15-89: employment certificate #6071, received 6-27-90, issued 8-1-90.
61. Jared Allen Reid, DOH 6-9-89: employment certificate #11341, received 6-29-90, issued 10-4-90.
- \* 62. Greg Alan Rich, DOH 6-15-89: work permit – none received; employment certificate received but returned, not validated.
63. Brenda Inman, DOH 1-12-90: employment certificate #8885, received 7-3-90, issued 9-5-90.
64. Aaron Brenneman, DOH 5-22-90: employment certificate #8884, received 7-3-90, issued 9-5-90.
65. Kevin Jones, DOH 11-11-89: employment certificate received 6-28-90 but returned, not validated.
66. Nathan S. Newitt, DOH 9-9-89: employment certificate – none received.
67. Jason Lee Singer, DOH 4-29-89: employment certificate received 6-28-90 but returned, received second time 8-21-90, issued 8-30-90.
68. Michael G. Clouten, DOH 6-26-89: employment certificate – none received.
69. Kurt M. Smith, DOH 10-27-89: employment certificate – none received.
- \* 70. Aaron T. Talbot, DOH 9-9-89: work permit – none received; employment certificate – none received.
- \* 71. Jason D. Young, DOH 6-1-89: work permit – none received; employment certificate – none received.
- \* 72. Luther Arquette, DOH 2-12-90: work permit – none received; employment certificate – none received.
73. Jeff Ashenfelder, DOH 5-17-90: employment certificate #6241, received 6-22-90, issued 8-2-90.
74. Debbie Dropenski, DOH 9-18-89: employment certificate #6434, received 6-22-90, issued 8-3-90.
75. Tina Guinn McFarland, DOH 5-22-90: employment certificate #6239, received 6-22-90, issued 8-2-90.
76. Bryan Iverson, DOH 1-19-90: employment certificate #13174, received 10-16-90, issued 10-18-90.

77. Alicia Lewis, DOH 3-1-90: employment certificate – none received.
- \* 78. David Lucas, DOH 4-26-89: work permit application received 6-26-90 but returned – none received again; employment certificate – none received.
79. Shannon Mostul, DOH 2-18-90: employment certificate #6228, received 6-22-90, issued 8-2-90.
80. Melissa Sabrowski, DOH 2-10-90: employment certificate #6230, received 6-22-90, issued 8-2-90.
81. Laura Savidge, DOH 5-14-90: employment certificate #6243, received 6-22-90, issued 8-2-90.
- \* 82. Christa Weaver, DOH 4-5-90: work permit #65833, received 7-16-90, issued 7-23-90; employment certificate #11877, received 10-9-90, issued 10-9-90.
- \* 83. Paul Davidson, DOH 12-9-89: work permit received 6-25-90, issued 6-26-90; employment certificate – none received.
84. Brian Day, DOH 11-17-89: employment certificate #6449, received 6-26-90, issued 8-6-90.
85. Jason Getch, DOH 5-13-90: employment certificate #6251, received 6-25-90, issued 8-3-90.
86. Rebecca Hewitt, DOH 7-29-89: employment certificate #6448, received 6-25-90, issued 8-6-90.
- \* 87. Melinda Marler, DOH 7-26-89: work permit #59965, received 6-20-90, issued 6-21-90; employment certificate #6443, received 6-26-90, issued 8-6-90.
88. Holly Moore, DOH 4-9-90: employment certificate #6253, received 6-26-90, issued 8-3-90.
89. Aaron Thyrell, DOH 6-24-89: employment certificate #6447, received 6-25-90, issued 8-6-90.
90. Patrick Williams, DOH 11-10-89: employment certificate #6442, received 6-26-90, issued 8-7-90.
91. Graham R. Christensen, DOH 5-2-90: employment certificate #6355, received 7-13-90, issued 8-3-90.
92. Joseph T. Fleischman, DOH 1-26-90: employment certificate – none received.
- \* 93. Nicole Lynn Franklin, DOH 6-19-89: work permit #62099, received 6-28-90, issued 6-29-90; employment certificate #5913, received 7-13-90, issued 7-31-90.
- \* 94. Bethany Leeanna Hill, DOH 2-24-90: work permit #44952, received 3-7-90, issued 3-13-90; employment certificate #5923, received 6-29-90, issued 7-31-90.
95. Thomas R. Hoskins, DOH 4-27-89: employment certificate #5910, received 7-13-90, issued 7-31-90.
- \* 96. Lucio Jimenez, DOH 3-17-90: work permit – none received; employment certificate – none received.
97. Sarah Jane Keortge, DOH 5-5-90: employment certificate – none received.
98. Laura M. Ledoux, DOH 6-27-89: employment certificate #5907, received 7-13-90, issued 7-31-90.
- \* 99. Robert Sammy Padilla, DOH 2-16-89: work permit #63163, received 7-5-90, issued 7-9-90; employment certificate #5915, received 7-13-90, issued 7-31-90.
- \* 100. Kelly D. Caufield, DOH 7-8-89: work permit – none received; employment certificate – none received.
101. Leslie B. Cecchetti, DOH 9-29-89: employment certificate #5940, received 7-2-90, issued 8-1-90.
- \* 102. Jose Javier Gonzalez, DOH 11-18-89: work permit received 4-17-91, issued 4-19-91; employment certificate – none received.
- \* 103. Charles C. Mayer, DOH 10-2-89: work permit – none received; employment certificate – none received.
104. Darren Anderson, DOH 5-6-89: employment certificate #6451, received 6-27-90, issued 8-6-90.

105. Steve Shawn Harris, DOH 4-28-90: employment certificate #6273, received 6-27-90, issued 8-3-90.
106. Nathen Paul Satter, DOH 4-28-90: employment certificate #6275, received 6-27-90, issued 8-3-90.
107. Kimberly Van Cleave, DOH 10-28-88: employment certificate #6879, received 6-27-90, issued 8-15-90.
108. Erik Vinas, DOH 8-3-89: employment certificate – none received.
109. Lorie Marie Brown, DOH 10-2-89: employment certificate #6404, received 6-13-90,
110. Christopher Gauthier, DOH 5-21-90: employment certificate #6007, received 6-13-90, issued 8-1-90.
111. Dawn Leah George, DOH 6-25-89: employment certificate #6403, received 6-13-90, issued 8-3-90.
112. Daphne Jill Hinrichs, DOH 5-22-90: employment certificate #6904, received 6-13-90, issued 8-16-90.
- \* 113. Jason Dean Howard, DOH 5-24-90: work permit #73886, received 8-23-90, issued 9-13-90; employment certificate #10321, received first time 6-13-90, returned unvalidated, received second time 8-23-90, issued 9-17-90.
114. Brian Keith Hudnall, DOH 5-21-90: employment certificate #6005, received 6-13-90, issued 8-1-90.
115. Daniel John Johnson, DOH 5-21-90: employment certificate #6010, received 6-13-90, issued 8-1-90.
116. Michele C. Lane, DOH 5-21-90: employment certificate #6901, received first time 6-13-90, received second time 8-14-90, issued 8-16-90.
- \* 117. Christine Obershaw, DOH 3-31-90: work permit #70976, received 8-14-90, issued 9-13-90; employment certificate #10322, received first time 6-13-90, returned unvalidated, received second time 8-14-90, issued 9-17-90.
118. Christopher Parksion, DOH 5-21-90: employment certificate #6009, received 6-13-90, issued 8-1-90.
119. Mathew Scheidegger, DOH 3-24-90: employment certificate #6905, received first time 6-13-90, received second time 8-14-90, issued 8-16-90.
120. Cainen Lorne Steele, DOH 1-18-90: employment certificate #6012, received 6-13-90, issued 8-1-90.
121. Bret T. Taylor, DOH 5-22-90: employment certificate #6020, received 6-13-90, issued 8-1-90.
122. Tami Lynn Tombleson, DOH 4-14-90: employment certificate #6906, received 6-13-90, issued 8-16-90.
123. John C. Tumbow, DOH 5-22-90: employment certificate #6022, received 6-13-90, issued 8-1-90.
124. Justin Blaine Walker, DOH 5-19-90: employment certificate #6013, received 6-13-90, issued 8-1-90.
125. Gregory Glenn Watson, DOH 5-22-90: employment certificate #6015, received 6-13-90, issued 8-1-90.
126. Jennifer J. Wright, DOH 5-16-90: employment certificate #6016, received 6-13-90, issued 8-1-90.
127. Keith Jones, DOH 5-7-90: employment certificate #6433, received 6-28-90, issued 8-3-90. The employment certificate application shows "Employment Starting Date 5-7-90." Although the application has written on it "did not work in June til [sic] 6-26-90," I find that he was hired and worked beginning in May 1990.
128. Jason Horn, DOH 5-22-90: employment certificate – none received.
129. Jessica Waldrop, DOH 6-5-90: employment certificate – none received.
- \* 130. Windee Boyce, DOH 3-23-90: work permit – none received; employment certificate – none received.
131. Pattie Marie Davis, DOH 2-26-90: employment certificate #6298, received 6-28-90, issued 8-3-90.

132. Kendra Jeanne Garde, DOH 3-11-90: employment certificate #6455, received 6-28-90, issued 8-6-90.
133. Brett A. Letourneau, DOH 7-5-89: employment certificate – none received.
134. April C. Mills, DOH 10-13-89: employment certificate – none received.
135. Christian A. Doyle, DOH 9-23-89: employment certificate – none received.
136. Shawn M. Feather, DOH 3-17-90: employment certificate #6414, received 7-3-90, issued 8-3-90.
137. Brian Ray Smith, DOH 3-7-90: employment certificate #6073, received 7-3-90, issued 8-1-90.
- \* 138. Daniel Lee Wright, DOH 4-7-90: work permit #66469, received 7-13-90, issued 7-24-90; employment certificate #5552, received 7-13-90, issued 7-25-90.
139. Maria Lynn Bennett, DOH 8-17-89: employment certificate received 7-12-90, issued 8-1-90.
- \* 140. Traisa D. Brockmann, DOH 5-1-90: work permit – none received; employment certificate – none received.
141. Stephan A. Fedosky, DOH 3-19-90: employment certificate received 6-28-90, issued 7-31-90.
142. Kristina D. Flores, DOH 9-5-89: employment certificate received 2-12-91, issued 2-19-91.
143. Joshua Robert Huff, DOH 8-28-90: employment certificate – none received.
144. David R. Johnson, DOH 4-10-90: employment certificate – none received.
145. Todd Allen Kennedy, DOH 4-08-89: employment certificate received 4-17-89, validated 8-16-89.
146. Patrick R. McMurtry, DOH 5-1-90: employment certificate – none received.
147. Donny Eugene Mower, DOH 4-2-90: employment certificate received 4-12-90, issued 6-7-90.
- \* 148. Jeff Scott Nelson, DOH 2-8-90: work permit – none received; employment certificate – none received.
149. Shannon Lee Newton, DOH 1-16-90: employment certificate – none received.
150. Bill Gene Reinhard, DOH 10-9-89: employment certificate received 10-11-89, issued 10-24-89.
151. Jason William Roach, DOH 4-8-89: employment certificate received 4-17-89, validated 8-16-89.
152. Trisha M. Shier, DOH 11-9-89: employment certificate – none received.
153. Dana Gail Skidmore, DOH 4-30-90: employment certificate filled out by Respondent 4-30-90, received 5-3-90, issued 8-23-90.
154. Zachariah Steigman, DOH 5-1-90: employment certificate received 6-29-90, validated 8-3-90.
155. Monty Sutherland, DOH 4-11-90: employment certificate – none received.
156. Jason Brent Thomas, DOH 4-30-89: employment certificate – none received.
157. Brandon Dean Tilton, DOH 4-2-90: employment certificate received 4-30-90, issued 6-7-90.
158. Eric Keith Vitacco, DOH 5-15-90: employment certificate – none received.
159. Steven W. Zingleman, DOH 9-18-89: employment certificate – none received.
160. Curtis Cooley, DOH 5-17-90: employment certificate #6195 filled out by Respondent 6-25-90, received 6-29-90, issued 8-2-90.
161. Janie Emerick, DOH 4-30-90: employment certificate #6193 filled out by Respondent 6-25-90, received 6-29-90, issued 8-2-90.
- \* 162. Bob Gibson, DOH 5-24-90: work permit #69425, received 8-13-90, issued 8-15-90; employment certificate #7512 received 6-29-90, issued 8-21-90.
- \* 163. Travis L. Driskel, DOH 7-5-90: work permit application received 8-13-90,

- returned unissued; employment certificate filled out by Respondent 7-6-90, but not issued.
164. Shelly Lyons, DOH 3-23-90: employment certificate #6197 filled out by Respondent 6-25-90, received 6-29-90, issued 8-2-90.
165. Joy McGee, DOH 2-13-90: employment certificate #6424 filled out by Respondent 6-25-90, received 6-29-90, issued 8-3-90.
166. Kris Smith, DOH 5-16-90: employment certificate #6423 filled out by Respondent 6-25-90, received 6-29-90, issued 8-3-90.
- \* 167. Chris Thomas, DOH 11-7-89: work permit – none received; employment certificate filled out by Respondent 6-25-90, but not issued.
- \* 168. David Wimberly or Wimberly, DOH 6-3-89: work permit – none received; employment certificate filled out by Respondent 6-25-90, but not issued.
169. Erin Storey, DOH 3-14-90: employment certificate #6200 filled out by Respondent 6-25-90, received 6-29-90, issued 8-2-90.
170. Eric Eidam, DOH 5-15-90: employment certificate #6196 filled out by Respondent 6-25-90, received 6-29-90, issued 8-2-90.
171. Brian Stewart, DOH 6-21-90: employment certificate #6199 filled out by Respondent 6-25-90, received 6-29-90, issued 8-2-90.
172. Michelle Davis, DOH 6-10-90: employment certificate #6266 filled out by Respondent 6-23-90, received 6-27-90, issued 8-3-90.
- \* 173. Manuel Cisneros, DOH 5-2-89: work permit – none received; employment certificate filled out by Respondent 6-26-90, but not issued.
174. Christopher S. Bennett, DOH 12-6-88: employment certificate filled out by Respondent 6-23-90, received 6-27-90.
175. Raymond Hoff Jr., DOH 9-13-89: employment certificate #6427 filled out by Respondent 6-23-90, received 6-27-90, issued 8-3-90.
176. Shane Jones, DOH 12-23-89: employment certificate #6425 filled out by Respondent 6-25-90, received 6-27-90, issued 8-3-90.
177. Ray Ward (Curtis Ray), DOH 11-29-89: employment certificate #6429 filled out by Respondent 6-23-90, received 6-27-90, issued 8-3-90.
178. James Gehrig, DOH 11-18-89: employment certificate #6428 filled out by Respondent 6-23-90, received 6-27-90, issued 8-3-90.
179. Sheldon Ayres, DOH 3-18-89: employment certificate #6426 filled out by Respondent 6-25-90, received 6-27-90, issued 8-3-90.
180. Juan Pinedo, DOH 11-12-88: employment certificate filled out by Respondent 6-25-90, received 6-27-90.
181. Travis R. Parker, DOH 2-18-90: employment certificate #6268 filled out by Respondent 6-25-90, received 6-27-90, issued 8-3-90.
182. Jeffery B. Phelps, DOH 4-20-90: employment certificate #4368 received 5-7-90, issued 6-5-90.
183. Angela Marie Brown, DOH 7-15-90: employment certificate – none received.
184. Timothy Craig Fieken, DOH 4-20-90: employment certificate #6208 received 6-25-90, issued 8-2-90.
185. Jennifer Anne Lewis, DOH 6-18-90: employment certificate #4856 filled out by Respondent 6-22-90, received 6-25-90, issued 7-10-90.
186. Loren J. McClaskey, DOH 11-7-88: employment certificate – none received.
187. Ben Joseph Monfils, DOH 8-16-89: employment certificate – none received.
188. Mark Jay Poochke, DOH 7-10-90: employment certificate – none received.

189. Bob William Roberts, DOH 7-10-90: employment certificate – none received.
- \* 190. Nathan A. Spears, DOH 10-1-89: work permit #64615, received 6-25-90, issued 7-13-90; employment certificate sent 6-21-90, not issued.
191. Brandon Craig, DOH 2-22-90: employment certificate #6892 received 8-6-90, issued 8-16-90.
192. Jeremy Hendon, DOH 12-1-89: employment certificate #6891 received 8-6-90, issued 8-16-90.
- \* 193. Chris Bechiel, DOH 9-17-89: work permit – none received; employment certificate – none received.
194. Brian Acevedo, DOH 6-11-90: employment certificate #6893 received 8-6-90, issued 8-16-90.
- \* 195. Nate Sunderman, DOH 2-12-90: work permit #70210, received 8-17-90, issued 8-21-90; employment certificate – none received.
- \* 196. Christopher Berg, DOH 3-2-90: work permit – none received; employment certificate – none received.
- \* 197. Jake Heitz, DOH 6-7-89: work permit – none received; employment certificate – none received.
198. Brooke McKinney, DOH 12-20-89: employment certificate #6897 received 8-6-90, issued 8-16-90.
- \* 199. Michael Moffit, DOH 6-4-90: work permit #63876, received 6-28-90, issued 7-10-90; employment certificate #6895 received 8-6-90, issued 8-16-90.
200. Steve Pierce Rainey, DOH 8-25-89: employment certificate – none received.
- \* 201. Jason Pokomey, DOH 11-26-89: work permit – none received; employment certificate – none received.
- \* 202. Christy Wing, DOH 9-6-89: work permit #64817, received 7-6-90, issued 7-16-90; employment certificate #6897 received 8-6-90, issued 8-16-90.
203. Shane Holden, DOH 4-28-90: employment certificate #5932 filled out by

- Respondent 6-23-90, received 6-27-90, issued 8-1-90.
204. Tom Sissel Kay, DOH 5-25-90: employment certificate #6343 filled out by Respondent 6-23-90, received 6-27-90, issued 8-3-90.
- \* 205. Jeremy Griffith, DOH 5-26-90: work permit #71112, received 8-27-90, issued 9-12-90; employment certificate #9927 received 8-16-90, issued 9-13-90.
206. Chandra Turner, DOH 6-20-90: employment certificate filled out by Respondent 6-23-90, received 6-27-90, issued 8-3-90.
207. Annie Winegar, DOH 7-25-90 or 7-29-90: employment certificate #6907 filled out by Respondent 8-7-90, received 8-10-90, issued 8-16-90.
- 172) The US Postal Service has established expectations for service performance. These expectations describe the time for service between a point of origin and a point of destination. The Postal Service has also established goals, measured as a percentage, for attaining their expectations. "Overnight" service means that, if a first-class piece of mail is put in a Post Office mailbox and picked up by 5 p.m. on Monday, it would reach its destination on Tuesday. "Two Day Service" means that, if a first-class piece of mail is put in a Post Office mailbox and picked up by 5 p.m. on Monday, it would reach its destination on Wednesday. "Three Day Service" means that, if a first-class piece of mail is put in a Post Office mailbox and picked up by 5 p.m. on Monday, it would reach its destination on Thursday. The Post Office stopped processing mail at the point of origin on Sundays about two years before hearing; thus, Sundays were not counted in measuring the expectations. The

Postal Service's expectation is that, from the following points of origin, a first-class piece of mail would reach Portland Zip Code 972xx by overnight service: Beaverton, Corvallis, Gresham, Hillsboro, Lake Grove, Milwaukie, Portland, Salem, and The Dalles. The Postal Service's expectation is that, from the following points of origin, a first-class piece of mail would reach Portland Zip Code 972xx by two-day service: Baker City, Bend, Eugene, Grants Pass, Klamath Falls, La Grande, Medford, North Bend, Pendleton, Roseburg, and Springfield. The expectations above had not changed for at least five years. The Postal Service measured the flow of some of the mail to check its performance. For overnight mail, the Postal Service attained its expectation, on average, 95 percent of the time for stamped mail, and 93 to 94 percent of the time for metered mail. For two-day mail, the Postal Service attained its expectation, on average, 91 to 92 percent of the time. Of the mail not delivered within the expected time (that is, for example, the 5 to 10 percent of mail not delivered overnight or in two days), approximately 50 percent was delivered the next day. As each additional day passed the percentage of mail reaching its destination increased until by the fifth additional day 100 percent of the measured mail had reached its destination.

#### Operation of the Work Permit Unit

173) The major work of the Work Permit Unit was to issue work permits and employment certificates.

174) In 1988, Shirley Barshaw, Florence Caisse, Debbie Brunner, one temporary worker, and one part-time

student helper were the only staff who answered the phone in the Work Permit Unit.

175) During the period 1988 to the time of hearing, the following persons worked as permanent staff in the Work Permit Unit: Shirley Barshaw, Florence Caisse, Debbie Brunner, Juley Robertson (formerly Bloorgarden), and Mary Riggs. At the time of hearing, Barshaw had worked in the Unit for 4½ years, Caisse for five years, Brunner for two years, and Robertson for two years. Riggs worked in the unit for around four months in 1990 before she retired. In addition, during the period 1988 to the time of hearing the unit employed Mark Cramer, Keith Hart (phonetic), Ray Makofski (phonetic), Derrick Webb, Kharmie Whitmore (phonetic), Steve (last name unknown), Angie (last name unknown), and two others as temporary staff. The temporary staff came from a temporary employment company. Some worked for only a couple of days. In addition, the unit used student help through the Private Industry Council (PIC); it used two students in 1988, two in 1989, and none in 1990. Temporary employees answered the unit's phones.

176) Barshaw supervised the receptionists, who answered questions from the public concerning many wage and hours issues. In 1988, the receptionists had a list of 20 commonly asked questions that they could answer. The receptionists answered questions from minors and parents, but referred questions from employers to the Technical Assistance Unit of the Agency. After the Work Permit Unit moved from the Agency's Salem office to the Portland office in the early spring

of 1988, the Portland receptionists no longer answered child labor law questions. Those questions were referred to the Work Permit Unit.

177) When compliance specialists assisted the Work Permit Unit in 1988, they did not work in the same area and did not answer the unit's phones.

178) Barshaw never heard anyone on her staff tell an employer that employment certificates needed to be filed only for newly hired minors. She did not believe anyone on her staff, including the temporaries, ever told an employer that the Work Permit Unit did not have the staff to process employment certificates. She never heard one of her staff give out incorrect information about the law. Temporary employees did not give out information about the law.

179) According to Tiffany, there were two types of employment certificates: (1) the employment certificate issued to minors, known as a work permit, and (2) the employment certificate issued to employers. The purpose of the work permit was to identify the minor and to indicate the minor's date of birth. The purpose of the employment certificate issued to employers was to ensure that the minor's employment was permitted, consistent with the Wage and Hour Commission's rules. It indicated the minor's identity, age, duties, hours of work, and other information necessary for the Agency to determine lawful employment.

180) The Work Permit Unit sent blank employment certificates upon request to Employment Division offices, high schools, and post offices.

181) A blanket employment certificate could be used by a public employer or the cannery industry as a means of hiring 10 or more minors ages 16 and 17 for a short period of time (up to 90 days), and by other employers wishing to employ 10 or more minors for a period of up to 10 days.

182) In 1988, employment certificate applications were two-page (one pink and one yellow), carbonless paper forms. When the Work Permit Unit received an employment certificate application, it was date-stamped and reviewed for hazardous orders, that is, hazardous or prohibited job duties. It was also reviewed for hours of work, wages, and the employer's and employee's data. Normally, if required information on the form was incomplete, it was returned to the employer with an information sheet showing missing information. If information required clarification, the unit staff could call the employer for more information or to give the employer an opportunity to modify the job if possible. If adjustments to the application could not be made, the employment certificate was denied, the reason was typed on the form, and the form was returned to the employer. Work Permit Unit staff checked for a work permit on file for the subject employee. If the minor did not have a work permit on file, the Agency returned the employment certificate application, not validated, to the employer, along with a work permit application for the minor. If information on the form was complete and valid, the pink copy was stamped "validated" and returned to the employer. The unit kept the yellow copy. In April 1989, the unit also began putting employment

certificate information into a computer database. However, due to the unit's workload, Paul Tiffany and Christie Hammond decided that the unit would revert to the precomputer method of handling employment certificates. Copies of validated employment certificates were kept on file for two years.

183) At the time of hearing, the Agency had records of work permit applications received since January 1, 1984, which went back to birth year 1970. Work permit applications received during the period January 1, 1984, through December 31, 1988, (that is, birth years 1970 to 1974) were on microfilm; hard copies of the applications received in 1984 through 1988 were destroyed. Applications were stored on microfilm for only work permits that were issued. No microfilm record existed for minors born in 1974 whose last names began with "P" or "Q" and who applied for a work permit in 1988. (At the Agency's request, the charging document was amended to delete work permit charges concerning any minors born in 1974 whose last names began with "P" or "Q") The microfilm records for J. Phelps to J. Picard, in birth years 1973 and 1974, were listed between T. Peters and V. Peters. A note on the front of the microfilm box read: "J. Phelps to J. Picard 1973-on, film number 68, after T. Peters and before V. Peters." At the time of hearing, the Work Permit Unit had been using the microfilm files for three years and had discovered no other irregularities in them. Before 1989, work permits were typed manually and were not numbered.

184) On April 1, 1989, the Work Permit Unit got a computer for

processing applications and for its records. The unit entered information from all work permit applications received from January 1, 1989, into the computer database. From January 1, 1989, to the time of hearing, records of issued work permits were kept in the computer. Once information was entered into the computer, work permits were printed the following day from the computer. This procedure was being followed at the time of hearing. Computer-issued work permits each had a number. Work permit applications were kept for at least one year after information from each application was put into the computer database; for example, at the end of 1990, all applications received in 1989 were destroyed. Hard copies of work permit applications received in 1990 and 1991 existed at the time of hearing. Records showed that some minors who had been issued a work permit before 1989 also had a work permit number issued by the computer. The computer-issued work permit number reflected that a duplicate (replacement) work permit had been issued, or the minor applied for and was issued a work permit more than once, or an employment certificate was issued by the computer for that minor and a number was assigned by the computer to the pre-1989 work permit.

185) In June 1989, Juley Robertson began working in the Work Permit Unit. She was primarily responsible for receiving, processing, and issuing work permits. She replaced Debbie Brunner. From the end of 1989 through 1991, Florence Caisse was primarily responsible for receiving, processing, and issuing employment

certificates. Robertson occasionally helped Caisse with the employment certificates. Shirley Barshaw had primary responsibility for handling work permit applications from minors under age 14 and blanket employment certificate applications. Robertson was primarily responsible for entering work permit information into the unit's computer, although temporary employees did it occasionally. Work permits were proofread against the application before the permits were issued. When information was retrieved from the computer, it could be retrieved by entering the minor's name, birthdate, or social security number. In the summer there was usually a backlog of work permit applications awaiting processing. Once an application was entered into the computer, it was issued the next business day. Applications came in by mail and by "walk-ins," that is, minors that come to the counter at the Work Permit Unit. Over-the-counter applications were processed while the applicant waited. Unit staff kept a tally sheet of work permit and employment certificate applications received and issued each day. Robertson did not check employment certificates for whether they were filed within 48 hours after the minor was hired: "It's never been our procedure to do so."

186) During August 1989, four compliance specialists assisted the Work Permit Unit process employment certificates to reduce a backlog. Two temporary employees entered data into the computer.

187) On January 1, 1990, the Work Permit Unit again began issuing employment certificates by computer. Under that procedure, which was

being followed at the time of hearing, the employer filled out and submitted an employment certificate application, which was a one-page document. The Agency reviewed it and, if validated, the computer printed out an employment certificate document, which was mailed to the employer the next day. The Agency kept the application, which was pink. The Agency had employment certificate records in hard copy back to 1988. All of Respondent's employment certificate applications were put into the computer database, including those received in 1989. All of the employment certificate records from some other employers had been put into the computer, where additional work had been done concerning those employers' records. During most times material, no information was put into the computer when an employment certificate application was denied and returned to the employer. At some time, some information was put into the computer from denied applications. Before the computer, only validated employment certificates were kept in the records.

188) In late 1990, some information from employment certificate applications was put into the computer by temporary staff. That staff also entered work permit information into the computer.

189) The Work Permit Unit staff processed work permit applications and employment certificate applications at the same time; that is, some staff processed work permits and some reviewed employment certificates. Reviewing all employment certificate applications was given first priority because of the hazardous

duties restrictions for minors. The unit attempted to review employment certificates for completeness and hazardous duties as quickly as possible after they were received. Normally, employment certificate applications were checked for hazardous duties on the day after they were received in that unit. Sometimes, as when someone was absent from the unit, it could be two to three days before the hazardous order check would be made. If an application indicated that a hazardous job was being performed, that application would be processed immediately by telephoning the employer. If the hazardous job was the minor's only job, then the employment certificate was denied; if the employer could change the job, then an employment certificate was issued based upon the changed duties. If a work permit application and an employment certificate application came in together, they were given priority and processed together, before other work permit applications. Processing work permit applications was given next priority. Processing employment certificate applications that did not indicate any hazardous duties was given next priority. If the employment certificate application was complete, no hazardous duties were listed, and the minor had a work permit, then a computer-printed employment certificate was mailed out.

190) Employment certificate applications were date-stamped on the day they were received. They were placed in batches with the other applications that came in on the same day. After an employment certificate application was checked for hazardous orders, if there was a backlog, the application

was set aside in the order received until the unit could get to it. The Work Permit Unit had a backlog of work permit applications and employment certificate applications awaiting processing during its busy season, which was during the spring and summer. The backlog of employment certificate applications could be up to eight months. After all information from the application was entered into the computer, a valid employment certificate was issued. The Work Permit Unit accepted employment certificates that came in more than 48 hours after hire. If minimum wage or maximum hour information was missing or was wrong on the application, correct information was included on the validated employment certificate. The Work Permit Unit did not specially check work times (day or night) on employment certificates for 16- and 17-year-old minors, because they could work at any time of the day or night. The Work Permit Unit accepted such employment certificates when employers wrote in "varies" for the hours of work. Hammond was "comfortable" with that. If the minor was 14 or 15, and the employer wrote "varies" for hours, the unit would put restrictions regarding hours of work on the employment certificate. When time allowed, during slow times of the year, the Work Permit Unit would call an employer regarding duties on an employment certificate. Sometimes employers called the Work Permit Unit, and information about duties on an employment certificate was obtained then.

191) The Work Permit Unit had a "comfort level" with the grocery industry and would validate employment

certificates on which "varies" was written for the duties of the job.

192) Fred Meyer usually put its post office box address in Portland as the employer's address on employment certificates for minors employed around the state. Fred Meyer often wrote "parcel" or "courtesy clerk" for the duties of some minor employees. Fred Meyer personnel told Caisse that they could specifically identify any one employee's specific duties and location upon request. Fred Meyer provided Caisse with a description of the duties of a "parcel" or "courtesy clerk." Barshaw did not believe that "parcels" or "courtesy clerks" were using cans-mackers or paper balers, or drove hysters. Tiffany thought the terms "parcel" or "courtesy clerk" were satisfactory if the staff in the Work Permit Unit were satisfied with them. Fred Meyer did not always file its employment certificates within 48 hours after hiring minors.

193) When an employment certificate was issued with restrictions, there was no follow-up to determine whether the employer was complying with those restrictions.

194) Barshaw did not consider less than three weeks of unprocessed employment certificate or work permit applications to be a backlog; more than three weeks was considered a backlog. "Administration may view that differently." Three weeks was measured from date of receipt of the employment certificates. A backlog was caused by a lack of resources. When temporary employees were helping, work was completed faster; when a staff member was ill, work was completed slower.

195) In July 1990, the turnaround time for processing work permit applications was two days and 15 weeks for employment certificates. In August 1990, the turnaround time was two days for work permits and 14 weeks for employment certificates. In November 1990, it was 16 weeks for employment certificates. In December 1990, the turnaround time for work permits was 24 hours, and it was 16 weeks for employment certificates. In January 1991, the turnaround time for work permits was 24 hours, and the backlog of employment certificates had been eliminated. In February 1991, the turnaround time for work permits was 24 hours, and six days for employment certificates. In March 1991, the turnaround time for work permits was five days, and eight days for employment certificates.

196) In the summer of 1990, there was a backlog in the Work Permit Unit. On one occasion, employment certificates were sent to the Agency's Eugene and Bend offices for review for hazardous orders by compliance specialists. John Lessel took an envelope box full of employment certificate applications to Eugene. The review took place over a few days. As they were reviewed, employment certificates with any problems were sent by state shuttle bus to Portland the next day. No log was kept of the employment certificates sent from and returned to Portland.

197) Sometimes when an employer had sent in an employment certificate application that got placed in the backlog, the employer sent in another application before the first one got processed. As a result, two

employment certificates were issued concerning the same employee.

198) If a minor had a job lined up but did not have a work permit, and if he or she called the Agency, the Agency would instruct the minor how to get a work permit immediately, by submitting the work permit application with the employment certificate application. If an employer submitted an application for a work permit, with proof of age, along with the application for an employment certificate, the employer could employ the minor and the Agency would not find a violation. Employers regularly called the Agency with questions about that, and the Agency gave that information.

199) If an employment certificate came in for a minor that did not have a work permit, that employment certificate might be placed in the backlog of applications. The minor could be working before the employment certificate was processed, invalidated, and mailed back to the employer.

200) An employment certificate application was denied if the minor did not have a work permit. A minor could not be legally employed without a work permit. The staff checked for the work permit at the time they processed the employment certificate. Normally, the staff checked for a work permit in the computer first and, if one was not there, they checked in the microfilm.

201) When the Agency received a work permit application, it must have had (among other information such as an address) a parent's signature, the minor's social security number, and a proof of age document. If the application was complete, the Work Permit Unit issued a computer-printed work

permit. The date of issue was the date the unit mailed out the permit.

202) The Work Permit Unit did not process employment certificate applications for employees who were 18 or older when hired. The unit processed applications for employees who were under 18 when hired, but who had turned 18 before the employment certificate was processed. The unit did not process work permit applications for persons age 18 or older.

203) Barshaw went to the Motor Vehicles Division and learned about their safety precautions concerning driver's licenses or learner's permits. The Wage and Hour Commission agreed to add driver's licenses or learner's permits to the list of acceptable documents that could be used as proof of age for work permits.

204) When the Work Permit Unit denied an employment certificate due to a hazardous order violation, it was sent back to the employer with instructions to terminate the employment of the minor. The employer was instructed to return the employment certificate to the Work Permit Unit with the termination date on it. Employers could submit a new employment certificate for the same minor showing duties that were not hazardous.

205) Employers were supposed to return their employment certificates to the Agency upon the termination of the respective minors. The Agency did not pursue violations of that requirement. Paul Tiffany made decisions about the Wage and Hour Division's enforcement priorities.

206) In August 1989, the Work Permit Unit issued an employment

certificate for a minor employed by Wrights Thriftway. Among the minor's duties was "uses paper baler." A restriction should have been placed on the employment certificate. Florence Caisse would have called the employer to advise it that the minor must stop performing that duty because it was hazardous.

207) Caisse always called the employer when she denied an employment certificate due to a hazardous duty.

208) When an employment certificate application indicated "bakery work," the employment certificate should have been issued with a restriction regarding operating certain power-driven bakery machines. The Agency issued an employment certificate on June 27, 1990, to Cutsworth Thriftway, on which the duties listed included "bakery work." No restriction was entered on the certificate. In the summer of 1990, Caisse, who normally processed employment certificates, was ill and missed work. Juley Robertson was filling in for Caisse and was in training; she might have processed this employment certificate.

209) Minors were prohibited from using scrap-paper balers. The Agency issued an employment certificate to Bi-Mart, which included use of a "bailer" in the minor's duties. A restriction on the use of balers should have been printed on the employment certificate. Upon learning of this at hearing, Barshaw said she would contact Bi-Mart to advise them of the restriction. The Work Permit Unit staff did not follow up by contacting the employer on each issued employment certificate with questionable duties found during hearing.

210) The Work Permit Unit did not audit employers for work permit or employment certificate compliance and was not involved in the enforcement activities of the Wage and Hour Division. The Work Permit Unit was not required to make referrals for enforcement based on noncompliance with requirements for employment certificates or work permits. The Work Permit Unit did not enforce the rule requiring employers to file employment certificates within 48 hours of hiring or permitting a minor to work. The unit did not make any record of, or report to anyone, an employment certificate that was filed more than 48 hours after a minor was hired.

211) The Technical Assistance Unit of the Agency was set up to inform employers about the requirements of the laws and rules the Agency enforced, including laws regulating the employment of minors. The Work Permit Unit responded to inquiries about child labor law and rules upon request.

212) The Agency regularly received a computer printout from the Oregon Department of Insurance and Finance (DIF) showing workers' compensation claimants under age 18. Barshaw reviewed that list and then requested copies of "801" reports on those minors where a hazardous duty might have been involved in the injury or the employment was somehow unlawful. Barshaw then reviewed those reports, and those that needed follow-up were referred to the administration of the Wage and Hour Division. The Work Permit Unit would check for work permits and employment certificates

for the minors named in the "801" reports referred to administration.

213) In January 1991, the Wage and Hour Commission was considering changes in the system of issuing work permits and employment certificates. They were considering proposals made by a Work Permit Unit workgroup to develop a more efficient method of operating, taking into account financing, workload, and maintaining safeguards for minors. Due to insufficient staff, equipment, and space, the unit had been unable to process employment certificates and work permits as fast as the Agency wanted. Commissioner Roberts postponed taking any action at that time on a proposal that called for eliminating work permits and using annual blanket employment certificates. The plan would have required statute, rule, and procedure changes. The Commissioner had qualms about giving up issuing individual employment certificates and believed the certificates should be reviewed as they then were. The Commissioner felt the current process was within the mandate of the law, ORS 653.307(1), and that the Agency should maintain the health and safety concerns for minors. The Commissioner had expressed her opinions about these issues before the case concerning Respondent arose. The Commissioner had a task force looking into child labor issues and wanted more information from it. Barshaw presented the workgroup's proposals to that task force and to the Wage and Hour Commission.

214) On March 13, 1991, the Agency issued a short range workplan for the Work Permit Unit for its busy

season, April through August 1991. The purpose of the plan was to inform the Commissioner's office of the capabilities of the Work Permit Unit to manage the workload. The unit projected a backlog of employment certificate applications.

215) Beginning in March 1991, some Agency field offices, including the Eugene office, were able to check for employment certificates and work permits by computer. Those offices had "read only" capabilities, that is, staff could not alter the information in the computer, they could only view the information. Beginning in April 1991, the Agency's field offices in Salem, Eugene, and Medford were able to enter work permit information into the their field computers. Work permit data entered in the field would be printed out the next day from the Work Permit Unit printer in the Portland office. Other field offices could issue temporary work permits to minors.

216) A sampling of employment certificates applications received by the Work Permit Unit on five days between January and May 1991 showed that 45 percent were filled out and signed by the employer (completed) within two days of the date the minor was hired, 14.3 percent were completed between 3 and 30 days after the date of hire, 15 percent were completed 30 days or more after the date of hire, and 25.7 percent did not contain information specific enough to permit a calculation.

217) During parts of the spring and summer of 1990, Florence Caisse in the Work Permit Unit was ill following a stroke. While she was absent, employment certificates were not checked for hazardous orders on a daily basis.

Julye (Bloomgarden) Robertson helped cover for Caisse during her absence. When Caisse returned to work after her illness, she was not able to do her tasks as quickly as before. In 1990, Barshaw had surgery, which caused her to miss some work in the late summer.

218) At Barshaw's direction, the staff of the Work Permit Unit pulled and examined all hard-copy employment certificates issued to Respondent and placed them in a box. Before she had her stroke, Caisse looked through all of the Work Permit Unit's files, pulled out all employment certificates filed by Respondent, and put them in the box. She never double-checked her work. Respondent's employment certificates that were placed in the box were processed more quickly than normal. The information from Respondent's certificates was put into the computer.

219) At the same time that the staff segregated Respondent's employment certificates, the Work Permit Unit was segregating employment certificates filed by other employers, such as Meier & Frank and Abby's Pizza. Investigations were being conducted on those companies. Compliance specialists had requested information about the employment certificates filed by those companies. Compliance specialists would ask the Work Permit Unit to check its files when the specialists were investigating a case where employment certificates or work permits might be a problem.

220) Wendi Teague, a former employee of Respondent's attorneys, searched the Agency's records, and found Respondent's employment certificates stored in boxes and file

cabinets. Some of Respondent's employment certificates were not segregated in boxes with the other Respondent employment certificates. They were in batches of employment certificates received in 1990 or later. She found two employment certificates in batches from June 1989.

221) The Work Permit Unit may not have pulled Grocery Warehouse employment certificates and put them in the box with Respondent's employment certificates, because the staff did not know that Grocery Warehouse was a business name for Respondent in the Klamath Falls area.

222) In March and April 1991, Shirley Barshaw checked for work permits and employment certificates for minors employed by Respondent in Baker City, Grants Pass, Klamath Falls, La Grand, Medford, Pendleton, The Dalles, and at stores on Culley Boulevard in Portland and the Halsey store in Portland. On April 3, 1991, Barshaw sent Assistant Attorney General Robb Haskins a copy of those lists and the six exhibits from the charging document with the names of Respondent's minor employees and copies of work permit applications (from microfilm). On the lists of names, Barshaw had written in red ink work permit numbers, employment certificate numbers, and the dates of receipt and issuance for both documents. She also indicated when a listed minor did not have a work permit and/or an employment certificate. She attached copies from microfilm of the work permit applications for those minors who had a permit, but no work permit number on file in the Work Permit Unit's computer. Also on the list of names were black

ink entries, which were from reviews of the Agency's records concerning the minors and Respondent that had been completed after June 11, 1990. Those reviews were made pursuant to a request to check for validated employment certificates for the minors listed in the exhibits; for those reviews, unit staff did not look for a minor's work permit if there was no employment certificate on file. The unit's computer was checked for validated employment certificates for the listed minors. If an employment certificate application had been received by the Work Permit Unit but, due to a backlog of applications, had not yet been processed, the earlier review showed that no employment certificate had been issued. Other reviews, also shown in black ink, showed later processed applications.

223) Barshaw gave Gilford the list, which is marked A-2, with Barshaw's black writing on it in September 1990.

224) Barshaw's checks in March and April 1991 of the information in the Work Permit Unit's files and computer regarding this case were more accurate than earlier checks because more information was then in the files and computer.

225) Barshaw compared the charging document against a list of employees produced by Respondent and found 15 names that the Agency charged that did not show up on Respondent's list.

226) Barshaw's review of the Agency's records for the minors listed in the charging document and the minors listed on a list provided by Respondent was not done for the purpose of creating the amended charging document. She did not know

why the charging document was amended.

227) At the Agency's attorney's request, Barshaw checked for work permits in the Work Permit Unit's microfilm for each minor listed in the amended charging document that had an asterisk by his or her name. When she found no work permit in the microfilm for a minor, she then checked the computer for a work permit. In some cases, for example when there was a question about the correct spelling of a minor's name, Barshaw then double checked the microfilm after she had checked the computer. Barshaw completed the check on May 3, 1991.

#### Other Enforcement Activities

228) The Wage and Hour Division enforced several sets of statutes and rules, including the wage collection laws, the minimum wage and overtime laws, the farm labor contractor and farm labor camp licensing laws, child labor laws, prevailing wage rate laws, private employment agency licensing laws, consumer electronic entertainment equipment service (CEES) dealer licensing laws, and certified shorthand reporter licensing laws. During times material, the division employed at most 20 compliance specialists statewide to enforce those laws. The compliance specialists' primary duty was to investigate for violations of and to gain compliance with those laws. With the exception of minimum wage audits, all investigations resulted from a complaint or a wage claim. Virtually every investigation revealed some kind of violation. Few cases went to a contested case hearing.

229) When a compliance specialist completed an investigation, he/she

made a recommendation, for example, for legal action, for civil penalties, or to close the case. The recommendation was made to management of the Wage and Hour Division.

230) For first-time violations that did not involve serious or hazardous situations, compliance specialists were authorized to recommend closure of cases when they achieved compliance, or got an assurance of future compliance, with the laws. Generally, if compliance was achieved, or if an employer agreed to comply, then the compliance specialist did not recommend civil penalties or further action. In 90 percent of the cases, compliance was achieved through education and persuasion by the compliance specialist. Due to the insufficient resources of the Agency, compliance specialists were not instructed to follow up on assurances of compliance. When a compliance specialist was unable to bring a person into compliance, the case was referred to the compliance specialist supervisor, who attempted to bring the person into compliance. The supervisor also tried to gain compliance through persuasion and education. The supervisor could get assistance from the deputy administrator or the case presenter. Most of the remaining 10 percent of cases were resolved by the supervisor. Generally, if an employer was in violation but brought itself into compliance, no civil penalties were assessed. Supervisors referred unresolved cases to the deputy administrator with a recommendation to either refer the case to the Department of Justice or to the administrative hearing process, whichever was appropriate, for further action.

The deputy administrator referred about half of the cases back to the compliance specialist supervisor for clarification, follow-up, or with direction to try a different approach. The remaining cases were referred to the Department of Justice or to the administrative hearings process for further action. If the Agency discovered a later repeat violation that was willful (that is, for example, it was not a subsequent violation involving an uninformed new manager), then the Agency could begin a civil penalty process or take some action against the offender's license. The investigation of Respondent was consistent with the Wage and Hour Division's enforcement policy. With the exception of Respondent, Lessel had never encountered an employer that agreed to comply only on its conditions.

231) For certain complaints regarding working conditions or hours worked, the Agency sent form letters to the employer advising the employer about the law and penalties. When appropriate, the Agency sent informational brochures and referred the employer to the Agency's Technical Assistance Unit.

232) Generally, in an investigation involving a large corporate employer, the employer's response from its central office where decisions were made could trigger an Agency concern about the employer's operation statewide. If an investigation indicated that a problem was a "local issue" (for example, a violation was discovered at only one of several stores), the Agency did not extend the investigation further. It was discretionary on the part of the

compliance specialist and supervisor whether to extend an investigation.

233) Generally, when compliance specialists found a violation of the law by an employer at one particular store or location, they checked the Agency's closed files for earlier violations at that same store or location. They did not check for open files. If earlier violations were discovered, the compliance specialist might handle the current investigation differently.

234) Compliance specialists and supervisors handled angry and hostile employers every week. They did not treat angry or hostile employers any differently, in terms of applying the law, than other employers. They treated employers impartially regardless of whether they were angry or hostile. They did not retaliate, nor did they back off enforcing the law, against employers who were angry or abusive.

235) The Agency's Field Operations Manual for Child Labor did not contain a written procedure for investigations.

236) The visits that some compliance specialists made at Respondent's stores were different than investigations they normally made, because the case was not assigned to them. On a normal child labor compliance contact, the compliance specialist would first review the child labor statutes, rules, policies, and interpretations in the Agency's Field Operations Manual (FOM). The compliance specialist would request an appointment with the store manager or the personnel officer. During the visit, after examining the store's records and interviewing that person about child labor laws and other laws that the Agency enforced,

the compliance specialist would give the manager or personnel officer a Minimum Wage poster, brochures, employment certificates, and work permit forms. The compliance specialist would carry a copy of the child labor administrative rules. The compliance specialist would explain how to complete and file the forms, and explain that the employer needed to complete the forms immediately in order to come into compliance. The majority of employers, "98 percent," "are anxious and willing to comply with that requirement immediately." If a violation involved a minor employee working without a work permit, then the compliance specialist would instruct the employer that the employment certificate and work permit forms could be sent in together, along with proof of age documents for the minor. Normally the forms were completed and mailed to the Agency's Work Permit Unit in the Portland office, and employers assured the compliance specialist that they would do that. In 1989, the practice was not to get copies of the completed employment certificates from the Work Permit Unit, unless there was a problem, such as a major child labor violation, a hazardous order violation, or a repeat violator. If it was a first-time contact with the employer, and the compliance specialist got an assurance of future compliance, the compliance specialist would accept that. At the time of hearing, the practice was to require the employer to mail the employment certificate forms directly to the compliance specialist or to check with the Work Permit Unit to find out if the unit had received the forms. Generally, compliance specialists gave employers 10 days to 2 weeks to come into compliance; some gave

larger employers more time to come into compliance than small employers. The goal was to obtain compliance. When the Agency received assurances of future compliance, it would close the case.

237) At the time a compliance specialist visited an employer's store, if the employer had employment certificates for all of its minor employees, the compliance specialist considered the employer to be in compliance at that time, even if the employment certificates had not been filed within 48 hours of hiring the respective minors. If, on the date of an Agency field visit, an employer filled out an employment certificate application for a minor employed for more than 48 hours, then, although the employer had been in violation of the law, it was in compliance on that day. When the compliance specialist found in the employer's files only the white portion of an employment certificate application, which was retained by the employer when the application was filed, but found no validated certificate, the compliance specialist took the employer's word that the employment certificate was filed.

238) If an employer called any of the Agency's offices for employment certificate forms, the Agency would send those forms to the employer.

239) The Agency and the US Department of Labor (USDOL) had concurrent jurisdiction regarding the enforcement of hazardous and prohibited occupations for minors. On occasion, the Agency requested interpretations of federal child labor regulations from the USDOL. Operating certain power-driven bakery machines and operating a "can smacker"

or can compacters were prohibited activities under federal law.

240) In November 1985, after reviewing all of the facts in a case against a company called Silver Tree Cedar Products, Inc. and its two principal owners, Tiffany instructed the Department of Justice to dismiss a court action for a permanent injunction against the respondents. The Agency had alleged that the company had employed minors without employment certificates or work permits; it had employed a minor under age 14, who was prohibited from working under the Fair Labor Standards Act, to work in connection with a factor or work shop; it employed minors between ages 16 and 18 to work in a sawmill building of a shingle mill, which was a hazardous occupation; it employed minors between ages 16 and 18 to operate power-driven wood-working machines, which was a hazardous occupation; it employed minors under age 16 in rooms or areas of a mill having power-driven machinery; and it refused to permit employees of the Bureau of Labor and Industries to enter and inspect the premises. Tiffany instructed the Department of Justice to dismiss the action "because there appears to be no ongoing violations, the Bureau of Labor and Industries has no record of previous violations and there appear to be no serious injuries to minors." Agency policy was that, with first-time or unintentional violations, and where the employer agreed to comply in the future, and where there was no serious injury to minor employees, unless there was some aggravating circumstance the Bureau would forgo assessment of civil penalties. Tiffany did

not recommend to the Wage and Hour Commission that they consider revoking the company's right to hire minors in the future. The employer had gone out of business.

241) In 1986, the Commissioner issued a final order in which Northwest Advancement, Inc., Jeff Henke, Joe Geer, and Tim Cox were assessed a total of \$45,550 in civil penalties for numerous child labor violations involving door-to-door sales. Among the violations were nine violations of work permit rules and eight violations of employment certificate rules. The respondents were assessed civil penalties of \$250 for each work permit violation and \$1,000 for each employment certificate violation.

242) During February 1988, C.S. Von Weller investigated four accident reports concerning minors employed by Private Industry Council (PIC). The four minors had work permits, but no employment certificates. The personnel manager for PIC had previously talked with the Agency, and the manager thought that if the minors had work permits, PIC did not need to file employment certificates. The manager was unaware of blanket permits. She requested a supply of employment certificates. The PIC program was funded under the Job Training and Partnership Act and managed by the State of Oregon. It provided summer employment for 14- to 21-year-old persons and assisted disadvantaged youth with educational programs and job readiness activities. It employed up to 1,000 youth. PIC gave Von Weller adequate assurances of future compliance. Von Weller recommended against denying PIC a blanket permit; he thought the

employer should be sent a "letter of admonishment." He referred the file to his supervisor. It was later closed by Hammond. On May 13, 1988, the Agency issued a blanket permit to PIC.

243) During fiscal year 1988-1989 (July 1988 through June 1989), the Agency processed 13,215 employment certificates, issued 39,910 work permits, and conducted 126 child labor investigations. The division investigated and closed 3,812 wage claims. It conducted 62 prevailing wage rate investigations, 166 farm/forest labor contractor investigations, 49 private employment agency investigations, and 83 CEEES investigations.

244) During the summer of 1988, C.S. Miller investigated an injury to a minor at a Safeway store in Eugene. The minor had sliced the tip of his finger while cleaning a meat slicer. The minor had a work permit, but the employer had failed to file an employment certificate for him. The store manager stated he was aware of the employment certificate filing requirements, and filed employment certificates for all of his minor employees. He was "startled" to learn he had no certificate for the injured minor. The store employed 18 minors. Miller recommended that the employer be notified by letter of the requirements regarding meat slicers. Such a letter was sent, and the case was referred to the US Department of Labor, pursuant to a Memorandum of Understanding between the Agency and USDOL. No civil penalty was recommended because the "manager had employer certificates for all minor employes [sic]." The case was closed.

245) When the Agency referred a child labor case to the USDOL, the

Agency did not routinely keep and prosecute a part of the case dealing with employment certificate violations. USDOL did not provide any report to the Agency about the disposition of cases the Agency referred it.

246) In August 1988, C.S. Miller and Beckfield (formerly Mercier) conducted a routine check at the Oregon State Fair in Salem. They contacted George Trung Van Tran, of the Southeast Asian Refugee Chamber of Commerce. They found two minors working in Van Tran's booth. Beckfield supplied him with employment certificates and explained the requirements for hiring minors and obtaining a blanket permit to hire minors on a temporary basis for a short duration. On a second check six days later, Miller and Beckfield requested copies of Van Tran's employment certificates. Van Tran became "irate, hostile," said he did not have time to talk, and said he had not filled out the forms. Miller and Beckfield explained the 48-hour rule and advised Van Tran about penalties. He took more employment certificate forms, saying he did not have time. Miller recommended a strong warning letter to the employer. Lessel wrote to the employer advising him of the violations found, of the civil penalty provisions of the law, of the Wage and Hour Commission's power to revoke his right to hire minors, and that if he were found to be employing minors in the future in violation of the law, the Agency would consider initiating action to assess civil penalties and to revoke the employer's right to hire minors. The case was closed.

247) In August 1988, C.S. Miller and Beckfield contacted Susan Egan,

of Tiffany Food Services, Inc., at the Oregon State Fair in Salem. Egan said that the employer planned to hire 18 to 24 minors to help serve food. Miller and Beckfield explained the child labor law requirements and left employment certificates and Employment of Minors brochures. They requested that Egan either fill out employment certificates or immediately obtain a blanket permit for the temporary employment of minors for a short duration. When they contacted Egan again six days later, they again explained the law's requirements and explained the civil penalty provisions. Egan became upset and thought Miller and Beckfield were harassing her, she said she was too busy to complete the employment certificates. A spot check of one minor for a work permit showed she had one. Miller recommended a strong warning letter be sent to the employer. Lessel wrote to the employer advising it of the violations found, of the civil penalty provisions of the law, of the Wage and Hour Commission's power to revoke its right to hire minors, and that if it were found to be employing minors in the future in violation of the law, the Agency would consider initiating action to assess civil penalties and to revoke the employer's right to hire minors. The case was closed.

248) In November 1988, Kimmons was assigned a case involving a report of a minor who was injured while operating a lift truck for his employer, Fred Meyer. Kimmons did not investigate the case. He talked with the US Department of Labor compliance officer and then referred the case to the USDOL. Kimmons believed the USDOL would check into employment

certificate or work permit violations. He sent the employer a form letter advising it that it might be in violation of child labor law regarding filing an employment certificate for the injured minor. Kimmons closed the case.

249) During November 1988, C.S. Von Weller was assigned a complaint of a minor working too many hours at a Taco Bell. After review by his supervisor concerning whether the federal law or state law applied to the case, Von Weller wrote a warning letter to the employer regarding work hours under federal law for minors.

250) In January 1989, C.S. Von Weller investigated an on-the-job injury report of a minor employed by Econo Max Mfg., Inc. The minor was injured by an automatic stapler. Von Weller visited the employer's plant and inspected the facility with the company president, who was very cooperative. The injured minor was the company's only minor employee and was hired because his mother worked there. The employer was unaware of employment certificate filing requirements and did not have a certificate for the minor. Von Weller found no violation of a hazardous order, because he was advised that, since the stapler was not electrically run (it was air-operated), the stapler was not a prohibited machine. Von Weller got his advice from Shirley Barshaw, who had been so advised by the USDOL in 1987. Von Weller wrote the employer a warning letter regarding employment certificates. After further checking with an analyst for the USDOL, Von Weller concluded that the air-powered stapler was a prohibited machine, and the file was referred to the USDOL.

251) On March 14, 1989, C.S. Beckfield wrote to a Fred Meyer store food manager about an investigation of an injury to a former employee. She and the manager had discussed child labor laws. Beckfield spoke to a personnel assistant in Fred Meyer's main office and learned that an employment certificate had been filed for the minor in question, but that it had been denied by the Agency because the minor did not have a work permit. The minor quit before Fred Meyer could resubmit the application. Beckfield wrote the employer:

"As you know, the Bureau of Labor and Industries is serious in their enforcement of the Child Labor Laws, and violations may result in fines of up to \$1,000 per violation. Although I am satisfied that Fred Meyers is normally in compliance with OAR 839-21-220, which requires that employer certificates be filed, and that both the Personnel office and Managers are aware of the prohibited hazardous occupations, I would like to encourage you to take particular care in the future to insure that minors are not engaged in any activity declared to be hazardous. Ms. Vicki Beal has already assured me that a regular system is in place for the completion of employer certificates.

"We appreciate your time and the positive attitude you expressed regarding this investigation."

252) On around March 21, 1989, C.S. Miller contacted several employers regarding their employment of minors. Lessel had directed her to contact several large employers to find out their level of understanding and

opinions about work permit and employment certificate requirements. Doug Johnson, the human resources manager for Bi-Mart in Eugene, reported that Bi-Mart employed about 2,500 persons, but only two or three were minors. Store managers did their own hiring and had a copy of a company written policy regarding hiring, hours of work, and work permit and employment certificate requirements. Johnson saw no problem with the work permit and employment certificate system. Jerry Kiolbasa, the director of human resources for Safeway Stores, Inc., reported that Safeway had no problem obtaining work permit and employment certificate information. It had no problem hiring minors. As each employee file was set up, necessary documents were completed before the employee started work. Kevin Gee, the manager of the Fred Meyer store on West 11th in Eugene, reported that his store hired very few minors. He said his staff completed all of the information in personnel packets furnished by Fred Meyer's personnel department at its head office in Portland, and then returned that information to the head office. Gee had no problems with the work permit or employment certificate system, but did not use it very often. Mr. Sweet, an assistant manager at Fred Meyer's Santa Clara store in Eugene, reported that store managers hire employees, but all applications had to be cleared through the company's head office. Miller understood that neither the West 11th or the Santa Clara Fred Meyer store employed any minors at that time. The Portland personnel office controlled the employees' personnel files. Patty Reardon and Suzie Cook, in Fred

Meyer's personnel office in Portland, were knowledgeable about employment certificates, but told Miller they would have to check to see who was completing them and how many minors were employed. Pat Straube, a co-owner of Dari Mart Stores, reported that the company employed around 200 persons in 22 stores. Each store did its own hiring and kept its own personnel files, although Straube said they planned to keep the records in the head office in the future. The company employed two minors. The company did not have employment certificates for the minors, and Straube was unaware of the employment certificate requirements. She requested employment certificate forms from the Agency, which Miller provided. Miller wrote a memo to Lessel describing her contacts with the employers. When Lessel read the memo at that time, he interpreted it to show general compliance with the work permit and employment certificate requirements.

253) During fiscal year 1989-1990 (July 1989 through June 1990), the Agency processed 13,657 employment certificates, issued 36,642 work permits, and conducted 112 child labor investigations. The Agency found 244 minors working without work permits and 695 minors working without employment certificates. Besides Respondent, the Agency did not assess civil penalties for child labor law violations against any employers in that fiscal year. The division investigated and closed 3,925 wage claims. It conducted 81 prevailing wage rate investigations, 177 farm/forest labor contractor investigations, 40 private employment agency investigations,

and 83 CEEES investigations. Some additional investigations, which were random minimum wage audits, were conducted that revealed violations of child labor laws.

254) During July 1989, C.S. Sifuentez investigated a complaint that minors were working in an ice plant, a hazardous occupation for minors. In addition, four minors age 15 were working at night, in violation of the restriction on hours of work for minors under age 16. At first contact, the employers stated they were too busy to meet with Sifuentez; however, six days later they met with him. Sifuentez found that four minors age 15 had been hired on June 30 or July 1, 1989, that two of them did not have work permits, that none of them had employment certificates (the employers had never seen them before), that three of the four minors worked at least one night shift, that the minors were working in an ice plant to process blocks and bags of ice, and that the minors were terminated on July 6, 1989. Sifuentez advised the employers of the possible penalties and consequences of future noncompliance. The employers agreed to comply in the future. Sifuentez considered as a mitigating factor that the minors had been referred to the employers by the state Employment Office. Sifuentez contacted that office to advise it about placing minors with these employers. Sifuentez recommended sending the employers a warning letter. Lessel wrote to the employers advising them of the violations found, of the civil penalty provisions of the law, of the Wage and Hour Commission's power to revoke their right to hire minors, and that

if they were found to be employing minors in the future in violation of the law, the Agency would consider initiating action to assess civil penalties and to revoke the employers' right to hire minors. The case was closed. Lessel did not recommend assessing civil penalties because he believed the employers had come into compliance.

255) During January and February 1990, C.S. Sifuentez investigated a report of a minor being injured while operating a cardboard baler at a Shop-N-Save store in Eugene. Three of the minor's fingers were cut. The store manager was unaware of work permit and employment certificate requirements. The store employed eight minors, ages 16 and 17. Sifuentez gave the manager work permits, employment certificates, a minimum wage poster, and Employment of Minors brochures, and advised the manager about child labor law requirements. Sifuentez recommended that the employer be sent a warning letter. Lessel wrote to the corporate employer advising it of the violations found, of the civil penalty provisions of the law, of the Wage and Hour Commission's power to revoke its right to hire minors, and that if it was found to be employing minors in the future in violation of the law, the Agency would consider initiating action to assess civil penalties and to revoke the employer's right to hire minors. Sifuentez later contacted the employer, who assured him that employment certificates had been filed, and that minors were no longer allowed to operate balers. On January 31, 1990, Sifuentez wrote to Oregon Food Industries, which published a newsletter that was mailed to over

1,000 grocery stores. He requested that they publicize the work permit and employment certificate filing requirements, as well as a list of prohibited occupations, including operation of cardboard baling machines. Oregon Food Industries published an article with that information. The case was closed.

256) During January through March 1990, C.S. Campbell investigated a complaint about work hours and breaks against Taco Time International, Inc. Campbell contacted the employer's director of training on January 19, 1990. The investigation revealed four violations of failure to provide proper break times, and Campbell estimated 60 violations of employment certificate filing requirements. She found no hazardous order violations. On February 6, 1990, the employer issued a memorandum to all managers of its 19 stores calling for a correction of the employee handbook regarding break and meal periods, and issued a memorandum to all managers requiring compliance with work permit and employment certificate filing requirements for minors. The memorandum contained instructions on how to fill out the employment certificate, copies of employment certificates, and the Employment of Minors brochure. Campbell was not aware of any previous violations by Taco Time. Campbell recommended that form letters regarding breaks and meal periods and child labor reporting requirements be sent to the employer and then the case be closed. Lessel wrote to the employer advising it of the violations found, of the civil penalty provisions of the law, of the Wage and Hour

Commission's power to revoke its right to hire minors, and that if it were found to be employing minors in the future in violation of the law, the Agency would consider initiating action to assess civil penalties and to revoke the employer's right to hire minors. The case was closed.

257) During February and March 1990, the Agency investigated an injury to a minor at an Abby's Pizza Inn in Florence. The minor, NeCole Fields, injured her hand in a meat grinding machine to the extent that the hand was later amputated. The manager of the Florence pizza parlor was very cooperative and wanted to comply with the law. He began taking corrective measures. The investigation was expanded to the employer's entire chain of 15 pizza parlors in Oregon. The investigation revealed 10 minors working without employment certificates and at least three minors operating hazardous machinery. Three compliance specialists investigated different parlors and the corporate headquarters. The corporate officers agreed to come into compliance, C.S. Campbell conducted training for the employer's managers, and the Agency provided posters, brochures, employment certificate and work permit forms, and various child labor bulletins. Several checks with the Work Permit Unit showed that all locations but one had filed the employment certificates; that one location was contacted and requested to follow up. "Based on the significant level of compliance achieved in a short period of time, [C.S. Campbell] recommended that a warning letter be sent to the corporation and no further action taken." Lessel wrote to the employer advising

it of the violations found, of the civil penalty provisions of the law, of the Wage and Hour Commission's power to revoke its right to hire minors, and that if it were found to be employing minors in the future in violation of the law, the Agency would consider initiating action to assess civil penalties and to revoke the employer's right to hire minors. The case was closed.

258) During February and March 1990, C.S. Bledsoe conducted a limited audit of one Meier & Frank Co. store in response to a minor's parent's complaint about hours worked. Bledsoe found that four minors did not have work permits, and the employer had not filed employment certificates for 11 minors. The director of human relations told Bledsoe that there had been several changes in personnel managers and that employment certificates had been overlooked during that turnover. Bledsoe also found that two 15-year-old minors had worked past 6 p.m. and other working hours violations. Bledsoe explained the violations and laws to the employer and provided employment certificate forms, statutes, and rules. The employer signed a promise of future compliance. The employer provided, without objection, a list of all minor employees statewide, their social security numbers, birthdates, hire dates, termination dates, and work permit verification. Bledsoe found that the employer had remedied the hours violations and was taking action to correct the employment certificate violations. She closed the file.

259) During March and April 1990, C.S. Sifuentez investigated the death of a minor employed by Tyler Corporation, dba Panda Pizza. The Agency

gave priority to investigations involving the death of a minor. The minor, Colby Lewis, was killed in an auto accident while he was delivering pizza for his employer. Sifuentez found that the employer employed 16 minors, that it had not been checking work permits, that seven minors had work permits, that the employer had not filed employment certificates, and that the employer violated hazardous occupation regulations by allowing five minors to drive motor vehicles on public highways. The employer was at all times cooperative. He immediately came into compliance with the hazardous occupation regulations, promptly began working with his employees to get work permits, and began filing employment certificates. Sifuentez recommended that civil penalties be assessed. The case was referred to Lessel and later was referred to Case Presenter Lee Bercot for further administrative action. After further investigation, a charging document was issued and a contested case hearing was held on November 5, 1991. The Commissioner issued a Final Order finding four violations of the rule prohibiting employing a minor in a hazardous occupation, 17 violations of the rule requiring employers to verify the age of a minor by requiring the minor to produce a work permit, 17 violations of the rule requiring employers to file an employment certificate within 48 hours after hiring or permitting a minor to work, and one violation of a rule requiring employers to maintain certain records on minor employees. The Forum found that the violations were not willful or repeated. The Commissioner assessed a civil penalty of \$9,400. The case was discussed by the Wage and

Hour Commission at several meetings. It received attention from the media.

260) During March through June 1990, C.S. Campbell investigated a complaint regarding overtime wages against International Kings Table, Inc. Campbell found errors that resulted in the employer paying about \$474 in back wages and found that the employer had not filed employment certificates for 50 minor employees in its 14 Oregon restaurants. The employer agreed to file employment certificates for all minors currently employed and to establish a procedure for filing the certificates for all newly hired minors. The employer provided a list to the Agency of the 50 minors employed and sent a memo to its Oregon managers explaining the employment certificate filing requirements. The employer later reported filing employment certificates for 22 minors, that six minors had terminated employment, and that three had turned 18. The manager said he would follow up with filing employment certificates for the remaining minors. Campbell was not aware of any previous violation by Kings Table. Campbell recommended closing the case because the employer had "resolved all points in issue." The file was closed.

261) From 1988 to 1990, Theresa Jones (formerly Lutz) worked at a Fred Meyer store on Hawthorn street in Portland. Her date of birth is June 12, 1972. Her brother, Kenneth Lutz, worked at the same store when he was age 17. Jones had a work permit and an employment certificate, which was not filed within 48 hours of hire. She worked as a "parcel," which included counting and sorting bottles,

customer assistance, cleaning up, and stocking shelves. On several occasions while she was a minor, she used a "hyster" (lift truck/forklift) to move stock when the person in charge (PIC) was too busy. She was told by the PIC to use the lift truck. PICs were senior hourly employees who were in charge when managers were not present. She was instructed how to use it by another "parcel," who was a minor. Jones used a cardboard baler while she was a minor. At times she climbed into the baler when it got clogged up. Jones used a "cansmacker" to crush returned drink cans. She was instructed to use the baler and cansmacker during her orientation after she was hired; she received training from other minors. On occasion, Jones worked at other Fred Meyer stores and used cansmackers and balers at those stores. Managers observed Jones using the baler and cansmacker. Kenneth Lutz also used a lift truck, a baler, and a cansmacker. Jones's boyfriend complained to the Agency that Jones used the lift truck. During May and June 1990, C.S. Von Weller investigated the complaint. Von Weller interviewed the store director and Jones. The store director instructed Jones to never operate a "hyster." Jones did not report to Von Weller that she was using a baler and a cansmacker. She told Von Weller that she had never been directed by a department manager to operate a hyster. Von Weller found that the employer had a policy prohibiting minors from operating forklifts. Von Weller reviewed child labor laws, including work permit and employment certificate requirements, with the store director and food manager, and explained the penalties for

violations. Von Weller determined that the minors employed at the store had work permits, but the Fred Meyer personnel office could not locate employment certificates for the four minors employed at the store. Von Weller contacted the personnel office on June 6, 1990, and determined that Fred Meyer's personnel staff were well aware of employment certificate filing requirements and had a filing process established. However, there was confusion due to a change in the form they received from the Agency - the new applications and computer-generated employment certificates. One personnel staff member had been throwing away a white portion of the certificate that was supposed to be retained by the employer until the validated certificate was returned by the Agency. Fred Meyer filed an employment certificate application for Jones and three other minors on June 6, 1990. Von Weller was not aware of other cases of minors employed by Fred Meyer operating lift trucks. At the time Von Weller wrote his report on the case, he believed the employer was in compliance with the employment certificate requirements and with the hazardous order regarding lift trucks. He recommended that a civil penalty be assessed for one hazardous order violation, based upon the use of the lift truck by Jones, and for violations of employment certificate filing requirements. He also recommended that the Agency use all compliance specialists to visit Fred Meyer stores statewide. He was advised that the Agency did not have the staff available to do that; Von Weller was unaware at that time of the investigation of Respondent. At that time, only three or four compliance

specialists were doing wage collection investigations; that team had around 100 cases per month in process. Pursuant to a Memorandum of Understanding between the Agency and the USDOL, the Agency referred the case to the USDOL and closed its file. The subsequent USDOL investigation did not reveal further violations.

262) Between June 1 and December 31, 1990, Fred Meyer submitted 280 employment certificates to the Agency. The certificates showed that 28.8 percent were completed within two days of the date the minor was hired, 42.4 percent were completed between 3 and 30 days after the date of hire, and 28.8 percent were completed 30 days or more after the date of hire. Nine of them did not contain sufficient information to be included in the calculation.

263) During the first three quarters of fiscal year 1990-1991 (July 1990 through March 1991), the Agency processed 19,676 employment certificates, issued 26,249 work permits, and conducted 96 child labor investigations. The division investigated and closed 3,536 wage claims. It conducted 118 prevailing wage rate investigations, 227 farm/forest labor contractor investigations, 24 private employment agency investigations, and 27 CEEES investigations. Some additional investigations, which were random minimum wage audits, were conducted that revealed violations of child labor laws.

264) In the summer of 1990, C.S. Johnson investigated a child labor case involving Mexicali Express. The investigation arose from a complaint about a hazardous occupation;

Johnson found no violation of a hazardous work order. Johnson discovered that no employment certificates had been filed. She contacted the employer's main office and expanded her investigation to all of the employer's branches. A representative of the employer said she had called the "labor board" and was told that the employer did not need to file employment certificates for minors that had work permits. The representative could not remember who she spoke with or what section the person worked in. Johnson checked with the Work Permit Unit staff, who did not recall a conversation with a representative from Mexicali Express. The staff said that no one in the Work Permit Unit would give out such information. Johnson gave Mexicali Express a two-week period of time in which to file employment certificates and asked the employer for an assurance of future compliance. The employer immediately agreed to file employment certificates. That was the first time the employer had been found in violation of child labor laws. The employer filed employment certificates for all of its minor employees. All of the minors had work permits. Compliance was obtained, and Johnson closed the file.

265) During June and July 1990, C.S. Bledsoe audited Penguin's Express Subs, a sandwich shop, based upon a complaint about minors using a meat slicer. Bledsoe found that the employer was a new business (and a different employer than the one about which the complaint was filed). Bledsoe found that two minors did not have work permits and four minors did not have employment certificates. She

also found recordkeeping violations and that one 14- or 15-year-old minor was allowed to work past 6 p.m. The employer was unaware of the law's requirements. The allegation about the meat slicer was unsubstantiated. Bledsoe gave the employer copies of the relevant rules and statutes, and discussed the violations with him. The employer agreed to file the employment certificates and remedy the violations, and promised to comply in the future. Bledsoe referred the file to her supervisor, who closed the file.

266) During June to October 1990, C.S. Bledsoe conducted an audit of Taco Bell based on complaints of the employer's failure to pay Oregon's minimum wage. The employer had been paying some of its employees under a federal "Student Wage Program," which allowed employers to pay student employees a minimum of 85 percent of the federal minimum wage. Bledsoe informed the employer that it must comply with the Oregon minimum wage law, which set a higher standard than the federal law. The employer paid the back wages for its employees statewide and provided the Agency with a list of its restaurants in Oregon. Bledsoe found nine violations of the employment certificate filing requirements at The Dalles Taco Bell. The manager of that restaurant gave the Agency a written promise of future compliance with the minimum wage laws and employment certificate and recordkeeping laws. The employer filed employment certificates for all minors in July 1990, which was more than 48 hours after hiring the minors; the employer was in compliance with the employment certificate filing

requirements at the time of Bledsoe's field visit to the restaurant. Bledsoe closed the file in October 1990. Tiffany thought there should be some follow-up on the case because of the minimum wage violations.

267) During June to October 1990, C.S. Bledsoe investigated a complaint that minor employees of the Hillsboro Trap and Skeet Club were working too many hours and were not being paid minimum wage. The employer paid the back wages due to 11 employees (a total of \$24.54). Bledsoe found three minors without employment certificates, and she left work permits and employment certificates with the employer. The employer later told Bledsoe that employment certificates had been filed. The employer signed a promise of future compliance regarding minimum wages, recordkeeping requirements, and employment certificates. Bledsoe referred the case to her supervisor, who closed the file.

268) Between August and December 1990, C.S. Von Weller investigated a parent's complaint that her minor daughter, age 15, was working too late at night for Taco Bell. Von Weller contacted the employer, who later admitted working the minor past 9 p.m. on several occasions. The employer alleged that the minor had lied about her age when hired. The minor was terminated when the employer learned the minor was under age 16. The employer's policy was to not hire minors under age 16. The employer admitted not checking for the minor's work permit and did not have an employment certificate for the minor. The employer gave Von Weller adequate assurances of future compliance. Von Weller

recommended that the employer be sent a warning letter. He later sent a warning letter, advising the employer of the penalties for repeated violations of child labor law. Von Weller was not aware that another compliance specialist, Bledsoe, was conducting a minimum wage audit of Taco Bell during the period June through October 1990.

269) Between August 1990 and February 1991, C.S. Campbell investigated a complaint of a minor using hazardous equipment at Gilbert Center Food Warehouse. Campbell found no evidence to substantiate the complaint, but found evidence of 10 minors without employment certificates and three minors without work permits. The employer supplied Campbell with lists of all of its minor employees at its seven stores. The employer filed employment certificates and work permit applications for its minors. Campbell believed the employer was in compliance with child labor laws and closed the file.

270) In March 1991, at John Lesel's direction, Campbell visited in Eugene a Bi-Mart store, a Fred Meyer store on West 11th street, a Safeway store, and a Food Value store to check for compliance with child labor law recordkeeping requirements, specifically employment certificates. Sifuentez also visited four stores in Eugene for the same reason. Campbell and Sifuentez found no minors employed at Bi-Mart stores. At one Food Value store (River Road), Sifuentez found that three minors did not have employment certificates, but the employer filled them out and gave them to Sifuentez. At the Food Value store that Campbell visited, she found no minors

employed. Food Value's corporate headquarters were at that location, so Campbell visited those offices. She discovered that Food Value had a procedure in place to handle newly hired employees. For minor employees, that procedure included the risk manager filling out the employment certificate and mailing it to the Agency. Upon the return of the employment certificate from the Agency, the manager mailed it to the store that hired the minor. Food Value operated nine stores in Oregon. The manager showed Campbell six validated employment certificates, and a check with the Work Permit Unit showed that 31 employment certificates were on file for Food Value stores. The manager determined that there had been a misunderstanding between himself and the manager at the River Road store that caused the employer to fail to file employment certificates for the store's minors; the misunderstanding was corrected. Campbell was aware of no previous violation by Food Value. At a Fred Meyer store, Campbell found that the manager knew about hazardous occupations for minors, but did not check for work permits and did not know about the employer's employment certificate filing procedures. Fred Meyer filed employment certificates from its corporate office in Portland and so did not keep the certificates on location at the stores. Sifuentez found one minor out of seven without an employment certificate at Fred Meyer. Sifuentez requested that Fred Meyer submit the employment certificate application to his office, which the employer did. The employer had submitted employment certificates for two minors, and had retained the white instruction sheet

for them, but had not received validated employment certificates from the Agency. Sifuentez did a computer check and discovered that Fred Meyer had submitted 530 employment certificates from its Portland main office, 11 employment certificates from a store on S.E. 22nd in Portland, and three employment certificates from its store in Warrenton. At the Safeway store that Campbell visited, she found no employment certificates. The manager had an Employment of Minors brochure and checked minors work permits. Safeway filed their certificates like Fred Meyer, from its headquarters in Portland. Further checks showed that Safeway had filed employment certificates for all minors at the stores contacted, although one minor did not have an employment certificate on the date of the field visit. A computer check showed that Safeway had submitted employment certificates from other stores in the Eugene area and statewide. Paul Tiffany wanted compliance checks at these stores as a follow-up to a commitment to Respondent's attorney to check for compliance in the retail food industry. Sifuentez and Campbell decided not to revisit the Dari-Mart store that had been contacted by C.S. Miller in March 1989; they substituted Food Value because it had a number of stores in the Eugene area. At the time of hearing in May 1991, the follow-up investigation was not complete, and Hammond had not reviewed the reports.

271) With regard to the cases involving Fred Meyer that were discussed at the hearing, Tiffany felt that in those cases there were indications that the employer knew what the laws

required and was trying to comply. The employer showed a willingness to comply. The investigators were satisfied that the employer was attempting to comply and that the violation in each particular case was an isolated incident. Tiffany thought that the difference between those cases and Respondent's case was that Respondent was only willing to comply on its conditions, that is, only if the Agency did certain things.

272) Tiffany did not believe it was a violation of the child labor laws for an employer to keep its employment certificates at a home office, instead of at individual stores, as Fred Meyer and Safeway did. He thought that the law, ORS 653.310, required that records be accessible, not that they be at a particular site; the rules required that employers make the records available at an accessible place. "One of the primary reasons we do that is so that large corporations can have centralized recordkeeping operations." He did not think it was a violation of the law that Respondent kept its records in Boise, as long as Respondent made those records available to the Agency in Oregon.

273) Except for Respondent, Tiffany could not recall an employer that refused to comply with employment certificate requirements, once the employer was informed of them. Tiffany knew of no case in which an employer agreed to comply only on its conditions. The Agency had never had a case where an employer agreed to comply with the employment certificate requirements only if the Agency first personally delivered or mailed employment certificate applications to it, and

then only if the Agency continued to supply the employer with them, indefinitely, without request. The Agency had never had an employer agree to comply with the employment certificate requirements only if the Agency provided personal training to managers regarding how to complete the employment certificates. The Agency had never had an employer agree to comply with employment certificate requirements only if the Agency achieved uniform, meaning 100 percent, compliance with those requirements by the employer's competitors in its industry. No Wage and Hour Division staff person had the authority to enter into an agreement with an employer that would make compliance with the employment certificate requirements conditional upon any of the conditions described in this Finding of Fact.

274) Other than in Respondent's case, no compliance specialist could recall recommending the assessment of civil penalties against an employer for only violations of employment certificate and work permit requirements. Before Respondent's case, the Agency had never proposed to assess civil penalties for only violations of employment certificate and work permit requirements.

275) Investigating Respondent's case and responding to the discovery requests strained the resources of the Agency. The Wage and Hour Division could not handle more than one case of its magnitude at a time.

#### Miscellaneous Findings

276) Paolini believed that the Agency was biased and prejudiced against Respondent in part because of

what happened in the following three civil rights cases:

276a) The Agency subpoenaed some of Paolini's and Gaylene Austin's investigative notes in a sex discrimination case (Hinds). The Agency thought the notes were discoverable; Respondent thought the notes were protected as either work product or by the attorney-client privilege. The Agency filed a motion in court to find Respondent in contempt for not complying with the subpoena. The Agency did not agree to postpone the hearing on two occasions when Paolini's mother was ill and later when she died. The judge postponed the hearing on both occasions. In January 1990, during the hearing, the Agency stated that the claim was not one of sex harassment, but one of sex discrimination. The judge denied the Agency's motion and did not require Respondent to produce the notes because the court found they were work product. Later, in an Administrative Determination, the Agency found substantial evidence of two unlawful employment practices. In a letter dated March 19, 1990, denying reconsideration of that determination, the Agency wrote that there was ample evidence of sexual harassment. Paolini wrote to the Agency about this apparent change in theory, and the Agency then issued a corrected copy of the March 19 letter deleting the reference to sexual harassment.

276b) The Agency was investigating a complaint known as the "Folmsbee case," which alleged sex discrimination because Respondent did not hire women for order selector positions in a distribution center. Paolini wanted the name of the person

who made a discriminatory statement to Complainant. The civil rights investigator, Ried, made a request for information that Paolini thought was burdensome and overbroad. Paolini said he would not provide the information until the Agency gave him the name of the person that made the statement. Ried issued a subpoena for the information. Paolini called Ried, who said he could not identify the person who made the statement. Ried said that his supervisors advised him that it was pointless to try to get information from Respondent and that the Agency had to use subpoenas. Ried modified his request for information and gave Respondent more time to respond. Respondent provided some information. Ried later visited the distribution center. During that visit, he asked for some telephone numbers. Paolini thought it was inappropriate for Agency investigators to talk with Respondent's supervisors unless Paolini was notified and present. The distribution center would not give Ried the information he requested, and Ried claimed Respondent was unreasonable to deal with. When Paolini then told Ried that he should have contacted Paolini for the information, Ried said that Paolini was unreasonable and that no one at the Agency could get along with Respondent. Ried said there was an "edict" from management of the Agency that management was to review matters concerning Respondent because it was unreasonable and difficult to deal with. The Agency issued an Administrative Determination in the case. Paolini requested reconsideration, which was denied. The case presenter, Alan McCullough, later contacted Paolini. Paolini had

processed cases with McCullough in the past "in a fair and reasonable way." McCullough said he did not think the Agency had a good case and asked for a settlement offer to resolve the matter. Paolini made an offer, which the Complainant did not accept. The case was closed without going to hearing. Paolini thought Respondent was prejudiced because a subpoena was issued, and he did not think the case was handled in a professional manner. He thought the case had no merit. Paolini wrote to McCullough to thank him for his "efforts and for taking a reasonable approach to this case." Paolini thought that McCullough was the only rational person in the Agency he had dealt with in the preceding two years.

276c) In a parental leave case (Myron) involving the use of paid sick leave during a parental leave, Paolini requested that the case be held in abeyance until another such case was ruled upon by the Oregon Court of Appeals. Judith Bracanovich, Quality Assurance Manager for the Civil Rights Division, denied that request. About 15 months later, the Civil Rights Division Case Presenter, Linda Lohr, contacted Paolini about the case. Lohr said that the case had been held in abeyance. She said that she would recommend to the Complainant a settlement for full back wages. If a settlement could not be reached and the Agency had to file Specific Charges, Lohr said the Agency would ask for emotional distress damages. She did not have evidence at that time of emotional distress.

277) Judith Bracanovich, Quality Assurance Manager in the Civil Rights

Division of the Agency in 1990, reviewed the Hinds case and had referred it to the Department of Justice to enforce the Agency's subpoena. An assistant attorney general corresponded with Paolini over some period of time. The Agency found that some employers that it worked with on a frequent basis were uncooperative and not complying with its subpoenas. Bracanovich chaired a subpoena taskforce on the problem. The Agency hired the Attorney General to enforce its subpoenas in several cases. The Agency's direction to the Attorney General's office in each case was to get compliance with the subpoena, by going to court if necessary. Bracanovich felt a need to get that word out, so that employers would not drag their feet in complying with subpoenas.

278) The Agency had experienced a lack of cooperation from Paolini before the Hinds case. Investigators found Paolini hard to deal with. The Agency had also experienced that Paolini "misattributed" words; he would "turn things around" from a conversation, then write a confirming letter that was inaccurate. In the Hinds case, Paolini claimed that the investigator agreed to hold the subpoena in abeyance pending the Agency's provision of authority for its subpoena of the requested material. The investigator made no such agreement.

279) In the Hinds case, the Agency was operating under two time constraints: first, the Agency was close to losing jurisdiction over the case, and there had already been one or two set overs, and second, Donna Broadsword, the civil rights investigator, was ill with cancer during the period that the

Agency was subpoenaing records from Respondent. She was too ill to testify at the court hearing and died shortly thereafter.

280) Bev Russell testified in the Hinds case in court regarding the Agency's subpoena. Her testimony was based upon the investigation of Donna Broadsword. Bracanovich testified in court that the case was being pursued as a sex discrimination case, based on a coworker's displeasure at having a woman assistant.

281) Nedra Cunningham wrote a reconsideration letter to Paolini regarding the Hinds case. The letter erroneously referred to sexual harassment, rather than sexual discrimination. Russell had the error corrected and sent a corrected copy to Paolini. Hinds later withdrew her case from the Agency and filed a lawsuit against Respondent.

282) Russell held no ill will or prejudice toward Paolini or Respondent.

283) Bracanovich held no personal grudge against Paolini because Respondent prevailed in the court case to enforce the subpoena. Bracanovich held no personal grudge against Paolini or Respondent because Paolini was hard to deal with. Bracanovich did not share her beliefs about Paolini with the Commissioner or anyone in the Wage and Hour Division.

284) It was Bracanovich's job to screen cases that had failed conciliation to determine which ones to take to hearing. If the Agency could not make a prima facie case, Bracanovich would close the file. In the Folmsbee case, she thought that the Agency could put on a prima facie case, but the chance

of proving it at hearing by a preponderance of the evidence was "very slim." She made the decision not to proceed to hearing with it. In such cases, Bracanovich would send the case to a case presenter to try to get a settlement. If such a case settled, the complainant could not take the case to court; if the case did not settle, the complainant could withdraw the case from the Agency and take it to court.

285) At the time of the Myron case, the Agency had six parental leave cases, including Respondent's case. After Bracanovich had denied Paolini's request to hold the case in abeyance, she was instructed to carry all of the parental leave cases "on a hold basis" while the case on appeal was pending. The case on appeal involved a challenge to the same rules that were being applied in the other six parental leave cases. When the appellate case was decided, Kelly Hagan, the Agency's legal policy advisor, instructed Bracanovich to move forward and assign the six cases to case presenters, which she did in November 1990. Bracanovich did not process Respondent's case with any intent to discriminate against either Respondent or Paolini. She treated the six parental leave cases "as a block."

286) Armonica Gilford drafted the original charging document in this case, the Notice of Intent to Assess Civil Penalties. Before drafting the charging document, Gilford reviewed the file and the facts in the case, looked at the regulations – OAR chapter 839, division 19 – and determined the amount of the civil penalties to assess. She had not made a determination of willfulness by Respondent.

Gilford drafted the original six exhibits that were attached to the charging document. When she drafted the exhibits, she intentionally did not include any minors hired before the date of Paolini's letter to Lessel on February 7, 1989. She did not intentionally include in the exhibits any employees who were not minors or for whom Respondent had filed an employment certificate on the date of the Agency's field visit to the store. She felt that, in such instances, Respondent was in compliance, even though it had missed the 48-hour filing requirement. At Paul Tiffany's direction, she did not charge a violation where an employment certificate was filed, but not within the 48-hour requirement. When additional field visits were made in July and August 1990, and those visits showed that the stores had filed employment certificates for the minors, Gilford decided not to amend the charging document because the stores appeared to be in compliance at that time, in spite of the fact that many of the certificates apparently had not been filed within 48 hours of hiring the minors. Gilford was responsible for serving the original charging document on Respondent.

287) Gilford expected more information from Agency field visits at the time she drafted and served the document. She did not wait for the entire investigation to be completed to prepare the charging document because many minors were working without employment certificates. By sending the charging document out at that time, Gilford hoped that Respondent would bring the rest of its stores into compliance. She also did not wait for the additional information because the

document was ready, her secretary was going on vacation for two weeks, and the Agency was short on clerical support staff. When she prepared the original charging document, Gilford was being as careful as she could and thought the document was accurate. Although the original charging document had typographical errors, it had been through numerous drafts and Gilford thought that such errors had been eliminated. She did not have help in proofreading the document until after it was served. After further investigation revealed minors working at Respondent's stores in Grants Pass, Medford, and Klamath Falls without employment certificates, Gilford intended to amend the charging document to add exhibit number 7.

288) When Gilford read Paolini's February 7, 1989, letter, she understood him to direct that employment certificates be filed for minors hired after that date. Gilford used February 7, 1989, as a cut-off date in section 2 of the original notice because that was the date of the "agreement" between Lessel and Paolini, referred to in Paolini's letter of that date. Gilford did not believe that this date for beginning compliance moved, nor that Parkinson's memo in February 1990 set a new beginning date for compliance.

289) In drafting the original exhibits, Gilford worked from several drafts. She had given to the Work Permit Unit the compliance specialists' original contact reports, and the unit then gave her information from the Agency's files about whether those minors had employment certificates. After the exhibits were prepared, the Work Permit Unit checked for employment certificates

and work permits in its records for the minors listed in the exhibits. Gilford could not understand some of the notations on that list. After the original notice was served on Respondent, Gilford asked Barshaw to do a double check on a revised exhibit.

290) Before she finished drafting the charging document, Gilford requested information from the Work Permit Unit about the number of minors working without work permits. The unit could not get that information to her before the deadline she had set. Gilford decided not to charge work permit violations in the original charging document. Later, Gilford decided not to amend the charging document for work permit violations because it appeared that Respondent's minor employees were submitting work permit applications. Gilford never talked with Respondent about coming into compliance with the requirement of verifying the minor's age by requiring the minor to produce a work permit before hire.

291) Gilford was responsible for this case from around March to mid-October 1990. During that period, Gilford did not attempt to negotiate a settlement or conciliate the case with Respondent because the Agency had attempted to get Respondent into compliance in earlier contacts. Gilford did not contact Respondent before the Notice of Intent was served on Respondent. She was aware from correspondence in the file of Respondent's claim that it was being singled out and that Respondent was asserting an estoppel argument. She reviewed the law and the facts on those issues. She did not believe there were mitigating factors present in the case. She spoke

with Paul Tiffany, Christie Hammond, John Lessel, Shirley Barshaw, Florence Caisse, and the receptionists at the front desk about Respondent's claim that someone in the Agency had told it not to file employment certificates. She was told that no one had made such statements, and no one had the authority to make such statements. She inspected the Work Permit Unit's files and found that there were not many employment certificates filed by Respondent, but that "quite a few" certificates had been filed by Fred Meyer, Kienow's, and other stores. Although Gilford was aware of evidence in the case that Respondent's managers said they were waiting for Agency staff to bring them employment certificates, she could not understand why in June 1990, nearly 18 months after Paolini's February 1989 memo to store managers, the managers had not notified someone that they had not received the forms needed to comply with the state law.

292) Gilford believed that Paolini was an experienced attorney in the area of industrial relations, including personnel, employment relations, and child labor. She knew that his area of responsibility included the Northwest and Oregon. She knew that he had been sent Oregon's child labor statutes and rules, and had no reason to believe he could not read and understand them. For that reason, she did not send him the precedent he asked for regarding the Agency's request for information about Respondent's minor employees.

293) A.A.G. Haskins suggested adding the work permit violations to the amended charging document.

Hammond was not involved with the decision to amend the charging document or the timing of the amendment. The Commissioner was ultimately responsible for the amended charging document in this case.

294) Hagan discussed the amended charging document with the Commissioner after she had signed it. He advised her that Respondent had requested a postponement of the hearing, based on its belief that the amendments changed the theory of the case, and it required discovery on the new charges. Hagan twice discussed the amended charging document with Tiffany. Both conversations concerned the possibility that the amendments would result in a postponement of the hearing.

295) Joan Stevens-Schwenger was the Agency's public information officer. The Commissioner was her supervisor. It was Stevens-Schwenger's job to issue educational and newsworthy information from the Agency to the public. Stevens-Schwenger often decided what was newsworthy and received suggestions from Agency staff and the Commissioner. Publicity was also an enforcement tool. She helped prepare the Commissioner for a press conference about this case in June 1990. Stevens-Schwenger got her background information from Paul Tiffany, Christie Hammond, and Armonica Gilford. The matter was the subject of a press conference because of the large number of violations alleged and the large civil penalty proposed against this statewide employer. Large fines tend to get a lot of attention from the press. She did not understand all of Respondent's legal defenses.

Stevens-Schwenger believed this case was unusual because of the large number of violations alleged and because the civil penalties were the largest ever proposed. Stevens-Schwenger issued media advisories and press releases to the news media regarding this case. Information in the advisories and releases came from the Commissioner and Agency staff. Newspapers and other media around the state carried stories about the case. When asked by the media if the publicity from the case could be potentially embarrassing to Respondent, Stevens-Schwenger said it could be. She attempted to make sure that information released to the public was accurate because it could be embarrassing to a respondent. Embarrassment can be a "fallout" from publicity. Some information given to the press was not accurate; for example, Stevens-Schwenger said that all of Respondent's stores that had been visited by the Agency were cited for violations, when some stores that were visited were not cited. Stevens-Schwenger advised the Commissioner about the substance of the opening statements in this hearing.

296) There was a need to educate employers about child labor laws. Some employers were misinformed about the laws. Well-publicized cases generally resulted in better compliance with the law. Respondent's case was a "high profile case." The number of employment certificates processed in the first nine months of fiscal year 1990-1991 (July 1, 1990, through March 31, 1991) was higher than in each of the previous 10 complete fiscal years.

297) Barshaw believed that the requirements for filing employment certificates were better known by Oregon employers at the time of hearing than they were two years before.

298) In July 1990, the Agency made a request to the state Emergency Board for an allocation of \$237,923 to cover a shortfall in its 1989-1991 services and supplies budget. The shortfall had been predicted during the 1989 Legislature, but the Agency was invited to return to the Emergency Board if it became apparent that it had insufficient funding. The Agency made a similar request to the Emergency Board in May 1990, but was asked to return in July at the recommendation of the Legislative Fiscal Office.

299) Lee Bercot, a case presenter in the Wage and Hour Division of the Agency, responded to many of Respondent's discovery requests, beginning in late November 1990. Before that, Armonica Gilford was primarily responsible for responding to those requests. Bercot also responded to Respondent's public records requests. During January 1991, A.A.G. Haskins replaced A.A.G. Rogers in representing the Agency in this case. The Wage and Hour Division administrator, Paul Tiffany, and A.A.G. Haskins prepared some responses to Respondent's discovery requests. At times Bercot was instructed to respond to specific requests for production that were included in larger discovery requests. Bercot continued to perform his other job functions during the time he was responding to Respondent's requests. As a case presenter, Bercot's efforts were primarily focused on farm labor

contractor cases; he prepared and took to hearing contested cases in which the Agency proposed to take some action against a contractor's license or assess civil penalties. The summertime was the peak season for Bercot's work. After December 1990, Bercot was the Wage and Hour Division's only case presenter; the case presenter position that Gilford had was never refilled due to budget cuts. Around March 1991, Bercot began devoting all of his time to work on Respondent's case. The Wage and Hour Division in Portland had three (and, in 1991, two) clerical assistants that could assist Bercot with responding to Respondent's discovery requests. At times, due to illness, only one clerical assistant was available. The clerical assistants did all of the clerical work for the division; they continued to perform their regular jobs during the time they assisted Bercot. He did much of the clerical work related to the discovery because no one else was available to do it. Some discovery requests came to Bercot through the Agency's attorney; others came to Bercot through the division administrator; still other requests were sent directly to Bercot from Respondent's attorney. At times, details of Respondent's discovery requests were confusing. When Bercot had questions, he contacted Respondent's attorney, Corbett Gordon, or her assistant, Keith Hamner. Some of Respondent's requests required a search for documents in other divisions of the Agency. Bercot had to learn the recordkeeping system of the Wage and Hour Division and the other divisions. At first, he knew nothing about the Work Permit Unit's recordkeeping system. Some requested files were not in

Portland, where the closed files were centralized at the time of the request, some files were not closed, and some were in the field offices. Respondent requested some documents or files more than once. In some cases, documents were produced very timely. In other cases, documents were not provided until months after they were requested. Sometimes Respondent was not satisfied with the quality of the photocopies the Agency provided; the Agency rephotocopied those documents and again provided them to Respondent. At times, Bercot received discovery requests and rulings faster than he could respond to them. Some documents that were the subject of written discovery requests were produced during depositions. Some documents were not in specific child labor files for certain employers, but in other files regarding the same employers. Bercot had to contact compliance specialists to locate some open files. Many documents from Respondent's file were produced before Respondent requested them; they were produced again at Respondent's request. At one point, the Agency produced 104 files for Respondent to inspect; Hamner inspected them, and the Agency copied the pages (or whole files) that Hamner marked. Due to an oversight by the person copying the files, some pages from 13 files were not copied at first. After Hamner notified Bercot of that, those pages were provided a week later. In at least one case, Hamner's method of paper clipping a file caused confusion about what Respondent wanted copied; when Hamner clarified with Bercot what he wanted, Bercot produced a copy of the entire file that same day. Some requests required

hand searches through years of filed employment certificates. In order to retrieve some information from the Work Permit Unit's computer, a special query had to be written for the computer by the Agency's Information Services Unit, which provided computer assistance to Agency staff. On some occasions, Bercot had trouble scheduling time for Hamner to inspect files because Hamner was busy. Incomplete discovery was produced in isolated instances. Bercot was not aware of any documents that were part of Respondent's file that were not provided to Respondent. Respondent requested some files that it believed were outside of the scope of the Hearing Referee's rulings. In some cases, when Respondent requested files by name, Bercot produced them even when he believed they were outside of the scope of Hearing Referee's rulings. Hamner did not look at some files that Respondent had requested because he was busy with other discovery. Bercot made a good faith effort to respond completely to Respondent's discovery and public records requests. Some documents and files produced during discovery were not offered into evidence.

300) On November 16, 1990, Tiffany sent out a memo to all Wage and Hour Division supervisors requesting that all employees make a diligent search of their areas for anything written regarding this case and to report back to him within a week. He got a memo from C.S. Grabe stating that she had reexamined her records and found that all materials had already been turned over to the supervisory staff. She said she had no new material to add. Seven pages of a file by

Grabe, including Campbell's June 8, 1990, memo, that Respondent had not received before were given to Respondent during a deposition of Grabe in April 1991. Grabe believed those pages had been provided earlier. C.S. Briggs also produced at her deposition a one-page report that Respondent had not received before. Tiffany did not know why those documents had not been given before and was not aware until he testified at hearing that any documents had not been produced.

301) C.S. Johnson was never instructed to withhold information about the Mexicali Express file from Respondent.

302) On March 12, 1991, Barshaw reported to Hammond that 15 minors listed in the charging document were not on Respondent's list of minors employed between August 14, 1988, and December 31, 1990. All 15 minors had birth year 1972. Hammond turned the list over to Bercot, who was coordinating discovery for Respondent.

303) On April 18, 1991, Paolini spoke to Ken MacKillop, who was the president of United Food and Commercial Workers (UFCW) Local 555 and a Wage and Hour Commissioner. They were in Springfield bargaining for a contract. Negotiations had broken off when a bargaining representative for the local union became angry. Paolini was in his car, getting ready to leave, when he told MacKillop that he (Paolini) could not continue bargaining the following week because of the hearing in this case. MacKillop asked why he did not settle the case, so they could get back to bargaining. MacKillop said he thought he could settle the

case if Paolini would give him a figure that Respondent was willing to settle for. Paolini said they had already offered to settle, but the offer was rejected. Paolini thought the Agency's different treatment of Respondent was "politically related."

304) Following opening statements on April 22, 1991, by the participants at the hearing in this case, the Commissioner's 1990 Contributions and Expenditures Reports were checked by Channel 2 television staff, who discovered that two food industry executives each personally contributed \$100 to the Commissioner's 1990 general election campaign. Stevens-Schwenger talked with the Commissioner's campaign manager after she was contacted by the media. The manager said contributions under \$1,000 were considered small. When asked by the press about Respondent's allegations that its failure to contribute to the Commissioner's reelection campaign was a motive for the Agency's enforcement of the child labor laws against Respondent, Stevens-Schwenger replied that the allegations were absurd. "If the Commissioner based enforcement proceedings on people who have not contributed to her campaign, she'd have to go after most of the employers in the state."

305) Two grocery industry executives (one employed by Safeway and the other employed by Kienow's) personally contributed \$100 each to the Commissioner's 1990 general election campaign. In the 1990 primary election campaign, Southland Corporation (7-11 stores) contributed \$757.11, and Fred Meyer made an in-kind

contribution of painting and food worth \$602.98. In the 1986 general election campaign, Southland Corporation contributed \$500, a grocery executive employed by Kienow's personally donated \$200, Fred Meyer made an in-kind contribution of \$396 for printing, and Plaid Pantry Foods made an in-kind contribution of \$52 for meat and cheese. In the 1986 primary election campaign, Fred Meyer made an in-kind contribution of \$415 for printing. Neither Respondent nor executives of Respondent contributed to the Commissioner's campaigns.

306) Kienow's was a grocer with 12 stores and 300 employees, mostly in the Portland area. It employed between 12 and 15 minors, whose basic duties were to clean up, carry out stock, and stock shelves. Kienow's personnel manager, Delbert White, usually did the hiring. He was familiar with the requirements of checking work permits and filing employment certificates. White filled out and filed the employment certificates for Kienow's. He had been familiar with the employment certificate requirements for years, and had filed them when he worked for White Stag for 36 years. He was employed by Kienow's in February 1988. Kienow's had a process in place for filing employment certificates before White was hired. When a minor applied for a job without a work permit, White would have the minor fill out a work permit form, and White would send it to the Agency with the minor's birth certificate and the employment certificate form. White never told anyone from Respondent that Kienow's was not familiar with employment certificate requirements or that Kienow's

did not file employment certificates. Kienow's was a member of Food Employers. White never told anyone at Food Employers that Kienow's was not familiar with employment certificate requirements or that Kienow's did not file employment certificates. Kienow's did not allow minors to operate cardboard balers or hysters.

307) Bi-Mart Company was in the retail hard merchandise business, with 43 stores in Oregon and Washington, and around 2,200 employees in Oregon. At the time of hearing, it employed between 20 and 40 minors in both states; in March 1989, it employed only two or three minors. At the time of hearing, Bi-Mart's personnel manager, Doug Johnson, had been familiar with Oregon's work permit and employment certificate requirements for many years. The company had a procedure in place for complying with those requirements. Information regarding procedures to follow when hiring minors was inside each "new-hire packet." That information alerted the hiring manager to the employment certificate requirements. Procedures for filling out employment certificates were in the company's policy manual. Johnson never told anyone from Respondent that Bi-Mart was not familiar with employment certificate requirements, or that Bi-Mart did not file employment certificates.

308) Fred Meyer corporation had around 40 stores in the Portland area and about another 12 stores around Oregon. It sold groceries, meat, deli, home improvement products, jewelry, apparel, and other general merchandise. It employed over 8,000 people in Oregon. Employees' personnel

records were kept in Fred Meyer's central office in Portland because employees often transferred between stores. Fred Meyer employed 16- and 17-year-old minors, generally as container and parcel clerks. Jan Bender, the corporate personnel manager, was aware of Oregon's requirements regarding work permits and filing employment certificates with the Agency within 48 hours of hiring a minor. She had been aware of such requirements since 1969. Fred Meyer had a procedure in place to comply with the employment certificate requirements since at least December 1983, when Bender became the personnel manager. According to that procedure, store managers did not fill out employment certificates; the hiring manager checked for a minor's work permit and sent to the personnel office in Portland a "hiring packet," which included the employment application, the I-9 form, a W-4 form, and other documents; the minor's date of birth was on the application; then, a staff person in the personnel office filled out the employment certificate and sent it to the Agency. Beginning in the summer of 1990, the staff kept a "white copy" of the employment certificate application in a "pending" file until the employment certificate was returned by the Agency; before then, no record was kept of employment certificates that were filed. Fred Meyer made an effort to get the employment certificates filed within 48 hours after hiring minors, but was unable to in some cases. Bender recalled a conversation with Ike Mabbott about "a new form that Oregon was requiring," but not the substance of the conversation. Bender never told anyone at Respondent that she or Fred

Meyer was not familiar with employment certificates or that Fred Meyer was not filing employment certificates. In July 1988, Bender's staff was familiar with employment certificates and was completing them. Fred Meyer was a member of Food Employers. Bender had not told Food Employers that Fred Meyer was unfamiliar with employment certificates or that Fred Meyer was not filing them.

309) Fred Meyer used "container clerks," whose job it was to count refundable cans and bottles, and fill out refund forms for customers. A "parcel" or "courtesy clerk" was a person that put groceries in customers' cars, collected grocery carts, and cleaned up. "Store helper" was a minor that worked generally outside of the grocery department and did customer service, stocked shelves, and did some clean-up. All of the job titles included other duties that a manager might assign.

310) In January 1991, Fred Meyer was the largest employer, Safeway was the ninth largest employer, and K-Mart was the 42nd largest employer in the Portland metropolitan area.

311) At the time of hearing, Safeway, Incorporated, operated 102 retail grocery stores out of its Portland division, which included seven stores in southwest Washington. It employed around 8,000 employees in Oregon, including from 250 to 400 minors. Jerome Kiolbasa, Safeway's human resources manager, was familiar with Oregon's work permit and employment certificate requirements. When a minor was hired at each store, the store staff would fill out the employment certificate form. Some stores sent employment certificates with the rest of

hiring forms to Kiolbasa's office, which sent them to the Agency. Other stores sent the forms directly to the Agency; in those cases, the store kept the white copy of the employment certificate. If Kiolbasa's office did not see evidence that the store had filed a certificate, then a clerk called the store and confirmed it. Safeway attempted to comply with the rule that requires employment certificates to be filed within 48 hours of hiring minors. But due to the time taken in its internal mail system, Safeway did not always meet that requirement. Sometimes information on the employment certificates was wrong. The procedure had been in place for "quite a number of years," and before 1988. Safeway's personnel records were kept at its central office. Some employment certificates were kept at the central office, and some were kept at the stores. Safeway randomly checked with all of its stores for work permits and employment certificates. At times material, Kiolbasa never told anyone from Respondent that Safeway was not familiar with, or was not filing, employment certificates.

312) Meier & Frank Company had seven retail department stores in Oregon, with approximately 2,000 employees. It employed about 20 minors. Helen Williams, the "director of associate employee relations, compensation, benefits and labor relations," was aware of the work permit and employment certificate requirements. Since 1977, Meier & Frank had a procedure in place to comply with those requirements. The procedure was not perfect, and in some cases an

employment certificate was not filed within 48 hours after hiring a minor.

313) The Wage and Hour Commission had three members, appointed by the Governor. One member was from the public at large, one represented organized labor, and one represented "the business sector." The Commissioner was the executive secretary to the Wage and Hour Commission. Her delegate to the Wage and Hour Commission was Paul Tiffany. Occasionally, the Commissioner attended the meetings of the commission. Tiffany informed the Wage and Hour Commission about actions being taken on Respondent's case. The commission did not direct that the investigation take place. Richard Edgington, a former chairperson of the commission, never discussed the investigation with Commissioner Roberts. During the investigation of the case, Tiffany provided information to Ken MacKillop, who was the chair of the Wage and Hour Commission at the time of hearing. MacKillop requested more information about the case, and Tiffany instructed Lessel to provide it.

314) During February 1991, Tiffany reported to the Wage and Hour Commission about Senate Bill 34. The bill was prepared and presented to the 1991 Oregon Legislature by the Agency. The legislation would have exempted employers regulated under the federal Fair Labor Standards Act from child labor civil penalties only under certain conditions, by amending ORS 653.370. The purpose of proposing the legislation was to clarify the existing Fair Labor Standards Act exemption in the civil penalties section of the state child labor law. A new

section 8 of the statute would have accurately represented the Agency's interpretation of the term "regulated under the Fair Labor Standards Act." The proposed section 8 provided:

"The provisions of subsection (1) of this section do not apply to employers regulated under Title 29, U.S.C. 212(c), containing the child labor provisions of the Fair Labor Standards Act, if the following conditions are met:

"(a) Violations of ORS 653.305 to 653.370 and the rules adopted thereunder are also violations of Title 29, U.S.C. 212, and the regulations adopted thereunder; and

"(b) The United States Department of Labor imposes a civil penalty pursuant to Title 29, U.S.C. 216(e), for violations of child labor laws or regulations adopted thereunder."

315) Respondent filled out federal immigration form I-9 for all newly hired employees since the law requiring that went into effect in 1986. Respondent never refused to fill out the I-9 forms.

316) During his 17 years with the Bureau of Labor and Industries in the Wage and Hour Division, Lessel had many times visited schools and delivered work permit forms. On one occasion, he delivered 1,800 work permits to students at Roseburg High School. The school requested that many forms because it was part of the program that career counselors and work coordinators would pass out work permit applications in their classes. On another occasion, Lessel delivered 5,000 work permits to Springfield High School, for distribution to the high school and

junior high school students. Lessel believed that many more minors got work permits than found work. Many students attended summer camps and other activities rather than taking jobs. Some may have worked for employers that did not file employment certificate forms.

317) At the time of hearing, Respondent had a reputation in the Agency as a repeat violator.

318) Lessel felt no personal animosity for Respondent or any of its representatives.

319) C.S. Beckfield never heard any Agency employee "exhibiting any negative attitudes about Albertson's."

320) C.S. Campbell was aware of a civil rights case involving Respondent that had been heard in an Agency contested case hearing. The Commissioner found no violation of law by Respondent in that case. Some Agency staff were disappointed by that result.

#### ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a foreign corporation doing business in Oregon. Bruce Paolini was Respondent's Regional Director of Labor Relations. Ike Mabbott was Respondent's Director of Personnel Services. Juanita Parkinson was Respondent's Employee Development Manager. Respondent employed persons under 18 years of age (minors) in Oregon.

2) On November 14, 1988, the Agency asked Respondent to make available records concerning its minor employees, which records Respondent was required to maintain under OAR 839-21-170. On April 27, 1990, the Agency again asked Respondent

to make available records concerning its minor employees, which records Respondent was required to maintain under OAR 839-21-170. On May 8, 1990, the Agency repeated that request. On May 18, 1990, Respondent refused to make its records available. Respondent did not make those records available to the Agency until February 22, 1991, after the Hearings Referee so ordered in a ruling on discovery, dated January 7, 1991, and again so ordered on February 21, 1991. Respondent failed to keep all records in an accessible place and to make those records available for inspection and transcription by the Commissioner or her authorized representatives.

3) Within 48 hours after the hiring of each of 205 minors, or of permitting each of those 205 minors to work, Respondent failed to file a completed employment certificate form by taking or mailing the completed form to any office of the Bureau of Labor and Industries. The 205 minors are those named in Finding of Fact 171, with the exceptions of Bill Reinhard and Dana Skidmore.

4) Respondent employed or permitted to work 51 minors without first verifying the minors' ages by requiring the minors to produce work permits. The 51 minors are those whose names are marked by an asterisk in Finding of Fact 171, with the exception of Dan Brewer.

5) The Agency did not enter into a contract with Respondent regarding the Agency's provision of assistance and forms to Respondent's stores.

6) Respondent failed to show that the Commissioner or the Hearings

Referee were impermissibly biased or prejudged this matter.

#### CONCLUSIONS OF LAW

1) At all times material, Respondent was subject to the provisions of ORS 653.305 to 653.370, and the administrative rules adopted thereunder.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein. Respondent was not regulated under the Fair Labor Standards Act with regard to employment certificates, work permits, and child labor recordkeeping requirements. ORS 653.370(1); OAR 839-19-100(1)(c) and (2).

3) Before the start of the contested case hearing, the Hearings Referee informed Respondent of its rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

4) The actions or inactions of Ike Mabbott, Bruce Paolini, Juanita Parkinson, and Respondent's store directors, who were all agents or employees of Respondent, are properly imputed to Respondent.

5) By failing to make accessible and available for inspections and transcriptions by the Commissioner's duly authorized representatives records containing the information required by OAR 839-21-170, Respondent violated OAR 839-21-175.

6) By failing to file a completed employment certificate form with the Agency within 48 hours after hiring each of 205 minors, or of permitting each of 205 minors to work,

Respondent committed 205 violations of ORS 653.310 and OAR 839-21-220(1)(b) and (3).

7) By failing to verify the age of 51 minors by requiring those minors to produce work permits before being employed or permitted to work, Respondent committed 51 violations of OAR 839-21-220(1)(a).

8) The doctrine of equitable estoppel does not apply to the Agency when it is enforcing a mandatory requirement of the law. *Bankus v. City of Brookings*, 252 Or 257, 259-60, 449 P2d 646, 648 (1969); *Solberg v. City of Newberg*, 56 Or App 23, 641 P2d 44, 48 (1982).

9) The Wage and Hour Commission did not exceed its authority in adopting OAR 839-21-170, 839-21-175, and 839-21-220(1). ORS 653.307(1), 653.525.

10) The void for vagueness doctrine does not apply to ORS 653.370. *Megdal v. Oregon State Board of Dental Examiners*, 288 Or 293, 605 P2d 273 (1980); *Davidson v. Oregon Government Ethics Commission*, 300 Or 415, 712 P2d 87 (1985).

11) The Agency's original charging document was not deficient in whole or in part. ORS 183.415(2), 653.370(2).

12) The Agency did not selectively enforce child labor statutes and rules against Respondent in violation of Respondent's constitutional rights under the Fourteenth Amendment of the US Constitution or under Article I, section 20, of the Oregon Constitution.

#### OPINION

This opinion is separated into several sections. The Forum will address in the first four sections the Agency's

three claims of violations and the assessment of civil penalties. Respondent's defenses that are specifically related to the claims and civil penalties are addressed in those respective sections. Respondent's remaining defenses are discussed in the following sections.

#### 1. Respondent Failed to Make Its Records Regarding Its Minor Employees Accessible and Available When Requested.

The Agency charged that:

"Albertsons' principal office willfully and repeatedly failed to provide the Commissioner with the names, addresses, birthdates, dates of hire and termination dates of all minors employed by Albertsons' Oregon stores since February 7, 1989 as requested by the Commissioner on April 27, 1990 in violation of OAR 831[sic]-21-170(1) and (3) and OAR 839-21-175. Civil Penalty of \$1000.

"Aggravating Circumstances: the Wage and Hour Division requested the same information from Albertsons' principal office on November 14, 1988. Albertsons did not provide the Wage and Hour Division with the requested information until February 22, 1991."

ORS 653.307(1) provides:

"The Wage and Hour Commission shall provide a method for issuing employment certificates to minors and employment certificates to employers for the employment of minors in accordance with rules and regulations which it may hereafter adopt pursuant to the provisions of ORS 183.310 to 183.550,

and shall by such rules and regulations require reports from employers employing minors." (Emphasis added.)

ORS 653.310 provides:

"No child under 18 years of age shall be employed or permitted to work in any employment listed in ORS 653.320(2), unless the person employing the child procures and keeps on file and accessible to the school authorities of the district where such child resides, and to the police and the commission an employment certificate as prescribed by the rules and regulations adopted by the Wage and Hour Commission pursuant to ORS 653.307, and keeps a complete list of all such children employed therein." (Emphasis added.)

ORS 653.320(2) lists the following places of employment:

"\* \* \* any factory, workshop, mercantile establishment, store, business office, restaurant, bakery, hotel or apartment house."

OAR 839-21-170(1) provides:

"Every employer employing minors shall maintain and preserve records containing the following information and data with respect to each minor employed:

"(a) Name in full, as used for social security recordkeeping purposes and on the same record, the minor's identifying symbol or number if such is used in place of name on any time, work or payroll records;

"(b) Home address, including zip code;

"(c) Date of birth;

"(d) Sex and occupation in which the minor is employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss or Ms.);

"(e) Time of day and day of week on which the minor's workweek begins;

"(f) Hours worked each workday and total hours worked each workweek;

"(g) Date the minor became employed by the employer and date employment was terminated."

OAR 839-21-175 provides:

"(1) All records required to be preserved and maintained by OAR 839-21-001 to 839-21-500 shall be preserved and maintained for a period of at least 2 years.

"(2) All employers shall keep the records required by OAR 839-21-001 to 839-21-500 in a safe and accessible place.

"(3) All records required to be preserved and maintained by OAR 839-21-001 to 839-21-500 shall be made available for inspections and transcriptions by the Executive Secretary or duly authorized representative of the Executive Secretary."

OAR 839-21-248 provides:

"Employers employing minors shall file reports that may be required by the Commission."

ORS 653.515(1) provides:

"The Commissioner of the Bureau of Labor and Industries shall be the secretary and executive officer of the Wage and Hour Commission."

The Forum finds that Respondent may have maintained and preserved records containing the information and data required by OAR 839-21-170(1) for each minor employed. However, for at least its terminated minor employees, some of the required information that the Agency requested was maintained only in Respondent's Boise office. The Agency made its requests to Bruce Paolini in that office. As the Hearings Referee ruled on January 7, 1991, when ordering Respondent to produce the same information:

"Respondent is required to maintain and preserve such records for at least two years, and make such records 'accessible' and 'available for inspections and transcription.' ORS 653.310, OAR 839-21-170 and 839-21-175. As it appears that only records of current employees are available in Oregon, the Agency's request cannot be complied with by requiring Agency personnel to visit Oregon stores. I do not find that records kept out-of-state are 'accessible' and 'available for inspection and transcription.' The Agency alleged in the Charging Document and stated in its Request for a Ruling that it has been requesting this information since November 14, 1988. Accordingly, the Agency's request for information back to August 1988 is not restricted by Respondent's requirement to keep such records for two years."

The Forum agrees with that reasoning. The statutes state that employers may be required to provide "reports" and keep a "list" of children employed. The administrative rules require

Respondent to keep precisely the information that the Agency requested and to keep it accessible and available for inspection and transcription. When an employer keeps some of those required records outside of Oregon, those records are not "accessible," and it is within the authority of the Agency to request that the employer provide access to the records in the form of a list containing the required information. The Agency requested the information in writing on three occasions, and Agency staff spoke with Paolini at least twice about it. On May 18, 1990, Paolini told Lessel that Respondent refused to send the requested records so that the Agency could check Respondent's compliance. Respondent never provided the information until twice ordered to do so by the Hearings Referee. By failing to keep its records in an accessible place and make the information available to the Agency, Respondent violated OAR 839-21-175.

In Respondent's third affirmative defense, it contended that the Agency was equitably estopped from assessing a civil penalty for Respondent's failure to make its records accessible and available because the Agency told Respondent that the Agency's request was inappropriate, and thus Respondent was not bound to respond.

With regard to Respondent's defense here and to its equitable estoppel defense to the employment certificate filing violations, the Agency argued that the doctrine of equitable estoppel does not apply against the government when it is enforcing mandatory requirements of the law. It argued that a public employee has no authority to waive the mandatory

requirements of the law. *Bankus v. City of Brookings*, 252 Or 257, 259-60, 449 P2d 646, 648 (1969); *Solberg v. City of Newberg*, 56 Or App 23, 641 P2d 44, 48 (1982). Respondent argues that the courts have applied the doctrine against the state. See, e.g., *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 669 P2d 1132 (1983); *Johnson v. Tax Commission*, 248 Or 460, 435 P2d 302 (1967); *Glover v. Adult and Family Services*, 46 Or App 829, 613 P2d 495 (1980).

In *Thrift v. Adult and Family Services*, 58 Or App 13, 646 P2d 1358 (1982), the Court of Appeals said,

"A review of the cases in which equitable estoppel has been successfully invoked against the government reveals that the individuals asserting estoppel would otherwise have received the particular benefits at issue but for the agencies' misleading or ambiguous assertions."

The court cited *Glover* and *Johnson*, above, and two other tax cases. The Forum's review of the cases suggests that the courts have limited the application of the doctrine to tax and government benefit cases, and to cases in which the government was involved in a land transaction or had negotiated a contract. The Oregon Supreme Court, in a recent case, did not reveal any intention to broaden the doctrine as applied against the government when it said:

"Estoppel, if ever applicable against the government, certainly does not apply here." *Committee in Opposition to the Prison in Malheur County v. Oregon Emergency Corrections Facility Siting*

*Authority*, 309 Or 678, 792 P2d 1203, 1207 (1990).

The Forum finds that the doctrine of equitable estoppel does not apply in a case such as this, where the Agency is enforcing a mandatory requirement of the law. An Agency employee could not have waived the requirements of the law and rules. In its exceptions, Respondent argues that the Commissioner's decision to impose civil penalties is entirely discretionary. It argues that "even if the Agency could not be estopped from requiring Albertsons to [comply with the requirement of the law], the Agency still could be equitably estopped from imposing a discretionary penalty upon Albertsons for the alleged violation." The Forum finds this argument meritless. What Respondent urges is a distinction without a difference. The Agency's use of all of its enforcement tools is discretionary. If the Agency could be estopped from using its enforcement tools (civil penalties being one), it would be effectively estopped from enforcing the mandatory requirements of the law. Employers, such as Respondent, could refuse to comply with the mandatory requirements of the law, and the Agency would be estopped from using its statutorily provided enforcement tools. The Forum finds that the doctrine of equitable estoppel does not apply to stop the Commissioner from exercising her power to impose civil penalties under ORS 653.370 for violations of child labor statutes and rules.

Nevertheless, if the doctrine does apply to the Agency in this case, Respondent must prove it by a preponderance of the evidence. *McKinney v. Hindman*, 86 Or 545, 551, 169 P2d 93

(1917). To constitute equitable estoppel or estoppel by conduct there must be a false representation, it must be made with knowledge of the facts, the other party (Respondent) must have been ignorant of the truth, the representation must have been made with the intention that it should be acted on by the other party, and the other party must have been induced to act on it. *Coos County v. State*, 303 Or 173, 180-81, 734 P2d 1348, 1354 (1987). The misrepresentation must be one of existing material fact, and not of intention, nor may it be a conclusion from facts or a conclusion of law. *Id.* Respondent must demonstrate not only reliance, but a right to rely upon the representation of the Agency. Reliance is not justified where Respondent had knowledge to the contrary of the fact or representation allegedly relied upon. *Id.*

Respondent's third affirmative defense refers to its allegation that John Lessel told Bruce Paolini that the Agency's first request for information, dated November 14, 1988, was inappropriate. The preponderance of credible evidence on the whole record refutes that allegation. The first request for information was made by Ron Kimmons, at the direction of Lessel, who was so directed by the deputy administrator of the Wage and Hour Division. The second request was made by Lynn Campbell, with Lessel's knowledge, and was later repeated by Lessel in a letter to Paolini. Both Kimmons and Campbell were supervised by Lessel. At the point of Lessel's letter, dated May 8, 1990, Paolini could no longer reasonably rely on an alleged comment by Lessel about the

appropriateness of the first request for information. The alleged comment could no longer serve to excuse Respondent's failure to provide the information.

Another reason Respondent asserts for its failure to provide the records is that Paolini asked for the Agency's authority for requesting the information. The Agency never cited its statutory and regulatory authority to Respondent. There was no misrepresentation; at best, there was a lack of action in response to Respondent's request. "Estoppel requires a representation to the person claiming detrimental reliance." *Thones v. Tatro*, 270 Or 775, 789, 529 P2d 912 (1974). The Oregon Supreme Court has held that "silence will create an estoppel only where there is a legal duty to speak." *Waterway Terminals v. P.S. Lord*, 242 Or 1, 24, 406 P2d 556 (1965), cited in *Coos County*, 734 P2d at 1359. Here, no such duty arose. Agency staff members were aware that Respondent had been provided with copies of the statutes, ORS chapter 653, and rules, and Paolini, an attorney, had copies of them. He either knew or should have known what the law required. Respondent could not justifiably rely on the Agency's silence regarding a legal citation, following the two Agency requests for the information. Respondent took no action to make any of the requested records, some of which were available only in Boise, accessible and available to the Agency. The Forum finds that the Agency is not estopped to enforce this recordkeeping requirement or to assess civil penalties for Respondent's failure over many months to make the

requested information available in any form. Accordingly, Respondent's third affirmative defense fails.

In its fourth affirmative defense Respondent contended that the Agency was equitably estopped from assessing civil penalties on the recordkeeping claim (and on the Agency's second claim regarding Respondent's failure to file employment certificates) because Respondent was told by an agent of the Agency with apparent authority to bind the Agency that: (1) Respondent did not need to comply with the employment certificate requirement, (2) an agent of the Agency would go to all of Respondent's stores in Oregon and train Respondent's personnel in the use of the employment certificates and failed to do so, and (3) an agent of the Agency would go to all of Respondent's stores in Oregon and provide them with copies of the employment certificate and failed to do so.

The facts do not support any of Respondent's points one, two, or three. With respect to point three, the evidence showed that the Agency agreed to mail or deliver forms to Respondent's stores. The Forum finds that none of the factual bases for Respondent's estoppel argument, even if true, have any relevance to Respondent's legal duty to maintain records and make those records available for inspection and transcription to the Agency, in compliance with OAR 839-21-170 and 839-21-175. Respondent could not justifiably rely on the alleged misrepresentations to conclude that it did not have to comply with the law's recordkeeping requirements. None of the alleged misrepresentations have anything to do with the

Agency's request that Respondent make its records available. The Agency provided Respondent with the rules, including those regarding recordkeeping requirements. Respondent either knew or should have known that its duty to make its records accessible and available was separate from its duty to file employment certificates. Respondent has failed to prove its fourth affirmative defense with regard to its failure to make its records available.

In Respondent's seventh affirmative defense it contended that the Agency's assessment of civil penalties for the recordkeeping violation and for the employment certificate violations breached an agreement between the Agency and Respondent that an Agency employee would provide assistance and forms to all of Respondent's stores in Oregon and failed to do so.

The Forum finds that even if there was an agreement as Respondent alleges, and even if that agreement was breached, such agreement and breach would have no bearing on the Agency's request for access to records, or on Respondent's failure to make its records available, or on the Agency's assessment of civil penalties for that failure. Respondent has failed to prove its seventh affirmative defense with regard to the recordkeeping claim.

Respondent's ninth affirmative defense contends that the Agency exceeded its authority in adopting OAR 839-21-170 and 839-21-175, which, as enforced, go beyond the statutory requirements and legislative intent of ORS 653.310. This is the same defense that Respondent raised (as its

seventh affirmative defense) in its second amended answer and on which the Hearings Referee granted summary judgment to the Agency.

It should be noted that the Agency did not adopt OAR 839-21-170 and 839-21-175; the Wage and Hour Commission did. In his ruling on summary judgment, the Hearings Referee found that:

"the Wage and Hour Commission did not exceed its authority in adopting OAR 839-21-170 and 839-21-175. ORS 653.307(1) provides that 'The Wage and Hour Commission \* \* \* shall by rules and regulations require reports from employers employing minors.' The records required to be kept by those rules include information like names, ages, occupations, hours and days of work, and dates of employment. Since the Commission is charged with regulating the employment of minors, and in particular regulates their hours of work and employment in hazardous occupations, the required records are directly related to administration of ORS 653.305 to 653.545 and employment certificates. Such records are reasonably necessary for the preparation of meaningful reports that may be required by the

commission. OAR 839-21-248. In addition, I find that the rules are within the authority of the Commission pursuant to ORS 653.525."

The Forum hereby adopts the Hearings Referee's summary judgment ruling, in accordance with OAR 839-30-070(6). These rules, as enforced here, do not exceed the intent or language of ORS 653.307 and 653.310. Respondent's ninth affirmative defense fails.

## 2. Respondent Failed to File Employment Certificates.

In its amended charging document, the Agency charged that Respondent willfully and repeatedly failed to procure and keep on file and accessible completed employment certificates within 48 hours after hiring each minor listed in 10 exhibits, in violation of the requirements of ORS 653.310 and OAR 839-21-220(3) and (5). The Agency originally cited 211 such violations, but withdrew four charges at hearing.

ORS 653.310 provides:

"No child under 18 years of age shall be employed or permitted to work in any employment listed in ORS 653.320(2), unless the person employing the child procures and keeps on file and accessible to the school authorities of the district where such child resides<sup>2</sup> and

<sup>2</sup> Respondent suggests that this language of the statute, "procures and keeps on file and accessible to the school authorities of the district where such child resides," requires employers to keep their employment certificates at the locale where the minor is employed, that is, at the store level. Respondent goes on to suggest that the Agency has failed to properly enforce the statute by allowing businesses such as Fred Meyer and Safeway to maintain their employment certificates at a central office. The Forum finds that the statutory language only identifies which school authorities may have access to the employment certificates. The language does not require employers to keep employment certificates locally, and the administration of the Wage and Hour

to the police and the commission an employment certificate as prescribed by the rules and regulations adopted by the Wage and Hour Commission pursuant to ORS 653.307, and keeps a complete list of all such children employed therein."

ORS 653.307(1) provides in part:

"The Wage and Hour Commission shall provide a method for issuing employment certificates to minors and employment certificates to employers for the employment of minors in accordance with rules and regulations which it may hereafter adopt pursuant to the provisions of ORS 183.310 to 183.550 \* \* \*"

OAR 839-21-220 provides in part:

"(1) Unless otherwise provided by rule of the Commission, no minor 14 through 17 years of age shall be employed or permitted to work unless the employer:

\* \* \* \*

"(b) Complies with the provisions of this rule.

\* \* \* \*

"(3) Within 48 hours after the hiring of a minor, or of permitting a minor to work, an employer shall file a completed employment certificate form by taking or mailing the completed form to any office of the Bureau of Labor and Industries.

\* \* \*

"(5) An employer must retain the validated employment certificate during the period the minor remains an employee of the employer."

The preponderance of credible evidence in the whole record shows that, with regard to the 205 minors referred to in Finding of Fact 171 and Ultimate Finding of Fact 3, Respondent failed to procure and keep on file an employment certificate as prescribed by the rules adopted by the Wage and Hour Commission pursuant to ORS 653.307.

Respondent argued at length that the Agency's records and its staff's search of those records were unreliable. The Forum finds that the employment certificate and work permit processing and issuing process was reliable. The Forum also finds that the checks of information in the computer and in other forms (hard copies and microfilm) were reliable. The fact that Shirley Barshaw could not explain isolated anomalies (for example, her inability to explain why she did not find an employment certificate for Chris Bennett) is not sufficient to render the entire recordkeeping system, the staff's work on it, and their retrieval of information unreliable. Unit staff proofread information put into the computer against the original applications at the time of input. They were able to retrieve information by employer,

Division has not so required. As the statute and OAR 839-21-175(2) state, records must only be kept in a safe and accessible place. Further, the statute and rule do not require employers' records to be accessible 24 hours per day, every day, including holidays, as Respondent seems to suggest. The Forum finds that it is enough that records are accessible during the normal business hours of an employer's business office.

employee name, date of birth, or social security number. They performed double checks between the work permit records on microfilm and on the computer. In some cases, they checked different spellings of names and alternative versions of other information when there was a question. They had worked with the microfilm records for three years and had discovered only two irregularities; the Agency withdrew all charges that would have been affected by those irregularities. The credible evidence produced was sufficient to find out whether a completed employment certificate was filed by Respondent within 48 hours of hire or whether a minor had a work permit at the time of hire. Based upon the numerous searches of the records by the Agency and by Respondent, the Forum finds that the evidence on the whole record is reliable and that the findings made from them are correct.

As mentioned above, in its fourth affirmative defense Respondent contends that the Agency is equitably estopped from assessing civil penalties on the Agency's claim that Respondent failed to file employment certificates because Respondent was told by an agent of the Agency with apparent authority to bind the Agency that: (1) Respondent did not need to comply with the employment certificate requirement, (2) an agent of the Agency would go to all of Respondent's stores in Oregon and train Respondent's personnel in the use of the employment certificates and failed to do so, and (3) an agent of the Agency would go to all of Respondent's stores in Oregon and provide them with copies of the employment certificate and failed to do so.

As noted above, the Forum finds that the equitable estoppel doctrine is not applicable in this case. If it is applicable to the Agency's imposition of civil penalties, the discussion below applies the elements of the doctrine as described above.

Respondent's first point refers to its allegation that some unnamed employee of the Agency, with some unknown title, in some unknown section, told Ike Mabbott that Respondent did not need to comply with the state law. Mabbott made no notes of that conversation. The Forum does not believe that such a statement was made.

"The credibility, i.e., weight, that attaches to testimony can be determined in terms of the inherent probability, or improbability of the testimony, the possible internal inconsistencies, the fact it is or is not corroborated, that it is contradicted by other testimony or evidence and finally that human experience demonstrates it is logically incredible." *Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256, 602 P2d 1161, 1168 (1979) (Richardson, J., concurring).

The Forum finds that it is inherently improbable that an employee of the Bureau, a law enforcement agency, told Mabbott that Respondent did not need to comply with the law. If such a statement was made, it was obviously not correct. Respondent had knowledge of the truth. Respondent had copies of the rules, copies of Employment of Minors brochures, and written information from Lessel that the Agency processed thousands of work permits and employment certificates each year. Paolini chose to believe that Lessel's

letter was just "bureaucratic-type talk." Respondent was repeatedly advised by Lessel that the alleged statement by the unnamed employee was incorrect and Respondent must comply with the law. Respondent argues that it could reasonably rely on the statement in spite of direct oral and written advice to the contrary by an Agency compliance specialist, Ron Kimmons (Ike Mabbott wanted something more than just Ron Kimmons's word for it), and his supervisor, John Lessel. The Forum finds that, even if such a comment from the unidentified source was made to Mabbott, it was unreasonable for Respondent to rely on it in the face of the authoritative information it received from the compliance section of the Agency. Respondent abandoned its claim of reliance on the alleged statement when it agreed to comply with the law in February 1989.

If Respondent's first point also refers to Lessel's agreement that Respondent could file employment certificates only for newly hired minors, its estoppel claim fails here as well. First, Respondent knew what the law required. In other words, Respondent was not ignorant of the truth, which was that the law required it to procure employment certificates for all of its minor employees. Second, Respondent could not justifiably rely on Lessel's statement. According to Paolini, when Lessel agreed to prospective application of the law, he asked Paolini not to tell anyone that he had waived compliance on current employees. Lessel could not have spoken with any authority when he did not want his superiors to find out what he had agreed to.

Respondent's second point refers to its allegation that Lessel agreed that Agency staff would visit each of Respondent's stores (except in remote areas of the state) to train Respondent's staff how to fill out employment certificates, and the Agency failed to do that. First, the Forum finds that the forms are simple and self-explanatory. Second, the Forum finds that Lessel made no such commitment. See Findings of Fact 40, 41, and 59. Lessel offered to go to a store directors meeting, but he was never invited to one. Paolini's memo of February 7, 1989, to Respondent's store directors makes no mention of training, and Paolini did not complain about a lack of training in later correspondence with the Agency. Indeed, Paolini provided training on the employment certificates at one of Respondent's store directors meetings and instructed the store directors how to fill out employment certificates in his February 1989 memo. He told the store directors that the law required that the forms be submitted within 48 hours of hiring a minor employee and that the directors "must begin to comply" once they received the forms. He testified that he expected some of the store managers to be able to complete the certificates without any additional training beyond his memo. Respondent again directed its store directors to file employment certificates (albeit only for new hires) in Nita Parkinson's February 1990 memo to store directors. No mention was made of, and no reliance was placed on, prior Agency training. The Forum finds that Respondent did not rely on any alleged commitment by the Agency to personally visit Respondent's stores to train its

personnel. Respondent's second point is not in accord with the facts.

Respondent's third point refers to Lessel's agreement to provide Respondent with employment certificate applications. During the Agency's months-long attempt to bring Respondent into compliance, Lessel offered the Agency's assistance to help Respondent obtain compliance. Employers are required to obtain employment certificate forms to comply with the law. OAR 839-21-220(1)(b) and (2). If an employer does not obtain employment certificate forms, the employer is not excused from filing them as required.<sup>3</sup>

The record shows that Ron Kimmons gave the Medford store director employment certificate forms on June 30, 1988. The store director sent the forms to Paolini at Paolini's direction. On July 1, 1988, the Work Permit Unit sent employment certificates to Paolini, and C.S. Kimmons requested that Respondent file them "posthaste" on "each minor in your employ in Oregon." On July 11, 1988, the Work Permit Unit sent an additional supply of 200 employment certificates to Mabbott and a supply to Respondent's district office in Portland. On December 15, 1988, Kimmons delivered 20 employment certificate forms to Respondent's Klamath Falls store. Thus, before February 7, 1989, the Agency provided Respondent's Boise office with hundreds of employment

certificates, provided individual stores with forms, and had directed Respondent to begin to comply. Respondent was not ignorant of the truth that it must file employment certificates for all of its minors and that it had the forms necessary to begin. While Lessel intended that the Agency would provide Respondent with more forms, he did not agree to visit each store to hand deliver them. Lessel never agreed that Respondent did not have to comply with the law until the Agency provided additional forms. By stating in his February 7, 1989, letter to Lessel that "I have directed our Oregon store directors to begin to submit the employment certificates upon their receipt of them," Paolini created the condition that Respondent now claims estops the Agency's enforcement action. In the face of the Agency's past provision of forms and directions to begin submitting them, Respondent could not justifiably rely on the Agency's silence concerning a condition Paolini created. Respondent had forms, was able to distribute those forms to its stores, and had the duty to get more forms if it needed them. Respondent's compliance with the law was not contingent on getting additional forms. On February 7, 1989, Paolini sent each of Respondent's Oregon stores a copy of an employment certificate with his memo of that date. On around March 14, 1989, the Agency sent more forms to

<sup>3</sup> Based on Lessel's offer to provide Respondent's stores with employment certificate forms, Bruce Paolini presumed that the Agency would provide forms to the stores continuously in the future, with no need of further requests from Respondent. Paolini thought the Agency should somehow monitor Respondent's submissions of employment certificates and automatically resupply Respondent's stores when the employment certificate supply got low. The Agency never agreed to such an arrangement. The Forum finds Paolini's presumption unfounded and unjustified.

21 stores and Respondent's district office in Portland. In April 1989, Paolini talked with all of his store directors about employment certificates and instructed them how to fill them out. At any time, any store director could have called the Agency and obtained employment certificate forms. Certainly by April 1989, some of Respondent's store directors knew they had not received forms from the Agency or from Respondent, and yet no one called the Agency.

On May 10, 1989, the store director of Respondent's North Bend store, Branderhorst, notified Gaylene Austin, who worked with Paolini in Boise, that he (Branderhorst) had not received employment certificates from the Agency. Ms. Austin contacted the Agency, which then sent forms to the store. Branderhorst filed with the Agency a copy of the employment certificate he had received with Paolini's February 1989 memo. Respondent's main office also sent Branderhorst employment certificate forms. At this point, Respondent's Boise office knew that at least one of its stores had not received employment certificates, yet it apparently did nothing to check whether other stores had not received forms, and it did not notify the Agency that some of its stores needed forms. It apparently took no action to distribute

forms that it already had to its other stores.

On January 26, 1990, C.S. Campbell left employment certificate forms with Respondent's store director, Mike Madden,<sup>4</sup> at its store on Hilyard Street in Eugene.

On around January 30, 1990, the Agency sent 600 employment certificate forms (along with work permit forms and Employment of Minors brochures) to Nita Parkinson, Respondent's director of training, with instructions that the store directors needed to file them for the minors they "now employ." On February 19, 1990, Parkinson sent Respondent's 39 Oregon store directors employment certificate and work permit forms, with instructions on how to fill them out.

The Forum finds that the Agency provided Respondent with hundreds of employment certificate forms from June 1988 through March 1989. Respondent's estoppel argument could not apply to any of those stores that received employment certificate forms during that period. Those stores include:

#502	Halsey, Portland.
#504	Cully, Portland.
#505	Shattuck, Portland.
#507	West 18th Avenue, Eugene.
#514	Corvallis.
#515	Hilyard Street, Eugene. <sup>5</sup>

<sup>4</sup> Mike Madden was the store director at a Hilyard Street store in Eugene, shown on Respondent's list provided to Lessel in February 1989. Barshaw sent forms in March 1989 to that store. In January 1990, Madden told Campbell he had never heard of employment certificates. The Forum finds this assertion not credible because of the number of times he should have been exposed to them by both Paolini and the Agency.

<sup>5</sup> The Forum finds that store #515 and #568 are, in effect, the same store at a new location. Store #515, at 3229 Hilyard Street, Eugene, had Mike Madden as store director and Sherry Smith as grocery manager. The Agency sent

#517 Milwaukie.  
 #521 Lake Grove, Lake Oswego.  
 #522 Grants Pass.  
 #524 Klamath Falls.  
 #542 Medford.  
 #547 82nd and Division, Portland.  
 #548 Bend.  
 #549 Oregon City.  
 #550 Bellline and Barger, Eugene.  
 #551 East Springfield, Springfield.  
 #554 174th and Powell, Portland.  
 #555 Albany.  
 #556 Gresham.  
 #557 Aloha.  
 #558 Sunnyview, Salem.  
 #559 Greenway and Hall, Beaverton.  
 #3500 Respondent's Division Office, Portland.

The Agency provided Respondent's North Bend store employment certificates in May 1989. Respondent's estoppel theory could not apply to this store after that date.

Respondent's estoppel theory could not apply to store #566 in Milwaukie or its store in Baker City, since those were new stores not on the list of stores Respondent provided to the Agency. Respondent did not request forms for those stores until after the Agency provided Nita Parkinson with 600 employment certificates, which she distributed to all of Respondent's Oregon stores.

Respondent's estoppel theory could not apply to any of its remaining stores after February 19, 1990, when Nita Parkinson distributed forms to all

of Respondent's Oregon stores. Regarding only those remaining stores where the Agency visited and charged violations, those stores are:

#135 La Grande.  
 #158 Pendleton.  
 #531 Oakway Mall, Eugene.  
 #532 The Dalles.  
 #539 Roseburg.  
 #541 Hillsboro.  
 #543 Holly Farm, Milwaukie.  
 #546 Cedar Hills, Beaverton.  
 #560 Division & River Road, Eugene.  
 #561 Commercial & Hillfiker, Salem.  
 #562 Keizer.  
 #563 Division and 122nd, Portland.  
 #565 Tigard.

In sum, while Lessel intended to send additional employment certificates to Respondent's stores, he did not misrepresent Respondent's duty to comply with the law. Lessel made the offer to send more forms with the knowledge that Respondent already had been sent hundreds of forms. Respondent was not ignorant of the truth that the law required it to procure and keep on file and accessible an employment certificate for each minor employee. Respondent had no right to rely on Lessel's representation, when it already had employment certificates, had knowledge of the law's requirements, and had previously been directed by the Agency to file them. In view of the above, Respondent should not be able to invoke the aid of the doctrine of estoppel. Respondent has

this store employment certificates in March 1989. That store closed. Store #568, at 3075 Hilyard Street, Eugene, opened with Mike Madden as store director and Sherry Smith as grocery manager. This is the store the Agency visited in January and June 1990.

failed to prove its fourth affirmative defense.

As noted above, in Respondent's seventh affirmative defense it contended that the Agency's assessment of civil penalties for the recordkeeping violation and for the employment certificate violations breached an agreement between the Agency and Respondent that an Agency employee would provide assistance and forms to all of Respondent's stores in Oregon and failed to do so.

The Forum finds that there was no contract between the Agency and Respondent. The Agency was not negotiating a contract with Respondent, it was trying to get Respondent to comply with mandatory laws and rules of Oregon. Respondent had a legal duty to comply. Lessel had no actual or implied authority to enter into such a contract with Respondent, and Respondent made no effort to find out if he was acting within the scope of his powers. As the Agency pointed out,

"It is also elementary law that a promise to perform an act that the promisor is already bound by law to perform cannot constitute consideration sufficient to support a bilateral contract. *Jole v. Bredbenner*, 95 Or App 193, 197, 768 P2d 433 (1989). Try as you may, the only promise that respondent made was to comply with the law, an obligation which at all times it had." (Agency's Posthearing Brief.)

Respondent argued in its exceptions to the Proposed Order that the *Jole* case provides an exception to this rule, which is that "a good faith compromise of a disputed claim can constitute

consideration." (Respondent's exceptions, citing *Jole*, at 198.) Respondent argues that it disputed the Agency's claim that Respondent had to comply with the law. The Forum finds that argument lacks merit. From the time that C.S. Kimmons contacted Respondent in June 1988, he and Lessel advised and directed Respondent to comply with the child labor statute and rules, copies of which the Agency sent to Mabbott and Paolini. The Forum has found that it would be unreasonable for Respondent to rely on allegedly conflicting advice from an unnamed employee of the Agency. While Respondent questioned whether the Agency was selectively enforcing the law, and whether the Agency could impose civil penalties under ORS 653.370, that is different than any dispute about whether Respondent had to comply with the law. ORS 653.310, in particular, is clear:

"No child under 18 years of age shall be employed \* \* \* unless the person employing the child procures and keeps on file and accessible \* \* \* an employment certificate as prescribed by the rules and regulations adopted by the Wage and Hour Commission \* \* \* and keeps a complete list of all such children employed therein."

Respondent is required to comply with that law, irrespective of its disagreements with the Agency over enforcement policy. The Forum finds that there was no true dispute about whether Respondent had to comply with Oregon child labor laws, and thus any compromise could not constitute consideration.

Paolini apparently treated most of his contacts with the Agency as if he were negotiating a contract. When he was advised about the law's requirements and directed to comply, he responded that

"we are willing to consider doing so if you assure us that other retail employers in Oregon will be required to do the same. \* \* \* If you will please provide us with a listing of the retail employers who uniformly submit such certificates, we will review such list and advise you of Albertson's position." (Paolini letter dated October 21, 1988.)

At hearing, Paolini described an elaborate set of "conditions, commitments, and understandings" coming from his discussions with Lessel. He felt Respondent's compliance with the law was conditional on the Agency performing various tasks, including bringing the entire food industry into uniform, meaning 100 percent, compliance with the same laws. Not only do these unwritten and vague "understandings" go beyond the scope of Respondent's affirmative defense, but the Forum finds that they do not constitute a contract.

The agreement Respondent alleges in its defense is that the Agency would provide assistance and forms to all of Respondent's stores and failed to do that. As found above with regard to Respondent's estoppel defense, Lessel never agreed to go to all of Respondent's stores to train its personnel. The assistance he offered – to provide training at a management meeting – was never accepted by Respondent. Lessel was never invited to provide

training. Nor was his offer to provide additional forms a condition precedent to Respondent's compliance with the law. Respondent was required by law to comply and could not by agreement make compliance conditional upon the Agency providing it with additional forms. There being no contract, Respondent has failed to prove its seventh affirmative defense with respect to its failure to file employment certificates.

### **3. Respondent Failed to Require Minors to Produce Work Permits Before Employing or Permitting the Minors to Work.**

In its amended charging document, the Agency charged that Respondent

"willfully and repeatedly employed or permitted to work each of 75 minors \* \* \* without first requiring each minor to produce a work permit, in violation of ORS 653.310 and OAR 839-21-220(1)."

The Agency withdrew 23 of those charges at hearing.

OAR 839-21-220(1), provides in part:

"Unless otherwise provided by rule of the Commission, no minor 14 through 17 years of age shall be employed or permitted to work unless the employer.

"(a) Verifies the minor's age by requiring the minor to produce a work permit[.]"

The preponderance of credible evidence in the whole record shows that, with regard to 51 minors identified by an asterisk in Finding of Fact 171 and referred to in Ultimate Finding of Fact 4, Respondent employed or permitted them to work without first verifying the minors' ages by requiring them to

produce work permits, in violation of OAR 839-21-220(1).

The Forum addressed above Respondent's assertion that the Agency's records and its search of those records were unreliable, and found that they were reliable and supported the Forum's findings of facts.

In its eighth affirmative defense, Respondent contended that the Agency's third claim (regarding Respondent's failure to verify minors' ages by requiring the minors to produce work permits) failed to state a claim on which relief could be granted. Respondent apparently abandoned this defense, since Respondent failed to address it in the posthearing brief. Nonetheless, the Forum will address it.

In the third claim of its amended charging document, the Agency referred to the statute and rule involved; charged the violations in the words of the rule; identified each minor by, at a minimum, name, social security number, date of birth, date of hire, and store name and location where the minor was employed; and stated the amount of the civil penalty the Agency proposed to impose. No more is required. ORS 183.415; 653.370. Accordingly, Respondent's eighth affirmative defense fails.

Respondent's twelfth affirmative defense contends that the Agency exceeded its administrative authority in adopting OAR 839-21-220(1), which provides:

"Unless otherwise provided by rule of the Commission, no minor 14 through 17 years of age shall be employed or permitted to work unless the employer.

"(a) Verifies the minor's age by requiring the minor to produce a work permit and

"(b) Complies with the provisions of this rule."

Here again, since Respondent failed to argue this legal issue in its posthearing brief, it appears to have abandoned the defense. Nonetheless, the Forum will address it.

The Agency did not adopt the rule. The Wage and Hour Commission did. ORS 653.307; OAR 839-21-210. In ORS 653.307 the Oregon Legislature gave the Wage and Hour Commission a broad grant of authority to "provide a method for issuing employment certificates to minors and employment certificates to employers." The statute requires minors to have employment certificates, which the commission calls work permits. OAR 839-21-006(11). The rules provide a method for issuing work permits to minors. OAR 839-21-210 and 839-21-215. The rule requires each minor to "obtain a work permit prior to securing employment." OAR 839-21-215(1).

The statute requires employers to procure employment certificates. ORS 653.310. Sections 2 through 8 of OAR 839-21-220, which sections Respondent did not challenge, provide a method for employers to get the employment certificate required by ORS 653.310.

Section (1)(a) of the challenged rule requires an employer to verify the age of a minor by making the minor produce a work permit before the minor is employed or permitted to work. An employment certificate cannot be validated unless it discloses that the

employment complies with all laws and rules for the employment of minors. OAR 839-21-220(4), (6). Again, one of the rules requires minors to have a work permit before getting a job. Based upon that and the fact that an employer needs to know the age of an applicant in order to comply with age-related hours and duties restrictions, the requirement of section (1)(a) is a reasonable adjunct to the procedure to procure employment certificates and is consistent with the work permit requirements.

Section (1)(b) of the challenged rule prohibits employers from employing minors unless the employers procure and retain employment certificates according to sections 2 through 8 of the rule. The Forum finds nothing in OAR 839-21-220(1)(b) that exceeds the authority of the commission.

The Forum finds that OAR 839-21-220(1) is within the authority granted to the Wage and Hour Commission by ORS 653.307. Respondent has failed to prove its twelfth affirmative defense.

#### 4. Civil Penalties for Child Labor Violations.

Pursuant to ORS 653.370(1),

"the Commissioner of the Bureau of Labor and Industries may impose upon any person not regulated under the Federal Fair Labor Standards Act who violates ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder, a civil

penalty not to exceed \$1,000 for each violation."

Respondent is not regulated under the Fair Labor Standards Act for the violations found here. See Conclusion of Law 2 and the discussion below regarding Respondent's first affirmative defense. The Agency has adopted rules, OAR chapter 839, division 19, to regulate civil penalties for child labor violations. A "violation" means "a transgression of any statute, rule or order, or any part thereof and includes both acts and omissions." OAR 839-19-004(9). "Each violation is a separate and distinct offense." OAR 839-19-015. For certain violations, the Agency has established minimum penalties. OAR 839-19-025. "The civil penalty for any one violation shall not exceed \$1,000. The actual amount of the civil penalty will depend on all the facts and any mitigating and aggravating circumstances." OAR 839-19-025(1).

#### Willful and Repeated Violations

In each of its three claims, the Agency alleged that Respondent "willfully and repeatedly" violated the statute and/or rules. OAR 839-19-025(5) provides:

"Willful and repeated violations of the provisions of ORS 653.305 to 653.370 or OAR 839-21-001 to 839-21-500 are considered to be of such seriousness and magnitude that no less than \$500 for each willful or repeated violation will be imposed when the Commissioner determines to impose a civil penalty."<sup>6</sup>

<sup>6</sup> Note that the rule begins with "Willful and repeated violations," but later refers to "willful or repeated violation." (Emphasis added.) In *In the Matter of Panda Pizza*, 10 BOLI 132, 141-42 (1992), the Forum held that rules should be

In *In the Matter of Panda Pizza*, 10 BOLI 132 (1992), the Forum found that, from OAR 839-19-025(5), consequences flow not from the willful doing of an act but rather from the willful violation of the law.

"[I]t is reasonable to predicate such consequences on actual or constructive knowledge of the law's requirements. 'Constructive knowledge' in this context means knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person has constructive knowledge of a thing if the person has the means to inform himself or herself but elects not to do so." *Panda Pizza*, at 143.

Also in *Panda Pizza*, at 143, the Forum gave "repeated" the following meaning:

"The ordinary dictionary meaning of 'repeated,' as an adjective, is 'said, made, done, or happening again, or again and again.' *Webster's New World Dictionary* 1205 (2d coll ed 1986). 'Again' means 'once more; a second time; anew.' 'Again and again' means 'often, repeatedly.' *Webster's*, at 25. 'Often' means 'many times,

repeatedly, frequently.' *Webster's*, at 988.

\*\*\*\*

"Much like 'willful \* \* \* violations,' the forum concludes that this portion of the rule is addressed to genuinely recalcitrant employers, employers who are repeat violators in the sense of having been cited for noncompliance in the past. There is no need in such cases to rely on actual or constructive knowledge of the law in order to justify minimum penalties. The fact of a prior citation for the same offense makes notice of the law's potential application a foregone conclusion, and the forum need not dwell in such cases on questions of knowledge and intent."

#### Amounts of Civil Penalties to Be Imposed

In its first claim, the Agency alleged that Respondent "willfully and repeatedly failed to provide the Commissioner" with certain information about "all minors employed by Albertsons' Oregon stores since February 7, 1989 as requested by the Commissioner on April 27, 1990 in violation of OAR 839-21-170(1) and (3) and OAR 839-21-175. Civil Penalty \$1000." In

read to give effect to every word, phrase, sentence, and section where possible. In *In the Matter of Mini-Mart Food Stores, Inc.*, 3 BOLI 262, 274 (1983). This is consistent with the general rule of statutory construction that, when construing a statute, a "judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. In order to give meaning to every word in OAR 839-19-025(5) (and not omit the word "or"), the Forum construed the rule to mean that: "willful and repeated violations of certain statutes and rules are both considered to be of such seriousness and magnitude that a minimum civil penalty will be imposed (when the Commissioner determines to impose a civil penalty); and, a minimum penalty will be imposed for each willful or repeated violation." *Panda Pizza*, at 142.

addition, the Agency alleged aggravating circumstances.

The Forum found a violation of OAR 839-21-175. Respondent had either actual or constructive knowledge of the requirements of OAR 839-21-170(1) and (3) and OAR 839-21-175 since at least July 1988, when compliance specialist Ron Kimmons sent Ike Mabbott a copy of OAR chapter 839, division 21. The Agency asked Respondent to provide information regarding its minor employees in November 1988. The information requested was information every employer is required to maintain, keep in an accessible place, and make available to the Commissioner with respect to each minor employed. Respondent did not make that information available to the Agency. The Agency again requested the information in April 1990 and again in May 1990. Respondent did not make the information available before any of the deadlines the Agency set. On May 18, 1990, Paolini refused to send any records to the Agency. Respondent did not provide the information until February 1991, after being twice ordered to do so by the Hearings Referee. The Forum finds that Respondent willfully violated OAR 839-21-175. No evidence in the record indicates that Respondent has been "cited for noncompliance in the past" for the same violations charged in the Notice of Intent to Assess Civil Penalties, as amended. *Panda Pizza*, at 143. Accordingly, the Agency has not proved its allegations of repeated violations.

The violation of OAR 839-21-175 is aggravated by the number of times the Agency requested this information and

the number of times Respondent failed to provide it. The Agency's ability to investigate this matter and bring Respondent into compliance with Oregon's child labor laws was impaired by Respondent's actions. "The mitigation to be considered refers to actions taken by the employer regarding the alleged violation, or to circumstances that might affect an employer's ability to comply with the law." (Rulings on Discovery Motions.) The fact that the Agency did not supply Respondent with a citation of its authority for its requests does not mitigate the violation. The Forum finds mitigation in the fact that much of the information the Agency requested was available at the store level for minors employed at the time of a field visit. In addition, Respondent's store directors and other store level staff were cooperative in making those records available upon request. The Forum imposes a civil penalty of \$750 for Respondent's willful violation of OAR 839-21-175.

In its second claim, the Agency alleged that Respondent willfully and repeatedly violated ORS 653.310 and OAR 839-21-220(3) and (5), which required Respondent to file and retain employment certificates. Respondent knew of the employment certificate filing requirements by no later than June 30, 1988, when Kimmons notified Paolini that Respondent's store had not filed them. By early July 1988, Respondent had copies of the rules and employment certificate forms. The Agency requested that Respondent comply, and it refused. Every failure to comply with the employment certificate law from that time on was committed knowingly and intentionally. In August

1988, Paolini said that Respondent would consider complying, assuming the Agency first met its conditions. Later assurances of future compliance by Respondent were conditional, and compliance was largely not achieved until June 1990. After February 1989, Paolini expected that, within several months, Respondent would stop complying if the Agency could not prove to Respondent that the entire food industry was in 100 percent compliance. The Forum finds that Respondent's violations of ORS 653.310 and OAR 839-21-220(3) and (5) were willful.

Respondent's violations are aggravated by the recalcitrant attitude of its upper management and its failure to take effective steps to bring itself into compliance with the law. The violations are mitigated by the cooperation of many of its store directors and other staff. Other mitigating circumstances are that some stores filed employment certificates during 1989, and, beginning in June 1990, many stores filed late employment certificates for their minor employees. The record shows, however, that Respondent still failed to file employment certificates for some minors employed in July 1990. The Forum imposes the minimum civil penalty permitted under OAR 839-19-025 (5) of \$500 per willful violation, as requested by the Agency. The total civil penalty for 205 willful violations of ORS 653.310 and OAR 839-21-220 equals \$102,500.

In its third claim, the Agency alleged that Respondent "willfully and repeatedly employed or permitted to work" 52 named minors "without first requiring each minor to produce a work permit, in violation of ORS

653.310 and OAR 839-21-220(1)." The Forum found 51 violations. From at least the time Bruce Paolini received Ron Kimmons July 1, 1988, letter, in which Kimmons advised Respondent that "employers in the State of Oregon are required to insure each minor, persons under 18 years, has a valid work permit upon hiring," Respondent had knowledge of its legal duty to require each minor to produce a work permit before it could employ the minor. On July 8, 1988, Kimmons sent and Ike Mabbott received a copy of the Oregon Administrative Rules regulating the employment of minors. No evidence in the record indicates that Respondent's corporate management made an effort to bring Respondent into compliance with the work permit law. The Forum finds that Respondent's violations of OAR 839-21-220 (1) were willful.

These violations are also aggravated by the recalcitrant attitude of Respondent's upper management and its failure to take any steps to bring Respondent into compliance with OAR 839-21-220(1). The violations are mitigated by the cooperation of many of Respondent's store directors and other staff. The Forum imposes the minimum civil penalty permitted under OAR 839-19-025(5) of \$500 per willful violation, as requested by the Agency. The total civil penalty for 51 willful violations of OAR 839-21-220(1) equals \$25,500.

In its first affirmative defense, Respondent contends that ORS 653.370(1) is unconstitutionally vague.

In *Megdal v. Oregon State Board of Dental Examiners*, 288 Or 293, 605 P2d 273 (1980), the Oregon Supreme Court held that the void for vagueness

doctrine did not apply in a case involving a revocation of a professional license for unprofessional conduct. In *Davidson v. Oregon Government Ethics Commission*, 300 Or 415, 712 P2d 87, 94 (1985), the court said,

"A civil penalty, as in this case, is a penalty, not a protective disqualification or disciplinary reprimand directed at his employment. Yet it is not a 'penal' sanction as that term has been used in decisions of the Supreme Court of the United States or of this court concerning vague penal laws.

"But we need not pursue the question whether, since *Megdal*, there have been indications that due process also denies government the power to inflict civil penalties for violations of standards so vague that they 'do not give fair notice of what they proscribe in time to let a person conform to the law,' [citing *Megdal*]."

After finding that the language challenged in *Davidson* was not vague, the court said,

"The rule against vagueness does not invalidate every law that leaves room for two or more interpretations on which legislators, lawyers and courts may differ, most laws do. Nor does the rule require that one must be able to predict with certainty the application of the law to every hypothetical set of facts." *Davidson*, 712 P2d at 94.

The Forum finds it questionable that the void for vagueness doctrine applies to an administrative civil penalty, which the court in *Davidson* said "is not a 'penal' sanction." The

language that Respondent argues is vague in ORS 653.370 is "not regulated under the Federal Fair Labor Standards Act." It is notable here that ORS 653.370 is not a statute that sets standards for behavior. The standards Respondent was required to comply with are not challenged. ORS 653.370 is a statute that describes those against whom the Commissioner may impose a civil penalty for violating standards set out in other statutes and rules. The Forum finds that the void for vagueness doctrine is aimed at standards of behavior or conduct that are so vague that those to whom they are addressed cannot discern what conduct is proscribed. That is not the case here. The Forum concludes that the void for vagueness doctrine does not apply to ORS 653.370.

Additionally, the Forum agrees with the Agency that the law is not vague. OAR 839-19-100 provides, in pertinent part:

"(1) The provisions of OAR 839-19-000 to 839-19-025 do not apply when minors are employed under the following circumstances:

"\*\*\*\*

"(c) When the employer is regulated under the child labor provisions of the Federal Fair Labor Standards Act (29 U.S.C. 201, et seq.).

"(2) As used in paragraph (1)(c) above, 'regulated under' means that the employer must be actively regulated by the child labor provisions of the Federal Fair Labor Standards Act. Employers employing minors whose employment is exempt from that act or the

rules and regulations adopted thereunder are not 'regulated under' the Federal Fair Labor Standards Act. Employers employing minors whose employment is not regulated under that Act because the Wage and Hour Division of the U.S. Department of Labor has decided to take no action in connection with the employment, are not 'regulated under' the Federal Fair Labor Standards Act."

In its posthearing brief, the Agency argued:

"Although the Federal Fair Labor Standards Act includes child labor provisions, where state law is more restrictive or more favorable to the employee than the federal law, state law governs. 29 CFR § 570.50(a) [sic]. *Alaska Intern. Industries, Inc. v. Musarra, Alaska*, 602 P2d 1240 (Alaska 1979). Federal law does not require minors to obtain work permits or employers to file employment certificates. Therefore, Oregon law, being more restrictive, prevails. Furthermore, federal child labor regulations expressly envision that state agencies may issue employment certificates for minors. 29 CFR § 570.5(b)(2). Oregon is one of the states from which the federal government will accept an employment certificate or a work permit as a substitute for a certificate of age. 29 CFR § 570.9(a). Clearly, the federal Fair Labor Standards Act does not regulate work permits and employer certificates." (Agency's Posthearing Brief.)

In Respondent's sixth affirmative defense it contends that the civil penalties proposed in the amended charging document greatly exceed the limits required by statute. Respondent argues that it has neither hired nor worked minors in violation of the laws of this state, and the civil penalties are not justified by the facts.

ORS 653.370 provides that the Commissioner may impose a civil penalty "not to exceed \$1,000 for each violation" of ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission. No penalty proposed by the Agency in the amended charging document exceeded \$1,000 per violation. The civil penalties charged do not exceed the limit set by the statute.

The preponderance of credible evidence on the whole record showed that Respondent violated the statute and rules 205 times concerning employment certificate requirements and 51 times concerning work permit requirements. Respondent hired and worked minors in violation of the laws of this state.

The rules for determining the amount of civil penalties, OAR 839-19-010 to 839-19-025, require a civil penalty of "no less than \$500 for each willful or repeated violation" of the law. OAR 839-19-025(5). With regard to the employment certificate and work permit violations, the Agency charged that they were willful and repeated, and proposed a civil penalty of \$500 for each violation. With regard to the records violation, the Agency charged that Respondent willfully and repeatedly violated the rules, cited aggravating factors, and proposed a \$1,000 civil

penalty. That proposed penalty was consistent with the statute and rules. Respondent has failed to prove its sixth affirmative defense.

#### 5. The Agency's Original Notice of Intent to Assess Civil Penalties.

In its second affirmative defense, Respondent contended that the Agency's original charging document was fatally deficient in whole or in part because it failed to include or convey to Respondent six exhibits on which it relied. The Hearings Referee granted the Agency's motion for summary judgment on this defense. The referee held that:

"ORS 183.415(2) requires that a notice include a statement of the party's right to a hearing, a statement of the authority and jurisdiction under which the hearing is to be held, a reference to the particular sections of the statutes and rules involved, and a short and plain statement of the matters asserted or charged. The Agency's notice, without the exhibits, meets those requirements. In addition to requirements similar to those in ORS 183.415, ORS 653.370(2) requires the notice to have a statement of the amount of the penalty imposed, a statement that the party must either pay the penalties or request a hearing within 20 days, a statement concerning waiver of a hearing, and a statement that the order will become final if the party fails to make timely the required requests. The Agency's notice, without the exhibits, complies with those additional requirements. The notice is not 'fatally deficient in whole or in part

as alleged by Respondent's second affirmative defense. Respondent's arguments are meritless as to the sufficiency of the notice."

The Forum hereby adopts the Hearing Referees ruling, pursuant to OAR 839-30-070(6). In addition, the Agency filed an amended charging document with 10 exhibits and served that on Respondent. Respondent has failed to prove its second affirmative defense.

#### 6. Selective Enforcement and Article I, Section 20, of the Oregon Constitution.

In its fifth affirmative defense, Respondent contended that the Agency selectively enforced the employment certificate and work permit requirements against Respondent. It contended "that this enforcement, the assertion of exorbitant penalties and the presentation of this matter at the initial stage to the press, was undertaken for improper purposes" by the Agency. In its posthearing brief, Respondent asserted that the singling out was due to: (1) Respondent's report to the US Senate that the Commissioner misrepresented Respondent's position on Oregon's parental leave law, and (2) Respondent's failure to make contributions to the Commissioner's reelection campaigns.

In its eleventh affirmative defense, Respondent contended that the Agency failed to apply its regulations indiscriminately as required by Article I, section 20, of the Oregon Constitution. In its brief, Respondent argued that the Agency's "enforcement of the [employment certificate] rule, work permit rule, and 49-hour [sic] rule" against Respondent was "carried out purely haphazardly and not evenhandedly as

required under the Constitution." It argued that it was treated differently than other employers by the Agency. (Respondent's Brief.)

The Forum will discuss these defenses together. If the doctrine of selective enforcement applies at all in this case, it exists to protect against constitutionally objectionable enforcement. In *Spray v. Board of Medical Examiners*, 50 Or App 311, 624 P2d 125 (1981), the Oregon Court of Appeals faced a claim of selective enforcement in a license revocation case. Judge Gillette wrote,

"Even assuming that the principles of selective enforcement applied in criminal trials apply to this case, this claim must also fail. In *State v. Hodgdon*, 31 Or App 791, 795-796, 571 P2d 557 (1977), *rev den* 282 Or 537 (1978), we stated:

" \* \* \* discriminatory enforcement of criminal statutes may be subject to attack where it can be shown that the enforcement is the result of intentional or purposeful invidious discrimination.

"The key to a claim of constitutionally objectionable enforcement is evidence of deliberate invidious discrimination. The fact that a criminal statute leaves room for the exercise of discretion in its enforcement does not of itself give rise to a violation of equal protection. In exercise of constitutionally permissible discretion, the state may decide not only who to prosecute, but also which of two applicable statutes will be used to prosecute."

(Citations omitted.)" *Spray*, 624 P2d at 140.

The petitioner's claim in *Spray* was based on newspaper clippings involving accusations of inappropriate drug prescriptions and injections against the team physician for the Portland Trailblazers and the fact that the Board of Medical Examiners failed to investigate those public charges. The court found there was no proof that the decision to bring a license revocation proceeding against the petitioner and not against other physicians who might be engaging in similar practices was the result of "intentional or purposeful invidious discrimination." In *State v. Hodgdon*, cited in *Spray*, the court was addressing discriminatory enforcement which was constitutionally objectionable under the Equal Protection Clause of the Fourteenth Amendment to the US Constitution.

The federal district court in Oregon has said that, to succeed on a claim of selective prosecution, the defendant must show that others were not prosecuted for the same conduct and the decision to prosecute was based on impermissible grounds; mere selectivity in prosecution creates no constitutional barrier. *U.S. v. Juvenile*, 599 F Supp 1126 (1984).

Besides *Spray*, the only other non-criminal state case cited to the Forum to mention selective enforcement was *Doherty v. Oregon Water Resources Director*, 308 Or 543, 783 P2d 519 (1989), in which Justice Fadeley wrote, under the heading "Selective Enforcement is Impermissible,"

"Simultaneous enforcement throughout a basin is not required by statute. The record does not

show that partial regulation would be ineffective and thereby does not show that partial regulation fails to promote public welfare, health, or safety." *Doherty*, 783 P2d at 527.

Selective prosecution in criminal cases has also been claimed to violate Article I, section 20.<sup>7</sup> In *State v. Brooks*, 103 Or App 477, 798 P2d 258 (1990), the court said,

"Section 20, protects against unjustified differentiation among classes of citizens, as well as unjustified denial of equal privileges or immunities to individual citizens. \*\*\*

"Defendant does not contend that his prosecution was due to an impermissible classification. He argues that his privileges as an individual were impermissibly denied. In determining, under section 20, whether the government has made or applied a law so as to impermissibly grant or deny privileges or immunities to an individual, 'the appropriate inquiry is whether the difference in treatment was merely "haphazard," i.e., without any attempt to strive for consistency among similar cases.'" *Brooks*, 798 P2d at 259 (citations omitted).

In footnote 3, the court said, "Article I, section 20, and the Equal Protection Clause of the Fourteenth Amendment are so similar that compliance with section 20, usually satisfies the Fourteenth Amendment." *Id.*, citing *State v.*

*Freeland*, 295 Or 367, 370, 667 P2d 509 (1983).

The Forum finds that this case is not similar to others described in Findings of Facts 228 to 275. As Paul Tiffany credibly testified, he could not recall an employer that refused to comply with employment certificate requirements, once the employer was informed of them. Tiffany knew of no case in which an employer agreed to comply only on its conditions. The Agency had never had a case where an employer agreed to comply with the employment certificate requirements only if the Agency first personally delivered or mailed employment certificate applications to it, and then only if the Agency continued to supply the employer with them, indefinitely, without request. The Agency had never had an employer agree to comply with the employment certificate requirements only if the Agency provided personal training to managers, regarding how to complete the employment certificates. The Agency had never had an employer agree to comply with employment certificate requirements only if the Agency achieved uniform, meaning 100 percent, compliance with those requirements by the employer's competitors in its industry.

Even assuming that Respondent has shown that other employers were not prosecuted for the same conduct as Respondent, it must also show that the enforcement was the result of intentional or purposeful invidious discrimination. Underlying Respondent's

claim here of invidious discrimination are two alleged causes: (1) that during testimony to a US Senate committee regarding Oregon's parental leave law, the Commissioner misrepresented Respondent's position on that law, Respondent later wrote to the committee to correct the Commissioner, and Respondent sent the Commissioner a copy of that letter, and (2) Respondent failed to contribute to the Commissioner's campaigns.

The Forum finds Respondent's allegations speculative and unpersuasive. Apart from Paolini's testimony that the Commissioner made misrepresentations to the Senate committee, no evidence showed that the Commissioner actually misrepresented Respondent's position or that she ever received a copy of Respondent's letter to the Senate committee. Even if those were facts, they are unpersuasive that the Agency based its investigation and enforcement efforts against Respondent on them. From nearly its first contact with the Agency in the summer of 1988, Respondent claimed that the Agency was harassing it and selectively enforcing the law against it. Respondent's claim then was based upon its belief that the Agency did not have uniform compliance in the food industry. This was long before the Commissioner testified before the Senate committee. The Forum finds that Respondent's conduct during the investigation and its failure to make significant progress toward compliance for a period of nearly two years (and for well over a year after its conditional assurance of future compliance) were the bases for the Agency's enforcement activities.

Similarly, Respondent has failed to persuade the Forum that Respondent's failure to contribute to the Commissioner's campaigns caused the Agency to invidiously discriminate against Respondent. Paolini testified that Ken MacKillop told him that Respondent should settle this case because the Agency would continue to bring claims against Respondent, as it did not contribute to the Commissioner's campaign. MacKillop denied that he made that statement. It is unnecessary for the Forum to resolve this conflicting testimony, since no evidence suggested that MacKillop had any factual basis for such a statement. Respondent argued that it was "the only large grocery chain in Oregon which has not made financial contributions to Commissioner Roberts' political campaign," and that "it has been denied equal treatment on account of its failure to contribute to Commissioner Roberts' campaign, which was supported by all the other major grocery chains." (Respondent's Brief.) The facts are to the contrary. Although the Forum believes that evidence from the 1986 primary and general election campaign is too remote, it shows that from the food industry the Commissioner received a \$500 contribution from the Southland Corporation (which runs 7-11 stores), a \$200 personal contribution from an executive of Kienow's, two in-kind contributions worth \$811 from Fred Meyer, and a \$52 in-kind contribution from Plaid Pantry Foods. In the primary campaign in 1990, the Commissioner received \$757.11 from Southland Corporation and a \$602.98 in-kind contribution from Fred Meyer. In the 1990 general election campaign, she

<sup>7</sup> Oregon Constitution, Article I, section 20, provides:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

received a \$100 personal contribution from an executive of Safeway and a \$100 personal contribution from an executive of Kienow's. The Forum finds that the personal contributions were just that: personal contributions. They do not represent contributions from the grocery industry. The contributions do not represent "all the major grocery chains." Many large grocery chains did not contribute. Respondent's evidence is unpersuasive that the Agency invidiously discriminated because of Respondent's lack of contributions. It has failed to prove its claim.

Respondent also contended that "the assertion of exorbitant penalties and the presentation of this matter at the initial stage to the press, was undertaken for improper purposes" by the Agency. As discussed above with respect to Respondent's sixth affirmative defense, the Forum has found that the civil penalties proposed by the Agency were within the statutory limit and consistent with the Agency's rules on civil penalties. The total amount of civil penalties assessed reflects the large number of violations Respondent committed. The civil penalties are not exorbitant. Compare *In the Matter of Northwest Advancement, Inc.*, 6 BOLI 71, 94-95 (1987), *aff'd*, *Northwest Advancement, Inc. et al v. Bureau of Labor*, 96 Or App 133, 772 P2d 934 (1989) (no finding regarding willful or repeated violations; \$1,000 per employment certificate violation, \$250 per work permit violation); *In the Matter of Panda Pizza*, 10 BOLI 132, 143-46 (1992) (violations found not willful or repeated; \$1,000 for one employment certificate violation, \$500 for two other employment certificate violations, \$100

each for 14 other employment certificate violations; \$1,000 for one work permit violation, \$500 for two other work permit violations, \$100 each for 14 other work permit violations; \$100 for one violation of recordkeeping requirements).

Regarding the Agency's presentation of this matter to the press, the Forum finds that the Agency's reasons were proper. The case was extraordinary due to the amount of the proposed civil penalties, and it involved a statewide employer. The Agency thought it was newsworthy, and to preserve its newsworthiness, the Agency needed to act quickly. The Agency believed the publicity would serve its educational and enforcement purposes, and recognized the importance and high value of using the media as an educational tool. Respondent suggested that the Commissioner's press conference was timed to influence the Agency's request for additional funding from the Emergency Board in July 1990. That is speculation. Paul Tiffany testified credibly that the Agency wanted to issue the charging document when it did in order to impress upon Respondent that its continuing noncompliance had to stop. Respondent has failed to prove that the Agency's enforcement was the result of intentional or purposeful invidious discrimination.

Respondent asserted that the Agency must have established, written standards and procedures to avoid arbitrary and capricious actions, and it failed to have written standards for its investigation and prosecution of child labor laws, citing *Sun Ray Drive-In, Inc. v. Oregon Liquor Control*

*Commission*, 16 Or App 63, 517 P2d 289 (1973). However, in *State v. Clark*, 291 Or 231, 630 P2d 810, 819 (1981), the Oregon Supreme Court said,

"We do not believe equal protection goes so far as to require previously stated standards as long as no discriminatory practice or illegitimate motive is shown and the use of discretion has a defensible explanation."

The Forum has found that Respondent has not proved a discriminatory practice and finds no illegitimate motive. Agency staff provided a defensible explanation for their actions. They perceived a recalcitrant employer that first was ignorant of the law, then refused to comply with the law, then grudgingly gave an assurance of future compliance on its own terms, and thereafter failed to comply in a significant way. The Forum finds that the Agency's grounds for enforcing the law against Respondent were well-founded and reasonable.

Respondent next claims that the Agency's enforcement of the rules was "carried out purely haphazardly and not evenhandedly as required" under Article I, section 20, and argued that it was treated differently than other employers by the Agency. As the court in *Brooks* said, "the appropriate inquiry is whether the difference in treatment was merely 'haphazard,' i.e., without any attempt to strive for consistency among similar cases." *Brooks*, 798 P2d at 259.

The Agency argued that Respondent, a corporation, is not protected by Article I, section 20. Respondent argues that it is protected as both an

individual citizen and as a member of a class. The Forum finds that this question is not settled by the courts. *Salern College & Academy, Inc. v. Employment Division*, 298 Or 471, 695 P2d 25, 36 (note 13)(1985); *Northwest Advancement, Inc., et al v. Bureau of Labor*, 96 Or App 133, 772 P2d 934, 941 (note 7)(1989). Respondent's reliance on *Penn Phillips Lands, Inc. v. State Tax Commission*, 247 Or 380, 430 P2d 349 (1967), is misplaced. That case rested on the Fourteenth Amendment to the US Constitution, not the Equal Protection Clause of Oregon's Constitution as Respondent asserts.

Assuming that Article I, section 20, does protect Respondent as either an individual or a member of a class, based upon the credible evidence in the whole record the Forum finds that the Agency did strive for consistency among similar cases, and the treatment that Respondent received was consistent with the Agency's policy. That treatment was not haphazard. The Forum officially notes that the Agency has limited resources and cannot prosecute every case with violations. Respondent's case, for example, severely strained the Agency's resources. When appropriate, the Agency referred cases to the US Department of Labor. The Agency cannot follow up on every employer's assurance of future compliance. In this case, however, Lessel thought when he first closed the case in March 1989 that "I don't think we are through with Albertson's!" When the Agency hired additional staff in early 1990, Lessel asked a compliance specialist to see whether Respondent was complying with the employment certificate filing

requirements. She found that during all of 1989, Respondent had filed only 16 certificates from only five stores. The Agency again sought an assurance of cooperation and compliance, and provided Respondent with hundreds more forms. The assurance Respondent gave was for compliance on "new hires," not all of its employees. Later checks by the Agency revealed a continued high level of noncompliance. The Forum finds that this case is dissimilar from other cases that were described at hearing as comparitors because the Agency believed that Respondent's corporate management (1) had shown a reluctance to comply, (2) would not give adequate assurances of future compliance, and (3) failed to bring itself into compliance after it gave conditional assurances. The Agency is not perfect. But the law does not require it to be perfect or to act perfectly consistently; it requires that the Agency strive for consistency. The Forum finds that the Agency has done that, and its decision to prosecute this case was not haphazard. Respondent has failed to prove its claim that the Agency impermissibly selectively enforced the statutes and rules, and its claim that the Agency failed to apply its regulations indiscriminately as required by the Oregon Constitution.

### 7. Bias and Prejudice

In its tenth affirmative defense, Respondent contends that the Agency is biased against Respondent and has prejudged this case.

Respondent has the burden of showing actual prejudice or bias. *Spray v. Board of Medical Examiners*, 50 Or App 311, 624 P2d 125, modified on other grounds, 51 Or App 773

(1981); *Boughan v. Board of Engineering Examiners*, 46 Or App 287, 611 P2d 670, 671 (1980); *Gregg v. Oregon Racing Commission*, 38 Or App 19, 588 P2d 1290, 1294 (1979).

Administrative agencies and their staffs typically investigate, prosecute, and adjudicate cases within their jurisdiction. This combination of functions by itself does not violate the due process clause. *Withrow v. Larkin*, 421 US 35, 54, 95 S Ct 1456, 43 L Ed 2d 712 (1975); *Fritz v. OSP*, 30 Or App 1117, 569 P2d 654, 656-67 (1977); *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 34, 514 P2d 888 (1973), *rev den* (1974). Disqualification of the Commissioner would be a drastic step. *Eastgate Theater, Inc. v. Board of County Commissioners of Washington County*, 37 Or App 745, 588 P2d 640, 644 (1978).

The law requires the Commissioner of the Bureau of Labor and Industries to cause to be enforced all laws regulating the employment of minors. ORS 651.050(1). The Commissioner has the authority to assess civil penalties upon a person who violates ORS 653.305 to 653.370 or any rule adopted thereunder by the Wage and Hour Commission. ORS 653.370(1). The Commissioner is required to issue an order directing the person to pay a penalty. ORS 653.370(2). The order becomes final if the person does not pay the amount specified in the order and fails to timely request a contested case hearing. ORS 653.370(3). If a request for a hearing is made, the Commissioner or the Commissioner's designee is required to hold a hearing. ORS 653.370(4). The Commissioner

issues the Final Order. OAR 839-30-180.

Respondent points to the Commissioner's comments in the June 1990 press conference, which Respondent asserts were "highly inappropriate," and to news releases by the Agency about the case as evidence of bias. (Respondent's Brief.) When the Commissioner held a press conference announcing that Respondent had been charged with violations, she was acting in her role as the enforcer of child labor laws. In its brief, Respondent argued that,

"the message delivered by Commissioner Roberts was clearly more than a factual statement apprising the public of a pending case, where the Commissioner made such bold, absolute, inflammatory, and personalized statements as:

"I am announcing my intention to cite Albertsons and Company, headquartered in Boise, Idaho, for 144 violations of the Oregon Child Labor Law."

"The fines that I am proposing for the alleged violations are \*\*\*"

"We have requested information from Albertsons and it has not been forthcoming."

"They may take me to the Court of Appeals, and that's exactly what Northwest Advancement did in the case of the door-to-door sales, and we were upheld in the courts and it went all the way up. That company, incidentally, has moved out of Oregon and is now in

Idaho." (Respondent's Brief) (emphasis in original).

The Forum does not find that the Commissioner's statements are evidence of bias. They describe her statutory duty of issuing an order requiring Respondent to pay a civil penalty. They indicate that the Agency had alleged violations, and describe one of the allegations. The last comment states a fact – Respondent might appeal the Commissioner's Final Order – and describes the history of another child labor case where the respondent appealed a Final Order.

"The fact that members of an agency have both investigated and adjudicated a particular controversy simply shows that they have performed their statutory duties. Without a showing to the contrary, state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Gregg, supra*, 588 P2d at 1294 (citations omitted).

That the Commissioner had contact with the case and had information about the allegations arising from the Agency's investigation before the hearing do not create a presumption of impermissible bias. See *Fritz, supra*, 569 P2d at 656; *Van Gordon v. Oregon State Board of Dental Examiners*, 34 Or App 607, 579 P2d 306, 309 (1978). In accordance with ORS 183.450(2), the Forum has made its findings and conclusions based solely on evidence presented in the contested case hearing and matters officially noticed and recorded in this order.

Respondent claimed that the Commissioner's reference to "willful and defiant" violations during the press conference was evidence of bias. The Forum finds that the Commissioner was describing the allegations based on what was told to her, and to her public information officer, by Agency staff. Paul Tiffany thought that the original charging document alleged willfulness (see Finding of Fact 168) and he told Stevens-Schwenger that Respondent had refused to comply with the law, based upon the investigation that resumed in January 1990 (see Finding of Fact 153). The Forum finds no evidence of impermissible bias in the Commissioner's comments.

With respect to Respondent's claim that the Commissioner's press conference and the Agency's press releases about this case show bias, the preponderance of credible evidence on the whole record shows, and the Forum has previously found, that the Agency had legitimate reasons for bringing this case to the attention of the media. The case involved the largest civil penalties ever assessed by the Agency, it was newsworthy, it would have statewide interest, and it promoted the Agency's educational and enforcement efforts. That the Agency was aware that publicity could cause Respondent embarrassment or have harmful effects on Respondent's economic, business, or community status is not probative of bias by the Commissioner.

Respondent claims that the proceedings in this case did not have the outward indicia of fairness, citing *Campbell v. Board of Medical Examiners*, 16 Or App 381, 395, 518 P2d 1042, 1049 (1974) and *Cinderella*

*Career and Finishing Schools, Inc. v. F.T.C.*, 425 F2d 583, 590 (DC Cir 1970). This "appearance of fairness doctrine" is of questionable viability in Oregon. See *State Administrative Law*, 13.4 (Oregon CLE 1985) ("*Cinderella Career and Campbell* may represent a minority view, at least in Oregon. The Oregon Court of Appeals has not been inclined to find reversible error from the outward appearance of unfairness"). See, e.g., *Higley v. Edwards*, 67 Or App 488, 678 P2d 775, 777 (1984) (court found no due process violation where a sheriff, who had found a deputy guilty of misconduct and fired the deputy, created and was a member of the board that later reviewed the matter); *Fritz, supra* (court found no due process violation where a member of disciplinary committee had made a prior investigation of the incident at issue, and probably reached a degree of prejudgment from that investigation); and *State ex rel Juvenile Department v. Davis*, 49 Or App 485, 619 P2d 1330, 1331 (1980) (court affirmed an agency action, "although the conflict in which the caseworker was involved has the appearance of impropriety").

Whatever the viability of the "appearance of fairness doctrine," the Forum does not find that the Commissioner's comments to the press lacked the "outward indicia of fairness." Taking all of her comments together, she made it clear that the Agency had investigated Respondent and had reason to believe violations had occurred, she repeatedly referred to the "alleged" violations and made it clear that Respondent could request and then would get a hearing on the

allegations. She also made it clear that she would make the final decision. The Forum cannot find that, by describing the statutory duties of the Commissioner and the hearing process, the Commissioner created an appearance of unfairness. *Gregg, supra*.

Respondent asserts that two Wage and Hour Commissioners "have in certain measure adjudged the facts in this case in such a way that it must be taken from Commissioner Roberts (and from the Commission) for adjudication." (Respondent's Brief.) The Forum finds this assertion meritless. The Wage and Hour Commission has no role in this proceeding. While the Commissioner is the secretary and executive officer of the Wage and Hour Commission, any bias the two commissioners may have is not probative of any bias or prejudgment by the Commissioner of Labor.

Respondent claims that the timing of the Agency's amendment to the charging document, the Agency's handling of discovery in this case, and its handling of investigations of three civil rights cases, are evidence of actual bias. The Forum finds these claims speculative and unpersuasive that the adjudicator in this case, the Commissioner, is biased. There is no evidence that she had any role in choosing the timing of the amendment to the charging document or had anything to do with how the Agency handled discovery. The Forum finds that, based on the several changes in case presenter and attorneys representing the Agency

during the prehearing stages of this contested case, based upon the large volume of discovery requested, based upon the limited resources of the Agency to respond to Respondent's requests, based upon the fact that complete and voluminous discovery was provided (with isolated exceptions), based upon the Agency's good faith efforts to provide discovery, and based upon the postponement of three months in the middle of the hearing so that Respondent could do additional discovery and preparation, Respondent was not prejudiced. Evidence that the Agency did not respond as quickly and as completely as the Respondent wanted on every request does not prove bias and prejudice. There is no evidence on the record that the Commissioner had any personal involvement with Respondent's three civil rights cases. The credible evidence on the whole record about these issues simply does not support or permit a reasonable inference of bias by the Commissioner.

Respondent argued at hearing that it was prejudiced by errors in the amended charging document and that these errors were evidence of bias because the Agency had correct information in its records. The Forum finds that, at most, errors show that Agency staff and its counsel are human and make mistakes.<sup>8</sup> The facts are not probative of bias or prejudice.

Respondent also claims that the Hearings Referee's rulings on the evidence are evidence of bias and

<sup>8</sup> The Forum notes that Respondent's records also contained errors and inconsistencies. For example, one exhibit shows a date of hire for Brandon Tilton as April 9, 1990, and another exhibit shows a date of hire for Tilton as April 2, 1990. Both documents were prepared by Respondent.

prejudgment. The record does not support that claim, and no bias or prejudice will be inferred. *Labor Board v. Donnelly Co.*, 330 US 219, 228-31, 67 S Ct 756, 91 L Ed 854 (1947).

Respondent has not met its burden to show actual bias, and thus its tenth affirmative defense fails.

#### ORDER

NOW, THEREFORE, as authorized by ORS 653.370, and as a civil penalty for violating the statutes and rules outlined above, ALBERTSON'S, INC. is hereby ordered to deliver to the Business Office of the Bureau of Labor and Industries Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232, the total amount of ONE HUNDRED TWENTY-EIGHT THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS (\$128,750), representing \$750 for one violation of OAR 839-21-175, \$102,500 for 205 violations of ORS 653.310 and OAR 839-21-220(3) and (5), and \$25,500 for 51 violations of OAR 839-21-220(1)(a).

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