

# 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 13

Cited: 13 BOLI

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# BOLI ORDERS

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## INTRODUCTORY NOTE

This thirteenth 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 May 27, 1994, and November 29, 1994.

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.

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**In the Matter of  
LOYAL ORDER OF MOOSE  
– Coos Bay Lodge No. 678 and Ken  
Edwards, Respondents.**

Case Numbers 63-93 and 12-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued May 27, 1994.

**SYNOPSIS**

Two female Complainants, who worked as bartenders in Respondent lodge's lounge and clubroom, were separately subjected to unwelcome touching and comment of a sexual nature by the male Respondent manager, whose conduct constituted sexual harassment. The manager aided and abetted lodge's unlawful practice. The Commissioner awarded each Complainant \$15,000 for emotional distress and one Complainant \$1,002 for lost wages. Both Respondents were liable for damages. ORS 659.030(1)(a), (b), (g); OAR 839-07-550(1), (2), (3); 839-07-555 (1)(a), (b), (c).

The above-entitled contested case 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 of the State of Oregon. The hearing was held on October 14 and 15, 1993, in conference room two of the State of Oregon Employment Division Office, 465 Elrod Street, Coos Bay, Oregon. The

Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Respondent Coos Bay Lodge No. 678 of the Loyal Order of Moose, a corporation (Respondent Lodge), was represented by Daniel M. Hinrichs, Attorney at Law, Coos Bay. Respondent Ken Edwards (Respondent Edwards) was present throughout the hearing and was represented by Eugene M. Thompson, Attorney at Law, Coquille. Complainants Charlene P. Moore (Complainant Moore) and Nancy L. Triplett (Complainant Triplett) were present throughout the hearing and were not represented by counsel.

The Agency called the following witnesses (in alphabetical order): Lodge member William Eugene Brown, former Agency investigator Miguel Bustamante (by telephone), Lodge member Diane Johnson, Lodge member and former Lodge bartender Mary Ann Koski-Kenyon, Complainant Moore, and Complainant Triplett.

Respondents called the following witnesses (in alphabetical order): current Lodge Governor Larry Crafton, Respondent Edwards, Respondent Edwards's friend Florence Fenton, Lodge member Oswald Clinton Harworth, and former Lodge bartender Deborah Shelton.

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

\* "Club stewardess" was a title used; the Forum has used the term "bartender," in keeping with the testimony.

of Fact, Conclusions of Law, Opinion, and Order.

#### FINDINGS OF FACT – PROCEDURAL

1) On December 9, 1992, Complainant Charldene P. Moore filed a verified complaint with the Agency, and on April 19, 1993, Complainant Nancy L. Triplett filed a verified complaint with the Agency. Each Complainant alleged that she was the victim of the unlawful employment practices of Respondent Lodge, which was aided and abetted by her supervisor, Respondent Edwards.

2) After investigation and review, the Agency issued an Administrative Determination as to each complaint finding substantial evidence supporting the allegations of the complaint and finding as to each that Respondents violated ORS 659.030(1).

3) The Agency initiated conciliation efforts between Complainant Moore and Respondents, conciliation failed, and on May 26, 1993, the Agency prepared and served on Respondents Specific Charges, alleging that Respondents discriminated against her in the terms and conditions of her employment and constructively discharged her due to her sex in violation of ORS 659.030(1)(a), (b), and (g).

4) The Agency initiated conciliation efforts between Complainant Triplett and Respondents, conciliation failed, and on August 17, 1993, the Agency prepared and served on Respondents Specific Charges, alleging that Respondents discriminated against her in the terms and conditions of her employment due to her sex in violation of ORS 659.030(1)(b) and (g).

5) With the Specific Charges in each case, the Agency served on the Respondents the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of Oregon Administrative Rules (OAR) regarding the contested case process (temporary OAR 839-50-000 to 839-50-420, effective April 12, 1993); and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) On June 18, 1993, under an extension of time, Respondent Lodge filed its answer to the Specific Charges in case number 63-93 (Moore). On July 6, 1993, under an extension of time, Respondent Edwards filed a letter denying the Specific Charges in case number 63-93.

7) On June 28, 1993, the Hearings Referee granted the motion of Respondent Lodge for a postponement and reset the hearing in case number 63-93 for October 14, 1993.

8) On August 30, 1993, the Hearings Unit received Respondent Lodge's request to depose the individual Complainants. On September 14, the Hearings Referee granted the request.

9) On September 7, 1993, under an extension of time, Respondent Lodge filed its answer to the Specific Charges in case number 12-94 (Triplett). On September 14, 1993, under an extension of time, Respondent Edwards filed a letter denying the Specific Charges in case number 12-94.

10) Effective September 3, 1993, the Commissioner adopted permanent Oregon Administrative Rules 839-50-000 to 839-50-420, governing contested case hearings. Those rules applied to all pending proceedings, including this proceeding, on and after September 3, 1993.

11) On September 21, 1993, the Hearings Referee received notice that Eugene M. Thompson, attorney, would be representing Respondent Edwards. Counsel requested a one-week delay. The Agency opposed further postponement, as did counsel for Respondent Lodge. On September 22, 1993, the Hearings Referee denied the postponement.

12) On September 28, 1993, the Hearings Referee consolidated cases numbered 63-93 and 12-94 for hearing pursuant to OAR 839-50-190. The Referee also issued a Discovery Order requiring the participants to exchange and file with the Hearings Unit their respective Summaries of the Case. The participants timely filed case summaries pursuant to the Referee's ruling.

13) In each of these cases, the Agency named as Respondent, in addition to Respondents Lodge and Edwards, the national Loyal Order of Moose, the proper name of which is Moose International, Inc. That entity answered both sets of Specific Charges, denying its status as an employer of either Complainant under Oregon law. On October 11, 1993, the Agency requested a ruling from the Hearings Referee dismissing the charges as to the national. On Octo-

ber 12, 1993, charges were dismissed against Moose International, Inc.

14) At the commencement of the hearing, the respective counsel for Respondents stipulated to the admission into evidence of certain Agency exhibits.

15) At the commencement of the hearing, the respective counsel for Respondents stated that their clients had each received a Notice of Contested Case Rights and Procedures with the Specific Charges and had no questions about it.

16) Pursuant to ORS 183.425(7), the Hearings Referee advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) The Proposed Order, which included an Exceptions Notice, was issued on January 26, 1994. Exceptions were due February 7, 1994. Respondent Edwards, personally and without counsel, timely filed exceptions which are dealt with at the end of the Opinion section herein. No exceptions were filed by Respondent Lodge.

#### FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent Lodge, a non-profit mutual benefit corporation, operated for its members meeting rooms and a bar and lounge located in North Bend, Oregon. Respondent Lodge engaged or utilized the personal service of one or more employees.

2) Respondent Edwards became a member of Respondent Lodge in 1991. He succeeded Gerald Triplett

\* "Participants" or "participant" refers to both Respondents and to the Agency. OAR 839-50-020(13).

as Lodge Administrator (Administrator) of Respondent Lodge. Gerald Triplett was Complainant Triplett's husband. The Administrator kept the books and managed the social quarters, which included the bar or lounge. The Administrator was the immediate supervisor of the bartenders.

3) Complainant Triplett was a member of Respondent Lodge through Women of the Moose from 1982 to 1992. She held several offices in Women of the Moose. She was an active Lodge member, editing a bulletin or newsletter and helping as bartender, all on a volunteer basis. On or about February 22, 1992, while Gerald Triplett was Administrator, she began working as a paid bartender. Her duties as bartender included mixing and serving drinks, accurately running the cash register or till, and helping to keep the clubroom clean.

4) Complainant Moore began working as bartender for Respondent Lodge in February 1992, while Gerald Triplett was Administrator. She was working a second job at the Coos Bay Red Lion and quit working for Respondent Lodge when she got more hours at Red Lion. Her last day of work for Respondent Lodge at that time was around March 7, 1992. She was not a Lodge member.

5) When Gerald Triplett quit as Administrator, he was not officially relieved of all duties until the paperwork with the bank accounts was completed and the national lodge acknowledged the change. Respondent Edwards assumed the duties, except for signing checks, in the meantime.

6) Gerald Triplett told his wife in March 1992, that he was quitting as

Administrator and that Respondent Edwards was acting Administrator. Respondent Edwards began supervising Complainant Triplett in late March.

7) On or about March 24, 1992, Complainant Triplett was working at the cash register when Respondent Edwards placed his arm around her and placed his hand on her breast. She took his hand away and warned him that if he did that again, he might be walking around with a high squeaky voice. She thought it could have been a mistake or accident, so she tried to make light of it, even though it bothered her. It was not just a casual brush as she could feel pressure from his hand. Her husband and another member were playing pool but the jukebox was playing and they did not appear to be aware that anything happened.

8) On or about April 10, 1992, Respondent Edwards again put his arm around Complainant Triplett and touched her breast. She was certain this time that it wasn't accidental, and she became angry. She took his hand away and told him: "Don't you ever do that again." She spoke angrily, but not loud. Again, her husband and another member were playing pool as she counted out the till and appeared unaware that anything had happened. Respondent Edwards did not appear embarrassed and made light of her remark.

9) Complainant Triplett did not mention these incidents to her husband because he had had two heart attacks and she feared for his health if he became upset.

10) After the incident in April, Complainant Triplett kept out of Respon-

dent Edwards's reach. She was concerned about him touching her all of the time she continued to work there.

11) Complainant Moore returned to work for Respondent Lodge in mid-May 1992. Respondent Edwards was Administrator. Her duties as bartender during both of her periods of employment by Respondent Lodge were mixing and serving drinks, accurately running the cash register or till, and helping to keep the clubroom clean.

12) Shortly after she returned to work in May as bartender for Respondent Lodge, Complainant Moore was working at the till when Respondent Edwards came up behind her and slipped his arm around her and placed his hand onto her left breast "sort of under" her blouse or shirt. Complainant Triplett was present and saw Respondent Edwards's act in the bar mirror.

13) At that time, Respondent Edwards also grasped at Complainant Moore's buttocks. She told him to quit and walked off. He smiled. His actions made Complainant Moore mad and upset. She told Complainant Triplett later that Respondent Edwards would not keep his hands off of her and kept asking her to go out with him.

14) When Complainant Moore arrived at work in the morning, Respondent Edwards was usually in his office to the left of the front door. As she went through to the clubroom or lounge, he would ask her into his office to "give him a kiss and a hug." She would tell him "no," and continue in to work.

15) Complainant Moore, Robert Hunt, and William Eugene Brown

shared a house on Broadway in North Bend. Brown was a Lodge member and a daily patron of the bar. Complainant Moore attempted to arrange to arrive with Brown so as not to be alone with Respondent Edwards. She did not at that time tell Brown about any concerns she had about the behavior of Respondent Edwards.

16) Complainant Moore tried to stay away from Respondent Edwards because she did not want him grabbing her again. On another occasion in May, Respondent Edwards went behind the bar and put his arm around Complainant Moore from behind.

17) One evening in early June, just before closing, Respondent Edwards was seated at the end of the bar. Complainant Moore was standing nearby, and he grabbed her arm and said "come here." She pulled away and said "no" and told him she had things to do. She feared that he again wanted to hug and kiss her.

18) Respondent Edwards's unwelcome behavior toward her made Complainant Moore feel degraded and uncomfortable. She became "paranoid" about going to work. She worked about a day after the instance wherein he grabbed her arm, then quit going in to work. She did not return to work at Respondent Lodge after June 4, 1992.

19) William Eugene Brown had been a Lodge member since 1982. As a daily patron, he knew that Complainant Moore worked there as bartender. She told him and Robert Hunt one night, speaking about Respondent Edwards, that she wasn't going to put up with his hands any more and that she wasn't going back to work there. This

was the first Brown had heard of a problem with Respondent Edwards. Complainant Moore seemed agitated and upset.

20) The next day, Complainant Moore called the bar and Complainant Triplett answered the telephone. Complainant Moore told her that she was not coming back to work because she was tired of the "hassles" she was getting.

21) On August 8, 1992, shortly before noon, Complainant Triplett and Respondent Edwards were alone, just before the bar opened. He said to her "If you'd give me a blow job like the other bartenders do, I might treat you more fairly." She responded in terms meaning "never."

22) Complainant Triplett was angry and upset. Although she was familiar with procedures for internal complaints, she did not bring Respondent Edwards's behavior to the attention of the Lodge Governor, Jim Lapping, because she thought he would tell Respondent Edwards and conditions would get worse. She believed she could not go directly to the all-male House Committee, except by letter, and did not wish to do so because her husband was on the committee. She could have reported it through Women of the Moose, or to state or national lodge officials, but she felt that might be time consuming and futile.

23) Complainant Triplett had difficulty with some of the other bartenders who worked for Respondent Lodge, particularly Marta Wehunt (phonetic). Marta became upset when Complainant Triplett left her notes about various bartender duties. Complainant Triplett also was unhappy about the shifts

assigned to her by Respondent Edwards.

24) Complainant Triplett was the subject of review by the House Committee in August 1992. The Committee meeting consisted of the Lodge officers and included Respondent Edwards and Gerald Triplett. Her interaction with other employees was discussed, as were her alleged conversations about Lodge business and a perceived lack of service while she was working. On August 15, Respondent Edwards informed her she was discharged.

25) Mary Ann Koski-Kenyon worked as a bartender for Respondent Lodge from 1987 to August 1990. She filled in one day as bartender for Respondent Lodge in May 1992, when Complainant Triplett became ill. When Koski-Kenyon attempted to discuss closing procedures with Respondent Edwards, who was seated at a table in the lounge, he urged her closer, put his arm around her, and pulled her toward him. Perhaps accidentally, his hand touched her behind. She resented being touched and was uncomfortable and uneasy.

26) Koski-Kenyon did not report Respondent Edwards's behavior toward her to an officer or the House Committee. The Committee was all male and she believed that such a complaint would not be taken seriously. She was not certain of his motive at the time, but she had previously observed Respondent Edwards place his hand on the shoulder of Londa Jordan, who was working as a bartender, when his hand slipped onto Jordan's breast. She recalled that Respondent Edwards was a member at the time,

but not whether he was acting as Administrator.

27) Diane Johnson had been a member of Respondent Lodge since 1974. In 1992, she was a patron of the lounge two or three times a week. She has since ceased going there because of what she described as a tavern atmosphere.

28) One evening during the time that Respondent Edwards was acting as Administrator, he reached around a female bartender, Londa Jordan, from behind and touched Jordan's breast. Jordan, who was placing glasses in the bar sink, leaned forward looking shocked and pulled her arm closer to her body. Johnson saw this from about three feet away. On an occasion in May, she saw Respondent Edwards go behind the bar and place his arm around Complainant Moore.

29) Miguel Bustamante was an investigator for the Agency from August 1990 to July 1993. In January 1993, he interviewed Jim Lapping, Governor of Respondent Lodge at that time, by telephone. Lapping told him that Respondent Edwards had been "removed" as Administrator.

30) Bustamante also interviewed Respondent Edwards by telephone in January 1993. Respondent Edwards stated that he quit the Administrator job because it took too much of his time. He denied kissing, hugging, or touching Complainant Moore.

31) Florence Fenton was the proprietor of the Halfway Tavern, which also served as the clubroom and meeting place of Amvets, a veterans organization. She had been acquainted with Respondent Edwards, who was

Commander of Amvets, for eight to nine years. She worked with him on various fund-raiser activities of the organization and believed him to be of good character. He did not have a reputation for making advances toward women.

32) Oswald Clinton Haworth had been a member of Respondent Lodge since 1978 and was an officer at times material. He was a daily patron of the lounge but usually left at 5 p.m. He never saw Respondent Edwards grab or touch any female bartender. He believed that Complainant Triplett caused trouble and that she thought she ran the bar. He thought that Complainant Moore's attire was sometimes "skimpy." He was on the House Committee that decided to discharge Complainant Triplett.

33) Deborah Shelton worked a few days as a bartender at Respondent Lodge when Respondent Edwards was Administrator. She had known him for several years. He was usually in his office while she worked the early shift. She never saw Respondent Edwards speak inappropriately or touch female employees or patrons. She never worked with Complainant Moore or Complainant Triplett.

34) Larry Crafton joined Respondent Lodge in 1991. He was a trustee and on the House Committee in 1992. He was Governor of the Lodge at the time of the hearing. In the spring and summer of 1992, he was in the lounge of Respondent Lodge once or twice a week, in the evening. Respondent Edwards was Administrator when Crafton began to go there regularly. Crafton had met Complainant Moore previously when she worked at the Humbolt

Club, across the street from Respondent Lodge. He observed her working there over a period of time and at the Respondent Lodge's lounge on one or two occasions. She got along well with the customers in both places. He never saw Respondent Edwards grab her.

35) Crafton saw that Complainant Triplett and Respondent Edwards didn't seem to speak to one another or have much to do with each other. He saw no touching of Complainant Triplett by Respondent Edwards. He saw that the bartender Marta was upset by notes from Complainant Triplett and that some customers weren't happy with Complainant Triplett's attitude, which was sometimes nice and sometimes not. Crafton believed that perhaps she had returned to work too soon after an illness. The House Committee decide to terminate her because "the Lodge couldn't afford to have half the customers mad."

36) Crafton did not recall the reason for Respondent Edwards's resignation as Administrator in October 1992. Respondent Edwards had "had words" with former Governor Lapping.

37) After Complainant Moore quit, she was still upset. She cried a lot and didn't want to go out or answer the phone. She felt depressed and stressed, but had no other physical symptoms. She did not seek counseling or medical assistance. She went to Riddle, Oregon, to visit a daughter for about a month. Then she visited a friend in Portland for three weeks, after which she returned to the Coos Bay area and began looking for work about August 1, 1992. She began working as a caregiver to an elderly woman in

October, first on a volunteer basis and then in a paid capacity. Through a sister, she got rent and food and some cash for her caregiver activities. After that, she obtained another caregiver position. She also cooked for Hunt and Brown. At the time of hearing, she had been caring for an elderly patient since July 1993. While working as a caregiver, she was not actively seeking other work. Her job history consisted of a series of bartender and other jobs at or near minimum wage in the Coos Bay-North Bend area.

38) While she was employed as bartender by Respondent Lodge between May 19 and June 4, Complainant Moore averaged 24.5 hours per week at \$5.00 per hour for average weekly earnings of \$122.50.

39) Complainant Moore would have continued to earn \$122.50 per week had she not resigned. She actively sought other employment during August and September, a period of about nine weeks, after which she was employed as a caregiver on volunteer, barter, and paid bases and did not seek other employment. Her wage loss was \$1,102.50 (9 weeks x \$122.50 per week).

40) Respondent Edwards's unwelcome behavior toward Complainant Triplett affected her digestion and sleep patterns. She was reluctant to be touched, even by her husband. She felt degraded and dirty. These effects began while she worked for Respondent Lodge under the supervision of Respondent Edwards and lasted for at least three months after she left that employment.

41) The testimony of Respondent Edwards was not altogether credible.

He stated that he did not accept the Administrator position until late April 1992 and did not begin actually working at the job until around May 1. But there was credible evidence placing him behind the bar and on the job at an earlier date. He denied the unwelcome touching of female employees, but there was credible evidence from witnesses other than the Complainants which tended to confirm the accusations. He was defensive about whether he drank while on duty during the day as Administrator, stating he never did so before 5 p.m., but then acknowledging that he gave himself "time off" as early as 3 p.m. if it appeared beneficial to the Lodge for him to join the customers. He denied attempting to socialize with Complainant Moore, but testified that he bought her a drink at another bar on what proved to be the last day she worked, characterizing it as business related. He testified that he resigned because he was "fed up," but told the Agency investigator that it was because it took too much of his time. Based on these inconsistencies and his demeanor, the Forum has credited only those portions of his testimony which were undisputed or which were verified by other credible evidence.

42) The testimony of Complainant Triplett was substantially credible. She kept a record of the hours she worked, both volunteer and paid, and as a result could recall the dates of occurrences. While it was clear she bore some animosity toward the Lodge over what she perceived as her unappreciated volunteer activity, her descriptions of the sexually oriented activities of Respondent Edwards toward her were

not manufactured. Those descriptions were far more credible than the less credible testimony to the contrary.

43) The testimony of Complainant Moore was substantially credible. Some of the incidents of the sexually oriented activities of Respondent Edwards toward her were witnessed by others and justified her decision not to return to work for Respondent Lodge after June 4. The Forum has considered her descriptions of the behavior of Respondent Edwards toward her more credible than the less credible testimony to the contrary. On the other hand, her efforts to mitigate her loss of income seemed confused and half-hearted.

#### ULTIMATE FINDINGS OF FACT

1) During times material herein, and particularly from March through October 1992, Respondent Lodge was an employer in this state.

2) Complainants Triplett and Moore were females employed by Respondent Lodge from February 22 to August 15, 1992, and from May 19 to June 4, 1992, respectively.

3) During times material herein, and particularly from March through October 1992, Respondent Edwards, male, was employed by Respondent Lodge as manager of its social area and during that time was the direct supervisor of Complainants Triplett and Moore.

4) Respondent Edwards sexually touched and made sexual remarks to Complainant Triplett because of her female sex, while acting as her direct supervisor, which touching and remarks were unwelcome.

5) Respondent Edwards sexually touched Complainant Moore, because of her female sex, while acting as her direct supervisor, which touching was unwelcome.

6) As a result of the unwelcome sexual touching and remarks, Complainant Triplett suffered severe mental distress, characterized by anger, upset, sleep disturbance, digestive problems, and feeling degraded.

7) As a result of the unwelcome sexual touching, Complainant Moore suffered severe mental distress characterized by anger, apprehension, upset, tears, depression, stress, isolation, and feeling degraded. She was forced to resign her employment to escape intolerable working conditions, resulting in lost wages in the amount of \$1,102.50.

#### CONCLUSIONS OF LAW

1) At all times material, Respondent Lodge 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) OAR 839-07-555 provides, in 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;

"(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."

The actions, inactions, statements, and motivations of Respondent Ken Edwards and of the members of Respondent Lodge's House Committee are properly imputed to Respondent Lodge herein.

4) ORS 659.030(1) provides, in part:

"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 refuse to hire or employ or 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, whether an employer or an employee, 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."

OAR 839-07-550 provides, in part:

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

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

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

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

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

By subjecting Complainant Triplett to unwelcome sexual touching, Respondent Lodge, by its agent Respondent Edwards, discriminated against her because of her sex in the terms and conditions of employment, whereby Respondent Lodge violated ORS 659.030(1)(b) and Respondent Edwards violated ORS 659.030(1)(g).

5) By subjecting Complainant Moore to unwelcome sexual touching, Respondent Lodge, by its agent Respondent Edwards, created intolerable working conditions and Complainant Moore's resignation was a constructive discharge whereby Respondent Lodge violated ORS 659.030(1)(a) and Respondent Edwards violated ORS 659.030(1)(g).

6) By subjecting Complainant Moore to unwelcome sexual touching, Respondent Lodge, by its agent Respondent Edwards, discriminated against her because of her sex in the terms and conditions of employment whereby Respondent Lodge violated ORS 659.030(1)(b) and Respondent Edwards violated ORS 659.030(1)(g)

7) 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 Respondents: 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. The amounts awarded in the Order below are a proper exercise of that authority.

#### OPINION

The Agency presented documentary and testimonial evidence to the effect that each of the female Complainants was an employee of Respondent Lodge and that each was subjected to unwelcome physical conduct of a sexual nature by Respondent Edwards. It was established that Respondent Edwards was also Respondent Lodge's employee and was the direct supervisor of each Complainant at the time of that conduct. Complainant Triplett was also subjected to unwelcome verbal conduct of a sexual nature by Respondent Edwards.

The facts as found herein rest on the credibility of the witnesses. The Forum has found that a prepond-

erance of the evidence favors the Agency's allegations based on the Agency having presented the more credible testimony. Respondents had the difficult task of establishing the negative and attempted to do so by mere denial, even in the face of credible, disinterested testimony that tended to confirm the allegations of violation. The Complainants credibly described several incidents of unwelcome sexual behavior toward them by Respondent Edwards during the several month period that he was Administrator. In addition, a witness had observed him touching another female bartender and was herself subjected to unwanted touching. Another witness, as a customer, had observed him touching Complainant Moore and, on a separate occasion, touching another female bartender.

The Agency established that these Complainants suffered serious damage as a result of the unlawful employment practices of Respondent Lodge by its agent Respondent Edwards. The behavior of Respondent Edwards toward these women caused each of them severe distress and upset. The resulting working conditions became so intolerable for Complainant Moore that she removed herself from them by ceasing to work for Respondent Lodge. When an employee leaves a job under such circumstances, she is said to be constructively discharged. The Forum has adopted the general rule that if the employer imposes working conditions so intolerable that the employee is forced into an involuntary resignation, the employer has encompassed a constructive discharge, provided that the Forum is satisfied that

the working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would resign. *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192, 215 (1981), *aff'd without opinion*, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983). The Forum has consistently applied that rule. *In the Matter of Rich Manufacturing*, 3 BOLI 137 (1982); *In the Matter of 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), *aff'd without opinion*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206 (1991); *In the Matter of William Kirby*, 9 BOLI 258 (1991); *In the Matter of Lee Schamp*, 10 BOLI 1 (1991); *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183 (1992), *aff'd without opinion*, *JLG4 v. Bureau of Labor and Industries*, 125 Or App 589, 865 P2d 1344 (1993); *In the Matter of Sunnyside Inn*, 11 BOLI 151 (1993); *In the Matter of C. Vogard Amezcua*, 11 BOLI 197 (1993).

The Agency neither alleged nor proved that Complainant Triplett's discharge was the result of unlawful discrimination. But she suffered severe mental distress from the unlawful sexual harassment while employed, and stated credibly that the effects remained for about three months after she left. It was established by the evidence that she had other stresses, such as her husband's illness and her own, but the employer takes the employee as it finds her. *Allied*

*Computerized Credit, supra*, at 217. The Forum is awarding Complainant Triplett the sum of \$15,000 to help eliminate the effects of the mental distress due to the unlawful practice.

Complainant Moore also suffered severe mental distress from the unlawful sexual harassment while employed, and her testimony indicated that it was about eight weeks before she was able to search for replacement employment. This delay in mitigation efforts was due in part to her emotional distress and resulting inability to seek work. The Forum is awarding Complainant Moore the sum of \$1,102.50 to compensate her for her wage loss during the nine-week period in July and August when she actively sought work, and the sum of \$15,000 to help eliminate the effects of the mental distress due to the unlawful practice.

#### Respondent Edwards's Exceptions

Respondent Edwards personally filed exceptions to the Proposed Order. They consisted of statements concerning the untruthfulness of the witnesses and allegations that there were witnesses to verify his statements. Respondent Edwards further alleged facts which suggested that several of the Findings of Fact were incorrect and again alleged the existence of witnesses and documents which would establish his position. The time and place to present any such evidence was at the hearing. Respondent Edwards was represented by counsel, and the Hearings Referee afforded all participants the opportunity to present witnesses and documentary evidence. No suggestion was made that the record might be incomplete because of the unavailability or absence of any

witness or evidence. The decision of the Forum was limited to the record. That record did not confirm Respondent Edwards's observations. Respondent Edwards's exceptions were without merit.

#### ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found, Respondents LOYAL ORDER OF MOOSE - COOS BAY LODGE NO. 678 and KEN EDWARDS are 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 NANCY TRIPLETT, in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000), representing compensatory damages for the mental and emotional distress suffered by NANCY TRIPLETT as a result of Respondents' unlawful practices found herein, PLUS interest at the legal rate from the date of this Order until Respondents comply herewith, and

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 CHARLDENE MOORE, in the amount of ONE THOUSAND ONE HUNDRED TWO DOLLARS AND FIFTY CENTS (\$1,102.50) representing wages CHARLDENE MOORE lost between August 1 and October 1, 1992, as a result of Respondents' unlawful practices found herein, PLUS interest thereon at the legal rate from October 1, 1992, until paid; PLUS, FIFTEEN

THOUSAND DOLLARS (\$15,000), representing compensatory damages for the mental and emotional distress suffered by CHARLDENE MOORE as a result of Respondents' unlawful practices found herein, PLUS interest at the legal rate on said compensatory damages from the date of this Order until Respondents comply herewith, and

3) Cease and desist from discriminating against any employee based upon the employee's sex.

**In the Matter of**

**Glenn and Nancy Arnesen, dba  
AUTO QUENCHER,  
and Glenn and Nancy Arnesen, dba  
The Auto Massager II, Respondents.**

Case Number 40-94

Final Order of the Commissioner  
Mary Wendy Roberts  
Issued May 27, 1994.

**SYNOPSIS**

Complainant, a black man, suffered severe emotional upset when Respondent's manager called him "a black assed nigger," and later told Complainant's friend that, in reference to Complainant's work performance, blacks have smaller brains than whites.

Finding that the manager's remarks were connected to his position as Complainant's supervisor, the Commissioner held that Respondent violated ORS 659.030(1)(b) by discriminating against Complainant in the terms and conditions of his employment based on his race, and awarded Complainant \$15,000 for mental distress. ORS 659.030(1)(b).

The above-entitled contested case 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 of the State of Oregon. The hearing was held on March 31, 1994, in the conference room of the offices of the Bureau of Labor and Industries, Suite 105, 700 E Main, Medford, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Glenn and Nancy Arnesen, dba Auto Quencher and dba Auto Massager II (Respondents), were represented by Lynn M. Myrick, Attorney at Law, Grants Pass. Respondent was present throughout the hearing. Complainant Edward L. Johnson (Complainant) was present throughout the hearing with his counsel, Michael G. Balocca, Attorney at Law, Ashland.

The Agency called the following witnesses (in alphabetical order): Complainant's friend Jeffrey Carter, his wife Christine Carter, Complainant's housemate Shannon Davis (by telephone),

\* "Respondent," in the singular, refers to Glenn Arnesen throughout this Order.

\*\* Under OAR 839-50-120, the role of Complainant's counsel is advisory only.

Complainant, and Agency Senior Investigator Barbara Turner. Respondents called as witnesses Respondents' former manager Ron Davis and Respondent.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, 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 November 9, 1992, Complainant Edward L. Johnson filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment practices of Respondents.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

3) The Agency initiated conciliation efforts between Complainant and Respondents, conciliation failed, and on January 26, 1994, the Agency prepared for service on Respondents Specific Charges, alleging that Respondents discriminated against him in the terms and conditions of his employment based on his race in violation of ORS 659.030(1)(b).

4) With the Specific Charges, the Agency served on the Respondents the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case

Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420, regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On March 17, 1994, the Agency filed a motion to amend the Specific Charges to include a second assumed business name of Respondents.

6) On March 23, 1994, the Hearings Referee allowed the Agency's motion to amend. Having learned that Respondents had obtained counsel, the Hearings Referee set a time for the participants to file case summaries pursuant to OAR 839-50-200 and 839-50-210. Counsel thereafter timely submitted Respondent's written response to the administrative complaint as Respondents' written answer to the Specific Charges and both participants timely filed their respective case summaries.

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

9) Pursuant to ORS 183.415(7), Respondents 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.

10) The Proposed Order, which included an Exceptions Notice, was issued on April 22, 1994. Exceptions were due by May 2, 1994.

\* "Participant" or "participants" refers to the Agency and the Respondents. OAR 839-50-020(13).

Respondent Glenn Arnesen personally filed timely exceptions, which are dealt with in the Opinion section of this Order.

#### FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondents Glenn and Nancy Arnesen were the owners of and did business under the assumed name of Auto Quencher at 775 Medford Center in Medford, Oregon. Respondent operated the business, which provided auto services and which engaged or utilized the personal service of one or more employees in this state. Respondents also did business as Auto Massager II.

2) Complainant, a black male, began working for Respondents at Auto Quencher on or about July 20, 1992. Complainant's duties involved the servicing of automobiles as "pit person." He worked in a dugout under the vehicle where he drained the motor oil, changed the oil filter, and checked such things as the differential and the tires. At times material, an employee of Hispanic origin, Jimmy Stihls, worked outside the pit on each vehicle while Complainant serviced it underneath.

3) In order to perform his duties, Complainant needed to know the year, make, and model of the vehicle he was servicing. The question of which employee was to obtain the make, model, and year information from the driver became an ongoing source of friction and argument between Stihls and Complainant. These arguments resulted in frequent loud shouting, beginning about four days after Complainant was hired.

4) At times material, Ron Davis, a Caucasian male, was manager of Respondent's Medford Center Auto Quencher location. He hired Complainant and was Complainant's immediate supervisor.

5) At times material, Respondent resided in Grants Pass. His son operated another location on Court Street in Medford. He was previously in real estate and construction and went into the car wash business in Oregon in about 1983. He stopped by when in Medford and looked at cleanliness and customer treatment as time allowed. His name was on the posted business license. His telephone number was on his business cards, which were available in the waiting room. At times material, Respondent was building a facility in Portland and had one in Grants Pass and two in Medford. He hired Davis as manager of the Medford Center Auto Quencher.

6) Ron Davis worked as manager for 16 months. His duties were to ensure that vehicles were lubricated and the oil changed in a proficient and timely manner. He supervised from three to four persons in winter and five in the summer. He was there directing the work between 8 a.m. and 5 p.m. in winter and between 9 a.m. and 6 p.m. in summer. He kept the hours of the employees, turned them in each pay period, distributed the resulting checks, ordered supplies, and accepted them for delivery. He was authorized to interview, hire, fire, do inventory, supervise the facility, and report any problems to Respondent. He assigned employees according to a work schedule he and Respondent developed. He ran the day-to-day

operation of the Medford Center Auto Quencher and rarely saw Respondent.

7) Respondent received a phone call from Davis stating that two employees, whom Davis named, were fighting and disagreeing constantly in front of customers and other employees. Respondent told Davis that he should take the employees into the office, sit them down, and have them get their feelings out toward each other and get the air cleared. Then Davis was to tell them that they have to work together as a team and to get back out into the bays. He told Davis to tell them that if they can't do that, then "we would have to terminate them."

8) Ron Davis met with Stihls and Complainant in the Auto Quencher office. Regarding their ongoing disagreement, he told them he did not know why they were arguing, because "you know how we say it in Oklahoma, there ain't nothing worse than a black assed nigger or a lazy assed spic, no way." Davis did not refer to himself as a "white assed honky."

9) Complainant had never been called "nigger" by any white man. Complainant was upset and confused, wondering why Ron Davis would think him less of a man than Davis. Complainant felt that the comment by Davis showed that he considered Complainant and Stihls to be inferior. The comment affected Complainant's opinion of Davis in particular and white males in general. He didn't trust Davis thereafter and knew how Davis evaluated him as a person. Complainant became more aware of race. The situation

affected his relationship with a white former roommate, Mike.

10) Complainant did not attempt to report Ron Davis's remarks to anyone else working for Respondent. While he was aware that Respondent had another Medford location, he did not know at the time the identity of Ron Davis's immediate supervisor or whether Respondent had any other nearby business locations. In the three to four weeks he worked at Auto Quencher, Complainant saw Respondent on one occasion. Complainant did not protest Ron Davis's comment at the time to Davis. He told Jeff Carter and his family that he didn't want to talk to Ron Davis.

11) Jeff Carter, a black male, had known Complainant for 13 years. He urged Complainant to come to Oregon from Oakland, California, where they had attended school together. Carter came to Oregon to attend Southern Oregon State College at Ashland.

12) Jeff Carter and Ron Davis were married to sisters, and Carter had known Davis for eight years. He saw Davis four or five times a week at times material.

13) While Complainant was working for Respondent, he told Carter that Ron Davis had said that as a supervisor, Davis could call him a "black assed nigger" and his co-worker a "lazy assed spic." Complainant was very upset at the time and asked Carter how to handle it. Complainant kept to himself after the incident. Jeff Carter saw a lot of anger toward white males

\* The Agency's Specific Charges did not address the termination of Complainant's employment with Respondent, and no testimony or other evidence regarding termination was received, as it was not an issue in the case.

in Complainant's reaction. It affected Complainant's trust of white males.

14) Jeff Carter's wife, Christine, a Caucasian, had been acquainted with Complainant through her husband for about seven years. She was acquainted with Ron Davis, who was married to her sister, for 11 to 12 years. About two weeks after Complainant began working for Respondent with Ron Davis as his supervisor, Christine Carter was visiting Ron Davis's house in the late afternoon or early evening. In response to her inquiry as to how Complainant was doing, Davis told her that he felt that the reason Complainant was not catching on as well as other employees had was because blacks had smaller brains than white people. Christine's sister was in another room at the time.

15) Christine Carter reported Ron Davis's remark about brains to Complainant within two days, in the evening at the Carter home. Jeff Carter was present. From his tone of voice and the way he looked, Complainant appeared to be angered and upset by the Ron Davis remark about brain size. He stated he couldn't believe that Ron Davis would make such a comment.

16) Although she knew that it would probably upset Complainant, Christine Carter thought it important that Complainant knew what Ron Davis said about him.

17) When Complainant learned from Christine Carter that Ron Davis had said he was not doing as well as white employees because blacks have smaller brains, it made him feel anger and doubt. He didn't want to return to work, but he had to. He didn't know what Davis would say next. He spoke

about the remarks with Chris and Jeff Carter and with his girlfriend, Shannon Davis.

18) Shannon Davis was employed at Southern Oregon State College when Complainant worked for Respondents. She was a close friend and was dating Complainant. They had daily conversations. In January 1993, they began living together in Vancouver, Washington. Complainant told her by telephone during the day while she was at work and he was working for Respondents that Ron Davis had said "there is nothing worse than a black assed nigger or a lazy assed spic."

19) Complainant was very upset and hurt by Ron Davis's remark because he thought he and Ron Davis were friends, and he hadn't realized that Ron Davis felt that way.

20) Complainant told Shannon Davis in person that Chris Carter told him that Ron Davis had said that black's brains were smaller than white's brains. His feelings were hurt, and he was "in grief" over the behind-the-back remark. Since the Ron Davis comments, Complainant has mentioned them often. He told Shannon Davis that his attitudes and perceptions regarding white males had changed and that he was disillusioned.

21) The distrust and suspicion of white males continued to some degree up to the time of hearing. It made him question whether he should have conducted himself in such a way as to be threatening, in order to have people fear talking about him. Complainant did not wish to do that, because he is a big man (6'4", 275 lbs.) and believed

he already seemed threatening to some.

22) After the employment with Respondent terminated in August 1992, Complainant later saw Ron Davis at a birthday party for Jeff Carter at Carter's home. Davis offered Complainant his hand and said he was sorry for what he had said. Davis told him that he spoke as he did because he thought those around him felt that way also. Complainant told Davis that it couldn't be undone, but that he would get along with Davis for the sake of the family, meaning the Carters.

23) At times material, Barbara Turner was a senior civil rights investigator with the Agency. She was assigned Complainant's complaint for investigation and held a fact-finding conference\* in December 1992, attended by Complainant, Respondent, Ron Davis, and attorney Balocca. At the conference, Respondent told the investigator that Ron Davis had called him on several occasions about difficulties between Complainant and Jimmy Stihls. Respondent told the investigator that Ron Davis had told him that Davis had made the comment to Complainant and Stihls about "nigger" and "spic." Respondent stated that he learned of the comment after it was made.

24) Respondent was not acquainted with Complainant and could not recall whether he had seen Complainant at work. At hearing, Respondent denied using racial slurs in

connection with Complainant and denied sanctioning or authorizing the use of such language. Respondent did not recall the exact words used by Ron Davis at the conference, but denied telling Davis what words to use. Ron Davis had no after-hours authority except in connection with break-ins and no authority to discuss employees with others.

25) Ron Davis told Respondent what he had said after the complaint was filed, while Davis was still employed. Respondent's impression from Davis's explanation to him was that Davis had used the terms he did as examples because the disagreement between Complainant and Stihls allegedly involved name calling. Respondent felt that if either employee were offended, they would have contacted Respondent.

26) At the conference, Ron Davis stated that he called Complainant and Stihls into his office and said he didn't care "if you are a lazy assed nigger or a lazy spic, we're not going to have these kinds of problems." On January 4, 1994, Turner reinterviewed Ron Davis. At that time, he told Turner that Respondent had instructed him to make the statement to Complainant and Stihls. He denied telling Christine Carter that Complainant was slower because blacks had smaller brains. He said he told her that Complainant was satisfactory but that he was not catching on as fast as a white person would, that blacks were slower than

\* A fact-finding conference is an informal investigative meeting involving the complainant, the respondent, the Agency investigator, and primary witnesses. It is used by the Agency in processing discrimination complaints and is intended to narrow the issues for investigation and to facilitate resolution; testimony is not under oath. OAR 839-03-060.

whites but they were okay "if you put a basketball in their hands." He did not state at the conference or in the January 4 interview that he referred to himself as a "white assed honky."

27) The testimony of Ron Davis was not credible. He stated he picked up the terminology he used while in the military. He stated that his full statement to Stihls and Complainant had been: "I am a white assed honky, if you're a black assed nigger, if you're a lazy spic, but here at the Auto Quencher we're all equal." He admitted telling Christine Carter, at home after working hours, that Complainant was slower than other employees, but denied commenting on brain size. He stated that Respondent had directed him to "clarify the circumstances and make sure that it didn't keep on risin' and be a major problem," and that "I figured if I got the problem out in the open and batted one on one with these guys that the problem would subside." He didn't recall if Respondent told him the words to use. He said he "didn't have it on paper," that Respondent just told him to cure the problem. Davis denied telling the Agency investigator that Respondent told him what to say. He said that Respondent told him to handle it to the best of his knowledge and then if it wasn't right, Respondent would deal with it himself. Davis also testified that prior to hearing Christine Carter told him she was expecting \$1,000 from any award Complainant got, and claimed that he told the Agency investigator about the "honky" portion of his comments. He stated that he didn't intend the comments to be offensive and didn't think they were since he included himself. He denied

that he ever apologized to Complainant because he didn't make the remark directly to or about Complainant and had nothing to apologize for. He didn't think Complainant would take it personally, but he testified that he was concerned about Complainant suing him. Despite what he may have told his employer, he made no claim that the arguments between Complainant and Stihls were racial in nature. Based upon the inconsistencies in his own statements and with other more credible testimony, the Forum has credited only those portions of his testimony which were confirmed by the credible testimony of others.

#### ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondents operated a business which engaged or utilized the personal service of one or more employees in this state.

2) Complainant, a black male, worked at Respondents' business in July and August 1992.

3) Ron Davis, a Caucasian male, was the manager of Respondents' business and Complainant's direct supervisor.

4) Davis reported to Respondent Glenn Amesen a series of arguments at work between Complainant and a co-worker.

5) As instructed by Respondent Glenn Amesen, Davis called Complainant and the co-worker together.

6) At the meeting, Davis characterized Complainant and the co-worker as a "black assed nigger" and a "lazy assed spic."

7) Davis told his sister-in-law that Complainant was not catching on as

well as white employees because blacks have smaller brains than whites. The sister-in-law informed Complainant of this statement.

8) As a result of his supervisor's offensive remarks, Complainant suffered mental distress characterized by upset, confusion, uncertainty, anger, and hurt, and became doubtful, distrustful, suspicious, disillusioned, and angry regarding his job and his supervisor and white males in general. These attitudes and perceptions continued up to the time of hearing.

#### CONCLUSIONS OF LAW

1) Under ORS 659.010 to 659.110, the Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein.

2) The actions, inactions, statements, and motivations of Ron Davis are properly imputed to Respondents herein.

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 race \* \* \* to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

4) Respondents subjected Complainant to discriminatory terms and conditions of employment by subjecting him, through his manager, to insulting and demeaning remarks and

comparisons based on his race, black, whereby Respondents violated ORS 659.030(1)(b).

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 perform an act or series of acts in order to eliminate the effects of an unlawful practice and to protect the rights of others similarly situated. The amount awarded in the Order below is a proper exercise of that authority.

#### OPINION

Almost 45 years after the prohibition of racial discrimination in employment in Oregon and nearly 30 years after a specific similar prohibition at the federal level,<sup>\*</sup> Complainant was subjected to the ultimate pejorative for a black man, the term "nigger," by his white male supervisor. He had never personally experienced that before. His upset, anger, and disbelief were understandable. Then he discovered that the same supervisor was evaluating his progress based on a vicious racial stereotype. It was not surprising that the anger and upset were intensified by distrust and uncertainty about the supervisor as well as other white males.

Respondent denied authorizing the remarks made by the manager Davis to and about Complainant. But Respondent placed Davis in the position from which he delivered the discriminatory comments. In his attempt at asserting his authority in order to solve

\* Chapter 221, Oregon Laws 1949.

\*\* Title VII, Civil Rights Act of 1964, 42 USC.

the disagreement between Complainant and Stihls, Ron Davis was clearly exercising his supervisory prerogative granted to him by Respondent. Respondents were responsible for the result just as they would have benefited from a more enlightened and successful resolution of a workplace problem.

As is true with sexual harassment, harassing activity of a racial nature must be severe and pervasive enough to create what a reasonable person would find to be an offensive work environment. This Forum has previously held that single, isolated instances of racial slurs might not constitute racial harassment, but where an offensive working environment is created by racially oriented statements made by the employer's agent, the employer is strictly liable for any resulting damage. *In the Matter of United Grocers Inc.*, 7 BOLI 1, 35 (1987). The severity of the offensive behavior can overcome the lack of frequency. In this case, Complainant was reluctant to continue working for and with Davis, and became distrustful of him and uncertain of when an incident of a similar nature would next occur. The report of the supervisor's standard for evaluating him intensified Complainant's discomfort because it illustrated the depth of the supervisor's bias, coming as it did in social conversation with the wife of a black man.

Respondents argued that any discussion by Ron Davis with his sister-in-law regarding Complainant was not only unauthorized, but took place outside of working hours, away from the work site and not as a discussion with Complainant, and was therefore not a violation. Respondents argued further

that they should not be liable for Christine Carter's reporting of the conversation to Complainant.

The Forum has previously ruled that time and place do not necessarily control whether there is an offense when there is an ongoing employment relationship. *In the Matter of Jerome Dusenberry*, 9 BOLI 173, 174 (1991). When offensive statements of a supervisor were made to co-workers who reported them to the complainant, and that knowledge contributed to the offensive work environment complainant experienced, the Commissioner imposed liability on the employer for harassment. *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183, 196 (1992), *aff'd without opinion*, JLG4 v. Bureau of Labor and Industries, 125 Or App 589, 865 P2d 1344 (1993).

#### Remedy

As noted, the shocking and severe insults in this case were not frequent and did not cover a lengthy period of time, but their effect was both immediate and long-lasting. Complainant testified credibly to the ongoing humiliation and distrust which outlasted the employment itself, and his distress was verified by other witnesses. Emotional distress damages will lie in a case of unlawful practice where emotional distress is established by a preponderance of the evidence. *Dusenberry*, *supra*, at 190.

"Awards for mental suffering depend on the facts presented by each Complainant. Respondents must take complainants as they find them." *In the Matter of Courtesy Express, Inc.*, 8 BOLI 139, 148 (1989).

In view of the duration and seriousness of Complainant's distress, the Forum is awarding \$15,000 to eliminate the effects of Respondents' unlawful practice.

#### Respondents' Exceptions

Respondent Glenn Arnesen timely filed exceptions to the Proposed Order without the assistance of counsel. They constitute argument regarding the lack of prior history of discrimination, Complainant's failure to report the incidents to Respondent directly, Respondent's previous unawareness of any bias on the part of Davis, Complainant's motives and credibility in denying being called "nigger" before, and Respondent's responsibility for his agent.

Respondent suggested that the Agency's evidence consisted of hearsay from the friends of Complainant, that the remarks of Davis were subject to interpretation as to what Davis was attempting to accomplish, and that Respondent should not be held responsible for discrimination because Respondent had no record of racial complaints, no knowledge that Davis might be biased, and no complaint to him from either Complainant or the other worker.

Respondent, as well as other employers, can take no comfort in the fact that an employee does not report a supervisor's discriminatory speech or act immediately to the employer. The offended employee has no legal duty to inform upper management of an offense before seeking redress under the law. Since the supervisor represents the employer, the employee might well assume that the supervisor's attitude is a reflection of

management's attitude. It is immaterial, then, whether Complainant attempted to reach Respondent. It is also immaterial whether Complainant had experienced offensive names in other contexts. He was entitled to a discrimination-free work environment which Respondent was legally obligated to provide. From the demonstrated discrimination, he understandably felt he would not be treated or evaluated fairly.

As to the "hearsay" nature of the evidence, Davis himself admitted the substance of his remarks, both at hearing and to the investigator, and Respondent acknowledged that Davis had repeated similar language to him when Davis told Respondent what had happened. All versions of Davis's words conveyed the basic message of racial inferiority. Finally, it is well settled that an employer is liable for the discriminatory acts of its supervisors toward other employees. *In the Matter of Franko Oil Company*, 8 BOLI 279, 288-89 (1990); *In the Matter of Casa Toltec*, 8 BOLI 149, 170 (1989). Respondent's exceptions are without merit.

#### ORDER

NOW, THEREFORE, as authorized by ORS 659.030(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found, Respondents GLENN and NANCY ARNESEN, dba AUTO QUENCHER and dba THE AUTO MASSAGER II, are 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 EDWARD L.

JOHNSON, in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000), representing compensatory damages for the mental and emotional distress suffered by EDWARD L. JOHNSON as a result of Respondents' unlawful practice found herein, plus interest at the legal rate from the date of this Order until Respondents comply herewith, and

2) Cease and desist from discriminating against any employee based upon the employee's race.

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**In the Matter of  
JOSE LUIS LINAN,  
dba Green Salem Forestry,  
Respondent.**

Case Number 17-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued July 6, 1994.

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**SYNOPSIS**

Where Respondent acted as farm labor contractor without a license three times, in violation of ORS 658.410(1), 658.415(1), and 658.417(1); and breached a valid contract entered into by him in his capacity as a farm labor contractor by failing to pay workers' compensation insurance premiums, in violation of ORS 658.440(1)(d); and breached a Consent Order entered into by him in his capacity as a farm labor contractor by twice acting as a

farm labor contractor without a license, in violation of ORS 658.440(1)(d); and had an unsatisfied judgment, the Commissioner assessed Respondent a civil penalty of \$5,500, pursuant to ORS 658.453(1), and denied him a farm labor contractor license, pursuant to ORS 658.420. ORS 658.410(1), 658.415(1), 658.417(1), 658.420, 658.440(1)(d), 658.453(1); OAR 839-15-145, 839-15-508, 839-15-510, 839-15-512, 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 held on April 5, 1994, in the conference room of the Bureau of Labor and Industries Office, 3865 Wolverine Street NE, Building E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Jose Luis Linan (Respondent) was represented by Andrew P. Ositis, Attorney at Law. Mr. Linan was present throughout the hearing.

The Agency called as witnesses Respondent's former employees Amando Chavez (by telephone) and Angel Chaves. Juan Mendoza, appointed by the Forum and under proper affirmation, acted as an interpreter for these witnesses. The Respondent called himself as his only witnesses.

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 25, 1993, the Agency issued a "Notice of Proposed Denial of Farm/Forest Labor Contractor License and to Assess Civil Penalties" (Notice) to Respondent. The Notice informed Respondent that the Agency: (1) intended to deny Respondent's application for a farm/forest labor contractor license, pursuant to ORS 658.420(1); and (2) intended to assess civil penalties against him in the amount of \$6,000, pursuant to ORS 658.453. The Notice cited the following bases for the Agency's intended actions: (1) acting as a farm labor contractor without a valid license issued by the Commissioner, in violation of ORS 658.410(1), 658.415(1), and 658.417(1) (three violations); (2) acting as a farm labor contractor without a valid license issued by the Commissioner, in violation of ORS 658.410(1), 658.415(1), and 658.417(1) (one violation); (3) failure to comply with the terms and provisions of all legal and valid agreements entered into in Respondent's capacity as a farm labor contractor, in violation of ORS 658.440(1)(d) (one violation); (4) failure to make timely payment of wages owed, in violation of ORS 652.140 (one violation); and (5) having an unsatisfied circuit court judgment. On August 23, 1993, Respondent filed an answer and a request for a hearing. On around September 8, 1993, Respondent filed an amended answer.

2) In his amended answer, Respondent moved to strike allegations of aggravation in paragraph three of the Notice and moved for the appointment of an independent hearings referee. Respondent alleged that the Agency's hearings referees were unable to provide Respondent with a fair hearing due to their conflict of interest as employees of the Agency. On October 14, the Agency responded to Respondent's motions. On October 15, 1994, the Forum denied the motions, ruling that (1) the Agency's allegations complied with the requirements of ORS 183.415(2) and OAR 839-50-060 and (2) the Forum requires a substantial showing of actual bias or prejudice by a referee. The mere fact that a hearings referee is an employee of the Agency is insufficient to prove bias or prejudice. *In the Matter of Clara Perez*, 11 BOLI 181, 182-83 (1993).

3) On September 13, 1993, the Agency requested a hearing date for this case. On September 28, 1993, 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 839-50-000 through 839-50-420.

4) On October 19, 1993, the Agency moved to amend the Notice. The Agency asked to amend paragraph three to allege four violations, instead of one, of ORS 658.440(1)(d).

The four violations alleged in paragraph three were based on the four violations alleged in paragraphs one and two of acting as a contractor without a license. In addition, the Agency moved to add a new paragraph six, alleging that Respondent breached a valid contract he entered into in his capacity as a farm labor contractor by failing to make workers' compensation insurance premium payments when due, in violation of ORS 658.440(1)(d) (one violation). The motion requested an additional \$2,500 in civil penalties. On October 20, the Agency again moved to amend the Notice to add new paragraphs seven and eight, alleging in each paragraph that Respondent acted as a farm labor contractor without a valid license, in violation of ORS 658.410(1), 658.415(1), and 658.417(1) (one violation each). This motion requested an additional \$4,000 in civil penalties. Respondent did not reply to either motion within the time required by OAR 839-50-150, and the Hearings Referee granted the motions under OAR 839-50-140(1). The Hearings Referee directed Respondent to file an amended answer and issued an amended Notice of Hearing. Following an extension of time, Respondent filed a supplemental answer.

5) On October 19, 1993, the Agency filed a motion for partial summary judgment. On November 4, 1993, the Agency filed a second motion for partial summary judgment. Following an extension of time, Respondent filed a response to both motions. On January 24, 1994, the Hearings Referee granted the motions in part.

6) On November 16, 1993, Respondent requested a postponement of the hearing because it conflicted with a trial that was scheduled before the Notice of Hearing was issued. On November 19, the Hearings Referee granted the motion. On December 7, the Hearings Unit issued a Notice of Amended Hearing Dates, setting the hearing for April 5, 1994.

7) On March 3, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case. The Agency and Respondent each submitted a summary.

8) On March 30, 1994, the Agency and Respondent agreed that the Agency would dismiss paragraphs four and eight of the amended Notice and that the Agency's documents submitted with its summary were authentic and did not require independent foundation.

9) At the start of the hearing on April 5, Respondent's attorney said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

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

11) At the start of the hearing, the Agency moved to dismiss two of the three violations alleged in paragraph one of the Notice. Specifically, the Agency moved to dismiss the allegations that Respondent acted as a farm labor contractor without the required

license on Bureau of Land Management (BLM) contract #1422H952-C-2-1098 and on United States Forest Service (USFS) contract #53-04R4-2-7370. The Agency believed the activities performed by Respondent under those contracts fell within an exemption from licensing contained in OAR 839-15-130(20)(a), regarding the application of a pesticide or herbicide.

12) On June 14, 1994, the Hearings Unit issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed 10 days for filing exceptions. The Hearings Unit received no exceptions.

#### FINDINGS OF FACT – THE MERITS

1) In August 1990, Respondent was a licensed farm labor contractor in Oregon. To get that license he had to pass a test, which asked many questions concerning farm labor contractor duties and responsibilities. Respondent knew farm labor contractors needed to provide workers' compensation insurance for their employees. The last farm labor contractor license issued to Respondent, dba Green Salem Forestry, expired on August 31, 1991.

2) Between November 1989 and December 1990, Liberty Northwest Insurance Corporation provided workers' compensation insurance to Respondent, in his capacity as a farm labor contractor. Respondent failed to pay \$12,261 in premiums during that period. Respondent breached his contract with Liberty Northwest Insurance Corporation.

3) In November 1991, Respondent signed a Consent Order with the

Agency to resolve a contested case in which the Agency sought to revoke his farm labor contractor license. In the Consent Order, Respondent admitted that:

1. he performed four forestation contracts in violation of ORS 658.418(2) and (3), regarding certain exemptions from the requirements for farm labor contractors engaged in forestation;
2. he failed to keep posted a notice specifying his compliance with the financial responsibility requirements of the law, in violation of ORS 658.415(15);
3. he transported workers in a vehicle without first providing the Commissioner satisfactory proof of an insurance policy on the vehicle, in violation of ORS 658.415(2); and
4. he failed to timely submit certified payroll records to the Commissioner for workers employed on two contracts, in violation of ORS 658.417(3) and OAR 839-15-300.

Respondent agreed to pay a \$5,000 civil penalty, cure some of the violations found, and

"comply with the terms and conditions of this Consent Order, ORS chapter 658 and the Commissioner's rules issued pursuant thereto now and in the future, and understands that any violation of this Consent Order shall be considered a breach of a legal and valid agreement entered into with the Commissioner in Contractor's capacity as a farm labor contractor, which breach and the admissions contained herein shall be

grounds for revocation or denial of Contractor's farm labor contractor license[.]"

In consideration of Respondent's agreements and the payment of the civil penalty, the Commissioner agreed to forego further administrative procedures and to issue Respondent a farm labor contractor license with a forestation indorsement.

4) In 1992, Respondent recruited workers in the State of Oregon to perform work on a USFS reforestation contract in Shelton, Washington. He did not have an Oregon farm labor contractor license at that time. He was licensed in Washington as a farm labor contractor. Workers he recruited labored on that contract.

5) While he was in Washington, Respondent heard of a reforestation job in Grants Pass. He called Don Jacobs, of Jacobs Contracting, about the job and Jacobs told him to bring workers to Grants Pass to work on a contract. Respondent told the workers of the job in Grants Pass.

6) In April 1992, Jacobs Contracting was working on a BLM contract, #1422H110-P2-5027 (5027), installing vexar tubes and tree shades in the Grants Pass area. On April 22, the owner of Jacobs Contracting, Belinda Jacobs, designated Donald Jacobs to be her representative on the contract and authorized Respondent and Hector Linan to sign work orders and act as crew bosses. Respondent worked for Jacobs Contracting.

7) In April and May 1992, Amando Chavez worked on the Grants Pass contract. Three or four days before the work started, Respondent met Chavez

at his apartment in Keiser and told him that a job was available in Grants Pass. The work involved tubing and shading. Chavez believed Respondent then hired him.

8) Amando Chavez got to know Don Jacobs on the Grants Pass job site. After Chavez started working on the job, he filled out a job application at Jacob's request in order to be paid.

9) The crew boss was Respondent's brother-in-law, Jose Luis Bazan. Respondent's brother, Hector Linan, transported the workers to Grants Pass and was a foreman at the site. There were around 12 workers on the job. Respondent took supplies, such as tubes and shades, each day to the work site in his truck or in Jacobs's truck. He got the supplies from the BLM. The workers lived in a motel, which was paid for by Don Jacobs, Hector Linan, or Respondent. Jacobs gave Hector and Respondent money to pay for the motel.

10) Angel Chaves came from Mexico and worked for Respondent and Jose Luis Bazan in 1991. In March 1992, Chaves returned from Mexico, looking for work. Chaves looked for Bazan, who was working as a crew boss with Respondent. Bazan took Chaves to work for Respondent in Washington. Respondent always paid Chaves in cash or with a personal check. When he returned to Oregon, Chaves and other workers rented an apartment in Keiser. Respondent came looking for Chaves, and told him he had work for Chaves in Grants Pass, working for Jacobs. Respondent chose several of the workers to take to Grants Pass. Chaves agreed to go to work, and Hector Linan took

him to Grants Pass. The vehicle they rode in was Respondent's. Some workers who had worked for Respondent in Washington worked in Grants Pass. Chaves knew five of the workers. While he was working in Grants Pass, Chaves met Jacobs. He had never met Jacobs before. Chaves later worked with Respondent on another contract in Eugene. He was transported between Keiser and Eugene in Respondent's van.

11) While they were working in Grants Pass, Respondent borrowed \$100 from Angel Chaves to buy food and a motel room for the workers. In October or November 1993, Chaves asked Respondent to pay the money back. Respondent told Chaves to forget it, because the money had been spent on everyone's expenses and because Chaves made a claim against Respondent with the Agency. Respondent had not paid back the \$100 to Chaves at the time of hearing.

12) Amando Chavez filed a wage claim with the Agency against Respondent because he was not paid. Chavez believed Respondent was his employer.

13) Respondent took some of the workers to the Agency to file wage claims against Jacobs because they had not been paid. Respondent did not want the workers to file wage claims against him. Respondent believed Jacobs had not paid him money owed. However, he did not file a wage claim against Jacobs. Respondent believed Jacobs was the contractor on the job.

14) Since March 10, 1993, Respondent has had an unsatisfied Marion County Circuit Court judgment in

favor of Liberty Northwest Insurance Corporation in the sum of \$12,261 for unpaid workers' compensation insurance premiums.

15) Respondent knew there was this judgment against him for failure to pay his insurance premiums. He did not pay the premiums because he had no money. He knew he had to pay the judgment, but he had no money.

16) From April 28 to June 27, 1993, Respondent had a farm labor contractor's temporary permit, while he had a license application pending. He took and passed the license exam, and paid the license fee, but was not licensed. He knew the permit expired on June 27, 1993. On July 7, 1993, Respondent received the Notice of Proposed Denial of a Farm/Forest Labor Contractor License and to Assess Civil Penalties, dated June 25, 1993.

17) From on or about June 28, 1993, until on or about September 21, 1993, Respondent employed workers in Oregon to labor upon a forestation subcontract in the Umpqua Resource Area, BLM contract #1442-H952-C-3-1022 (1022). During that time, Respondent did not possess a valid farm labor contractor license or a temporary permit. Respondent knew he did not have a license. Respondent was doing business as Green Salem Forestry.

#### ULTIMATE FINDINGS OF FACT

1) During all material times herein, Respondent was acting as a farm labor contractor, as defined by ORS 658.405, in the State of Oregon. Respondent's farm labor contractor license expired on August 31, 1991. The Agency issued Respondent a

temporary permit on April 28, 1993. The permit expired on June 27, 1993. At no time after August 31, 1991, did Respondent have a farm labor contractor license.

2) In 1992, Respondent recruited workers in Oregon to labor upon a USFS forestation contract in Shelton, Washington. During that time, Respondent did not possess a valid farm labor contractor license with a forestation indorsement.

3) In April 1992, Respondent recruited forestation workers in Oregon to labor upon Bureau of Land Management contract #1422H110-P2-5027 in the Grants Pass area, when at all material times, Respondent did not possess a valid farm labor contractor license with a forestation indorsement.

4) Respondent failed to make workers' compensation insurance premium payments when due and, thereby, failed to comply with the terms and provisions of the legal and valid insurance policy contract Respondent entered into, in his capacity as a farm labor contractor, with Liberty Northwest Insurance Corporation.

5) Since March 1993, Respondent has had an unsatisfied circuit court judgment against him for \$12,261, for unpaid workers' compensation insurance premiums.

6) From June 28 to September 21, 1993, Respondent employed workers in Oregon to labor upon BLM contract #1422-H952-P-3-1022 in the Umpqua Resource Area, when at all material times, Respondent did not possess a valid farm labor contractor license with a forestation indorsement. Respon-

dent knew he did not have a license when he employed these workers.

7) In November 1991, Respondent signed a Consent Order with the Agency. In it, Respondent agreed to

"comply with the terms and conditions of this Consent Order, ORS chapter 658 and the Commissioner's rules issued pursuant thereto now and in the future, and understands that any violation of this Consent Order shall be considered a breach of a legal and valid agreement entered into with the Commissioner in [Respondent's] capacity as a farm labor contractor, which breach and the admissions contained herein shall be grounds for revocation or denial of [Respondent's] farm labor contractor license[.]"

By acting as a farm labor contractor without a license, as described in Ultimate Findings of Facts 2 and 3, above, Respondent breached a legal and valid agreement between the Commissioner and Respondent, entered into in Respondent's capacity as a farm labor contractor. These breaches are grounds for denial of his license application.

8) Respondent's character, reliability, and competence make him unfit to act as a farm labor contractor.

#### 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. ORS 648.405 to 658.485.

2) ORS 658.405 provides, in part:

"As used in ORS 658.405 to 658.503 and 658.830 and

658.991(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, and clearing, piling and disposal of brush and slash and other related activities \* \* \*; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities; \* \* \* or who enters into a subcontract with another for any of those activities."

OAR 839-15-004 provides, in part:

"As used in these rules, unless the context requires otherwise:

\* \* \*

"(5) 'Forest Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the forestation or reforestation of lands; or

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the forestation or reforestation of lands; \* \* \*

\* \* \*

"(7) 'Forestation or reforestation of lands' includes, but is not limited to:

"(a) The planting, transplanting, tubing, precommercial thinning, and thinning of trees and seedlings; \* \* \*

\* \* \*

"(15) 'Worker' means any individual performing labor in the forestation or reforestation of lands \* \* \*. A 'worker' includes, but is not limited to employees and members of a cooperative corporation."

ORS 658.410(1) provides, in part:

"No person shall act as a farm labor contractor with regard to 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."

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."

Respondent was a farm labor contractor. By acting as farm labor contractor with regard to the forestation or reforestation of lands without a valid license issued to him by the Commissioner, as described in Ultimate Findings of Fact 2, 3, and 6, Respondent violated ORS 658.410(1), 658.415(1), and 658.417(1) three times.

3) ORS 658.440(1) provides, in part:

"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."

Respondent violated ORS 658.440(1)(d) three times by failing to pay workers' compensation insurance premiums when due and by twice breaching the terms of the Consent Order Respondent entered into with the Commissioner.

4) ORS 658.453(1) provides, in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.503 and 658.830, recruits, solicits, supplies or employs a worker.

\*\* \* \*

"(c) A farm labor contractor who fails to comply with ORS 658.440(1) \*\*\*.

\*\* \* \*

"(e) A farm labor contractor who fails to comply with ORS 658.417(1) \*\*\*."

OAR 839-15-505 provides in part:

"(2) 'Violation' means a transgression of any statute or rule, or any part thereof and includes both acts and omissions."

OAR 839-15-508 provides, in part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

"(a) Acting as a farm or forest labor contractor without a license in violation of ORS 658.410;

\*\* \* \*

"(f) Failing to comply with contracts or agreements entered into as a contractor in violation of ORS 658.440(1)(d);

\*\* \* \*

"(2) In the case of Forest Labor Contractors, in addition to any other penalties, a civil penalty may be imposed for each of the following violations:

"(a) Failing to obtain a special endorsement from the Bureau to act as a Forest Labor Contractor in violation of ORS 658.417(1)."

OAR 839-15-510 provides:

"(1) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed,

and shall cite those the Commissioner finds to be appropriate:

"(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude and seriousness of the violation;

"(d) Whether the contractor or other person knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor or other person to provide the Commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

"(3) In arriving at the actual amount of the civil penalty, the Commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or other person in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the Commissioner shall consider all mitigating circumstances presented by the contractor or other person for the purpose of reducing the amount of the civil penalty to be imposed."

OAR 839-15-512 provides, in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) Repeated violations of the statutes for which a civil penalty may be imposed are considered to be of such magnitude and seriousness that a minimum of \$500 for each repeated violation will be imposed when the Commissioner determines to impose a civil penalty.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm or forest labor contractor without a valid license, the minimum civil penalty shall be as follows:

"(a) \$500 for the first offense;

"(b) \$1,000 for the second offense;

"(c) \$2,000 for the third and each subsequent offense."

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. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

5) ORS 658.420 provides, in part:

"(1) The Commissioner of the Bureau of Labor and Industries 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.

"(2) The commissioner shall issue a license within 15 days after the day on which the application

therefor was received in the office of the commissioner if the commissioner is satisfied as to the applicant's character, competence and reliability."

OAR 839-15-145 provides, in part:

"The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules includes, but is not limited to, consideration of:

"\* \* \*

"(2) A person's reliability in adhering to the terms and conditions of any contract or agreement between the person and those with whom the person conducts business.

"\* \* \*

"(4) Whether a person has unsatisfied judgments or felony convictions.

"\* \* \*

"(6) Whether a person has paid worker's compensation insurance premium payments when due.

"(7) Whether a person has violated any provision of ORS 658.405 to 658.485."

OAR 839-15-520 provides, in part:

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

"\* \* \*

"(k) Acting as a farm or forest labor contractor without a license.

"(2) When the applicant for a license \* \* \* demonstrates that the

applicant's \* \* \* character, reliability or competence makes the applicant \* \* \* unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the license application be denied \* \* \*.

"(3) The following actions of a Farm or Forest Labor Contractor license applicant \* \* \* demonstrate that the applicant's \* \* \* character, reliability or competence make the applicant \* \* \* unfit to act as a Farm or Forest Labor Contractor.

"(a) Violations of any section of ORS 658.405 to 658.485;

"\* \* \*

"(j) Failure to make workers' compensation insurance premium payments when due[.]"

Respondent's multiple violations of ORS 658.410(1), 658.415(1), 658.417(1), and 658.440(1)(d), as well as Respondent's unsatisfied judgment and his willful breach of the Consent Order, demonstrate Respondent's unfitness to act as a farm labor contractor. 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 labor contractor.

#### OPINION

##### 1. Summary Judgment

Pursuant to OAR 839-50-150(4), the Agency filed two motions for partial summary judgment. It asserted that no genuine issue existed as to any material fact and the Agency was entitled to judgment as a matter of law as to the alleged violations. Subsection c of OAR 839-50-150(4) provides that,

where the hearings referee grants the motion, the decision shall be set forth in the proposed order. This order complies with that procedure.

The Hearings Referee granted the Agency's motions in part. He granted summary judgment on paragraphs two, five, six, and seven, and on one violation alleged in paragraph three of the Agency's Notice. He denied summary judgment on the allegation in paragraph eight of the Notice. Since the Agency dismissed paragraph eight at hearing, that portion of the summary judgment ruling has been deleted. Otherwise, the pertinent parts of the ruling are set forth in full below.

"The Agency sought summary judgment on paragraphs two, five, six, seven, and eight, and on one of four violations alleged in paragraph three of its Amended Notice of Proposed Denial of a Farm/Forest Labor Contractor License and to Assess Civil Penalties (Notice). Respondent filed a timely response to the motions.

##### "Paragraph Two

"In paragraph two of its Notice, the Agency alleged that Respondent acted as a farm labor contractor without a valid license, in violation of ORS 658.410(1), 658.415(1), and 658.417(1), by recruiting workers in Oregon to work on a United States Forest Service (USFS) contract in Shelton,

Washington, at a time when Respondent did not have an Oregon farm labor contractor (FLC) license.

"In his answer, Respondent admits that he recruited workers in Oregon to work on a forestation contract in Shelton, Washington, and that he did not have an Oregon FLC license at the time. He states that he had the required licenses issued by the federal government and the State of Washington.

"In its motion, the Agency argues that:

"The legislature clearly recognized potential issues with federal pre-emption and state authority and jurisdiction, and delineated, in ORS 658.501, those acts, in transactions involving more than one state, for which an Oregon license is required. The recruitment of workers in this state to perform work outside this state is an act within the delineated acts for which an Oregon license is required."

"In his response to the motion, Respondent counters that the Agency:

"mis-states the provisions of ORS 658.501, in that the referenced statute merely fills in the gaps and states that the statute

\* "In his answer, Respondent states that 'he recruited workers in the State of Oregon to work [on] a reforestation contract in Shelton, Oregon.' (Emphasis added.) In his response to the Agency's motion for summary judgment, he states that 'Workers in Oregon are recruited to work in Washington.' I take official notice from maps of Oregon and Washington that there is no Shelton, Oregon, but there is a Shelton, Washington. The Forum finds that Respondent meant Shelton, Washington, when he wrote Shelton, Oregon, in his answer.

applies where it is not preempted. So, we have a farm labor contractor with a federal license and a Washington license. Workers in Oregon are recruited to work in Washington. It is a purely legal question of whether the contractor must also need to be licensed in Oregon. Respondent contends that it is not required and is regulatory over-kill to so demand.'

"The Agency's motion for summary judgment regarding paragraph two is GRANTED. ORS 658.501 provides in part:

"ORS 658.405 to 658.503 and 658.830 apply to all transactions, acts and omissions of farm labor contractors and users of farm labor contractors that are within the constitutional power of the state to regulate, and not preempted by federal law, including but not limited to the recruitment of workers in this state to perform work outside this state, \* \* \* and the payment, terms and conditions, disclosure and record keeping required with respect to work performed outside this state by workers recruited in this state.'

"The statute can be interpreted two ways. First, it can be read to list transactions, acts, and omissions that are subject to the FLC laws, and that the legislature has found 'are within the constitutional power of the state to regulate, and [are] not preempted by federal law.'

"Second, it can be read so that the clause 'ORS 658.405 to

658.503 and 658.830 apply to all transactions, acts and omissions' is qualified by the clause 'that are within the constitutional power of the state to regulate, and not preempted by federal law.' Thus, each listed transaction, act, and omission, including 'the recruitment of workers in this state to perform work outside this state,' must be reviewed to see if it meets the qualifications, including whether regulation of it is preempted by federal law. Note that it is the Agency's regulation of the act that could be preempted, not the act itself.

"Under the first interpretation, the Agency's motion must be granted, because, as a matter of law, Respondent's admitted recruitment of workers in Oregon to perform work in Washington is an act covered by the FLC law. ORS 658.405(1), 658.510. Regulation of Respondent's act is within the state's constitutional power, and it is not preempted by federal law. ORS 658.510. Respondent's act requires a license, and he acted without one, in violation of ORS 658.410(1), 658.415(1), and 658.417(1).

"Under the second interpretation, the Agency's motion must still be granted. Respondent has not suggested that the act of recruiting workers in Oregon to perform work in another state is outside of the constitutional power of Oregon to regulate. While the work involved in this allegation occurred on federal land, Respondent has not claimed that the federal

government has exclusive jurisdiction over national forest lands within the states. The Forum finds that the federal government does not have exclusive jurisdiction over the national forest lands within the states. See Article I, Section 8, Clause 17, of the United States Constitution, and A.G. Opinion No. 6888 (January 21, 1972). The Forum finds that the act of recruiting workers in Oregon to work outside of this state is within the constitutional power of the state to regulate.

"The issue then, under the second interpretation of ORS 658.501, is whether regulation of this act (recruiting workers in Oregon to perform work outside this state) is preempted by federal law. See Article VI, Clause 2 of the U.S. Constitution, and A.G. Opinion No. 6888 (January 21, 1972). Under either interpretation of ORS 658.501 and under the case law of this Forum, there is no question that Oregon's FLC laws apply to the act of recruiting workers in this state to perform work outside this state. See *In the Matter of Leonard Williams*, 8 BOLI 57 (1989) ('To recruit or solicit workers in Oregon to work in the forestation or reforestation of lands, wherever situate [here, in Alaska, on a USFS contract] is a forest labor contractor activity requiring a valid farm labor contractor license with appropriate indorsement.' (emphasis original)). In *Williams*, the issue of preemption was not raised.

"Under the facts here, the application of Oregon's licensing

requirements to Respondent would be preempted by federal law if the Oregon regulation interfered with federal government functions and was in conflict with federal procurement legislation. *Leslie Miller, Inc., v. Arkansas*, 352 US 187, 77 S Ct 257, 1 L Ed 2d 231 (1956); *Gartrell Construction, Inc. v. Aubry*, 940 F2d 437 (9th Cir 1991). The issue, it appears, focuses on the federal determination of a responsible bidder.

"Federal procurement regulations require federal agencies to determine affirmatively the responsibility of prospective contractors. 48 CFR Ch. 1, Part 9. According to federal policy, 'contracts shall be awarded to responsible prospective contractors only,' and '[n]o purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.' 48 CFR Ch. 1, section 9.103 (Policy). To be determined responsible, a prospective contractor must \* \* \* [b]e otherwise qualified and eligible to receive an award under applicable laws and regulations.' *Id.*, at section 9.104-1 (General Standards).

"I take official notice of Agency policy, as enunciated on pages 11-14 of the Agency's amended case summary for *In the Matter of Tauruscorp, Inc.*, #12-92 (1992) (no final order issued):

"a) Bidding: Because a requirement for a state license to bid operates as a condition precedent to the right to bid on all contracts (including federal), the State requirement frustrates the expressed federal policy of

selecting the lowest responsible bidder by screening out potential bidders on federal contracts. Federal procurement regulations require an affirmative federal determination of responsibility prior to contract award, which, by practice and interpretive case law has been extended to the time to proceed (perform) on the contract. Because this determination may be delayed until as late as the time of Notice to proceed, it is reasonable to conclude that any screening out of bidders before this point (award or time for performance) would frustrate or interfere with the federal interest in shopping for and selecting the most favorable bidder.

"b) Performance (aspects other than bidding): As with the bidding issue, the answer to the performance issue turns on the interest of the federal government in regulation of its own contract activity with minimum interference by the State. The pivot is the federal responsible bidder determination as in [*Leslie Miller, Inc., v. Arkansas*, 352 US 187, 77 S Ct 257, 1 L Ed 2d 231 (1956)] and [*Gartrell Construction, Inc. v. Aubry*, 940 F2d 437 (9th Cir 1991)]. An additional factor, however, results in an answer different from that of the bidding question.

"The Federal Acquisition Regulations require that a clause similar to 48 CFR section 52.236-7 be included in certain types of solicitations and be

met as a prerequisite to an affirmative determination of responsibility. The procurement regulations of the Department of Agriculture (U.S. Forest Service) and the Department of the Interior (Bureau of Land Management) require a clause of this type in its reforestation solicitations. In relevant part, this clause reads as follows:

"The contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any federal, State, and municipal laws, codes, and regulations applicable to the performance of the work \*\*\*"

"For purposes of comparison below, this version of the clause will be referred to as the "general clause."

"An acceptable alternative to the general clause is one which names the specific permits and licenses (federal and state) which must be obtained by the contractor as a prerequisite to an affirmative determination of responsibility. This form will be referred to as the "specific clause." Both the Bureau of Land Management and United States Forest Service use the specific clause, requiring a federal MPSA Certificate and a state Farm Labor Contractor License.

"The form of the clause utilized results in a very important difference with respect to

whether obtaining a state license is a condition precedent to an affirmative determination of responsibility for contract award and performance. As delineated by the United States Comptroller General's Opinion [*What-Mac Contractors, Inc.*, B-1921188, September 6, 1979, 79-2 CPD 179] at pages 5-7, where a general clause is used, the failure of a successful bidder to obtain the state license is not a prerequisite to an affirmative determination of responsibility (for award and performance); where a specific clause is used, obtaining the state license is a prerequisite to an affirmative determination of responsibility (for award and performance). Where, as here, the specific clause is used and the bidder cannot obtain a state license, the contract and the award is made to the next lowest and responsible bidder.

"The importance of this distinction as to the performance issue is this: If a bidder cannot receive an affirmative determination of responsibility without a state license, then the state license requirement cannot, by definition, frustrate or interfere with the federal interest in shopping for and awarding to the lowest responsible bidder. Since there is no conflict or interference with federal law in this situation, there is no federal preemption of the state's application of its licensing law to the performance of federal

contracts within the state. While the court in *Aubry*, at p. 440, negates the distinction between bidding and performance, that court was dealing with a contract containing the general clause where such a distinction would not be functional: no state license is required for an affirmative determination of responsibility. Where, however, a state license is required for an affirmative determination of responsibility, a federal contract cannot be awarded [or] performed without it. In the latter situation the federal law and state law are working in harmony and there is no preemption under the Supremacy clause.' [Emphasis original.]

"While I have taken notice of the Agency's 1992 policy statement, and it notes that USFS and BLM both use a 'specific clause' in their contracts, I do not know, and the evidence does not show, what clause was used in the USFS contract in this case. Nevertheless, I find that Respondent's act here, recruiting workers in Oregon to work in Washington, is a matter that did not interfere with Respondent's bidding for the USFS contract, or with a federal determination of Respondent's responsibility. It is apparent from the pleadings regarding paragraph four that Respondent got the USFS contract in Shelton, Washington. According to Respondent, he had the necessary federal and Washington state licenses. An Oregon license was not a prerequisite to bid on the

USFS contract. Recruiting workers for the USFS job would not have occurred until after the contract had been awarded to Respondent as a responsible prospective contractor. Even if he recruited Oregon workers before he was awarded the contract, 'failure of a bidder to meet State or local licensing requirements prior to award, where the [invitation for bid] contained only general statements regarding State or local licenses, was a matter between the State and local authorities and the awardee and would not affect the legality of the contract awarded.' Comptroller General's Opinion, at page 7.

"Under even a general clause, once Respondent was awarded the contract and was notified to proceed, he was 'responsible for obtaining any necessary licenses and permits, and for complying with any federal, State, and municipal laws, codes, and regulations applicable to the performance of the work applicable.' Thus, I find that the Agency's licensing requirements did not interfere with federal government functions in this case; nor were they in conflict with federal procurement legislation. Accordingly, Oregon's FLC law, which required Respondent to become licensed before he recruited workers in this state to perform work outside of this state, is not preempted by the Supremacy Clause of the U.S. Constitution.

"I find as a matter of law that (1) the FLC laws apply to

Respondent's act of recruiting workers in this state to work outside of this state, (2) the FLC law was not preempted in this case, and (3) Respondent violated ORS 658.410 (1), 658.415(1), and 658.417(1) by acting as a farm labor contractor with regard to the forestation or reforestation of lands without a license.

#### "Paragraph Three

"In paragraph three of its Notice, the Agency alleges that in November 1991 Respondent executed a consent order with the Commissioner, wherein Respondent 'admitted violations of ORS chapter 658, and agreed to perform certain conditions in consideration of the Commissioner foregoing further proceedings to revoke' his 1991 FLC license. A consent order regarding Respondent, case number 29-91, was attached to the Notice. In the consent order, which he signed on November 5, 1991, Respondent:

"represents to the Commissioner that he will comply with the terms and conditions of this Consent Order, ORS Chapter 658, and the Commissioner's rules issued pursuant thereto now and in the future and understands that any violation of this Consent Order shall be considered a breach of a legal and valid agreement entered into with the Commissioner in [Respondent's] capacity as a farm labor contractor, which breach and the admissions contained herein shall be grounds for revocation or denial of

[Respondent's] farm labor contractor license[.]

"The Agency alleges that Respondent breached his consent order agreement with the Commissioner, in violation of ORS 658.440(1)(d), by violating ORS chapter 658 as alleged in paragraph two of the Notice. Specifically, Respondent breached the consent order by acting as a farm labor contractor with regard to the forestation or reforestation of lands without a license, in violation of ORS 658.410(1), 658.415(1), and 658.417(1).

"In his amended answer, Respondent admitted that he executed a consent order with the Commissioner, and that the order was attached to the notice. He denied the allegation that he committed the violations alleged in paragraph two of the notice.

"In its motion, the Agency asks for summary judgment based on Respondent's admission regarding the consent order, and on the violations alleged in paragraph two, which violations occurred within a year of the execution of the consent order. In response, Respondent states only that '[t]he determination in this paragraph is dependent on the findings on paragraph 2.'

"The Agency's motion for summary judgment regarding paragraph three is GRANTED. ORS 658.440(1) provides in part:

"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.'

"I find that Respondent entered into a legal and valid agreement with the Commissioner when he executed the consent order in November 1991. That agreement was entered into in Respondent's capacity as a farm labor contractor. As found above in the section concerning paragraph two, Respondent violated ORS 658.410(1), 658.415(1), and 658.417(1) when he recruited workers without a license in August through September 1992. These violations breach Respondent's agreement with the Commissioner. I find that no genuine issue as to any material fact exists, and the Agency is entitled to a judgment as a matter of law that Respondent violated ORS 658.440(1)(d), as alleged.

#### "Paragraph Five

"In paragraph five of its notice, the Agency alleges that, since March 10, 1993, Respondent 'has had an unsatisfied Marion County Circuit Court Judgment in favor of Liberty Northwest as plaintiffs, in the sum of \$12,261.00 for unpaid workers compensation premiums.' The Agency alleges that this judgment demonstrates that Respondent's character, competence and reliability make him unfit to act as a farm labor contractor, pursuant to

OAR 839-15-145(4). In his answer, Respondent admits that there is an existing unpaid judgment as described.'

"The Agency's motion for summary judgment regarding paragraph five is GRANTED. OAR 839-15-145 provides in part:

"The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules includes, but is not limited to, consideration of:

\*\*\* \*\*

"(4) Whether a person has unsatisfied judgments or felony convictions.'

"I find that no genuine issue as to any material fact exists, and the Agency is entitled to a judgment as a matter of law that Respondent has an unsatisfied judgment, which the Commissioner shall consider when she assesses Respondent's character, competence, and reliability.

"Paragraph Six

"In paragraph six of the Notice, the Agency alleges that Respondent failed to make workers' compensation insurance payments to Liberty Northwest Insurance Corporation, in breach of a valid contract entered into by Respondent in his capacity as a farm labor contractor, in violation of ORS 658.440(1)(d). In his supplemental answer, Respondent admits that he failed to pay the workers' compensation premiums when due[.]

\* "The Agency cited OAR 839-15-145(1)(d). According to the Secretary of State's April 1991 printing of the Oregon Administrative Rules, the correct cite for this section of the rule is OAR 839-15-145(4).

Respondent argues that this allegation is the mirror image of the allegation in paragraph five, and constitutes double jeopardy. He also alleges that his failure to pay was due to a lack of funds.

"The Agency's motion for summary judgment regarding paragraph six is GRANTED. ORS 658.440(1) provides in part:

"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.'

"I find that no genuine issue as to any material fact exists, and the Agency is entitled to a judgment as a matter of law that Respondent failed to comply with the terms and provisions of his legal and valid agreement with Liberty Northwest Insurance Corporation, in violation of ORS 658.440(1)(d). The reasons behind Respondent's breach of the agreement are relevant to the sanction to be imposed for the violation of ORS 658.440(1)(d), but do not change the fact that a violation occurred.

"Further, there is no double jeopardy. 'Double jeopardy does not occur unless a man is tried twice; it takes two trials to raise the issue.' *State v. Nelson*, 13 Or App 159, 509 P2d 36, 38 (1973)

(quoting Fisher, Double Jeopardy: Six Common Boners Summarized, 15 UCLA L. Rev 81, 86 (1967)). The Commissioner may find that a contractor has acted in violation of the farm labor contractor law, and may also consider the consequences of that act when determining whether the contractor is fit to act as a farm labor contractor. She can both impose a civil penalty and deny a license based on the same violation of the statute. Imposing both of these sanctions is contemplated by the farm labor contractor statutes and rules, and does not constitute double jeopardy. See, for example, ORS 658.453(1).

"Paragraph Seven

"In paragraph seven of its Notice, the Agency alleges that:

"From on or about June 28, 1993 until on or about September 21, 1993, [Respondent] employed workers in the State of Oregon, to labor upon a forestation subcontract in the Umpqua Resource Area, BLM #1442-H952-C-3-1022, when, at all material times, [Respondent] did not possess a valid Farm/Forest Labor Contractor License, in violation of ORS 658.410(1), 658.415(1), and 658.417(1).'

"In his answer, Respondent admits the act, but denies that a civil penalty is appropriate as respondent had a temporary license which expires 7/27/93 and anticipated a renewal of the license.'

"Along with the motion for summary judgment, the Agency submitted four exhibits in support of its motion. (Exhibits D, E, F, and G) Among the exhibits was an affidavit from the administrative specialist in the Agency's Licensing Unit whose primary duty involves licensing farm labor contractors. In addition, the exhibits include a computer printout showing that Respondent's license expired on August 31, 1991, and a copy of Respondent's temporary permit, which was issued on April 28, 1993, and expired on June 27, 1993. In response to the motion, Respondent states, 'The respondent has admitted to the act of being a subcontractor at the place and time alleged.'

"The Agency's motion for summary judgment regarding paragraph seven is GRANTED. ORS 658.410(1) provides in part:

"No person shall act as a farm labor contractor with regard to 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 \*\*\*'

"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 endorsement 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.'

"I find that no genuine issue as to any material fact exists, and the Agency is entitled to a judgment as a matter of law that Respondent acted as a farm labor contractor with regard to the forestation or reforestation of lands without a valid license issued by the Commissioner, in violation of ORS 658.410(1), 658.415(1), and 658.417(1).

"Paragraph Eight

[DELETED]

"Summary

"I granted summary judgment on paragraphs two, five, six, and seven, and on one violation alleged in paragraph three of the Agency's Notice. I denied summary judgment on the allegation in paragraph eight of the Notice. In each case in which I granted the motion, summary judgment is only for the violation of law alleged (or in the case of paragraph five, that the Commissioner shall consider Respondent's unsatisfied judgment when reviewing Respondent's character, competence, and

reliability). I did not grant summary judgment on those parts of the paragraphs that requested a particular sanction, or alleged aggravating circumstances."

The Forum hereby adopts and affirms those rulings.

## 2. Remaining Allegations

Two allegations remain after the summary judgment ruling, the dismissal of the allegations in paragraphs four and eight of the Amended Notice, and the dismissal of two of the three allegations in paragraph one. First, in paragraph one, the Agency alleged that Respondent acted as a farm labor contractor without a license when he recruited workers in April 1992 for the forestation contract in Grants Pass, in violation of ORS 658.410(1), 658.415(1), and 658.417(1). Second, in paragraph three, the Agency alleged that Respondent breached a legal and valid agreement (the Consent Order), entered into in his capacity as a farm labor contractor, when he committed the violations alleged in paragraph one, above.

Regarding the allegation in paragraph one, the preponderance of credible evidence on the whole record shows that Respondent recruited Messrs. Chavez and Chaves at their apartment in Keiser for forestation work in Grants Pass. Some evidence shows that Jacobs was the employer. Even if Respondent was not the workers' employer (though at least some workers believed he was), Respondent was still acting as a farm labor contractor. ORS 658.405(1) defines farm labor contractor to mean a person "who recruits, solicits, supplies or employs workers on behalf of an employer

engaged in [reforestation] activities." As a farm labor contractor, Respondent was required to be licensed, and he violated the farm labor contractor laws by acting as a contractor without one.

Regarding the allegation in paragraph three, Respondent's violations charged in paragraph one above breach his agreement (in the Consent Order) with the Commissioner. Respondent made that agreement in his capacity as a farm labor contractor, and his failure to comply with it violates ORS 658.440(1)(d).

## 3. Civil Penalties

The Agency proposed to assess civil penalties for: (1) three occasions when Respondent acted as a farm labor contractor without a license, in violation of ORS 658.410, 658.415, and 658.417; and (2) three occasions when Respondent failed to comply with the terms and provisions of his agreements – once with Liberty Northwest Insurance Corporation and twice with the Commissioner – in violation of ORS 658.440(1)(d).

The Commissioner may assess a civil penalty not to exceed \$2,000 for each of these violations. ORS 658.453(1)(a), (c), and (e); OAR 839-15-508(1)(a), (f), and (2)(a), and 839-15-512(1). The Commissioner may consider mitigating and aggravating circumstances when determining the amount of any penalty to be imposed. OAR 839-15-510(1). It was Respondent's responsibility to provide the Commissioner with any mitigating evidence. OAR 839-15-510(2).

Respondent acted as a farm labor contractor without a license on three

separate occasions. One was when he recruited workers in Keiser to do reforestation work on a BLM contract in Grants Pass (paragraph one of the Notice). Another occasion was when he recruited workers in Oregon to do forestation labor on a USFS contract in Washington (paragraph two). The last occasion was when he employed workers to work on a reforestation subcontract for the BLM in the Umpqua Resource Area (paragraph seven).

Pursuant to OAR 839-15-512(3), the minimum civil penalty "shall" be \$500 for the first offense, \$1,000 for the second offense, and \$2,000 for the third offense. Although there are aggravating factors that would permit the Forum to assess higher penalties, these are the penalties the Agency requested at hearing. Accordingly, the Forum assesses civil penalties of \$3,500 for these three violations.

Respondent also failed to comply with the terms and provisions of all legal and valid agreements and contracts he entered into in his capacity as a farm labor contractor. Regarding his failure to pay his workers' compensation insurance premiums, Respondent offers as mitigation his statement that he did not have the money to pay them. As aggravating factors, Respondent has prior violations of statutes and rules, as shown in the Consent Order. OAR 839-15-510(1)(b). The Forum finds that breaching a contract to pay for workers' compensation insurance is quite serious because forest labor contractors have a statutory duty to provide such insurance for the protection of their workers. ORS 658.417(4). If contractors fail to pay their insurance premiums, they

lose their insurance, and, if nothing else, the purpose of the law – to protect the workers – is frustrated. Since Respondent's failure to pay for the insurance occurred over a period of a year, the Forum believes he knew he was breaching his contract, which aggravates the violation. The Agency requested and the Forum hereby assesses \$1,000 for this violation.

Regarding Respondent's two breaches of his agreement with the Commissioner, Respondent states that he did not know it was a violation of Oregon law to recruit workers in Oregon to labor in Washington, when he had his Washington farm labor contractor's license. He also asserts that he told the workers in Washington about the job in Grants Pass and claims he did not recruit them in Oregon. The Forum has found to the contrary, but will accept as mitigation that Respondent did not believe he had violated the law. As aggravating circumstances, the Forum finds that the breach of a Consent Order demonstrates a failure to take all measures necessary to prevent violations of the farm labor contractor statutes and rules. The Forum again notes Respondent's history of prior violations. The Agency requested and the Forum hereby assesses \$500 each, or \$1,000 total, for these two violations.

#### 4. License Denial

The Agency proposed to deny a farm labor contractor license to Respondent because he violated various provisions of ORS 658.405 to 658.503, which violations demonstrated that his character, competence, or reliability make him unfit to act as a farm labor contractor. See ORS 658.420; OAR

839-15-145(2), (4), (6), (7); and 839-15-520(1)(k), (2), (3)(a), (j).

ORS 658.420 provides that the Commissioner shall investigate each applicant's character, competence, and reliability, and 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(7), 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). Failure to make workers' compensation insurance premium payments when due is an action the Commissioner considers to be of such magnitude and seriousness that she shall propose to deny a license application. OAR 839-15-520(2), (3)(j). In addition, the Commissioner shall consider that Respondent has an unsatisfactory judgment. OAR 839-15-145(4). Finally, by the terms of the Consent Order, Respondent's breaches of the agreement are grounds for denial of Respondent's license application.

Based upon the whole record of this matter, and under the administrative rules applicable here, 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 Respondent's application for a license.

Pursuant to ORS 658.415(1)(c) and OAR 839-15-140(3) and 839-15-520(4), where an application for a farm labor contractor license has been denied, the Commissioner will not issue the applicant a license for three years from the date of the denial.

#### ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, the Commissioner of the Bureau of Labor and Industries hereby denies JOSE LUIS LINAN a license to act as a farm or forest labor contractor, effective on the date of the Final Order. JOSE LUIS LINAN is prevented from reapplying for a license for three years from the date of denial, in accordance with ORS 658.415(1)(c) and OAR 839-15-140(3) and 839-15-520(4).

AND FURTHER, as authorized by ORS 658.453, JOSE LUIS LINAN is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FIVE THOUSAND FIVE HUNDRED DOLLARS (\$5,500), 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. This assessment is the sum of the following civil penalties against Respondent: (1) acting as a forest labor contractor without a license (first offense), \$500; (2) acting as a

forest labor contractor without a license (second offense), \$1,000; (3) acting as a forest labor contractor without a license (third offense), \$2,000; (4) failing to comply with the terms and conditions of a legal and valid contract entered into in Respondent's capacity as a farm labor contractor (with Liberty Northwest Insurance Corporation), \$1,000; and (5) twice failing to comply with the terms and conditions of a legal and valid contract entered into in Respondent's capacity as a farm labor contractor (with the Commissioner of Labor), \$500 each, or \$1,000. Total civil penalties equal \$5,500.

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**In the Matter of  
ALASKA AIRLINES, INC.,  
Respondent.**

Case Number 59-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued August 3, 1994.

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#### SYNOPSIS

Respondent's refusal to allow Complainant to use accrued sick leave for parental leave was an unlawful employment practice. The Commissioner awarded Complainant \$7,640 for the leave denied, confirming the basis for the damage calculation of *In the Matter of Portland General Electric*, 7 BOLI 253 (1988), and overruling that of *In the Matter of Oregon Department of*

Transportation, 11 BOLI 92 (1992); awarded him \$2,500 for emotional distress; and ordered Respondent to adjust Complainant's leave accrual. ORS 659.360, 659.365; OAR 839-07-805, 839-07-820, 839-07-825, 839-07-845, 839-07-875.

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, 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 June 1, 1994, in the conference room of the offices of the Bureau of Labor and Industries, Suite 1004, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (Agency) was represented by Linda Lohr, an employee of the Agency. Chris Monson (Complainant) was present throughout the hearing (by telephone) and was not represented by counsel. Attorney at Law Cynthia Canfield, Respondent's representative, was present throughout the hearing as an observer.

The Agency called the following witnesses (in alphabetical order): Agency Team Manager Patricia Blank; Complainant's co-worker and union shop steward, Gary Hurd (by telephone); Complainant Chris Monson; and Agency Senior Investigator David Wright. 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 1, 1992, Complainant filed a verified complaint with the Agency, alleging that he was the victim of the unlawful employment practices of Respondent.

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 initiated conciliation efforts between the Complainant and Respondent, conciliation failed, and on March 25, 1994, the Agency prepared for service on Respondent Specific Charges, alleging that Respondent had committed an unlawful employment practice in that Respondent failed to permit him to utilize accrued sick leave benefits during the period of his parental leave, in violation of ORS 659.360(3) and ORS 659.360(1)(b).

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 May 3, 1994, the Agency filed a motion for order of default against Respondent. On May 5, 1994, the Forum issued to Respondent a "Notice of Default," and advised Respondent that it had until May 16, 1994, in which to request relief from the default. The Forum further advised Respondent of the necessity of appearing and responding through an attorney licensed in Oregon.

6) On May 13, 1994, the Respondent filed a request for relief from default. On May 19, 1994, the Agency responded to the request. On May 20, 1994, the Hearings Referee granted the Agency's motion for an order of default and denied Respondent's request for relief from default.

7) On May 18, 1994, the Hearings Referee issued a discovery order to the participants, directing them each to submit a Summary of the Case by May 24, 1994. The Hearings Referee noted to the participants that the impending rulings on the motion for order of default and request for relief from default could impact the necessity of preparing and filing the material requested by the discovery order.

8) Pursuant to OAR 839-50-210 and notwithstanding the proviso of the Hearings Referee's order, Respondent filed a Summary of the Case as an offer of proof. Respondent's case summary, with appended Exhibits R-1 through R-10, was received for that limited purpose and has not been considered by the Forum.

9) Pursuant to the proviso of the discovery order, the Agency did not file a Summary of the Case. The Hearings Referee found that the reason given was satisfactory for purposes of OAR 839-50-200(8), and declined to impose sanctions.

10) Pursuant to ORS 183.415(7), at the commencement of the hearing the Agency was 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) The Proposed Order, which included an Exceptions Notice, was issued on June 30, 1994. Exceptions were required to be filed by July 11, 1994. No exceptions were received by the Hearings Unit.

#### FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent was a foreign corporation<sup>\*</sup> operating an air transportation business in Oregon which engaged or utilized the personal services of 25 or more employees within this state.

2) Complainant was employed by Respondent on or about May 21,

\* Upon arrival at the hearing, Ms. Canfield inquired whether she would be permitted to cross-examine the witnesses; she was informed that she would not be permitted to do so because Respondent was in default. See Findings of Fact – Procedural 5 through 8.

\*\* While the Agency cited a violation of ORS 659.360(1)(b), it is clear from the factual allegations, as well as the pairing with ORS 659.360(3), that the violation alleged was intended to be one of ORS 659.360(1)(a).

\* "Participant" or "participants" refer to the Agency and the Respondent. OAR 839-50-020(13).

\*\* The evidence presented in this matter formally identifies the Respondent as Alaska Airlines, Inc. The Forum has amended the caption on its own motion to comport with the evidence presented.

1985, and at times material he held the position of aircraft mechanic as a full-time, permanent employee.

3) Complainant was anticipating the birth of his first child between April 28 and May 1, 1992.

4) Complainant made his first written request for parental leave, through the provisions of ORS 659.360, on an unknown date more than 30 days prior to the anticipated birth date. Complainant gave this request for 12 weeks parental leave, to commence on or about May 1, 1992, to his supervisor, Roger Peitz. After telephoning Linda Luse at corporate headquarters, Roger Peitz informed Complainant the request would be denied. Complainant discarded this request.

5) Complainant requested of Respondent the use of 12 weeks (480 hours) of his accrued sick leave during his parental leave.

6) The period of 12 weeks commencing on or about May 1, 1992, was within the interval between the anticipated birth of Complainant's child and the time the child would reach 12 weeks of age.

7) Complainant asked to use his accrued sick leave so that he could afford to take the entire 12 weeks of permissible parental leave.

8) Respondent's sick leave policy permitted monthly accrual of sick leave benefits and did not authorize the use of sick leave benefits for parental leave.

9) At times material, Respondent had no formal parental leave policy and had no posting concerning such leave.

10) In April 1992, Complainant had accrued 512 or 513 hours of available sick time.

11) Complainant was denied the use of any accrued sick leave benefits during his parental leave.

12) Following Respondent's denial of Complainant's requested use of sick leave benefits, Complainant reduced his leave request by nine weeks out of concern for the financial burden of the unpaid leave.

13) As a result, Complainant made a second written request for parental leave on or about April 9, 1992, in which he requested 14 days parental leave (with five work days paid as vacation, five work days unpaid, and four weekend days).

14) Complainant's child, a son, was born on April 24, 1992.

15) Complainant could not afford to take more than one week of unpaid leave. Complainant had 80 hours of accrued vacation at the time of the parental leave.

16) Complainant eventually took 15 working days for parental leave. Complainant elected to use 10 days (80 hours) of accrued vacation in order to take as much leave as possible; the remaining five days (40 hours) were unpaid. Complainant utilized two days of sick leave while his wife was hospitalized for childbirth and commenced parental leave immediately thereafter. Respondent did not require Complainant to use accrued vacation time.

17) Due to the foreshortened period of parental leave, Complainant experienced the loss of what he regarded as one of the most important times in

his life and that of his son, that of early bonding with the newborn.

18) In April 1992, Complainant was being paid at the rate of \$19.10 per hour.

19) Complainant was paid for two weeks of vacation time, in the amount of \$1,528, during his parental leave.

20) The economic value of 10 weeks of sick leave in Complainant's pay grade at times material was \$7,640, representing 50 days at 8 hours per day at \$19.10 per hour.

21) The economic value of 12 weeks of sick leave in Complainant's pay grade at times material was \$9,168, representing 60 days at 8 hours per day at \$19.10 per hour.

22) Had Complainant's initial request to utilize sick leave benefits been granted, Complainant would have expended 480 hours of sick leave.

23) The testimony of Claimant was found to be credible. His demeanor was calm and forthright, even where his memory of dates was deficient and unresponsive of his claim. He responded to questions without hesitation and made no effort to avoid any issue. His statements were supported by testimony from other witnesses who the Hearings Referee had no reason to disbelieve. Where dates differed between Complainant's testimony at hearing and his earlier statements to Agency Senior Investigator David Wright, the dates given nearer in time to the events were accepted as accurate.

24) Gary Hurd's testimony was credible. He was not related to Complainant and had no apparent personal stake in this matter. He was

straightforward with his answers. He offered specifics when he could and made no attempt at fabrication when his memory failed.

25) The testimony of each Agency witness was entirely 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 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 25 or more persons within the State of Oregon.

2) Complainant was employed by Respondent, and, at all times material, he was a regular, permanent employee. At the time of his leave, Complainant had been employed by Respondent for more than 90 days.

3) Complainant was anticipating the birth of his child between April 28 and May 1, 1992. Complainant made a timely request for parental leave, through the provisions of ORS 659.360, for a period of 12 weeks commencing on or about May 1, 1992.

4) The period of 12 weeks commencing on or about May 1, 1992, was within the interval between the anticipated birth of Complainant's child and the time the infant would reach 12 weeks of age.

5) Complainant had 512 or 513 hours of available sick time in April 1992.

6) Respondent's sick leave policy did not authorize the use of accrued sick time for parental leave.

7) Respondent denied the Complainant's request to utilize 480 hours of his accrued sick time during the period of his parental leave.

8) On or about April 9, 1992, Complainant submitted a second parental leave request in which he sought to use 14 days of parental leave (10 work days), five days of which were to be paid as vacation days.

9) Complainant took 15 working days (120 hours) as parental leave. Complainant elected to use 80 hours of accrued vacation time in order to have as much leave as possible in his financial situation. The remaining five days (40 hours) of the leave were unpaid.

10) Following the denial of his request to use accrued sick leave benefits, Complainant reduced the requested leave by nine weeks out of concern for the financial burden of unpaid leave.

11) Complainant experienced the loss of opportunity for early bonding with his newborn, an opportunity he considered to be of utmost importance in his life and that of his child.

12) Had the Complainant's request to utilize sick leave benefits been granted, he would have expended 480 hours of sick leave during his parental leave, for which he would have been paid \$9,168. Complainant was paid for two weeks vacation time, in the total amount of \$1,528, during his parental leave.

#### CONCLUSIONS 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 659.030 (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

Respondent was found in default, pursuant to OAR 839-50-330(1)(a), for failure to file an answer to the Specific Charges. Respondent made a request for relief from default which was denied by the Forum. In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6).

#### Prima Facie Case.

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, employed by the employer on a basis other than seasonal or temporary 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. This statute also provides that the employee is entitled to utilize any accrued sick leave during the parental leave. ORS 659.360(3). The entitlement to use accrued sick leave during parental leave is conditioned only upon the prior accrual of such benefits. *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or 606, 614, 859 P 2d 1143, 1148 (1993).

To present a prima facie case in this matter, the Agency must establish the following elements:

- (1) At times material, the Respondent was an employer in this state employing 25 or more employees;
- (2) At times material, the Complainant was employed by Respondent on a basis other than as a temporary or seasonal employee, and had been so employed for more than 90 days at the time of his parental leave request;
- (3) The Complainant made a request for parental leave;
- (4) The period requested was within the interval between the anticipated birth of the employee's infant and the time the infant would reach 12 weeks of age;
- (5) The Complainant requested the use of accrued sick leave benefits during the period of the parental leave;
- (6) The Complainant had sufficient sick leave benefits accrued;
- (7) The Complainant was denied the use of accrued sick leave benefits; and
- (8) Complainant was harmed because of the denial of use of accrued sick leave benefits during parental leave.

The Agency has established a prima facie case. The credible testimony of Agency witnesses together with

\* By rule, the Commissioner has interpreted this provision as requiring a written request, more than 30 days before the requested leave, which includes the anticipated date of birth, the date certain for commencement of the leave, and the dates the parent-employee will terminate his or her leave. OAR 839-07-820(1), 839-07-825(1), 839-07-830, 839-07-805(13).

documentary evidence submitted was accepted and relied upon herein.

Regarding the first two elements, the evidence showed that, at all times material, Respondent utilized the personal services of 25 or more employees within the State of Oregon; that Complainant was one such employee; that Complainant was employed as a regular, full-time employee; and that Complainant had been so employed for more than 90 days prior to the first day of his parental leave. Respondent was an employer subject to ORS 659.360, and Complainant was an employee covered by its provisions.

Complainant successfully invoked the provisions of ORS 659.360 by making a timely request for parental leave for all or part of the interval between the anticipated birth of the infant and the time the infant would reach 12 weeks of age. Regarding the third element, the sufficiency of the request for parental leave, credible evidence on the record showed that Complainant first made a written request for parental leave on an unspecified date more than 30 days before the anticipated birth of his infant. In this request, it is inferred that Complainant indicated the anticipated date of birth, as well as the date for commencement and duration of the requested leave, as he did so in the second request. Such an inference is not necessary to a prima facie determination, however, as the remedy for failure to make a timely request for parental leave is not the elimination of the right to parental leave. Instead, the remedy is a delay and reduction of the parental leave period, provided the employer gives notice of its intent to do so within seven days.

ORS 659.360(9); OAR 839-07-845. No evidence was introduced suggesting that the employer gave such notice.

The evidence adduced established that Complainant requested 12 weeks of parental leave, commencing with the birth of the infant. This period is within the interval between the anticipated birth and the time the infant would attain 12 weeks of age, and satisfies the fourth element.

The credible testimony of Complainant, supported by that of Gary Hurd, demonstrated that Complainant requested the use of accrued sick leave benefits for the duration (12 weeks) of the requested parental leave and that this request was denied. Through this testimony, the Agency established elements five and seven. Evidence satisfying element six was presented through Complainant's testimony and his earlier statement to Senior Investigator David Wright, together establishing that in April 1992 Complainant had 512 or 513 hours of available sick leave, duly accrued pursuant to Respondent's sick leave plan or policy. Complainant's accrued sick leave benefits (512 or 513 hours) exceeded the number he sought to use for parental leave (480 hours).

Credible evidence in the entire record established that, as the result of Respondent's denial of Complainant's requested use of 12 weeks (480 hours) of his accrued sick leave benefits, Complainant reduced the period requested due to his financial inability to take more than one week of unpaid leave. In order to take as much leave as possible, Complainant elected to utilize his accrued vacation leave (80

hours) for parental leave. In addition to 80 hours paid as vacation, Complainant took 40 hours (one week) of unpaid leave during the period of parental leave. The total period of parental leave taken by Complainant was 120 hours (15 work days), commencing immediately after the birth of his child. Due to the foreshortened period of leave, Complainant experienced the loss of the opportunity for early bonding with his newborn, a time he regarded as of the utmost importance in his life and that of his son.

The denial of use of his accrued sick leave harmed Complainant by foreshortening the period he could afford to spend on parental leave, to his emotional deprivation, and by forcing him to exhaust other benefits and to take unpaid time, to his economic loss. The eighth and final element was established by the Agency.

The Agency has established a prima facie case in support of its Specific Charges. 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 was an unlawful employment practice.

#### Damages.

Under ORS chapter 659, the Commissioner is authorized to eliminate the effects of any unlawful practice found. ORS 659.060(3), 659.010(2). ORS 659.365 provides that violation of ORS 659.360 subjects the violator to the same civil remedies and penalties as other unlawful practice violations under ORS chapter 659.

Where an adverse employment decision causes Complainant mental

suffering, this Forum may award compensation. *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den, 287 Or 129 (1979); *Holien v. Sears Roebuck and Co.*, 298 Or 76, 689 P2d 1292 (1984). In this instance, Complainant was upset by the loss of a valued opportunity for early bonding with his first child. The opportunity, once lost, was irretrievable. This Complainant did not testify to sleepless nights, visceral discomfort, or a need for medical attention. The Forum is awarding \$2,500 to Complainant to compensate for the sense of loss he did experience as a result of Respondent's unlawful employment practice.

In order to eliminate the effects of the unlawful practice, where, as here, the Complainant sought the use of sick leave benefits for parental leave and was denied, the measure of the economic damage is the value of the amount of sick leave requested, less the value of paid leave actually taken, together with the simultaneous crediting and debiting of the appropriate benefit accounts. See *In the Matter of Portland General Electric*, 7 BOLI 253 (1988), *aff'd on other grounds, Portland General Electric v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). *But see In the Matter of Oregon Department of Transportation*, 11 BOLI 92 (1992). To the extent it is inconsistent with this Order, *Oregon Department of Transportation* is overruled.

#### 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, the Respondent, Alaska Airlines, Inc., 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 Chris Monson, in the amount of:

a) SEVEN THOUSAND SIX HUNDRED FORTY DOLLARS (\$7,640), less legal deductions, representing the value of 10 weeks (400 hours) of accrued sick leave that should have been paid to Complainant under the statute in connection with the requested 12 weeks of parental leave to which the Complainant was entitled; PLUS,

b) INTEREST AT THE ANNUAL RATE OF NINE PERCENT, on the amount in paragraph "a" from July 20, 1992, until paid, computed and compounded annually; PLUS,

c) TWENTY-FIVE HUNDRED DOLLARS (\$2,500), 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 the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Restore 80 hours to Chris Monson's vacation leave account, and deduct 400 hours from Chris Monson's accrued sick leave account.

\* The damages awarded in the instance of a default are limited by the allegations of the Specific Charges. The Agency alleged that Complainant sought and was denied the use of 400 hours of accrued sick leave benefits.

3) 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.

4) Notify all employees of their rights under ORS 659.360 through 659.370, and, as required by OAR 839-07-870, post in a conspicuous place at every establishment of Respondent's in Oregon where employees are employed, the notice provided by the Bureau of Labor and Industries 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  
ALASKA AIRLINES, INC.,  
Respondent.**

Case Number 61-94

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 3, 1994

**SYNOPSIS**

Respondent's refusal to allow Complainant to use accrued sick leave for parental leave was an unlawful employment practice. The Commissioner ordered Respondent to adjust Complainant's leave accrual. ORS 659.360, 659.365; OAR 839-07-805, 839-07-820, 839-07-825, 839-07-845, 839-07-875.

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, 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 June 1, 1994, in the conference room of the offices of the Bureau of Labor and Industries, Suite 1004, 800 NE Oregon St., Portland, Oregon. The Bureau of Labor and Industries (Agency) was represented by Linda Lohr, an employee of the Agency. Roger Price (Complainant) was

\* Ms. Canfield arrived approximately two minutes into the Hearings Referee's opening comments. Upon arrival, Ms. Canfield inquired whether she would be permitted to cross-examine the Agency's witnesses. She was advised by the Referee that she would not be permitted to do so because Respondent was in default. See Findings Of Fact -- Procedural 5 through 8. Ms. Canfield was later permitted to review the written comments which had been read by the Referee in her absence.

present throughout the hearing and was not represented by counsel. Attorney at Law Cynthia Canfield, Respondent's representative, was present throughout the hearing as an observer.

The Agency called the following witnesses (in alphabetical order): Agency Team Manager Patricia Blank, Agency Senior Investigator Victoria Pratt, and Complainant Roger Price.

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 February 2, 1993, Complainant filed a verified complaint with the Agency, alleging that he was the victim of the unlawful employment practices of Respondent.

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 initiated conciliation efforts between the Complainant and Respondent, conciliation failed, and on March 25, 1994, the Agency prepared for service on Respondent Specific

Charges, alleging that Respondent had committed an unlawful employment practice in that Respondent failed to permit Complainant to utilize accrued sick leave during the period of his parental leave, in violation of ORS 659.360(3) and 659.360(1)(b)\*.

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 May 3, 1994, the Agency filed a motion for order of default against Respondent. On May 5, 1994, the Forum issued to Respondent a "Notice of Default" and advised Respondent that it had until May 16, 1994, in which to request relief from the default. The Forum further advised Respondent of the necessity of appearing and responding through an attorney licensed in Oregon.

6) On May 13, 1994, the Respondent filed a request for relief from default. On May 19, 1994, the Agency responded to the request. On May 20, 1994, the Hearings Referee granted the Agency's motion for an order of default and denied Respondent's request for relief for default.

7) On May 18, 1994, the Hearings Referee issued a discovery order to the participants,\*\* directing them each to submit a Summary of the Case by May 24, 1994. The Hearings Referee noted to the participants that the impending rulings on the motion for an order of default and request for relief from default could impact the necessity of preparing and filing the material requested by the discovery order.

8) Pursuant to OAR 839-50-210 and notwithstanding the proviso of the Hearing Referee's order, Respondent filed a Summary of the Case as an offer of proof. Respondent's case summary, with appended exhibits, was received for that limited purpose and has not been considered by the Forum.

9) Pursuant to the proviso of the discovery order, the Agency did not file a Summary of the Case. The Hearings Referee found that the reason given was satisfactory for purposes of OAR 839-50-200(8) and declined to impose sanctions.

10) Pursuant to ORS 183.415(7), at the commencement of the hearing the Agency was 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) During the hearing and pursuant to OAR 839-50-140(2), the Agency moved to amend the Specific Charges to conform the damages requested

therein to the evidence presented at the hearing. The motion was granted.

12) The Proposed Order, which included an Exceptions Notice, was issued on June 30, 1994. Exceptions were required to be filed by July 11, 1994. No exceptions were received by the Hearings Unit.

#### FINDINGS OF FACT - THE MERITS

1) At all times material, Respondent was a foreign corporation\* operating an air transportation business in Oregon which engaged or utilized the personal services of 25 or more employees within this state.

2) Complainant was employed by Respondent on or about May 23, 1983, and at times material he held the position of customer service agent as a regular, permanent employee.

3) Complainant was anticipating the birth of his child on January 21, 1993.

4) Complainant made his first formal request for parental leave in November 1992. Complainant requested two weeks of vacation for parental leave commencing on or about January 21, 1992.

5) Complainant made a second written request for parental leave on or about December 2, 1992, in which he requested that he be permitted to use accrued sick leave instead of vacation for the two weeks (80 hours) of parental leave previously requested.

6) In December 1992, Complainant had accrued in excess of 400 hours of available sick time.

7) The period of two weeks commencing on or about January 21, 1992, is a period of time commencing with the anticipated birth of Complainant's child and ending with the date the child would attain 12 weeks of age.

8) On December 3, 1992, Complainant was denied the use of any accrued sick leave benefits during his parental leave.

9) Respondent's sick leave policy permitted periodic accrual of sick leave benefits and did not authorize the use of sick leave benefits for parental leave.

10) Complainant's child was born on January 8, 1992.

11) Complainant took 10 working days (two weeks) for parental leave, all of which was paid as vacation. Respondent did not require Complainant to use accrued vacation time.

12) For the most part, the Hearings Referee was impressed by Complainant's forthright demeanor and found his testimony to be believable. However, on one point his testimony seemed inconsistent and contradictory. He was not convincing on the issue of requesting sick leave benefits for more than two weeks. Based on Complainant's inconsistent testimony regarding his desire to request more sick leave, the Forum finds his testimony on this point to be not credible.

13) The testimony of each Agency witness was entirely credible. The Hearings Referee observed the demeanor of each witness and found each to be forthright and direct in his or

\* While the Agency cited a violation of ORS 659.360(1)(b), it is clear from the factual allegations, as well as the pairing with ORS 659.360(3), that the violation alleged was intended to be one of ORS 659.360(1)(a).

\*\* "Participant" or "participants" refer to the Agency and the Respondent. OAR 839-50-020(13).

\* The evidence presented in this matter formally identifies the Respondent as Alaska Airlines, Inc. The Forum has amended the caption on its own motion to comport with the evidence presented.

her answers. Each witness's answers were consistent with the answers of the other witnesses as well as the documentary evidence.

#### ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent was an 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. At the time of his leave, Complainant had been employed by Respondent for more than 90 days.

3) Complainant was anticipating the birth of his child on January 21, 1993. Complainant made a timely request for parental leave, through the provisions of ORS 659.360, for a period of two weeks commencing on or about January 21, 1993.

4) The period of two weeks commencing on or about January 21, 1993, was within the interval between the anticipated birth of Complainant's child and the time the infant would reach 12 weeks of age.

5) Following his first request, Complainant learned of the sick leave provisions of the Oregon Parental Leave Law. On December 2, 1992, Complainant submitted a second parental leave request in which he sought to substitute the use of 80 hours of accrued sick leave for the 80 hours of vacation time previously requested.

6) Complainant had in excess of 400 hours of available sick time in December 1992.

7) Respondent's sick leave policy did not authorize the use of sick time for parental leave.

8) On December 3, 1992, Respondent denied the Complainant's request to utilize 80 hours of his accrued sick time for parental leave.

9) Complainant took 10 days (80 hours) of parental leave. Complainant elected to use 80 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.

10) Complainant experienced no compensable mental suffering.

11) Had the Complainant's request to utilize sick leave benefits been granted, he would have expended 80 hours of accrued sick leave for his parental leave.

#### CONCLUSIONS 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 659.030 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

Respondent was found in default, pursuant to OAR 839-50-330(1)(a), for failure to file an answer to the Specific Charges. Respondent made a request for relief from default which was denied by the Forum. In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6).

#### Prima Facie Case

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, employed by the employer on a basis other than seasonal or temporary 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. This statute also provides that the employee is entitled to utilize any accrued sick leave during the parental leave. ORS 659.360(3). The entitlement to use accrued sick leave during parental leave is conditioned only upon the prior accrual of such benefits. *Portland General Electric Company v. Bureau of Labor and Industries*, 317 Or 606, 614, 859 P 2d 1143, 1148 (1993).

To present a prima facie case in this matter, the Agency must establish the following elements:

(1) At times material, the Respondent was an employer in this state employing 25 or more employees;

(2) At times material, the Complainant was employed by Respondent on a basis other than as a temporary or seasonal employee, and had been so employed for more than 90 days at the time of his parental leave request;

(3) The Complainant made a request for parental leave;

\* By rule, the Commissioner has interpreted this provision as requiring a written request, more than 30 days before the requested leave, which includes the anticipated date of birth, the date certain for commencement of the leave, and the dates the parent-employee will terminate his or her leave. OAR 839-07-820(1), 839-07-825(1), 839-07-830, 839-07-805(13).

(4) The period requested was within the interval between the anticipated birth of the employee's infant and the time the infant would reach 12 weeks of age;

(5) The Complainant requested the use of accrued sick leave benefits during the period of the parental leave;

(6) The Complainant had sufficient sick leave benefits accrued;

(7) The Complainant was denied the use of accrued sick leave benefits;

(8) The Complainant was harmed because of the denial of use of accrued sick leave benefits during parental leave.

The Agency has established a prima facie case. The credible testimony of Agency witnesses together with documentary evidence submitted was accepted and relied upon herein.

Regarding the first two elements, the evidence showed that, at all times material, Respondent utilized the personal services of 25 or more employees within the State of Oregon; that Complainant was one such employee; that Complainant was employed as a regular, permanent employee; and that Complainant had been so employed for more than 90 days prior to the first day of his parental leave. Respondent was an employer subject to ORS 659.360, and Complainant was an employee covered by its provisions.

Complainant successfully invoked the provisions of ORS 659.360 by making a timely request for parental leave for part of the interval between the anticipated birth of the infant and the time the infant would reach 12

weeks of age. Regarding the third element, the sufficiency of the request for parental leave, credible evidence on the record showed that Complainant first made a written request for parental leave in November 1992. In this request, it is inferred that Complainant indicated the anticipated date of birth, as well as the date for commencement and duration of the requested leave, as he did so in the second request. Such an inference is not necessary to a prima facie determination, however, as the remedy for failure to make a timely request for parental leave is not the elimination of the right to parental leave. Instead, the remedy is delay and reduction of the parental leave period, provided the employer gives notice of its intent to do so within seven days. ORS 659.360(9); OAR 839-07-845. No evidence was introduced suggesting that the employer gave such notice.

The second request was made on December 2, 1992. The evidence adduced concerning the second request established that Complainant again requested two weeks of parental leave, commencing with the birth of the infant. This period is within the interval between the anticipated birth and the time the infant would attain 12 weeks of age and satisfies the fourth element.

The credible testimony of Complainant, supported by documentary evidence, demonstrated that in his second request, Complainant sought the use of accrued sick leave benefits for the duration (two weeks) of the requested parental leave and that his request was denied. Through this testimony, the Agency established elements five and seven. Evidence

satisfying element six was presented through Complainant's testimony, establishing that in December 1992 Complainant had in excess of 400 hours of available sick leave, duly accrued pursuant to Respondent's sick leave plan or policy. Complainant's accrued sick leave benefits (400+ hours) exceeded the number he sought to use for parental leave (80 hours).

Credible evidence in the entire record established that as a result of Respondent's denial of Complainant's requested use of two weeks (80 hours) of his accrued sick leave benefits, Complainant took two weeks (80 hours) of parental leave paid as vacation. The total period of parental leave taken by Complainant was 80 hours (10 work days), commencing immediately after the birth of his child, as planned. To the extent that Complainant exhausted his vacation benefits in lieu of the use of his accrued sick leave benefits, the eighth and final element was established by the Agency.

The Agency has established a prima facie case in support of its Specific Charges. 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 was an unlawful employment practice.

#### Damages

Under ORS chapter 659, the Commissioner is authorized to eliminate the effects of any unlawful practice found. ORS 659.060(3), 659.010(2). ORS 659.365 provides that violation of ORS 659.360 subjects the violator to the same civil remedies and penalties as other unlawful practice violations under ORS chapter 659.

Where an adverse employment decision causes Complainant mental suffering, this Forum may award compensation. *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, rev den, 287 Or 129 (1979); *Holien v. Sears Roebuck and Co.*, 298 Or 76, 689 P2d 1292 (1984). In this instance, because Complainant's testimony concerning his desire to have requested and received the use of more sick leave was not believed, and the Forum found that Complainant took the amount of parental leave planned, no compensation for mental suffering will be awarded.

#### 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, the Respondent, Alaska Airlines, Inc., is hereby ORDERED to:

1) Restore 80 hours to Roger Price's vacation leave account and deduct 80 hours from Roger Price's accrued sick leave account.

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.

3) Notify all employees of their rights under ORS 659.360 through 659.370, and, as required by OAR 839-07-870, post in a conspicuous place at every establishment of Respondent's in Oregon where employees are employed, the notice provided by the Bureau of Labor and Industries

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  
WS, INC.,**

**dba West State, Inc., Respondent.**

Case Number 25-94

Final Order of the Commissioner  
Mary Wendy Roberts  
Issued August 10, 1994.

**SYNOPSIS**

Respondent refused to hire Complainant as a welder because of his disability (deafness). Respondent believed it would be unsafe to allow Complainant to work inside oil tankers because his disability would enhance the danger to himself and his co-workers from fire and falling objects. The Commissioner held that (1) Respondent had an affirmative duty to assess Complainant's ability to fulfill the job requirements, and, if necessary, to reasonably accommodate him; and (2) Respondent had the burden of proving its inability to accommodate Complainant. The Commissioner found that (1) with reasonable accommodation, Complainant would be able to perform the job without present risk of probable incapacitation to himself; (2) Complainant's disability would not materially enhance the inherent risk to his

co-workers of working as boilermakers in an oil tanker; (3) Respondent failed to assess whether Complainant was capable of fulfilling the job requirements inside of an oil tanker; (4) Respondent failed to make a reasonable accommodation for Complainant; (5) accommodation was possible without undue hardship; and therefore (6) Respondent violated ORS 659.425(1)(a). The Commissioner ordered Respondent to pay Complainant \$2,650 in back wages and \$20,000 in damages for his mental suffering, and to adopt a written policy and practice regarding employees and applicants with disabilities. ORS 659.400(1), (3); 659.425(1)(a); OAR 839-06-225, 839-06-230, 839-06-245.

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 on January 4 and 5, and February 17 and 18, 1994, in Room 1004, State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (Agency) was represented by Linda Lohr, an employee of the Agency. John R. Barber, Jr. (Complainant) was present throughout the hearing and was not represented by counsel. Complainant was assisted by interpreters throughout the hearing. WS, Inc. (Respondent) was represented by Amy Alpern, Attorney at Law. Ramon Herndon was present throughout the hearing as Respondent's representative.

**FINDINGS OF FACT –  
PROCEDURAL**

The Agency called the following witnesses (in alphabetical order): John Barber, the Complainant; Pam Barber, Complainant's wife; Ralph Ceccacci, former general foreman at Northwest Marine Works; Don Chandler, business manager for the Boilermakers Union, Local 72; Larry Dixon, boilermaker and former WS, Inc. employee; Cindy Forsythe, secretary and dispatcher for Local 72; Clifford Gard, boilermaker and former WS, Inc. employee; and Jim Gill, former supervisor at Northwest Marine Works. Debiah L. McKnight, Jim McKnight, Johann Paoletti-Schelp, and Dottie Rundles acted as interpreters for Complainant. They were appointed and affirmed by the Forum.

Respondent called the following witnesses (in alphabetical order): Charles Edward Eckelhoff, Sr., former superintendent of the structural department for Northwest Marine Works; Brian Ferguson, boilermaker and former WS, Inc. employee; Ramon Herndon, steel department manager over boilermakers for WS, Inc.; John Johnson, senior foreman in the steel department for WS, Inc.; Michael Shaddock, boilermaker for WS, Inc. and chief steward for the boilermakers union; and Dr. Elizabeth Skovron, director of the health and safety department of WS, 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.

1) On or about November 2, 1992, Complainant John R. Barber, Jr. filed a verified complaint with the Civil Rights Division of the Agency. He alleged he was the victim of the unlawful employment practices of Respondent. He claimed that Respondent discriminated against him because of his disability (deafness) in that, on August 7, 1992, Respondent refused to hire him.

2) The Agency found substantial evidence of the alleged unlawful employment practices of Respondent in violation of ORS 659.425(1).

3) There is no evidence on the record concerning whether the Agency caused steps to be taken through conference, conciliation, and persuasion to effect a settlement of the complaint.

4) On September 9, 1993, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent refused to hire Complainant because of his deafness and that Respondent could have reasonably accommodated Complainant's disability. The Agency alleged that Respondent's action violated ORS 659.425(1)(a).

5) With the Specific Charges, the Agency 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 September 30, 1993, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges and asserted three affirmative defenses.

7) On September 30, 1993, Respondent's attorney requested a postponement of the hearing. On October 4, 1993, the Forum granted the request pursuant to OAR 839-50-150 (5)(c). The Hearings Referee issued an amended Notice of Hearing setting the hearing for January 4, 1994.

8) Pursuant to OAR 839-50-210 and the Hearings Referee's order, the Agency and Respondent each filed a Summary of the Case.

9) A pre-hearing conference was held on January 4, 1994, at which time the Agency and Respondent stipulated to facts that were admitted by the pleadings and stipulated that Complainant was a disabled person under ORS 659.400, *et seq.* Those facts were admitted into the record by the Hearings Referee at the beginning of the hearing. Other stipulations were made during the hearing, and are reflected in the findings below.

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

11) Pursuant to ORS 183.415(7), the Agency and Respondent 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) On January 12, 1994, the Forum sent a Notice of Additional Hearing Dates to the participants, showing the continuation of the hearing on February 17.

13) At the continuation of the hearing on February 17, the Hearings Referee requested a Statement of Policy from the Agency and left the record of the hearing open for it until February 28, 1994. OAR 839-50-400. The Agency submitted a timely statement, which was admitted to the record.

14) On February 28, 1994, the Hearings Referee and the Agency's Case Presenter toured Respondent's steel shop and an oil tanker under repair by Respondent. The tour was led by Ramon Herndon, manager of Respondent's steel department.

15) On March 7, 1994, Respondent requested an opportunity to submit a post-hearing brief.

16) On April 4, 1994, the Agency withdrew its Statement of Agency Policy. On April 14, 1994, the Hearings Referee denied Respondent's request to file a post-hearing brief.

17) On June 3, 1994, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the Certificate of Mailing. Following an extension of time, Respondent filed timely exceptions to the Proposed Order on July 1, 1994.

#### FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent WS, Inc. was an Oregon corporation engaged in ship building and repair under the assumed business name of West State, Inc. Respondent was an employer in this state utilizing

the personal services of six or more employees, subject to the provisions of ORS 659.010 to 659.435.

2) Complainant is deaf and has been so since infancy. He is a disabled person, as defined in ORS 659.400(1), for purposes of ORS 659.425.

3) Complainant had hearing aids. He had worn them throughout his life. Usually, he did not wear hearing aids at work because they were very expensive to replace if they got burned, and the noises he heard at work with them bothered him. He did not wear hearing aids when he worked for Respondent. Wearing hearing aids at work would enable Complainant to hear people talking, although he could not understand their words. Without hearing aids, Complainant could hear low-pitched sounds. He could hear the sound of a low-pitched horn, of a carbon arc welder, and of hammers. He felt vibrations very well. He knew the sound of welding and could distinguish that sound from other loud sounds. He could not hear the human voice, unless someone was yelling with a low pitch very close to him. While Complainant's speech was difficult to understand, at hearing he demonstrated that he could shout clear warnings, such as "watch out" or "look out below." He knew how to give warning signals with his hammer.

4) When working, Complainant communicated by reading lips and writing notes. He also communicated by co-workers tapping him and directing his attention to things.

5) At times material, Complainant was a journeyman welder and certified boilermaker. He had several years of

training and experience as a welder. He could do jet welding, wire welding, scarfing, torching, and carbon arcing, and use an air needle gun and electric burn eye. Besides working for Respondent, he had worked for Northwest Marine Works (NW Marine); Cascade General, Inc.; Ciserv (in San Francisco); Mar Com, Inc.; and Zidell Marine Corporation. He had worked on 20 boats, including oil tankers, cruise ships, navy ships, race boats, a yacht, and a tug boat.

6) By all accounts Complainant was an excellent, safe welder and employee. Ramon Herndon, Respondent's steel department manager, thought Complainant was a very good worker. John Johnson, Respondent's senior foreman for boilermakers, thought Complainant was a very good worker and welder, and was safety conscious. Respondent's shop foreman told Complainant that he did good work. Complainant's supervisors at NW Marine said he was an excellent, safety-conscious worker. He won two awards for safety while he worked for NW Marine. He was not a careless worker. He had not been injured or caused an injury to another worker. Not all boilermakers could do all the different types of welding jobs at NW Marine. Complainant could do all the jobs. He was very good about communicating what he was going to do.

7) Complainant was a member of the Boilermakers Union, Local 72. He worked out of the union hall, as he had for six years. The union dispatcher would call Complainant and talk to Complainant's wife about a job. Typically, Complainant would report for work the next day.

8) Beginning on February 2, 1989, Complainant worked at various times for Respondent. He did not work for Respondent during 1990 or 1991. He worked 27 days for Respondent in 1992.

9) Respondent used a preferential hiring list, which was made up of boiler-makers who had worked 1,000 hours in a year for Respondent. Once Herndon and Johnson determined the "manning level" needed for the work on a ship, Johnson made up a list of workers from Respondent's preferential hiring list. Johnson sent the list of workers to the union. The union dispatcher would call back later with the names of workers dispatched to Respondent. She would then send Johnson a confirmation list by fax. Complainant was not on Respondent's preferential hiring list because he had not worked 1,000 hours in a year. From February through September 1992, the list had the names of 220 employees. Beginning in October 1992, the list had the names of 233 employees. When there was too much work for the employees on the preferential hiring list, Respondent would call the union for workers on an out-of-work list.

10) On his employment application for Respondent (dated "2/2/89"), Complainant wrote that he was deaf. On April 6, 1992, Complainant signed a form entitled "Medical History." After Complainant signed the form, someone else wrote: "Deaf - states he has no hearing - states he has worked 5 yrs in shipyards and has no restrictions." In April 1992, the company tested Complainant for drugs. Respondent never gave Complainant any

other medical tests. He was never examined by a doctor. Other than on the application and the medical history form, no one from Respondent ever asked Complainant about his deafness. No one ever asked Complainant if he wore a hearing aid.

11) Respondent employed Complainant as a welder and fitter (boiler-maker) in the steel shop. Johnson, Respondent's senior foreman in the steel department, transferred someone out of the shop so Complainant could work there. Complainant was an experienced shop hand. Johnson thought Complainant could not hear or speak.

12) When Respondent first hired Complainant in 1989, Johnson talked to Herndon, Respondent's steel department manager, about Complainant's inability to speak or hear. They considered whether they would transfer Complainant to a ship if work ran out in the shop. At that time they decided that, because of Complainant's disability, it was not safe for him to work in ships. They decided they would not transfer Complainant to a ship from the shop.

13) Work on a ship was inherently dangerous because of fire, falling objects, and the use of a crane on the top deck.

14) Herndon believed that, inside a ship, Complainant would be at substantially greater risk of injury than hearing workers. He believed Complainant's disability would put his co-workers at substantially greater risk. Herndon did not believe Complainant could yell a warning or communicate to his co-workers if he dropped something or if there was a fire.

15) Before August 1992, Herndon and Johnson talked several more times about putting Complainant on a ship. Each time Complainant was dispatched to Respondent, Herndon and Johnson considered whether there was an area where Complainant could work without putting him or his co-workers in danger. There was always the possibility that shop work would run out, and Complainant would want to be transferred to a ship. Johnson always arranged for Complainant to work in the shop. Neither Herndon nor Johnson ever assigned Complainant to a ship. Herndon would never put Complainant on the deck or in a tank of a ship, although he would consider putting Complainant in the "house" of a ship. Respondent's boilermakers rarely worked in the "house" of a ship; the majority of ship work was in the tank. Occasionally they did some work on the main deck of a ship and a little work on the outside of a ship in dry dock. Outside work on a ship in dry dock was less dangerous than work in the tank. Work in the shop was the safest. Johnson knew that eventually they would have to tell Complainant he could not work in a ship. The issue never came up until Johnson had to refuse to hire Complainant in August 1992.

16) Besides working for Respondent, Complainant worked for NW Marine between 1986 and 1992. NW Marine went out of business around November 1992. Complainant had acquired seniority with NW Marine. At least once when NW Marine called Complainant for work, he left a job with Respondent to work for NW Marine so he would not lose his seniority. At NW

Marine, seniority was important regarding who was called to work. Seniority was not considered when deciding which welders to place in the shop or in a ship.

17) Complainant worked for NW Marine in the shop and, from 1990, on ships. In 1990, Complainant made an oral complaint to the union about NW Marine, because the company kept him in the shop and would not let him work on ships. After the complaint, NW Marine let Complainant work on ships. NW Marine was able to accommodate Complainant's disability on the ships. He worked on a ship if there was no shop work available. Ralph Ceccacci, the head foreman in the shop, thought Complainant was an excellent shop hand and so NW Marine liked to use Complainant in the shop. Ceccacci knew from his supervisor that Complainant had some hearing. Complainant worked on three oil tankers for NW Marine. He worked on the inside of the tanks, on the upper decks, and on the outsides and bottoms of the ships. Each oil tanker job lasted around four weeks. Complainant went inside the tanks over 100 times. Jim Gill was a foreman for NW Marine and supervised Complainant when he worked inside the tankers. Gill considered Complainant to be an excellent, safe worker. Gill knew Complainant was deaf. Gill and Complainant communicated by Complainant reading Gill's lips and Complainant writing on a note pad. Complainant and leadpersons all carried note pads to communicate on. There were no complaints about Complainant from his co-workers. Gill never hesitated to put Complainant on a ship because of his

deafness. NW Marine always made sure Complainant worked with another welder, and the supervisor always made sure Complainant worked in a safe situation. The supervisor always notified the fire watch and the other welders that Complainant was deaf. Gill never had a problem with Complainant, who always did his job. Gill assigned him to work where he could do the best job. Complainant worked in the ships without incident.

18) Charles Eckelhoff worked at NW Marine from 1982 to 1991. From 1982 to 1990 he was superintendent of the steel department. After 1990 he was involved in business development and management. As superintendent, Eckelhoff was responsible for the safety of boilermakers. Eckelhoff did not think Complainant should be allowed to work in the shop or on ships. Eckelhoff objected to putting Complainant on a ship because he felt spoken communication was essential there. Eckelhoff and some of the supervisors under him agreed that Complainant should not work on a ship. Eckelhoff believed Complainant was an outstanding worker, but he never supervised or worked with Complainant. Eckelhoff was amazed at how well Complainant got along in the shop. Before 1990, John Hudson, the assistant superintendent, usually assigned the work, and Complainant was assigned to the shop. Eckelhoff thought the reason NW Marine later allowed Complainant to work on ships was that the personnel department, located in San Diego, did not know the dangers and did not care. Eckelhoff thought it was just a matter of time before Complainant got hurt on a ship.

Ceccacci – who was foreman of the shop and, in 1991 and 1992, general foreman (of the shop and ships) – never knew Eckelhoff opposed putting Complainant on the ships. Don Chandler was a supervisor during times material. He discussed safety issues with Eckelhoff and never heard Eckelhoff express a problem with putting Complainant on a ship.

19) On August 7, 1992, John Johnson called the union hall to request a number of workers. Johnson made the boilermaker work assignments for the shop and ships "99.9 percent" of the time. The available work was in the tank of a ship, to repair brackets and horizontal framework. The work was done from staging hung in the tanks.

20) The union dispatcher called and talked to Complainant's wife about him working for Respondent. Complainant accepted the work.

21) The dispatcher reported a list of names, including Complainant's, to Johnson. Johnson told the dispatcher that the company could not use Complainant because the available work was in the tanks of a ship, and it would be unsafe to use Complainant. Between one and two hours after she first called Complainant's wife, the dispatcher called her back. The dispatcher told her what Johnson had said and that Complainant should not report for work. Complainant went in to work the next morning.

22) When Complainant came in, Johnson told him that the only work available was in the tanks of a ship and that Respondent could not hire him. Johnson double-checked with the shop, and no work was available there.

Johnson believed it was not appropriate to put Complainant in a tank because of the dangers involved and because Complainant could not speak or hear. Johnson and Herndon had previously decided that Complainant could not work in a tank. They could not think of a way to make the ship safe for Complainant. Johnson thought that hearing and speaking were necessary on ship. After Johnson had made the decision that he could not put Complainant to work anywhere, he talked for around 10 minutes to Dr. Elizabeth Skovron, Respondent's director of health and safety. Skovron had been on ships. Johnson told Skovron that a deaf-mute boilermaker had been dispatched for work and that only tank work was available. Johnson told Skovron that Complainant had previously worked in the shop with no health or safety problems, but that no shop work was available. Skovron and Johnson explored ways to put Complainant to work. Their main concern was for the safety of Complainant and his co-workers. Skovron agreed that it was not a good idea to hire Complainant for tank work. Johnson then reconfirmed with Complainant that he could not work in the ship and that there was no work for him in the shop. He explained why Respondent was not hiring him. Johnson did not discuss with Complainant any accommodation or ask Complainant what accommodations he might need to be able to work in a ship. Johnson just relied on his experience and knowledge of working in the tanks. Complainant left.

23) Although Skovron was a licensed medical doctor, she did not practice medicine while employed by

Respondent, unless it was an emergency. She had no expertise or particular interest in deafness. She was employed by Respondent to give advice on health and safety issues to the production managers. Although part of her job was to oversee the First Aid station, she did not examine employees. Respondent employed paramedics to handle accidents and injuries. She believed Complainant was unable to hear or speak, because that is what Johnson told her. She believed there would be an increased risk of injury to Complainant because of the confined spaces on the ships, with limited access and egress; he could not hear calls in an emergency, and he could not call out for help or warn others of danger. She thought that Complainant's co-workers were "probably" at a materially enhanced risk of injury working around Complainant. Skovron could see no way to accommodate Complainant's disability in a ship.

24) After Complainant left, Johnson talked to Herndon about Complainant. Johnson told Herndon what he (Johnson) had done. Complainant had the skills necessary to do the ship work, and Herndon felt Complainant was qualified to work in the tank, except for his deafness.

25) Any time there was work in the shop, Respondent could transfer a journeyman welder from the shop to a ship to allow Complainant to work in the shop. On August 7 and 8, 1992, there was no available work in the shop, except for the shop foremen and leadpersons. Respondent had a shop foreman and leadperson on each of four shifts. When the shop was slow, Johnson tried to keep the foremen and

leadpersons on day shift. The foremen had held their positions for at least seven years. The leadpersons were outstanding journeymen, who were usually the last ones laid off. Normally, leadpersons did no production welding; they were supervisors. The collective bargaining agreement between Respondent and Complainant's union stated that "it is not the intention of [Respondent] to use leadpersons or foremen to replace journeymen regarding their production assignments." Occasionally, shop foremen and leadpersons worked in the ships. Some of the leadpersons would take a layoff before they would transfer to a ship, because they did not like to work in the ships. Respondent gave them "make-work" tasks in the shop to keep them employed and available during the slow times.

26) In October 1992, Complainant worked for Respondent for five days. He worked in the shop. He was then told to go work on the ship. Before Complainant started work on the ship, the foreman said Complainant could not work there because it was dangerous and told him to do some clean-up work. Other employees had a lot of work. Complainant was laid off because Respondent would not permit him to work on the ship. Some of his co-workers went from working in the shop to working on the ship.

27) NW Marine used a "buddy system," meaning that no welder worked alone; at least two workers were always sent into a tank together and were expected to watch out for each other. The buddy system did not include assigning welders to be partners. NW Marine's safety training taught

workers to look out for each other and to make sure no one had a hard time getting out of a tank in an emergency. A fire watch was required to be present when one or more welders were working. If a welder was working on a job away from other workers, a fire watch would be assigned to stay with that one welder. If welders were working in different areas inside a ship, then at least one fire watch was assigned to each of those areas. The fire watch would roam around the assigned area. In addition, the foreman's responsibility was to monitor the job and the welders' work.

28) When welders worked together, they had to be far enough apart so that one welder's sparks would not burn the other welders. They did not work close enough to touch each other. While at NW Marine, a co-worker would run up and physically notify Complainant of any changes or dangers. His co-workers watched out for themselves and Complainant.

29) Herndon did not think a buddy system would work for Complainant. He thought the buddy would just have to stand and monitor Complainant, to yell for him, and move him out of the way of a falling object. Herndon did not think this was economically feasible. Although he thought two welders could work close enough to touch each other, one could not watch the other and weld. In order for Complainant and his co-workers to be safe, Herndon thought Complainant would have to be in a box, to protect him from objects falling from above, and to prevent him from dropping something on workers below. Herndon did not think a box around Complainant would be feasible.

30) On tankers, boilermakers fixed cracks and removed and replaced steel. When they went into a tank, they usually took tools, such as hammers and grinders, and pieces of steel. Even with lights strung up, it was generally murky inside a tank because of smoke.

31) An oil tanker could have from 15 to 20 tanks. The size of the tanks varied. They could be small, around three feet high by six feet wide by ten feet long, or they could be large, around 80 feet high by 30 feet wide by 100 feet long.

32) Inside a large tank there could be up to eight levels of staging. Sometimes the staging was built with tubular scaffolding. More often hanging staging was used. The walking surfaces were not even. Ladders were used to move between levels of the staging. Welders could be working on each level. Welders moved very slowly as they worked. They might work in one spot for 15 minutes or all day. Generally, a leadperson tried to keep a welder working in one spot as long as possible, because moving workers around took time. On the staging, it was common for workers to drop or knock off objects like pieces of steel or tools. An object could bounce on the side of the tank or the staging as it fell. Sometimes a worker below could hear yelling or hear the object bouncing as it fell and dodge it. Sometimes the workers would not know which way to dodge and could not tell which direction the noise was coming from; then it was best to stay still. Sometimes an object fell without bouncing and so made no sound before it hit. It was possible to knock something off the

staging and not know it. Sometimes, no one shouted a warning when an object fell. If a welder was wearing a respirator and hood, he or she would have to remove them before yelling. Even hearing a warning, workers without hearing disabilities got hit by falling objects because they were not able to move out of the way. While welding, a worker could not watch for falling objects. Foremen or leadpersons could move welders out from under other welders. It was common to put plywood on the staging above where a welder was working to protect that welder from falling objects. Complainant would be at some enhanced risk in a tank because he could not hear a shouted warning, and a co-worker would not always be close enough to touch and warn him of a falling object. Since becoming a boilermaker, Complainant had never been hit by a falling object.

33) Brian Ferguson was a boilermaker in Respondent's shop for four years and worked with Complainant. He had previously worked on ships for FMC Corporation. He believed spoken communication was essential and that Complainant's co-workers were at greater risk of injury because of Complainant's disability. In an emergency, Ferguson thought it would take Complainant too long to remove his hood and respirator to blow a whistle. Ferguson had never been hit by a falling object while working as a boilermaker, but had seen others hit three or four times.

34) Herndon and Skovron did not think that, in the event Complainant dropped an object, having him blow a whistle would be effective because of

the time it would take him to remove his hood and respirator to blow it.

35) Skovron was not sure the other workers would hear the whistle. Regarding an air horn system around Complainant's waist, Skovron did not think that was a viable option because Complainant would be too slow in blowing it.

36) It was standard in the industry for riggers to use whistles when lowering steel into a tank with a crane. Hearing a whistle meant to stop and look overhead. If Complainant used a whistle in the tank, Herndon believed the workforce would have to be retrained.

37) Johnson did not think that giving Complainant a whistle would alleviate the danger, because he still would not be able to hear warnings. Johnson thought it would take too long to get and blow the whistle if Complainant dropped something, and too long to blow an air horn on his belt. Once a fire started, Johnson thought it was necessary to communicate with words.

38) Where multiple levels of staging were used, if Complainant were assigned to the top level, he would be safe from falling objects. Complainant was able to shout a warning to co-workers. At NW Marine, Complainant never dropped anything on another worker. Complainant was never injured. Ceccacci did not think Complainant was at a greater risk than other workers. The top level of staging was not the safest place during a fire because heat and smoke would go to the top. A worker at the top level might have to climb down as much as 80 feet to the bottom of the tank and then

climb up at another location to get out. Most tanks had just one access hole.

39) Before tanks could be repaired, they had to be emptied of oil or water and cleaned. Working on tanks was dangerous if they had not been properly cleaned. Even when properly cleaned, crude oil left a paraffin buildup on the surfaces of the tanks. The paraffin was flammable. Complainant thought the ships Respondent worked on were clean and safe. He found about half of the ships he worked on for NW Marine to be dirty; that is, there was oil or fuel left in the tanks. This increased the danger of fire or explosion when welders worked.

40) Scrapping was probably the most dangerous job for boilermakers in a tank because the worker was burning out old metal impregnated with oil. Old metal was scrapped before new metal was welded in. During the scrapping stage, most of the flammable paraffin was burned off, so welding there later was safer.

41) Jim Gill was a boilermaker and foreman for NW Marine. In 17 years of experience, Gill knew of four cases in which a ship had to be evacuated because of fire. He had seen two fires. He never experienced an explosion, but was aware of one or two of them occurring at NW Marine. On one ship that had a fire, paraffin on the wall of a tank started burning, and the fire watch did not put it out. Workers had to be evacuated. Gill had to locate a worker who was not accounted for during the fire. The worker was in a different tank than the one the fire was in and did not realize there was a fire. The worker had been inside the ship for half an hour before he was discovered

missing. Gill did not use spoken communication to find that worker. He located the worker and tapped him on the shoulder to get his attention. In another case, a fire started smoldering during a lunch break, and no one knew about it. When the workers went back to work, the fire was burning in the deck below and they had to evacuate. In case of fire, workers inside the ship were notified by others yelling and tapping them. A deaf worker would not hear verbal warnings. In a case where a tank filled with smoke, spoken communication could be a vital part of rescuing workers.

42) There were no typical ship repair jobs. There were no typical fires; it depended on the tank, how dirty it was, how much paraffin there was, and how quickly someone caught the fire. Gill could not say how long it would take to notify a deaf worker of a fire and evacuate him or her.

43) Don Chandler worked for 25 years as a boilermaker and foreman in ships. In that time he saw around 12 fires that required the evacuation of the ship. There were some injuries and deaths.

44) Ramon Herndon had been in the ship repair business for 16 years. He had seen many fires and was in two major ones where workers were in danger of losing their lives. In one case involving a fire in a cargo tank, everyone evacuated except two men who stayed to fight the fire. Within a minute, the smoke was too thick to see through. When firefighters arrived, they did not want to go into the tank because of the smoke and their unfamiliarity with the area inside. Herndon rode a hook from a crane into the tank.

By yelling back and forth, he gave directions to the two men so they could find him, and they all rode the hook out. In another case, welding on one side of a bulkhead caused a fire to start on the other side. Smoke filled both tanks. Everyone got out, but the last employee barely got out because of the smoke.

45) Mike Shaddock was a boilermaker with 20 years of ship-repair experience. He had worked for Respondent for seven years, primarily on ships. In the 20 years, Shaddock had seen one small fire. It was in a small tank. Everyone was close together and was evacuated. There was some smoke, but Shaddock could see 40 feet. Workers used yelling as a way of communicating. He believed a deaf person would be at a much greater risk of injury than a hearing person because there would be no way to communicate with the deaf person other than to touch him or throw something at him. Shaddock believed it would be a significant hardship to throw something at a worker or to touch a worker, rather than to yell at the worker.

46) John Johnson had been in the ship repair business for 19 years. He recalled three major fires. The first fire was in a tank. He and the fire watch tried to put the fire out while other workers evacuated. Everyone was yelling and running, and got out within about a minute. The tank filled with smoke. They contained the fire, but Johnson was "scared to death." In the second case, one side of a boiler in an engine room caught on fire. A crew above the fire had to evacuate. They had only seconds to get out. Johnson and another man were unable to

control the fire and had to get out. The third fire was in one of Respondent's ships. Everyone evacuated. There was very little time to get out. Johnson considered this danger when he decided not to put Complainant in a tank.

47) Ralph Ceccacci worked for NW Marine for around 19 years as a welder. During that time, he had to evacuate ships three or four times.

48) Clifford Gard worked in ships as a boilermaker for seven years. He had seen fires erupt, but they were put out by the fire watch. He had never seen a major fire and had never evacuated a ship because of fire.

49) Larry Dixon was a boilermaker in ships for around six years and worked for two years for Respondent. In the six years, he was evacuated twice. Each welder had a tank card showing the welder's name. Before welders went into a ship, they left their tank cards at the entry. When they evacuated a ship, they grabbed their cards. The foremen and leadpersons would then check the cards to make sure the welders got out. Sometimes welders did not pick up their cards. When a welder found out there was a fire, it was common sense to notify other welders nearby.

50) NW Marine trained and certified Complainant as a fire watch, and he performed that duty for NW Marine. A fire watch was required always to be inside the tank while boilermakers were working. The fire watch's duty was to watch for fires inside the tank of a ship. The fire watch carried a hose to put out fires, which could start from the boilermaker's work on the oil-impregnated steel. While Complainant worked for NW Marine, he was on fire

watch once when some oil caught on fire. He put the fire out. He never saw a fire while working for Respondent.

51) Welders wore special clothing, including leather uniforms, gloves, a hood, safety glasses, a hard hat, and heavy steel-toed boots. With the hood down (over the worker's face), the worker could see an area of about 6 to 12 inches; there was no peripheral vision. With the hood up (on top of the head), the worker could see all around. When welding on a ship caused smoke and fumes, welders often wore face masks with respirators. If a person yelled with the respirator on, the yell was muffled. To communicate effectively, a worker had to raise the hood and take the respirator off. Welders wore ear plugs or other hearing protection while performing most of their work. Oregon's OSHA rules required hearing protection when noise exceeded 85 dBA. Complainant did not need to wear hearing protection due to his deafness.

52) In the ship repair industry, workers were exposed to a lot of noise. Some of Respondent's employees had confirmed hearing loss because of it. The noise level inside a tanker varied depending on the job, but overall it was noisy inside a tank. The noise was produced by the ventilation system, welding, grinding, hammering, workers yelling, and echoes. At times the noise was so loud that a worker could not understand what another worker next to him was yelling. To get someone's attention, a worker had to walk up and touch the person. Respondent did some carbon arcing in 1992. Carbon arcing was so loud that welders had to wear hearing protection, and then it

was difficult for the welder to hear someone beside him yelling. It was very hard to hear with or without hearing protection. Using ear plugs or other hearing protection muffled all sounds and reduced the noise a welder heard. When welding was going on inside a tank, it was impossible to hear a sound alarm from the top deck of the ship because of the noise and the distance from the alarm. If there was a fire, the workers were warned by leadpersons to get out.

53) At NW Marine, welders did carbon arcing regularly. Because carbon arcing was very loud, the welders wore ear protection. After 1991, most boilermaker work for Respondent was done with (1) wire machines, in which a spool of wire was fed into a gun and the wire was electrically melted; (2) stick welding, in which an electrode around 12 inches long was put into a stinger (clamp) and the electrode was melted into a groove; and (3) torching, in which a boilermaker scrapped or burned with flame. Generally, Respondent's boilermakers wore earplugs when working with wire machines, stick welders, or torches. Some other types of welding did not require hearing protection.

54) Besides fire and falling objects, there were other dangers present when working on a ship. There were fumes from the welding, and it was normal for a tank to be smoky from the welding. There were holes one could fall through. On the main deck, there was a crane moving steel and equipment. At NW Marine, major accidents were rare. Complainant saw one person electrocuted at NW Marine, when the person touched an electric wire.

He heard of another person killed when a wire welder fell and hit the worker in the back.

55) Work in Respondent's shop was different from work on a ship. In the shop, Complainant did jet welding, wire welding, scarf torching, and carbon arc welding. He also operated a crane, did fitter work, and built parts for the ships. There was little fire danger in the shop. There was some danger from the crane. If work was done correctly, it was safe to work in the shop.

56) In the shop at NW Marine, a bell and a light were used as a fire alarm system. Complainant used a whistle when he operated a crane. At the gangway on top of each ship, NW Marine had an alarm system with a flashing light and a low-pitched horn. Complainant could hear the horn. NW Marine used the alarm system for fires or if someone got hurt.

57) Complainant never saw a safety alarm system while he worked for Respondent.

58) Respondent held regular safety meetings in which foremen talked about fires and other problems on the ships. Complainant attended the meetings, but did not understand what was being discussed. Complainant knew how to be safe working on ships from his training at Portland Community College, from his experience, and by doing the same things other workers did. Respondent never trained Complainant on safety procedures regarding a fire on ship. Complainant was never told by a Respondent or a NW Marine supervisor that he was not working safely.

59) At NW Marine, the foreman kept another welder close to Complainant to make sure he could be notified. That was very effective. In addition, they had Complainant work on the top deck, where there was less danger from fire and falling objects. One of Complainant's foremen at NW Marine believed that, while Complainant had a whistle and a buddy, he was not at an increased risk to himself or his co-workers.

60) At NW Marine, the welders and other workers were trained regarding how to keep the workplace safe. Regarding the danger of dropping objects, they were trained to keep their areas clean and to move tools and other objects away from the edge of the staging. Everyone was aware of the dangers and the safety precautions. Accidents were caused by carelessness and equipment failures.

61) Because of the flashing, bright light from welding, Johnson and Skovron did not think workers would notice a flashing warning light in a tank. In addition, the welders' view was down for long periods of time while they welded, so they would not see a flashing warning light. Jim Gill thought it would be possible to put a flashing warning light in a tank and possible to see such a light with a mask on and while welding.

62) Respondent's management did not explore the possibility of using a fog-horn type of alarm in the tank.

63) From August 7, 1992, to April 13, 1993, when he started working for Zidell Marine Corporation, Complainant lost wages from Respondent in the amount of \$2,650.

64) From November 1992 to April 13, 1993, Complainant was unemployed as a welder. He did some work with his father, who had a business of repairing homes for old people. The business was not the father's full-time work. Complainant did small, odd jobs. He helped his father paint one house, they cleaned up a house, and they fixed a porch on another. Between August and December 1992, Complainant earned around \$20.00 to \$50.00 working with his father.

65) Complainant had no income from January to April 13, 1993. The union did not call him for work from August 7, 1992, to April 13, 1993, except for a week of work for Respondent in October 1992. During that eight-month time, Complainant was actively seeking work.

66) At the time of hearing, Complainant worked for Zidell Marine Corporation as a boilermaker building new barges.

67) Complainant felt very upset and angry when Respondent refused to let him work on ships because of his disability. He felt Respondent's action was unfair. He lost sleep, had upset stomachs and headaches, quickly lost his temper, and argued with his wife and three children, which was uncharacteristic of him. He was unhappy and either depressed or angry. Normally he was easygoing. As a result of losing work with Respondent, Complainant lost income. His family did not have enough food. He got food from a food bank at Christmas time. This embarrassed him. His wife's parents had to help pay doctors' bills for the family. Complainant's health insurance depended on the number of hours he

worked. His health insurance was running out at a time a doctor said Complainant's daughter needed an operation on her foot. At the time of hearing, Complainant was still upset about Respondent's action.

68) Complainant's testimony was generally credible. He responded to questions without hesitation and made no effort to avoid any issue. His demeanor was calm and forthright, even where his memory was deficient and unsupportive of his complaint. He had repeated problems with his memory, especially regarding dates. As a result, some of his testimony was inconsistent or unreliable. That testimony was given less weight when it conflicted with other credible evidence on the record. Much of Complainant's testimony was supported by testimony from other witnesses whom the Hearings Referee had no reason to disbelieve.

#### ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent employed six or more persons within the State of Oregon.

2) Complainant applied for employment with Respondent.

3) Complainant has a hearing impairment that substantially limits one or more major life activities.

4) Complainant possessed the training, experience, education, and skill necessary to perform the duties of the boilermaker position with Respondent.

5) Complainant possessed the ability to perform the job safely and efficiently, with reasonable accommodation and without present risk of probable incapacitation to himself.

6) Working as a boilermaker in the tank of an oil tanker, by its very nature, included an inherent risk of injury or incapacitation to workers. With reasonable accommodation, the inherent risk to Complainant's co-workers was not materially enhanced because of his hearing impairment.

7) Respondent refused to hire Complainant because of his disability.

8) Complainant lost wages and suffered mental distress because of Respondent's refusal to hire him.

#### 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 659.460. ORS 659.010(6) and 659.400(3).

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, and 659.435.

3) ORS 659.400 provides, in part:

"As used in ORS 659.400 to 659.460, unless the context requires otherwise:

"(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment."

Complainant is a disabled person.

4) OAR 839-06-225 provides:

"(1) To come within the protection of ORS 659.425, a

handicapped' individual must be able to perform the duties of the position occupied or sought. 'Able to perform' shall mean, subject to the provisions of OAR 839-06-230:

"(a) Possessing the training, experience, education, and skill necessary to perform the duties of the position and normally required by the employer of other candidates for the position;

"(b) Possessing the ability to perform the job safely and efficiently, with reasonable accommodation and without present risk of probable incapacitation to him/herself. An individual occupying a particular position may at any time be evaluated to determine if there is a present risk of probable incapacitation to him/herself.

"(2) An employer may not use the provisions of this section as a subterfuge to avoid the employer's duty under ORS 659.425."

Complainant was able to perform the duties of the position sought.

5) OAR 839-06-230 provides:

"(1) Notwithstanding other provisions of these rules, a position which by its very nature includes an inherent risk of injury or incapacitation to co-workers or the general public need not be filled by a handicapped individual if, even with reasonable accommodation, the inherent risk is materially

enhanced because of the individual's impairment.

"(2) To meet the provisions of section (1) of this rule it must be demonstrated that, as it affects the performance of the actual job duties, the individual's impairment with reasonable accommodation would result in a greater risk of injury or incapacitation to co-workers or the general public than is true for others qualified to perform such work and not so impaired."

Complainant's disability, with reasonable accommodation, would not materially enhance the inherent risk of working as a boilermaker in the tank of an oil tanker.

6) OAR 839-06-245 provides:

"ORS 659.425 imposes an affirmative duty upon an employer to make reasonable accommodation for an individual's physical or mental impairment where the accommodation will enable that individual to perform the work involved in the position occupied or sought:

"(1) Accommodation is a modification or change in one or more of the aspects or characteristics of a position including but not limited to:

"(a) Location and physical surroundings;

"(b) Job duties;

"(c) Equipment used;

"(d) Hours, including but not limited to:

"(A) Continuity (extended breaks, split shifts, medically essential rest periods, treatment periods, etc.); and

"(B) Total time required (part-time, job-sharing).

"(e) Method or procedure by which the work is performed.

"(2) Accommodation is required where it does not impose an undue hardship on the employer. Whether an accommodation is reasonable will be determined by one or more of the following factors:

"(a) The nature of the employer, including:

"(A) The total number in and the composition of the work force; and

"(B) The type of business or enterprise and the number and type of facilities.

"(b) The cost to the employer of potential accommodation and whether there is a resource available to the employer which would limit or reduce the cost. Example: funding through a public or private agency assisting handicapped persons;

"(c) The effect or impact of the potential accommodation on:

"(A) Production;

"(B) The duties and/or responsibilities of other employees; and

"(C) Safety:

"(i) Of the individual in performing the duties of the position with-

out present risk of probable incapacity to him/herself; and

"(ii) Of co-workers and the general public if the individual's performance, with accommodation, does not present a materially enhanced risk to co-workers or the general public (See OAR 839-06-230).

"(d) Medical approval of the accommodation; and

"(e) Requirements of a valid collective bargaining agreement including but not limited to those governing and defining job or craft descriptions, seniority, and job bidding, but this rule shall not be interpreted to permit the loss of an individual's statutory right through collective bargaining.

"(3) A handicapped person who is an employee or candidate for employment must cooperate with an employer's efforts to reasonably accommodate the person's impairment. A handicapped person may propose specific accommodations to the employer, but an employer is not required to accept any proposal which poses an undue hardship. Nor is the employer required to offer the accommodation most desirable to the handicapped person, except that the employer's choice between two or more possible methods of reasonable accommodation cannot be intended to discourage or to attempt to discourage a handicapped person from seeking or continuing employment."

Respondent failed to reasonably accommodate Complainant. Accommo-

\* In 1989, the Legislature amended the Oregon Revised Statutes, including ORS 659.400 *et seq.*, to change "handicapped" to "disabled." See §§ 129 and 131, chapter 224, Oregon Laws 1989. Oregon administrative rules in chapter 839 have not been changed likewise. In addition, appellate cases and Final Orders issued before 1989 used the word "handicapped." In this order, the Forum has used the word "handicapped" or "disabled" according to how they were used in the original text.

dation was possible without undue hardship to Respondent.

7) ORS 659.425(1) provides, in relevant part:

"For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for any employer to refuse to hire, employ or promote, or bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:

"(a) An individual has a physical or mental impairment which, with reasonable accommodation by the employer, does not prevent the performance of the work involved."

Respondent violated ORS 659.425 (1)(a).

8) Pursuant to ORS 659.435 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 659.400 to 659.460, 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

To begin with, there is no dispute that WS, Inc. is an employer and a respondent as defined by statute. ORS 659.010(13), 659.400(3). There is no dispute that Complainant is a member of a protected class. ORS 659.400(1).

There is no dispute that Respondent refused to hire Complainant because of his disability. And the preponderance of evidence proves that Complainant was harmed by Respondent's action. OAR 839-05-010(1).

What is in dispute is whether Respondent could have reasonably accommodated Complainant's disability to enable him to perform the duties of the job safely, that is: (1) without a present risk of probable incapacitation to himself, OAR 839-06-245(2)(c)(C)(i), 839-06-225(1)(b); and (2) without materially enhancing the inherent risk of injury or incapacitation to co-workers, OAR 839-06-245(2)(c)(C)(ii), 839-06-230(1). The Agency pleaded that Respondent could have reasonably accommodated Complainant's disability and that its failure to do so and hire Complainant constitutes a violation of ORS 659.425.

#### Ability to Perform

The Agency presented persuasive proof that Complainant had the training, experience, education, and skill necessary to perform all the duties of a boilermaker inside the tank of a ship. Virtually every witness, including Respondent's Ramon Herndon and John Johnson, testified that Complainant was a very good or excellent boilermaker and could perform any of the boilermaker jobs in a ship. He had at least the same training, experience, education, and skill as Respondent normally required of other candidates for that position. OAR 839-06-225 (1)(a). Likewise, the evidence was persuasive that Complainant possessed the ability to do the job efficiently. OAR 839-06-225(1)(b).

That leads to the issue of whether Complainant could have performed the job safely, with reasonable accommodation, and without present risk of probable incapacitation to himself. OAR 839-06-225(1)(b).

#### Present Risk of Probable Incapacitation

The Forum discussed the "present risk of probable incapacitation" standard at length in the case of *In the Matter of Fred Meyer*, 9 BOLI 157 (1990), and will not repeat that discussion here. In summary, however, the Forum held that the "present risk of probable incapacitation" standard required by OAR 839-06-225 must be interpreted so that it is consistent with the standards stated in *Montgomery Ward v. Bureau of Labor*, 280 Or 163, 570 P2d 76, 79 (1977), and *Pacific Motor Trucking Co. v. Bureau of Labor and Industries*, 64 Or App 361, 668 P2d 446, 450 (1983), *rev den*, 295 Or 772, 670 P2d 1036 (1983).

The Court of Appeals, in *Pacific Motor Trucking*, held that the employee's risk of probable incapacitation should be considered "at the time of rejection." The word "present" refers to when the risk of probable incapacitation occurs. "Present" does not refer to when an "event" might occur. The court said that to "refuse to allow a discharge to be based on an employee's risk of injury in the future is consistent with the statute's policy." 668 P2d at 450. Thus, if the risk (of probable incapacitation) does not arise for a year, or a month, or some other time after "the time of rejection," then the applicant is not at "present risk of probable incapacitation." *Fred Meyer*, 9 BOLI at 172.

Here, I find that Complainant and all of the boilermakers working in the ships were at present risk of incapacitation. The issue, however, is not the inherent risk present in the ships. The issue is whether, because of his disability, Complainant was at a present risk of probable incapacitation. So we turn to the issue of whether incapacitation was probable.

The test for "probability" is not:

"whether it is more probable than not that a person's impairment would create a hazard to himself or others, but whether, under all the circumstances, there is a reasonable probability that the applicant's condition renders him unable to perform the job duties in a manner which will not endanger himself or others. Inherent in that analysis is a consideration of the likelihood and probable severity of harm in the event of an accident; the more hazardous the job, the more stringent employment qualifications may be." *Quinn v. Southern Pacific Transportation Co.*, 76 Or App 617, 631-32, 711 P2d 139, 148-49 (1985).

The "inquiry, then, is whether [Respondent] has demonstrated a factual basis for believing, to a reasonable probability, that [Complainant], because of his [deafness], could not safely perform the job of [boilermaker in the ship]." *Quinn*, 76 Or App at 632, 711 P2d at 149.

"To deny the opportunity to work when a risk is less than probable would contravene the policy of the statute to guarantee the fullest employment of handicapped persons which is compatible with the

reasonable demands of the job." *Pacific Motor Trucking*, 668 P2d at 450 (quoting *Montgomery Ward v. Bureau of Labor*, 280 Or at 168, 570 P2d 76); ORS 659.405.

The facts amply demonstrate that all ship workers are exposed to the dangers of falling objects and fire. A preponderance of the evidence did not show, however, that it was reasonably probable that Complainant would be incapacitated due to his deafness. The "probable incapacitation" standard does not require that incapacitation be certain. Thus, evidence that Complainant successfully performed boiler-maker duties on ships for other employers does not necessarily make the risk improbable. However, his history of working in ships for other employers without injury and the undisputed evidence that he was a safe worker undermine the argument that he was at present risk of *probable* incapacitation. In addition, the testimony of boiler-makers and supervisors with ship experience is convincing that an injury to Complainant was not probable.

The Forum has previously observed that "the determination of probability appears to be left to the testimony of experts." *In the Matter of Pacific Motor Trucking Company*, 3 BOLI 100, 112 (1982), *aff'd*, *Pacific Motor Trucking Co. v. Bureau of Labor and Industries*, 64 Or App 361, 668 P2d 446 (1983), *rev den*, 295 Or 772, 670 P2d 1036 (1983). The typical "dueling doctors" case involves expert testimony about a worker with a disabled back or a heart condition, and focuses on the extent of the disability and whether the job duties will incapacitate

the worker. Here there was no expert medical opinion regarding Complainant's deafness. Before he was rejected for employment on the ship, no one from Respondent talked to him about his disability. The expert opinions regarding job duties came from the boiler-makers and supervisors who had worked in the ships. They were the ones with expertise about the dangers involved with the work.

Regarding fires, that danger was almost always present. However, the testimony shows that it was *not* reasonably *probable* that Complainant would be incapacitated by fire because of his deafness. Complainant had been a boilermaker since at least 1987 and had worked on numerous ships, including oil tankers. He had seen one small fire and put it out. Jim Gill had 17 years of experience and knew of only four cases in which a ship had to be evacuated because of fire. He had seen two fires. Don Chandler worked for 25 years as a boilermaker and foreman in ships. In that time he saw around 12 fires that required the evacuation of the ship. There were some injuries and deaths. Ramon Herndon had been in the ship repair business for 16 years. He had seen many fires and was in two major ones where workers were in danger of losing their lives. Mike Shaddock was a boilermaker with 20 years of ship-repair experience. He had seen one small fire. John Johnson had been in the ship repair business for 19 years. He recalled three major fires. Ralph Ceccacci worked for around 19 years as a welder. During that time, he had to evacuate ships three or four times. Clifford Gard worked in ships as a

boilermaker for seven years. He had never seen a major fire and had never evacuated a ship because of fire. Larry Dixon was a boilermaker in ships for around six years. In that time he was evacuated twice. These facts show that the severity of the harm from fire can be death, but they do not persuade the Forum that there was a reasonable probability that, due to his deafness, Complainant would be incapacitated by fire. With reasonable accommodation (discussed below), the Forum believes Respondent could have made the risk to Complainant little different from that to other workers in a ship.

Regarding the risk of injury from falling objects, here again, with reasonable accommodation, the Forum finds that Respondent could make that risk the same or less than that for other welders. It would not be reasonably probable that Complainant would be incapacitated by a falling object, due to his deafness.

None of the other risks described by witnesses, such as the risk from fumes, were so immediate that a co-worker could not tap and warn Complainant before he would be incapacitated. These risks simply do not create a probability that Complainant would be incapacitated due to his disability.

Accordingly, the Forum finds that, with reasonable accommodation, Complainant would have been able to work on the ship safely. Respondent failed to establish to a reasonable probability that Complainant's deafness precluded his satisfactory performance in a manner that would not endanger himself. *Quinn*, 76 Or App

at 632, 711 P2d at 149. With accommodation, Complainant would not have been at a present risk of probable incapacitation due to his deafness.

#### Materially Enhanced Risk to Co-workers

The position of boilermaker working inside an oil tanker includes an inherent risk of injury or incapacitation due to fire and falling objects. According to OAR 839-06-230(1), this position need not be filled by a disabled individual if, "even with reasonable accommodation, the inherent risk [to co-workers] is materially enhanced because of the individual's impairment." The question here is whether, with reasonable accommodation, Complainant's deafness would have materially enhanced the inherent risks to his co-workers.

Regarding the risk of fire, the evidence on the whole record simply does not show that Complainant's deafness would have enhanced this risk for his co-workers. If Complainant were to start a fire, he could yell and otherwise notify the firewatch, his co-workers, or a supervisor. There is no evidence on the record to suggest that, if he had to evacuate a ship, his deafness would put his co-workers at any enhanced risk of injury or incapacitation. While one could contrive a scenario in which Complainant would be the only person in a position to communicate orally with co-workers in order to rescue them, such a situation is improbable at best. One could also make up a scenario in which a co-worker was trying to rescue Complainant and needed to communicate orally. However, with reasonable accommodation, the Forum believes that this situation, too, is improbable. As a

result, the inherent risk from fire to his co-workers would not be materially enhanced by Complainant's deafness.

Regarding the inherent danger from falling objects, Complainant's deafness would not materially enhance this risk to his co-workers. The fact is that Complainant could yell a warning if he dropped or kicked something off a scaffold. This is what his co-workers would do. Given the loudness inside the tanks, it is improbable that Complainant's deafness would have somehow enhanced his co-workers' inherent risk of injury from falling objects. The real issue concerning falling objects and Complainant's deafness is the danger to Complainant and his inability to hear an oral warning about something falling toward him. That issue is addressed above, regarding the present risk of probable incapacitation to him, and below, regarding reasonable accommodation.

#### Reasonable Accommodation

The Handicapped Persons' Civil Rights Act requires reasonable accommodation as a way of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities. Respondent had an affirmative duty to reasonably accommodate Complainant's disability, so that he could perform the work involved in the position sought. ORS 659.425(1)(a); OAR 839-06-245; *Braun v. American Intern. Health*, 315 Or 460, 846 P2d 1151, 1157 (1993). Accommodation was required unless it imposed an undue hardship on Respondent. OAR 839-06-205(8), 839-06-245(2); *Blumhagen v. Clackamas County*, 91 Or App 510, 756 P2d 650, 655 (1988).

One factor to consider in making this determination is the effect of the potential accommodation on safety. OAR 839-06-245(2)(c)(C). Respondent contended that it could not be liable under ORS 659.425 because Complainant's deafness prevented him from working as a welder in the ships without endangering himself or others.

Because some of Oregon's civil rights laws are modeled after federal civil rights laws, the Commissioner has often looked to federal case law for guidance in interpreting and administering Oregon's laws. While federal case law interpreting federal statutes and regulations is not binding on the Agency, it can be instructive and may be adopted as precedent in Oregon cases. *In the Matter of C & V, Inc.*, 3 BOLI 152, 160 (1982). Oregon's Handicapped Persons' Civil Rights Act was derived directly from regulations adopted under sections 503 and 504 of the federal Rehabilitation Act of 1973, 29 USC sections 793-794. *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, 780 P2d 743, 746 n.6 (1989); *Braun*, 846 P2d at 1155. Accordingly, the Forum will look to federal case law regarding the Rehabilitation Act for guidance with this case.

In *Prewitt v. U.S. Postal Service*, 662 F2d 292, 27 FEP 1043, 1054-56 (5th Cir 1981), the court held that:

"the burden of proving inability to accommodate is upon the employer. The administrative reasons for so placing the burden likewise justify a similar burden of proof in a private action based upon the Rehabilitation Act. The employer has greater knowledge

of the essentials of the job than does the handicapped applicant. The employer can look to its own experience, or, if that is not helpful, to that of other employers who have provided jobs to individuals with handicaps similar to those of the applicant in question. Furthermore, the employer may be able to obtain advice concerning possible accommodations from private and government sources. \*\*\*

"Although the burden of persuasion in proving inability to accommodate always remains on the employer, we must add one caveat. Once the employer presents credible evidence that indicates accommodation of the plaintiff would not reasonably be possible, the plaintiff may not remain silent. Once the employer presents such evidence, the plaintiff has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence."

The Forum agrees with the Circuit Court's reasoning and believes it correctly reflects the state of the law regarding the issue of reasonable accommodation. Accordingly, the Forum will apply this burden and order of proof here.

Although safety is a paramount concern for Respondent,

"the emphasis must remain on whether the individual applicant is capable of fulfilling the job requirements. Adherence to that principle is necessary to prevent the kind of invidious discrimination based on unfounded stereotyping that the

[Handicapped Persons' Civil Rights] Act is designed to prevent. It is clear that, whether an applicant's own personal safety or that of others is in question, the Act requires an individual assessment of the safety risk." *Quinn v. Southern Pacific Transportation Co.*, 76 Or App 617, 631, 711 P2d 139, 148 (1985) (citations omitted).

As the first step in this process, the employer has an affirmative duty to evaluate the employee's capabilities. Otherwise, the employer cannot accurately and objectively determine (1) the individual's ability to perform the job, and (2) whether reasonable accommodation is necessary. Once the individualized assessment is done, the employer must then look at possible accommodations, if necessary.

To begin the individual assessment, the employer should always consult the person with a disability. That did not occur here. Had Respondent's representatives consulted with Complainant about his disability, they would have learned about his specific physical abilities and limitations. They would have learned: (1) he could shout a warning; (2) he could hear low-pitch sounds; and (3) he had more hearing ability when he wore his hearing aids. They also would have learned what accommodations other employers had made for him. They could have identified potential accommodations and assessed how effective each would be in enabling Complainant to perform the duties of the position sought. As it was, Respondent's representatives made assumptions without medical information, without information from the Complainant about his deafness, and

without information about how he had worked safely in comparable jobs for other employers. They relied solely on their fears about safety, presumptions about persons who are deaf, and misconceptions about Complainant's abilities and limitations. Respondent failed to adequately assess whether Complainant was capable of fulfilling the job requirements, with or without accommodation.

Respondent accommodated Complainant before and after August 1992 by placing him in the shop. On August 7 and 8, however, there were only foremen and leadpersons working in the shop. OAR 839-06-245(2) provides, in relevant part:

"Accommodation is required where it does not impose an undue hardship on the employer. Whether an accommodation is reasonable will be determined by one or more of the following factors: \*\*\*

"(e) Requirements of a valid collective bargaining agreement including but not limited to those governing and defining job or craft descriptions, seniority, and job bidding, but this rule shall not be interpreted to permit the loss of an individual's statutory right through collective bargaining."

Article 4 of the collective bargaining agreement between Respondent and the Boilermakers Union provided that "it is not the intention of [Respondent] to use leadpersons or foremen to replace journeymen regarding their production assignments." To replace a foreman or leadperson in the shop with Complainant and send that person to a ship to work as a journeyman welder

would have violated the terms of the agreement. This would impose an undue hardship on Respondent. Accordingly, Respondent was not required to accommodate Complainant on August 7 or 8, 1992, by transferring a leadperson or foreman out of the shop to a ship.

Respondent did not accommodate Complainant on the ship in August 1992 because Johnson and Herndon had previously determined that it would be unsafe to have him work on a ship. Safety was, obviously, a legitimate concern, and the reasonableness of an accommodation may be determined by assessing the effect of the potential accommodation on safety. OAR 839-06-245(2)(c)(C).

What is unclear from this record is whether Respondent considered any particular accommodation for Complainant if he worked on board a ship. It appears that in 1989, Johnson and Herndon decided it would be safer for Complainant to work in the shop than in a ship and put him in the shop. They considered the dangers inherent in ship work and decided they would never let Complainant work on ship because of those dangers. The record is barren of any evidence that Respondent adequately considered any accommodation to permit Complainant to work inside a ship. While assessing the dangers on ship was important, the act requires more.

The act requires Respondent to make a reasonable effort to provide an effective accommodation. The accommodation Respondent made before and after August 1992 was to place Complainant in the shop. When no shop work was available in August,

Respondent was required to make another reasonable effort to accommodate Complainant. An employer's obligation to provide a reasonable accommodation applies to all aspects of employment. This duty is ongoing and may arise any time that a person's disability or job changes. See, e.g., OAR 839-06-225(1)(b). Respondent failed to do its duty adequately.

When John Johnson saw Complainant's name on the list of workers dispatched from the union, he told the dispatcher that Complainant should not be sent out, because the only available work was in a ship. He was following the decision made earlier that it would be unsafe to let Complainant work on the ship. No effort had been made before to accommodate Complainant on the ship, and no effort was made on August 7. When Complainant arrived at the workplace on August 8, Johnson repeated that no work was available in the shop and that he could not use Complainant in the tank of the ship because it was unsafe. Again, no accommodation was considered. Although he talked for a few minutes with Dr. Skovron about whether to put Complainant in the tank of a ship, neither of them had information about Complainant's specific abilities or limitations. As stated earlier, Respondent failed to assess Complainant's capabilities. It is also quite apparent they did not adequately explore possible accommodations.

People with disabilities are restricted in employment opportunities by many kinds of barriers. Many are restricted only by barriers in other people's minds, such as unfounded fears, stereotypes, presumptions, and

misconceptions about job performance, safety, absenteeism, costs, or acceptance by co-workers and customers. Under the law, an employer must perform an individualized assessment of a disabled person's capabilities and try to find a reasonable accommodation that would allow the person to overcome these barriers and perform the duties of the job. An employer may not allow these unfounded fears, stereotypes, presumptions, and misconceptions to influence its employment decisions. Acting on assumptions is not the same as acting on facts, especially when those assumptions are based on such stereotypes and misconceptions. On this record, the Forum finds that Respondent failed to make a reasonable effort to accommodate Complainant's disability in August 1992.

To rebut Respondent's evidence that no accommodation was possible, the Agency presented evidence that suggested that accommodation could in fact have been reasonably made. OAR 839-06-245(1) provides:

"Accommodation is a modification or change in one or more of the aspects or characteristics of a position including but not limited to:

"(a) Location and physical surroundings;

"(b) Job duties;

"(c) Equipment used;

"(d) Hours \*\*\*

"(e) Method or procedure by which the work is performed."

Respondent's primary safety concerns included the danger of fire and of falling objects. The Agency presented evidence to show, and the Forum

concludes, that Respondent could have reasonably accommodated Complainant on a ship so that he was not at a present risk of probable incapacitation and so that his performance did not materially enhance the risk to his co-workers.

Respondent only called for boilermakers on the union's out-of-work list (which Complainant was on) when it had more work than the welders on its preferential hiring list could handle. Thus it is reasonable to infer that, on August 7, Respondent had around 200 boilermakers working on the ship. If Respondent were to have given Complainant a partner, that is, teamed him up with another boilermaker in a location where they could work within a few feet of each other, the partner could easily have warned Complainant of any changes or fire dangers that arose. The partner could have been directed to notify Complainant of such events and stick with him if an evacuation were necessary. It is inconceivable that Respondent could not have found a location where Complainant could have worked with his partner and where they could have been quickly evacuated. Similarly, I find it most improbable that Respondent could not have assigned duties and found a location for Complainant and his partner where they would not have had other welders working directly above them. Such reasonable accommodations would protect Complainant from falling objects and the danger of being lost in a fire. They would cost Respondent nothing, would not affect Respondent's production, and would have manageable effects on the duties and responsibilities of other

employees. The fact that Complainant had worked successfully and safely on many ships, including tankers, for other employers seriously undermines Respondent's claim that no accommodation was possible.

To conclude, the Forum finds that Respondent failed to make a reasonable effort to accommodate Complainant in August 1992, and the Agency presented persuasive evidence that reasonable accommodation was possible.

#### **Back Wages**

The Agency and Respondent stipulated to \$2,650 as the amount of back wages Complainant lost due to Respondent's refusal to hire him in August 1992. The preponderance of credible evidence on the whole record, including Complainant's testimony, showed that he was actively seeking employment up to the time he was hired in April 1993. Respondent failed to prove that Complainant failed to mitigate his lost wages. OAR 839-50-260(5).

#### **Mental Suffering**

Regarding mental suffering damages, Complainant testified credibly that the discrimination based upon his disability made him very upset and angry. He felt Respondent's action was unfair. He lost sleep, had upset stomachs and headaches, quickly lost his temper, and argued with his wife and three children, which was uncharacteristic of him. He was unhappy and either depressed or angry, though normally he was easygoing.

The denial of employment with Respondent caused Complainant's family to suffer financial distress. His family

did not have enough food. He got food from a food bank at Christmas time, which embarrassed him. His in-laws had to help pay doctors' bills, and Complainant's health insurance was jeopardized at a time a doctor said Complainant's daughter needed an operation. At the time of hearing, Complainant was still upset about Respondent's action.

The Commissioner has previously recognized that the anxiety and uncertainty connected with loss of employment income is compensable. *In the Matter of Spear Beverage Company*, 2 BOLI 240 (1982). The specter and uncertainties of unemployment are also compensable when attributable to an unlawful practice. *In the Matter of the City of Portland*, 2 BOLI 41 (1980). While not all of Complainant's financial difficulties are attributable to Respondent's failure to hire him (because his continued employment with Respondent would have depended on the work available and therefore would have been short term and intermittent), certainly some of them are. Respondent is liable for some of Complainant's mental suffering caused by his financial difficulties.

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

#### **Conference, Conciliation, and Persuasion**

In its Specific Charges, the Agency alleged that "attempts to resolve the matter by conference, conciliation and persuasion were unsuccessful." In its answer, Respondent denied "that adequate attempts were made to resolve

the matter by conference, conciliation and persuasion," and affirmatively alleged that the Agency "failed to make reasonable efforts to resolve this matter by conference, conciliation and persuasion after issuing its determination." At hearing, neither the Agency nor Respondent presented evidence on this issue.

ORS 659.050 states, in part, that

"[I]f the investigation discloses any substantial evidence supporting the allegation of the complaint the commissioner *may* cause immediate steps to be taken through conference, conciliation and persuasion to effect a settlement of the complaint \* \* \*." (Emphasis added.)

ORS 659.060(1) provides:

"In case of a failure to resolve a complaint after reasonable effort under ORS 659.050, or if it appears to the commissioner that the interest of justice requires a hearing without first proceeding by conference, conciliation and persuasion, or if a written request is made by respondent in accordance with ORS 659.050, the commissioner shall cause to be prepared and served upon each respondent required to appear at such hearing such specific charges, in writing, as the respondent will be required to answer, together with a written notice of the time and place of such hearing."

OAR 839-03-070(1) provides in part:

"If the [Civil Rights] Division finds substantial evidence of unlawful discrimination, a representative of the Division *may* seek to eliminate

the effects of the unlawful discriminatory act(s) by conference, conciliation, and persuasion. \* \* \* (Emphasis added.)

This Forum has ruled several times that the statutes permit, but do not require, the Commissioner to cause steps to be taken to effect settlement of a civil rights complaint. See, e.g., *In the Matter of Lucille's Hair Care*, 3 BOLI 286, 298 (1983), *aff'd, remanded for interest calculation, Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189 (1985), *on remand*, 5 BOLI 13 (1985) (respondent moved to dismiss the specific charges, alleging the Commissioner failed, refused, and neglected to engage in conciliation outlined in ORS 659.050; the Commissioner held, "the Legislature's use of the verb 'may' throughout ORS 659.050 makes it clear that this statute *permits but does not require* the Commissioner to cause steps to be taken to effect settlement of a civil rights complaint." (Emphasis original.)) *Accord In the Matter of PAPCO, Inc.*, 3 BOLI 243, 250 (1983) ("The Agency may attempt conciliation under ORS 659.050, but does not have a duty to do so or to succeed in such attempts.")

The administrative procedure used by the Agency to process a civil rights complaint is not a matter the Agency needs to plead and prove in a contested case. If a respondent believes the Agency has not followed the procedure, then it can raise that issue as an affirmative defense, just as Respondent did here. When a respondent raises the issue, it has the burden of presenting evidence to support its affirmative defense. ORS 183.450(2). In this case, given the lack of evidence

on whether the Agency "failed to make reasonable efforts to resolve this matter by conference, conciliation and persuasion," Respondent failed to prove its defense. In any event, the Forum continues to hold that an attempt to conciliate a complaint is a discretionary procedure of the Civil Rights Division.

#### ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3), 659.010(2), and 659.435, and to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondent, WS, INC., is hereby ORDERED to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street #32, Suite 1010, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for JOHN R. BARBER, JR., in the amount of:

a) TWO THOUSAND SIX HUNDRED AND FIFTY DOLLARS (\$2,650), representing wages Complainant lost as a result of Respondent's unlawful practice found herein; PLUS,

b) Interest on the lost wages at the annual rate of nine percent accrued between April 1, 1993, and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

c) TWENTY THOUSAND DOLLARS (\$20,000), 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 the Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Adopt a non-discriminatory written policy and practice regarding employees and applicants with disabilities and the employer's duty to reasonably accommodate those employees and applicants. The content of such policy is to be preapproved by the Civil Rights Division of the Oregon Bureau of Labor and Industries.

3) Cease and desist from discriminating against any current employee or applicant on the basis of disability.

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#### In the Matter of JAVIER GARCIA, Respondent.

Case Number 70-94

Final Order of the Commissioner

Mary Wendy Roberts

Issued August 16, 1994.

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#### SYNOPSIS

Where an individual acted as a farm labor contractor without a license, in violation of ORS 658.410(1) and 658.415(1); failed to carry a license while acting as a farm labor contractor,

in violation of ORS 658.440(1)(a); failed to display a license to a person to whom workers were to be provided, in violation of ORS 658.437; operated three farm-worker camps without the requisite license and indorsement, in violation of ORS 658.715(1)(a); failed to post a farm labor contractor indorsement to operate farm-worker camps at each of the three camps he operated, in violation of ORS 658.730(2); failed to continually maintain a surety bond to operate farm-worker camps, in violation of ORS 658.735(1); failed to post a notice of compliance with the farm-worker camp bonding requirement at each of the three farm-worker camps he operated, in violation of ORS 658.735(8); failed to register with the Bureau each of three farm-worker camps he operated, in violation of ORS 658.750(1); failed to post the informational notice required by ORS 658.755(1)(2) at each of his three farm-worker camps, in violation of ORS 658.755(1)(2); and assisted a person not entitled to operate a farm-worker camp to violate ORS 658.705 to 658.850, in violation of ORS 658.755(3)(e), the Commissioner assessed a civil penalty in the amount of \$18,000 against Respondent, pursuant to ORS 658.453(1) and 658.850(1). ORS 658.410(1); 658.415(1); 658.440(1)(a); 658.437; 658.715(1)(a); 658.730(2); 658.735(1); 658.735(8); 658.750(1); 658.755(1), (2); 658.755(3)(e); OAR 839-14-420; 839-14-440; 839-15-508; 839-15-512.

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The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, designated as Hearings Referee by Mary Wendy

Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on June 14, 1994, in the conference room of the Bureau of Labor and Industries Office, 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Javier Garcia (Respondent) did not attend the hearing and was not represented by counsel. Respondent was found to be in default, having been duly notified of the time and place of hearing and thereafter having failed to appear in person or through a representative.

The Agency called the following witnesses (in alphabetical order): City of Silverton Ordinance Officer Sylvia Beebe; Respondent's neighbor, Judith Lowery; Agency Compliance Specialist Raul Pena; and Agency Field Representative Vasilie Shimanovsky.

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 10, 1994, the Agency issued a "Notice of Intent to Assess Civil Penalty" (Notice of Intent) to Respondent. The Notice of Intent cited the following bases for this assessment:

1. Acting as a farm labor contractor without a farm labor

contractor's license, in violation of ORS 658.410(1) and 648.415(1) (civil penalty of \$500 for one violation);

2. Failure to carry a farm labor contractor's license, in violation of ORS 658.440(1)(a) (civil penalty of \$500 for one violation);

3. Failure to display or provide copy of farm labor contractor's license to person to whom workers are to be provided, in violation of ORS 658.437 (civil penalty of \$500 for one violation);

4. Operation of a farm-worker camp without farm labor contractor license, in violation of ORS 658.715(1)(a) (civil penalty of \$3,500 for three violations);

5. Operation of a farm-worker camp without camp indorsement, in violation of ORS 658.715(1)(a) (civil penalty of \$3,500 for three violations);

6. Failure to post camp indorsement, in violation of ORS 658.730(2) (civil penalty of \$3,500 for three violations);

7. Failure to continually maintain surety bond, in violation of ORS 658.735 (civil penalty of \$3,500 for three violations);

8. Failure to post notice of bond, in violation of ORS 658.735(8) (civil penalty of \$3,500 for three violations);

9. Failure to register farm-worker camp, in violation of ORS 658.750(1) (civil penalty of \$3,500 for three violations);

10. Failure to post informational notice, in violation of ORS

658.755(1), (2) (civil penalty of \$3,500 for three violations);

11. Assisting a person not entitled to operate a farm-worker camp, in violation of ORS 658.755(3)(e) (civil penalty of \$3,500 for three violations).

2) The Notice of Intent (in English) was served on Respondent on March 9, 1994.

3) By a letter written in Spanish and received by the Bureau on March 21, 1994, Respondent requested a Spanish translation of the Notice of Intent, denied that he was paid other than as an hourly worker, and denied knowing anything of Linda Garcia for the past three months. An English translation of this letter was obtained and is attached to the original letter.

4) On April 1, 1994, the Agency mailed (by certified mail) an additional copy of the Notice of Intent to Respondent, together with a cover letter (in Spanish) and a summary of Respondent's rights (in Spanish). Respondent received these documents on April 7, 1994.

5) On April 15, 1994, the Agency mailed to Respondent a Spanish translation of the Notice of Intent and a cover letter, also in Spanish, informing Respondent of the time limitation within which to answer.

6) In April 1994, the Agency received Respondent's answer to the Notice of Intent (in Spanish). In his answer, Respondent admitted working for the named farmers, but as a field supervisor, not as a contractor, denied being paid a commission by the farmers; and stated that he rented the house for his family. Due to the

content of Respondent's answer, it will also be treated as a request for hearing on the Agency's intended action.

7) On April 26, 1994, the Agency requested a hearing from the Hearings Unit.

8) On May 3, 1994, 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 (in Spanish). With the hearing notice, the Hearings Unit sent to Respondent a "Notice of Contested Case Rights and Procedures" (in Spanish), containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-50-000 through 839-50-420 (English).

9) The notice and other accompanying documents described in Finding of Fact – Procedural 8, above, which were mailed to 300 Sixth Street, Gervais, Oregon 97026, were returned to the Hearings Unit on May 10, 1994, stamped "Unclaimed" and "Delivery attempted on P.O. Box 842."

10) On May 17, 1994, in Spanish and in English, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by June 6, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure

to submit the summary. The Agency submitted a timely summary. No summary was received from Respondent.

11) Respondent was personally served with the Notice of Hearing (and appended documents described in Finding of Fact – Procedural 8, above, on May 24, 1994.

12) On June 9, 1994, the Hearings Unit received from the Agency an addendum to its case summary.

13) At the time and place set forth in the Notice of Hearing for this matter, Respondent Javier Garcia did not appear or contact the Hearings Unit. Pursuant to OAR 839-50-330(2), the Hearings Referee waited approximately 35 minutes after the time set for hearing before commencing the hearing. The Hearings Referee found Respondent in default, pursuant to OAR 839-50-330(2), for failure to attend the hearing.

14) The Hearings Referee found from the official file herein that Respondent had received a "Notice of Contested Case Rights and Procedures."

15) Pursuant to ORS 183.415(7), the Agency was 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.

16) On July 28, 1994, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the Certificate of Mailing. An Exceptions Notice was part of the Proposed Order. Exceptions, if any, were to be filed by August 8, 1994. No exceptions were received by the Hearings Unit.

#### FINDINGS OF FACT – THE MERITS

1) During May and June 1992, within the State of Oregon, Respondent employed and supplied workers to harvest strawberries for Boyd Yoder (The Y-4 Farm).

2) During May and June 1992, within the State of Oregon, Respondent employed and supplied workers to harvest berries for G & C Farms.

3) Between May and July 1992, Respondent housed workers, in Silverton, who he employed and supplied to local berry growers Boyd Yoder and G & C Farms, at 419 High Street, 1215½ S Water Street, and 992 Woodland Drive.

4) During all times material herein, Respondent was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

5) During all times material herein, Respondent did not possess a farm labor camp indorsement to a valid farm labor contractor license.

6) During all times material herein, Linda Franks Garcia was married to Javier Garcia. Linda Garcia was formerly known as Linda Franks.

7) During all times material herein, Linda Franks Garcia was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

8) During all times material herein, Linda Franks Garcia did not possess a farm labor camp indorsement to a valid farm labor camp license.

9) During all times material herein, no farm-worker camps were registered at the Bureau to Respondent.

10) During all times material herein, no farm-worker camps were registered at the Bureau to Linda Franks or Linda Garcia.

11) Between May and July 1992, Respondent did not maintain a surety bond or cash equivalent, as required to operate a farm-worker camp.

12) On December 14, 1990, Respondent and Linda Franks entered into a rental agreement with the Ray McKillop Real Estate Agency for the premises located at 1215½ S Water Street, Silverton, Oregon.

13) The premises located at 1215½ S Water Street, Woodburn, continued to be rented by Respondent and Linda Franks Garcia between May and July 1992.

14) On January 18, 1992, Respondent and Linda Franks Garcia entered into a rental agreement with the Ray McKillop Real Estate Agency for the premises located at 419 High Street, Silverton, Oregon.

15) The premises located at 419 High Street, Silverton, continued to be rented by Respondent and Linda Franks Garcia between May and July 1992.

16) The premises located at 992 Woodland Drive, Silverton, was rental property previously occupied by Linda Franks Garcia. During the period May through July 1992, the property was rented by Linda Franks Garcia and/or Respondent, but not occupied by them.

17) In April 1992, Respondent and Linda Franks Garcia came to the Bureau's Salem office to apply for a joint farm labor contractor license. Compliance Specialist Pena assisted them,

explaining the contents of the licensing packets and instructing them on the activities requiring a license to perform. Pena provided each with a farm labor contractor licensing packet. Linda Franks Garcia and Respondent told Pena that they had been talking to a farmer named "Brian," who told them that he would not deal with them unless they were licensed as contractors. Pena believes that the "Brian" mentioned by the Garcias is the same "Brian" who operates G & C Farms.

18) In mid-May 1992, Pena was driving the back roads of Clackamas County, inspecting farms where fresh produce is grown. He observed a worker hoeing in a strawberry field and stopped to talk with him. The worker told Pena that he worked directly for Boyd Yoder, but workers who came to look for work at the farm were told to contact a Hispanic man and a Caucasian woman.

19) On May 21, 1992, Pena went to The Y-4 Farm at approximately 6:30 a.m., as he knew that The Y-4 Farm was to start harvesting strawberries that day. Pena saw many people in the fields. He observed Linda Franks Garcia filling out I-9 and W-4 forms and saw Respondent assigning rows and supervising the workers.

20) On June 4, 1992, Compliance Specialist Silva received an anonymous call concerning Respondent and Linda Franks Garcia. The caller told Silva that Linda Franks Garcia was working with a Hispanic man named Javier, that Linda was recruiting workers to pick strawberries for growers; and that Respondent was renting the house at 1215½ S Water Street to approximately 24 workers.

21) On June 4, 1992, Pena and Silva went to a house located at 1215½ S Water Street, Silverton, arriving between 5 and 6 p.m. Pena observed approximately 20 workers who appeared to be living there. Pena, who is fluent in both Spanish and English, spoke with some of the workers in Spanish. The workers he spoke with told him that they lived at that location and paid their rent to Respondent in cash; that Respondent came to the house once a week to collect the rent from each resident; that they worked for Respondent, who was a contractor; that Respondent found work for them; that they were not free to work for anyone other than Respondent; that they had been working at Boyd Yoder's and at G & C Farms; that the housing was provided in connection with the work; and that there were no occupants who were not doing agricultural work. Pena observed living conditions which were overcrowded and unsanitary. Mattresses were on the floor throughout the quarters and there were three to four bags of garbage in the kitchen.

22) While at 1215½ S Water Street, Pena found no camp indorsement, notice of compliance with surety bond, or informational notice required by ORS 658.755(1)(2) posted on the premises.

23) During all times material, the farm-worker camp located at 1215½ S Water Street was not registered with the Bureau.

24) On the same date, immediately after leaving 1215½ S Water Street, Pena and Silva went to 419 High Street, Silverton. At 419 High Street they found a two-story house (in front) and a converted garage (in the rear).

Linda Franks Garcia was living in the upstairs of the house. Linda Franks Garcia and Respondent were both at the main house when Pena and Silva arrived. Pena observed approximately 20 migrant farm workers in and around the converted garage. Pena interviewed a couple of the workers in Spanish. Pena was told by the workers that they lived in the garage and paid their rent to Respondent in cash; that they worked for Respondent, who was a contractor; that Respondent found work for them and transported them; that they were not free to work for anyone other than Respondent; that they had been working at Boyd Yoder's, G & C Farms, Bob Gabriel's, and Postum Farms; and that there were no occupants who were not doing agricultural work.

Pena observed two portable chemical toilets in the yard near the garage. The large opening for garage doors had been walled off. The garage was approximately 12 feet by 20 feet in dimension. Inside the garage, Pena observed a stove, refrigerator, and shower stall on the main floor. Pena climbed a ladder to the attic; the attic was no higher than three feet at the peak. Pena observed mattresses all over the attic and talked with a couple of workers he found there.

25) While at 419 High Street, Pena found no camp indorsement, notice of compliance with surety bond, or informational notice required by ORS 658.755(1)(2) posted on the premises.

26) During all times material, the farm-worker camp located at 419 High Street was not registered with the Bureau.

27) On July 31, 1992, Pena returned to 419 High Street and took statements from five Hispanic farm workers. These workers told Pena that they worked for Respondent and Linda Franks Garcia; that they lived at 419 High Street and paid their rent to Respondent in cash; that Respondent came to the house to collect the rent from each resident; and that they had been working at Boyd Yoder's, G & C Farms, Bob Gabriel's, and Postum Farms.

28) At all times material herein, Judith Lowery lived at 1034 Woodland Drive, Silverton. A gravel easement crosses her property, which provides access to 992 Woodland Drive and one other piece of property. During times material, the only navigable road into 992 Woodland Drive was this gravel easement road. The area is heavily wooded and secluded. Commencing in late April or early May 1992, on weekdays, Lowery began to see several vans driven into the property at 922 Woodland Drive at about 5:30 a.m., leaving soon thereafter, loaded with Hispanic persons. The same vehicles would return the Hispanics each evening. It appeared to Lowery that between 25 to 40 Hispanics were being transported to and from this location. On Sundays, Lowery observed Hispanic persons on foot on the gravel easement road, carrying plastic bags containing what looked like laundry and groceries. This same pattern went on until August. Lowery knows Linda Franks Garcia. Before this particular period of time, Linda Franks Garcia had rented and resided at the combined trailer-shed located on the premises at 992 Woodland Drive.

Between April and August 1992, Lowery observed Linda's GMC truck being driven in and out of the property, usually by her brother or son. In July 1992, Lowery complained to the Bureau that a farm-worker camp was being operated at 992 Woodland Drive and that there was insufficient water and sanitary facilities to accommodate the number of persons housed there.

29) On July 14, 1992, as the result of a phone call from Judith Lowery, Field Representative Vasilie Shimanovsky went to the property described by Lowery, at the end of Woodland Drive. Shimanovsky observed a house trailer at that location and approximately 15 migrant farm workers. Shimanovsky is fluent in both Spanish and English. He interviewed some of the Hispanic farm workers in Spanish. These workers told Shimanovsky that they worked for Respondent, who is a contractor; that they were not free to work for anyone other than Respondent; that Respondent would get calls about work and then transport them to that place; that the housing is provided in connection with the work; that they pay rent to Respondent to live at this location; and that Respondent deducts their rent from their paychecks.

30) While at 992 Woodland Drive, Shimanovsky found no camp indorsement, notice of compliance with surety bond, or informational notice required by ORS 658.755(1)(2) posted on the premises.

31) During all times material, the farm-worker camp located at 992 Woodland Drive was not registered with the Bureau.

32) On August 11, 1992, Silva returned to 419 High Street in connection

with a wage claim filed against Linda Franks Garcia. When he arrived, both Respondent and Linda Franks Garcia were present, doing paperwork for a number of workers. Silva saw a large number of I-9 forms and what appeared to be application forms.

33) On September 18, 1992, City of Silverton Ordinance Officer Beebe responded to a complaint from neighbors about barking dogs at 1215½ S Water Street. At that location, Beebe observed three dogs tied to the converted shed behind the main house. A young Hispanic woman responded to Officer Beebe's knock at the door of the shed. The woman did not speak English, but was able to communicate that the others had gone to work. Through the open door, Officer Beebe observed mattresses and belongings on the floors of three or four rooms. There was no furniture in the shed. Officer Beebe talked with a tenant in the main house. The tenant told Beebe that at least 18 Hispanics lived in the shed and that they left early every day in vans and returned in the evening.

34) Payroll records from Boyd Yoder for May and June 1992 show Respondent being paid at the rate of \$10.00 per hour, commencing on May 26, 1994. Linda Franks Garcia is shown on the records at the same hourly rate. The record shows 273 employees; of these, 30 are listed at the 1215½ S Water Street address, and nine are listed at the 419 High Street address.

35) Payroll records from G & C Farms for May and June 1992 show Respondent being paid at the rate of \$10.00 per hour, commencing on May

22, 1994. The record shows 286 employees; of these, 26 are listed at the 1215½ S Water Street address, one is listed at the 419 High Street address, and one is listed at 992 Woodland Drive.

36) A comparison of social security numbers for the workers listed at 1215½ S High Street on the Yoder payroll and the G & C payroll shows that 21 of the workers appear on both lists. The names of the workers have been slightly altered.

37) The Salem-Keizer telephone directory Yellow Pages for May 1992/1993 carried a listing under the category "Farm Management Service" for "Migrant Labor Supervisor-Contract or Leasing," in Silverton, at 873-5146. This telephone number is that of Respondent and Linda Franks Garcia.

38) In the fall of 1992, Pena called 873-5146 in Silverton, posing as a worker looking for Christmas tree harvesting work. Linda Garcia answered the phone. The conversation was conducted in Spanish. Upon learning that he was looking for work, Linda Garcia called Respondent to the telephone. After several questions, Respondent told Pena when and where to show up for work.

39) The testimony of each witness was entirely 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 consistent with the answers of the other witnesses as well as the documentary evidence.

#### ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent, a natural person, employed and supplied workers to perform labor for another in Oregon in the production or harvesting of farm products. In addition, in connection with the employment of workers to labor in the production or harvesting of farm products, Respondent furnished lodging for such workers in Silverton, Oregon, at 419 High Street, 1215½ S Water Street, and 992 Woodland Drive.

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

3) During all times material herein, Respondent was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

4) During all times material herein, Respondent did not have an indorsement to a valid farm labor contractor license to operate a farm labor camp.

5) Between May 28 and June 29, 1992, Respondent employed and supplied workers to G & C Farms for the harvesting of farm products

6) Between May 28 and June 29, 1992, while acting as a farm labor contractor by employing and supplying workers to G & C Farms, Respondent failed to carry a farm labor contractor license.

7) Prior to supplying workers to begin the harvesting work on G & C

Farms, Respondent failed to display or provide a copy of a farm labor contractor license to the person to whom the workers were to be provided.

8) Between May and July 1992, Respondent operated a farm-worker camp at 419 High Street, Silverton, Oregon.

9) Between May and July 1992, Respondent operated a farm-worker camp at 1215½ S Water Street, Silverton, Oregon.

10) Between May and July 1992, Respondent operated a farm-worker camp at 992 Woodland Drive, Silverton, Oregon.

11) Between May and July 1992, Respondent operated the three farm-worker camps described in Ultimate Findings of Fact 8, 9, and 10, without the required farm labor license and camp indorsement.

12) Between May and July 1992, Respondent's three farm-worker camps, described in Ultimate Findings of Fact 8, 9, and 10, were not registered by Respondent with the Bureau.

13) Between May and July 1992, while operating three farm-worker camps described in Ultimate Findings of Fact 8, 9, and 10, Respondent failed to continually maintain a surety bond, cash deposit, or cash equivalent in the amount of \$15,000.

14) Between May and July 1992, while operating three farm-worker camps described in Ultimate Findings of Fact 8, 9, and 10, Respondent failed to post, at each camp, a farm labor

\* The address of the farm-worker camp at the end of Woodland Drive was variously identified by witnesses as 992 Woodland Drive and 922 Woodland Drive. The witnesses' description of the location and physical features of the camp convince the Forum that both addresses refer to the same camp.

contractor indorsement to operate a camp.

15) Between May and July 1992, while operating three farm-worker camps described in Ultimate Findings of Fact 8, 9, and 10, Respondent failed to post at each camp a notice of compliance with the statutory surety bond, or cash equivalent, requirements.

16) Between May and July 1992, while operating three farm-worker camps described in Ultimate Findings of Fact 8, 9, and 10, in Silverton, Oregon, Respondent failed to post at each camp an informational notice required by ORS 658.755(1)(2).

17) At all times material herein, Linda Franks Garcia was not licensed as a farm labor contractor in Oregon, did not possess an indorsement to operate farm-worker camps in Oregon, and had not registered any farm-worker camps in Oregon.

18) Between May and July 1992, while operating three farm-worker camps in Silverton, Oregon, Respondent assisted Linda Franks Garcia, a person not entitled to operate a farm-worker camp, to violate ORS 658.705 to 658.850.

#### CONCLUSIONS OF LAW

1) ORS 658.405 provides, in part:

"As used in ORS 658.405 to 658.485 and 658.830 and 658.991(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in \*\*\* the production or harvesting of farm

products; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities; or who, in connection with the recruitment or employment of workers to work in these activities, furnishes board or lodging for such workers \*\*\*"

OAR 839-15-004 provides, in part:

"As used in these rules, unless the context requires otherwise:

\*\*\*

"(4) 'Farm Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the production or harvesting of farm products; or

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the production or harvesting of farm products; or

"(c) Any person who furnishes board or lodging for workers in connection with the recruiting, soliciting, supplying or employing of workers to be engaged in the production or harvesting of farm products; \*\*\*

"(8) 'Production and harvesting of farm products' includes, but is not limited to, the cultivation and tillage of the soil, the production, cultivation, growing and harvesting of any agricultural commodity and the preparation for and delivery to market of any such commodity.

\*\*\*

"(15) 'Worker' means any individual performing labor \*\*\* in the production and harvesting of farm products. A 'worker' includes, but is not limited to employees and members of a cooperative corporation."

During May and June 1992, Respondent was acting as a farm labor contractor.

2) ORS 648.405 to 658.485 provides that the Commissioner of the Bureau of Labor and Industries of the State of Oregon shall administer and enforce those sections. The Commissioner has jurisdiction over the Respondent and the subject matter herein.

3) 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."

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 658.485."

Respondent violated ORS 658.410(1) and 658.415(1) by acting, as described in Ultimate Findings of Fact 1, 5, and 6, as a farm labor contractor without a license.

4) ORS 658.440(1) provides, in part:

"Each person acting as a farm labor contractor shall:

"(a) Carry a labor contractor's license at all times and exhibit it upon request to any person with whom the contractor intends to deal in the capacity of a farm labor contractor."

Respondent violated ORS 658.440 (1)(a) by failing to carry a farm labor contractor's license while acting as a farm labor contractor between May 28 and June 29, 1992, in connection with employing and supplying workers for the harvesting of farm products at G & C Farms.

5) ORS 658.437 provides, in part:

"(1) Prior to beginning work on any contract or other agreement the farm labor contractor shall:

"(a) Display the license or temporary permit to the person to whom workers are to be provided, or the person's agent; and

"(b) Provide the person to whom workers are to be provided, or the person's agent with a copy of the license or temporary permit."

Before supplying workers to begin work for G & C Farms, Respondent did not display or provide a copy of a farm labor contractor license to the person to whom workers were to be provided, in violation of ORS 658.437.

6) ORS 658.715(1) provides, in part:

"No person shall operate a farm-worker camp unless:

"(a) The person is a farm labor contractor licensed under ORS 658.405 to 658.503 and 658.830, and the contractor first obtains an indorsement to do so as provided in ORS 658.730 \*\*\*."

ORS 658.705 provides, in part:

\*\*\*

"(7) 'Farm-worker camp' means any place or area of land where sleeping places, manufactured structures or other housing is provided by a farmer, farm labor contractor, employer or any other person in connection with the recruitment or employment of workers to work in the production and harvesting of farm crops \* \* \*. 'Farm-worker camp' does not include:

"(a) A single, isolated dwelling occupied solely by members of the same family, or by five or fewer unrelated individuals \* \* \*"

Respondent violated ORS 658.715 (1)(a) three times by operating three farm-worker labor camps in Silverton, Oregon, between May and July 1992, without being licensed as a farm labor contractor and without having obtained an indorsement to operate a farm labor camp.

7) ORS 658.730 provides, in part:

"(1) In accordance with the applicable provisions of ORS 183.310 to 183.550, the commissioner, by rule, shall establish an indorsement system for any farm labor contractor who operates a farm-worker camp. \* \* \*

"(2) the indorsement shall be posted conspicuously in an exterior area of the camp that is open to all employees and in a manner easily visible to the occupants of and visitors to the camp."

Respondent violated ORS 658.730(2) three times by failing to post an indorsement to operate a farm-worker

camp at each of the three farm-worker camps operated by him in Silverton, Oregon, between May and July 1992.

8) ORS 658.735 provides, in part:

"(1) Each applicant [ for a farm labor camp operator indorsement ] shall submit with the application and shall continually maintain thereafter a bond approved by the commissioner. The amount of the bond and the security behind the bond shall be \$15,000. This bond shall satisfy the bond required by ORS 658.415. \* \* \*

\*\*\*

"(8) Every indorsee required by this section to furnish a surety bond, or make a deposit in lieu thereof, shall keep conspicuously posted in \* \* \* the camp \* \* \* a notice \* \* \* specifying the indorsee's compliance with the requirements of this section and specifying the name and Oregon address of the surety on the bond or a notice that a deposit in lieu of the bond has been made with the commissioner, together with the address of the commissioner."

Respondent violated ORS 658.735(1) by failing to continually maintain a surety bond, or cash equivalent, for the operation of farm-worker camps between May and July 1992.

9) Respondent violated ORS 658.735(8) three times by failing to post a notice of compliance with the bond requirement in each of the three camps operated by him in Silverton, Oregon, between May and July 1992.

10) ORS 658.750(1) provides, in part:

"Every farm-worker camp operator shall register with the Bureau each farm-worker camp operated by the operator."

ORS 658.755(3) provides, in part:

"No farm-worker camp operator shall:

"(a) Operate a camp which is not registered with the bureau as required by ORS 658.750."

ORS 658.705(8) provides:

"'Farm-worker camp operator' means any person who operates a farm-worker camp."

OAR 839-14-035(8) provides:

"'Farm-worker camp operator' means any person who operates a farm worker camp. In determining who is a farm worker camp operator, the Bureau will consider the farm worker camp operator to be the person who, as a practical matter, exercises the ultimate right to determine terms and conditions of occupancy of the camp and who controls its maintenance and operation."

Between May and July 1992, Respondent operated three farm-worker camps in Silverton, Oregon, which he had not registered with the Bureau. In so doing, Respondent violated ORS 658.750(1) three times.

11) ORS 658.755 provides, in part:

"(1) Every farm-worker camp operator shall:

\*\*\*

"(g) Post an informational notice, on a form provided by the bureau set forth in subsection (2) of this section, in an area of the farm-

worker camp frequented by occupants.

"(2) The notice provided by the bureau under paragraph (g) of subsection (1) of this section shall be published in English and in the language used to communicate with the occupants of the farm-worker camp and shall contain the following information:

"(a) The name and address of the operator.

"(b) The address and phone number of the bureau as specified by the commissioner.

"(c) A statement that inquiries regarding the terms and conditions of occupancy may be made to the bureau.

"(d) A statement that the farm-worker camp is registered with the bureau.

"(e) The address and phone number of the division as specified by the division.

"(f) A statement that inquiries regarding health and sanitation matters may be made to the division at the address or phone number listed."

Respondent violated ORS 658.755(1) and (2) three times by failing to post an informational notice at each of the three farm-worker camps operated by him in Silverton, Oregon, between May and July 1992.

12) ORS 658.755(3) provides, in part:

"No farm-worker camp operator shall:

\*\*\*

"(e) Assist a person who is not entitled to operate a farm-worker camp under ORS 658.705 to 658.850 to act in violation of ORS 658.705 to 658.850 or in violation of ORS 658.405 to 658.503 and 658.830 \* \* \*"

Between May and July 1992, in violation of ORS 658.755(3), Respondent, while acting as a farm-worker camp operator, assisted Linda Garcia, a person not entitled to operate a farm-worker camp, to act in violation of ORS 658.705 to 658.850.

13) ORS 658.453(1) provides, in part

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.503 and 658.830, recruits, solicits, supplies or employs a worker.

\* \* \*

"(c) A farm labor contractor who fails to comply with ORS 658.440(1) \* \* \*"

OAR 839-15-505 provides, in part:

"(2) 'Violation' means a transgression of any statute or rule, or any part thereof and includes both acts and omissions."

OAR 839-15-508 provides, in part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

"(a) Acting as a farm or forest labor contractor without a license in violation of ORS 658.410;

\* \* \*

"(s) Failing to carry the license in violation of ORS 658.440(1)(a)."

OAR 839-15-510 provides:

"(1) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the Commissioner finds to be appropriate:

"(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude and seriousness of the violation;

"(d) Whether the contractor or other person knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor or other person to provide the Commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

"(3) In arriving at the actual amount of the civil penalty, the Commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or other person in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the

Commissioner shall consider all mitigating circumstances presented by the contractor or other person for the purpose of reducing the amount of the civil penalty to be imposed."

OAR 839-15-512 provides, in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) Repeated violations of the statutes for which a civil penalty may be imposed are considered to be of such magnitude and seriousness that a minimum of \$500 for each repeated violation will be imposed when the Commissioner determines to impose a civil penalty.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm or forest labor contractor without a valid license, the minimum civil penalty shall be as follows:

"(a) \$500 for the first offense;

"(b) \$1,000 for the second offense;

"(c) \$2,000 for the third and each subsequent offense."

ORS 658.850(1) provides:

"In addition to any other penalty provided by law, the commissioner may assess a civil penalty not to exceed \$2,000 for each violation of any provision of ORS 658.715 to 658.850."

OAR 839-14-420 provides, in part:

"Pursuant to ORS 658.850, the Commissioner may impose a civil penalty for any of the following violations:

"(1) Operating a farm worker camp without first having obtained a farm labor contractor's license in violation of ORS 658.715;

"(2) Operating a farm worker camp without first having obtained an indorsement to do so in violation of ORS 658.715;

"(3) Failing to post the indorsement in violation of ORS 658.730(2);

"(4) Failing to continually maintain a bond and security behind the bond in violation of ORS 658.735;

"(5) Failing to post a notice of compliance with ORS 658.735, in violation of ORS 658.735(8);

"(6) Failing to register each farm worker camp operated by the farm worker camp operator in violation of ORS 658.750;

"(7) Failing to comply with the following provisions of ORS 658.755(1), as follows:

"(a) ORS 658.405 to 658.485, if required; or

\* \* \*

"(g) Post an informational notice as required by ORS 658.755(1)(g).

\* \* \*

"(13) Assisting a person who is not entitled to operate a farm worker camp under ORS 658.705 to 658.850 to act in violation of any of the following statutes, in violation of ORS 658.755(3)(e):

"(a) ORS 658.705 to 658.850,  
or

"(b) ORS 658.405 to 658.485  
\* \* \*

OAR 839-14-430 provides, in part:

"(1) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the Commissioner finds to be appropriate:

"(a) The history of the farm worker camp operator or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude and seriousness of the violation;

"(d) Whether the farm worker camp operator or other person knew or should have known of the violation.

"(2) It shall be the responsibility of the farm worker camp operator or other person to provide the Commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed."

OAR 839-14-440 provides, in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating or aggravating circumstances.

"(2) Repeated violations of the statutes for which a civil penalty may be imposed are considered to be of such magnitude and

seriousness that a minimum of \$500 for each repeated violation will be imposed when the Commissioner determines to impose a civil penalty.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm worker camp operator without a valid license indorsement or a farm worker camp is being operated without a valid registration certificate, the minimum civil penalty shall be as follows:

"(a) \$500 for the first offense;

"(b) \$1,000 for the second offense;

"(c) \$2,000 for the third and subsequent offense."

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 Respondents. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

#### OPINION

##### 1. Default

Respondent failed to appear at the hearing and thus defaulted to the charges set forth in the Notice of Intent to Assess Civil Penalties. Respondent's only contribution to the record was his 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, 145 (1990), *In*

*the Matter of Michael Burke*, 5 BOLI 47, 52 (1985); see also OAR 839-30-185.

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*.

The Agency has established a prima facie case. The credible evidence on the whole record established that at times material, Respondent employed or supplied workers to harvest farm products on behalf of G & C Farms; that Respondent failed to carry or display a farm labor contractor license while acting as a farm labor contractor in connection with G & C Farms; that Respondent operated three farm-worker camps without having first obtained a farm labor contractor license or an indorsement to operate farm-worker camps; that Respondent failed to register the three farm-worker camps he operated; that Respondent failed to continually maintain a bond approved by the Commissioner; that Respondent failed to post, in any of his three farm-worker camps, an indorsement to operate a farm-worker camp, a notice of bond, or an

informational notice required by ORS 658.755; and that Respondent, while acting as a farm-worker camp operator, assisted Linda Franks Garcia, a person not entitled to operate a farm-worker camp, to act in violation of ORS 658.705 to 658.750.

The evidence establishing the above violations was credible, persuasive, and the best evidence available, given the failure of Respondent to appear at the hearing. Having considered all the evidence on the record, the Forum finds that the prima facie case has not been contradicted or overcome.

##### 2. Acting as a Farm Labor Contractor Without a License

A person acts as a farm labor contractor if the person "recruits, solicits, supplies or employs" a worker for the purpose of producing or harvesting farm products or if that person furnishes lodging for such workers. The record herein clearly demonstrates that Respondent hired workers and supplied them to G & C Farms to harvest strawberries between May 28 and June 29, 1992, as alleged. The workers interviewed at 1215½ S Water Street, 419 High Street, and 992 Woodland Drive, Silverton, all stated unequivocally that they worked for Respondent and that he was a contractor who found them work, transported them, and housed them. Respondent directly deducted the rent for the workers housed at 992 Woodland Drive from wages, further evidence of his status as their employer. Further, the payroll records of both Boyd Yoder and G & C Farms confirm that Respondent was supplying workers to more than one farmer, defeating the

assertion in Respondent's answer that he was exclusively a supervisory employee of G & C Farms and, therefore, exempt from the licensing requirement.

Respondent was not licensed as farm labor contractor between May 28 and June 29, 1992. By engaging in activities which by statutory definition were those of a farm labor contractor, Respondent violated ORS 658.410(1) and 658.415(1), subjecting him to civil penalties.

### 3. Failure to Carry License

Because Respondent was not licensed as a farm labor contractor between May 28 and June 29, 1992, he could not have carried a license when he employed and supplied workers to harvest strawberries for G & C Farms during that time period. In consequence, Respondent violated ORS 658.440(1)(a).

### 4. Failure to Display License

Because Respondent was not licensed as a farm labor contractor, he could not have displayed his license or provided a copy of his license to an agent of G & C Farms before supplying the workers or commencing the harvest. Respondent violated ORS 658.437, but is not subject to civil penalties for that violation. *In the Matter of Clara Rodriguez*, 12 BOLI 153, 174-75, 178 (1994).

### 5. Operation of Farm-Worker Camp Without License or Indorsement

The credible evidence on the record establishes that between May and July 1992, Respondent was not licensed as a farm labor contractor and did not have a farm-worker camp indorsement issued by the Bureau. Two issues remain: (1) whether the

facilities at 1215½ S Water Street, 419 High Street, and 992 Woodland Drive, Silverton, were farm-worker camps; and (2) whether the facilities at these locations, if farm-worker camps, were operated by Respondent.

In pertinent part, ORS 658.705(7) defines a "farm-worker camp" as any place where housing is provided by a farm labor contractor in connection with the recruitment or employment of workers to harvest farm products. Agency employees Pena, Shimanovsky, and Silva conducted inspections of the three Silverton facilities, 1215½ S Water Street, 419 High Street, and 992 Woodland Drive. At each location, 15 to 20 unrelated farm workers were living on the premises. Workers were interviewed at each of these locations. The workers stated that they worked for Respondent, a contractor who found the work for them; that the housing was provided in connection with their employment; that they were not free to work for anyone other than Respondent; that Respondent collected the rent from them; that they had all worked at the same locations, the locations Respondent took them to; and that Respondent operated the facilities and collected the rent. Payroll records from G & C Farms and Boyd Yoder establish that a large number of workers on those jobs resided in these camps. Unquestionably, the three Silverton facilities, 1215½ S Water Street, 419 High Street, and 992 Woodland Drive, were farm-worker camps.

The workers at all three locations identified Respondent as the person who operated the camps. Rent was paid to Respondent. Respondent

controlled who could reside at the camp by prohibiting anyone other than people who worked only for him. Some occupants identified Respondent as the renter or lessor of the property. Rental agreements with the owners of 419 High Street and 1215½ S Water Street were made by Respondent and Linda Franks Garcia. As a practical matter, Respondent and Linda Franks Garcia, as joint tenants, had and exercised the ultimate right to determine terms and conditions of occupancy of the camp, its maintenance, and operation. The credible evidence on the whole record demonstrates that Respondent was the primary operator of the farm-worker camps located at 1215½ S Water Street, 419 High Street, and 992 Woodland Drive.

### 6. Failure to Register Farm-Worker Camps

The credible evidence on the entire record establishes that the farm-worker camps located at 1215½ S Water Street, 419 High Street, and 992 Woodland Drive, Silverton, were not registered by Respondent with the Bureau.

### 7. Failure to Maintain Bond

The uncontroverted, credible evidence on the record demonstrates that Respondent was not licensed as a farm-worker camp operator and did not post a notice of compliance with the bond requirement at each camp. No proof of compliance with the bonding requirement has been filed with, or presented to, the Bureau. It can be inferred from these circumstances that Respondent did not obtain or maintain a surety bond to operate farm-worker camps.

### 8. Failure to Post Indorsement to Operate Camp

Credible evidence on the entire record establishes that Agency employees Pena and Shimanovsky inspected the camps located at 1215½ S Water Street, 419 High Street, and 992 Woodland Drive, Silverton, and that they searched for, but did not find, a camp indorsement posted at any of the three camps.

### 9. Failure to Post Notice of Bond

Credible evidence on the entire record establishes that Agency employees Pena and Shimanovsky inspected each of the camps located at 1215½ S Water Street, 419 High Street, and 992 Woodland Drive, Silverton, and that they searched for, but did not find, a notice of compliance with the bond requirement posted at any of the three camps.

### 10. Failure to Post Informational Notice

Credible evidence on the entire record establishes that Agency employees Pena and Shimanovsky inspected the camps located at 1215½ S Water Street, 419 High Street, and 992 Woodland Drive, Silverton, and that they searched for, but did not find, an informational notice required by ORS 658.755(1) and (2) posted at any of the three camps.

### 11. Assisting Person Not Entitled to Operate Farm-Worker Camps

The uncontroverted evidence establishes that Respondent and Linda Franks Garcia worked together to conduct a business to supply farm workers to labor for local farmers in the production and harvesting of farm products and in providing lodging to workers in

furtherance of that business. The lodging provided by Respondent and Linda Franks Garcia to workers, at 1215 ½ S Water Street, 419 High Street, and 992 Woodland Drive, Silverton, were farm-worker camps, as defined by ORS 658.705(7). Linda Franks Garcia and Respondent were the joint renters of these premises and exercised the ultimate right to determine terms and conditions of occupancy of the camp, its maintenance, and operation. Respondent collected the rent from the occupants. Respondent, by his status as joint renter and operator of the camps, and by his activities as the apparent manager of the camps, assisted Linda Franks Garcia, a person not entitled to operate farm-worker camps, to violate ORS 658.705 to 658.850, by assisting her to operate three farm-worker camps without a license or indorsement to do so.

## 12. Civil Penalties

The Agency proposed to assess civil penalties for (1) Respondent's acting as a farm labor contractor without a license, in violation of ORS 658.410 and 658.415; (2) Respondent's failure to carry or display a farm labor contractor license while acting as a farm labor contractor in connection with G & C Farms; (3) Respondent's operation of three farm-worker camps without having first obtained a farm labor contractor license and a camp indorsement; (4) Respondent's failure to register the three farm-worker camps he operated; (5) Respondent's failure to continually maintain a bond approved by the commissioner; (6) Respondent's failure to post, in any of his three farm-worker camps, an indorsement to operate a

farm-worker camp; (7) Respondent's failure to post, in any of his three farm-worker camps, a notice of bond; (8) Respondent's failure to post, in any of his three farm-worker camps, an informational notice required by ORS 658.755; and (9) Respondent's assistance of Linda Franks Garcia, a person not entitled to operate a farm-worker camp, to act in violation of ORS 658.705 to 658.850, as prohibited by ORS 658.755(3).

The Commissioner may assess a civil penalty not to exceed \$2,000 for each of these violations, save the violation of ORS 658.437, for which no civil penalty is authorized.\* ORS 658.453(1)(a), (c); OAR 839-15-508(1)(a), (s); ORS 658.850(1); OAR 839-14-420(1), (2), (3), (4), (5), (6), (7)(a), (g), and (13)(a). The Commissioner may consider mitigating and aggravating circumstances when determining the amount of any penalty to be imposed. OAR 839-15-510(1); OAR 839-14-430(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. No aggravating circumstances were alleged by the Agency.

Respondent acted as a farm labor contractor without a license when he employed and supplied workers to labor for another, G & C Farms, in the harvesting of farm products. While the evidence supports additional violations of the licensure provisions by Respondent, they were not alleged. Pursuant to OAR 839-15-512(3), the minimum penalty for the first offense is \$500. Accordingly, the Forum assesses civil

penalties of \$500 for this violation, as requested by the Agency.

Respondent failed to carry a license while employing and providing workers to pick strawberries for G & C Farms. No aggravating circumstances were alleged. The Agency requested and the Forum hereby assesses a first offense \$500 civil penalty for the violation. *Cf. In the Matter of Boyd Yoder*, 12 BOLI 223, 231-32 (1994) (assessing a first offense \$500 civil penalty for the failure of the recipient of farm labor contractor services to inspect the license of the contractor before work commenced).

Respondent operated three farm-worker camps without having first obtained a contractor license and farm-worker camp indorsement, in violation of ORS 658.715(1). Pursuant to OAR 839-14-440(3), the minimum penalty "shall" be \$500 for the first offense, \$1,000 for the second offense, and \$2,000 for the third offense. Accordingly, the Forum assesses civil penalties of \$3,500 for these three violations.

Respondent failed to post a farm labor camp indorsement at each of the three camps he operated. No aggravated factors were alleged. The Forum hereby assesses \$500 for each violation, a total of \$1,500 in civil penalties for these three violations.

Respondent failed to maintain a surety bond for the operation of farm labor camps. The Forum finds that one violation has been committed and that violation is aggravated by the magnitude and seriousness of the violation, given the potential liability posed by the operation of multiple camps. Accordingly, the Forum assesses a \$2,000 civil penalty for this violation.

Respondent failed to post a notice of compliance with the bonding requirement at each of the three camps he operated. No aggravated circumstances were alleged. The Forum hereby assesses \$500 for each violation, a total of \$1,500 in civil penalties for these three violations.

Respondent failed to register with the Bureau the three farm-worker camps he operated. Pursuant to OAR 839-14-440(3), the minimum penalty "shall" be \$500 for the first offense, \$1,000 for the second offense, and \$2,000 for the third offense. No aggravated circumstances were alleged. Accordingly, the Forum assesses civil penalties of \$3,500 for these three violations.

Respondent failed to post the informational notice required by ORS 658.755(1) and (2) at each of the three camps he operated. No aggravated circumstances were alleged. The Forum hereby assesses \$500 for each violation, a total of \$1,500 in civil penalties for these three violations.

Finally, Respondent assisted a person not entitled to operate a farm-worker camp to do so, in violation of ORS 658.705 to 658.850. The Forum finds that the violations were aggravated by their repetition and their seriousness. The Forum hereby assesses \$500 for the first offense, \$1,000 for the second offense, and \$2,000 for the third offense, as requested.

## ORDER

NOW, THEREFORE, as authorized by ORS 658.453 and 658.850, Javier Garcia is hereby ordered to deliver to the Bureau of Labor and

\* See Part 4 of this Opinion, above.

Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of EIGHTEEN THOUSAND DOLLARS (\$18,000), plus any interest thereon, which accrues at the annual rate of nine percent, between a date 10 days after the issuance of this Order and the date Respondent complies with this Order. This assessment is the sum of the following civil penalties against Respondent:

As penalty for one violation of ORS 658.410(1) and 658.415(1), \$500.

As penalty for one violation of ORS 658.440(1)(a), \$500.

As penalty for three violations of ORS 658.715(1)(a), \$3,500.

As penalty for three violations of ORS 658.730(2), \$1,500.

As penalty for one violation of ORS 658.735(1), \$2,000.

As penalty for three violations of ORS 658.735(8), \$1,500.

As penalty for three violations of ORS 658.750(1), \$3,500.

As penalty for three violations of ORS 658.755(1) and (2), \$1,500.

As penalty for three violations of ORS 658.755(3)(e), \$3,500.

**In the Matter of  
Al Weaver, dba  
U.S. TELECOM INTERNATIONAL,  
Respondent.**

Case Number 77-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued September 1, 1994.

**SYNOPSIS**

Respondent willfully failed to pay Claimant all wages due upon termination, in violation of ORS 653.025(3) (minimum wages) and ORS 652.140(2), and failed to prove that he was financially unable to pay the wages at the time they accrued. The Commissioner ordered Respondent to pay wages owed plus civil penalty wages, pursuant to ORS 652.150, ORS 652.140(2), 652.150, 653.025(3), and 653.055(1), (2).

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, 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 2, 1994, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Gratiela Soare (Claimant) was present throughout the hearing. Al Weaver (Respondent) was present throughout the hearing and was represented by Brice Smith, Attorney at Law.

The Agency called the following witnesses (in alphabetical order): Lora Lee Grabe, Compliance Specialist, Bureau of Labor and Industries; and Gratiela Soare, Claimant. Respondent called himself as his only 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 August 30, 1993, Claimant filed a wage claim with the Agency. She alleged that she had been employed by Respondent and that Respondent had failed to pay wages earned and due to her.

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

3) On February 16, 1994, 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 \$173.38 in wages and \$400.20 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 March 14, 1994, Respondent, through his attorney, filed an

answer to the Order of Determination. Respondent's answer also contained a request for a contested case hearing in this matter. Respondent's answer denied that Claimant was the employee of Respondent, that Respondent owed Claimant \$173.38 in unpaid wages, and further set forth the affirmative defense that Respondent was financially unable to pay such wages.

5) On June 8, 1994, 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 Claimant 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 839-50-000 to 839-50-420.

6) On July 6, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by July 25, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency and Respondent each submitted a timely summary.

7) At the start of the hearing, Respondent's attorney stated he had reviewed the "Notice of Contested Case

Rights and Procedures" and had no questions about it.

8) 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.

9) Respondent and the Agency stipulated to certain facts, which were admitted into the record by the Hearings Referee during the course of the hearing.

10) The Proposed Order, which included an Exceptions Notice, was issued on August 10, 1994. Exceptions were required to be filed by August 22, 1994. No exceptions were received by the Hearings Unit.

#### FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Respondent, a person, did business as U.S. Telecom International, selling pay phones in and around Portland, Oregon. He utilized the personal services of one or more persons in the State of Oregon.

2) In December 1992, Claimant was looking for work and responded to an advertisement in The Oregonian, placed by Respondent. The advertisement contained the following text:

"SALES/ Phone/\$100 Commission.  
Your phone. 665-5831"

3) In December 1992, Respondent hired Claimant as a telemarketer, to contact sales prospects to arrange an appointment for a salesperson to make a sales presentation.

4) At the time of hire, Claimant was 15 years old; Claimant revealed her age to Respondent during their initial phone conversation.

5) At the time of hire, Respondent and Claimant entered into an oral agreement that Claimant would perform work for \$100 commission per appointment that resulted in the sale, by Respondent, of a pay phone. Claimant had no ownership interest or expectation of sharing in the profits of the business. Claimant was hired for an indefinite period. She derived no benefits other than her anticipated wages from her work for Respondent. There was no agreement about the number of hours or days per week Claimant was required to work, or whether Claimant was able to work for others while employed by Respondent.

6) Claimant's duties included calling commercial establishments by telephone, giving a pre-set presentation designed to elicit interest in locating pay phones on the premises, scheduling appointments for Respondent to make sales presentations, and relaying the appointments to Respondent.

7) Claimant worked out of her home, utilizing her own telephone to place the calls to prospective businesses. Respondent furnished the pre-set presentation, a list of the types of businesses to call, and "lead" forms to record the pertinent information about a prospective customer.

8) Respondent instructed Claimant to follow the pre-set presentation, modifying it only to the extent that it would not sound as if she was reading

it. Claimant was not at liberty to go outside the scope of the presentation in her contact with each business prospect. Respondent provided Claimant with a list of the types of businesses to call; he recommended that she contact the restaurants first. Respondent advised Claimant to call the prospects during regular business hours, but to avoid making calls during the lunch hour. Respondent instructed Claimant on the use of the "lead" form, and required that she fill it out and call him with appointment information.

9) From on or about December 29, 1992, to on or about March 6, 1993, Claimant performed services as a telemarketer for Respondent.

10) Claimant quit without notice on March 6, 1993.

11) Respondent kept no time record for Claimant.

12) Claimant's records, which are accepted as fact, reveal that during the period between December 29, 1992, and March 6, 1993, she worked 36.5 total hours in 13 days.

13) At times material, the minimum wage in Oregon was \$4.75 per hour, pursuant to ORS 653.025(3).

14) To date, Respondent has not paid Claimant any compensation for her work during the period of her claim.

15) Civil penalty wages were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: \$173.38 (the total wages earned) divided by 13 (the number of days worked during the claim period) equals \$13.34 (the average daily rate of pay). This figure of \$13.34 is multiplied by 30 (the number of days for which civil

penalty wages continued to accrue) for a total of \$400, when rounded to the nearest dollar. This figure varies slightly from that set forth in the Order of Determination.

16) At all times material, Respondent's registered business address was 17838 SE Washington, Portland, Oregon 97233. His business phone number was 665-5831. This address and telephone number were those of the residence of Respondent's wife. Respondent and his wife are separated, but not divorced.

17) Respondent commenced selling pay phones for Cherry Communications in 1991 and was so engaged for one and one-half years.

18) At times material herein, Respondent received \$343 per month in Social Security benefits, and \$44.60 per month in Supplemental Security Income (SSI) payments. The total of these benefits was \$387.60 per month.

19) At times material, Respondent was renting a room in an apartment for \$150 per month, and had no expenses other than this rent and food.

20) Other than the documentation of the amount of social security benefits received, Respondent did not produce specific information about his financial resources and his business and personal requirements during the wage claim period. He submitted no income tax records, no deed or other official document showing legal ownership of the residence at 17838 SE Washington, Portland, Oregon 97233, and no records documenting his rent payments.

21) The Hearings Referee carefully observed the demeanor of each

\* Pursuant to ORS 653.010(11), "wages" means compensation due to an employee by reason of employment.

witness. The testimony of Claimant was credible. She had the facts readily at her command and her statements were supported by documentary records. There is no reason to determine the testimony of the Claimant to be anything except reliable and credible.

22) Respondent's testimony was not credible. His demeanor was volatile and vociferous; he was repeatedly admonished and restrained by his attorney. His testimony was often evasive and inconsistent. For example, he testified that his employment as an agent for a company other than his own was a subject that never came up in conversations with his telemarketers. However, he later testified that he told his telemarketers that he worked as an agent for Cherry Communications at the time of their hire, and that he would have to be paid by Cherry Communications before he could pay them. In addition, his testimony regarding his business location fluctuated. He twice testified that he conducted his business from his apartment. Another time he testified that the residence at 17838 SE Washington, Portland, was his principal place of business. Yet another time he testified that the residence at 17838 SE Washington, Portland, was just his principal mailing address. He was vague and evasive when questioned about the role of the telemarketers in the sales scheme, insisting that they were salespersons. He displayed contempt for the proceedings and the Agency's witnesses. For the above reasons, his testimony was untrustworthy and was given little weight whenever it conflicted with credible evidence on the record.

In some cases, his testimony was not believed even when it was not controverted by other evidence.

#### ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person doing business as U.S. Telecom International in the State of Oregon, and engaged the personal services of one or more persons in the operation of that business.

2) During the period December 29, 1992, to March 6, 1993, Claimant was not a coowner or copartner of Respondent. She had no ownership interest in the business, and no right to share in the profits of the business of Respondent.

3) During the period of the wage claim, Claimant was not an independent contractor. Claimant was hired for an indefinite period. Respondent furnished all the equipment and supplies Claimant used on the job, except the telephone, which was located at Claimant's home. Respondent detailed and controlled how Claimant was to perform her duties. Claimant derived no benefits other than her anticipated wages from her work for Respondent.

4) Between December 29, 1992, and March 6, 1993, Respondent suffered or permitted Claimant to render personal services to him wholly in this state.

5) The state minimum wage during 1992 and 1993 was \$4.75 per hour.

6) During the period December 29, 1992, to March 6, 1993, Claimant earned \$173.38. Respondent owes Claimant \$173.38 in earned and unpaid compensation.

7) Claimant quit employment with Respondent without notice on March 6, 1994.

8) Respondent willfully failed to pay Claimant all wages within five days, excluding Saturdays, Sundays and holidays, after she quit, and more than 30 days have elapsed from the date her wages were due.

9) Respondent failed to prove an affirmative defense of financial inability to pay the wages due at the time they accrued.

10) During the period December 29, 1992, to March 6, 1993, Claimant worked 13 days. Claimant's average daily rate for this period of employment was \$13.34 (\$173.38 earned divided by 13 days equals \$13.34 average rate per day). Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$400, when rounded to the nearest dollar (Claimant's average daily rate, \$13.34, continuing for 30 days).

#### CONCLUSIONS OF LAW

1) 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.

2) Prior to the commencement of the contested case hearing, the Forum informed 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.

3) ORS 68.110(1) provides:

"A partnership is an association of two or more persons to carry on as coowners a business for profit."

Claimant was not a coowner or copartner with Respondent in the business of U.S. Telecom International.

4) ORS 653.010 provides in part:

"\* \* \*

"(3) 'Employ' includes to suffer or permit to work; \* \* \*"

"(4) 'Employer' means any person who employs another person \* \* \*"

ORS 652.310 provides in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees \* \* \*"

"(2) 'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

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, 652.310 to 652.405, and 653.010 to 653.261.

5) ORS 653.025 requires that:

"\* \* \* for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

"\* \* \*"

"(3) For calendar years after December 31, 1990, \$4.75."

Respondent failed to pay Claimant the minimum wage rate of \$4.75 for each hour of work time.

6) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant quit employment without notice.

7) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, 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 from the due date; 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.

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 her earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

#### OPINION

##### Claimant Worked As An Employee

Respondent contended in his answer that Claimant was not an employee, but was hired as an independent contractor. Oregon statutory law does not define "independent contractor" for purposes of wage claim law. This Forum has previously followed Oregon case law to ascertain the distinction between an employee and an independent contractor. See *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264, 274-78 (1982), and the Oregon cases cited therein. Oregon case law holds that the primary question 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. It focuses on control over the

manner and means of accomplishing a result rather than the result itself, that is, control over how work will be done rather than just what work will be done. If answering the question above establishes that the worker is the subordinate party, depending on the employer's business, the worker is an employee rather than an independent contractor.

In this case, the preponderance of the credible evidence on the record establishes that Respondent had the right to control and direct the details and methods of Claimant's work. Claimant provided services that were an integral part of Respondent's business, was hired for an indefinite period of time, worked exclusively for Respondent on a commission basis, used only Respondent's supplies, and derived no benefits other than the expected wages for her work. This evidence establishes that Claimant was an employee of Respondent.

Having considered all the evidence on the record, the Forum finds that Claimant was not an independent contractor. Respondent's control over the scope and method of Claimant's presentation for the solicitation of sales appointments, and over the making and communication of those appointments, on behalf of Respondent's business, was clearly established.

"Employee" means any individual who otherwise than as a co-partner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who

pays or agrees to pay such individual at a fixed rate \* \* \*." ORS 652.310(2).

On the basis of that definition of "employee," the Forum finds that Claimant worked as an employee between December 29, 1992, and March 6, 1993, not as a copartner or independent contractor.

This Forum has previously found that, for purposes of the definition of "employee" in ORS 652.310(2), an "employer who pays or agrees to pay an individual at a fixed rate" includes an employer who is required by law to pay a minimum wage to workers, but has failed to do so. *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 44 (1993). Thus, the absence of an agreement to pay or actual payment to a worker will not take the worker out of the definition of "employee," where a minimum wage law requires that worker to be paid a minimum wage. Here the law requires employers to pay employees at a fixed minimum wage rate, and that rate was \$4.75 per hour. ORS 653.025(3). Claimant was Respondent's employee despite the fact that Respondent did not pay her at that fixed rate.

##### Wages Due

Respondent did not assert in his answer and the Hearings Referee did not find any exemption or exclusion from the coverage of the Minimum Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS chapter 652, for Respondent or Claimant.

\* Respondent attempted belatedly, in his case summary, to raise an exemption as an additional defense. In the absence of an amendment to the answer, this defense was waived. See OAR 839-50-130(2) and 839-50-140.

ORS 653.025 prohibits employers from paying their workers at a rate less than \$4.75 for each hour of work time. ORS 653.055(1) provides that "[a]ny employer who pays an employee less than the [minimum wage and overtime] 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 [minimum wage and overtime] is no defense to an action under subsection (1) of this section." Credible evidence based on the whole record establishes that Respondent and Claimant agreed to compensation for her services at the rate of \$100 for each appointment that resulted in a sale by Respondent, and establishes that no sales resulted from appointments made by Claimant. Under the agreement, Claimant would be entitled to no compensation. Respondent was obligated, however, to pay Claimant at a rate not less than \$4.75 per hour. The wage agreement between Respondent and Claimant is no defense to non-payment.

Credible evidence based on the whole record establishes that Claimant worked 36.5 hours. At minimum wage, Claimant earned \$173.38, no part of which has been paid.

#### Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion or moral delinquency, but only requires that 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). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent knew he was not paying Claimant wages for her work and intentionally failed to pay any wages. Evidence showed that Respondent acted voluntarily, and was a free agent. Respondent must be deemed to have acted willfully under this test, and thus is liable for penalty wages under ORS 652.150.

The only way an employer who has willfully failed to pay wages due at the termination of employment can avoid paying a penalty for that failure is to prove that the employer was financially unable to pay the employee the wages at the time they accrued. *In the Matter of Kenneth Cline*, 4 BOLI 68 (1983). This Forum has repeatedly held that it is an employer's burden to prove the employer's financial inability to pay a claimant's wages. See ORS 652.150, 183.450(2), and OAR 839-50-260(3). See also *In the Matter of Jorion Belinsky*, 5 BOLI 1, 10 (1985); *In the Matter of Mega Marketing*, 9 BOLI 133, 138 (1990). A showing that, at the time they accrued, an employer had a "financial inability to pay wages", in the strict sense in which this Forum has interpreted that phrase, requires specific information as to the financial resources and expenses of both the business and the employer (personally) during the claim period, as well as

submission of the records from which that information came. *In the Matter of Lois Short*, 5 BOLI 277 (1986).

Respondent testified that he was financially unable to pay Claimant. The only specific information provided by Respondent, in addition to his testimony, was a computerized printout of the social security benefits he received at times material. Respondent provided no documentation of total earnings during that period, including any income from Cherry Communications, such as income tax statements would demonstrate. Respondent, who is married, provided no records concerning income of his wife, or ownership of the home in which his wife resides and from which Respondent conducted his business (Respondent testified that his wife owns the residence). In the absence of such specific information, Respondent failed to show that he was financially unable to pay Claimant's wages at the time they accrued, and cannot escape penalty wage liability.

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Waylon & Willes, Inc.*, 7 BOLI 68, 72 (1988).

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Al Weaver to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Gratiela Soare in the amount of

(\$573.38), representing \$173.38 in gross earned, unpaid, due, and payable wages; and \$400 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$173.38 from April 1, 1993, until paid and nine percent interest per year on the sum of \$400 from May 1, 1993, until paid.

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**In the Matter of  
VICTOR OVCHINNIKOV  
and Valley Contracting, Inc.,  
Respondents.**

Case Number 66-93  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued September 2, 1994.

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#### SYNOPSIS

Where two farm labor contractors, an individual and his corporation, acted as a farm labor contractor by employing 54 workers without a license, in violation of ORS 658.410(1) and 658.417(1); and the two failed to file certified payroll records for work performed as a farm labor contractor, in violation of ORS 658.417(3); and the individual acted as a farm labor contractor without a license, in violation of ORS 658.410(1) and 658.417(1) on three occasions; and the individual failed to pay money when due to the four persons entitled thereto, in violation of ORS 658.440(1)(c); and the individual

failed to carry a farm labor contractor license while acting as a farm labor contractor on four occasions, in violation of ORS 658.440(1)(a); and the individual discriminated against an employee because the employee instituted proceedings related to ORS 658.405 to 658.503, in violation of ORS 658.452; and the individual breached a valid contract entered into by him in his capacity as a farm labor contractor by violating the terms and conditions of a Consent Order with the Commissioner, in violation of ORS 658.440(1)(d), the Commissioner assessed a total civil penalty of \$129,000 against both Respondents, pursuant to ORS 658.453 (1), and denied a farm labor contractor license to each Respondent, pursuant to ORS 658.420. ORS 658.410(1); 658.417(1), (3); 658.420; 658.440 (1)(a), (c), (d); 658.452; 658.453(1); OAR 839-15-145; 839-15-508; 839-15-512; 839-15-520.

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on May 24 and 25, 1994, in the conference room of the Bureau of Labor and Industries Office, 3865 Wolverine Street NE, Bldg E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Respondent Ovchinnikov (Victor Ovchinnikov, Victor Ovchinnikov, dba Valley Reforestation) represented himself. Mr. Ovchinnikov was present throughout the first day of

hearing and voluntarily absented himself for the remainder of the hearing. Respondent Valley Contracting, Inc., previously found to be in default, did not appear through an authorized representative.

The Agency called the following witnesses (in alphabetical order): Palemon Arce, a former employee of Respondent Ovchinnikov and of Respondent Valley Contracting, Inc.; Victoria Arthur, an employee of the U.S. Bureau of Land Management (BLM) (by telephone); Marle Brandt, an employee of the U.S. Forest Service (USFS) (by telephone); Ken Burton, an employee of the USFS (by telephone); Virgilio Cancino, a former employee of Respondent Valley Contracting, Inc.; Orrin Corak, an employee of the USFS (by telephone); John Eckhart, an employee of the USFS (by telephone); William Foster, an employee of the Oregon Department of Forestry (by telephone); Blas Garcia, a former employee of Respondent Ovchinnikov and of Respondent Valley Contracting, Inc.; Stuart Hoffman, an employee of the BLM (by telephone); Walter Kastner, Jr., an employee of the BLM (by telephone); Thomas Katwyk, an employee of the BLM (by telephone); Raul Pena, a Compliance Specialist with the Wage and Hour Division of the Bureau of Labor and Industries; Susan Sepulveda, an employee of the USFS (by telephone); Gabriel Silva, a Compliance Specialist with the Wage and Hour Division of the Bureau of Labor and Industries; Suzie Sutton, an employee of the USFS (by telephone); Barbara Syper, an employee of the USFS (by telephone); JoAnn West, payroll accountant for Respondent

Ovchinnikov and Respondent Valley Contracting, Inc.; and Dottie Williams, an administrative specialist with the Licensing Unit of the Bureau of Labor and Industries (by telephone). Juan Mendoza, appointed by the Forum and under proper affirmation, acted as an interpreter for Agency witnesses Arce, Cancino, and Garcia.

The Respondents called no witnesses and presented no evidence.

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 February 26, 1993, the Agency issued a "Notice of Proposed Denial of Farm Labor Contractor License Application and Intent to Assess Civil Penalties" (Notice of Intent) to Respondents. The Notice of Intent informed Respondents that the Agency intended to deny Respondents' joint application for a farm labor contractor license, pursuant to ORS 658.420(1), and intended to assess civil penalties against them, pursuant to ORS 658.453. The Notice of Intent cited the following bases for the Agency's intended actions: (1) acting as a farm labor contractor without a valid license or indorsement issued by the Commissioner (three claims); (2) failure to pay wages when due; (3) failure to carry a farm labor contractor's license; (4) failure to provide workers' compensation insurance; and (5) failure to comply with the terms and provisions of all

valid contracts entered into in their capacity as farm labor contractors.

2) The Notice of Intent was personally served on Victor Ovchinnikov, Respondent, and as registered agent for Respondent Valley Contracting, Inc., on February 26, 1993.

3) On April 27, 1993, the Agency received Respondent Ovchinnikov's answer to the Notice of Intent. In his answer, Respondent Ovchinnikov denied the allegations of the Notice of Intent. He requested a hearing on the Agency's intended action.

4) On May 24, 1993, the Agency sent the Hearings Unit a request for a hearing date. On June 2, 1993, the Hearings Unit issued to Respondents 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 Respondents a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's temporary administrative rules regarding the contested case process – OAR 839-50-000 through 839-50-420. The temporary rules, effective April 12, 1993, became permanent on September 3, 1993.

5) On August 12, 1993, the Hearings Referee issued a discovery order to the participants, directing them each to submit a Summary of the Case, according to the provisions of OAR 839-50-210(1).

6) On August 17, 1993, the Agency filed a motion for an order finding Respondent Valley Contracting, Inc. in default. The motion recited the

history of personal service of the notice on Respondent Victor Ovchinnikov, as the registered agent of Respondent Valley Contracting, Inc., on February 26, 1993. The motion recited further that the Agency had received neither an answer nor request for hearing, filed by an attorney licensed in Oregon, on behalf of Respondent Valley Contracting, Inc., prior to the expiration of the filing deadline.

7) On August 17, 1993, the Agency filed a motion for partial summary judgment against Respondent Ovchinnikov, seeking the summary denial of Respondent Ovchinnikov's farm labor contractor license application. The motion was predicated on the anticipated order of default concerning Respondent Valley Contracting, Inc., which would necessarily result in the denial of a farm labor contractor license to that entity and the consequent inability of Respondent Ovchinnikov to become jointly licensed as the majority shareholder.

8) On August 17, 1993, the Hearings Referee wrote to Respondents, establishing a deadline for their responses to the motions of the Agency and advising Respondent Valley Contracting, Inc. of the necessity of appearing and responding through an Oregon attorney.

9) On August 23, 1993, the Hearings Referee received a letter from Brendan Enright, Respondent Ovchinnikov's bankruptcy attorney, who provided a copy of Respondent Ovchinnikov's Chapter 13 bankruptcy petition and interposed the protection of the automatic stay provision of the U.S. Bankruptcy Code as a bar to the present proceeding.

10) On August 26, 1993, the Agency wrote to the Hearings Referee, advising that the Agency was seeking precautionary relief from the automatic stay in the U.S. Bankruptcy Court. On the same date, the Agency filed a request for postponement of the hearing and a request to delay requiring a response from Respondent Ovchinnikov to the Agency's motion for partial summary judgment, pending resolution of the jurisdictional issue.

11) On August 26, 1993, the Hearings Referee granted the Agency's request for postponement and deferred ruling on the motion for partial summary judgment.

12) On October 19, 1993, the Agency notified the Hearings Referee of the order of the U.S. Bankruptcy Court granting relief from the automatic stay, provided a copy of the order, and requested that the Hearings Referee rule on the Agency's motion for default against Respondent Valley Contracting, Inc. and the Agency's motion for partial summary judgment against Respondent Ovchinnikov.

13) On October 22, 1993, the Hearings Referee wrote to the Respondents, setting deadlines for response to the Agency's motions and again advising that Respondent Valley Contracting, Inc. was required to appear and respond through an attorney.

14) On November 15, 1993, Respondent Valley Contracting, Inc. appeared through counsel, filed a motion for relief from default and for an extension of time within which to file an answer, and requested a hearing. As the bases of its motion for relief from default, Respondent Valley Contracting, Inc. offered the lack of familiarity of its

sole shareholder and registered agent, Victor Ovchinnikov, with the legal requirement that a corporation appear through an attorney, and the company's inability to hire an attorney due to financial problems. Respondent Valley Contracting, Inc. cited a lack of prejudice to the Agency as a further reason for the Hearings Referee to grant relief from default and to grant an extension within which to file an answer. Counsel's motions were timely mailed on November 12, 1993.

15) On November 15, 1993, the Hearings Referee issued a Notice of Amended Hearing Dates.

16) On November 22, 1993, the Agency filed a response to the motions of Respondent Valley Contracting, Inc. for relief from default and for an extension of time to file an answer. The Agency opposed the motions for lack of good cause, citing Victor Ovchinnikov's prior experience with the Agency's contested case procedures, the unambiguous notice that a corporation must be represented by an attorney, the clear notice of the deadline for filing an answer, and the underlying, business-related cause of the financial problems.

17) On November 29, 1993, the Hearings Referee issued an Order of Default against Respondent Valley Contracting, Inc. and denied the motions for relief from default and for an extension of time by Respondent Valley, Inc. In entering an Order of Default, the Hearings Referee relied upon OAR 839-50-330(1)(a), citing the failure of Respondent Valley Contracting, Inc., following the service of the Notice of Intent, to timely request a hearing and file an answer. The Hearings

Referee found an absence of good cause for granting relief from default in the claimed inability to afford an attorney. The Hearings Referee dismissed the lack of prejudice to the Agency as a consideration in evaluating a request for relief from default. Finally, in denying the motion of Respondent Valley Contracting, Inc. for an extension of time to answer, the Hearings Referee found that the proffered reasons for failing to answer did not constitute an excusable mistake or a circumstance over which Respondent Valley Contracting, Inc. lacked control, as required by the applicable rule.

18) On November 29, 1993, the Hearings Referee denied the Agency's motion for partial summary judgment against Respondent Ovchinnikov on the issue of the Agency's proposed denial of a farm labor license. While Respondent Ovchinnikov had failed to respond to the motion, the Hearings Referee determined that although Respondent Valley Contracting, Inc. was in default, it could not be denied a license until a prima facie case supporting the Agency's Notice of Intent was made on the record. Because the summary judgment motion against Respondent Ovchinnikov hinged on the denial of the license to Respondent Valley Contracting, Inc., the motion was made prematurely.

19) On December 22, 1993, the Agency requested reconsideration of the motion for partial summary judgment and reversal of the prior ruling, for the reason that the Agency was not required to make out a prima facie case on the record where, as here, the license applicant had failed to request a hearing.

20) Respondent Ovchinnikov did not respond to the Agency's motion to reconsider. On January 7, 1994, the Hearings Referee granted the motion to reconsider and reversed the prior denial of the motion for partial summary judgment. In reversing the prior ruling, the Hearings Referee agreed that ORS 183.310(2) precluded the need for the Agency to present a prima facie case prior to denying the license of the defaulting applicant, Respondent Valley Contracting, Inc. Because the Agency could immediately deny a license to Respondent Valley Contracting, Inc. without further proceedings, the motion for summary judgment was not premature. The Hearings Referee ruled that the motion must be granted because, as a matter of law, Respondent Ovchinnikov (as the corporation's majority shareholder) could not be licensed from his joint application with the corporation.

21) On February 4, 1994, the Hearings Referee issued a discovery order.

22) On February 15, 1994, the Agency filed a motion to amend substantially its Notice of Intent, to incorporate allegations of new violations, and to withdraw the allegations of paragraph III of the original notice. On the same date, the Agency filed a motion to postpone the hearing, citing the substantial amendments to the notice, the lack of time for Respondent[s] to respond to the amendments prior to the scheduled hearing date, and the

likelihood that the Agency would move to consolidate the present case with the related cases against four additional Respondents.

23) On February 14, 1994, contemporaneously with drafting the amended notice herein, the Agency separately issued a Notice to Assess Civil Penalties against Valley Contracting, Inc. for the violations which account for the amendments to the notice herein. The notice was served upon Victor Ovchinnikov, the registered agent for the corporation, and upon Brendan Enright, Attorney at Law, on February 14, 1994. A Final Order of Default was entered on this notice on May 13, 1994. This Final Order of Default has been withdrawn. The order withdrawing the Final Order of Default of May 13, 1994, is hereby received into the record.

24) On February 22, 1994, Respondent Ovchinnikov's attorney, Brendan Enright, contacted the Hearings Referee and stated that he had no objection to the postponement or the consolidation of this case with the new cases for hearing. On the same date, the Hearings Referee issued a ruling granting the Agency's motion for postponement, based upon the agreement of the participants and set a deadline for Respondents' reply to the motion to amend.

25) Respondent Ovchinnikov did not respond to the motion to amend. On February 25, 1994, the Hearings Referee granted the Agency's motion

\* The separate Notice of Intent to Assess Civil Penalties against Valley Contracting, Inc. alleged violations equivalent, in part, to paragraphs II, III, V, and VI of the amended notice herein and added an additional allegation, that of assisting an unlicensed contractor. All of the alleged violations related to USFS contract #52-04U3-3-00009 and are addressed in this order.

to amend, appended a copy of the amended notice, and advised Respondents that an amended answer was due on March 18, 1994.

26) On April 21, 1994, the Agency filed a motion for partial summary judgment against Respondent Victor Ovchinnikov on all of the allegations and corresponding civil penalties encompassed in the amended notice which were not included in the original notice. The Agency specified the failure of Respondent Ovchinnikov to timely file an amended answer and the resultant default as the basis for the motion.

27) On May 3, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by May 16, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary.

28) On May 6, 1994, the Agency withdrew its motion for partial summary judgment and, instead, moved that an Order of Default be issued on all of the allegations contained in the amended notice which were not included in the original notice. This motion was based on the failure of Respondents to timely file an amended answer.

29) On May 9, 1994, the Hearings Referee wrote to Respondents, advising them of the deadline for filing a response to the Agency's motion for

default and asking that Brendan Enright apprise the Hearings Referee of whether he continued to represent either Respondent.

30) On May 10, 1994, a Notice of Change of Hearings Referee was issued to the participants.

31) On May 11, 1994, Respondent Ovchinnikov called the Hearings Unit seeking clarification of the May 9, 1993, letter from Referee McKean. A conference call was held between Referee McKean, Referee Bracanovich, and Respondent Ovchinnikov, in which Respondent Ovchinnikov was advised of the current procedural status of the matters set for hearing, the filings required to be made on or by May 16, 1993, and was reminded of the requirement that any filing made on behalf of Respondent Valley Contracting, Inc. be made by an attorney. Because Respondent Ovchinnikov maintained that he did not have a copy of the amended notice, a copy of the amended notice was faxed to him, in care of the Bureau's Salem office. Respondent Ovchinnikov picked up the copy of the amended notice at the Bureau's Salem office on the same date.

32) On May 12, 1994, Respondent Ovchinnikov again called the Hearings Unit to clarify what was required to be submitted on May 16, 1994. The Hearings Referee again apprised Respondent Ovchinnikov of the required responses by both Respondents to the Agency's motion for default, of the required answers to the amended notice by both Respondents, and of the required filing of case summaries by both; Respondent Ovchinnikov was again advised that any filings on behalf

of Valley Contracting, Inc. were required to be made by an attorney.

33) On May 16, 1994, the Hearings Referee was contacted by Brendan Enright, who advised that he had ceased to represent Respondent(s) on March 28, 1994.

34) On May 16, 1994, the Hearings Unit received a letter from Respondent Ovchinnikov which has been treated as an answer to the amended notice and a request for relief from default. Concerning his failure to answer the amended notice, Respondent Ovchinnikov indicated that he had given the amended notice to Brendan Enright, his attorney, who was going to answer it. Respondent Ovchinnikov further states that when his attorney later resigned, Respondent Ovchinnikov was unaware that the attorney had not filed the amended answer. Respondent Valley Contracting, Inc. filed neither an answer to the amended notice nor a request for relief from default.

35) On May 18, 1994, the Hearings Referee granted the Agency's motion for an order of default against both Respondents, then granted relief from default as requested by Respondent Ovchinnikov. In granting the motion for an order of default against both Respondents, the Hearings Referee relied upon OAR 839-50-330(1)(a), citing the failure of each Respondent to timely file an answer to the amended notice. In granting Respondent Ovchinnikov's request for relief from default, the Hearings Referee found that Respondent Ovchinnikov's reliance upon Brendan Enright to answer the amended notice on his behalf, as an individually named Respondent, constitutes an excusable mistake or

circumstance over which he had no control where, as here, Mr. Enright appears to have responded to a motion filed contemporaneously on behalf of both the corporation and Mr. Ovchinnikov. Consequently, the failure of Respondent Ovchinnikov to file an answer on his own behalf, due to this misplaced reliance, constitutes good cause as required by OAR 839-50-340 and as defined by OAR 839-50-020(9).

36) The Agency timely filed a Summary of the Case on May 16, 1994. On May 19, 1994, the Agency filed an addendum to its Summary of the Case. Neither Respondent filed a Summary of the Case.

37) At the start of the hearing, Respondent Ovchinnikov said that he had received, but not read, the Notice of Contested Case Rights and Procedures. Respondent Ovchinnikov had no questions about it. The Hearings Referee read aloud the rules applicable to the hearing to Respondent, fully explained the procedures, offered her assistance, provided Respondent Ovchinnikov with rules, paper, and pen, and instructed Respondent to read the rules during the noon recess. Following the noon recess, Respondent Ovchinnikov stated that he had read most of the rules and had no questions about them. The Hearings Referee renewed her offer of assistance and continued to entertain questions from Respondent as they arose.

38) Pursuant to ORS 183.415(7), the Agency and Respondent Ovchinnikov 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.

39) During the hearing, the Agency made a motion to again amend the amended Notice of Intent to conform to the evidence and to reflect issues presented at the hearing. The motion was made pursuant to OAR 839-50-140. The amendments corrected the spelling of Respondent Ovchinnikov's last name from "Ovchinikov" to "Ovchinnikov," correctly renumbered paragraph VII, by inserting "I" following "VI," and corrected the contract number in paragraph II from "52-04U3-3-0009" to "52-04U3-3-00009." The Hearings Referee granted the motion because the amendments reflected issues and evidence that had been previously introduced into the record and addressed without objection from Respondent Ovchinnikov, were technical only, and conformed the pleadings to the evidence presented at hearing.

40) Following a full day of presentation of the Agency's case, and within minutes of the commencement of the second day of hearing, Respondent Ovchinnikov telephoned the Hearings Referee, stating that he wished a postponement to obtain an attorney. Respondent was advised that such a postponement was not permitted once a hearing had commenced, pursuant to OAR 839-50-110(2). Respondent Ovchinnikov declined to attend the remainder of the hearing and to present a defense.

41) At the conclusion of the hearing, the record was left open until 5 p.m. on June 6, 1994, for receipt of copies of four Agency exhibits.

42) After hearing, the Agency submitted copies of the four exhibits, as directed by the Hearings Referee.

43) On June 6, 1994, pursuant to the May 25, 1994, ruling, the Forum closed the record herein.

44) On July 28, 1994, the Hearings Unit issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed 10 days for filing exceptions. The Hearings Unit received no exceptions.

#### FINDINGS OF FACT – THE MERITS Victor Ovchinnikov/Valley Contracting, Inc.

1) Respondent Ovchinnikov is a natural person who was licensed as a farm labor contractor with a forestation indorsement between August 28, 1989, and March 24, 1991.

2) Under the prior licenses, Respondent Ovchinnikov did business as Valley Reforestation and was a sole proprietor. The business address was 1810 E Hardcastle Street, Woodburn, Oregon, the residence address of Respondent Ovchinnikov. The business phone number was 981-1271; the residence phone number was also 981-1271.

3) On May 29, 1990, on BLM contract #OR 952-CTO-1147, a manual release contract let to Respondent Ovchinnikov dba Valley Reforestation, Respondent Ovchinnikov authorized Burkoff to act in his absence on all listed contract activities except on contract modifications.

4) On June 14, 1990, on BLM contract #OR 952-CTO-3153, a manual release contract let to him, Respondent Ovchinnikov named Simon Burkoff as foreman.

5) On October 3, 1990, Respondent Ovchinnikov's workers

commenced forestation work on BLM contract #OR952-CTO-3196, a pre-commercial thinning contract in the South Umpqua Resource Area near Roseburg, Oregon. This contract had been awarded to Respondent Ovchinnikov, dba Valley Reforestation. The BLM Contracting Officer Representative (COR) on the contract was Tom Katwyk. One of the foremen was Jose Arroyo. On October 18, 1990, Compliance Specialist Florence Blake made a site visit. She found that six of the workers, including Arroyo, were sleeping and cooking out of two vans.

6) After March 24, 1991, Respondent Ovchinnikov was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm/forest labor contractor.

7) On March 12, 1991, A Notice of Intent to Deny a Farm Labor Contractor License and Intent to Assess Civil Penalties was issued by the Agency against Respondent Victor Ovchinnikov, dba Valley Reforestation. This notice alleged that Respondent Ovchinnikov had acted as a farm/forest labor contractor without a license (one violation), failed to timely file certified payroll records (two violations), failed to post a notice of bond (one violation), failed to furnish written work agreements to workers (five violations), failed to provide drinking water for the workers (one violation), operated a farm-worker camp without a camp indorsement (one violation), failed to register a farm-worker camp (one violation), and failed to make workers' compensation payments when due (one violation).

8) In 1991, on USFS contract #53-05??-1-64, a timber stand

improvement contract in the Okonogan, let to Respondent Ovchinnikov, dba Valley Reforestation, Respondent Ovchinnikov designated Burkoff as a foreman.

9) On September 20, 1991, on USFS contract #52-0?M6-0022, a thinning contract in the Mt. Baker area of Region 6, let to Respondent Ovchinnikov, dba Valley Reforestation, Respondent designated as foremen Simon Burkoff and Homero Hernandez.

10) On October 31, 1991, Respondent Ovchinnikov executed a Consent Order with the Commissioner in resolution of the notice described in Finding of Fact 7. As a term of the Consent Order, Respondent Ovchinnikov expressly admitted that he had acted as a farm/forest labor contractor without a license (one violation), failed to timely file certified payroll records (two violations), failed to post a notice of bond (one violation), failed to furnish written work agreements to workers (five violations), failed to provide drinking water for the workers (one violation), operated a farm-worker camp without a camp indorsement (one violation), failed to register a farm-worker camp (one violation), and failed to make workers' compensation payments when due (one violation). As a further condition of the Consent Order, Respondent Ovchinnikov agreed that a repeat occurrence of any violation admitted in the Consent Order or any violation of a term or condition of the Consent Order would constitute a breach of a legal and valid agreement entered into with the Commissioner in Respondent Ovchinnikov's capacity as a farm labor contractor, which breach

would be grounds for revocation or denial of Respondent Ovchinnikov's farm labor contractor license.

11) On April 15, 1992, on USFS contract #52-0531-2-0172, a tree planting contract in Region 6 let to Respondent Ovchinnikov, dba Valley Reforestation, Respondent Ovchinnikov delegated limited authority on contract matters to foremen Simon Burkoff, Jose Arroyo, and Francisco Garcia.

12) In June 1992, Agency Compliance Specialist Raul Pena received wage claims from four workers, Miguel Medina Jano, Jesus Eduardo Gonzalez, Angel Soto, and Adolfo Martinez. This crew worked on an S.B.I., Inc. contract near Grants Pass until May 16, 1992, and a Valley Reforestation thinning contract with the USFS, USFS contract #52-0531-2-0172, in Antenima, Washington, between May 21 and June 7, 1992. Gonzalez claimed unpaid wages for work performed on both contracts. Jano, Soto, and Martinez claimed wages only for the work in Washington for Respondent Ovchinnikov. On June 12, 1992, Pena interviewed Adolfo Martinez Espinosa and Miguel Medina Jano in Spanish. Both men signed statements following the interviews. Both told Pena that while at Adolfo's apartment in Salem, Amano Perez came to recruit workers for Respondent Ovchinnikov for a thinning contract near Chelan, Washington. Before leaving Salem on May 20, 1992, they were told they would be paid \$130 per acre. They commenced work on May 21, 1992. There were eight workers on the contract. After working two days, they realized that they were not being paid enough to cover the work of the

entire crew. They were then told by Perez that Respondent Ovchinnikov would pay an hourly rate of \$9.99 per hour. They worked eight hours per day for 15.5 days. For this work, Martinez was paid \$310.05; Jano was paid \$360.05; Soto was paid \$298.72; and Gonzalez was paid \$275.11. Pena interviewed Jesus Gonzalez on June 16, 1992. Gonzalez told Pena that he had worked on the S.B.I., Inc. contract in Grants Pass and on Respondent Ovchinnikov's contract in Washington; that the boss in Washington was Respondent Ovchinnikov; and that the contract in Grants Pass was to S.B.I., Inc., but the boss was Respondent Ovchinnikov. On June 16, 1992, Pena sent demand letters on behalf of the workers to Respondent Ovchinnikov, dba Valley Reforestation. In response to the demand letters, four checks drawn on the account of Respondent Ovchinnikov, dba Valley Reforestation, dated June 29, 1992, were received by the Agency. The checks were drawn as follows: Adolfo Martinez-Espinosa, \$610.84; Angel Soto, \$622.00; Jesus Eduardo Gonzalez, \$207.52; Miguel Medina Jasso [sic], \$497.22. The last day of work was June 7, 1992. Pena attempted to serve subpoenas on Martinez, Jano, and Gonzalez to secure their testimony at hearing; he was unable to locate Gonzalez, and service upon Martinez and Jano was unsuccessful.

13) Respondent Ovchinnikov performed the activities described in Findings of Fact 11 and 12 pursuant to a contract between Respondent and the USFS, for remuneration or a rate of pay agreed upon in that contract.

14) On September 19, 1992, Respondent Ovchinnikov incorporated Valley Contracting, Inc. Respondent Ovchinnikov was its president, registered agent, and sole owner. The business address was 1810 E Hardcastle St., Woodburn, Oregon, the residence address of Respondent Ovchinnikov. The business phone number was 981-1759; the residence phone number was 981-1271.

15) On November 9, 1992, Respondent Ovchinnikov submitted to the Agency a farm/forest labor contractor license application for a joint license for Respondent Valley Contracting, Inc. and himself (as majority shareholder), dated October 29, 1992. No permit or license was ever issued to Respondent Valley Contracting, Inc. and Respondent Ovchinnikov as a result of this application.

16) On April 2, 1993, Valley Contracting, Inc. was awarded USFS contract #53-04U3-3-00009 for timber stand improvement (thinning and burning) in the Winema National Forest, Chemult Ranger District, within the State of Oregon. Work was performed on this contract between May 17 and June 14, 1993. Respondent Ovchinnikov bid the contract and executed all other contract documents as president of the corporation. At the prework conference on May 17, 1993, Respondent Ovchinnikov identified Jose Arroyo as an employee trained in cardiopulmonary resuscitation. Among others, Homero Hernandez, Fidel Hernandez, and Francisco Garcia were named by Respondent Ovchinnikov as foremen on the contract. Respondent Ovchinnikov assigned payment under the contract to Offord Finance Co. of

Central Point, Oregon. In the contract documents, Respondents represented that they were licensed as a farm/forest labor contractor in the State of Oregon. The maximum number of workers employed on the contract in a day was 54. On June 18, 1993, through Oregon Legal Services, Leonides Santos-Dionicio collected unpaid wages for his work on this contract in the amount of \$281.35.

17) Respondents performed the activities described in Finding of Fact 16 pursuant to a contract between Respondent Valley Contracting, Inc. and the USFS, for remuneration or a rate of pay agreed upon in that contract.

18) No certified payroll records were provided by Respondents to the Commissioner on USFS contract #53-04U3-3-00009, a job for which Respondents paid employees directly.

19) Respondent Victor Ovchinnikov filed for Chapter 13 Bankruptcy in the United States Bankruptcy Court for the District of Oregon on July 26, 1993. In his Chapter 13 plan, Respondent Ovchinnikov lists an annual income of \$120,000 from his reforestation business for the 1992 tax year, claims to own no farm or forest equipment, and lists liabilities to government agencies in the amount of \$194,597, all likely incurred in Respondent Ovchinnikov's forestation activities.

20) Blas Garcia started working for Respondent Ovchinnikov in 1990. He performed all types of work in the forest for Respondent Ovchinnikov, including planting, hoeing, and making roads. Jose Arroyo and Garcia had worked together as equals; Jose drove the van. Blas had also worked on forest jobs with Simon Burkoff.

Respondent Ovchinnikov was at job sites with Simon; Respondent Ovchinnikov was also at job sites with Jose. Respondent Ovchinnikov sometimes took workers to job sites. Some days Respondent Ovchinnikov, Simon, and Jose were all at the same job site. When Simon and Jose were together on jobs, Simon was the boss. When Simon, Jose, and Respondent Ovchinnikov were together on jobs, Simon and Respondent Ovchinnikov were the bosses. The vehicles used belonged to Respondent Ovchinnikov. The workers were paid at two offices in Woodburn. When there were problems with pay, the workers talked to Respondent Ovchinnikov. In the fall of 1993, Blas complained to the Agency and to Oregon Legal Services about wages owing from Respondent Ovchinnikov for work on a forestation contract near Chemult. A claim was filed against Respondent Ovchinnikov in U.S. Bankruptcy Court. Sometime in November 1993, Garcia called Simon Burkoff to get work harvesting Christmas trees. Simon told him about the Molalla job and told Garcia he would be working for Respondent Ovchinnikov. Arce picked him up in the morning to go to Mall 99, the meeting place for workers. When they arrived at Mall 99, Respondent Ovchinnikov, Simon Burkoff, and Ixiquo Aguilar were there. Respondent Ovchinnikov told Arce that Garcia could not work for him because "we had problems with him." Arce drove Garcia home. Two days later, Jose Arroyo told Arce that Respondent Ovchinnikov would not let Garcia work because Garcia had gone to Oregon Legal Services.

21) On November 2, 1993, Oregon Legal Services filed an application for an order to examine Debtor Victor Ovchinnikov (Respondent) in the United States Bankruptcy Court for the District of Oregon. A copy of the application was mailed to Respondent Ovchinnikov's attorney, Brendan Enright, on November 1, 1993. The requested examination of Respondent Ovchinnikov, by deposition, was commenced on November 5, 1993, and concluded on February 22, 1994. A claim for wages and other violations of ORS 658.405 through 658.503, on behalf of Garcia and five other workers, was formally filed with the United States Bankruptcy court on March 11, 1994.

22) On May 23, 1994, Respondent Ovchinnikov's Petition for Bankruptcy was dismissed at his request.

#### S.B.I., Inc.

23) On December 30, 1991, S.B.I., Inc. was incorporated. The listed registered agent was Simon Burkoff, 704 Young Street, Woodburn, Oregon. No address for a principal office was listed.

24) On February 11, 1992, Simon Burkoff submitted a farm/forest labor contractor license application for a joint license for S.B.I., Inc. and himself (as majority shareholder), dated February 7, 1992. In the application, Simon Burkoff represented that he was the president and sole owner of the corporation and listed the business address as 704 Young Street, Woodburn, Oregon, with a mailing address of PO Box 819, Woodburn, Oregon. The business phone was listed as 981-1271.

25) A temporary permit to conduct business as a farm/forest labor

contractor was issued jointly to Simon Burkoff and S.B.I., Inc. on March 11, 1992. By its terms, the permit was to expire on May 10, 1992. On May 8, 1992, the Agency issued a joint farm/forest labor contractor license to Burkoff and S.B.I., Inc. The license was to expire on January 31, 1993.

26) In its application for a corporate contractor's bond, S.B.I., Inc., through Simon Burkoff, president, represented that Burkoff was the sole owner and that he had worked as a foreman for Valley Reforestation for contract years 1990 and 1991. The business phone was listed as 981-1271. The corporation's bank was identified as the Bank of America and the accountant as Cliff West. The application was signed by Burkoff on January 2, 1992.

27) The indemnitors for the bond were identified in the indemnity agreement with Amwest Surety Insurance Company (Amwest) as Simon Burkoff, Yakov Ovchinnikov, and Irina Ovchinnikov. The agreement was signed on April 13, 1992. To secure the bond for S.B.I., Inc., Yakov Ovchinnikov and Irina Ovchinnikov executed a mortgage on land owned by them at 13013 Killiam Road, NE, near Woodburn, Oregon.

28) Yakov and Irina Ovchinnikov are the parents of Victor Ovchinnikov.

29) In April 1992, S.B.I., Inc. was awarded USFS contract #03-04KK-2-02816, a tree netting and tubing contract in the Malheur National Forest, Burns District, within the State of Oregon. In connection with the award of this contract, Contract Specialist Barbara Syper, the contracting officer for the USFS on this contract, spoke with

Simon Burkoff by telephone in early April 1992. Burkoff told Syper that he had been working for Victor Ovchinnikov and Valley Reforestation for the prior two years; that he was now going on his own and would be using Victor's crews; that the crews were then in Washington working on a thinning contract; and that these crews would become his employees. The prework meeting was arranged through Respondent Victor Ovchinnikov. Respondent Ovchinnikov did not attend the prework meeting; although Simon Burkoff attended the prework, it appeared to the government representatives in attendance that Burkoff had not read the contract and that Burkoff's English was not at all good. Burkoff represented to COR Tom Howard that Respondent Ovchinnikov was his partner. The address given for both Burkoff and Respondent Ovchinnikov was PO Box 819, Woodburn, Oregon; the phone number given for Burkoff was (503) 981-1271; the number given for Respondent Ovchinnikov was (503) 931-2382 (mobile).

One crew of four, including foreman Carlos Gonzalez, began work on this contract on April 21, 1994. This crew quit the job due to pay below the contract minimum on April 25, 1992. Simon Burkoff brought a new crew on April 29, 1992, designating Francisco Garcia as the contractor's representative. On April 29, 1992, Syper received a telephone call from Agency employee Pena, in which Syper was informed that the Agency had received a verbal wage complaint and that Carlos Gonzalez would be immediately contacting Respondent Ovchinnikov to attempt to obtain the crew's fair pay

and that if Gonzalez were unsuccessful, written wage claims would be filed. Between May 5 and 13, 1992, Respondent Ovchinnikov telephoned the COR five times to obtain a pay invoice. During these conversations, Respondent Ovchinnikov indicated that "they" were in a cash crunch. Respondent Ovchinnikov arranged to send a crew for needed rework. Work was completed on the project on May 15, 1992. The maximum number of workers laboring on this contract on any day was 12.

30) In April 1992, Pena interviewed Timoteo Gonzalez in connection with the wage claim filed against S.B.I., Inc. concerning the Malheur contract described in Finding of Fact 29, above. Gonzalez told Pena that he had asked Respondent Ovchinnikov to pay by the hour instead of the acre, and, as a result, the crew had been fired by Respondent Ovchinnikov; that Respondent Ovchinnikov was in charge; that Burkoff had the license, but Respondent Ovchinnikov was the person behind S.B.I., Inc., the backer. The Agency attempted to serve a subpoena on Timoteo Gonzalez to testify at hearing, but was unsuccessful.

31) On April 29, 1992, Pena sent a demand letter to Burkoff at 1810 E Hardcastle Street, Woodburn, Oregon, for the unpaid wages of Carlos Gonzalez, Timoteo Gonzalez, Jorge Gonzalez, and Jorge Guzman for their work on the contract described in Finding of Fact 29, above. Checks drawn on the S.B.I., Inc. account at the Bank of America (Woodburn) and bearing a stamped, facsimile signature of Burkoff as maker, were forwarded to the Bureau. On May 1, 1992, a demand for

further wages owing to the same men for work on the same contract was sent to Burkoff at his home address. On May 5, 1992, in satisfaction of the second demand, Respondent Ovchinnikov personally delivered four checks, drawn on the same S.B.I., Inc. account, to the Agency's Salem office. These checks also bore the stamped, facsimile signature of Burkoff.

32) On April 28, 1992, S.B.I., Inc. was awarded BLM contract #1422H 952-C-2-2095, a manual vegetation control (brushing) contract in the Glendale Resource Area, Medford District, within the State of Oregon. Work was performed on this contract between May 6 and August 5, 1992. Jose Arroyo and Amando Perez appeared as foremen on the contract. On June 22, 1992, in a telephone conversation with the BLM Alternative COR, Victoria Arthur, Simon Burkoff did not know the name of the foreman of a S.B.I., Inc. crew recently dispatched to the contract site. The maximum number of workers employed on the contract on any day was 36. Respondent Ovchinnikov was not mentioned in the contract daily diaries.

33) On May 27, 1992, S.B.I., Inc. was awarded BLM contract #1422H 952-C-2-3105 for manual maintenance (brush clearing) of young conifers in the Tillamook Resource Area, Salem District, within the State of Oregon. Work on this contract was performed between June 12 and September 11, 1992. BLM Supervisory Forester Walter Kastner, Jr. was the COR on the contract; Forester Stuart Hoffman was the alternative COR and Project Inspector on the contract. Simon Burkoff and Francisco Garcia attended the

prework conference on June 9, 1992; Burkoff designated Respondent Ovchinnikov and Francisco Garcia as the contract representatives. On June 17, 1992, Respondent Ovchinnikov designated Fidel Hernandez, Alex, and Alvaro Lopez as additional contract representatives. It is unusual to have someone other than the contractor sign the authorization of contract representatives. Following the prework conference, of 39 contacts BLM had with contractor SBI, Inc., 34 were contacts made by or with Respondent Ovchinnikov; five were with Burkoff. These contacts concerned such matters as noncompliance with the contract, representative designations, payment, rework, work progress, fire shutdown, and extension of contract time. Respondent Ovchinnikov was the main, almost sole, contact for S.B.I., Inc. on the contract. On August 7, 1992, two months into the contract, Burkoff called BLM, informing BLM that Respondent Ovchinnikov was away on a fire and requesting a copy of the contract. A maximum of five workers labored on the contract on any one day.

Wage interviews were conducted on site by Raul Pena, a Spanish-speaking employee of the Agency, in September 1992. The interviews were conducted in Spanish. The spokesperson for the workers, Santiago Rosales, told Pena that Respondent Ovchinnikov had hired him and that Respondent Ovchinnikov was in charge, but that the contract belonged to Burkoff.

34) S.B.I., Inc. performed the activities described in Findings of Fact 32 and 33, pursuant to contracts between S.B.I., Inc. and the BLM, for

remuneration or a rate of pay agreed upon in those contracts.

35) In 1992, S.B.I., Inc. submitted proposals to bid on projects let by the State of Oregon Department of Forestry. In a document filed by S.B.I., Inc. on April 20, 1992, in connection with these proposals, S.B.I., Inc. listed Victor Ovchinnikov and Cliff [sic] West as the dispatch contacts; listed Burkoff's telephone number as (503) 981-1271; listed Victor Ovchinnikov as the contact person for the corporation; and appended a Certificate of Insurance (automobile) identifying the insured as S.B.I., Inc./Victor Ovchinnikov, 1810 E Hardcastle, Woodburn, Oregon. In a Certificate of Compliance filed by S.B.I., Inc. on August 3, 1992, Victor Ovchinnikov is listed as the contact person for the corporation. A contract award letter to S.B.I. [sic], dated September 16, 1992, is directed to the attention of Respondent Ovchinnikov at PO Box 819, Woodburn, Oregon. In a form letter to SBI [sic] dated September 28, 1992, in which the Department of Forestry solicited the return of mailing list information, Respondent Ovchinnikov's name was written in as the contact person for S.B.I., Inc.; the address portion was first written as "1810," then crossed out and replaced with PO Box 819, Woodburn, Oregon.

36) While investigating wage claims in June 1994, Pena went to 1810 E Hardcastle, Woodburn, the residence address of Respondent Ovchinnikov, where he found both Respondent Ovchinnikov and Simon Burkoff. Pena noted the license number of the vehicle Burkoff was driving; a subsequent license plate check revealed that the vehicle was owned by

Victor and Penny Ovchinnikov. Penny Ovchinnikov is the wife of Victor Ovchinnikov.

37) On June 4, 1994, S.B.I., Inc. was awarded USFS contract #52-04T0-2-1061S for the manual release of conifers in the Siuslaw National Forest, Hebo Ranger District, within the State of Oregon. Work on this contract was performed between June 14 and approximately August 7, 1992. USFS Forestry Technician John Eckhart was the COR on the contract. A maximum of 15 workers labored on the contract at any one time. On June 9, 1992, Burkoff signed a contractor's designation letter, granting full authority to Respondent Ovchinnikov and Francisco Garcia to act on all contract matters. On June 16, 1992, Burkoff signed an authorization granting full contract authority to Respondent Ovchinnikov to act on all contract matters. Normally, contractor's give minimal contract authority to their foremen. Eckhart formed the impression that Respondent Ovchinnikov was running the contract. Eckhart very seldom saw Burkoff during the contract. The contact telephone number for S.B.I., Inc. for the contract was Respondent Ovchinnikov's home number. On June 24, 1992, Foreman Albert Lopez asked Eckhart the procedure for reporting a pay rate below the minimum wage. Lopez was concerned that Respondent Ovchinnikov would fire him if he learned that Lopez had complained about the wages. Lopez reported that his crew was receiving one-half the bid price to do the work. On July 16, 1992, Lopez again broached the pay issue and agreed to provide Eckhart with the names of eight of the ten crew

members. On July 16, 1992, Eckhart called Carol Rogers of the United States Department of Labor (USDOL). On July 28, 1992, representatives from the USDOL conducted employee wage interviews on site. On the same day, the USFS inspected the workers' saws for spark screens. The saws were not properly equipped. Respondent Ovchinnikov and Burkoff were on site; Respondent Ovchinnikov stated that he would remedy the saw problems that afternoon.

38) S.B.I., Inc. performed the activities described in Findings of Fact 29 and 37, above, pursuant to contracts between S.B.I., Inc. and the USFS, for remuneration or a rate of pay agreed upon in those contracts.

39) Between May 13 and September 22, 1992, the following checks, drawn on the S.B.I., Inc. account of the Woodburn branch of the Bank of America, were issued to Respondent Ovchinnikov, over the stamped, facsimile signature of Simon Burkoff.

Check Date	Amount	Notation
5/13/92	\$1,000.00	Crew Expense
5/15/92	\$ 665.25	-
5/31/92	\$ 665.25	-
6/15/92	\$ 665.25	-
6/30/92	\$ 665.25	-
7/1/92	\$ 500.00	Reimbursement for Expenses
7/7/92	\$ 500.00	Expense Reimburse
7/10/92	\$1,747.43	Expense Reimburse
7/15/92	\$ 500.00	Supplies
7/31/92	\$ 665.25	-
8/15/92	\$ 665.25	(NSF)
9/3/92	\$ 550.00	Wire Draw to Fidel Hernandez
9/15/92	\$ 300.00	Empl. Draw Reimburse
9/18/92	\$2,500.00	Bonding-Yakov
9/22/92	\$1,200.00	Advances to Men

40) The checks described in Finding of Fact 39, above, total \$13,449.36.

41) Respondent Ovchinnikov's name does not appear on any weekly payroll register submitted by S.B.I., Inc. with certified payroll records on 51 occasions between June 15 and November 18, 1992.

42) On December 28, 1992, Burkoff executed an application for the renewal of the joint farm/forest labor contractor license for himself and S.B.I., Inc. In this application, Burkoff listed the business address as PO Box 819, Woodburn, Oregon, and the business phone as 981-1634.

43) On the joint license renewal application of Simon Burkoff and S.B.I., Inc., dated December 28, 1992, Burkoff indicated that S.B.I., Inc. would use no vehicle in its business operation. The Agency knew that a vehicle was being used in the business and wanted to question Burkoff about this. On January 20, 1993, Simon Burkoff and Respondent Ovchinnikov talked, in person, to Farm Labor Unit Supervisor Nedra Cunningham; Respondent Ovchinnikov did most of the talking. Subsequent to January 20, 1993, in response to the questioning concerning the vehicle, Burkoff produced a sale agreement for a 1992 Ford F350 pickup between Respondent Ovchinnikov and S.B.I., Inc., dated January 27, 1993.

44) On March 1, 1993, the Agency issued a Notice of Proposed Refusal to Renew a License and Intent to Assess Civil Penalties against Burkoff and S.B.I., Inc., alleging multiple violations of ORS 658.405 through 658.503. On April 8, 1993, the Agency received a letter from Burkoff, in which Burkoff withdrew the joint application for license renewal, and asked that all

paperwork, including bonding, be returned.

45) On June 14, 1993, a Final Order (On Default) was taken against Simon Burkoff and S.B.I., Inc. by the Agency on its earlier notice. Pursuant to the Final Order, the application for renewal was denied and civil penalties in the amount of \$56,400 were assessed.

#### **Trails West, Inc.**

46) On October 16, 1992, Trails West, Inc. was incorporated. Effective April 12, 1993, the registered agent was shown as Jose Trinidad Arroyo Martinez (hereinafter Jose Arroyo), 1060 Brian Street, PO Box 452, Woodburn, Oregon. No address for a principal office was listed.

47) On April 6, 1993, Jose Arroyo submitted a farm/forest labor contractor license application for a joint license for Trails West, Inc. and himself (as majority shareholder), dated April 5, 1993. In the application, Arroyo represented that he was the president and sole owner of Trails West, Inc. and listed the business address as 1060 Bryan Street, Woodburn, Oregon, with a mailing address of PO Box 452, Woodburn, Oregon. The business phone was listed as 981-4178.

48) In its application for a corporate contractor's bond, Trails West, Inc., through Jose Arroyo, president, represented that Arroyo was the sole owner and that he had worked as a foreman for S.B.I., Inc. for contract year 1992. The business address was listed as PO Box 452, Woodburn, Oregon. The corporation's bank was identified as the Bank of America and the accountant as Cliff West. The application was

signed by Arroyo on March 26, 1993. The financial statement listed \$7,000 in equipment.

49) A temporary permit to conduct business as a farm/forest labor contractor was issued jointly to Jose Arroyo and Trails West, Inc. on April 13, 1993. By its terms, the permit was to expire on June 12, 1993. On June 13, 1993, the Agency issued a joint farm/forest contractor license to Arroyo and Trails West, Inc. The license was to expire on April 30, 1994.

50) In a USFS experience questionnaire dated June 7, 1993, Arroyo, as president of Trails West, Inc., represented that he had two years' experience in thinning and planting, listing projects for S.B.I., Inc. and Valley Reforestation, among others. In the financial statement portion, Arroyo listed Christmas tree equipment in the amount of \$52,000 and 40 chain saws worth \$6,000.

51) On June 9, 1993, Trails West, Inc. was awarded BLM contract #1422-H952-C-3-3031, a manual maintenance and precommercial thinning contract in the Tillamook Resource Area, Salem District, State of Oregon. Work was performed on the contract between June 8 and September 27, 1993. Payments on the contract were made to the Offord Finance Company. BLM Forester Stuart Hoffman was the Alternate COR and Project Inspector on the contract. The BLM had difficulty reaching Arroyo in person during the contract. The telephone number he had given was an answering service or message phone (JoAnn West). Arroyo would usually call back, but not right away. To facilitate communication, either JoAnn

West or Arroyo gave BLM a fax number to use, 981-1759. That number seemed to work better for obtaining quick responses to contract matters. Hoffman believed that the fax number was the telephone number for Respondent Ovchinnikov. Respondent Ovchinnikov replied to some of the faxes intended for Arroyo, and Hoffman could hear Respondent Ovchinnikov in the background sometimes when Hoffman spoke to Arroyo by telephone. Respondent Ovchinnikov was present on site at least once during the contract work. Hoffman suspected that Respondent Ovchinnikov was involved in the contract. For about a week, Respondent Ovchinnikov exclusively dealt with the BLM on the contract.

52) Trails West, Inc. performed the activities described in Finding of Fact 51, pursuant to a contract between Trails West, Inc. and the BLM, for remuneration or a rate of pay agreed upon in that contract.

53) On July 6, 1993, Trails West, Inc. was awarded USFS contract #52-04N0-3-042C, a thinning and lopping contract in the Ochoco National Forest, Paulina Ranger District, State of Oregon. Work was performed on the contract between July 7, 1993, and November 22, 1993. USFS Supervisory Contract Specialist Orrin Corak was the Contracting Officer on the contract; Ken Burton was the Acting COR for the contract. Homero Hernandez and Francisco Garcia were designated representatives on the contract. The telephone number for Arroyo was the number for JoAnn West, an answering service or message number. An alternate phone number given to Corak

was 981-1634. Simon Burkoff was on site on about June 24, 1993, representing the company on the contract and calling himself "Sam Berkot." On June 29, 1993, a contract document sent by certified mail to Trails West, Inc. at PO Box 452, Woodburn, was signed for by Respondent Ovchinnikov. On November 16, 1993, Anton Meneyev and his crew arrived on site to work as a subcontractor. Upon being informed that he would not be permitted to subcontract, Meneyev used the USFS office phone to call Trails West. When he made the call, he placed it for "Victor." Victor Ovchinnikov returned the call within minutes; the conversation was then conducted in Russian.

54) On August 20, 1993, Arroyo, as president of Trails West, Inc., executed an assignment of pay due for performance of USFS contract #53-04N7-3-28, in the Butte Falls Ranger District of the Rogue River National Forest, to Offord Finance of Central Point, Oregon. Arroyo listed the address for the company as 1810 E Hardcastle, Woodburn, Oregon.

55) On August 31, 1993, Trails West, Inc. was awarded USFS contract #52-04KK-3-90, a tree planting and netting contract in the Malheur National Forest, Prairie City Ranger District, near John Day, Oregon. USFS Supervisory Contract Specialist Marle Brandt was the Contracting Officer on the contract. One of the designated representatives on the contract was Francisco Garcia. Blas Garcia was employed as a worker on this project. He was part of an original crew of four workers. Simon Burkoff transported the crew back after four days as the

crew had no experience. Burkoff got a new crew through Armando Garcia, a recruiter for Respondent Ovchinnikov. Armando Garcia and Francisco Garcia are thought by Blas Garcia to be the same person. Palemon Arce, Ignatio Ruiz, and Luis Garcia Hernandez were workers on this contract. Ruiz and Hernandez were recruited by Omar Hernandez; Respondent Ovchinnikov was in charge of the operation. Agency Compliance Specialist Raul Pena attempted to locate Ruiz and Hernandez to secure their testimony for hearing; he was not able to locate them.

56) Trails West, Inc. performed the activities described in Findings of Fact 53 and 55 pursuant to contracts between Trails West, Inc. and the USFS, for remuneration or a rate of pay agreed upon in those contracts.

57) At the Salem Office of State of Oregon Forestry, during the 1993 reforestation season, Respondent Ovchinnikov identified himself to Purchasing Agent William Foster by name. When asked what company he was representing, Respondent said he was representing Trails West, Inc.

58) In the fall of 1993, Trails West, Inc. was awarded a three-year, multi-million dollar contract near Elkton, Oregon. The job involved the lifting of seedlings. On approximately September 20, 1993, Pena and two other Agency employees made a site visit. Pena talked with Arroyo, who was driving a white truck owned by Victor and Penny Ovchinnikov. In October or November 1993, in connection with this same contract, State Forestry Purchasing Agent William Foster observed Arroyo and Simon Burkoff

together at the Elkton Nursery. Burkoff called himself "Sam," but Foster recognized him as Simon Burkoff from visits Burkoff made to the Salem Office of State Forestry in 1992.

59) Compliance Specialist Pena went to the apartment of Jose Arroyo at 250 Locust Street, #15, Canby, Oregon, in approximately October 1993, at a time when Arroyo had been in business approximately 10 months. The apartment was bare except for a television set on the floor of the living room and a table with one chair in the kitchen. Trails West had substantial contracts at that time, one worth in excess of one million dollars. Arroyo was not fluent in English. Arroyo was not sophisticated; Pena saw a check written by Arroyo in which Arroyo had entered the amount of the check in the space provided for the payee's name. Through his work, Pena has had a lot of experience with farm labor contractors. It takes awhile for a contractor to build up a business, usually the contractor starts with small contracts. In Pena's experience, it is unusual for a contractor to drop out of the blue and get multi-million dollar contracts. When Pena attempted to serve Arroyo with documents in February 1994, Arroyo no longer lived in the Canby apartment. Pena located Arroyo living in a house owned by Yakov Ovchinnikov.

60) In November 1993, Trails West, Inc. was performing USFS contract #52-04T0-3-5022s, a precommercial thinning contract in the area of Waldport, Oregon. On November 4, 1993, Jose Arroyo could not identify the foreman on site when asked his name by COR Armstrong.

61) In November 1993, Compliance Specialist Pena obtained from Jose Arroyo the following canceled checks, drawn on the account of Trails West, Inc.:

Date	Payee	Amount	Notation
6/19/93	Telecomm Systems	\$56	#368999 (Valley Reforestation)
7/16/93	Bank Of America	\$7,434.02	[Endorsed by Victor Ovchinnikov]
7/29/93	Bank of America	\$11,906.94	[Endorsed by Victor Ovchinnikov]
10/29/93	Bank of America	\$8,443	[Endorsed by Victor Ovchinnikov]
7/21/93	Simon Burkoff	\$1,000	Payroll draw

62) In November 1993, Compliance Specialists Pena and Silva observed an advertisement in the Capital Press causing them to suspect that Respondent Ovchinnikov was contracting Christmas tree harvest projects. Silva called the telephone number, which was recognized as that of JoAnn West Accounting. Silva posed as a worker and was told to go to Mall 99 the following day at 6:30 a.m. The following day, November 15, 1993, Silva and Pena arrived at 5:30 a.m. and parked near the meeting place. Respondent Ovchinnikov was the first person to arrive. As Arroyo, Fidel Hernandez, Hornar Hernandez, Ixioq Aguilera, and others arrived, they each went to talk to Respondent Ovchinnikov. Respondent Ovchinnikov was believed to be giving instructions. Pena wanted to observe from a closer vantage point and arranged for a task force of Agency employees to return on November 17, 1993. The task force of Pena, Silva, Shimanovsky, and Sifuentez returned to Mall 99 at 5:15 a.m. on November 17, 1993. As planned, Pena hid himself in a newspaper recycling bin and set himself up to videotape the rendezvous.

Respondent Ovchinnikov arrived first, at approximately 6 a.m. He waited in his truck. As each vehicle arrived, the vehicle would either pull up alongside Respondent Ovchinnikov's vehicle for the driver to talk to him or the driver would park and walk over to Respondent Ovchinnikov's truck. Farm workers began to arrive next. Ixiqio Aguilera and Arroyo arrived. Both talked to Respondent Ovchinnikov. Two vans arrived and went to Respondent Ovchinnikov's location. By 6:25 a.m., many vehicles and farm workers had arrived. Homar Hernandez arrived and talked directly to Respondent Ovchinnikov. Fidel Hernandez arrived and received instructions from Respondent Ovchinnikov. At approximately 6:30 a.m., Fidel and Ixiqio rounded up workers. Respondent Ovchinnikov left first, followed by the others. Silva and Shimanovsky attempted to follow a group from Mall 99, but lost them. On a hunch, they went to the Vern Forristall farm in Molalla where they observed the same vehicles they had seen at Mall 99.

63) On either November 17 or 18, 1993, Silva returned to the Forristall farm to interview workers. Silva observed a Christmas tree harvest underway; Christmas tree equipment was on site. Silva talked with some of the workers. He was told by some that they had been hired by Jose, others said they had been hired by a Russian named "Victor." Neither Jose nor Respondent Ovchinnikov were at the site. Silva returned the same day and observed Respondent Ovchinnikov talking to workers. Respondent Ovchinnikov told Silva that Arroyo was the contractor, that a bookkeeper in

Woodburn pays the workers, and that he was present because the Christmas tree baler was his and he was checking to see that it was being used properly. Respondent Ovchinnikov had been giving the workers their assignments before Silva arrived, according to two workers.

64) On November 30, 1993, INS made a raid on the Vern Forristall farm. Eight to twelve workers fled upon the arrival of the INS agents. Respondent Ovchinnikov was present, standing off to the side observing the tree operation, and told the agents that the crews belonged to Arroyo. Arroyo was in the truck loading Christmas trees. Of the four aliens interviewed by INS, one stated he had been recruited by Palemon, one (Felipe Miguel Pascual) said he had been hired by Respondent Ovchinnikov, and the remaining two workers would not answer. Virgilio Cancino labored on the Molalla Christmas tree contract in November 1993. Ixiqio recruited him. Ixiqio told Cancino that Respondent Ovchinnikov was the boss. Cancino rode with Respondent Ovchinnikov to the work site. He was paid by Ixiqio at Respondent Ovchinnikov's office in Woodburn. Respondent Ovchinnikov had two offices in Woodburn.

65) Palemon Arce started working for Respondent Ovchinnikov in December 1989. He has done many types of forest work for Respondent Ovchinnikov, including precommercial thinning, brushing, making fire tracks, fire fighting, and work with Christmas trees. Arce and Jose Arroyo have worked together. When they worked together, Respondent Ovchinnikov was the boss. Arce worked for Jose in

1993 in Tillamook, Estacada, John Day, Medford, Molalla, and Silverton. He has driven a van for Respondent Ovchinnikov and Jose Arroyo. He transported workers in the van. The vans belonged to Respondent Ovchinnikov. When there was a problem with pay, Jose told Arce to talk to Respondent Ovchinnikov about it. When Jose and Respondent Ovchinnikov worked together, Respondent Ovchinnikov was in charge of the money. Arce has seen Respondent Ovchinnikov send Jose to the work site and give Jose the money to pay the workers. Jose would make out the checks.

66) On February 14, 1994, a Notice of Intent to Revoke Farm Labor Contractor's License and to Assess Civil Penalties was issued by the Agency against Jose Arroyo and Trails West, Inc., alleging multiple violations of ORS 658.405 through 658.503.

67) In a deposition of Respondent Ovchinnikov taken by Oregon Legal Services in connection with wage claims on February 22, 1994, Respondent Ovchinnikov stated that he worked on the Forristall Christmas tree harvest in November 1993 as an employee of Arroyo; that he was paid \$4.75 an hour to load trees onto trucks; that Arroyo had previously worked for him as a forestation laborer, and that he owned no Christmas tree baler or loader.

68) On May 19, 1994, a Final Order (On Default) was taken against Jose Arroyo and Trails West, Inc. by the Agency on its earlier notice. Pursuant to the Final Order, the joint license was revoked and civil penalties in the amount of \$166,500 were assessed.

#### General

69) Respondent Ovchinnikov, Simon Burkoff, and Jose Arroyo used the same bonding company, accountant, bank, and vehicles.

70) The testimony of each witness was entirely 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 consistent with the answers of the other witnesses as well as the documentary evidence.

#### ULTIMATE FINDINGS OF FACT

1) During 1989, 1990, and part of 1991, Respondent Ovchinnikov was licensed as a farm labor contractor, with a forestation indorsement, doing business in the State of Oregon as Valley Reforestation, a sole proprietorship. His license expired on March 24, 1991. On November 9, 1992, he submitted an application for a joint 1993 farm/forest labor contractor license for Valley Contracting, Inc. and himself, as majority shareholder. At no time after March 24, 1991, did Respondent Ovchinnikov have a farm labor contractor license with a forestation indorsement. At no time has Valley Contracting, Inc. been licensed as a farm/forest labor contractor in the State of Oregon. The Agency's proposed denial of the joint application for a farm/forest labor contractor license is a subject of this proceeding.

2) During all material times herein, Respondent Ovchinnikov was acting as a farm labor contractor, as defined by ORS 658.405, doing business in the State of Oregon. Respondent Ovchinnikov acted as an individual,

except between April 2, 1993, and June 14, 1993, when he acted on behalf of Valley Contracting, Inc. Between April 2 and June 14, 1993, Valley Contracting, Inc. was acting as a farm/forest labor contractor.

3) In May 1992, Respondent Ovchinnikov, through his agent, Amano Perez, recruited or solicited two workers in Oregon to perform labor for another in the forestation or reforestation of lands in the State of Washington.

4) During all times material herein, Respondent Ovchinnikov, a natural person, had a financial interest and managerial role in S.B.I., Inc., which recruited, solicited, supplied, or employed workers to perform labor for another in Oregon in the forestation or reforestation of lands.

5) Between April 21 and May 15, 1992, Respondent Ovchinnikov did not recruit, solicit, supply, or employ forestation workers to labor upon USFS contract #03-04KK-2-02816 in the Burns District.

6) Between June 14 and August 7, 1992, Respondent Ovchinnikov did not recruit, solicit, supply, or employ forestation workers to labor upon USFS contract #52-04T0-2-1061S in the Hebo District.

7) Between May 6 and August 5, 1992, Respondent Ovchinnikov did not recruit, solicit, supply, or employ forestation workers to labor upon BLM contract #1422H952-C-2-2095 in the Medford District.

8) Between June 12 and September 11, 1992, Respondent Ovchinnikov, on behalf of S.B.I., Inc., employed or supplied a forestation

worker to labor upon BLM contract #1422H952-C-2-3105 in the Salem District, when, at all material times, Respondent Ovchinnikov did not possess a valid farm labor contractor license with a reforestation indorsement.

9) During all times material herein, Respondent Ovchinnikov, a natural person, had a financial interest in Trails West, Inc., which recruited, solicited, supplied, or employed workers to perform labor for another in Oregon in the forestation or reforestation of lands.

10) Between June 8 and September 27, 1993, Respondent Ovchinnikov did not recruit, solicit, supply, or employ forestation workers to labor upon BLM contract #1422H952-C-3-3031 in the Salem District.

11) Between July 19 and November 22, 1993, Respondent Ovchinnikov did not recruit, solicit, supply, or employ forestation workers to labor upon USFS contract #52-04N0-3-042C in the Paulina District.

12) In September 1993, Respondent Ovchinnikov did not recruit, solicit, supply, or employ forestation workers to labor upon USFS contract #52-04KK-3-90 in the Prairie City District.

13) In 1992, Respondent Ovchinnikov did not recruit, solicit, supply, or employ farm workers to harvest Christmas trees for Dave Buell.

14) In November 1993, Respondent Ovchinnikov employed or supplied at least one farm worker to harvest Christmas trees for Vern Forristall at the Forristall farm near Molalla, Oregon, when, at all material times, Respondent Ovchinnikov did not possess a valid farm labor contractor license.

15) During all times material herein, Respondent Ovchinnikov, a natural person, owned and operated Respondent Valley Contracting, Inc., which recruited, solicited, supplied, or employed workers to perform labor for another in Oregon in the forestation or reforestation of lands.

16) Between May 17 and June 14, 1993, Respondents Ovchinnikov and Valley Contracting, Inc. employed 54 forestation workers to labor upon USFS contract #53-04U3-3-00009 in the Chemult District, when, at all material times, Respondents did not possess a valid farm labor contractor license with a reforestation indorsement.

17) Respondent Ovchinnikov failed to pay, when due, to four of his forestation workers, all wages earned and unpaid immediately upon the termination of the workers' employment on a tree thinning contract in the State of Washington. The USFS had entrusted that compensation to Respondent Ovchinnikov for the purpose of promptly paying his workers for that labor. As a result, Respondent failed to distribute promptly, when due, to the individuals entitled thereto, all money entrusted to the farm labor contractor for that purpose.

18) Respondent Ovchinnikov failed to carry a farm labor contractor's license at all times while acting as a farm labor contractor in connection with the contracts identified in Ultimate Findings of Fact 3, 8, 14, and 16.

19) Respondent Valley Contracting, Inc. was not required to carry a farm labor contractor's license at all times while acting as a farm labor contractor in connection with the contract

identified in Ultimate Finding of Fact 16.

20) Between on or about May 17 and June 14, 1993, Respondents Ovchinnikov and Valley Contracting, Inc. employed and provided crews to perform reforestation labor on USFS contract #53-04U3-3-00009. Respondents failed to 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 it paid employees directly.

21) Between on or about May 17 and June 14, 1993, Respondent Valley Contracting, Inc. did not assist Respondent Victor Ovchinnikov, an unlicensed person, to act in violation of ORS 658.405 to 658.503.

22) In November 1993, Respondent Ovchinnikov, while acting as a farm labor contractor, discriminated against Blas Garcia, a regular seasonal employee, by refusing to rehire him to harvest Christmas trees because Garcia had made a claim against Respondent for compensation for his services and had caused proceedings to be instituted related to ORS 658.405 to 658.503 and 658.830.

23) On October 31, 1991, Respondent Ovchinnikov signed a Consent Order with the Commissioner. As a term of the Consent Order, Respondent Ovchinnikov expressly admitted each allegation of the notice. As a further condition of the Consent Order, Respondent Ovchinnikov agreed that a repeat occurrence of any violation admitted in the Consent Order, or any violation of a term or condition of the Consent Order, would constitute a breach of a legal and valid agreement

entered into with the Commissioner in Respondent Ovchinnikov's capacity as a farm labor contractor, which breach would be grounds for revocation or denial of Respondent Ovchinnikov's farm labor contractor license. By acting as a farm labor contractor without a license, as described in Ultimate Findings of Fact 3, 8, 14, and 16, above, Respondent Ovchinnikov repeated a violation admitted in the Consent Order and breached a legal and valid agreement between the Commissioner and Respondent Ovchinnikov, entered into in his capacity as a farm labor contractor. This breach is grounds for denial of Respondent Ovchinnikov's license application.

24) Respondent Ovchinnikov's character, reliability, and competence make him unfit to act as a farm labor contractor. The character, competence, and reliability of Respondent Valley Contracting, Inc. make it unfit to act as a farm labor contractor.

#### 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. ORS 648.405 to 658.485.

2) ORS 658.405 provides, in part:

"As used in ORS 658.405 to 658.503 and 658.830 and 658.991(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but

not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, and clearing, piling and disposal of brush and slash and other related activities or the production or harvesting of farm products; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities \* \* \*"

OAR 839-15-004 provides, in part:

"As used in these rules, unless the context requires otherwise:

"(4) 'Farm Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the production or harvesting of farm products; or

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the production or harvesting of farm products; \* \* \*

\* \* \*

"(5) 'Forest Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the forestation or reforestation of lands; or

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the forestation or reforestation of lands; \* \* \*

\* \* \*

"(8) 'Production and harvesting of farm products' includes, but is not limited to, the cultivation and tillage of the soil, the production, cultivation, growing and harvesting of any agricultural commodity and the preparation for and delivery to market of any such commodity.

"(9) 'Forestation or reforestation of lands' includes, but is not limited to:

"(a) The planting, transplanting, tubing, precommercial thinning, and thinning of trees and seedlings; and

"(b) The clearing, piling and disposal of brush and slash; and

"(c) Other activities related to the forestation or reforestation of lands, including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land.

"(15) 'Worker' means any individual performing labor in the forestation or reforestation of lands or in the production and harvesting of farm products, or any person who is recruited, solicited, supplied or employed to perform such labor, notwithstanding whether or not a contract of employment is formed or the labor is actually performed. A 'worker' includes, but is not limited to employees and members of a cooperative corporation.

"(16) 'Person' means any individual, sole proprietorship, partnership, corporation, association or other business or legal entity."

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 658.417 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."

Respondents were acting as farm labor contractors. By acting as a farm labor contractor with regard to the production and harvesting of farm products without a valid license issued to him by the Commissioner, as described in Ultimate Finding of Fact 14,

Respondent Ovchinnikov violated ORS 658.410(1) one time. By acting as a farm labor contractor with regard to the forestation or reforestation of lands without a valid license issued by the Commissioner, as described in Ultimate Findings of Fact 3 and 8, Respondent Ovchinnikov twice violated ORS 658.410(1) and 658.417(1). By acting as a farm labor contractor with regard to the forestation or reforestation of lands without a valid license issued by the Commissioner, as described in Ultimate Finding of Fact 16, Respondents Valley Contracting, Inc. and Ovchinnikov violated ORS 658.410(1) and 658.417(1) 54 times.

3) The actions, inactions, and statements of Amando Perez are properly imputed to Respondent Ovchinnikov. As Amando Perez was either Respondent Ovchinnikov's employee or agent during times material herein, and his actions, inactions, and statements were made in the course and within the scope of that employment or agency, Respondent is responsible for those actions, inactions, and statements.

4) 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."

OAR 839-15-300 provides, in part:

"(1) Forest Labor Contractors engaged in the forestation or reforestation of lands must, unless otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or contractor's agent pays employees directly.

"(2) The certified true copy of payroll records shall be submitted at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submissions may be made."

By failing to provide to the Commissioner a certified true copy of all payroll records for work done as a farm labor contractor, when they paid employees directly, at least every 35 days starting from the time work first began on USFS forestation/reforestation contract #53-04U3-3-00009, Respondents violated ORS 658.417(3) and OAR 839-15-300 one time.

5) ORS 658.440(1) provides, in part:

"Each person acting as a farm labor contractor shall:

"(a) Carry a labor contractor's license at all times and exhibit it upon request \* \* \*."

Respondent Ovchinnikov violated ORS 658.440(1)(a) four times when he failed to carry a farm labor contractor's

license while acting as a farm labor contractor in relation to the contracts identified in Ultimate Findings of Fact 3, 8, 14, and 16. Respondent Valley Contracting, Inc. did not violate ORS 658.440(1)(a).

6) ORS 652.145 provides:

"Notwithstanding ORS 652.140, if an employee has worked for an employer as a seasonal farm worker, whenever the employment terminates, all wages earned and unpaid become due and payable immediately. However, if the employee quits without giving the employer at least 48 hours' notice, wages earned and unpaid are due and payable within 48 hours after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever first occurs. \* \* \*"

ORS 658.440(1) provides, in part:

"Each person acting as a farm labor contractor shall:

"\* \* \*

"(c) Pay or distribute promptly, when due, to the individuals entitled thereto all money or other things of value entrusted to the labor contractor by any person for that purpose."

By failing to pay promptly, when due, to Jesus Eduardo Gonzalez, Miguel Medina, Adolfo Martinez Espinoza, and Angel Soto earned wages to which they were entitled immediately upon completion of the Washington USFS forestation contract, and which wages had been entrusted to Respondent to so pay, Respondent Ovchinnikov violated ORS 658.440(1)(c) four times.

8) ORS 658.440(1) provides, in part:

"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."

Respondent Ovchinnikov violated ORS 658.440(1)(d) when, during 1992 and 1993, he acted as a farm labor contractor without a license to do so, violating the terms and conditions of the 1991 Consent Order, a valid agreement with the Commissioner of the Bureau of Labor and Industries entered into by Respondent Ovchinnikov in his capacity as a farm labor contractor.

9) ORS 658.440(3) provides, in part:

"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."

Between May 17 and June 14, 1993, Respondent Valley Contracting, Inc. did not assist Respondent Ovchinnikov, an unlicensed person, to act in violation of the farm labor contractor laws and did not violate ORS 658.440(3)(e).

10) ORS 658.452 provides, in part:

"No farm labor contractor or employer shall discharge or in any

other manner discriminate against any employee because:

"(1) The employee has made a claim against the farm labor contractor or employer for compensation for the employee's own personal services.

"(2) The employee has caused to be instituted any proceedings under or related to ORS 658.405 to 658.503 and 658.830. \* \* \*

Respondent Ovchinnikov violated ORS 658.452 when he refused to permit the rehire of Blas Garcia, a regular seasonal employee, because Garcia had made a claim against Respondent Ovchinnikov, a farm labor contractor, for compensation for his own services, and caused to be instituted proceedings related to ORS 658.405 to 658.503 and 658.830.

11) ORS 658.453(1) provides, in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.503 and 658.830, recruits, solicits, supplies or employs a worker.

\* \* \*

"(c) A farm labor contractor who fails to comply with ORS 658.440(1), \* \* \* or (3).

"(d) Any person who violates ORS 658.452.

"(e) A farm labor contractor who fails to comply with ORS 658.417(1), (3) \* \* \*"

OAR 839-15-505 provides, in part:

"(2) 'Violation' means a transgression of any statute or rule, or any part thereof and includes both acts and omissions."

OAR 839-15-508 provides, in part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

"(a) Acting as a farm or forest labor contractor without a license in violation of ORS 658.410;

\* \* \*

"(e) Failing to pay or distribute when due any money or other valuables entrusted to the contractor in violation of ORS 658.440(1)(c);

"(f) Failing to comply with contracts or agreements entered into as a contractor in violation of ORS 658.440(1)(d);

\* \* \*

"(k) Discharging or in any other manner discriminating against employees in violation of ORS 658.452;

\* \* \*

"(o) Assisting an unlicensed person to act as a contractor in violation of 658.440(3)(e);

\* \* \*

"(s) Failing to carry the license in violation of ORS 658.440(1)(a).

\* \* \*

"(2) In the case of Forest Labor Contractors, in addition to any

other penalties, a civil penalty may be imposed for each of the following violations:

"(a) Failing to obtain a special indorsement from the Bureau to act as a Forest Labor Contractor in violation of ORS 658.417(1).

"(b) Failing to provide certified true copies of payroll records in violation of ORS 658.417(3)."

OAR 839-15-510 provides:

"(1) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the Commissioner finds to be appropriate:

"(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude and seriousness of the violation;

"(d) Whether the contractor or other person knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor or other person to provide the Commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

"(3) In arriving at the actual amount of the civil penalty, the Commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or

other person in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the Commissioner shall consider all mitigating circumstances presented by the contractor or other person for the purpose of reducing the amount of the civil penalty to be imposed."

OAR 839-15-512 provides, in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) Repeated violations of the statutes for which a civil penalty may be imposed are considered to be of such magnitude and seriousness that a minimum of \$500 for each repeated violation will be imposed when the Commissioner determines to impose a civil penalty.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm or forest labor contractor without a valid license, the minimum civil penalty shall be as follows:

"(a) \$500 for the first offense;

"(b) \$1,000 for the second offense;

"(c) \$2,000 for the third and each subsequent offense."

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 Respondents. The assessment of the civil

penalties specified in the Order below is an appropriate exercise of that authority.

12) ORS 658.420 provides, in part:

"(1) The Commissioner of the Bureau of Labor and Industries 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.

"(2) The commissioner shall issue a license within 15 days after the day on which the application therefor was received in the office of the commissioner if the commissioner is satisfied as to the applicant's character, competence and reliability."

OAR 839-15-145(1) provides, in part:

"The character, competence and reliability contemplated by ORS 658.405 to 658.475, and these rules includes, but is not limited to, consideration of.

"(a) A person's record of conduct in relations with workers, farmers and others with whom the person conducts business.

"(b) A person's reliability in adhering to the terms and conditions of any contract or agreement between the person and those with whom the person conducts business.

"(c) A person's timeliness in paying all debts owed including advances and wages.

" \* \* \*

"(g) Whether a person has violated any provision of ORS 658.405 to 658.485."

OAR 839-15-520 provides, in part:

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

"(e) Assisting an unlicensed person to act as a Farm or forest Labor Contractor,

" \* \* \*

"(g) Discharging or discriminating in any way against an employee as per ORS 658.452;

" \* \* \*

"(k) Acting as a farm or forest labor contractor without a license.

"(2) When the applicant for a license \* \* \* demonstrates that the applicant's \* \* \* character, reliability or competence makes the applicant \* \* \* unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the license application be denied \* \* \*.

"(3) The following actions of a Farm or Forest Labor Contractor license applicant \* \* \* or an agent of the license applicant \* \* \* demonstrate that the applicant's \* \* \* character, reliability or competence make the applicant \* \* \* unfit to act as a Farm or Forest Labor Contractor.

"(a) Violations of any section of ORS 658.405 to 658.485;

" \* \* \*

"(d) Failure to comply with federal, state or local laws or

ordinances relating to the payment of wages \* \* \*;

" \* \* \*

"(f) Repeated failure to file or furnish all forms and other information required by ORS 658.405 to 658.485 and these rules \* \* \*"

Respondent Ovchinnikov's violations of ORS 658.410(1), 658.417(1), 658.417(3), 658.440(1)(a), 658.440(1)(c), 658.440(1)(d), and 658.452 demonstrate Respondent Ovchinnikov's unfitness to act as a farm labor contractor. Respondent Valley Contracting, Inc.'s violations of ORS 658.410(1) and 658.417(3) demonstrate the unfitness of Respondent Valley Contracting, Inc. to act as a farm labor contractor. 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 Respondents to act as a farm labor contractor.

## OPINION

### 1. Default

Respondent Valley Contracting, Inc. failed to file an answer to the amended Notice of Intent and as to the Notice of Intent to Assess Civil Penalties against Valley Contracting, Inc. Respondent Valley Contracting, Inc. thus defaulted to the charges set forth in the amended notice and the Notice of Intent to Assess Civil Penalties. Because Respondent Valley Contracting, Inc. never requested a hearing on

either notice, and both notices contained the requisite waiver notification, the Agency is not required to present a prima facie case on the record.<sup>\*</sup> ORS 183.310(2)(a), (c), 183.415(6). In the absence of requests for hearings on each of the two notices, the violations against Respondent Valley Contracting, Inc. have been established by virtue of the respective defaults and the Agency's files in this matter, made a part of the record as Agency exhibits.

### 2. Summary Judgment

Pursuant to OAR 839-50-150(4), the Agency filed a motion for summary judgment for denial of the license of Respondent Ovchinnikov, based upon the default of Valley Contracting, Inc. and the resultant impending license denial to that entity. It asserted that no genuine issue of fact existed and the Agency was entitled to judgment as a matter of law as to the denial. The Hearings Referee granted that motion. Subsequent to the granting of this motion, the Agency amended its notice, which had the effect of relieving Valley Contracting, Inc. of its default and, thereby, removed the basis for the summary judgment. The previous order granting summary judgment is hereby vacated. Valley Contracting, Inc. later defaulted as to the amended notice and as to the Notice of Intent to Assess Civil Penalties against Valley Contracting, Inc.

### 3. Acting as a Farm Labor Contractor Without a License

ORS 658.410(1) requires that any person acting as a farm labor

\* While no case establishing the alleged violations against Respondent Valley Contracting, Inc. need be made, the alleged violations against Respondent Ovchinnikov, who did not default, must be proven by a preponderance of the evidence.

contractor be in possession of a license, issued by the Commissioner, to do so. This section also requires that any person acting as a farm labor contractor with regard to the forestation/ reforestation of lands be in possession of a license with the forestation indorsement required by ORS 658.417(1). This juxtaposition suggests that the license required to engage lawfully in farm labor contractor activities consists of one part, the basic license alone, and that the license required to lawfully engage in forest labor contractor activities consists of two parts, the basic license plus an added indorsement. In the latter situation, the two parts form one license, the license needed for forestation activities. Consequently, when a person acts as a forest labor contractor and is unlicensed, the act is one simultaneous violation of ORS 658.410(1), the basic license, and ORS 658.417(1), the indorsement. See, e.g., *In the Matter of Kenneth Vanderwall*, 9 BOLI 148 (1990); *In the Matter of Miguel Espinoza*, 10 BOLI 96 (1991); *In the Matter of Z and M Landscaping, Inc.*, 10 BOLI 174 (1992); *In the Matter of Ivan Skorohodoff*, 11 BOLI 8 (1992); *In the Matter of Alejandro Lumbreras*, 12 BOLI 117 (1993).

The Agency has charged separate violations of ORS 658.410(1) and ORS 658.417(1) where the unlicensed contractor activity involved the forestation or reforestation of lands. In each such instance, the Forum finds that one simultaneous violation has occurred.

#### A. Victor Ovchinnikov, dba Valley Reforestation

With regard to the allegation of paragraph I (10), the preponderance of

the credible evidence on the whole record shows that in May 1992, Respondent Ovchinnikov, through his foreman, Armano Perez, recruited Adolfo Martinez Espinosa and Miguel Medina Jano at the apartment of Mr. Martinez in Salem, Oregon, for forestation work in the State of Washington. Respondent Ovchinnikov was the contractor employing and supplying workers on USFS contract #52-0531-2-0172, a thinning contract with the USFS near Chelan, Washington. As his agent, the actions of Foreman Perez are attributable to Respondent Ovchinnikov. Respondent Ovchinnikov was not licensed as a farm labor contractor with a forest indorsement in the State of Oregon in May 1992.

A person acts as a farm/forest labor contractor if the person "recruits, solicits, supplies or employs" a worker for the purpose of forestation or reforestation of lands. Such activity by a person without a farm labor contractor license must take place in Oregon in order for there to be a violation. The fact that the forestation or reforestation work was in the State of Washington is not material. *In the Matter of Leonard Williams*, 8 BOLI 57, 73-74 (1989); *In the Matter of Jose Linan*, 12 BOLI 24 (1994). ORS 658.405 to 658.485 was enacted to protect workers in Oregon from all unlawful employer activity in the forestation/reforestation field. Allowing unlicensed recruitment in this state on the basis of job location outside Oregon would not accomplish this purpose. To recruit or solicit workers in Oregon to work in the forestation or reforestation of lands, wherever situated, is a forest labor contractor activity requiring a valid farm labor contractor

license with appropriate indorsement. *Williams*, 8 BOLI at 273. Respondent Ovchinnikov was required to have a farm labor contractor's license with a forest indorsement to recruit workers within the State of Oregon, and he violated the farm labor contractor laws by acting as a contractor without one.

#### B. S.B.I., Inc.

According to Agency policy, a financially interested associate in a farm labor contractor 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. *In the Matter of Amalia Ybarra*, 10 BOLI 75, 80 (1991). The credible evidence in the entire record demonstrates that Respondent Ovchinnikov had a financial interest in S.B.I., Inc. during times material herein.

Vehicles owned by Respondent Ovchinnikov were used in the S.B.I., Inc. operation; Simon Burkoff drove a truck owned by Respondent Ovchinnikov, and vans owned by him were used to transport workers. The parents of Respondent Ovchinnikov mortgaged their property to secure the S.B.I., Inc. contractor bond. Respondent Ovchinnikov received checks in the amount of \$13,449.36 from the corporation, but was not an employee of the corporation according to the certified payroll records provided to the Commissioner. Simon Burkoff represented to USFS COR Tom Howard that he and Respondent were partners. At least one worker stated that Respondent Ovchinnikov was the

financial backer of S.B.I., Inc. The examples cited above are indicia of the financial interest of Respondent Ovchinnikov in S.B.I., Inc.

It is clear from the evidence that Respondent Ovchinnikov performed managerial, administrative, or executive functions on behalf of S.B.I., Inc. Testimony of USFS and BLM contracting officers and the contents of their daily diaries demonstrate Respondent Ovchinnikov's extensive involvement in the administration of the contracts S.B.I., Inc. held with those agencies. He had been delegated inordinate authority to represent the corporation on contractual matters and, on one contract, had undertaken to delegate the contractual authority himself. Respondent Ovchinnikov dealt with the government contracting officers on matters relating to payment, contract modifications rework, contract performance, inspections, contract provisions, wage disputes, problem-solving, and other matters calling for representative authority. Workers and contracting officers observed that Respondent Ovchinnikov appeared to be in charge of the operation.

While the evidence establishes that Respondent Ovchinnikov had a financial interest in S.B.I., Inc., the evidence does not establish the nature or extent of that financial interest or the degree of control he exercised. S.B.I., Inc. was issued a certificate of incorporation at the time of its incorporation in 1991, which certificate is conclusive evidence that the corporation has been incorporated under the Oregon Business Corporation Act. ORS 60.027(4). The corporation was licensed to operate as a farm labor contractor. The

corporation engaged in no unlicensed conduct. In order to hold Respondent Ovchinnikov accountable for unlicensed activity with respect to the contractor activities undertaken by or on behalf of S.B.I., Inc., Respondent must be shown to have been a majority shareholder of S.B.I., Inc. or he must personally have performed activities requiring a contractor license. In the absence of proof that Respondent Ovchinnikov was a majority shareholder and, therefore, required to be licensed, Respondent Ovchinnikov can only be found to have been in violation of the farm labor contractor licensure provisions if he engaged in activities on behalf of the corporation which themselves required a license to perform.

On this record, one such act has been demonstrated. Respondent Ovchinnikov directly hired at least one worker, Santiago Rosales, to labor upon a brush clearing contract between S.B.I., Inc. and the BLM, #1422H952-C-2-3105, in the Tillamook Resource Area, Salem District. This contract was performed between June 12 and September 11, 1992. Respondent was not licensed as a farm labor contractor after March 24, 1991. Respondent Ovchinnikov violated ORS 658.410(1) and 658.417(1) when, without a license to do so, he employed Santiago Rosales to perform labor for another in the forestation/reforestation of lands.

#### C. Trails West, Inc.

As with S.B.I., Inc., the preponderance of credible evidence establishes that Respondent Ovchinnikov had a financial interest in Trails West, Inc. The vehicles used by Trails West, Inc. were owned by Respondent Ovchinnikov, including the truck driven by Jose Arroyo and the vans used to transport workers. Trails West, Inc. funneled payments totaling \$27,783.96 to Respondent Ovchinnikov through Ovchinnikov's account at the Woodburn branch of the Bank of America. Christmas tree equipment valued at \$52,000 was owned by Respondent Ovchinnikov and used by Trails West, Inc. On at least two contracts, Jose Arroyo assigned all payments due under the contract to Offord Finance Company, a creditor of Respondent Ovchinnikov.

Respondent Ovchinnikov performed the full range of managerial or executive functions for Trails West, Inc. as had been performed by him for S.B.I., Inc. He routinely negotiated with government contracting officers and dealt with all types of contractual issues arising from Trails West, Inc.'s performance of contracts with the USFS and BLM. He appears to have been the dominant figure for Trails West, Inc. in that corporation's dealings with both federal agencies. According to some workers, Respondent Ovchinnikov was in charge of the operation.

\* In the circumstance of this case, where a duly formed corporation (with the purported sole shareholder being someone other than Respondent) is acting as the contractor (and is licensed to so act), it would be necessary to first plead and prove facts sufficient to meet the criteria which would allow the Forum to "pierce the corporate veil" of S.B.I., Inc., before a showing could be made that Respondent Ovchinnikov was a majority shareholder. See, e.g., *Amfac Foods v. Int'l Systems*, 294 Or 94, 654 P2d 1092 (1982).

Trails West, Inc. was issued a certificate of incorporation in 1992. The corporation was licensed as a farm labor contractor at times material herein. The extent of Respondent Ovchinnikov's financial interest or control has not been established. In the absence of proof that Respondent was a majority shareholder of the corporation and, therefore, required to be licensed, Respondent Ovchinnikov can only be found to have been in violation of the farm labor contractor licensure provisions if he engaged in activities on behalf of the corporation which themselves required a license.

A preponderance of credible evidence on the record establishes that Respondent personally hired at least one worker, Felipe Miguel Pascual, to labor upon the Forristall Christmas tree harvest in November 1993. Respondent Ovchinnikov was not licensed to act as a farm labor contractor in November 1993. When Respondent Ovchinnikov employed or supplied Felipe Miguel Pascual to labor for another upon a contract for the harvesting of farm products, without a farm labor contractor license, he violated ORS 658.410(1).

#### D. Valley Contracting, Inc.

On April 2, 1993, Valley Contracting, Inc. was awarded USFS contract #53-04U3-3-00009 for timber stand improvement (thinning and burning) in the Winema National Forest, Chernult Ranger District, within the State of Oregon. Work was performed on this contract between May 17 and June 14, 1993. Respondent Ovchinnikov bid the contract and executed all other contract documents as president of the corporation. Respondents employed

54 workers on the contract. By employing 54 workers to labor for another in the forestation or reforestation of lands, Respondents were required to be licensed as farm labor contractors with a forest indorsement; because they were not so licensed between May 17 and June 14, 1993, they violated ORS 658.410(1) and 658.417(1) 54 times.

#### 4. Assisting an Unlicensed Contractor

The Agency has alleged, and the Forum has found, that both Respondents violated ORS 658.410(1) and 658.417(1) by employing workers on a forestation contract, USFS #53-04U3-00009, at a time when they were not licensed by the Commissioner to do so. The Agency has also alleged that Respondent Valley Contracting, Inc. assisted Respondent Ovchinnikov in acting as an unlicensed farm labor contractor with respect to the contract activities, by functioning as a "front" for Respondent Ovchinnikov, behind which he controlled the corporation and earned the profits.

The formation of a corporation by an individual for the purpose of conducting any lawful business that the individual could conduct is specifically authorized by ORS 60.074 and 60.077. Farm labor contracting is a lawful business. Respondent Ovchinnikov formed a corporation, Valley Contracting, Inc., to conduct a farm labor contracting business. Respondent Ovchinnikov was not debarred as a contractor and could have conducted the business as an individual, but elected, as was his right, to operate the business as a corporation. There is no evidence that the corporation was not

duly formed for a lawful purpose or that it was a sham. If a corporation, duly formed by its owner to conduct a lawful business, provides some insulation for the owner, while permitting the owner to realize the profits, it is a function that is sanctioned by the law. Indeed, the limitation to liability this business form provides to the owner is one of the central purposes of the corporate form. Respondent Ovchinnikov was not assisted to act in violation of ORS 658.405 to 658.503 by the corporation he duly formed, owned, and operated.

### 5. Certified Payroll Records

Credible evidence showed that Respondents started work on USFS contract #53-04U3-3-00009 on May 17, 1993. Respondents' first submission of payroll statements should have been submitted by no later than 35 days after this work first began. OAR 839-15-300. No payroll records were received. Based on this credible evidence and Respondent Ovchinnikov's admission that he did not provide certified payrolls to the Commissioner within the time required, the Forum has found that Respondents violated ORS 658.417(3).

### 6. Failure to Distribute Money When Due

The provisions of ORS 658.405 to 658.503 and 658.830 apply to all transactions, acts, and omissions of farm labor contractors regarding the payment, terms, disclosure, and record-keeping required with respect to work performed outside this state by workers recruited within this state. ORS 658.501. Consequently, a farm labor contractor's failure to distribute money, when due, to the individuals entitled thereto for work performed on a

forestation contract in another state is within the power of the State of Oregon to regulate when the individuals entitled to the money were recruited in the State of Oregon.

In the present case, a preponderance of the credible evidence on the entire record establishes:

1) In June 1992, Agency Compliance Specialist Raul Pena received wage claims from four workers, Miguel Medina Jano, Jesus Eduardo Gonzalez, Angel Soto, and Adolfo Martinez;

2) Recruited in Oregon, this crew worked on a Valley Reforestation thinning contract with the USFS, contract #53-04U3-00009, in Antenima, Washington, between May 21 and June 7, 1992;

3) The crew was due all unpaid, earned wages on June 7, 1993, upon completion of the contract (ORS 652.145);

4) The crew was told by Perez that Respondent Ovchinnikov would pay an hourly rate of \$9.99 per hour;

5) The crew worked eight hours per day for 15.5 days; for this work, Martinez was paid \$310.05, Jano was paid \$360.05, Soto was paid \$298.72, and Gonzalez was paid \$275.11;

6) On June 16, 1992, Pena sent demand letters on their behalf to Respondent Ovchinnikov, dba Valley Reforestation;

7) In response to the demand letters, four checks drawn on the account of Respondent Ovchinnikov, dba Valley Reforestation, dated June 29, 1992, were received by the Agency;

8) The checks were drawn to Adolfo Martinez-Espinosa (\$610.84),

Angel Soto (\$622), Jesus Eduardo Gonzalez (\$207.52), and Miguel Medina Jasso [sic] (\$497.22).

By failing to pay, when due, all money entrusted to him by the USFS for the purpose of paying wages to four workers entitled thereto, Respondent Ovchinnikov violated ORS 658.440 (1)(c) four times.

### 7. Failure to Carry a Farm Labor Contractor License

While acting as a farm labor contractor on the contracts identified in Ultimate Findings of Fact 3, 8, 14 and 16, Respondent Ovchinnikov was not licensed as a farm labor contractor. Because he was not licensed, he could not have been carrying a license, as required. By his failure to do so, Respondent Ovchinnikov violated ORS 658.440(1)(a) four times.

Where a corporation is acting as a farm labor contractor, it is doing so as a theoretical or fictional "person." It is incapable of carrying a license and cannot be required to perform an impossible act. The contractor activities are conducted through the actions of real persons. It is the real persons, those who are acting as farm labor contractors on behalf of the corporation or who are majority shareholders of the corporation, who are required to carry a farm labor contractor license. Consequently, while Respondent Ovchinnikov was required to carry a farm labor contractor license when he performed farm labor contracting activities on behalf of Valley Contracting, Inc., Valley Contracting, Inc. was not required to do so and cannot be found in violation of ORS 658.440(1)(a).

### 8. Discriminating Against Employee

Blas Garcia started working for Respondent Ovchinnikov in 1990. He performed all types of work in the forest for Respondent Ovchinnikov, including planting, hoeing, and making roads. In the fall of 1993, Blas complained to the Agency and to Oregon Legal Services about wages owing from Respondent for a forestation contract near Chemult, Oregon. Respondent Ovchinnikov had notice of this claim following receipt by his attorney of a request for deposition mailed by Oregon Legal Services on November 1, 1993. The requested examination of Respondent Ovchinnikov, by deposition, was commenced on November 5, 1993. Sometime later in November 1993, Garcia called Simon Burkoff to get work harvesting Christmas trees. Simon told him about the Molalla job and told Garcia he would be working for Respondent Ovchinnikov. Paleron Arce picked him up in the morning to go to Mall 99, the meeting place for workers. Respondent Ovchinnikov was at Mall 99 when they arrived. Respondent Ovchinnikov told Arce that Garcia could not work for him because "we had problems with him." Arce drove Garcia home. Two days later, Jose Arroyo told Arce that Respondent Ovchinnikov would not let Garcia work because Garcia had gone to Oregon Legal Services. A claim for wages and other violations of ORS 658.405 through 658.503, on behalf of Garcia and five other workers, was formally filed with the United States Bankruptcy Court on March 11, 1994.

The preponderance of the credible evidence establishes that Respondent Victor Ovchinnikov, a farm labor

contractor, refused to permit the rehire of Blas Garcia, his regular seasonal employee, because Garcia made a claim against Respondent Ovchinnikov for wages for his own services or because Garcia caused to be instituted a proceeding related to ORS 658.405 to 658.830, a violation of ORS 658.452.

#### 9. Failure to Comply with Valid Agreement

The preponderance of credible evidence on the record shows that Respondent Ovchinnikov, by his subsequent unlicensed farm labor contractor activities, failed to comply with the terms and provisions of his 1991 Consent Order with the Commissioner, a legal and valid agreement entered into by him in his capacity as a farm labor contractor, in violation of ORS 658.440(1)(d).

#### 10. License Denial

The Agency proposed to deny a farm labor contractor license to Respondents because they violated various provisions of ORS 658.405 to 658.503, which violations demonstrated that their character, competence, or reliability make them unfit to act as farm labor contractors. See ORS 658.420; OAR 839-15-145(1) (a), (b), (c), and (g); and 839-15-520(1)(g) and (k), (2), and (3)(a), (d), and (f).

ORS 658.420 provides that the Commissioner shall investigate each applicant's character, competence, and reliability, and 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(7), 839-15-520(3)(a). Here, Respondents have 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). Respondent Ovchinnikov's failure to pay wages when due is a violation that the Commissioner considers to be of such magnitude and seriousness that she shall propose to deny a license application. OAR 839-15-520(2), (3)(d). Similarly, repeated failure to file all forms and other information required by ORS 658.405 to 658.485, and the rules enacted pursuant thereto, is a violation the Commissioner considers to be of such magnitude and seriousness that she shall propose to deny a license application. OAR 839-15-520 (1)(a), (2), (3)(f). In addition, the Commissioner considers discharging or discriminating against a worker, because that worker has made a claim for wages or otherwise initiated proceedings related to ORS 658.405 through 658.503, to be of such magnitude and seriousness that she may propose to deny a license application to Respondent Ovchinnikov. OAR 839-15-520(1)(g). Finally, by the terms of the Consent Order, Respondent Ovchinnikov's breach of the agreement is grounds for denial of his license application, and, independently, the failure to comply

with the provisions of his legal and valid agreement with the Commissioner demonstrates Respondent Ovchinnikov's unfitness to act as a farm labor contractor. OAR 839-15-145(1)(a) and (b).

On the basis of the whole record in this matter, and under the administrative rules applicable here, the Forum is not satisfied as to Respondents' character, competence, and reliability and finds them unfit to act as farm labor contractors. The Order below is a proper disposition of Respondents' application for farm labor contractor licenses.

Pursuant to ORS 658.415(1)(c) and OAR 839-15-140(3) and 839-15-520(4), where an application for a farm labor contractor license has been denied, the Commissioner will not issue the applicant or applicants a license for three years from the date of the denial.

#### 11. Civil Penalties

The Agency proposed to assess civil penalties for (1) Respondents' acting as farm labor contractors without a license, in violation of ORS 658.410 and 658.417; (2) Respondents' failure to provide certified payroll records, in violation of ORS 658.417(3); (3) Respondent Ovchinnikov's acting as a farm labor contractor without a license, in violation of ORS 658.410; (4) Respondent Ovchinnikov's acting as a farm labor contractor without a license, in violation of ORS 658.410 and 658.417; (5) Respondent Ovchinnikov's failure to pay wages, when due, from money entrusted to him for that purpose, in violation of ORS 658.440(1)(c); (6) Respondent Ovchinnikov's failure to carry a farm labor contractor license, in violation of ORS

658.440(1)(a); (7) Respondent Ovchinnikov's discriminatory refusal to permit the rehire of a regular employee, in violation of ORS 658.452; and (8) Respondent Ovchinnikov's failure to comply with the terms and provisions of his agreement with the Commissioner, in violation of ORS 658.440(1)(d).

The Commissioner may assess a civil penalty not to exceed \$2,000 for each of these violations. ORS 658.453(1)(a), (c), (d), and (e); OAR 839-15-508(1)(a), (e), (f), (q), (s), and (2)(a), (b). 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.

Respondent Ovchinnikov, as an individual, acted as a farm labor contractor without a license on three separate occasions. One was when he recruited workers in Salem to do forestation work on a USFS contract in Washington (paragraph one, item 10 of the amended notice). Another occasion occurred when Respondent Ovchinnikov employed or supplied a worker on BLM contract #1422H952-C-2-3105 in the Salem District (paragraph one, item 4). The next occasion was when he employed or supplied at least one worker on the Vern Forristall Christmas tree harvesting contract near Molalla (paragraph one, item 9).

The Forum finds that Respondent Ovchinnikov's acting as a farm labor contractor without a license is

aggravated by the prior violation of the same statutes, the number of violations, and, given that licensure is at the heart of the state's effort to regulate farm labor contractors, the magnitude and seriousness of the violations. Accordingly, the Forum assesses \$2,000 for each of these three violations, for a total of \$6,000.

Respondent Ovchinnikov also failed to distribute money, when due, to four of his workers entitled thereto, when money had been entrusted to him for that purpose, in violation of ORS 658.440(1)(c). As aggravating factors, the Respondent has prior violations of statutes and rules, as shown in the Consent Order, the number of violations; and the magnitude and seriousness of the violations, especially when considered with the pattern of wage disputes and the number of wage complaints that Respondent Ovchinnikov has settled in relation to the contracts described in this Order. The Forum assesses \$2,000 for each of four violations of ORS 658.440(1)(c), for a total of \$8,000.

Respondent Ovchinnikov also failed to carry a farm labor license, in violation of ORS 658.440(1)(a), in the performance of farm labor contractor activities on each of the three contracts described above and in the performance of farm labor contractor activities on USFS contract #53-04U3-00009, a contract held by Valley Contracting, Inc. The aggravating factors are the number of violations and the prior violations of farm labor contractor statutes and rules. Accordingly, the Forum assesses \$500 for each of four violations of ORS 658.440(1)(a), for a total of \$2,000.

The Forum finds that Respondent Ovchinnikov's discriminatory refusal to permit the rehire of Blas Garcia, a long-time seasonal employee, because Mr. Garcia sought payment of the wages to which he was entitled or because Mr. Garcia caused proceedings related to ORS 658.405 to 658.503 to be initiated, is aggravated by the seriousness of the violation, the willful nature of the violation, and the prior violations of farm labor contractor statutes and rules. The Forum assesses \$2,000 for this violation of ORS 658.452.

Additionally, Respondent Ovchinnikov's violation of ORS 658.440(1)(d) for failing to comply with the terms and provisions of his agreement with the Commissioner, an agreement he entered in his capacity as a farm labor contractor, demonstrates a failure to take all measures necessary to prevent violations of the farm labor contractor statutes and rules. The Forum again notes Respondent Ovchinnikov's history of prior violations, the repeated nature of the violations constituting the breach, and the magnitude and seriousness of the violation. The Forum assesses \$2,000 for this violation.

In addition, the Respondents violated ORS 658.410 and 658.417(1) when they employed 54 workers on USFS contract #53-04U3-3-00009, in the Chemult Ranger District, and did not possess a license to act as a farm labor contractor. This violation is aggravated by the number of prior violations of these same provisions by Respondent Ovchinnikov, the number of prior violations of farm labor contractor statutes and rules, the magnitude

and seriousness of the violation, and the willful nature of the violation since Respondents knew of the licensing requirement and had a pending application for the license. The Forum assesses against Respondents \$2,000 for each of 54 violations, for a total of \$108,000.

Finally, Respondents' violation of ORS 658.417(3), for failure to submit certified payroll records on USFS contract #53-04U3-3-00009, is aggravated as a repeated violation of the same statute, and by the number of prior violations of the farm labor contractor statutes and rules. The Forum assesses \$1,000 for this violation.

The Forum assesses Respondent Ovchinnikov, individually, a total of \$20,000 in civil penalties. In addition, the Forum assesses Respondents Ovchinnikov and Valley Contracting, Inc. a total of \$109,000 in civil penalties. Total civil penalties assessed against both Respondents equal \$129,000.

#### ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, the Commissioner of the Bureau of Labor and Industries hereby denies Victor Ovchinnikov and Valley Contracting, Inc. a license to act as a farm or forest labor contractor, effective on the date of this Final Order. Victor Ovchinnikov and Valley Contracting, Inc. are 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, Victor Ovchinnikov and

Valley Contracting, Inc. are hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of ONE HUNDRED AND NINE THOUSAND DOLLARS (\$109,000), plus any interest thereon, which accrues at the annual rate of nine percent, between a date 10 days after the issuance of this Order and the date Respondents comply with this Order. This assessment is the sum of the following civil penalties against Respondents:

- 1) \$108,000 for 54 violations of ORS 658.410(1) and 658.417(1);
- 2) \$1,000 for one violation of ORS 658.417(3);

AND FURTHER, as authorized by ORS 658.453, and in addition to the civil penalties imposed above, Victor Ovchinnikov is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of TWENTY THOUSAND DOLLARS (\$20,000), plus any interest thereon, which accrues at the annual rate of nine percent, between a date 10 days after the issuance of this Order and the date Respondent Ovchinnikov complies with this Order. This assessment is the sum of the following civil penalties against Respondent Ovchinnikov:

- 1) \$4,000 for two violations of ORS 658.410(1) and 658.417(1);

- 2) \$2,000 for one violation of ORS 658.410(1);
- 3) \$8,000 for four violations of ORS 658.440(1)(c);
- 4) \$2,000 for four violations of ORS 658.440(1)(a);
- 5) \$2,000 for one violation of ORS 658.452;
- 6) \$2,000 for one violation of ORS 658.440(1)(d).

**In the Matter of  
RONALD TURMAN,  
Respondent.**

Case Number 52-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued September 13, 1994.

**SYNOPSIS**

Respondent hired a 15-year-old minor in his logging operation without checking for a work permit, without filing an employment certificate, without creating the records required for employing minors, and without maintaining such records for two years. The Commissioner held that the violations were aggravated because the minor was seriously injured on the job, and assessed the maximum civil penalty for each. ORS 653.307(1); 653.310; 653.315(1); 653.370(1); 658.453; OAR 839-19-010(1), (2); 839-19-015; 839-19-020(1)(a) to (e), (2), (3), (4);

839-21-006(2), (3), (4), (7), (8), (10), (13); 839-21-170(1)(a) to (g), (2)(a), (b), (3); 839-21-175(1), (2), (3); 839-21-102(1)(y), (ss); 839-21-220(1)(a), (b), (2) to (8).

The above-entitled contested case 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 of the State of Oregon. The hearing was held on May 3, 1994, in conference room number 2 of the offices of the Oregon Employment Department, 485 Elrod Street, Coos Bay, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Ronald Turman (Respondent) was not represented by counsel and was present throughout the hearing.

The Agency called the following witnesses: Roy Lynn Wright, his mother Janell Lynn Wright, and Respondent. Respondent called as witnesses himself and his employee Kenneth John Dery.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, 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 December 10, 1993, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of

Intent) to Respondent Ronald Turman. The Notice of Intent cited the following bases for this assessment:

"1. Employing a Child Under the Age of 18 Without Procuring and Keeping on File an Employment Certificate as Prescribed by the Wage and Hour Commission Pursuant to ORS 653.307; 653.310; OAR 839-21-220(3). [Respondent] employed Roy L. Wright, a child under the age of 18, on July 7-9 and 13-14, 1993, in [Respondent's] woodcutting and logging operations. [Respondent] did not file an employment certificate as prescribed by the Wage and Hour Commission for Wright prior to employing Wright or during Wright's employment. The magnitude and seriousness of the violation are enhanced by the hazardous nature of the employment and the fact that Wright suffered a broken back while working for [Respondent] on July 14. CIVIL PENALTIES OF \$5,000. (FIVE VIOLATIONS)

"2. Employing a Child Under the Age of 18 Without Verifying Minor's Age by Requiring Minor to Produce Work Permit as Prescribed by the Wage and Hour Commission Pursuant to ORS 653.307; 653.310; OAR 839-21-220(1). [Respondent] employed Roy L. Wright, a child between the age of 14 and 17, without first verifying Wright's age by requiring Wright to produce a Work Permit. CIVIL PENALTIES OF \$1,000. (ONE VIOLATION)

"3. Failure to Maintain and Preserve Records with Respect to

Each Minor Employed. OAR 839-21-170(1). [Respondent] failed to record and preserve the information required to be maintained with respect to Roy L. Wright, a minor employee under the age of 16, including, but not limited to date of birth, time of day and day of week on which Wright's workweek began, and the time of day that Wright began working and stopped working. CIVIL PENALTIES OF \$1,000. (ONE VIOLATION)

"4. Failure to Maintain and Preserve Records Required by OAR 839-21-170(1) for at Least 2 Years and to Keep Such Records in a Safe and Accessible Place. OAR 839-21-175. [Respondent] failed to maintain and preserve the records required by OAR 839-21-170(1) for Roy L. Wright, a minor employee under the age of 16, for at least two years. CIVIL PENALTIES OF \$1,000. (ONE VIOLATION)"

2) The Notice of Intent gave Respondent 20 days from receipt in which to request a contested case hearing and file a written answer to the factual allegations stated in the notice.

3) On January 3, 1994, the Agency received from Respondent a letter requesting a hearing and responding to the Notice of Intent. The response questioned the five violations alleged, and alleged that a record of hours worked was kept but that Respondent was unaware that he needed to keep track of the time Wright began and finished each day. The letter further alleged that Respondent had been unable to obtain counsel, had been

fined by other agencies, and had lost the contract upon which he was working as a result of Wright's July accident. Respondent expressed concern about his ability to pay any civil penalty assessed.

4) The Agency requested a hearing date, and on February 11, 1994, the Hearings Unit issued a Notice of Hearing setting forth the time and place of the hearing which was served on Respondent together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420 regarding the contested case process.

5) On April 27, 1994, pursuant to OAR 839-50-200 and 839-50-210, the Agency timely filed a case summary.

6) At the commencement of the hearing, Respondent stated that he had received the Notice of Contested Case Rights and Procedures and had no questions about it.

7) 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.

8) During the hearing, at Respondent's request, the Hearings Referee, Respondent, the Agency Case Presenter, and the witnesses viewed a series of X-rays of Wright's back taken in July 1993, under the supervision of Wright's physician and in the possession of Wright's mother. They clearly depicted a severe separation and lat-

eral displacement between two vertebra, i.e., a "broken back."

9) The Proposed Order, which included an Exceptions Notice, was issued on May 13, 1994. Exceptions were due by May 23, 1994. None were received.

#### FINDINGS OF FACT -- THE MERITS

1) During times material herein, Respondent was engaged in salvage logging near Reedsport, Oregon, engaging or utilizing the personal service of one or more employees in this state.

2) Respondent had worked as a salvage logger for 15 years, during which time he had seen minors under 18 working in the woods. He had himself worked in the woods before he was 18. He was unaware that he needed an employment certificate for a minor employee, that he needed to view a minor's work permit prior to the minor beginning work, that there were special requirements for records to be kept on minor employees, or that there were restrictions on the type of work minors under 18 could legally perform.

3) Salvage logging as practiced by Respondent involved the removal of already-downed timber which, for reasons of terrain, weather, etc., had not been totally harvested during previous logging operations. Some of the wood was cut and split for firewood.

4) Respondent located each log, determined whether it was "sound," and marked it for "bucking" (cutting into removable sections). Logs to be removed by helicopter were marked for helicopter pick-up. As part of the selection, he marked those downed trees which were too dangerous to salvage due to location, surroundings, or

condition. Marking was done with various colors of ribbon. The work was on steep, uneven terrain. There was danger of logs shifting or rolling downhill when disturbed by bucking or by brush clearing. As a precaution, the buckler was never to work uphill from another crew member.

5) Around July 13, 1993, Respondent contracted with Erickson Air-Crane to prepare salvage logs for removal by helicopter at the Camp Creek job site near Loon Lake, several miles east of Reedsport.

6) Roy Lynn Wright (Wright) was born October 18, 1977, and was 15 years of age during July 1993.

7) In early July 1993, Respondent hired Wright to assist with Respondent's work. Wright was an acquaintance of Pat Parrish, who worked for Respondent. Respondent did not ask Wright for a work permit. Wright did not have a work permit in July 1993. Respondent did not, at the time of Wright's hire or thereafter, file with the Agency the required employment certificate regarding the employment of Wright.

8) Wright was paid \$6.00 an hour. Parrish kept Wright's time, turned it in to Respondent, received one paycheck for himself and Wright, cashed it, and gave Wright his share in cash. Respondent's record showed the date and number of hours Wright worked, but not the time of day he started and stopped.

9) Wright worked for Respondent near Reedsport on July 7, 8, and 9, 1993. He rode to work with Parrish and worked eight or nine hours each day. Respondent was on the job site

each day. Wright split and stacked firewood, using a split maul and double-bitted ax.

10) On July 13, Wright began working at the site near Loon Lake. His duties were to carry gasoline and oil to Parrish and Respondent, who each operated chain saws bucking logs Respondent had measured. Wright also hand-cleared brush away from the downed logs so that the sawyer could buck the wood. He used a machete, a shovel and an ax, working eight to nine hours that day. He received no particular safety instructions, either during the previous week or at the Loon Lake location.

11) Wright had the same duties at the same location on July 14. Before noon, Respondent left the work site to locate additional logs. Wright continued to work with Parrish. He was getting out his lunch when he was struck by a log from above him on a hillside and carried to the bottom of the hill. He was semi-conscious, lying on his stomach. He remembered Parrish feeling for broken bones and assisting him to Parrish's pickup. They started toward Reedsport.

12) On the way out of the Loon Lake area, Parrish and Wright met Respondent. Wright was transferred to Respondent's pickup, and Respondent drove him to a hospital in Reedsport.

13) Wright's mother, Janell Lynn Wright, learned of her son's accident by telephone from her husband, who in turn had received a call on CB radio from an International Paper crew. She arrived at the hospital in Reedsport shortly before Wright was taken by ambulance to Bay Area Hospital in Coos Bay.

14) Wright's injuries included a crushing separation and severe lateral displacement of a vertebra at T-11, a collapsed lung and three broken ribs. He was in Bay Area Hospital for 16 days, during which his lung was reinflated, the vertebra was splinted with a bone graft from his hip, and metal rods were surgically implanted alongside his spine at the level of the break. He was still under rehabilitative treatment at the time of hearing.

15) SAIF, Respondent's workers' compensation insurer, covered Wright's medical expense and time loss.

16) Following Wright's injury, the Oregon Occupational Safety and Health Division (OR-OSHA) conducted an investigation and imposed civil penalties on Respondent involving failure to train workers in hazards and prevention and failure to have a qualified first-aid person available.

17) Respondent and his adult employee obtained first-aid qualification since the injury to Wright. Respondent testified that he would henceforth comply with the laws relating to the employment of minors.

18) There was no evidence that, at times material, Respondent was regulated by the Fair Labor Standards Act as to the work permits, the employment certificates, or the records and preservation thereof required by state law in connection with the employment of minors.

#### ULTIMATE FINDINGS OF FACT

1) Respondent employed Roy Wright, a child under the age of 16 years, on July 7, 8, 9, 13, and 14,

1993, in Respondent's woodcutting and logging activity in Oregon.

2) Respondent did not file an employment certificate for Wright prior to or during Wright's employment.

3) Respondent did not require Wright to produce a work permit or otherwise verify Wright's age before employing him.

4) Respondent did not record and preserve Wright's date of birth, the time of day or day of week when Wright's workweek began, or the time of day Wright began and stopped working.

5) Respondent did not maintain and preserve such records for two years.

6) At times material, Respondent was not regulated by the Fair Labor Standards Act as to the work permits, the employment certificates, or the records and preservation thereof required by state law in connection with the employment of minors.

#### CONCLUSIONS OF LAW

1) OAR 839-21-006 provides, in part

"As used in ORS 653.306 to 653.360 and in OAR 839-21-001 to 839-21-500, unless the context requires otherwise:

\* \* \* \*

"(2) 'Bureau' means Bureau of Labor and Industries of the State of Oregon.

"(3) 'Commission' means the Wage and Hour Commission of the State of Oregon.

"(4) 'Commissioner' means the Commissioner of the Bureau of Labor and Industries.

\* \* \* \*

"(7) 'Employment Certificate' means the employment certificate issued to employers for the employment of minors pursuant to ORS 653.307, and the employment permit referred to in 653.360(3).

"(8) 'Executive Secretary' means the Commissioner of the Bureau of Labor and Industries.

\* \* \* \*

"(10) 'Minor' means any person under 18 years of age.

\* \* \* \*

"(13) 'Work Permit' means the employment certificate issued to minors pursuant to ORS 653.307."

ORS 653.307 provides, in part:

"(1) 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."

ORS 653.310 provides, in part:

"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."

OAR 839-21-220 provides:

"(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:

"(a) Verifies the minor's age by requiring the minor to produce a Work Permit and

"(b) Complies with the provisions of this rule.

"(2) Employment Certificate forms may be obtained at all Bureau of Labor and Industries offices and State Employment Division offices.

"(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.

"(4) If the Employment Certificate form is properly filled out and discloses that the employment complies with all laws and rules for the employment of minors, the Employment Certificate shall be stamped 'validated' and returned to the employer.

"(5) An employer must retain the validated Employment Certificate during the period the minor remains an employee of the employer.

"(6) If it appears that the employment will violate any law or

rule pertaining to the employment of minors, the Employment Certificate will be stamped 'denied' and returned to the employer.

"(7) Upon receipt of a notice of denial, an employer must immediately terminate the minor involved.

"(8) Upon termination of a minor, the Employment Certificate containing the date of termination must be returned to the Bureau of Labor and Industries within 48 hours."

Respondent did not file an employment certificate prescribed by the Wage and Hour Commission within 48 hours of employing a minor under the age of 18 years, or at any time, and violated ORS 653.310 and OAR 839-21-220(3).

2) Respondent did not verify the age of Roy L. Wright, a minor between the ages of 14 and 17, by requiring him to produce a work permit prior to employing him and violated ORS 653.310 and OAR 839-21-220(1).

3) ORS 653.315 provides, in part:

"(1) No child under 16 years of age shall be employed for longer than 10 hours for any one day, nor more than six days in any one week.

"(2) No child under 16 years of age shall be employed at any work before 7 a.m. or after 6 p.m. \*\*\*

\*\*\*"

OAR 839-21-170 provides, in part:

"(1) 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 minor is employed \* \* \* ;

"(e) Time of day and day of week on which 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.

"(2) In addition to the records referred to in paragraph (1) of this rule, every employer employing minors under 16 years of age shall maintain and preserve records containing the following information and data with respect to each minor under 16 years of age employed:

"(a) The time of day that the minor began working and the time of day that the minor stopped working;

"(b) A schedule of the maximum number of hours to be worked each day and each week by each minor under 16 years of age.

"(3) The records required to be maintained and preserved in paragraphs (1) and (2) of this rule are

required in addition to and not in lieu of any other recordkeeping requirement contained in OAR 839-21-001 to 839-21-500. However, when one record will satisfy the requirements of more than one rule, only one record shall be required."

Respondent failed to preserve and maintain the records required to be kept on a minor employee under the age of 16 years, thus violating OAR 839-21-170.

4) OAR 839-21-175 provides, in part:

"(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 transcription by the Executive Secretary or duly authorized representative of the Executive Secretary."

Respondent failed to preserve and maintain for a period of two years the records required to be kept on a minor employee under the age of 16 years, thus violating the letter of OAR 839-21-175.

5) OAR 839-21-102(1) provides, in part:

"Pursuant to OAR 839-21-097 (1)(a) the Commission hereby declares the following occupations and types of work to be hazardous

and any employment by minors under 16 years of age is hereby prohibited:

" \* \* \*

"(y) Logging operations

" \* \* \*

"(ss) Wood cutting, sawing"

Under the rules of the Wage and Hour Commission, Respondent could not legally employ a minor under the age of 16 years in his logging and woodcutting operations.

6) ORS 653.370 provides, in part:

"(1) In addition to any other penalty provided by law, 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."

OAR 839-19-010 provides, in part:

"The Commissioner may impose a civil penalty for violations of any of the following statutes [and] administrative rules \* \* \* :

"(1) Violation of any provisions of ORS 653.305 to 653.370.

"(2) Violation of any provision of OAR 839-21-001 to 839-21-500."

OAR 839-19-015 provides:

"Each violation is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct offense."

OAR 839-19-020 provides, in part:

"(1) Except as provided in (4) below, when determining the amount of civil penalty to be imposed, the Commissioner shall consider the following circumstances and shall cite those the Commissioner finds applicable:

"(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes and rules;

"(b) Prior violations, if any, of statutes and rules;

"(c) The magnitude and seriousness of the violation;

"(d) The opportunity and degree of difficulty to comply;

"(e) Any other mitigating circumstances.

"(2) It shall be the responsibility of the employer to provide the Commissioner with evidence of the mitigating circumstances set out in section (1) above.

"(3) In arriving at the actual amount of the civil penalty, the Commissioner shall consider whether the minor was injured while employed in violation of the statutes and rules.

"(4) Notwithstanding section (1) of this rule, in the case of a serious injury to or the death of a minor while employed in violation of the statutes or rules, the Commissioner may impose the maximum penalty allowed by ORS 653.370."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the Respondent and the subject matter in this proceeding and is authorized to impose a civil penalty for each violation found herein. The penalties

assessed in the Order below are a proper exercise of that authority.

#### OPINION

The basic facts in this case are undisputed. Respondent hired Roy Wright, who was 15 at the time, as a worker in Respondent's salvage logging and woodcutting operation. There was no attempt to comply with the statutes and rules regulating the employment of minors. Wright should not have been employed in logging or woodcutting at all, as both are listed as hazardous work prohibited to minors under 16. Respondent did not verify the minor's age through inspecting his work permit and did not file the required employment certificate. In addition, he did not keep the records required when employing a minor. Obviously, even cursory compliance with the statutes and rules could have prevented the devastating injury suffered by Wright. It is not possible to characterize the failures to verify a work permit and submit an employment certificate as mere technical violations. Those requirements are designed to prevent employment of minors under a certain age in hazardous work and to regulate the hours of employment of minors in non-hazardous work. That design and intent was totally defeated by Respondent's non-compliance.

#### Civil Penalties

ORS 653.370 authorizes a civil penalty of \$1,000 for each violation of 653.305 to 653.370 or of OAR 839-21-001 to 839-21-500. OAR 839-19-010, *et seq.*, outlines the evaluations that the Commissioner may make in determining any amount to be assessed. Other than testimony that he would in the future observe

Oregon's child labor laws and that he had obtained first-aid qualification, there was no evidence offered in mitigation. Ignorance of the law is not a mitigating circumstance. *In the Matter of Panda Pizza*, 10 BOLI 132, 144, 146 n.14 (1992). Neither is the fact that another regulating agency has imposed civil penalties within its jurisdiction in reference to the same occurrence.

Respondent violated ORS 653.310 and OAR 839-21-220(3) for five successive working days. Respondent violated ORS 653.310 and OAR 839-21-220(1) on July 7. At the same time, he failed to record and preserve the information required by OAR 839-21-170(1). All of these violations contributed to the injury to the minor and are assessed below at the statutory maximum because of their magnitude and seriousness. Respondent also failed to maintain and preserve records in keeping with OAR 839-21-175 for a period of two years. The failure to abide by any of the statutes and rules for employing minors, coupled with the serious avoidable injury, constitutes severe aggravation, and the maximum penalty is assessed for each violation.

#### ORDER

NOW, THEREFORE, as authorized by ORS 658.453, Respondent Ronald Turman is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of EIGHT THOUSAND DOLLARS (\$8,000), plus any interest thereon, which accrues at the annual rate of

nine percent, between a date 10 days after the issuance of this Final Order herein and the date Respondent complies herewith. This assessment is the sum of the following civil penalties against Respondent:

As penalty for five violations of OAR 839-21-220(3), \$5,000.

As penalty for violation of OAR 839-21-220(1), \$1,000.

As penalty for violation of OAR 839-21-170(1), \$1,000.

As penalty for violation of OAR 839-21-175, \$1,000.

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**In the Matter of  
Allstar Inns Operating L.P., dba  
MOTEL 6,  
Respondent.**

Case Number 50-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued September 15, 1994.

#### SYNOPSIS

Respondent discharged female Complainant because she leaked breast milk, a condition related to her sex through her recent pregnancy and giving birth. The Commissioner awarded Complainant \$8,360 in back pay and \$15,000 for her mental suffering. ORS 659.029; 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, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on June 7, 1994, in room 1004 of the offices of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Robert Browning, an employee of the Agency. Allstar Inns Operating L.P., a limited partnership doing business as Motel 6 (Respondent), was represented by Kathleen Murphy, Attorney at Law, of the firm of Bogle & Gates, Portland. Stephanie Warrilow (Complainant) was present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses (in alphabetical order): Complainant's former foster parent Bonnie F. Epling; Respondent's former employee Marta Huston; Agency Senior Investigator Peter Martindale; Complainant; and Complainant's husband, Michael Warrilow. Respondent called as a witness Motel 6 Assistant General Counsel Alan Jay Rabinowitz (by telephone).

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, 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 19, 1993, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondent.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

3) The Agency initiated conciliation efforts between Complainant and Respondent, conciliation failed, and on February 14, 1994, the Agency prepared for service on Respondent Specific Charges, alleging that Respondent discriminated against her based on her sex and maternity in terminating her employment in violation of ORS 659.029 and 659.030(1)(a).

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

5) On March 14, 1994, after obtaining an extension of time in which to respond to the charges, Respondent timely filed its answer which admitted that Complainant had been employed by Respondent at the times alleged, denied that Complainant's discharge was an unlawful employment practice, and, as an affirmative defense, alleged

that Complainant was discharged for poor performance.

6) On May 3, 1994, the Hearings Referee issued a Discovery Order requiring that the participants' file case summaries pursuant to OAR 839-50-200 and 839-50-210 by May 10, 1994. Thereafter, Respondent requested a postponement which was not opposed by the Agency, and the Hearings Referee reset the hearing and the due date for case summaries.

7) On May 10, 1994, the Agency served notice of a change of Case Presenter, and on May 11, the Forum served notice of a change of referee. Thereafter, the participants timely filed their respective case summaries.

8) At the commencement of the hearing, counsel for Respondent stated that she had read the Notice of Contested Case Rights and Procedures 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 matters to be proved, and the procedures governing the conduct of the hearing.

10) The Proposed Order, which included an Exceptions Notice, was issued on June 21, 1994. Exceptions, if any, were due by July 1, 1994. Respondent timely filed exceptions which are dealt with as explained in the Opinion section of this Order.

#### FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent Allstar Inns Operating L.P. did business under the name Motel 6 – Tigard West in Tigard, Oregon.

Respondent's business, which provided lodging and related services, engaged or utilized the personal service of one or more employees in this state.

2) Complainant, female, began working for Respondent on or about September 20, 1992, at Tigard West. Complainant's initial duties were as a housekeeper or maid.

3) Shirley Little and her husband, Bruce Little, were the resident managers of Tigard West at times material. They lived in a unit adjacent to the motel office. Shirley Little saw to the office and housekeeping, and Bruce Little handled maintenance.

4) Complainant was interviewed and hired by Shirley Little. Complainant had given birth to her first child on August 30, 1992, and was nursing the baby. She informed Shirley Little of the need to nurse while working and received approval.

5) Beginning on September 20, Complainant worked three days at housekeeping. She received no complaints about her work as a housekeeper. She worked between two and one-half and four and one-half hours per day in housekeeping. On the third day, September 22, the Littles asked if she had any cash handling experience and whether she had other clothes suitable for meeting the public. Complainant stated that she had done cashier work and had other clothes. Shirley Little wanted her to try the front desk as cashier-receptionist and told her to report at 1 p.m. on the 23rd to learn the position.

\* "Participant" or "participants" refers to the Agency and the Respondent. OAR 839-50-020(13).

6) While she worked for Respondent, Complainant earned \$4.75 an hour in housekeeping and \$4.75 an hour on the front desk. The front desk position was eight hours per day, five days a week. The desk position had more hours than housekeeping, and Complainant saw the increased earnings and responsibility as an advancement.

7) The duties of the front desk clerk included assisting customers in registering, keeping track of keys and the occupancy of rooms on a large key board, handling cash and credit card vouchers, and making entries into a ledger. Flagging a room incorrectly on the key board could result in renting a room that was not clean, was occupied, or was otherwise not available.

8) At times material, Complainant and Michael Warrilow, her husband, had one vehicle between them. He worked an early morning shift. When Complainant was on the front desk, he brought her to work and picked her up. He also brought her lunch.

9) Complainant arrived early on the 23rd. Her husband was to bring her lunch, and, when he did not, she obtained permission from Shirley Little to go get lunch. Shirley Little told Complainant to bring lunch in the future, that she would not be allowed to leave for lunch.

10) When she went for lunch on the 23rd, Complainant also bought Bruce Little a carton of cigarettes at his request. While she was away from the motel on these errands, she experienced a leakage of breast milk which soaked her blouse. She changed her blouse while at home. When she brought Bruce Little his cigarettes, he

asked why she had changed clothes, and she told him that her breasts had leaked.

11) Complainant worked at the front desk a total of eight hours on September 23 and eight hours on September 24, 25, and 26. Respondent's timesheets did not record any late arrivals, early departures, or absences. Her shift was from 1 p.m. to 9 p.m. On Complainant's first day on the front desk, Shirley Little handed her a loose leaf notebook containing written "do's and don'ts," which she was expected to read and consult as she had time. She received no formal training the first day and learned by trial and error. She was not allowed to take the notebook, which she described as an "employee manual," off the premises and was expected to read it during her shift, while watching the desk. Generally, the Littles were available in their apartment next to the office.

12) On the day following Complainant's first shift at the front desk, Shirley Little told Complainant that she had made a number of mistakes. She appeared upset and told Complainant that she was up all night helping the night auditor correct the ledger. Shirley Little told Complainant to put the registration cards aside until she could show Complainant what to do with them. She then gave Complainant some training in the areas where the mistakes had occurred and showed Complainant how to reconcile the cards and the ledger.

13) After Shirley Little explained the cards and ledger to Complainant on September 24, there were no further complaints about the ledger or the cards.

14) Complainant was told that Bruce Little handled maintenance. He helped her with the front desk when she had questions and checked on her from time to time. He told Complainant that she was doing a "great job."

15) The Littles handled the front desk from early morning until Complainant came on at 1 p.m. After Complainant left at 9 p.m., the night desk clerk, who was also known as the night auditor, handled the front desk until early morning.

16) At times material, Respondent had a policy of discouraging "loitering" on motel premises by members of employees' families or by off-duty employees. It was not among the written policies Complainant acknowledged when she began working for Respondent.

17) Michael Warrilow met the Littles when Complainant worked for Respondent. He brought her lunch on her second day on the desk. He stayed a few minutes and chatted with Shirley Little. She informed him and Complainant that Respondent had a no loitering policy for employees and their relatives. After that, he did not stay around while Complainant was working.

18) Complainant brought a sweater to work with her on September 25 in case she had more breast leakage. In the evening, her breasts again leaked, and she put on the sweater to cover her blouse. Bruce Little asked later if she were cold and she told him the reason for the sweater.

19) Complainant again worked the front desk from 1 p.m. to 9 p.m. on September 26. She called in to Shirley

Little to report that she might be late due to transportation problems, but she arrived on time. She was told that she had done a great job for the 25th.

20) September 27 and 28 were Complainant's scheduled days off. Paydays were on alternate weeks. September 28th was a payday. She went in to pick up her check and noticed a new employee at the front desk. As she left, Complainant stated to Shirley Little that she would see her the following day, and Little did not respond.

21) Shirley Little telephoned Complainant at Complainant's home at about 7 p.m. on September 28th. She stated that she was placing Complainant "on call" for a couple of weeks.

22) Complainant asked why she was being placed "on call." Shirley Little told her it was because Complainant's breasts were leaking and that in Little's opinion, Complainant had gone to work too soon after having a baby. Shirley Little said that Complainant should get her body back to a regular routine. She stated further that she was aware that Complainant needed income, so she would remain on the payroll. She told Complainant not to worry, that she had a job.

23) Michael Warrilow was at home when Shirley Little called Complainant on September 28. Because Complainant had a habit of repeating instructions or conversations as she heard them in order to be sure she understood them correctly, he was aware of what Shirley Little told her.

24) On October 5, Complainant telephoned Shirley Little to see if she

was needed. Little told Complainant she would not be needed that week.

25) On October 7, Complainant received the balance of her earnings by mail. It was not a regular payday, and she called Shirley Little to ask if she was being terminated. Little responded at first by saying she did not have work for Complainant at that time. Complainant asked again if she was terminated, and Little finally said that she was. Shirley Little stated that she didn't want Complainant's breast leakage to become a major problem and that it was interfering with Complainant's job performance. She repeated her opinion that Complainant had come to work too soon after having her baby. She did not accuse Complainant of being distracted or inattentive or of having tardiness problems.

26) Michael Warrilow was present on October 7 when Complainant called Shirley Little and again heard Complainant repeat what she was told.

27) Marta Huston worked for Respondent at Tigard West as a desk clerk from July 1992 to July 1993. She was hired by Shirley Little. Huston had no prior desk experience. Her training consisted of a three-hour opportunity to read the loose leaf notebook containing the written "do's and don'ts" for the front desk. From her observation, three hours was about the usual "training" for a new front desk person, although some received less.

28) At times material, Huston worked from 9 p.m. to 5 a.m. as desk clerk and night auditor. As night auditor, she saw the work of the day desk clerks. She was not acquainted with Complainant at the time. She had no

specific recollection of unusual problems with the guest ledger around the time Complainant would have been the 1 p.m. to 9 p.m. front desk clerk. All desk clerks had difficulties while learning the position. There was a high turnover in both the desk clerk and housekeeping positions. Huston thought that Shirley Little gave some "slack" to new employees, but when Huston made errors in the performance of her clerk duties, Shirley Little told her about them. Huston was not pregnant while she worked for Respondent.

29) Shirley Little was a "hard woman." She was very verbal, lacked tact, and tended to criticize publicly what she perceived as an employee's shortcomings rather than speaking privately with the employee. She was detail-oriented, picky and hard to please, demanding, and impatient.

30) Huston had seen Complainant's name for a short time on the day shift record. Sometime in the fall of 1992, she asked Bruce Little why the name had disappeared. He told her that Complainant had problems with "lactation," that she was dripping breast milk on the desk and the front office smelled like spoiled milk. He also mentioned that Complainant's husband was "hanging around" and that Complainant had problems with tardiness.

31) Peter Martindale was a Senior Investigator with the Agency at times material. He was assigned to the investigation of Complainant's administrative complaint and issued the administrative determination finding substantial evidence of an unlawful employment practice.

32) At the time of the hearing, Alan J. Rabinowitz was Assistant General Counsel for Respondent. He participated in the hearing by telephone from his office in Dallas, Texas. He had responded by letter to Martindale's investigative inquiry, outlining Respondent's position that Complainant's termination was performance related, based on inability to follow instructions and being distracted by the frequent presence of her husband, which led to numerous bookkeeping errors. Respondent, through Rabinowitz, denied that Complainant's breast leaking accidents had anything to do with her termination and asserted that Shirley Little had no recollection of being aware of them.

33) Generally, the shifts for the desk position at Respondent's motels were 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m. Rabinowitz had not observed operations of the Tigard West location at times material.

34) As part of his investigation, Martindale attempted to hold a fact-finding conference.\* Complainant attended, but neither Shirley Little nor any other representative of Respondent was present. Later in the investigation, Martindale interviewed Shirley Little in a telephone conference call in which Rabinowitz participated.

35) Shirley Little had been employed at Tigard West by the previous operator of the motel. The previous operator had a policy of placing employees "on call" prior to termination, pending preparation of a final

paycheck. Respondent does not have such a policy.

36) In July or August 1993, the employment of Bruce and Shirley Little with Respondent was terminated. They subsequently became unavailable. Neither the Agency nor Respondent was able to locate them for the hearing.

37) A handwritten memo in Respondent's file, attributed to Shirley Little and dated October 7, 1992, recited Complainant's transfer to desk clerk and acknowledged that Complainant had no prior training or experience. The memo mentioned the "constant" presence of Complainant's husband and stated that Complainant's "ability to handle transactions was not an adequate standard." These were given as reasons for termination, together with inattention. There was no mention of tardiness.

38) The termination of her employment for the reasons stated to her by Shirley Little humiliated Complainant. She was deeply offended. She was humiliated, angry, and frustrated. "I didn't know what to do. I felt violated as a mother and as a female." She was hurt and disappointed by the manner of discharge and by the economic dislocation which she knew would result. Her anger and hurt persisted through the following months as she sought replacement employment. This distress remained with her to some degree up to the time of the hearing.

\* A fact-finding conference is an informal investigative meeting involving the complainant, the respondent, the Agency investigator, and primary witnesses. It is used by the Agency in processing discrimination complaints and is intended to narrow the issues for investigation and to facilitate resolution; testimony is not under oath. OAR 839-03-060.

39) Complainant had other sources of stress in her life besides the employment experience with Respondent. Her husband was in a custody dispute over his child by a former marriage. The economic pressure of losing the second income caused marital discord. In early 1993, Complainant's unemployment and the resulting economic pressure also forced her to move in with her former foster parents, the Eplings, in Cherry Grove, which is south and west of Forest Grove. When the distance to her husband's job proved too great, she and her husband moved to her parent's home. Eventually, in June and July 1993, Complainant sought counseling for upset and depression resulting from her treatment at Respondent.

40) Complainant told Bonnie Epling, with whom she had lived as a foster child when she was 15, that she was not called back to work for Respondent because her breasts were leaking. Complainant appeared very upset by that. She consistently searched for work in the Forest Grove and Cornelius areas, as well as closer to Portland, while she and her husband resided with the Eplings.

41) Shortly after learning from Shirley Little of her discharge, Complainant began seeking other employment. She inquired or applied at convenience stores, fast food outlets, and retail establishments as well as manufacture and assembly plants. She had little training or experience. She searched from October to August at least three times a week, except for two weeks in December, during which she and her husband moved to the Epling home in Cherry Grove.

42) Complainant contacted over 30 employers during this period. She contacted some more than once. She was hired in August 1993 at Empire Pacific Industries at \$6.00 an hour.

43) Complainant would have continued to earn \$190 per week had she remained working for Respondent past September 26, 1992. Between that date and August 1, 1993, when she became employed at a higher rate, a period of 44 weeks, Complainant would have earned \$8,360 (\$190 x 44).

#### ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent operated a motel which engaged or utilized the personal service of one or more employees in this state.

2) Complainant, a female, worked at Respondent's motel in September 1992.

3) Shirley Little and Bruce Little were resident managers of Respondent's business and Complainant's direct supervisors.

4) Complainant had recently given birth and was breast feeding the baby. She experienced engorgement, a condition causing her to leak breast milk. This happened twice while she was working.

5) Respondent's manager, Shirley Little, terminated Complainant's employment because Complainant leaked breast milk.

6) Being discharged for a reason connected with childbirth made Complainant feel demeaned as a mother and as a woman, and caused her to suffer severe mental distress characterized by emotional upset, anger, and

hurt which continued up to the time of hearing.

7) As a result of being discharged by Respondent, Complainant lost wages in the amount of \$8,360.

#### CONCLUSIONS OF LAW

1) ORS 659.010 provides, in part:

"As used in ORS 659.010 to 659.110 \*\*\* unless the context requires otherwise:

\*\*\*\*

"(6) 'Employer' means any person \*\*\* who in this state \*\*\* engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is performed.

"(12) 'Person' includes one or more \*\*\* corporations \*\*\*.

"(14) 'Unlawful employment practice includes only those unlawful employment practices specified in ORS \*\*\* 659.030 \*\*\*."

Respondent was an employer subject to ORS 659.010 to 659.110 at all times material herein.

2) ORS 659.040 (1) provides:

"Any person claiming to be aggrieved by an alleged unlawful employment practice, may \*\*\* make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the \*\*\* employer \*\*\* alleged to have committed the unlawful employment practice complained of \*\*\* no later than one year after the alleged unlawful employment practice."

Under ORS 659.010 to 659.110, the Commissioner of the Bureau of Labor

and Industries has jurisdiction of the persons and subject matter herein.

3) The actions, inactions, statements, and motivations of Shirley Little and Bruce Little are properly imputed to Respondent herein.

4) ORS 659.029 provides:

"For the purposes of ORS 659.030, the phrase 'because of sex' includes, but is not limited to, because of pregnancy, childbirth and related medical conditions or occurrences. Women affected by pregnancy, childbirth or related medical conditions or occurrences shall be treated the same for all employment-related purposes \*\*\* as other persons not so affected but similar in their ability or inability to work by reason of physical condition, and nothing in this section shall be interpreted to permit otherwise."

ORS 659.030 provides, in 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 \*\*\*."

By discharging Complainant due to lactation engorgement, a condition or occurrence related to pregnancy and childbirth, Respondent violated ORS 659.030(1)(a).

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 perform an act or series of acts in order to eliminate the

effects of an unlawful practice and to protect the rights of others similarly situated. The amounts awarded in the Order below are a proper exercise of that authority.

#### OPINION

The Agency presented evidence that Complainant, a female, took a job in housekeeping for Respondent shortly after she gave birth to her first child, whom she was breast feeding. On her third day in housekeeping, where she averaged only a few hours a day, she was invited to try being a desk clerk, which she saw as a full-time opportunity with more responsibility. She was given little training and learned on the job. As a result, she made mistakes. When she was shown the accepted manner of performing desk clerk functions, she did not repeat the errors. Because the family had one vehicle, Complainant's husband provided her with transportation. This put him at the work site each day. He stayed and talked to Complainant and the manager, Shirley Little, on one occasion. When Little informed them of a "no loitering" rule, Complainant's husband did not again come into the office.

On her first day as desk clerk, Complainant experienced a leakage of her breasts while she was away from the job site. She was able to change her blouse before returning to work. Two days later, in the evening, she again experienced breast leakage. She had brought a sweater to work with her and put that on over her blouse. On both occasions, when questioned about her change of clothing, Complainant truthfully reported the

cause. After Complainant had worked four days on the desk, Shirley Little advised her by telephone on her day off that she was on "on call" status. Complainant testified convincingly that Little told her Little's opinion that Complainant had returned to work too soon after giving birth and that Complainant should allow her body to adjust. Little assured Complainant that she was still on the payroll. When a week had passed, Complainant called and was told there was no work that week. Two days later, she received her final check. When she called Shirley Little, Little told her that she was discharged because Little did not want the breast leakage to become a major problem. Little repeated her opinion that Complainant had started work too soon after having a baby.

Respondent's managers, the Littles, were unavailable for hearing. As a result, evidence supporting the alleged unsatisfactory performance defense was extremely sparse. Respondent's own records, other than Shirley Little's note in a file, did not support claimed deficiencies in Complainant's work. There were no notations on the time records of late arrivals. There was nothing to refute that the lack of training understandably accounted for the admitted mistakes or to refute the commonality of mistakes by new employees. A preponderance of the available evidence established that Respondent's performance-based defense was pretextual.

In 1977, the Oregon Legislature clarified ORS 659.030 relating to a person's sex as it was protected against discriminatory acts in employment.

Not only was mere gender protected, but also, in the case of females, the unique attributes of pregnancy, childbirth, and related conditions were declared to be protected. Clearly, lactation and resultant engorgement were intended to be included as a "related medical condition" of pregnancy and childbirth. The act of Respondent's manager in discharging Complainant because of recent childbirth and a medical condition related to childbirth was an unlawful employment practice.

The unexpected discharge from employment for the reason given to Complainant by Shirley Little angered and offended Complainant and caused her to feel demeaned both as a mother and as a woman. She suffered severe emotional distress as a result. Her anger and hurt persisted, and she sought counseling for resulting depression. She still felt offense and frustration at the time of the hearing. Complainant's distress was verified by other witnesses. Emotional distress damages will lie in a case of unlawful practice where emotional distress is established by a preponderance of the evidence. *In the Matter of Jerome Dusenberry*, 9 BOLI 173, 190 (1991).

The Forum is awarding \$15,000 to compensate Complainant for her emotional distress and \$8,360 to compensate her for her lost wages.

#### Respondent's Exceptions

Respondent timely filed a total of eight exceptions to the Proposed Order, arguing that the ultimate finding of discrimination was not supported by the evidence, that the evidence supported Respondent's reason for discharge, that Complainant's lack of

training was irrelevant, that there was not trustworthy substantiation of Complainant's claim, that Complainant's move to her former foster parent's was not due to economic pressure from job loss, that the emotional distress damages were excessive in view of numerous other sources of stress in Complainant's life, that the Referee erred in assuming the loss of 40 hours per week, and that Complainant (the Agency) failed to prove that Respondent's proffered reason was not the true reason for discharge and that sex discrimination was the true reason.

Respondent's exceptions 1, 2, and 8 essentially cover the case: Did the evidence support a finding of discriminatory discharge or did it support Respondent's legitimate, nondiscriminatory reason for discharge? In other words, did the evidence of unlawful motive presented by the Agency, together with legitimate inferences therefrom, form a preponderance over Respondent's claimed reason for discharge? Respondent, citing *St. Mary's Honor Center v. Hicks*, 113 S Ct 2742 (1993), argues:

"Respondents [sic] stated reason for termination of Complainant was not pretext. The ultimate burden of proof always remains with the Complainant. Complainant did not sufficiently demonstrate that Respondent's proffered reason for termination was not a true reason for termination and that sex discrimination was."

Respondent is correct that the burden of proving unlawful discrimination remains with the Agency. Oregon courts have rejected any burden shifting. Citing *City of Portland v. Bureau of Labor*

\* Section 2, chapter 330, Or Laws 1977, now codified as ORS 659.029.

and Industries, 298 Or 104, 890 P2d 475 (1984), the Oregon Court of Appeals has said:

"We conclude that the burden does not shift from the plaintiff in Oregon discrimination actions in which the issue is simply whether the plaintiff's allegation or the employer's denial of discrimination is correct." *Callan v. Confederation of Oregon School Administrators*, 79 Or App 73, 717 P2d 1252 (1988).

Here, the Agency adduced evidence which, if believed, showed a prohibited motive on the part of Respondent's manager. Complainant first worked for Respondent in house-keeping, then was transferred to the front desk. She saw that as a positive opportunity. She admitted some initial mistakes as she was learning the desk position, but denied any recurrence after her first shift. The witness Huston testified that all desk clerks, including herself, had some difficulty at first, but did not comment specifically on Complainant's performance. She was unaware that Complainant worked there at the time. Huston repeated what she was told by Bruce Little when she noted that Complainant's name had vanished from the schedule: that Complainant's breasts dripped and the office smelled like sour milk, that Complainant was frequently tardy, and that Complainant's husband hung around the office. Other than Bruce Little's statement, there was no claim, record, or suggestion that Complainant was tardy, and she and her husband testified that he ceased coming into the office after learning that was prohibited. Complainant testified credibly that

Shirley Little gave her opinion, based on Complainant's engorgement difficulty, that Complainant was working too soon after giving birth.

Against this, Respondent offered the manager's brief note concerning the discharge suggesting that Complainant's performance was the cause. There was no other supporting documentation respecting purported performance deficiencies. A preponderance of the available evidence favored the Agency's position. Where an employer's adverse employment action against an employee is accompanied by words or acts which clearly demonstrate the employer's prohibited bias, both the prima facie case and evidence that the employer's proffered alternate reasons are pretextual are satisfied.

Respondent's exceptions 6 and 7 center on the findings regarding damages. Respondent argues that the emotional distress found was excessive in view of "numerous sources of stress in Complainant's life" and that the calculation of lost wages was excessive because Complainant was not a full-time employee. This Forum has stated previously that mental distress awards depend on the facts presented by each complainant, and respondents must take complainants as they find them. *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206, 217 (1991); *In the Matter of Courtesy Express, Inc.*, 8 BOLI 139, 148 (1989); *In the Matter of Lee's Cafe*, 8 BOLI 1, 21 (1989). Mental distress awards reflect the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, the type and duration of the

mental distress, and the vulnerability of the victim. *In the Matter of Pzazz Hair Designs*, 9 BOLI 240, 256 (1991) (citing *Fred Meyer v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den*, 287 Or 129 (1979)). While not frequent, the conduct here was deliberate and severe and resulted in lasting distress to a young mother. The fact that a victim of discriminatory practice may have other sources of upset and emotional strain does not relieve the offending respondent from responsibility for distress caused by the practice. Evidence that the claimed upset is traceable to the unlawful practice will support an award in the face of less persuasive evidence that there were other upsetting factors. Complainant testified credibly to being angered, to being offended and demeaned both as a mother and as a woman, and to resultant severe emotional distress and depression which persisted and for which she sought counseling.

As to the wage loss, both former employees Huston and Complainant testified that the afternoon front desk shift was 1 to 9 p.m. and was 40 hours per week. Documents and Complainant's testimony showed that she worked four days from 1 p.m. to 9 p.m. (eight hours), taking her lunch on the premises, and expected two days off before beginning the next workweek. Respondent's representative testified to a "usual" hour allocation for the desk position, but was unspecific about the Tigard West location. The Agency's evidence on wage loss was the most persuasive.

The remainder of Respondent's exceptions are without merit.

## ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010 (2), and in order to eliminate the effects of the unlawful practices found, Respondent ALLSTAR INNS OPERATING L.P., dba MOTEL 6, is hereby ordered to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, State Office Building, Ste. 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for STEPHANIE WARRILOW, in the amount of:

a) EIGHT THOUSAND THREE HUNDRED SIXTY DOLLARS (\$8,360) representing wages lost by Complainant between September 28, 1992, and August 1, 1993, PLUS

b) FIFTEEN THOUSAND DOLLARS (\$15,000), representing compensatory damages for the mental and emotional distress suffered by STEPHANIE WARRILOW as a result of Respondent's unlawful practice found herein, PLUS

c) Interest at the legal rate from August 1, 1993, on the sum of \$8,360 until paid, PLUS

d) Interest at the legal rate on the sum of \$15,000 from the date of this Final Order until Respondent complies herewith, and

2) Cease and desist from discriminating against any employee based upon the employee's sex.

**In the Matter of  
MARY C. STEWART-DAVIS,  
dba Image "10", Respondent.**

Case Number 55-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued September 26, 1994.

**SYNOPSIS**

The Commissioner accepted Respondent's record of wage Claimant's hours worked, and found that Respondent paid Claimant (a hair stylist paid on commission) less than minimum wage and overtime. Respondent withheld \$32.00 from Claimant's pay to reimburse herself for the purchase of Claimant's business cards. The Commissioner held that Respondent willfully failed to pay Claimant's earned wages when due, and that Respondent failed to prove she was unable to pay Claimant's wages at the time they accrued. The Commissioner ordered Respondent to pay the wages due plus civil penalty wages and interest. ORS 652.140(2); 652.150; 652.310(1), (2); 652.610(3), (4); 653.010(3), (4), (12); 653.025(3); 653.035(2), (3); 653.055(1), (2); 653.261(1); OAR 839-20-004(9); 839-20-010(1), (2); 839-20-030 (1); 839-20-041(1), (2).

The above-entitled contested case 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 of the State of Oregon. The hearing was held on May 10, 1994, in room number 1004 of

the State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Mary C. Stewart-Davis, dba Image "10" (Respondent), was not represented by counsel and was present throughout the hearing. Shawn M. L. Smith (Claimant) was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses the Claimant and Agency Compliance Specialist Ursela Bessler. Respondent called as witnesses herself and her former employees Gail Pohl, Mary Sautner (by telephone), and Carol Schulte (by telephone).

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

**FINDINGS OF FACT --  
PROCEDURAL**

1) On or about July 2, 1993, Claimant filed a wage claim with the Agency. She alleged that she had been employed by Respondent, who had failed to pay all wages earned and due to her.

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

3) On December 8, 1993, through the Washington County Sheriff, the Agency served on Respondent Order

of Determination No. 93-160 (Determination Order) based upon the wage claim filed by Claimant and the Agency's investigation. The Determination Order found that Respondent owed Claimant \$674.50 in straight time wages and \$57.04 in overtime wages computed at the minimum wage of \$4.75 per hour on a total of 150 hours worked, eight of which were worked over 40 hours in a workweek, less the sum of \$361.48, leaving a total of \$370.06 unpaid. The Determination Order found further that the failure to pay was willful, and that there was due and owing the sum of \$1,219 in civil penalty wages.

4) The Determination Order required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit a written answer to the charge.

5) On December 27, 1993, the Agency received from Respondent a written answer to the Determination Order and a request for hearing. The answer admitted that Claimant had been employed by Respondent at the times alleged, denied that Claimant had worked the hours claimed, denied Claimant had worked over 40 hours in any week, denied that Claimant was owed further wages, and alleged that Claimant was paid \$393.48. Respondent further denied that there was a willful failure to pay, denied the accuracy of the Agency's penalty wage computation, alleged that Claimant was paid for all hours worked at a rate above minimum wage, and affirmatively alleged that Respondent would not have been able to pay the wages

alleged to be owed at the time they allegedly came due.

6) The Agency requested a hearing date, and on March 3, 1994, the Hearings Unit issued a Notice of Hearing setting forth the time and place of the hearing which was served on Respondent together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420 regarding the contested case process.

7) At the commencement of the hearing, Respondent stated that she had received the Notice of Contested Case Rights and Procedures and had no questions about it.

8) 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.

9) During the hearing, one Respondent exhibit and ten Agency exhibits were identified and received and copies of pages from Respondent's appointment book were identified. The page copies from Respondent's appointment book are hereby admitted into the record.

10) The Proposed Order, which included an Exceptions Notice, was issued on June 7, 1994. Exceptions, if any, were due by June 17, 1994. Both Respondent and the Agency timely filed exceptions which are dealt with as explained in the Opinion section of this Order.

**FINDINGS OF FACT – THE MERITS**

1) During times material herein, Respondent operated a beauty shop under the assumed name Image "10" (the shop) in Beaverton, Oregon, engaging or utilizing the personal service of one or more employees.

2) Respondent hired Claimant as part-time receptionist at the shop at \$5.00 an hour in March 1993. Claimant began working as a hair dresser and manicurist on April 14, 1993. Claimant's compensation then changed from the hourly rate to commission. She received 60 percent of the fee for hair styles, haircuts, permanents, manicures, etc., and 10 percent of retail sales of hair and nail care products. There was no agreement or understanding providing for a regular draw against commissions.

3) Respondent was still in hair dresser school when she opened the shop. She was a licensed nail technician, but did not become a licensed hair dresser until after May 15. She employed a licensed hair dresser, Carol Long, as manager for hair. Before she got her hair dresser license, Respondent worked evenings, about 5:30 p.m. to 8:30 p.m., doing nails.

4) Claimant's workweek as a hair dresser and manicurist was from Tuesday through Saturday. She generally arrived at the shop between 9 and 10 a.m. and left between 5 and 7 p.m., depending on appointments. She was available between those hours for walk-in clients if she did not have an appointment. When not with a customer, Claimant answered the telephone, greeted customers, made coffee, and cleaned the shop. She also distributed flyers advertising the

shop's services. There was no time clock.

5) Claimant believed that as a full-time hair dresser, she was expected to be available for eight hours on a daily basis. She always advised the manager if she was going to be gone during the day, either directly or by marking herself out on the appointment book.

6) Initially, Respondent paid for advertising, including the printing of flyers and business cards. Some of the hair dressers and manicurists later developed and paid for their own flyers. Respondent encouraged the distribution of the flyers when employees were not servicing customers.

7) Gail Pohl worked for Respondent as a hair dresser at times material. She was paid on the basis of 60 percent commission on hair dresser work plus 10 percent of retail sales. She worked Tuesday through Saturday from 8 or 9 a.m. to 3 p.m. or later. She sometimes took full days off, marking herself out on the schedule. She usually told Respondent or the manager when she wouldn't be in and when she left.

8) Mary Sautner worked for Respondent as a hair dresser at times material. She was paid on the basis of 60 percent commission on hair dresser work plus 10 percent of retail sales. She worked the days she wanted to and described herself as "part-time." She took full days off, marking herself out on the schedule. On days that she came in, she sometimes left if she had no customers. She thought it "polite" to tell Respondent, who was usually not there, or the manager when she left.

9) Carol Schulte worked as a manicurist for Respondent through May 1993. She considered herself a full-time employee, which meant being available eight hours per day. She was usually there, although she did not always have the time filled with customer appointments.

10) All of Respondent's employees knew that Respondent expected the shop to have coverage to provide services between 8 a.m. and 5 p.m. Carol Long functioned as manager between those hours. Respondent usually was not present during those hours and could not know by observation who was present at work.

11) Respondent did not tell any of the employees that they must be at the shop eight hours a day, five days a week. Respondent did not tell any of the employees that they must leave the shop if they did not have a customer.

12) Respondent held occasional meetings to discuss means of attracting customers and suggested that the employees distribute flyers between appointments. All of the employees recognized that they could not service customers if they were not at work. Respondent's employees felt some obligation to be present during the day while the shop was open, even though walk-in customers were not frequent.

13) Claimant was compensated in full for the hours she worked as a receptionist prior to assuming her hair dresser duties.

14) On or about May 13, 1993, Respondent inquired whether Claimant needed more business cards. Claimant responded that her supply was

low. Respondent then had 1,000 cards printed.

15) On or about May 15, Claimant informed Respondent that she was quitting.

16) Respondent advised Claimant that the cost of the 1,000 business cards would be deducted from Claimant's final paycheck. Claimant left Respondent a note stating that she did not feel she had ordered additional business cards and that she would have ordered only 500 if she had intended to stay. Respondent deducted half the cost of the cards, or \$32.00, from Claimant's final check.

17) Claimant filed her wage claim over the deduction for business cards. The Agency's initial investigation discovered that Claimant may have been compensated at a rate less than minimum wage (\$4.75 per hour) for the time actually spent at the shop.

18) At times material, Ursela Bessler was a Compliance Specialist with the Wage and Hour Division of the Agency. From time to time, she acted as a Compliance Specialist Supervisor. In December 1993, Bessler supervised Margaret Trotman, who attempted to obtain information from Respondent on Claimant's claim. Trotman was ill at the time of the hearing.

19) In a September 15, 1993, demand letter, the Agency advised Respondent of its findings regarding unpaid minimum and overtime wages and asked for payment or for copies of Respondent's records if the claim was disputed.

20) Receiving no reply to its September letter, the Agency issued its Determination Order. After Respon-

dent requested a hearing, Compliance Specialist Trotman attempted to obtain further information from Respondent regarding Claimant's daily time records and time spent on flyers and in meetings. Respondent did not reply.

21) At times material, appointments for the hair dressers and manicurists were marked in the shop's appointment book. Each date in the book consisted of two facing pages with times of day listed in 15-minute increments down the center of each page from 8 a.m. through 7:45 p.m. Several columns from top to bottom were headed with the names of Respondent and individual employees, as "Mary D., Carol L., Mary S., Gail, Shawn, Carol S., Mimi." Appointments were entered opposite the time of day when they were to occur and occupied the approximate space representative of the time that the service to be performed would normally take. If an employee was unavailable for appointments, that is, was arriving late, had the day off, or left early, a vertical line was drawn, usually by the employee or at her direction, down the center of her column opposite the time she was gone. Employees used their individual columns to note time spent in distributing flyers.

22) When Claimant filed her wage claim, she relied on her memory in listing the dates and hours she had worked for Respondent. Having no information from Respondent, the Agency computed the wages paid and due from Claimant's estimates for the purpose of the Determination Order. At times material, the minimum hourly wage in Oregon was \$4.75 and over-

time at one and one-half times the minimum hourly wage was \$7.13.

23) The appointment book pages were a more accurate reflection of the time worked by Claimant than was her undocumented recollection presented to the Agency. For instance, it showed that she worked 24 days rather than the 18 claimed by the Agency.

24) Based upon Respondent's records, Claimant was at the shop available for work a total of 177.75 straight time hours and three overtime hours from April 14 to May 15, 1993, inclusive. Claimant's earnings, on the basis of minimum wage, were \$865.70, including overtime. At the time she terminated her employment, \$504.22 of that amount remained unpaid.

25) Respondent paid obligations of the business while Claimant was employed and thereafter through the time the shop closed two to three months later.

26) The average daily rate from which penalty wages are calculated is the result of dividing the total days worked by the employee into the total amount the employee should have been paid for the period. The penalty wage is then determined by multiplying the average daily rate by the number of days, up to 30, that wages remain unpaid.

27) The average daily rate based on \$865.70 earned in 24 working days was \$36.07. The amount of \$36.07 multiplied by 30 equals \$1,082, rounded to the nearest dollar per Agency policy.

#### ULTIMATE FINDINGS OF FACT

1) During times material herein, and particularly from March through

May 1993, Respondent was an employer in this state.

2) Claimant was employed by Respondent from March through May 15, 1993.

3) Claimant was properly compensated from March through April 13, 1993.

4) From April 14 through May 15, 1993, Respondent and Claimant agreed that Claimant would be paid 60 percent of the fee for hair styles, haircuts, permanents, manicures, etc., and 10 percent of retail sales of hair and nail care products. She earned commissions of \$393.48 and was paid \$361.48.

5) The state minimum wage during 1993 was \$4.75 per hour.

6) Claimant worked a total of 177.75 straight time hours and three overtime hours from April 14 to May 15, 1993, inclusive, earning a total of \$865.70 at \$4.75 per straight time hour and \$7.13 per overtime hour.

7) When Claimant quit her employment, Respondent owed her \$865.70 less amounts paid, or \$504.22.

8) When Claimant quit her employment, Respondent failed to pay her \$504.22 within five days and failed to pay her \$504.22 for 30 days after that.

9) The average daily rate for Claimant was \$36.07. Penalty wages equal \$1,082.

#### 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 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) ORS 653.010 provides, in part:

" \* \* \*

"(3) 'Employ' includes to suffer or permit to work \* \* \*."

"(4) 'Employer' means any person who employs another person \* \* \*"

" \* \* \*

"(12) 'Work time' includes both time worked and time of authorized attendance."

ORS 652.310 provides, in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees \* \* \*."

"(2) 'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled. \* \* \*"

ORS 653.025 requires that:

" \* \* \* for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any

employee at wages computed at a rate lower than:

"\* \* \*

"(3) For calendar years after December 31, 1990, \$4.75.

ORS 653.035 provides in part:

"\* \* \*

"(2) Employers may include commission payments to employees as part of the applicable minimum wage for any pay period in which the combined wage and commission earnings of the employee will comply with ORS 653.010 to 653.261. In any pay period where the combined wage and commission payments to the employee do not add up to the applicable minimum wage under ORS 653.010 to 653.261, the employer shall pay the minimum rate as prescribed in ORS 653.010 to 653.261.

(3) Employers \* \* \* may not include any amount received by employees as tips in determining the amount of minimum wage required to be paid by ORS 653.010 to 653.261."

OAR 839-20-004(9) provides:

"Commissions' or 'pay on a commission basis' means payment based on a percentage of total sales, or of sales in excess of a specified amount, or on a fixed allowance per unit agreed upon as a measure of accomplishment or on some other formula and may be the sole source of compensation or payment in addition to other compensation."

OAR 839-20-010 provides:

"(1) Employees shall be paid no less than the applicable minimum wage for all hours worked, which includes 'work time' as defined in ORS 653.010(12). If in any pay period the combined wages of the employee are less than the applicable minimum wage, the employer shall pay, in addition to sums already earned, no less than the difference between the amounts earned and the minimum wage as prescribed by the appropriate statute or administrative rule.

"(2) Employers may include commission and bonus payments to employees when computing the minimum wage. Such commission or bonus payments may only be credited toward employees' minimum wages in the pay periods in which they are earned."

OAR 839-20-041 provides, in part:

"(1) On duty (engaged to wait): Where waiting is an integral part of the job, i.e., when the time spent waiting belongs to and is controlled by the employer and the employee is unable to use the time effectively for his/her own purposes that employee will be considered as engaged to wait. All time spent in inactivity where an employee is engaged to wait will be considered as part of hours worked.

"(2) Off duty (waiting to be engaged): Periods during which an employee is completely relieved from duty and which are long enough to enable him/her to use the time effectively for his/her own purposes are not hours worked. He/she is not completely relieved from duty and cannot use the time

effectively for his/her own purposes unless he/she is told in advance that he/she may leave the job and that he/she will not have to commence work until a specified hour has arrived. Whether the time is long enough to enable him/her to use the time effectively for his/her own purposes depends upon all of the facts and circumstances of the case."

Respondent's failure to pay Claimant at a fixed rate of at least \$4.75 per hour for each hour of work time was a violation of ORS 653.025.

4) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides, in part:

"[A]ll 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 when computed without benefit of commissions, overrides,

spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Respondent's failure to pay Claimant one and one-half times her regular hourly rate, in this case the minimum wage of \$4.75, for all hours worked in excess of 40 hours in a week was a violation of ORS 653.261(1) and OAR 839-20-030(1).

5) ORS 653.055 provides, in part:

"(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."

Respondent's failure to pay Claimant in accordance with ORS 653.261(1) and OAR 839-20-030(1) made Respondent liable for penalty wages under ORS 652.150, regardless of any understanding Respondent may have had with her employees, including Claimant, to pay them less.

6) ORS 652.610 provides that an employer must furnish the employee an itemized statement each regular payday showing the amount and purpose of deductions made during the

pay period at the time wages are paid. That statute continues as follows:

"(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:

"(a) The employer is required to do so by law:

"(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books;

"(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer, and that such deduction is recorded in the employer's books; or

"(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party.

"(4) Nothing in this section shall be construed as prohibiting the withholding of amounts authorized in writing by the employee to be contributed by the employee to charitable organizations, including contributions made pursuant to ORS 243.666 and 663.110; nor shall this section prohibit deductions by check-off dues to labor organizations or service fees, where such is not otherwise prohibited by law; nor shall this section diminish or enlarge the right of any person to assert and enforce a lawful set-off or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process."

Respondent's deduction from Claimant's wages of the cost of the business cards was a violation of ORS 652.610 and constituted a failure to pay wages earned.

7) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimant terminated employment.

8) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, 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 from the due date; 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.

9) Under the facts and circumstances of this record, and in accordance with ORS 652.332, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant her earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

## OPINION

### 1. Work Time

"Employ" is defined as including to suffer or permit to work. ORS 653.010(3). Work time is all time an employee is required to be on the employer's premises, on duty, or at a prescribed work place. ORS 653.010(12). There is no requirement on the part of the employee for mental or physical exertion. Work time includes time spent waiting to perform work for the benefit and at the request of the employer. Unless an employee is specifically relieved from duty for a time period sufficiently long for the employee to use for his or her own purposes, the employer must compensate the employee for time spent waiting. OAR 839-20-041; *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106

(1989). *In the Matter of La Estrellita, Inc.*, 12 BOLI 232, 243-44 (1994); *In the Matter of Martin's Mercantile*, 12 BOLI 262, 274 (1994). In this case, there was testimony from which the Forum could conclude that Claimant was not only present between appointments, but also was performing work duties during those times. Claimant was present at the work site both for scheduled appointments and to cover for walk-in business. Her presence to cover for unscheduled or walk-in trade benefited both Respondent and herself, since both shared in any income generated. While walk-in trade was infrequent, the potential existed. Respondent never assigned specific hours and persons for this coverage. She never told Claimant or other employees to leave the shop during those times they were not actively engaged in an appointment. The workday was unstructured and casual, and Respondent did not insist on specific shifts, but employees felt obligated to advise Respondent or her manager of their availability. Each felt obligated to be present to fulfill her particular role as a full-time or part-time employee. The time Claimant spent waiting for work was compensable work time.

### 2. Minimum Wage and Overtime

Respondent did not assert and the Hearings Referee did not find any exemption or exclusion from the coverage of the Minimum Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS chapter 652, for Respondent or Claimant.

ORS 653.025 prohibits employers from paying their workers at a rate less than \$4.75 for each hour of work time. ORS 653.035 allows the employer to

credit commission payments against minimum wages earned, but specifies that a combination of commission and minimum wage must be paid where commission alone does not cover the time worked. ORS 653.055(1) provides that

"[a]ny employer who pays an employee less than the [minimum wage and overtime] 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 [minimum wage and overtime] is no defense to an action under subsection (1) of this section." In other words, Claimant, as well as the other employees, could not agree to accept less than minimum wage.

### 3. Commission Compensation

Respondent argued that Claimant, when she worked as a hairdresser, was compensated by commission of 60 percent of the fee for service plus 10 percent of product sales, and that these combined to pay Claimant well above minimum wage for the hours spent in actually rendering the service and selling the product. Respondent had the right to control Claimant's work, Claimant's hours, and the services Claimant provided as an integral part of Respondent's business. Claimant was employed for an indefinite period, used only Respondent's facilities,

equipment and supplies, and sold Respondent's products. Claimant was a subordinate party and not an independent contractor or co-partner, and rendered personal services in this state to Respondent who agreed to pay her at a fixed rate. See ORS 652.310(2). The agreement to pay at a fixed rate includes the statutory requirement to pay a minimum wage. *Martin's Mercantile, supra; In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 44 (1993).

There was testimony from the employees that while they were not told to be there during specific hours, they knew that they could not obtain work unless they were present. Respondent never told them to leave if they were without an appointment, and Respondent accepted the services, such as cleanup, which they performed. Credible evidence based on the whole record established that Respondent paid Claimant at a rate less than \$4.75 per hour. An agreement between the employer and the wage claimant to accept less would not be a defense, and neither is the acceptance by the employee of less than the minimum.

Employers are free to compensate employees at any rate, or solely by commission, so long as the agreed periodic or commission rate does not result in an employee earning less than minimum wage for all the hours worked. 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 was obligated by law to pay Claimant one and one-half times the regular hourly rate, in this case the minimum

rate, for all hours worked in excess of 40 hours in a week.

### 4. Hours Worked

Respondent introduced pertinent portions of the appointment book, which was used at times material to record appointments for each operator. It also showed the times each employee was available and present for work each day. All witnesses testified as to the manner this record was kept, including the "lining out" of time off. The wage claim record created by Claimant with the assistance of the Agency, relying as it did on her memory, was not as reliable. The Forum has found that the appointment book, as a contemporaneous record, was the more accurate reflection of Claimant's work time.

### 5. Deductions

There was evidence that Respondent deducted \$32.00 from Claimant's earned commissions. Respondent admitted doing so. Respondent's deduction of \$32.00 for business cards was not a proper deduction. It was not authorized in writing by the employee and was not for the employee's benefit.

### 6. Computation of Penalty Wages and Agency Exceptions to the Proposed Order

The Agency excepted to the calculation of wages in the Proposed Order because it was, in the Agency's view, based on facts not in evidence, that is, Respondent's appointment book. In the alternative, the Agency excepted to the reduced penalty wage total resulting from the failure to use the revised wage total in calculating Claimant's daily rate.

The appointment book showed more days and more hours worked and uncompensated than did Claimant's memory. This served to change the total wage and the average daily rate for computation of the penalty wages. The Proposed Order provided that the wages owed could not be amended upward from the Determination Order because there was no motion to conform to the proof, but inconsistently used the revised total work days in computing penalty. Thus, the wages owed were less than Respondent's actual obligation, and the recomputed penalty was less than that sought by the Agency. As the Agency's alternative exception points out, this created a situation wherein the Respondent employer was not compelled to comply with ORS 652.140. Based on the finding that the appointment book information was the most probative on the record, the order should have enforced the duty of the employer to pay what was really due, since that duty is absolute. *In the Matter of Handy Andy Towing, Inc.*, 12 BOLI 284, 294 (1994); *Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164 (1983). The evidence upon which the recalculation was based was before the Forum and was commented upon by the witnesses and the participants. Respondent used it from which to extract information regarding the hair and other service appointments attributed to her employees, including Claimant. After it was identified by Respondent and the witnesses, all of whom testified as to the manner in which it was kept, the appointment book information was properly admitted by the fact-finder as the most reliable, even though the unrepresented

Respondent did not formally offer it into evidence. The Forum's duty is to provide a full and fair inquiry. ORS 183.415(10); *Berwick v. AFSD*, 74 Or App 460, 703 P2d 994, rev den 300 Or 332 (1985). The Commissioner has inherent authority to fashion a remedy based on the evidence before the Forum. The penalty wages in the Proposed Order were not based on the actual earnings, and that was error. This Final Order is based on the correct calculations.

#### 7. Respondent's Exceptions to the Proposed Order

Respondent excepted to the Proposed Order citing the following issues: (1) that Claimant was merely off duty (waiting to be engaged) (OAR 839-20-041) when she did not have an actual appointment; (2) that Claimant was not at the salon the number of hours found when she testified she could and did leave; (3) that there should be no penalty wages because any failure to pay Claimant was not willful; and (4) the issue of the unauthorized deduction should not have been considered because it was not included in the Determination Order.

(1) Respondent misinterprets OAR 839-20-041. Under the facts in this case, Claimant was not off duty whenever she did not have an appointment. The rule clearly states:

"Periods during which an employee is completely relieved from duty and which are long enough to enable [the employee] to use the time effectively for [the employee's] own purposes are not hours worked. [The employee] is not completely relieved from duty and cannot use the time effectively for

*[the employee's] own purposes unless [the employee] is told in advance that [the employee] may leave the job and that [the employee] will not have to commence work until a specified hour has arrived.*" (Emphasis supplied.)

Respondent admits that employees were not told in advance when they could leave, but suggests that "this was implied." That does not conform to the rule, which therefore did not apply to Claimant's employment.

(2) Respondent argues that the Proposed Order did not consider Claimant's testimony that she frequently left the premises on personal business. Respondent had a duty to keep records of the hours Claimant worked. ORS 653.045. Respondent cannot present such records as were kept and then deny their accuracy. The hours found were based on the available information including the interpretation by the witnesses as to the meaning of the entries.

(3) The meaning of "willfully fails to pay any wages," as used in ORS 652.150, has been repeatedly held not to imply or require blame, malice, wrong, perversion, or moral delinquency. The language simply means conduct done of free will. Respondent intended to pay Claimant as she did, and Respondent's ignorance of the law is not relevant. Thus it is not necessary that there be evidence of a manifest intent to violate the law. It is enough that what was done by the employer was done of free will. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). That case has been followed in numerous orders of this Forum, and the cases

cited by Respondent are not to the contrary.

(4) The wage deduction was before the Forum as part of the claim of unpaid amounts which were included in the Determination Order. Respondent had adequate notice of the claim and was not prejudiced.

Respondent, although not denominating another separate exception, argues that she was not subject to penalty because the business was in debt and never made any money. Inability to pay is an affirmative defense subject to proof. The facts found were that the business continued after Claimant quit, and other employees and suppliers were paid. The allocation of available funds was the employer's choice. An inability to pay Claimant, as contrasted to an unwillingness to do so, was not shown. The remainder of Respondent's comments excepting to the Proposed Order are, as are those exceptions discussed, without merit.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders MARY C. STEWART-DAVIS, dba Image "10," to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR SHAWN M. L. SMITH in the amount of ONE THOUSAND FIVE HUNDRED EIGHTY-SIX DOLLARS AND TWENTY-TWO CENTS (\$1,586.22), representing \$504.22 in

gross earned, unpaid, due, and payable wages, and \$1,082 in penalty wages, PLUS

2) Interest at the rate of nine percent per year on the sum of \$504.22 from May 20, 1993, until paid, PLUS

3) Interest at the rate of nine percent per year on the sum of \$1,082 from June 19, 1993, until paid.

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**In the Matter of  
YELLOW FREIGHT SYSTEM, INC.,  
Respondent.**

Case Number 53-93  
Amended Final Order of the  
Commissioner  
Mary Wendy Roberts  
Issued September 27, 1994.

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#### SYNOPSIS

Respondent subjected Czechoslovakian-born Complainant, a dock worker, to different terms and conditions of employment as well as to different standards of discipline (including discharge) due to his national origin, in violation of ORS 659.030(1)(a) and (b). The Commissioner awarded Complainant \$42,000 in back pay and \$10,000 for mental suffering. ORS 659.030(1)(a) and (b).

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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, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 1, 2, and 6, 1993, in Room 1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Peter Krcek (Complainant) was present throughout the hearing. Yellow Freight System, Inc. (Respondent), a corporation, was represented by Donna R. Sandoval, Attorney at Law, Portland. Michael W. McMillan, Corporate Labor Relations Manager for Respondent, was present throughout the hearing. Ronald E. Sandhaus, Corporate Attorney and Assistant Secretary of Respondent, was present throughout July 1.

The Agency called as witnesses, in addition to Complainant (in alphabetical order): Respondent's former employee William L. Davis; Respondent's employees Willie Vincent Bell, Fred Deiss, Douglas Egan, William A. Griffith, Albert (Butch) Hunziker, and Raymond D. Manning; Respondent's former Breakbulk Operations Manager Robert F. Hess; Respondent's Breakbulk Manager Gerald Martin; Respondent's Regional Sales Manager Gary O'Connell; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America Line Drivers, Local Pickup and Delivery Local Union No. 81 (Local 81 or the union) Secretary-Treasurer Larry Wilson.

Respondent called as witnesses (in alphabetical order): Respondent's employee Katie Davis, General Operations Manager John Eckhardt, Corporate Labor Relations Manager Michael

W. McMillan, Dock Supervisor Jim Ryan, and Shift Operations Manager John Sausbury.

On May 27, 1994, 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 petitioned the Court of Appeals for judicial review of the Commissioner's May 27, 1994, 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 correct the provisions in the Order for the payment of interest.

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

#### FINDINGS OF FACT – PROCEDURAL

1) On February 11, 1992, Complainant Peter Krcek filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment practices of Respondent.

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 659.030(1)(a).

3) The Agency initiated conciliation efforts between Complainant and Respondent, conciliation failed, and on March 26, 1993, the Agency prepared and served on Respondent Specific Charges, alleging that Respondent subjected Complainant to different terms and conditions in employment based on his national origin, in violation of ORS 659.030(1)(b), and that Respondent discharged Complainant based on his national origin, in violation of ORS 659.030(1)(a).

4) With the Specific Charges, the following were served on Respondent: a) Notice of Hearing setting forth the time and place of the hearing in this case; 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 (OAR 839-30-020 to 839-30-200); and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) Effective April 12, 1993, the Commissioner adopted temporary Oregon Administrative Rules 839-50-000 to 839-50-420, governing contested case hearings. Those rules applied to all pending proceedings, including this proceeding. All procedures herein on or after April 12, 1993, are in accordance with those rules, which were served on Respondent April 8, 1993, and became permanent on September 3, 1993.

6) On June 7, 1993, Respondent filed a motion to amend its answer to the Specific Charges. On June 8, 1993, the Hearings Referee issued a

ruling allowing Respondent's amended answer. Also on June 8, the referee served upon the participants a discovery order calling for case summaries to be filed by 5 p.m. June 14, 1993, pursuant to OAR 839-50-200 and 839-50-210.

7) On June 14, 1993, the participants timely filed their respective case summaries under the ruling of June 8.

8) On June 15, 1993, based on a conference call of that date with the participants, the Hearings Referee reset the hearing scheduled for June 24, 1993, to July 1, 1993, and issued a written ruling to that effect.

9) On June 23, 1993, the Hearings Referee issued a ruling extending the reporting time for subpoenas served for the original hearing date of June 24 and ruled that notice of the extension could be served on the subpoenaed witnesses by regular mail.

10) On June 30, 1993, the Agency filed an addendum to its case summary covering newly discovered witnesses and documents.

11) At the commencement of the hearing, Respondent's attorney stated that she had reviewed the Notice of Contested Case Rights and Procedures and had no questions about it.

12) 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.

13) Following the presentation of its case in chief, the Agency moved to amend the Specific Charges to conform to the evidence in the matter of Complainant's earnings during and

after his employment with Respondent as it affected the allegation of wage loss. There being no objection, the Hearings Referee allowed the amendment.

14) At the close of the hearing, with the concurrence of the participants, the Hearings Referee admitted as administrative exhibits a diagram of Respondent's Portland dock facility and the witness McMillan's organization chart of Respondent.

15) The Proposed Order, which included an Exceptions Notice, was issued on August 27, 1993. Exceptions to the Proposed Order were due under an extension of time by September 17, 1993. Respondent timely filed exceptions which are dealt with as explained in the Opinion section herein.

#### FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was a foreign corporation operating an interstate freight carrier business in Oregon, which engaged or utilized the personal service of one or more employees. Respondent through its officers and agents reserved the right to control the means by which such service was performed.

2) Complainant, a native of Prague, Czechoslovakia, immigrated to the United States for political reasons in 1981 when he was 36 years of age. He had completed high school and a two-year electronics college in Czechoslovakia. Other than a brief elective course in high school, his formal education did not include English, which he learned on his own. He worked as an attendant in a nursing home in Michigan. In 1982, he attended a trucking school in Detroit,

after which he moved to Eugene, Oregon. He worked at gardening and housecleaning, saved money, and bought his own truck. He worked as an owner-driver for North American Van Lines for four years. He became a naturalized U.S. citizen in 1987. He also did some weatherization and door-to-door sales.

3) Complainant began working for Respondent as a "casual" dock worker in 1989. Casual workers were on an on-call status, working as needed, any shift. After about two months, Complainant was hired on a trial basis, and, in another month, obtained a regular position as a city driver and dock worker. At first, he worked a midnight shift ("graveyard"). Later, he worked the "swing" shift, approximately 3:30 p.m. to midnight.

4) Complainant worked at the loading dock of Respondent's Portland terminal. At times material, the dock was a covered platform running generally north and south and was 732 feet long and 60 feet wide. Arranged along the east and west sides and also at the north end were numbered loading-unloading areas, called "doors" or "breakdoors." Each door was designed to accommodate a truck-trailer placed perpendicular to the dock with its open end toward the dock. Any difference in height between the truck or trailer bed and the dock was adjusted by using ramps.

5) Complainant's duties were to load and unload truck trailers as assigned. Cargo to be loaded or unloaded could consist of many small packages or of large crates, or be mixed large and small items. Cargo might or might not be on pallets or

"skids." As included duties, Complainant checked cargo for damage and checked the weight of the containers.

6) Dock workers, including Complainant, were directed in their work by a dock supervisor or dock foreman. The dock foreman for the in-bound end of the dock had a small office at that end, and the dock foreman for the out-bound end of the dock had a small office at that end. These foreman offices were known to all as the "in-bound taco stand" and the "out-bound taco stand." The dock foreman reported to the shift operations manager, who shared the terminal operations manager's office in a building located at about the center of the west side of the dock. That building also contained a lunchroom, restrooms, and workers' coat room. The dock office was glassed on the south and east sides overlooking the dock. Just to the east of the dock office, in the middle of the dock, was the city delivery office.

7) The shift operation managers worked four days on and four days off. Dock supervisors worked 12-hour shifts rather than a 40-hour week and changed every three days. An individual dock worker was supervised by several dock supervisors and shift operations managers during a month's time. One result of this arrangement was that a "casual" dock worker (an on-call worker with no permanent employee status) was observed by a number of supervisors before a decision was made about hiring the worker permanently. Complainant discussed work problems with the dock supervisor or the shift operations manager. He took personal problems, such as the need for unscheduled vacation, to

the Breakbulk Operations Manager, Bob Hess.

8) Robert F. Hess was Breakbulk Operations Manager of Respondent's Portland facility from June 1986 to August 1992. Hess was responsible for all dock freight operations. He supervised the four shift operations managers, who in turn supervised the dock foremen. He had ultimate hiring and firing authority. Shift operation managers could terminate if Hess was unavailable.

9) Dock workers, including Complainant, did not know from shift to shift whether they would be loading or unloading (out bound or in bound), did not know which trailer they would be assigned, or the type of cargo they would handle until they reported at the beginning of their shift. At that time, they were each assigned to the in-bound or out-bound end of the loading area. The assignments to specific "doors" were generally communicated to the dock workers by the dock foreman.

10) Several dock workers at Respondent's Portland terminal believed that there was some favoritism in the assignment of trailers, that dock workers who were not native born white Americans appeared to receive the most difficult loads, those which were all mixed and all hand freight. They were much more time-consuming than loads which were palletized and moveable by forklift. Loads were assigned by dock supervisors. Workers also believed that Respondent's management required a certain average minimum number of freight bills completed by each worker each shift and that a worker's productivity was evaluated

according to success in meeting the minimum. If a worker did not complete a quota of freight bills, he might be singled out for low production and assigned other tasks, such as sweeping.

11) Sweeping the dock area was bargained-for work and part of the job duties of the dock workers. Respondent's management denied any written or standardized minimum number of freight bill production.

12) A freight bill was a description of freight from the consignor. It might include one or many items of freight. There might be as few as one or as many as 100 bills in a trailer, depending on the size and nature of the shipment.

13) Workers known as "hostlers," operating yard tractors or "goats," moved trailers in and out of the loading-unloading area. Trailers were thus dropped at the dock for loading or unloading. Freight was moved in and out of trailers or up and down the dock manually or by use of carts or forklifts. Hostlers waited in the cab of the goat until a trailer was completed, at which time the trailer was removed and another brought in.

14) When Complainant became a regular full-time employee, he was scheduled for a 40-hour week. He became a member of Teamster Local 81. He attempted to work available overtime, sometimes working seven days a week. Union dock workers were entitled to time and one-half over 40 hours, double time on weekends, and triple time on certain holidays. On September 28, 1991, Complainant's pay was \$15.91 per straight time hour. A time clock recorded the time worked. On the swing shift, workers punched out

for lunch at about 7:30 p.m. and back in at 8 p.m.

15) Complainant, like other dock workers, was required to punch in prior to the beginning of his shift, to punch out at lunch and back in at the end of the lunch period, and to punch out at the end of the shift. The beginning and ending of each lunch period and each break period was signaled by a buzzer. Workers were not required to punch out for breaks. Workers, including Complainant, occasionally forgot to punch out for lunch, discovering the mistake later when the worker returned to the time clock. When that occurred, the worker would punch out and back in and ask the shift operations manager to initial the card. The shift operations manager never refused to do so. There was no penalty when this occurred.

16) Each time Complainant asked for a signature to correct a lunch period clocking, he was told to be more careful and not to forget again. Workers who were late in punching in at the start of a shift might be penalized for the time lost. Complainant was late perhaps two to three times in two and one-half years. He never received a warning for tardiness.

17) Respondent's payroll department would advise operations if workers did not clock out for the lunch hour. If the time card showed the correct number of punches (i.e., in to begin, out for lunch, in after lunch, and out to end the shift, total of four), payroll deducted the half hour for lunch, regardless of the actual minutes recorded for the lunch period.

18) Respondent provided a lunchroom for use during lunch and breaks.

Complainant obtained operations manager Eckhardt's permission not to use the regular lunchroom because of smokers. For a time he used the daytime lunchroom of the office workers until shift operation manager Saulsbury forbade him the use of that lunchroom. As an alternative to using the lunchroom, Complainant would find a piece of plywood to lie on and put it behind a pile of freight in the trailer in which he was working, so as not to be disturbed by co-workers as he rested. He believed the supervisors knew this and had observed him; he made no effort to conceal what he was doing. He did this after punching out for lunch.

19) Complainant had observed other workers napping. He saw Willie Bell and Gary Brule sleeping during work hours. Workers napped during the 7:30 to 8 p.m. lunch break and sometimes during the short rest breaks. Complainant never received any warnings about sleeping on the job. He understood that taking other than "proper" breaks, that is, a 15-minute break midway in each half of the work period plus a 30-minute lunch break, was considered abuse of company time.

20) Respondent's supervisory personnel considered conversations between workers during work time as potential abuse of company time. Complainant had been told to return to work when he was actually discussing a loading or freight problem with a co-worker. He believed that "theft of company time" was the same as "abuse of company time." Complainant never received any written criticism from Respondent about his work performance,

although he was once told verbally that he had loaded food too near poison.

21) Complainant got along with his co-workers. He paid little attention to ethnic or racial comments among the workers in the form of jokes. None were directed toward him, except for what he perceived as good-natured comments from friends comparing Czechs and Polacks. He did not recall that supervisors participated in this type of comment.

22) Complainant had discussions with shift operations manager John Saulsbury about work, smoking, and using the lunchroom. Saulsbury told Complainant several times prior to September 1991 not to use trailers during his lunch break. Complainant had discussed this with Saulsbury in inclement weather because he did not use the lunchroom. Saulsbury told Complainant that he was to be in the lunchroom. Complainant pointed out that other employees used the trailers to rest and asked to see the rule about lunch hours. At least twice during discussions between Complainant and Saulsbury, Saulsbury got mad and while going away from Complainant, that is, as he was leaving the trailer where Complainant was working, he called Complainant "stupid Czech" and "fucking Czech" and "motherfucker." Complainant placed these incidents at several months to a year apart. Complainant also heard from co-workers that Saulsbury referred to him in this manner.

23) Complainant did not see resting in trailers during lunch as a safety issue because all work generally ceased during the lunch period. Forklifts would not be coming into the

trailers, and hostlers would not be moving trailers.

24) On September 28, 1991, Complainant was recovering from an attack of flu, which he had for a week including his two days off, September 25 and 26. He was unloading a trailer at door 35, in front of the outbound taco stand. Saulsbury was the shift operations manager and Jim Ryan was the dock foreman. Complainant felt sick about two hours into the shift. He went twice to the main lunchroom building, once to use the restroom and once to get aspirin and a snack to take with the aspirin. He met Ryan near the lunchroom at that time and explained he was getting aspirin because he did not feel well.

25) The trailer was a mixed load, and, at the time, Complainant was working near the nose of the trailer, sorting the various boxes onto carts as he unloaded. As he moved a pallet with a forklift, part of the boxes fell over, and he restacked and sorted them. He had obtained a clean sheet of plywood. He placed the plywood flat behind the stacks of boxes and moved the carts so that he was completely closed in. He lay down to rest. Just before or just as he lay down, he heard the lunch buzzer. He knew he had not punched out for lunch, but decided to punch out and in at the end of the period, as he and others had done before.

26) Jim Ryan had been a dock supervisor or shift foreman for Respondent for five years. On an evening some weeks prior to September 28, 1991, Ryan had formed a suspicion about Complainant taking a normal lunch break and then eating afterward.

He determined to watch Complainant. On September 28, he looked for Complainant near lunch time. He found Complainant upstairs in the office building. Complainant stated he was getting a drink of water and returned to work. When the lunch buzzer sounded at 7:30, Ryan again went by Complainant's trailer and saw what he termed a "false wall," i.e., a wall of freight with nothing behind it, consisting of two loaded carts. Ryan went to the time clock and pulled Complainant's time card. Complainant had not punched out for lunch. It was about five minutes into the lunch period. Ryan then reported to Saulsbury that he believed Complainant was in his trailer behind a false wall of freight, that he hadn't punched out, and had already eaten and intended to stay in the trailer and take a second lunch hour.

27) Shift operation manager Saulsbury had worked for Respondent for 16 years. Ryan came to him on September 28 and said he suspected Complainant had taken an unauthorized break and that he couldn't find Complainant. Saulsbury said to check Complainant's time card to see if he'd punched out for lunch. After the lunch buzzer, Ryan then reported that Complainant had built a wall of freight. Saulsbury obtained a camera, photographed the freight, and then leaned over the cargo and photographed Complainant.

28) Complainant was awakened by a flash of light; he stood and saw Saulsbury with a Polaroid camera. Saulsbury directed Complainant to come with him to the office, commenting that it was bad for Complainant and he would probably be fired.

29) While still in the trailer, Saulsbury told Complainant that he had been observed sleeping many times before.

30) Saulsbury instructed Ryan to obtain a worker representative as a witness. Ryan summoned Fred Deiss, who joined Saulsbury, Ryan, and Complainant in the shift operations office. Saulsbury explained the situation to Deiss.

31) Fred Deiss had worked as a dock worker for Respondent for five years. He was working on Complainant's shift on September 28, 1991. He was a union member, but not a union shop steward. He was called out of the lunchroom by Ryan. He found Saulsbury and Complainant in the operation manager's office. He was shown a picture of Complainant lying down on a piece of plywood in a trailer. Saulsbury told Deiss that Complainant had been caught sleeping and showed Deiss a time card which showed that Complainant had clocked in, only, that day.

32) Saulsbury questioned Complainant about punching out and about whether he had eaten lunch in the lunchroom before the lunch break and then gone to the trailer to sleep. Saulsbury asked Complainant how long it took him to build the wall. Complainant stated he was tired and had gotten aspirin earlier from the medicine cabinet and later became drowsy. Saulsbury said "Peter, you are good, but not that good," and "this has been going on for a while, hasn't it, Peter?" Complainant stated that he had forgotten to punch out, that he was sorry, and that he thought he was on his own time. He repeated that he didn't believe he had

done anything wrong, that he was on his own time. Saulsbury asked Complainant and Deiss to wait outside and made a telephone call.

33) Saulsbury called Hess at home and explained that he and Ryan had found Complainant sleeping in a trailer on the dock when he should have been at lunch. Saulsbury described taking a picture of the "false wall" of freight on two carts parked across the trailer and a picture of Complainant lying on the floor sleeping. Saulsbury told Hess that Complainant wasn't where he was supposed to be, that Complainant's action in building the wall appeared premeditated, and that Complainant should be terminated for theft of company time. Hess had Saulsbury go over this information at least twice and then told him to go ahead with the termination, pending further investigation. Complainant's time card did not show that he had punched out for lunch. Mere failure to clock out for lunch was normally handled by discussion, verbal warning, and warning letter, in that order. The element of premeditation was the determiner in this instance.

34) Saulsbury did not mention to Hess any prior instances wherein Complainant was suspected of sleeping when he was supposed to be working. Saulsbury did not mention anything about Complainant claiming to be tired or not feeling well.

35) When they stepped out, Deiss told Complainant not to say anything more and to wait for a regular union representative. He described Complainant as rattled. Saulsbury called them back in and told Complainant he was terminated, that he would be

escorted off the premises, and to see the union if he had any questions. When Complainant stated he was without his car, Saulsbury called a taxi. Saulsbury said nothing to Complainant about Complainant's national origin.

36) At times material, in accordance with the collective bargaining agreement with the union, Respondent used a warning system of steadily increasing severity in dealing with discipline and behavior on the part of bargaining unit members:

a) verbal warning or discussion, where the supervisor made note of an oral discussion with the employee over an infraction or unacceptable behavior, and of any caution the supervisor may have given;

b) warning letter, where an official written warning went to the employee and the union for an infraction or series of infractions;

c) suspension, where the employee, in writing to the employee and the union, was given days off for an infraction or series of infractions; and

d) discharge, where the employer notified the employee and the union of an outright termination for an infraction or series of infractions.

37) The bargaining agreement provided for written warning to the employee and the union prior to a discharge, but an employee could be discharged or suspended without a written warning for certain infractions which were known informally to both union and management as "cardinal sins." They included dishonesty, drunkenness, recklessness on duty

resulting in serious accident, and willful, wanton, or malicious damage to the employer's property, as well as other causes such as unauthorized passengers, unprovoked physical assault on an employee or customer, selling, transporting or using illegal drugs on duty, and proven negligence involving serious equipment damage on duty.

38) The categories of dishonesty, drunkenness, recklessness, and willful damage were the subject of discharge guidelines contained in a supplemental Letter of Understanding between the employers and the union. The Letter of Understanding defined dishonesty as: "Basically deceitful intent to defraud the Employer by theft or something of monetary value, not intended to be time per se."

39) Respondent's managers interpreted dishonesty as including theft of company time, but not including abuse of company time. Theft of company time contained the element of deceit or premeditation. Abuse of company time consisted of unplanned, inadvertent, or incidental activity during work time that was not work oriented, such as returning late from an authorized break or dozing off in a warm "goat" cab while awaiting assignment.

40) Respondent's managers interpreted dishonesty as including sleeping on company time. Respondent's managers testified that sleeping in equipment such as trailers during the lunch break was prohibited.

41) At times material, there was no specific written policy prohibiting sleeping in trailers during the lunch break. Respondent preferred that dock workers take the lunch break from buzzer to buzzer, but a worker finishing a job

could work into the lunch hour and do so without obtaining prior permission. The lunch hour was not strictly enforced before September 28, 1991.

42) When a serious infraction resulting in suspension or discharge was grieved, acceptance of resignation in lieu of the challenged discipline was an option. Either the union or the employer could propose the compromise, which might also include a letter of job knowledge (as contrasted to a positive recommendation).

43) At times material, the choice of whether to write up an infraction or merely discuss it without a written record, or whether to even treat a situation as an infraction, was with the supervisor or manager noting it. Enforcement was not consistent.

44) At times material, discharges and other serious personnel actions were reviewed by Respondent's management, then jointly by management and the local union. If there was no change of position, a grievance would then be heard at the first level by the Oregon Joint State Committee, comprised of employer and union representatives. If deadlocked, the matter then went to the Joint Western Committee (San Diego).

45) In November 1989, Complainant failed to punch out at lunch and his supervisor noted a verbal discussion. In November 1990, Ryan noted a verbal discussion with Complainant about Complainant wandering about the dock during his shift, which Ryan characterized as "abuse of company time." Other than those incidents, there was no record of Complainant being the subject of discipline before September 28, 1991. Complainant took pride in

being a good employee. Complainant acknowledged that he had previously described Saulsbury and Ryan as good supervisors. He meant that they pushed the work and got it done. He did not testify that they were kind or even fair.

46) William L. Davis, a native born American, was a member of the bargaining unit at Respondent for about eight years, working mostly as a hostler. During that time he received 14 verbal warnings regarding his job performance, 14 warning letters, and two suspensions. Infractions included tardiness, six preventable accidents, mishandling freight and paperwork, and two instances of sleeping in equipment. Both of the latter occurred while he was on duty. He stated that he "tested" the employer, committing infractions intentionally in order to be suspended and receive time off. He timed the infractions in any one category so that they would extend past a nine-month period provided in the bargaining agreement as a limitation on individual disciplinary actions. These infractions did not include "cardinal sins." He successfully grieved a job reassignment based on co-worker complaints of his unsafe work habits. He resigned in early 1993 in lieu of a grievance over a dishonesty discharge not involving theft of time.

47) During the period September 1985 to September 1991, a worker named Robert DeCelio, born in New York state, received 16 warning letters regarding his job performance, one suspension, and a discharge. Infractions included at least nine preventable accidents (one unreported), one mishandling of freight, two abuse of

company time, one failure to follow instructions, and four failure to properly perform work assignment. The discharge, which was based on two preventable accidents in September 1991, was reduced to a suspension without pay and DeCelio was returned to work in November. In 1993, he accepted an uncontested five-day suspension in connection with another preventable accident. Having successfully grieved termination action, he was still employed at time of hearing.

48) Complainant did not totally understand the grievance process or the concept of union grievance. He was in touch with Local 81, but did not recall all details because he was in shock. He dealt with business agent Bill Shatava, who told him the union would get his job back. He attended two meetings at which he testified before a panel of company and union people. Complainant generally understood the term "dishonesty," but did not understand why he was accused of it when he took lunch on his time and just forgot to punch out. He gathered after each meeting that he was not being put back to work. Shatava told him that there was a "deadlock" and that the next step was a meeting in San Diego which he could attend. He could not afford to do so. The San Diego meeting resulted in rejection of Complainant's grievance.

49) Complainant believed he was treated totally differently from native born American workers due to his national origin. He believed that he received more difficult loads than other workers. He believed he was a productive employee and that he had saved Respondent money by re-

weighing freight in accordance with a company program. He had received special awards for this. Saulsbury questioned the time Complainant used in re-weighing, although other workers appeared to use more time and did not save as much as Complainant had.

50) Complainant had no intent of being dishonest or to "cheat on the company." The discharge was devastating to Complainant, and the time following it was the most difficult time of Complainant's life, including his political confrontations in Europe. He was nervous, upset, and physically shaken. He was anxious about the economic implications and about how to pay his bills and maintain his personal relationships. He was still supporting two children in his home. He knew he had to obtain other employment if he could not return to Respondent.

51) At no time during the events of September 28 or during the grievance procedure did Complainant claim discrimination. He did not testify to or advise the union of his feeling that his national origin played a role in his discharge.

52) Complainant believed that the grievance process was about whether he was a good employee who had made a mistake in not punching out before resting. He hoped that the company would forgive that mistake in view of his good work record. It did not occur to him until later that the remarks and treatment he attributed to Saulsbury suggested another motivation.

53) Raymond D. Manning had worked for Respondent as a dock worker for nearly seven years, during which time he had worked graveyard and evening shifts. In that time,

workers whom he believed had slept during work hours were not discharged. DeCelio slept while working, many times under circumstances when a supervisor could observe it.

54) Workers sometimes slept on the job under circumstances where a supervisor could observe it. Union members would not report a co-worker sleeping on company time to management because they might risk a fine or other sanction from the union for reporting a fellow Teamster. They merely awakened the worker. Workers considered it to be management's job to detect those who slept on company time.

55) Dock workers often slept during the lunch break, particularly on the swing and graveyard shifts. They lay down on lunchroom benches, tables, floors, or in the restroom and slept. Some did not even bother to come to the lunchroom, but rather slept in the trailer where they were working.

56) Albert (Butch) Hunziker had worked as a dock worker for Respondent for 15 years and had, previous to September 28, 1991, been a shop steward. He was working swing shift on that date and escorted Complainant to the gate to wait for a cab. On that evening, he overheard Jim Ryan say "we got rid of that Czech, finally."

57) Willie Vincent Bell had worked for Respondent as a dock worker for seven years. He worked swing shift on September 28, 1991. During the lunch period, he saw Saulsbury enter a trailer with a camera and leave the trailer with the camera, grinning. Bell passed the window of the office and saw the pictures involving Complainant on the window sill next to Saulsbury's

desk. He was told that Complainant had been fired. He had previously heard that Ryan had called Complainant a "dumb Czech."

58) William A. Griffith had worked as a dock worker for Respondent since August 1989. He worked swing shift with Complainant and on September 28, 1991, was assigned to the trailer next to the one in which Complainant was working. Just before lunch, he noticed Ryan looking into Complainant's trailer. Griffith was finishing his trailer, sweeping it out, when the lunch buzzer went off. He continued working until he finished about 10 minutes into the lunch period. He saw Saulsbury enter Complainant's trailer with a camera and noted flashes. Griffith then punched out for lunch. When he returned about 30 minutes later, he noted Complainant, Saulsbury, and Ryan in the office.

59) Douglas Egan, born in Oregon, had worked for Respondent for over five years and was shop steward at the time of hearing. He worked as a hostler when Complainant was employed. Egan was caught twice sleeping on the job, once in a line haul tractor he had entered to get warm and once in a trailer where he had been working. Each time, a supervisor woke him and sent him back to work. He was not disciplined. He received a warning for abuse of company time when he spent 20 minutes of work time talking to another worker. A worker named Westcott received letters for abuse of company time after being videotaped playing Keno at a convenience store during regular work time.

60) At times material, Complainant was the only Portland worker discharged for sleeping on the job.

61) Complainant was embarrassed and deeply humiliated by the presence of and knowledge of his co-workers near the office, and by the arrival and apparent knowledge of the taxi driver. He was profoundly shocked by the turn of events. At no time did he believe he would be fired or that he deserved to be fired. He acknowledged that the failure to clock out for lunch was a serious error in judgment.

62) Following the discharge of September 28, 1991, Complainant found employment with Market Transport on December 2, 1991, as a team truck driver on a mileage rate basis of \$.135 per mile. Although this was a full-time job, his earnings were \$1,811.96 less per month than his 1991 average monthly earnings at Respondent of \$3,916.12. Counting two months he was totally unemployed, his total wage loss from September 28, 1991, to hearing was \$42,259.48 ((19 x \$1,811.96) + (2 x \$3,916.12)).

63) Complainant's testimony was somewhat difficult to follow. He communicated well in English, but he was not accomplished in fielding the types of questions asked in a hearing setting. For instance, he had difficulty articulating the ways in which he was treated differently by his manager. It was a visceral matter with him that he did not have English to explain. His manner, however, was sincere, and overall his testimony was credible.

64) The testimony of Jim Ryan was not altogether credible. He testified that on September 28 he checked for Complainant about 7:20 or so after

seeing Complainant upstairs and didn't find him in his assigned trailer or in another trailer, in the break room or the restroom. But his handwritten statement, prepared shortly after the events, acknowledged seeing Complainant working in his trailer at 7:20 p.m. He testified that Complainant said he was getting a drink, then later stated that he saw Complainant get a drink. He testified that he first reported his suspicions to Saulsbury on September 28, after he pulled the time card, but his handwritten statement recited that he told Saulsbury before the lunch break that he suspected Complainant had already eaten. He stated that Complainant would have been disciplined even if he had clocked out for lunch, that dock workers were told repeatedly to get off the dock at lunch time. His written statement and his testimony are inconsistent with a much more detailed statement attributed to him in the transcript of the San Diego portion of Complainant's grievance, wherein he states that other supervisors and co-workers suspected Complainant of sleeping in a trailer at lunch and then taking a second lunch break. No other supervisor, except perhaps Saulsbury, suggested this, and no workers verified it. Because of these inconsistencies and the defensive and self-justifying manner in which he testified, the Forum has credited only those portions of his testimony which were confirmed by other credible evidence.

65) The testimony of John Saulsbury was inconsistent with a detailed statement attributed to him in the grievance transcript, wherein he states that other employees suspected Complainant of extra lunches and breaks.

Worker testimony did not confirm this and in fact suggested that it was extremely unlikely that other dock workers would share such information with a shift operations manager. His testimony was also inconsistent and less credible than more credible evidence on the subject of permissible rest habits of the work force at times material. Because of these inconsistencies, the Forum has credited only those portions of his testimony which were confirmed by other credible evidence.

#### ULTIMATE FINDINGS OF FACT

1) At times material, Respondent was a corporation operating an interstate freight carrier business 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) Complainant is a native of Czechoslovakia.

3) From 1989 to fall 1991, Complainant worked for Respondent as a dock worker.

4) From 1989 to fall 1991, Respondent treated Complainant differently from his native born American co-workers.

5) John Saulsbury, a shift operations manager for Respondent, referred to Complainant in his presence as "stupid Czech" and "fucking Czech" and "motherfucker."

6) On September 28, 1993, Respondent discharged Complainant for dishonesty.

7) Complainant's national origin played a key role in his treatment on the job and in his discharge.

8) Complainant experienced wage loss of \$42,259.48 due to termination of his employment by Respondent.

9) Complainant experienced emotional distress due to termination of his employment by Respondent.

#### CONCLUSIONS OF LAW

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

2) 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 \*\*\* national origin \*\*\* to bar or discharge from employment such individual. \* \* \*

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

ORS 659.040 provides, in pertinent part:

(1) Any person claiming to be aggrieved by an alleged unlawful employment practice, may \* \* \* make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the \*\*\* employer \*\*\* alleged to have committed the unlawful employment practice complained of \* \* \*."

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

3) The conduct of Respondent in discharging Complainant, its employee, based on his national origin was a violation of ORS 659.030(1)(a).

4) The conduct of Respondent in discriminating against Complainant in the terms, conditions, and privileges of employment based on his national origin was a violation of ORS 659.030(1)(b).

5) The actions, inactions, statements, and motivations of Robert F. Hess, Jim Ryan, and John Saulsbury are properly imputed to the Respondent herein.

6) 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 perform an act or series of acts in order to eliminate the effects of an unlawful practice and to protect the rights of others similarly situated. The amounts awarded in the Order below are a proper exercise of that authority.

#### OPINION

The law of the State of Oregon makes it an unlawful employment practice to base any adverse employment policy or decision affecting an employee on the employee's national origin. Thus, the country of birth of an employee, or even the employee's ancestry, are not factors that can be legally considered in determining whether the employee is to be hired or retained. This does not mean that mere birth outside the United States precludes an employer from refusing to hire, demoting, disciplining, or terminating an individual. The standard for

such actions should be no higher and no lower than that for native born Americans. If the only differentiation between employees of American birth and those of identifiable foreign origin is that national identity, that is, if they are treated the same in all respects, a charge of national origin discrimination cannot be maintained.

In this case, there were overt indications that at least two persons in supervisory positions considered Complainant's status as a Czechoslovakian in dealing with him. There was treatment that set him apart from other workers. Only Complainant was discharged for what was termed stealing time when he went to sleep without checking out for lunch. Others who slept when on the job were sometimes, although not universally, disciplined. None of them received discharge as a result. Complainant was the only dock worker at Respondent's Portland facility to be discharged for sleeping on the job.

Respondent asserted that it was applying an objective standard in regard to the matter of an employee sleeping during work hours. That standard was whether the sleeping was accidental or unintended ("abuse of company time") or whether it was premeditated ("theft of company time"). The problem with such a purportedly objective standard is that the threshold definition (unintended vs. premeditated) was liable to subjective evaluation. Thus, Complainant's claim of illness was ignored, although the physical condition of and the physical surroundings of those who nodded off in yard tractors were considered. Respondent's managers emphasized the

intent demonstrated by the "false wall," but in other instances failed to impute intent to repeated violations by employees with voluminous disciplinary records.

Ryan testified to one prior incident that lead him to suspect Complainant of taking unauthorized time. By the time of the grievance, however, that incident had mushroomed to a habitual pattern that supposedly had other employees upset. In view of the testimony, solicited by Respondent, that Teamsters don't snitch on Teamsters, the Forum cannot credit the assertion that Complainant's co-workers complained about him or were pleased when he was in trouble.

Respondent's position was that the sanction used on Complainant was proper and unavoidable under the circumstances and the bargaining agreement. But Respondent, most particularly through Complainant's direct supervisors, had the initial choice of what discipline, if any, to impose for Complainant's infraction. It was Respondent, through those supervisors, that chose to see the situation as a deliberate attempt by Complainant to be paid for not working, rather than, as Complainant claimed, a mere failure to clock out. Respondent maintained that it was an interpretation by the union that put Respondent in the position of having to discharge Complainant for "dishonesty," a "cardinal sin." The letter relied on defined "dishonesty" as "Basically deceitful intent to defraud the Employer by theft or [sic: theft of?] something of monetary value, *not intended to be time per se.*" (Emphasis supplied.) Whatever the interpretation of that language might be by a union-

management committee or labor arbitrator, it is not clear to this Forum that a failure to clock out under the circumstances described in this matter, or the suspicion that work time might have been used to prepare a place to rest, necessarily or inescapably leads the employer to process a dishonesty discharge.

Respondent argued that other dock workers who slept and were not disciplined were not similarly situated to Complainant. But the only difference was Respondent's subjective judgment of the workers' intent. One actually admitted his infractions were knowing or intentional. Another was disciplined for "abuse of time" after being videotaped gambling off premises while on work time. Others caught sleeping on work time were not disciplined at all.

Thus, Ryan and Saulsbury exercised an element of discretion on September 28, 1991. Complainant's work record did not reflect multiple prior infractions or challenges to Respondent's rules which had been acted upon by the employer. Indeed, compared to some of his native born co-workers, Complainant's prior record was exemplary. Respondent's agents, particularly Saulsbury and Ryan, chose to view Complainant's violation as a "cardinal sin." Saulsbury's prior comments regarding Complainant's nativity and Ryan's post discharge comment provided insight into the motivation for the severity of the sanction they set in motion. The repeated characterization of the stacked freight in the trailer as a "false wall" was calculated to show intent and ignored the fact that it was part of Complainant's job duties to sort and re-stack freight onto pallets

or carts. It was Saulsbury's "false wall" information coupled with the failure to clock out that prompted Hess, who was not present, to approve the severe sanction proposed by Saulsbury. Saulsbury did not communicate Complainant's explanation to Hess. The after-discharge attempts by both Saulsbury and Ryan to bolster the reason for the penalty proposed with the claim that Complainant's co-workers had complained to them about Complainant's lunch habits was simply not believable.

Respondent suggested that there was no standard for a "prima facie" case of national origin discrimination. This Forum has consistently articulated in the past the elements used to establish intentional discrimination:

- 1) The respondent is a respondent as defined by statute;
- 2) The complainant is a member of a protected class;
- 3) The complainant was harmed by an action of the respondent;
- 4) The harmful action was taken because of the Complainant's membership in the protected class. OAR 839-05-010(1).

"Proof" includes both facts and inferences. *In the Matter of City of Umatilla*, 9 BOLI 91, 104 (1990), *aff'd without opinion, City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991) (sex discrimination). To the same effect as to prima facie discrimination involving various protected classes: *In the Matter of Coos-Bend, Inc.*, 9 BOLI 221 (1991) (sex); *In the Matter of Community First Building Maintenance*, 9 BOLI 1 (1990) (injured worker); *In the Matter*

*of Western Medical Systems, Inc.*, 8 BOLI 108 (1989) (injured worker); *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989) (sex); *In the Matter of Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989) (sex); *In the Matter of Peggy's Cafe*, 7 BOLI 281 (1989) (OSHA retaliation). In this case, the evidence permits the inference that Complainant's national origin played a key role in his treatment by Respondent. The crucial question is whether the harmful action would have occurred had the Complainant not been a member of the protected class. OAR 839-05-015.

Because of the overt language directed at Complainant and because he appeared to be accorded less consideration than other employees who were not foreign born, the Forum finds that Complainant's national origin played a key role in both his on-the-job treatment and his discharge. This is not to say that Complainant's failure to clock out is condoned; it was merely excusable and had been excused in others.

Sudden, unexpected termination of employment is traumatic. It causes stress due to humiliation, economic dislocation, and self-doubt. When such a termination is due to unlawful motivation, the resulting emotional distress is compensable. Complainant was embarrassed in front of his peers and was subjected to continued economic stress. The Forum is awarding \$10,000 for Complainant's mental distress.

#### Respondent's Exceptions

Respondent filed voluminous exceptions to the Proposed Order. There were 47 exceptions to the

Findings of Fact (FOF) alone. Many were mere argument or a different view of the same facts or questioned the use of hearsay (Exceptions 5, 6, 9-13, 15, 17, 18, 19, 21, 24-31, 32, 34, 35, 37-39, 41, 43, 45-47). They require no individual exposition or changes in the findings. At least two exceptions, 26 and 36, set out matter which was already covered in other Findings of Fact. Some of the exceptions led the Forum to revise a few findings for clarity and accuracy: Exception 1, revised FOF 2; Exception 2, revised FOF 6; Exceptions 3 and 4, revised FOF 7 and 8; Exceptions 7 and 8, revised FOF 10, new FOF 11; Exception 14, revised FOF 21, now FOF 22; Exception 22, revised FOF 27, now FOFs 28 and 29; and Exception 23, revised FOF 30, now FOF 32, clarifying Complainant's apology.

Some of Respondent's remaining exceptions prompt comment to the extent that, contrary to Respondent counsel's assertions, there was testimony to support the findings excepted to (Exceptions 11, 20, 33). It was clear from Complainant's testimony and that of the witness Deiss that Complainant's apology was for forgetting (neglecting) to clock out and not, as his supervisors would have it, for sleeping on company time (Exception 23). Respondent's Exception 16 pointed out that Complainant was questioned at hearing regarding the possibility that he might have misunderstood "checker," a generic term for dock worker, for "Czech." In response, Complainant attributed the full term "Czechoslovakian" to Saulsbury. Respondent argued that was the first that Respondent had heard of that accusation and that

Complainant must have made it up. Complainant, on the other hand, said at the time he had been remembering more as testimony progressed. Complainant's explanation was credible, particularly in view of the fact that none of the witnesses referred to the dock worker position as checker. The "Czech-checker" argument was a non-argument since Saulsbury denied saying anything.

Respondent further argues in its exceptions that the record lacks substantial evidence to support a finding of liability and that the comparators presented by the Agency were not apt comparators because their offenses were not as severe as Complainant's "dishonesty." On the contrary, there was evidence allowing the conclusion that it was more likely than not (i.e., a preponderance) that Complainant's national origin was the cause and that the degree of severity attributed to an offense varied with the identity of the employee as well as with the bias and motivation of the accusing supervisor.

#### AMENDED 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, YELLOW FREIGHT SYSTEM, INC. 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 Peter Krcek, in the amount of:

a) FORTY-TWO THOUSAND TWO HUNDRED FIFTY-NINE DOLLARS AND FORTY-EIGHT CENTS

(\$42,259.48), representing wages Complainant lost between September 28, 1991, and July 1, 1993, as a result of Respondent's unlawful practice found herein; PLUS

b) INTEREST AT THE ANNUAL RATE OF NINE PERCENT on \$9,644.20 of said wages from January 1, 1992, until paid, computed and compounded annually; PLUS

c) INTEREST AT THE ANNUAL RATE OF NINE PERCENT on \$21,743.52 of said wages from January 1, 1993, until paid, computed and compounded annually; PLUS

d) INTEREST AT THE ANNUAL RATE OF NINE PERCENT on \$10,871.76 of said wages from July 1, 1993, until paid, computed and compounded annually; PLUS

e) 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

f) Interest on said damages for mental distress, at the legal rate, accrued between the date of this Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any employee because of that employee's national origin.

**In the Matter of  
MARIO A. PEDROZA, D.D.S.,  
Respondent.**

Case Number 72-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued September 27, 1994.

**SYNOPSIS**

Although Respondent was entitled to an offset from wages owed to Claimant due to an overpayment of vacation benefits pursuant to ORS 652.610(4), Respondent willfully failed to pay Claimant all wages due upon termination, in violation of OAR 839-20-030 (overtime wages), and ORS 652.140 (2). The Commissioner ordered Respondent to pay the wages owed plus civil penalty wages, pursuant to ORS 652.150, and interest. ORS 652.140(2); 652.150; 652.360; 652.610(4); 653.045; 653.055(2); 653.261(1); and OAR 839-20-030(1).

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, 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, 1994, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Valerie Hodges, an intern of the Agency. Portia Yamall (Claimant) was present throughout the hearing by telephone. Mario A. Pedroza, D.D.S. (Respondent) was

present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses (in alphabetical order): Barbara Lopez, former co-worker of Claimant; Brett Matthews, former domestic partner of Claimant; Linda Robinson, employee of a dental office adjacent to that of Respondent; Margaret Trotman, Compliance Specialist, Bureau of Labor and Industries; and Portia Yamall, Wage Claimant (by telephone).

Respondent called the following witnesses: Barrie Pedroza, office manager and wife of Respondent, and Mario Pedroza, Respondent.

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 7, 1993, Claimant filed a wage claim with the Agency. She alleged that she had been employed by Respondent and that Respondent had failed to pay wages earned and due to her.

2) Subsequent to filing the wage claim, on September 30, 1993, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

3) On March 29, 1994, 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 \$835.20 in wages and \$3,195 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 April 15, 1994, Respondent, through his attorney, filed an answer to the Order of Determination. Respondent's answer also contained a request for a contested case hearing in this matter. Respondent's answer denied that Respondent owed Claimant unpaid wages and further set forth the defenses that Claimant had overstated the number of hours and days claimed and that Claimant had been overpaid in an amount that exceeded the wages claimed owing.

5) On June 6, 1994, 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 Claimant 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 839-50-000 to 839-50-420.

6) On June 9, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case,

\* "Participant" or "participants" refer to the Agency and the Respondent. OAR 839-50-020(13).

according to the provisions of OAR 839-50-210(1). The summaries were due by June 28, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency and Respondent each submitted a timely summary.

7) By letter of June 21, 1994, the Agency notified the Hearings Referee and Respondent's counsel that Claimant would be appearing by telephone.

8) On June 24, 1994, the Hearings Unit received Respondent's request for issuance of subpoenas for Claimant's 1993 income tax return and for her personal appearance at hearing. On the same date, the Hearings Referee denied the request for a subpoena to secure the personal appearance of Claimant due to her status as a witness, not a party, and the provisions of OAR 839-50-020(14). The Hearings Referee set a prehearing conference call for July 1, 1994, to hear argument and resolve the request for discovery of the 1993 income tax return.

9) On June 28, 1994, the Agency submitted a letter to the Forum disavowing that any stipulations had been entered into between the Agency and the Respondent.

10) On June 30, 1994, the Agency moved for a discovery order, with an attached letter showing the Agency's attempts to obtain Respondent's records through an informal exchange of information.

11) On July 1, 1994, a prehearing conference was held. The Agency representative was present in the Hearings Unit conference room. Dr. Pedroza was present by telephone

and was not represented by counsel. Dr. Pedroza confirmed that he would not be represented by counsel at hearing. Both discovery requests were addressed. As the result of the Agency's agreement that existing exhibits accurately represented the wages paid by Dr. Pedroza to the Claimant during the wage claim period, Respondent agreed that no ruling was required on the Respondent's request for the income tax return. With regard to the Agency's discovery request, the Hearings Referee granted the Agency's motion, in part, and issued a discovery order directing Respondent to provide copies of any and all personnel records for Claimant and printouts or other documents showing orders placed with Henry Schein Co. during the wage claim period. The Hearings Referee further ordered that a copy of any written agreement regarding Claimant's rate of pay during the wage claim period be provided, if such a writing was in existence. On July 5, 1994, Respondent provided the existing requested records as exhibits and indicated that no written agreement regarding Claimant's rate of pay existed.

12) During a prehearing conference, Respondent and the Agency stipulated to certain facts, which were read into the record by the Hearings Referee at the beginning of the hearing.

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

14) 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.

15) At the conclusion of its case-in-chief, the Agency moved to amend the Order of Determination to conform calculations of Claimant's earned and unpaid wages, and penalty wage calculations, to the evidence presented at hearing. Respondent did not object, and the Hearings Referee granted the motion, pursuant to OAR 839-50-140 (2).

16) The Hearings Referee left the hearing record open until July 25, 1994, to allow the Respondent and the Agency to submit written closing arguments. Both participants submitted timely closing arguments. The documents submitted by the Agency and by Respondent were received and marked as exhibits.

17) On August 12, 1994, the Hearings Referee reopened the record to receive evidence on vacation leave taken by Claimant in the years 1990 and 1991.

18) On August 29, 1994, the Agency filed a stipulation, executed by the participants, specifying the number of vacation days taken by Claimant in 1990 and in 1991. The stipulation was marked and received into the record.

19) On August 29, 1994, upon receipt of the stipulation described in Finding of Fact 18, above, the Hearings Referee closed the record herein.

20) The Proposed Order, which included an Exceptions Notice, was issued on August 30, 1994. Exceptions were required to be filed by September 9, 1994. On September 9, 1994, the

Hearings Unit received the Respondent's timely exceptions, which are addressed in the Findings of Fact and Opinion sections of this Final Order.

#### FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Respondent, a person, was a licensed dentist who employed one or more persons in the State of Oregon.

2) From on or about June 9, 1990, to on or about April 2, 1993, Respondent employed Claimant as a dental assistant.

3) Claimant's duties included providing chair-side assistance to the dentists, taking X-rays, sterilizing instruments, ordering supplies, performing laboratory work, and assisting with orthodontics.

4) Respondent and Claimant entered into an oral agreement that Claimant would perform eight hours of work per day for \$92.00 (\$11.50 per hour).

5) Respondent kept no hourly time record for Claimant.

6) Respondent paid employees twice a month. Employees of Respondent recorded, for each pay period, the number of days worked and days taken as vacation or for illness on a wall calendar in the employee break room. Barrie Pedroza called in the days worked to Paychex, a payroll service utilized by Respondent, from information recorded by employees on this calendar. Paychex computed payroll from the information supplied by Barrie Pedroza, and generated computerized payroll records reflecting, for each employee, the rate of pay, the number of days worked, the number of days taken as vacation, and the

number of days taken off work for illness.

7) Claimant kept no hourly records for time worked. Before leaving her employment with Respondent, she photocopied the wall calendar for 1993 referred to in Finding of Fact 6, above.

8) When Claimant filed her wage claim and amendments, she relied on her memory and the photocopy of the wall calendar in listing the dates and hours she had worked for Respondent.

9) Patients were scheduled between 8:30 a.m. to 5:30 p.m. A morning review of patient files took place at 8:15 a.m. each day. Claimant, with the knowledge and assent of Respondent, was on the employer's premises performing service to the employer from 7:30 a.m. to 5:30 p.m., with an hour off for lunch. The office occasionally closed early and only rarely closed later than 5:30. The lunch hour was sometimes truncated, depending on the patient schedule, emergency appointments, and the availability of the second dental assistant.

10) When the office closed early, the employees were often permitted to leave early. No deductions were taken from the employees' pay on these occasions.

11) An office appointment book was kept by Respondent, which noted the block of time allotted to each patient when scheduled and the dental procedure to be performed. The appointments did not always end when scheduled, particularly if appointments were double-booked, the treatment

plan changed, or if a second dentist was working.

12) On January 8, 1993, the office closed early due to snow; Claimant worked eight hours on that date. On January 20, 1993, the power went out and employees worked four hours. On February 19, 1993, the office closed at approximately 3 p.m., due to Respondent's travel to attend a seminar. Claimant worked 7.5 hours on February 19, 1993.

13) Claimant's testimony, accepted as fact,\* except as modified by the previous Finding of Fact, reveals that during the period January 1, 1993, through April 2, 1993, she worked a total of 563.5 hours in 63 days. Of those hours, 511 hours were "straight time hours," that is, hours worked up to 40 per workweek. The remaining 52.5 hours were "overtime hours," that is, hours worked in excess of 40 hours per workweek.

14) Pursuant to ORS 653.261 and OAR 839-20-030 (Payment of Overtime Wages) and Agency policy, Claimant's total earnings for the period January 1 through April 2, 1994, were \$6,868.39. The total reflects the sum of the following:

511 hours @ \$11.50 per hour =	\$5,876.50
52.5 hours at the overtime rate of \$17.25 (one and one-half times the \$11.50 agreed rate) +	905.64
<b>TOTAL EARNED</b>	<b>\$6,782.14</b>

15) Respondent paid Claimant \$5,965.63 for work performed during the period of the wage claim.

16) Claimant quit without 48 hours' notice on April 2, 1993.

17) During the period of Claimant's employment, Respondent had a vacation policy that permitted vacation accrual, after the first six months of employment, at the rate of one workweek equivalent for the first year, and two workweek equivalents for the second and subsequent years.

18) During 1990 and 1991, Claimant worked three days per week. During 1992, Claimant worked four days per week. From January 1 through April 2, 1993, Claimant worked five days per week.

19) Pursuant to Respondent's vacation policy, Claimant was entitled to no vacation days in 1990, three vacation days in 1991, eight vacation days in 1992, and two and one-half days prorated vacation in 1993.

20) Claimant used all accrued vacation days in 1991 and 1992.

21) In 1993, Respondent valued and paid Claimant's vacation days at the rate of \$92.00 per day.

22) Claimant was paid \$782 for eight and one-half vacation days for 1993. Claimant was entitled to \$230 for two and one-half vacation days for 1993. Claimant was overpaid \$552 for six days of vacation benefits for 1993. Respondent is entitled to a setoff against wages owed in the amount of \$552.

23) Respondent owes Claimant \$264.51 in unpaid wages, representing \$6,782.14 in earned wages, less

\$5,965.63 wages paid,\* less \$552 vacation overpayment.

24) Civil penalty wages, computed in accordance with Agency policy, are as follows: \$6,782.14 (the total wages earned) divided by 63 (the number of days worked during the claim period) equals \$107.65 (the average daily rate of pay). This figure of \$107.65 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$3,229.50, rounded to \$3,230 pursuant to Agency policy.

25) For the most part the Hearings Referee was impressed by Complainant's forthright demeanor and found her testimony to be believable. However, on an important point her testimony seemed evasive. She was not convincing on the issue of the timing of accrual of vacation benefits or on the extent of her use of vacation benefits. Based on Complainant's evasive testimony regarding the use and accrual of vacation benefits, the Forum finds her testimony on this point to be not credible. Because her claims about the hours she worked were estimates, the Forum credited her testimony when it was generally supported by Respondent's office appointment book and did not credit her estimates when unsupported by the appointment book.

26) Respondent's testimony was generally credible. However, on an important point his testimony was inconsistent or was contradicted by credible evidence. For example, with regard to the wage agreement and the hourly rate of pay, documentary evidence and

\* Claimant's testimony concerning hours worked was accepted as fact except where unsupported by other credible evidence, such as the appointment book entries on January 8, January 20, and February 19, 1993.

\* These sums are exclusive of vacation benefits used or paid. The vacation benefits (both used and paid) are factored into the amount of offset allowed.

testimony at hearing demonstrate that Respondent has given a number of different versions concerning Claimant's hourly rate of pay. Respondent has relied on an alleged agreement with Claimant to work nine hours a day at the flat rate of \$92.00 a day, for an hourly rate of \$10.22. Respondent has also maintained that Claimant's daily compensation broke down to \$9.68 per hour for eight hours, with the ninth hour compensated at \$14.52. Respondent's own records, however, show that when overtime was paid for the acknowledged overtime worked on March 20, 1993, Claimant was compensated at the rate of \$17.25 an hour. An overtime rate of \$17.25 an hour translates into a regular rate of \$11.50 per hour. For the reasons given in the Opinion section of this Order, which are incorporated herein by this reference, Respondent's version of the agreed rate of pay was not found to be credible.

27) The testimony of Barbara Lopez was generally credible. Her demeanor was generally forthright. Due to her continuing employment relationship with Respondent, her potential for bias was obvious. However, that alone was not enough to cause the Hearings Referee to conclude that her testimony was not largely credible. On one point, however, the Forum did not credit her testimony due to the change in content of her statement between June 22, 1994, and the date of the hearing. On June 22, 1994, she told the Case Presenter that when patients were finished before 5:30 p.m., the employees remained at work until 5:30. At hearing, she testified that the employees left before 5:30 if patients

were finished. Because of this contradiction, the speculation by the witness as to the departure time of employees on dates in dispute was not credited.

28) The testimony of Barrie Pedroza left the Forum with the impression that she was trying to protect her husband. For example, she attempted to explain away damaging statements made by her husband to Margaret Trotman on the telephone by characterizing receipt of telephone calls as an inconvenience. The witness has both a financial and emotional stake in supporting the version of her husband. For these reasons, her testimony was given less weight than other sworn testimony where it conflicted with the other testimony.

29) The testimony of the other witnesses was entirely credible. The Hearings Referee observed the demeanor of each witness and found each to be believable.

#### 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) Respondent employed Claimant as a dental assistant from June 9, 1990, through April 2, 1993.

3) During the wage claim period, that is January 1 through April 2, 1993, Respondent and Claimant had an oral agreement whereby Claimant's rate of pay was \$92.00 for eight hours of work (\$11.50 per hour).

4) Claimant's last day worked was April 2, 1993, the same day she notified Respondent that she was quitting employment.

5) During the period January 1 through April 2, 1993, Claimant worked 63 days and earned \$6,782.14 in wages.

6) Respondent owes Claimant \$264.51, which represents \$6,782.14 earned, minus \$5,965.63 in wages paid, minus \$552 for vacation benefits Respondent paid to Claimant in excess of vacation benefits Complainant had accrued.

7) Respondent willfully failed to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after she quit, and more than 30 days have elapsed from the date her wages were due.

8) Claimant's average daily rate for the wage claim period of employment was \$107.65 (\$6,782.14 earned, divided by 63 days equals average rate per day).

9) Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$3,230 (Claimant's average daily rate, \$107.65, continuing for 30 days, when rounded to the nearest dollar).

10) Respondent made no showing that he was financially unable to pay Claimant's wages at the time they accrued.

#### 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 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) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides, in part:

"[A]ll 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 when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Respondent was obligated by law to pay Claimant one and one-half times

her regular hourly rate of \$11.50, in this case \$17.25, for all hours worked in excess of 40 hours in a week. Respondent failed to do so.

5) ORS 652.610(4) allows, on due legal process, for a lawful setoff against the compensation due an employee, any compensation already made by the employer to the employee that the employee admits to have been due and the employee has received. Therefore, Respondent herein is allowed a setoff of \$552 (six days excess vacation paid times \$92.00/day) from Claimant's wages.

6) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent failed to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit employment without notice, and violated ORS 652.140(2).

7) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of

any employee whose employment ceases, as provided in ORS 652.140 and 652.145, 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 from the due date; 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.

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 her earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

#### OPINION

##### Work Time

"Employ" includes to suffer or permit to work. ORS 653.010(1). Work time is all time an employee is required or permitted to be on the employer's premises, on duty. In this case Respondent suffered or permitted Claimant to arrive at Respondent's office and perform job duties at 7:30 a.m., 45 minutes before the morning file review

and one hour before the first patient. As a matter of public policy, it must be assumed that an employee should be compensated for all work performed. *In the Matter of S.O.S. Towing and Storage, Inc.*, 3 BOLI 145, 148 (1982). All the time Claimant spent working from 7:30 a.m. to 5:30 p.m. (less one hour for lunch) was compensable work time.

##### Hours Worked

In wage claim cases such as this, the Forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying his burden of proof, the court analyzed the situation as follows:

"An employee who brings suit under 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the

nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed

or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-88.

Here, ORS 653.045 requires an employer to maintain payroll records. Respondent kept no such records of Claimant's work. Pursuant to the analysis then, the employee, or in this case the Agency, has the burden of first proving that the employee "performed work for which he was improperly compensated." The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. This Forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work — where that testimony is credible. See *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989); *In the Matter of Sheila Wood*, 5 BOLI 240, 254 (1986). Here, Claimant's testimony and other evidence was credible. The Forum concludes that Claimant was employed and was improperly compensated, and the Forum may rely on the evidence produced by the Agency regarding the number of hours worked by Claimant

as a matter of just and reasonable inference.

Upon this showing, the burden shifted to Respondent to produce persuasive "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens Pottery Co.*, 328 US at 687-88. Respondent produced the 1993 appointment book for his office, which did not negate the reasonableness of the Claimant's evidence, except as to the hours worked on the following dates: January 8, January 20, and February 19, 1993. On each of these dates, the appointment book contains persuasive evidence that the office closed unusually early. The hours worked, as testified to by Claimant, were adjusted accordingly.

#### Rate of Pay

Respondent has consistently maintained that Claimant agreed to work at a daily rate of \$92.00. Documentary evidence and testimony at hearing, however, demonstrate that Respondent has given a number of different versions concerning Claimant's hourly rate of pay. He has maintained that Claimant worked no overtime, save four and one-half hours on March 20, 1993, which was separately compensated. If this is true, Claimant must have been working at the daily rate of \$92.00 for eight hours (or less) of work. Respondent has also maintained that Claimant's daily compensation broke down to \$9.68 per hour for eight hours, with the ninth hour compensated at \$14.52. Respondent has

\* The fact that Claimant did not recall the early closure of the office on three dates did not render the remainder of her testimony concerning hours worked untrustworthy.

\*\* Eight hours work for \$92.00 translates into \$11.50 per hour.

also relied on an alleged agreement with Claimant to work nine hours a day at the flat rate of \$92.00 a day, for an hourly rate of \$10.22.

Respondent's own records, however, show that when overtime was paid for acknowledged overtime worked on March 20, 1993, Claimant was compensated at the rate of \$17.25 an hour. An overtime rate of \$17.25 an hour translates into a regular rate of \$11.50 per hour, the rate Claimant has consistently claimed throughout these proceedings.

The Forum finds that the wage agreement between Claimant and Respondent for \$92.00 a day was for eight hours of work, and, as a consequence, that Claimant's agreed regular hourly rate was \$11.50.

#### Overtime

Respondents did not assert and the Hearings Referee did not find any exemption or exclusion from the coverage of the Wage and Hour Laws, ORS chapter 653, for Respondent or Claimant.

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. Where the employee is employed on the basis of a single hourly rate, as here, the hourly rate is the "regular rate." OAR 839-20-030(3). Pursuant to OAR 839-20-030(3), the Respondent is obligated by law to pay Claimant one and one-half times her regular hourly rate of \$11.50 for all hours worked in excess of 40 hours in a week.

\* The formula contained in OAR 839-20-030(3)(b), utilized by Respondent to determine overtime in an exhibit, is inapplicable in this situation.

#### Setoff

ORS 652.610(4) provides, in part that

"Nothing in this section shall \* \* \* diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach, or apply an employee's compensation on due legal process."

Respondent asserted a lawful setoff for the six days of vacation benefits overpaid to Claimant. Claimant acknowledged receipt of payment for eight and one-half days of vacation benefits (\$782) in 1993. The Forum has found that Claimant was entitled to two and one-half days of prorated vacation (\$230) in 1993, and that none of the eight and one-half vacation days paid was for vacation benefits earned in a prior year. Accordingly, the Forum reduced the amount of wages due by \$552 (\$782 less \$230).

#### Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that 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).

Respondent testified that his failure to pay overtime was due to ignorance of the legal requirement in the face of an agreed daily rate, his failure to recognize that Claimant's hours exceeded

40 in a week, and his reliance on a professional payroll service.

This Forum has previously held that employers cannot be excused from their obligation to pay overtime for all hours worked in a single workweek due to their ignorance of that legal obligation. *In the Matter of John Owen*, 5 BOLI 121, 128 (1986). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent knew the number of hours worked by Claimant each day, knew he was paying Claimant a flat daily rate, and intended to pay only that rate. He knew he was not paying Claimant overtime wages and intentionally failed to pay those wages. Evidence showed that Respondent acted voluntarily and was a free agent. Respondent must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150.

As to Respondent's reliance on a payroll service and a generalized "bookkeeping error" to negate the existence of willfulness, a faulty payroll system is no defense to a failure to pay wages owed and does not allow a Respondent's actions to be characterized as unintentional. *In the Matter of Loren Malcom*, 6 BOLI 1, 11 (1986).

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Wayton & Willes, Inc.*, 7 BOLI 68, 72 (1988).

### Respondent's Exceptions

Respondent's exceptions question credibility determinations and reiterate the substance of two of his defenses at hearing, namely, that Claimant agreed to work nine hours per day at the flat rate of \$92.00, and that because Respondent believed the value of the excess vacation benefits paid to Claimant were greater than wages owed for overtime, a willful failure to pay cannot be implied.

Exceptions 2 and 3 concern credibility determinations. Ample evidence on the record, the reasonable inferences therefrom, and the Hearings Referee's observations of the demeanor of the witnesses, convince the Forum that the credibility determinations concerning witnesses Trotman, B. Pedroza, Claimant, and Respondent were correct as initially made and will remain undisturbed.

Concerning Exception 4, the Forum found that the offset for excess vacation was less than the overtime owed. That Respondent maintained otherwise was based on a lack of understanding of the operation of the overtime statutes and rules. Had Respondent used the correct formula to calculate overtime wages due, he would have arrived at an amount which was greater than the amount overpaid as vacation. That Respondent failed to apprehend the correct application of the law and based his actions upon his incorrect application, does not exempt him from a determination that he willfully failed to pay overtime. Willful, under ORS 652.150, "simply means conduct done of free will." A.G. Letter Opinion No. Op. 6056 (September 26, 1986); *In the Matter of*

*Central Pacific Freight Lines, Inc.*, 7 BOLI 272, 280 (1989); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989); *In the Matter of William Sama*, 11 BOLI 20, 24 (1992); *In the Matter of Mark Vetter*, 11 BOLI 25, 31 (1992). Respondent knew what he was paying, intended to pay as he did, and was a free agent. A financially able employer is liable for a penalty when he or she willfully does or fails to do any act which results in failure to meet his or her statutory obligation.

With respect to Respondent's Exception 1 regarding the agreed rate and Claimant's work schedule, the Forum has expanded upon Finding of Fact 9 to clarify what was intended by "normal work schedule." The intention was to state the hours Claimant was present and working, not the hours flowing from a wage agreement. The Forum has also added a section entitled "Work Time" to the Opinion section preceding discussion of the exceptions, to amplify the significance intended by the distinction. It is worthy of note that even if Claimant agreed to work nine hours a day for a flat daily rate, for five days per week, such an agreement would have been void. An agreement between an employer and an employee to waive overtime pay is void under Oregon law. *Owen*, 5 BOLI at 125; *In the Matter of Ken Taylor*, 11 BOLI 139, 143 (1992); ORS 652.360, 653.055(2).

### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders MARIO A. PEDROZA, D.D.S., to deliver to the Business Office of the Bureau of Labor

and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR PORTIA YARNALL in the amount of THREE THOUSAND FOUR HUNDRED NINETY-FOUR DOLLARS AND FIFTY-ONE CENTS (\$3,494.51), representing \$264.51 in gross earned, unpaid, due, and payable wages, and \$3,230 in penalty wages, PLUS

2) Interest at the rate of nine percent per year on the sum of \$264.51 from May 1, 1993, until paid, PLUS

3) Interest at the rate of nine percent per year on the sum of \$3,230 from June 1, 1993, until paid.

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### In the Matter of JOANN WEST, Respondent.

Case Number 58-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued October 7, 1994.

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### SYNOPSIS

Where an independent accountant placed an advertisement offering contracting services in a local newspaper on behalf of the accountant's client, a farm/forest labor contractor, the accountant was not recruiting or soliciting

workers on behalf of another, and, consequently, was not acting as an unlicensed farm labor contractor in violation of ORS 658.410 and/or 658.417 (1). Where the accountant was neither acting as a farm labor contractor nor involved in the business that may have had a role in placing additional advertisements offering the services of a contractor, the accountant was not assisting an unlicensed person to violate ORS 658.405 to 658.503, in violation of ORS 658.440(3)(e). ORS 658.405 (1), 658.410(1), 658.417(1), 658.440 (3)(e).

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on June 16, 1994, in the conference room of the Bureau of Labor and Industries Office, 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. JoAnn West (Respondent) was present throughout the hearing and was represented by Robert Gunn, Attorney at Law.

The Agency called the following witnesses (in alphabetical order): Raul Pena, Compliance Specialist, Wage and Hour Division, Bureau of Labor and Industries; Carol Skyles, an employee of the Capital Press; and JoAnn West, Respondent.

The Respondent called the following witness: JoAnn West, Respondent.

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

#### RULING

At the close of its case-in-chief, the Agency moved to amend consolidated paragraphs II and III in the manner set forth in Finding of Fact – Procedural 13. Respondent objected to this amendment, stating that the motion to amend was untimely made, that such an amendment would add significant new issues, and that the amendment would change the nature of the allegation and the basis of the proposed penalty.

The first portion of the motion to amend, the addition of an alternative basis for meeting the definition of a farm labor contractor – recruiting workers for an employer engaged in the business of forestation (without the requirement of remuneration) – is governed by OAR 839-50-140(2)(a). This rule permits an amendment to the pleadings, after commencement of the hearing, when the amendment is for the purpose of conforming the pleading to the issues and evidence presented, when the issue and supporting evidence were introduced without objection or the issue was addressed by the participants, and when the participant raising the new issue moves the Forum to amend its pleadings to conform to the evidence and to reflect issues presented. A review of the record reveals that evidence supporting an additional theory to meet the definition of

a farm labor contractor – that of recruiting workers for an employer engaged in the business of forestation (without the requirement of remuneration) – came into the record without objection and, in addition, was addressed directly by Respondent. As a result, the Forum grants the portion of the motion to amend that would add the following words: "or recruited and solicited workers for Jose Arroyo Martinez and Trails West, Inc., an employer engaged in the forestation/reforestation of lands \*\*\*\*"

The second portion of the requested amendment seeks to add the harvesting of farm products to the activities of the person or entity for whom Respondent allegedly recruited workers. The amendment is meant to bring activities related to harvesting Christmas trees under the umbrella of farm labor activities, rather than forest labor activities. Both participants were aware that the activities at issue were those related to the alleged recruitment for work harvesting Christmas trees. The issue was not new. However, the notice labeled the alleged recruitment as recruitment for work in forestation rather than in the production or harvesting of farm products. Under these circumstances, even if the Forum treated the requested amendment in the light most favorable to Respondent – as if it raised an issue not in the pleadings and treated the issue as if the evidence was objected to at hearing – the motion must be granted.

OAR 839-50-140(1)(b) allows amendment of the pleadings after commencement of hearing when evidence supporting a new issue has been raised, but objected to; when the

presentation of the merits of the action would be served thereby; and when the objecting participant fails to satisfy the hearings referee that the admission of such evidence would substantially prejudice the objecting participant in maintaining the action or defense upon the merits. The Hearings Referee is not convinced that re-characterizing work harvesting Christmas trees from forestation work to farm work would substantially prejudice the Respondent in maintaining its defense on the merits. Respondent's defense turns on whether her activities on behalf of contractors constituted recruitment. Whether the alleged recruitment of labor to harvest Christmas trees constitutes recruitment for forestation work or for farm work is secondary or even tertiary to the essential merits of the defense. Pursuant to OAR 839-50-140 (1)(b), the Forum grants the portion of the requested amendment adding harvesting of farm products to the categories of work for which workers were allegedly recruited.

#### FINDINGS OF FACT – PROCEDURAL

1) On February 14, 1994, the Agency issued a "Notice of Intent to Assess Civil Penalty" (Notice of Intent) to Respondent. The Notice of Intent cited the following bases for this assessment:

1. Assisting an unlicensed person to act in violation of ORS 658.405 to 658.503, in violation of ORS 658.440(3)(e) (civil penalty of \$2,000 for each of two violations).

2. Acting as a farm labor contractor with regard to the forestation and reforestation of lands without a valid farm labor

contractor's license, in violation of ORS 658.410 (civil penalty of \$2,000 for each violation of two violations).

3. Acting as a farm labor contractor with regard to the forestation and reforestation of lands without a special indorsement, in violation of ORS 658.417(1) (civil penalty of \$2,000 for each of two violations).

The Notice of Intent was served on Respondent on February 14, 1994.

2) On February 23, 1994, the Agency received Respondent's answer to the Notice of Intent. In her answer, Respondent denied the alleged violations and requested a hearing on the Agency's intended action.

3) On March 4, 1994, the Agency requested a hearing from the Hearings Unit.

4) On March 25, 1994, 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 839-50-000 through 839-50-420.

5) On May 3, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered

into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by May 16, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary.

6) On May 10, 1994, the Hearings Referee issued a Notice of Amended Hearing Dates and Notice of Change of Hearings Referee.

7) On May 10, 1994, the Hearings Referee wrote a letter to the Respondent and the Agency postponing the date for submission of case summaries to June 6, 1994.

8) The Agency submitted a timely case summary. No summary was received from Respondent.

9) The Agency submitted an addendum to its case summary on June 15, 1994.

10) At the start of the hearing Respondent's attorney stated that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

11) 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.

12) At the outset of the hearing, the Agency made a motion to amend the Notice of Intent to consolidate paragraphs II and III into one simultaneous violation of ORS 658.410 and 658.417(1), rather than separate violations, and, accordingly, to reduce the penalties sought by \$4,000.

Respondent did not object to the amendment, and it was allowed.

13) During the hearing, the Agency made a motion to amend the Notice of Intent to conform to the evidence and to reflect issues presented at the hearing. The motion was made pursuant to OAR 839-50-140. The amendments added language to consolidated paragraphs II and III, as follows:

"In October and November 1993, Contractor, for an agreed remuneration or rate of pay, recruited and solicited workers on behalf of Jose Arroyo Martinez and Trails West, Inc., licensed farm labor contractors, to perform labor for another in the forestation/ reforestation of lands or harvesting of farm products, or recruited and solicited workers for Jose Arroyo Martinez and Trails West, Inc., an employer engaged in the forestation/ reforestation of lands and the harvesting of farm products, on at least two occasions by placing advertisements in the Salem Capital Press intended to solicit work and recruit workers for Martinez and Trails West, Inc. on forestation/ reforestation and farm labor projects. The magnitude and seriousness of these violations are aggravated by the fact that Trails West, Inc. was a 'front' for Ovchinnikov. CIVIL PENALTIES OF \$4,000. (TWO VIOLATIONS)"

The Hearings Referee took the motion under advisement. For the reasons that appear in the Ruling above, the motion to amend is granted.

14) The Proposed Order, which included an Exceptions Notice, was issued on August 3, 1994. Exceptions were required to be filed by August 15, 1994. On August 5, 1994, the Hearings Unit received from the Agency a request for an extension of time within which to file exceptions. The Hearings Referee granted the Agency's request and extended the time for filing exceptions to August 23, 1994. On August 26, 1994, the Hearings Unit received the Agency's exceptions, postmarked August 23, 1994. On September 2, 1994, the Hearings Unit received Respondent's response to the Agency's exceptions, objecting to the exceptions and requesting that the Final Order be entered as proposed." The Agency's exceptions are addressed in the Opinion section of this Final Order.

#### FINDINGS OF FACT -- THE MERITS

1) Prior to June 1993, Respondent's husband, Clifton West, owned an accounting business that he operated under the assumed business name of JoAnn West Accounting. Respondent JoAnn West was not involved in the business prior to June 1993.

2) From June 1993 to the time of hearing, Respondent, a natural person," took over the operation of the

\* The language proposed by the motion to amend is underlined.

\*\* The Agency's request for an extension of time within which to file exceptions, the Forum's ruling granting the Agency's request for an extension of time, the Agency's exceptions, and Respondent's response to the Agency's exceptions were marked as exhibits and were received into the record.

\*\*\* The evidence presented in this matter concerns actions taken by the Respondent in her individual capacity. The Forum has amended the caption on

business, owned by her husband, continuing to run it under the assumed business name of JoAnn West Accounting. Respondent provided accounting and bookkeeping services, payroll services, secretarial services, telephone message and answering services, and fax transmission services for small businesses.

3) Business clients of JoAnn West Accounting are billed by the hour. The same hourly rate applies, regardless of the services performed.

4) The bulk of the clientele of JoAnn West Accounting is made up of small business owners in the Russian community near Woodburn, Oregon. Many of the business owners are independent contractors, including dry-wallers, berry farmers, plumbers, truckers, reforestation contractors, masons, and electricians. JoAnn West Accounting has performed the same range of services identified in Finding of Fact 2, above, for all clients.

5) The telephone message and answering service is provided to clients because, in the Russian community, often there is no one in the home during the day who understands the business world.

6) During times material herein, Victor Ovchinnikov was a business client of JoAnn West Accounting.

7) During times material herein, Jose Arroyo and Trails West, Inc. were business clients of JoAnn West Accounting.

8) A display advertisement with the following text appeared in the

November 20, 1992, issue of the Capital Press:

"TREE PLANTING

Reforestation - Christmas Trees

Experienced 5-20 man crews.

Valley Contracting Inc.

(503)981-1345 (503)981-1271"

9) The advertisement in Finding of Fact 8, above, appeared in two classifications in the November 20 issue: "Christmas Trees" (classification #57); and "Services" (classification # 66).

10) A display advertisement with the following text appeared in the December 18, 1992, issue of the Capital Press:

"TREE PLANTING

Reforestation - Christmas Trees

Experienced 5-20 man crews.

Valley Contracting Inc.

(503)981-1345 (503)981-1271"

11) The advertisement in Finding of Fact 10, above, appeared in the "Christmas Trees" classification (#57).

12) A display advertisement with the following text appeared in the December 20, 1992, issue of the Capital Press:

"TREE PLANTING

Reforestation - Christmas Trees

Experienced 5-20 man crews.

Valley Contracting Inc.

(503)981-1345 (503)981-1271"

13) The advertisement in Finding of Fact 12, above, appeared in the "Christmas Trees" classification (#57).

14) A display advertisement with the following text appeared in the October 29, 1993, issue of the Capital Press:

"XMAS TREE

HARVESTING

Cut-Bale-Load

All or Part

Licensed-Bonded-Insured

503-981-1345

Woodburn, OR"

15) The advertisement in Finding of Fact 14, above, appeared in the "Christmas Trees" classification (#57).

16) A display advertisement with the following text appeared in the November 12, 1993, issue of the Capital Press:

"TREE PLANTING

Reforestation or

Christmas Trees

Licensed-Bonded-Insured

503-981-1345

Woodburn, OR"

17) The advertisement in Finding of Fact 16, above, appeared in the "Timber, Lumber" classification (#47).

18) A display advertisement with the following text appeared in the November 29, 1993, issue of the Capital Press:

"TREE PLANTING

Reforestation or

Christmas Trees

Licensed-Bonded-Insured

503-981-1345

Woodburn, OR"

19) The advertisement in Finding of Fact 18, above, appeared in the "Christmas Trees" classification (#57).

20) Respondent did not place the advertisements described in Findings of Fact 8, 10, and 12, above. Respondent does not know who placed those ads, is not aware of whether there was any involvement by JoAnn West Accounting, and did not personally give permission to Victor Ovchinnikov to use the business number of JoAnn West Accounting in the ads.

21) In October and November 1993, at the request of Jose Arroyo, Respondent personally placed the three advertisements described in Findings of Fact 14, 16, and 18, above, on behalf of Trails West, Inc. Arroyo wanted the ads placed because he was looking for Christmas tree fields to harvest and, later, to plant.

22) The telephone number listed in the advertisements described in Findings of Fact 14, 16, and 18, above, is the business number for JoAnn West Accounting. Respondent permitted Arroyo to use her business number in the ads because, when he was out in the woods working, no one was available at his telephone number who spoke English.

23) Carol Skyles has worked in the display advertising section of the Capital Press for 15 years. At times material herein, her job duties included taking ads from customers, doing ad layouts, and sending ads to be typeset. Skyles is familiar with the advertising categories used at the Capital Press. The category or categories in which an advertisement will be run are determined jointly by the person placing the ad and the Capital Press employee

its own motion to comport with the evidence presented.

\* The Capital Press is a newspaper of general circulation in the area of Salem, Oregon.

taking the ad. Category #57 includes Christmas trees for sale in bulk or for harvest, as well as equipment and services which are being offered. Category #47 lists timber and lumber for purchase and for sale. Category #59 lists help or services wanted. Category # 66 lists services for offer.

24) In 1992, Victor Ovchinnikov was not licensed as a farm or forest labor contractor.

25) Victor Ovchinnikov incorporated and owned Valley Contracting, Inc. On November 9, 1992, Victor Ovchinnikov submitted to the Bureau an application for a joint farm/forest labor contractor license on behalf of himself and Valley Contracting, Inc. No license resulted from this application.

26) In October and November 1993, Jose Arroyo and Trails West, Inc. were jointly licensed as a farm labor contractor with a forestation indorsement.

27) Respondent often contacted the United States Forest Service (USFS) and the Bureau of Land Management (BLM) regarding contracts Jose Arroyo and Trails West, Inc. were performing. These contacts usually came about as the result of a call from Arroyo from a pay phone when he was out of town working in the woods; Arroyo would call and ask Respondent to make calls for him. Generally, the calls were to pass messages or to get information from or to the USFS and BLM, or to or from Jose Arroyo. Respondent sometimes requested invoices from the USFS or BLM in order to know whether and when the payroll could go out, and she regularly exchanged faxes with the government officials.

28) When workers called or came by the office looking for work, Respondent would refer them to a client if she knew they had work. She did this free of charge, as a courtesy to the client. The workers would come by her business because they had been paid there previously.

29) Respondent received several calls as a result of the ads described in Findings of Fact 14, 16, and 18. The calls were from Christmas tree growers who had trees to cut. Respondent took their messages and passed the messages on to Jose Arroyo. Arroyo took it from there.

30) On November 12 or 13, 1993, after seeing one of the 1993 ads described in Findings of Fact 14 and 16, above, Compliance Specialist Silva called the listed number, posing as a worker looking for Christmas tree work. JoAnn West answered the phone and told Silva when and where to show up for possible work. The location given was the IGA parking lot. He was told to talk to Jose Arroyo.

31) On approximately November 15, 1993, and again on November 17, 1993, Compliance Specialists Pena and Silva went to the IGA parking lot to observe the contracting activity. On both days they observed Victor Ovchinnikov, the first person to arrive, giving instructions and organizing people. Jose Arroyo was present and got directions from Ovchinnikov. On November 17, the crews were followed to a farm owned by Vern Foristall near Molalla. The crews were observed harvesting Christmas trees at that location. One worker from these crews was asked why he had gone to the IGA to get work. That worker told

Pena that he had gone to the IGA because he had worked for Victor Ovchinnikov in the past and that location is where they had met.

32) Respondent receives and consults the Bureau's farm labor contractor licensing list. As of the date of hearing, Victor Ovchinnikov's name had not appeared on that portion of that list that showed revoked or denied licenses.

33) During all times material herein, Respondent was not licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor.

34) Respondent was credible. Her demeanor impressed the Hearings Referee that she was believable. In addition, Respondent's testimony was corroborated by documentary evidence, as well as the testimony of each of the Agency's witnesses, which was also found to be credible.

35) The testimony of each other witness was entirely 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 consistent with the answers of the other witnesses as well as the documentary evidence.

#### ULTIMATE FINDINGS OF FACT

1) Respondent had no active role in JoAnn West Accounting until June 1993.

2) Respondent did not place the 1992 advertisements with the Capital Press and did not give Victor Ovchinnikov permission to use the business number for JoAnn West Accounting in the advertisements.

3) The 1992 advertisements identified in Findings of Fact 8, 10, and 12, were advertisements that offered contracting services to owners of Christmas tree lots, not advertisements requesting the services of workers.

4) Respondent personally placed the 1993 advertisements identified in Findings of Fact 14, 16, and 18, above, on behalf of Jose Arroyo and Trails West, Inc.

5) The 1993 advertisements described in Ultimate Finding of Fact 4, above, were advertisements offering contracting services to owners of Christmas tree lots, not advertisements requesting the services of workers.

6) During all times material herein, Respondent, by placing the ads described in Ultimate Finding of Fact 4, above, was not recruiting or soliciting workers to perform labor for another in the production or harvest of farm products or in the forestation or reforestation of lands.

7) During all material times herein, Respondent was not acting as a farm/forest labor contractor, as defined by ORS 658.405, in the State of Oregon.

8) During all material times herein, Respondent was not assisting an unlicensed person to act in violation of ORS 658.405 to 658.503.

9) During all times material herein, Respondent was not licensed as a farm/forest labor contractor.

#### CONCLUSIONS OF LAW

1) ORS 648.405 to 658.485 provides that the Commissioner of the Bureau of Labor and Industries of the State of Oregon shall administer and enforce those sections.

2) ORS 658.405 provides, in part:

"As used in ORS 658.405 to 658.503 and 658.830 and 658.991(2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees and seedlings, and clearing, piling and disposal of brush and slash and other related activities or the production or harvesting of farm products; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in these activities \* \* \*."

OAR 839-15-004 provides, in part:

"As used in these rules, unless the context requires otherwise:

"(4) 'Farm Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the production or harvesting of farm products; or

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the production or harvesting of farm products; \* \* \*

\* \* \*

"(5) 'Forest Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the forestation or reforestation of lands; or

"(b) Any person who recruits, solicits, supplies or employs workers for an employer who is engaged in the forestation or reforestation of lands; \* \* \*

\* \* \*

"(8) 'Production and harvesting of farm products' includes, but is not limited to, the cultivation and tillage of the soil, the production, cultivation, growing and harvesting of any agricultural commodity and the preparation for and delivery to market of any such commodity.

"(9) 'Forestation or reforestation of lands' includes, but is not limited to:

"(a) The planting, transplanting, tubing, precommercial thinning, and thinning of trees and seedlings; and

"(b) The clearing, piling and disposal of brush and slash; and

"(c) Other activities related to the forestation or reforestation of lands, including, but not limited to, tree shading, pinning, tagging or staking; fire trail construction and maintenance; slash burning and mop up; mulching of tree seedlings; and any activity related to the growth of trees and tree seedlings and the disposal of debris from the land.

"(15) 'Worker' means any individual performing labor in the forestation or reforestation of lands

or in the production and harvesting of farm products, or any person who is recruited, solicited, supplied or employed to perform such labor, notwithstanding whether or not a contract of employment is formed or the labor is actually performed. A 'worker' includes, but is not limited to employees and members of a cooperative corporation.

"(16) 'Person' means any individual, sole proprietorship, partnership, corporation, association or other business or legal entity."

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 658.417 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."

ORS 658.440 provides, in part:

"(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."

The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein related to the alleged violations of ORS 658.410, 658.417(1) and 658.440(3).

2) Respondent did not act as a farm labor contractor without a license and did not violate ORS 658.410 or 658.417(1).

3) Respondent did not assist an unlicensed person to act in violation of ORS 658.405 to 658.503 and did not violate ORS 658.440(3)(e).

#### OPINION

The Agency charged Respondent with violations of ORS 658.405 to 658.503 based upon Respondent's allegedly having placed advertisements bearing her business telephone number, for forestation and/or farm labor, on behalf of Victor Ovchinnikov and Jose Arroyo (Trails West, Inc.). For reasons that appear below, the Forum finds that Respondent has not violated the laws governing farm and forest labor contractors.

The undisputed evidence demonstrated that Respondent played no part in the placement of the

advertisements, which were run in 1992, on behalf of Victor Ovchinnikov. Respondent was not involved in JoAnn West Accounting in 1992. Respondent did not give permission for Victor Ovchinnikov to utilize the business number of JoAnn West Accounting, a business owned and operated by Respondent's husband. Respondent cannot be found to have violated ORS 658.440 (3)(e) by assisting Victor Ovchinnikov, as alleged.

A person acts as a farm labor contractor if the person "recruits, solicits, supplies or employs" a worker for the purpose of forestation or reforestation of lands or the harvesting or production of farm products. The Agency alleged in paragraph II that Respondent acted as a farm labor contractor by recruiting or soliciting workers on behalf of another engaged in forestation, reforestation, or the harvesting or production of farm products. The Agency alleged that the recruitment or solicitation was carried out by placing advertisements bearing Respondent's telephone number. This Forum has previously determined that "to recruit," within the context of the statute, means to seek a worker or workers for the purpose of establishing a direct employer-employee relationship between the person being sought and another, including the recruiter. *In the Matter of Leonard Williams*, 8 BOLI 57, 73 (1989). This Forum has further determined that "to solicit," within the context of the statute, means to proselytize or to appeal to a worker for the services of the worker in order to establish a direct employer-employee relationship. *Id.* Advertising, as a vehicle of recruitment or solicitation, may violate the

farm labor contractor licensure provisions, provided the content of the advertisement, in context, meets either of these definitions. The subject advertisements herein meet neither definition.

The 1993 advertisements, placed by Respondent on behalf of Jose Arroyo and Trails West, Inc., did not seek workers for the purpose of establishing an employment relationship with Trails West, Inc. and Jose Arroyo. This is clear from the placement of the advertisements, their content, and from the content of the other advertisements in the same classification. The ads, instead, offered the contractor's services to owners of Christmas tree lots for harvesting and planting Christmas trees. Further, there was no apparent connection between the ads and a subsequent telephone call seeking employment-related information. The content of the subject telephone call was itself equivocal. The Agency did not demonstrate that workers utilized classified ads to obtain employment in the harvesting of Christmas trees, much less the particular section of classified ads identified herein. Finally, there was no evidence that any workers called in response to these ads. Under these circumstances, Respondent, in placing these ads bearing her telephone number, did not recruit or solicit workers for another, as alleged. Therefore, Respondent did not act as a farm labor contractor in placing the ads and did not violate the farm/forest contractor licensure provisions of ORS chapter 658.

Even though not separately charged by the Agency, it is worth noting that a telephone conversation of

the type that took place here – between an answering service for a contractor and a (supposed) job seeker, resulting in steering the job seeker to the contractor-client – standing alone, is unlikely to give rise to a violation of the farm labor contracting licensure provisions. Were it otherwise, a vast number of unsuspecting answering services, receptionists, and secretaries, to name but a few, would find themselves afoul of a law that they would have had no reason to suspect applied to them. It would place a tremendous burden on providers of these business services if they were required to become conversant with the substantive laws regulating the myriad of professions or occupations represented by their clientele. Such a burden may fairly be placed on the clientele – the persons engaged in the occupation – but not on persons whose duties place them in the role of an answering or secretarial service. There could be circumstances where an individual or business might cross the line between acting merely as an answering service, a conduit between two parties, and become a contractor, which would give rise to a licensure violation by an independent answering service. However, such are not the facts before the Forum.

#### Exceptions

The Agency filed timely exceptions to four aspects of the Proposed Order herein and the Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order flowing therefrom. The Agency argues, first, that the Hearings Referee incorrectly characterized a significant piece of evidence in Finding of Fact 28, in that the Referee found

that Respondent, as a courtesy, referred workers to a client if a worker called or came by the office looking for work. In support of its exception, the Agency suggests there was no evidence that this service was performed as a courtesy and that the referee should have concluded that this was a service included within those billed by Respondent. A review of the testimony reveals that Respondent twice listed the services for which she billed clients and referrals were not among them. Further, Respondent specifically testified that she made these referrals as a courtesy to her clients, which testimony was uncontroverted and credible. Respondent also specifically testified that she never agreed to accept money for locating workers. The evidence supports the characterization made by the referee in Finding of Fact 28; the Forum has, however, added clarifying information to that finding.

For its second exception, the Agency argues that the conversation described between Gabriel Silva and Respondent, in Finding of Fact 30, should be quoted verbatim, rather than summarized, in order to highlight the significance of the conversation as an indication of the intent of the advertisements. The transcribed conversation offered into evidence at hearing and repeated in the exception is not inaccurate; it is, however, not probative of the existence of the violation alleged by the Agency. Consequently, it makes no difference whether it is summarized or set out verbatim. Were it probative of or material to the intent of the advertisements, it would no doubt have significance.

The Agency alleged that the Respondent, without a farm/forest labor contractor license, recruited and solicited workers on behalf of Jose Arroyo Martinez and Trails West, Inc., on two occasions by placing advertisements in the Capital Press intended to solicit work and recruit workers for Martinez and Trails West, Inc. The uncontroverted evidence, presented by the Agency through Capital Press employee Carol Skyles, was that the 1993 ads placed by Respondent were not placed in the category of ads (category #59) utilized for help wanted, but were placed in categories designed to offer services to owners of fields planted in Christmas trees (whether offering to harvest the fields or replant the fields following harvest). This placement is consistent with the purpose for placing the ads testified to by Respondent. The evidence does not support an inference that the ads placed by Respondent were intended to recruit or solicit workers, as suggested by the Agency. The only supportable inference to be drawn, given the placement and content of the advertisements, is that the advertisements were intended to solicit or procure contracts to harvest or plant Christmas tree fields. Since the ads were not placed in the help wanted section of the classified ads, it is not reasonable to infer that workers seeking employment looked to these advertisements or responded to these advertisements. It is much more likely that any worker calling or coming by Respondent's place of business seeking work did so as the result of having been paid there in the past, as Respondent testified was common, rather than from having read the wrong section of the newspaper and calling in

response. Indeed, there was no evidence presented that any worker called Respondent in response to these ads.

The only evidence presented concerning responses tied to these ads was as follows: (1) Respondent's testimony that she took phone messages from Christmas tree growers regarding fields for harvest and passed them to Jose Arroyo, resulting, she was told by Arroyo, in jobs for him; and (2) The affidavit of Gabriel Silva and testimony of Raul Pena to the effect that while looking through the classified ads to locate contractors who might be operating without a license, Respondent's phone number was recognized in one of the subject ads; that Silva called Respondent's number, in response, to learn which contractor was behind the ad, as the ad stated that the contractor was licensed and bonded; and that Silva posed as a worker to obtain the desired information. That Silva called Respondent (posing as a worker) in response to the ad does not translate to workers calling Respondent in response to the ad. A worker seeking employment, logically, would have sought ads in the help wanted section of the paper, if the paper was a source of employment leads at all. The subject ads were not located there. Agency Compliance Specialists Silva and Pena had a different purpose in looking at the classified ads and found these ads in an entirely different section from that for help wanted. The Agency has made a leap that the Forum is not free to make -- that because someone with an entirely different purpose found the ad (and in an unlikely category for seeking workers) and

called Respondent, posing as a worker, in response to the ad, and was told where and when hiring might occur -- that the ad was intended to recruit or solicit workers (and that Respondent was responding to the worker as if the worker had seen the ad and calling as the result). Adopting the guise of a worker seeking employment (as a vehicle to secure other information) in response to an ad that does not seek workers, does not convert the ad to one that was intended to seek workers just because Respondent answered the employment-related questions of the caller. The conversation between Silva and Respondent is not probative of or material to a determination of the intent of the advertisements. Accordingly, there is no purpose to be served in highlighting the conversation by setting it out verbatim, or of otherwise attributing special significance to it.

The third exception is closely related to the second. The Agency argues that the conclusion contained in Ultimate Findings of Fact 3 and 5 -- that the advertisements were not advertisements seeking the services of others -- should be stricken, as it does not inextricably flow from the conclusion that the subject advertisements were advertisements offering services to others. For the reasons stated in the Opinion, and in the discussion of the second exception, above, as well as Findings of Fact referred to below, the Forum disagrees with the premise. The conclusion that the

advertisements were not advertisements seeking the services of workers did not result automatically from the conclusion that the advertisements were advertisements offering the services of the contractor to others (growers). The conclusion that the advertisements were not advertisements seeking services of workers was based on independent factual determinations (in addition to Findings of Fact 14-19, see numbers 21, 23, and 29). The preponderance of the credible evidence on the whole record supports the conclusions contained in Ultimate Findings of Fact 3 and 5, as written.

Finally, in its fourth area of exception, the Agency argues that the Forum utilized the wrong test for determining whether or not Respondent engaged in unlawful recruiting activity. The Agency misreads the use of *Williams, supra*, in the Forum's Opinion. As it is undisputed that the subject of the recruiting allegation against Respondent was the placement of advertisements, it was unnecessary for the Forum to recite that the *Williams* test applies to advertisements. The issue is whether the advertisements themselves recruit or solicit workers or are intended to recruit or solicit workers; hence the necessary focus on the meaning of "to recruit" and "to solicit." These advertisements are not aimed at workers, but at growers, and do not seek to form an employment relationship with workers; hence, they cannot meet the definition for recruiting or soliciting

\* Similarly, Respondent was not charged with recruiting by steering a worker or workers to Respondent, and no amendment was requested or made; the findings requested in Agency exceptions numbered four and five are, therefore, inappropriate.

workers and, as such, do not fall within the activities requiring a license, as defined in ORS 658.405(1). The *Williams* language cited by the Agency in its fourth exception was, in *Williams*, merely a restatement of its announced test (the same test used by the Forum) into the language encompassing the particular issue in *Williams* – whether the prohibited recruitment includes advertisement for partners. In answer to this issue, the Commissioner first set out the applicable test for recruitment and for solicitation, then recast it to fit the case – advertisement of employment availability – so as to include the advertisement for a work relationship as partners as well as the advertisement for an employer-employee work relationship within the recruitment prohibition. Although unnecessary to the issue presented herein, application of the restated test language to the facts, as found, yields the same result. Respondent did not, in placing the subject advertisements, give notice of employment availability with her client. Respondent, in placing the ads, gave notice of her client's availability for employment.

The Forum utilized the correct test to determine that Respondent did not, in its advertisement, recruit or solicit workers for employment. Since the advertisements were not aimed at workers and did not "recruit" or "solicit" workers in order to form an employment relationship, Respondent engaged in no unlawful practice by placing them in the Capital Press on behalf of Jose Arroyo and Trails West,

Inc." The Forum, in an attempt to communicate its reasoning process and the parameters of its decision with clarity, has added two paragraphs to the section of this Opinion, which precedes the discussion of the exceptions.

#### ORDER

NOW, THEREFORE, the evidence having failed to show that Respondent was acting as a farm labor contractor as defined under ORS 658.405(1) and was, therefore, not in violation of ORS 658.410, 658.417(1), or 658.440(3)(e), the Commissioner of the Bureau of Labor and Industries hereby orders that the Notice of Intent to Assess Civil Penalties herein, against JoAnn West and JoAnn West, dba JoAnn West Accounting, be and is hereby dismissed.

In the Matter of  
ANNA PACHE,  
aka Anna Komilkin, Respondent.

Case Number 57-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued October 12, 1994.

#### SYNOPSIS

Respondent willfully failed to pay 47 Claimants all wages due upon termination, in violation of ORS 653.025(3) (minimum wages), and ORS 652.140(2). Respondent had the burden of proving that an exception to the minimum wage law applied to her workers. The Commissioner ordered Respondent to pay wages owed and civil penalty wages, pursuant to ORS 652.150, ORS 652.140(2), 652.150, 652.310, 653.020(1), 653.025(3), 653.045.

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, 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 26, 1994, in Conference Room "B" of the Public Services Building, 255 Capitol St. NE, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Anna Pache, aka Anna Komilkin (Respondent), was present throughout the hearing and was repre-

sented by Raymond Tindell, Attorney at Law.

The Agency called the following witnesses (in alphabetical order): Wage Claimants Flor Botello, Ruth Botello, and Rogello Rojas; and Agency Compliance Specialist Gabriel Silva. The Agency and Respondent entered into a stipulation that, if called as witnesses, the remaining Claimants would testify in accordance with the contents of their respective wage claims.

Respondent called the following witnesses (in alphabetical order): Respondent's employee and friend, Albert Gonzales; Respondent Anna Pache; and Respondent's husband, John Pache.

Monica Hay, appointed by the Forum and under proper affirmation, acted as an interpreter for Wage Claimants Flor Botello, Ruth Botello, and Rogelio Rojas, witnesses called by 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 the dates indicated, the following Claimants each filed a wage claim<sup>1</sup> with the Agency, alleging that he or she had been employed by Respondent and that Respondent had

\* The activity is "prohibited" only if it is done without a license.

\*\* This conclusion precludes Agency exceptions numbered seven and eight.

<sup>1</sup> Wage claim forms filed by Claimants and Claimants' responses thereon are in Spanish.

failed to pay wages earned and due to him or her.		(kk) Laurencio Martinez	07/29/93
(a) Alejandro Almeda	undated	(ll) Zenaido Martinez	undated
(b) Efrain Almeda	undated	(mm) Abrahan G. Navarete	08/09/93
(c) Pedro Almeda	undated	(nn) Rene C. Olivo	08/09/93
(d) Elias D. Amaro	08/13/93	(oo) Rafael S. Pineda	08/13/93
(e) Candido H. Amaro	08/13/93	(pp) Abrahan Rojas	08/09/93
(f) Jose G. Amaro	08/09/93	(qq) Enrique Rojas	08/11/93
(g) Ambrosio Velasquez	08/11/93	(rr) Rodrigo Rojas	08/09/93
(h) Juan Andrade	undated	(ss) Petra Rojas	08/09/93
(i) Agustin Avelar	08/13/93	(tt) Rogelio Rojas	08/09/93
(j) Carlos Baltazar	08/06/93	(uu) Sabina Rojas	08/09/93
(k) Martin Bernal	08/12/93	(vv) Isidro B. Ramirez	08/06/93
(l) Jeronimo Billa	08/06/93	(ww) Pedro P. Rosales	08/05/93
(m) Carmen Botello	08/09/93	(xx) Abel Sanchez	08/12/93
(n) Flor Botello	08/09/93	(yy) David Sanchez	08/12/93
(o) Ruben Botello	08/09/93	(zz) Mariano Sandoval	undated
(p) Ruben Botello, Jr.	08/09/93	(aaa) Silvestre Serda	08/11/93
(q) Ruth Botello	08/09/93	(bbb) Alfonso Solis	undated
(r) Julio Campos	08/06/93	(ccc) Satumino Soto	08/09/93
(s) Angel Camacho	08/09/93	(ddd) Ignacio Solano	08/06/93
(t) Miguel A. Cardenas	08/06/93	(eee) Oscar D. Suarez	08/13/93
(u) Ignacio Chihuahua	08/09/93		
(v) Juan F. DeJesus	08/09/93		
(w) Miguel A. Dominguez	08/13/93		
(x) Evaristo Escamillo	undated		
(y) Mario Escamillo	undated		
(z) Victorino Estrada	undated		
(aa) Serafino Evangelista	undated		
(bb) Juan G. Estrada	08/13/93		
(cc) Miguel Godinez	08/16/93		
(dd) Armando Hernandez	08/13/93		
(ee) Gustavo Hernandez	08/09/93		
(ff) Nolberto Jimenez	08/13/93		
(gg) Elio S. Labra	08/13/93		
(hh) Salvador Lara	08/09/93		
(ii) Ermenegilda Licona	08/16/93		
(jj) Telesforo D. Lopez	08/06/93		

<sup>2</sup> There is no assignment of wages in the record for Wage Claimants Jeronimo Billa, Telesforo D. Lopez, Isidro Ramirez, or Ignacio Solano.

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 9, 1994, following an extension of time, Respondent, through her attorney, filed an answer to the Order of Determination. Respondent's answer also contained a request for a contested case hearing in this matter. Respondent's answer denied that Respondent owed Claimants unpaid wages or penalty wages and further denied that any failure to pay wages was willful.

6) On February 24, 1994, the Agency sent the Hearings Unit a request for a hearing date. On March 25, 1994, 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 839-50-000 to 839-50-420.

7) On April 14, 1994, the Agency requested a postponement of the hearing because the Compliance Specialist assigned to this case, Gabriel Silva, would be out of the state on the dates set for hearing and because a significant number of the Claimants, who are migrant farm workers, would be out of the area until late July, when they would return to this area to harvest berries. On April 14, 1994, the Hearings Referee sent a letter to Respondent asking for her response to the

motion. Respondent never responded. 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 May 3, 1993, Respondent's attorney, Kelly Clark, filed a letter with the Hearings Unit withdrawing as counsel of record in this matter.

9) On June 27, 1993, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by July 18, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency and Respondent each submitted a timely summary.

10) On July 1 and July 4, 1994, the Hearings Referee received recorded telephone messages from Respondent to the effect that she wished to discuss postponement of the hearing.

11) A telephone conference was conducted on July 5, 1994, to hear argument on Respondent's request for postponement. Respondent based her request on an inability to prepare for hearing in the time remaining before the scheduled hearing date; her inability to afford an attorney at the present time; and the inconvenience to her of holding the hearing during the berry harvest. The Agency opposed the postponement for the reason that

the matter had been scheduled for hearing during the berry harvest to ensure that the Claimants, most of whom are migrants, would be in the jurisdiction and able to testify. On July 6, 1994, the Hearings Referee denied Respondent's motion because Respondent failed to show good cause for a postponement.

12 ) On July 5, 1994, the Agency moved for a discovery order, with attached exhibits showing the Agency's attempts to obtain Respondent's records through an informal exchange of information. On July 6, 1994, the Hearings Referee granted the Agency's motion and issued a discovery order directing Respondent to provide: (1) any documents in her possession or the possession of her agent showing records of hours and dates worked by the workers listed in the Order of Determination; (2) copies of all I-9's completed by workers employed by Respondent in 1992 and 1993; and (3) any documents in her possession showing records of hours and dates worked by workers employed by Respondent during the 1992 berry harvest season. Respondent was ordered to provide those records by July 15, 1994.

13) On July 11, 1994, Respondent's attorney, Raymond Tindell, requested a postponement of the hearing because he had been retained only recently and would not have sufficient time to prepare. A further basis for the request was the inconvenience and potential losses to Respondent were the hearing to be held at the height of the berry harvest, as scheduled. In the alternative, Respondent requested a bifurcation of the hearing

in order to take the testimony of the Agency's witnesses as scheduled, yet allow Respondent additional time to prepare. Respondent requested a telephone hearing to take argument on the setover request. On July 13, 1994, the Hearings referee granted Respondent's request for a telephone hearing.

14) On July 18, 1994, Respondent filed a request to change the place of the hearing from Salem to Portland, due to the location of counsel's office in Portland.

15) A telephone hearing was conducted on July 19, 1994, to take argument on Respondent's postponement request and request to change the location of the hearing. Concerning the postponement request, Respondent repeated the reasons for the request as set out in Finding of Fact – Procedural 13, above. The Agency opposed the request for postponement, citing the availability of the Claimants, the untimeliness of the request, the involvement of several attorneys in this matter on Respondent's behalf, and the absence of good cause for Mr. Tindell's late hiring. As to bifurcation of the hearing, the Agency noted the possible impact on its ability to rebut Respondent's case, but acknowledged the fairness of such an approach in the present circumstances. Respondent's request to move the hearing to Portland, due to the location of counsel's office, was opposed by the Agency because of the location of the witnesses. On July 20, 1994, the Forum denied Respondent's request for postponement, pursuant to OAR 839-50-150(5), because Respondent had not shown good cause for a postponement; granted Respondent's request to

bifurcate the hearing, as a reasonable alternative to postponement; and denied Respondent's request to relocate the hearing to Portland, due to the untimeliness of the request, the difficulty of locating facilities for the large number of witnesses in this case, and the location of the witnesses.

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

17) During a pre-hearing conference, Respondent and the Agency stipulated that the wage claims, which are the subject of this proceeding, were filed within the statutory period of limitation – six years.

18) 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.

19) 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.

20) During the hearing, the Agency moved to amend Exhibits "A" and "B" of the Order of Determination to correct the name of one of the Claimants from "Rodrigo Rojas, Sr." to "Rogelio Rojas." Respondent consented to the

amendment. The Agency's motion to amend was granted by the Hearings Referee.

21) The Proposed Order, which included an Exceptions Notice, was issued on September 21, 1994. Exceptions were required to be filed by October 3, 1994. On October 3, 1994, the Hearings Unit received Respondent's timely exceptions. 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, a person, owned a farm in Scio, Oregon, where she did business as a berry grower. She employed one or more persons in the State of Oregon to harvest her blackberries in July 1993.

2) On various dates from on or about July 10, 1993, to on or about July 31, 1993, Respondent employed 51 of the 57 Claimants<sup>3</sup> as blackberry pickers.

3) During all times material herein, Respondent and Claimants had an oral agreement that Claimants would be compensated for picking blackberries at the rate of \$0.12 per pound.

4) In the region surrounding Scio, Oregon, hand harvesting of berries is customarily paid on a piece-rate basis.

5) At times material, the minimum wage in Oregon was \$4.75 per hour, pursuant to ORS 653.025(3).

<sup>3</sup> For reasons appearing in the Opinion section, *infra*, the Forum finds that there is insufficient evidence to corroborate that Claimants Serafino Evangelista, Salvador Lara, Abraham Navarete, Pedro Rosales, Abel Sanchez, and David Sanchez were employed by Respondent during the wage claim period. These claims have been rejected. Of the 51 Claimants whose employment has been corroborated, the claims of Jeronimo Billa, Telesforo D. Lopez, Isidro Ramirez, or Ignacio Solano have been rejected because there are no assignments of claims in the record for these individuals. See n.2, *supra*.

6) Respondent kept no contemporaneous time record of the Claimants' work.

7) Claimants kept no time records of their work.

8) In 1993, Respondent had a poor berry crop.

9) Pickers use crates (also called boxes) to collect berries. A crate weighs between 14 to 17 pounds on average. With an average crop, a picker is generally able to pick between 250 to 350 pounds of blackberries in a day; this is the equivalent of approximately 20 crates. With a poor crop, a picker can pick approximately 1 to 1.5 crates per hour. At 14 to 17 pounds on average, the average number of pounds picked per hour with a poor crop (weight of 1 to 1.5 crates) would range from 14 pounds per hour to 25.5 pounds per hour.

10) Claimant Alejandro Almeda worked for Respondent for two days during the wage claim period, working a total of 14 hours. He picked 297.5 pounds of berries. He averaged 21.25 pounds per hour. At the agreed rate, Claimant A. Almeda would have earned \$2.55 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$66.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$66.50.

11) Claimant Efrain Almeda worked for Respondent for two days during the wage claim period, working a total of 14 hours. He picked 351 pounds of berries. He averaged 25.1 pounds per hour. At the agreed rate, Claimant E. Almeda would have earned \$3.01 per hour, which is below

minimum wage. At the minimum wage rate, Claimant earned \$66.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$66.50.

12) Claimant Pedro Almeda worked for Respondent for two days during the wage claim period, working a total of 14 hours. He picked 236.5 pounds of berries. He averaged 16.9 pounds per hour. At the agreed rate, Claimant P. Almeda would have earned \$2.03 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$66.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$66.50.

13) Claimant Elias D. Amaro worked for Respondent for two days during the wage claim period, working a total of 16 hours. He picked 409 pounds of berries. He averaged 25.6 pounds per hour. At the agreed rate, Claimant E. Amaro would have earned \$3.07 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$76.00. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$76.00.

14) Claimant Candido H. Amaro worked for Respondent for three days during the wage claim period, picking 634 pounds. The number of hours worked is unknown. At the agreed rate, Claimant C. Amaro earned \$76.08. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$76.08.

15) Claimant Jose G. Amaro worked for Respondent for four days during the wage claim period, working a total of 26 hours. He picked 695

pounds of berries. He averaged 26.7 pounds per hour. At the agreed rate, Claimant J. Amaro would have earned \$3.20 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$123.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$123.50.

16) Claimant Ambrosio Velasquez worked for Respondent for one day during the wage claim period, working a total of 9.5 hours. He picked 287.5 pounds of berries. He averaged 30 pounds per hour. At the agreed rate, Claimant would have earned \$3.60 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$45.12. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$45.12.

17) Claimant Juan Andrade worked for Respondent for two days during the wage claim period, working a total of 14 hours. He picked 261 pounds of berries. He averaged 18.6 pounds per hour. At the agreed rate, Claimant Andrade would have earned \$2.23 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$66.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$66.50.

18) Claimant Agustin Avelar worked for Respondent for one day during the wage claim period, picking 237 pounds of berries. The number of hours worked is unknown. At the agreed rate, Claimant Avelar earned \$28.44. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$28.44.

19) Claimant Carlos Baltazar worked for Respondent for one day during the wage claim period, working a total of six hours. He picked 175 pounds of berries. He averaged 29.2 pounds per hour. At the agreed rate, Claimant Baltazar would have earned \$3.50 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$28.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$28.50.

20) Claimant Martin Bernal worked for Respondent for two days during the wage claim period, working a total of 14 hours. At the minimum wage rate, Claimant earned \$66.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$66.50.

21) Claimant Carmen Botello, date of birth (DOB) December 19, 1978, worked for Respondent for four days during the wage claim period, picking 660 pounds of berries. At the agreed rate, Claimant C. Botello earned \$79.20. Claimant was not paid for her work. The balance of earned, unpaid, due, and owing wages equals \$79.20.

22) Claimant Flor Botello worked for Respondent for four days during the wage claim period, working a total of 44 hours. At the minimum wage rate, Claimant earned \$209. Claimant was not paid for her work. The balance of earned, unpaid, due, and owing wages equals \$209.

23) Claimant Ruben Botello worked for Respondent for four days during the wage claim period, working a total of 44 hours. He was credited for picking 715.5 pounds of berries, which reflects his picking as well as

some by other family members. At the minimum wage rate, Claimant earned \$209. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$209.

24) Claimant Ruben Botello, Jr., DOB October 11, 1981, worked for Respondent for four days during the wage claim period, picking 660 pounds of berries. At the agreed rate, Claimant Botello earned \$79.20. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$79.20.

25) Claimant Ruth Botello worked for Respondent for four days during the wage claim period, working a total of 44 hours. She was credited with picking 941.5 pounds of berries, which reflects her picking as well as some by other family members. At the minimum wage rate, Claimant earned \$209. Claimant was not paid for her work. The balance of earned, unpaid, due, and owing wages equals \$209.

26) Claimant Julio Campos worked for Respondent for two days during the wage claim period, working a total of 14 hours. He picked 350 pounds of berries. He averaged 25 pounds per hour. At the agreed rate, Claimant Campos would have earned \$3.00 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$66.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$66.50.

27) Claimant Angel Camacho worked for Respondent for three days during the wage claim period, working a total of 19 hours. He picked 621 pounds of berries. He averaged 32.7 pounds per hour. At the agreed rate,

Claimant Camacho would have earned \$3.92 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$90.25. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$90.25.

28) Claimant Miguel A. Cardenas worked for Respondent for one day during the wage claim period, working a total of six hours. He picked 87 pounds of berries. He averaged 14.5 pounds per hour. At the agreed rate, Claimant Cardenas would have earned \$1.74 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$28.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$28.50.

29) Claimant Ignacio Chihuahua worked for Respondent for four days during the wage claim period, working a total of 44 hours. He picked 736.5 pounds of berries. He averaged 16.7 pounds per hour. At the agreed rate, Claimant Chihuahua would have earned \$2.00 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$209. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$209.

30) Claimant Juan DeJesus worked for Respondent for four days during the wage claim period, working a total of 45 hours. He picked 1,262.5 pounds of berries. He averaged 28.1 pounds per hour. At the agreed rate, Claimant DeJesus would have earned \$3.37 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$213.75. Claimant was not paid for his work. The

balance of earned, unpaid, due, and owing wages equals \$213.75.

31) Claimant Miguel A. Dominguez worked for Respondent for three days during the wage claim period, working a total of 24 hours. He picked 675.5 pounds of berries. He averaged 28.1 pounds per hour. At the agreed rate, Claimant Dominguez would have earned \$3.37 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$114. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$114.

32) Claimant Evaristo Escamillo worked for Respondent for two days during the wage claim period, working a total of 14 hours. He picked 165 pounds of berries. He averaged 11.8 pounds per hour. At the agreed rate, Claimant E. Escamillo would have earned \$1.41 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$66.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$66.50.

33) Claimant Mario Escamillo worked for Respondent for two days during the wage claim period, working a total of 14 hours. He picked 443.5 pounds of berries. He averaged 31.7 pounds per hour. At the agreed rate, Claimant M. Escamillo would have earned \$3.80 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$66.50. Claimant was not paid for his work. The bal-

ance of earned, unpaid, due, and owing wages equals \$66.50.

34) Claimant Victorino Estrada worked for Respondent for two days during the wage claim period, working a total of 14 hours. He picked 294 pounds of berries. He averaged 21 pounds per hour. At the agreed rate, Claimant V. Estrada would have earned \$2.52 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$66.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$66.50.

35) Claimant Juan Estrada worked for Respondent for three days during the wage claim period, picking 667 pounds of berries. The number of hours worked is unknown. At the agreed rate, Claimant J. Estrada earned \$80.04. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$80.04.

36) Claimant Miguel Godinez worked for Respondent for one day during the wage claim period, working a total of 8.5 hours. He picked 140 pounds of berries.<sup>4</sup> He averaged 16.5 pounds per hour. At the agreed rate, Claimant Godinez would have earned \$1.98 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$40.37. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$40.37.

37) Claimant Armando Hernandez worked for Respondent for three days

<sup>4</sup> An exhibit shows 280 pounds credited to Claimant Godinez. The wife of Claimant Godinez, Ermenegilda Licon, registered the weight of her berries under her husband's name. Accordingly, the total weight registered in the exhibit has been divided between them.

during the wage claim period, working a total of 24 hours. He picked 693 pounds of berries. He averaged 28.9 pounds per hour. At the agreed rate, Claimant Hernandez would have earned \$3.47 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$114. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$114.

38) Claimant Gustavo Hernandez worked for Respondent for four days during the wage claim period, working a total of 27 hours. He picked 739.5 pounds of berries. He averaged 27.4 pounds per hour. At the agreed rate, Claimant G. Hernandez would have earned \$3.29 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$128.25. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$128.25.

39) Claimant Nolberto Jimenez worked for Respondent for three days during the wage claim period, working a total of 24 hours. He picked 663 pounds of berries. He averaged 27.6 pounds per hour. At the agreed rate, Claimant Jimenez would have earned \$3.31 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$114. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$114.

40) Claimant Elio S. Labra worked for Respondent for three days during the wage claim period, working a total of 24 hours. He picked 676.5 pounds of berries. He averaged 28.2 pounds per hour. At the agreed rate, Claimant

Labra would have earned \$3.38 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$114. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$114.

41) Claimant Ermenegilda Licona worked for Respondent for one day during the wage claim period, working a total of 8.5 hours. She picked 140 pounds of berries.<sup>5</sup> She averaged 16.5 pounds per hour. At the agreed rate, Claimant Licona would have earned \$1.98 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$40.37. Claimant was not paid for her work. The balance of earned, unpaid, due, and owing wages equals \$40.37.

42) Claimant Laurencio Martinez worked for Respondent for three days during the wage claim period, working a total of 18 hours. He picked 469.5 pounds of berries. He averaged 26.1 pounds per hour. At the agreed rate, Claimant L. Martinez would have earned \$3.13 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$85.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$85.50.

43) Claimant Zenaido Martinez worked for Respondent for two days during the wage claim period, working a total of 14 hours. He picked 197.5 pounds of berries. He averaged 14.1 pounds per hour. At the agreed rate, Claimant Z. Martinez would have earned \$1.69 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$66.50.

Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$66.50.

44) Claimant Rene C. Olivo worked for Respondent for six days during the wage claim period, working a total of 48 hours. The number of pounds of berries picked is unknown. At the minimum wage rate, Claimant earned \$228. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$228.

45) Claimant Rafael S. Pineda worked for Respondent for two days during the wage claim period, picking 448 pounds of berries. The number of hours worked is unknown. At the agreed rate, Claimant Pineda earned \$53.76. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$53.76.

46) Claimant Abrahan Rojas, DOB January 1980, worked for Respondent for four days during the wage claim period, picking 660 pounds of berries. At the agreed rate, Claimant A. Rojas earned \$79.20. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$79.20.

47) Claimant Enrique Rojas worked for Respondent for one day during the wage claim period, working a total of 9.5 hours. He picked 271 pounds of berries. He averaged 28.5 pounds per hour. At the agreed rate, Claimant E. Rojas would have earned \$3.42 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$45.12. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$45.12.

48) Claimant Rodrigo Rojas, DOB March 1982, worked for Respondent for four days during the wage claim period, picking 660 pounds of berries. At the agreed rate, Claimant Rodrigo Rojas earned \$79.20. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$79.20.

49) Claimant Petra Rojas worked for Respondent for four days during the wage claim period, working a total of 44 hours. At the minimum wage rate, Claimant earned \$209. Claimant was not paid for her work. The balance of earned, unpaid, due and owing wages equals \$209.

50) Claimant Rogelio Rojas worked for Respondent for four days during the wage claim period, working a total of 44 hours. At the minimum wage rate, Claimant earned \$209. The weights for berries picked by the entire family were registered under the name of Claimant Rogelio Rojas, and totaled 2,070.5 pounds. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$209.

51) Claimant Sabina Rojas, DOB September 1984, worked for Respondent for four days during the wage claim period, picking 660 pounds of berries. At the agreed rate, Claimant S. Rojas earned \$79.20. Claimant was not paid for her work. The balance of earned, unpaid, due, and owing wages equals \$79.20.

52) Claimant Mariano Sandoval worked for Respondent for two days during the wage claim period, working a total of 14 hours. He picked 268 pounds of berries. He averaged 19.1 pounds per hour. At the agreed rate,

<sup>5</sup> See n.4, *supra*.

Claimant Sandoval would have earned \$2.29 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$66.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$66.50.

53) Claimant Silvestre Serda worked for Respondent for one day during the wage claim period, working a total of 9.5 hours. He picked 297.5 pounds of berries. He averaged 31.3 pounds per hour. At the agreed rate, Claimant Serda would have earned \$3.76 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$45.12. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$45.12.

54) Claimant Alfonso Solis worked for Respondent for two days during the wage claim period, working a total of 14 hours. He picked 323 pounds of berries. He averaged 23.1 pounds per hour. At the agreed rate, Claimant Solis would have earned \$2.77 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$66.50. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$66.50.

55) Claimant Saturnino Soto worked for Respondent for one day during the wage claim period, working a total of 9.5 hours. He picked 258.5 pounds of berries. He averaged 27.1 pounds per hour. At the agreed rate, Claimant Soto would have earned \$3.25 per hour, which is below minimum wage. At the minimum wage rate, Claimant earned \$45.12. Claimant was not paid for his work. The bal-

ance of earned, unpaid, due, and owing wages equals \$45.12.

56) Claimant Oscar Suarez worked for Respondent for three days during the wage claim period, picking 714 pounds of berries. The number of hours worked is unknown. At the agreed rate, Claimant Suarez earned \$74.87. Claimant was not paid for his work. The balance of earned, unpaid, due, and owing wages equals \$74.87.

57) Each Claimant quit without notice on his or her last day of employment as reflected in exhibits in the record. No worker quit later than July 31, 1993.

58) In August 1993, the Agency paid an additional 64 wage claims in the total amount of \$8,367.66. These claims were filed by berry pickers against Respondent for work performed during the same interval worked by the Claimants herein. The claims were paid from the proceeds of a check issued jointly to Anna Pache and the Bureau of Labor and Industries by Santiam Valley Fruit, Inc. Santiam Valley Fruit, Inc. is a cannery located in Stayton, Oregon.

59) Each Claimant's average daily rate for the wage claim period of employment was the total earned divided by the days worked. Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal the amounts shown in Table 1 for the respective Claimants, all of whom remained unpaid for over 30 days.

60) Respondent did not allege in her answer the affirmative defense of financial inability to pay Claimants' wages due at the time they accrued. At hearing, some testimony was

TABLE 1

Claimant	Earned/Owed	Days Worked	Aver. Daily Rate	x 30	Penalty
Alejandro Almeda	\$66.50	+2	\$33.25	x 30	\$997.50
Efrain Almeda	\$66.50	+2	\$33.25	x 30	\$997.50
Pedro Almeda	\$66.50	+2	\$33.25	x 30	\$997.50
Elias D. Amaro	\$76.00	+2	\$38.00	x 30	\$1,140.00
Jose G. Amaro	\$123.50	+4	\$30.87	x 30	\$926.25
Ambrosio Velasquez	\$45.12	+1	\$45.12	x 30	\$1,353.60
Juan Andrade	\$66.50	+2	\$33.50	x 30	\$997.50
Carlos Baltazar	\$28.50	+1	\$28.50	x 30	\$855.00
Martin Bernal	\$66.50	+2	\$33.25	x 30	\$997.50
Fior Botello	\$209.00	+4	\$52.25	x 30	\$1,567.50
Ruben Botello	\$209.00	+4	\$52.25	x 30	\$1,567.50
Ruth Botello	\$209.00	+4	\$52.25	x 30	\$1,567.50
Julio Campos	\$66.50	+2	\$33.25	x 30	\$997.50
Angel Camacho	\$90.50	+3	\$30.08	x 30	\$902.40
Miguel A. Cardenas	\$28.50	+1	\$28.50	x 30	\$855.00
Ignacio Chihuahua	\$209.00	+4	\$52.25	x 30	\$1,567.50
Juan F. DeJesus	\$213.75	+4	\$53.44	x 30	\$1,603.12
Miguel A. Dominguez	\$141.00	+3	\$38.00	x 30	\$1,140.00
Evanisto Escamillo	\$66.50	+2	\$33.25	x 30	\$997.50
Mario Escamillo	\$66.50	+2	\$33.25	x 30	\$997.50
Victorino Estrada	\$66.50	+2	\$33.25	x 30	\$997.50
Miguel Godinez	\$40.37	+1	\$40.37	x 30	\$1,211.10
Armando Hernandez	\$114.00	+3	\$38.00	x 30	\$1,140.00
Gustavo Hernandez	\$128.25	+4	\$32.06	x 30	\$961.80
Nolberto Jimenez	\$114.00	+3	\$38.00	x 30	\$1,140.00
Elio S. Labra	\$114.00	+3	\$38.00	x 30	\$1,140.00
Ermenegilda Licona	\$40.37	+1	\$40.37	x 30	\$1,211.10
Laurencio Martinez	\$85.50	+3	\$28.50	x 30	\$855.00
Zenaido Martinez	\$66.50	+2	\$33.25	x 30	\$997.50
Rene C. Olivo	\$228.00	+6	\$38.00	x 30	\$1,140.00
Enrique Rojas	\$45.12	+1	\$45.12	x 30	\$1,353.60
Petra Rojas	\$209.00	+4	\$52.25	x 30	\$1,567.50
Rogelio Rojas	\$209.00	+4	\$52.25	x 30	\$1,567.50
Mariano Sandoval	\$66.50	+2	\$33.25	x 30	\$997.50
Silvestre Serda	\$45.12	+1	\$45.12	x 30	\$1,353.60
Alfonso Solis	\$66.50	+2	\$33.25	x 30	\$997.50
Saturnino Soto	\$45.12	+1	\$45.12	x 30	\$1,353.60
Candido H. Amaro	\$76.08	+3	\$25.36	x 30	\$760.80
Agustin Avelar	\$28.44	+1	\$28.44	x 30	\$853.20
Carmen Botello	\$79.20	+4	\$19.80	x 30	\$594.00
Ruben Botello, Jr.	\$79.20	+4	\$19.80	x 30	\$594.00
Juan G. Estrada	\$80.04	+3	\$26.28	x 30	\$800.40
Rafael S. Pineda	\$53.76	+2	\$26.88	x 30	\$806.40
Abrahan Rojas	\$79.20	+4	\$19.80	x 30	\$594.00
Rodrigo Rojas	\$79.20	+4	\$19.80	x 30	\$594.00
Sabina Rojas	\$79.20	+4	\$19.80	x 30	\$594.00
Oscar D. Suarez	\$74.87	+3	\$24.96	x 30	\$748.80
<b>TOTAL</b>					<b>\$49,950.00</b>

introduced on this subject, however, no amendment was made to the pleadings, and the issue is not properly before the Forum.

61) The testimony of Claimant Rojas was credible. His demeanor was forthright, even where his memory was deficient and unresponsive of his wage claim. Except for a minor inconsistency regarding the time Respondent arrived to weigh the berries, his statements were supported by the testimony of the other witnesses. The testimony of Claimant and the other Agency witnesses was reliable and credible. The Hearings Referee observed the demeanor of each witness and found each to be forthright and direct in his or her answers. Except for the minor inconsistency noted above, each witness's answers were consistent with the answers of the other witnesses as well as the credible documentary evidence.

62) Respondent's testimony was not credible. Her demeanor was volatile, her memory convenient, and her statements, on occasion, bordered on the fantastic. For example, she testified that 43 of the 121 total workers who claimed wages for July 1993 (the 57 Claimants herein plus 64 already paid) did not work for her. Of these 43 named workers, 16 clearly appear in her records.<sup>6</sup> When confronted with copies of her own records bearing the names of some of the 16 workers, Respondent claimed the records were not hers, or that the writing was not hers,

or that she could not read Spanish (the names of the Hispanic workers are spelled identically in both English and Spanish). At one time, following the testimony of Flor Botello, Respondent testified that she could not say whether she recognized Flor as a worker of hers who helped with the records because she cannot remember faces; however, within minutes of that testimony, when confronted by the name of a worker in her records, Respondent testified that she could only remember faces and not names.

Respondent testified that she did not remember or could not estimate the number of pounds or crates an average worker could pick in an hour or a day. However, she made fantastic claims about the number of pounds (500) or crates (10) she could pick in an hour, in an apparent attempt to inflate the pounds per hour ratio and, thereby, to reduce the number of hours of work reflected by the quantity of pounds picked in her records. In addition, her testimony regarding her own entries in the spiral notebook fluctuated. She twice testified that the workers themselves entered some of the hours in the notebook. She once identified the handwriting concerning hours as her own. Another time she testified that she could not identify her own handwriting or read her own records. For reasons that appear in the Opinion section of this Order, the Forum has concluded that Respondent may well have doctored her records, adding

<sup>6</sup> These 16 workers are as follows: Miguel Cardenas, Margarito Cruz, Juan de Jesus Flores, Miguel Godinez, Reyes Marques, Laurencio Martinez, Alejandro Garcia Martinez, Albino Merino, Pedro Merino, Marcelino Morales, Porfirio Perez, Isidro Ramirez, Zosimo Salgado, Ignacio Solano, Oscar Suarez, and Adrian Soto Sosa.

hours to the weight figures after the fact.

Respondent swore vehemently that Agency employees forced her to come to the Bureau office. However, in a letter written to Oregon Attorney General Kulongoski on September 9, 1993, she stated that she had gone to the Bureau office to get help. When confronted with this discrepancy, Respondent claimed that the typist could have added words to her letter. During her testimony, Respondent displayed and expressed a certain amount of paranoia concerning certain Bureau employees and appeared to entertain a belief that they were out to get her to an extraordinary degree.

For all the reasons stated above, the Forum has disbelieved all of her testimony except that which was corroborated by other credible evidence. In some cases, her testimony was not believed even when it was not controverted by other evidence.

#### 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) During the wage claim period, that is July 10 to July 31, 1993, Respondent and Claimants had an oral agreement whereby the Claimants' rate of pay was \$0.12 per pound for berries picked.

3) The state minimum wage during 1993 was \$4.75 per hour.

4) Respondent has not paid Claimants any wages owed.

5) Respondent employed the Claimants<sup>7</sup> shown in Table 2 as berry pickers at various times during the interval July 10 through July 31, 1993. The number of days and hours worked (or the number of days and pounds picked by each), as well as the amount earned and owed to each, are shown in Table 2.

6) Respondent willfully failed to pay the respective Claimants all wages within five days, excluding Saturdays, Sundays, and holidays, after each Claimant ceased working; more than 30 days have elapsed from the date the respective Claimant's wages were due.

7) Each Claimant's<sup>8</sup> average daily rate for the wage claim period of employment was the total earned divided by the days worked. Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal the amounts shown in Table 1 for the respective Claimants, all of whom remained unpaid for over 30 days.

8) Respondent did not allege in her answer an affirmative defense of financial inability to pay the wages due at the time they accrued. Respondent made no showing that she was financially unable to pay Claimants' wages at the time they accrued.

<sup>7</sup> While evidence also corroborates the employment by Respondent of Claimants Jeronimo Billa, Telesforo D. Lopez, Isidro Ramirez, and Ignacio Solano, their claims have been rejected because no assignments of their claims appear in the record. To minimize confusion, their names have been omitted from this list of employees.

<sup>8</sup> See n.7, *supra*.

TABLE 2

Claimant	Days Worked	# Hours / # Pounds	Earned and Owed
(a) Alejandro Almeda	2	14	\$66.50
(b) Efrain Almeda	2	14	\$66.50
(c) Pedro Almeda	2	14	\$66.50
(d) Elias D. Amaro	2	16	\$76.00
(e) Jose G. Amaro	4	26	\$123.50
(f) Ambrosio Velasquez	1	9.5	\$45.12
(g) Juan Andrade	2	14	\$66.50
(h) Carlos Baltazar	1	6	\$28.50
(i) Martin Bernal	2	14	\$66.50
(j) Flor Botello	4	44	\$209.00
(k) Ruben Botello	4	44	\$209.00
(l) Ruth Botello	4	44	\$209.00
(m) Julio Campos	2	19	\$66.50
(n) Angel Camacho	3	14	\$90.50
(o) Miguel A. Cardenas	1	6	\$28.50
(p) Ignacio Chihuahua	4	44	\$209.00
(q) Juan F. DeJesus	4	45	\$213.75
(r) Miguel A. Dominguez	3	24	\$141.00
(s) Evaristo Escamillo	2	14	\$66.50
(t) Mario Escamillo	2	14	\$66.50
(u) Victorino Estrada	2	14	\$66.50
(v) Miguel Godinez	1	8.5	\$40.37
(w) Armando Hernandez	3	24	\$114.00
(x) Gustavo Hernandez	4	27	\$128.25
(y) Nolberto Jimenez	3	24	\$114.00
(z) Elio S. Labra	3	24	\$114.00
(aa) Ermenegilda Licon	1	8.5	\$40.37
(bb) Laurencio Martinez	3	18	\$85.50
(cc) Zenaido Martinez	2	14	\$66.50
(dd) Rene C. Olivo	6	48	\$228.00
(ee) Enrique Rojas	1	9.5	\$45.12
(ff) Petra Rojas	4	44	\$209.00
(gg) Rogelio Rojas	4	44	\$209.00
(hh) Mariano Sandoval	2	14	\$66.50
(i i) Silvestre Serda	1	9.5	\$45.12
(j j) Alfonso Solis	2	14	\$66.50
(k k) Saturne Soto	1	9.5	\$45.12
(l l) Candido H. Amaro	3	634 lbs.	\$76.08
(m m) Agustin Avelar	1	237 lbs.	\$28.44
(n n) Carmen Botello	4	660 lbs.	\$79.20
(o o) Ruben Botello, Jr.	4	660 lbs.	\$79.20
(p p) Juan G. Estrada	3	667 lbs.	\$80.04
(q q) Rafael S. Pineda	2	448 lbs.	\$53.76
(r r) Abrahan Rojas	4	660 lbs.	\$79.20
(s s) Rodrigo Rojas	4	660 lbs.	\$79.20
(t t) Sabina Rojas	4	660 lbs.	\$79.20
(u u) Oscar D. Suarez	3	714 lbs.	\$74.87
TOTAL			\$4,480.91

## CONCLUSIONS OF LAW

1) Before the start of the contested case hearing, the Forum informed the Respondent of her 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.

2) ORS 653.010 provides, in part:

\*\*\*

"(3) 'Employ' includes to suffer or permit to work; \*\*\*.

"(4) 'Employer' means any person who employs another person \*\*\*"

ORS 652.310 provides, in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees \*\*\*.

"2) 'Employee' means any individual who otherwise than as a co-partner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

During all times material herein, Respondent was an employer and 51 Claimants were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261.

3) 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.

4) ORS 653.025 requires that:

\*\*\*\* for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

\*\*\*\*

"(3) For calendar years after December 31, 1990, \$4.75."

ORS 653.020 provides, in pertinent part:

"ORS 653.010 to 653.261 does not apply to any of the following employees:

"(1) An individual employed in agriculture if:

"(a) Such individual is employed as a hand harvest or pruning laborer and is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been paid, on a piece-rate basis in the region of employment and is employed by an employer who did not, during any calendar quarter during the preceding year use more than 500 piece-rate-work-days of agricultural labor;

\*\*\*\*

"(d) Such individual, other than an individual described in paragraph (c) of this subsection:

"(A) Is 16 years of age or under and is employed as a hand harvest laborer; is paid on a piece-rate basis in an operation which has been, and is

customarily and generally recognized as having been paid on a piece-rate basis in the region of employment; and

"(B) Is paid at the same piece-rate as employees over 16 years of age on the same farm; \* \* \*

Regarding the Claimants who were 16 years of age or under, Respondent was exempt from the statutory requirement in ORS 653.025 to pay them the minimum wage. Respondent produced no evidence that there was an exemption under ORS 653.020(1)(a) for the remaining Claimants. Respondent violated ORS 653.025 with respect to the remaining 42 Claimants.<sup>9</sup>

5) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs.

Respondent violated ORS 652.140(2) by failing to pay 47 Claimants all wages earned and unpaid within five

days, excluding Saturdays, Sundays, and holidays, after the Claimants quit employment without notice.

6) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, 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 from the due date; 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 47 Claimants when due as provided in ORS 652.140.

7) 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 47 Claimants their earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

<sup>9</sup> Of the 47 Claimants whose wage claims have been accepted, five were under the age of 16 years in July 1993. Those five Claimants are Carmen Botello, Ruben Botello, Jr., Abraham Rojas, Rodrigo Rojas, and Sabina Rojas. See Findings of Fact 21, 24, 46, 48, and 51.

## OPINION

A preponderance of the credible evidence on the whole record established that Respondent employed 51 of the 57 Claimants during the period of the wage claim and willfully failed to pay them all wages, earned and payable, when due. The record establishes that Respondent, with respect to 47 of the Claimants,<sup>10</sup> has violated ORS 652.140 as alleged and that she owes 47 Claimants civil penalty wages pursuant to ORS 652.150.

### Respondent Was an Employer

ORS 652.310(1) defines, in pertinent part, "Employer" as "any person who in this state, \* \* \* engages personal services of one or more employees \* \* \*." For the purposes of interpreting "employees" as used within ORS 652.310, see the discussion immediately below. Respondent engaged the personal services of more than one person to pick berries at her farm, and was an employer, for purposes of enforcement of ORS chapters 652 and 653.

### Claimants Worked as Employees

The initial issue in this case is whether Claimants worked for Respondent as employees. This Forum has previously accepted the definition of "employee" in ORS 652.310(2) for the purposes of interpreting ORS 652.140 and 652.150, and likewise accepts it here. See *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 40-41 (1993) (relying on *Lamy v. Jack Jarvis & Co., Inc.*, 281 Or 307, 574 P2d 1107, 1111 (1978)).

ORS 652.310(2) provides:

"Employee" means any individual who otherwise than as a co-partner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

Using this definition of "employee," the Forum finds that Claimants worked as employees on various days between July 10 and July 31, 1993, and not as co-partners or independent contractors. The evidence established that 51 Claimants picked berries for Respondent and that Respondent agreed to pay them at the fixed rate of \$0.12 per pound. No evidence was presented to suggest that Claimants were partners of Respondent or independent contractors.

The preponderance of the credible evidence on the whole record establishes that 51 of the 57 Claimants were employed by Respondent during the wage claim period.

Respondent produced a spiral notebook which, along with two other exhibits, was represented to be the only record created or maintained by Respondent showing the names of her employees during the 1993 cane berry season and the production of each employee during the wage claim period. The notebook, together with the other two exhibits, was used to verify that each Claimant worked for Respondent during the 1993 berry harvest. If a Claimant's name did not

<sup>10</sup> See n.7, *supra*.

appear in one of these three records of Respondent, that claim was rejected by the Forum unless other evidence, excluding the Claimant's own wage claim, corroborated the employment. The names of the following Claimants did not appear in these records:

- (1) Camen Botello
- (2) Flor Botello
- (3) Ruben Botello, Jr.
- (4) Serafino Evangelista
- (5) Salvador Lara
- (6) Ermenegilda Licona
- (7) Abraham Navarete
- (8) Renee Olivo
- (9) Abraham Rojas
- (10) Petra Rojas
- (11) Rodrigo Rojas
- (12) Sabina Rojas
- (13) Pedro Rosales
- (14) Abel Sanchez
- (15) David Sanchez

Of these 15 Claimants, the employment of nine has been corroborated by other witnesses or documents.

The employment of the three Botello children was corroborated by the testimony of Flor Botello, Ruth Botello, and Rogelio Rojas, as well as by three exhibits and the presence of Flor Botello's handwriting in the spiral notebook. The employment of Petra Rojas and the three Rojas children was corroborated by the testimony of Ruth Botello and Rogelio Rojas, and this employment was further corroborated by the sheer volume of berries listed under the name of Rogelio Rojas in the exhibits. The claim of Ermenegilda Licona, the wife of Miguel Godinez, was corroborated by three written

exhibits.<sup>11</sup> Finally, the employment of Renee Olivo was corroborated by the testimony of Ruth Botello.

There was no corroboration of the employment of the remaining six Claimants. Accordingly, the production of the notebook (when taken together with two other exhibits) negated the reasonableness of the evidence of employment of the following Claimants: Serafino Evangelista, Salvador Lara, Abraham Navarete, Pedro Rosales, Abel Sanchez, and David Sanchez. Their claims have been rejected.

#### Minimum Wage

Respondent did not assert and the Hearings Referee did not find any exemption or exclusion from the coverage of the Minimum Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS chapter 652, for Respondent or Claimants, except for the exemption provided by ORS 653.020(1)(d) for the five employees who were under the age of 16 years during July 1993. See Conclusion of Law 4, above. Respondent had the burden of proof to show the remaining Claimants were exempt, and failed to do so.

ORS 653.025 prohibits employers from paying their non-exempt workers at a rate less than \$4.75 for each hour of work time. ORS 653.055(1) provides that:

"[a]ny employer who pays an employee less than the [minimum wage and overtime] 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 [minimum wage and overtime] is no defense to an action under subsection (1) of this section."

Credible evidence based on the whole record establishes that Respondent agreed to pay Claimants at a rate that amounts to less than \$4.75 per hour. This wage agreement between Respondent and Claimants provides no defense in the current proceeding.

#### Hours Worked

In wage claim cases such as this, the Forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying his burden of proof, the court analyzed the situation as follows:

"An employee who brings suit under 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great

public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a

<sup>11</sup> The exhibits indicate that the berries picked by Ermenegilda Licona were listed under the name of her husband. Accordingly, the total weight attributable to Miguel Godinez has been divided in half, each spouse receiving credit for 140 pounds.

situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 68688.

Here, ORS 653.045 requires an employer to maintain payroll records. Respondent produced a spiral notebook, which, along with two other exhibits, was represented to be the only record created or maintained by Respondent showing the names of her employees during the 1993 cane berry season and the production of each employee during the wage claim period. This notebook contained pages bearing the names of employees and a list of poundage credited to each employee as the berries were weighed. The names of some employees are entered on more than one page, even though multiple days are contained on many of the pages. Some entries are dated; some are not. These entries are in more than one hand and apparently written with different pens as the color of ink on the original varies. The column or columns of weights

associated with each employee have been totaled, and Respondent identified that writing as her own. Entries have also been made in Respondent's hand purporting to assign a number of hours to each employee. These entries are all in the same hand and written in the same color of ink. It is apparent to the Forum that the record originally consisted of the name of each employee followed by a running list of the weights of berries credited to them. It appears that arbitrary figures purporting to represent hours worked by each employee were added to these lists after the fact. This conclusion is consistent with the credible testimony of Claimants Flor Botello, Ruth Botello, and Rogelio Rojas, who testified that Respondent recorded only the weights picked, and that the workers were not asked the number of hours worked; and consistent, as well, with Respondent's admission, contained in an exhibit, that the workers worked for her on a piece-rate basis and not on an hourly basis. Accordingly, the Forum did not rely on the number of hours entered in that record.

Respondent kept no credible record of Claimants' hours of work. Pursuant to the analysis then, the employee, or in this case the Agency, has the burden of first proving that the employee "performed work for which he was improperly compensated." The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. This Forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and

from which to draw an inference of the extent of that work -- where that testimony is credible. See *In the Matter of Sheila Wood*, 5 BOLI 240, 254 (1986); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). Here, Claimants' evidence was credible. The Forum concludes that 47 Claimants were employed and were improperly compensated, and the Forum may rely on the evidence produced by the Agency regarding the number of hours worked by Claimants or their piece-rate production, where required, as a matter of just and reasonable inference.

Upon this showing, the burden shifted to Respondent to produce persuasive "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens Pottery Co.*, 328 US at 687-88. Weights listed in Respondent's notebook and the two additional exhibits were used by the Forum to determine whether the number of pounds picked would result in the earning of minimum wage and as a check of the reasonableness of the hours claimed by each Claimant. If the total weight, when multiplied by \$0.12/lb., would not result in the earning of the minimum wage, the earnings for the employee were calculated at the minimum wage rate for the number of hours claimed by the employee.<sup>12</sup> Pursuant to this procedure, the number of hours claimed by the employee were used for employees (a) through (kk), as listed in Ultimate Finding of Fact 5 (Table 2), above; the total number of

pounds picked were used to calculate earnings for employees (ll) through (uu), as also listed in Ultimate Finding of Fact 5 (Table 2), above.

#### Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that 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). Respondent, as an employer, had a duty to know the amount of wages due to its employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983).

Respondent claims that her failure to pay Claimants was not willful. She argues that had the Bureau not used the funds from Santiam Valley Fruit, Inc. to pay 64 of her other workers, she could have paid all workers, including these Claimants; consequently, she argues, her failure to pay these Claimants should not be deemed to be willful. Respondent's argument is without merit. The total pay that was owed by Respondent to all workers far exceeds the amount of the check from Santiam Valley Fruit, Inc. The total amount of wages found owing to the Claimants herein is \$4,480.91. The total amount paid by the Bureau to the first group of 64 workers totaled \$8,367.66.<sup>13</sup> The total wages owed to

<sup>12</sup> If weights for several family members were listed under only one or two names, the Forum determined the wages owed by hours worked for the adults and by the average pounds picked for the minors under 16 years of age.

<sup>13</sup> The Forum has verified that of the 64 original claimants paid, the em-

workers, \$12,848.57, well exceeds the proceeds of the check.

Here, evidence established that Respondent knew she was not paying Claimants wages for their work and intentionally failed to pay any wages. Evidence showed that Respondent acted voluntarily and was a free agent. Further, with particular regard to the laws governing the payment of minimum wage, Respondent admitted in her testimony that she became aware of the minimum wage requirement in 1992, and yet persisted in making other wage agreements in 1993. Respondent must be deemed to have acted willfully under this test, and thus is liable for penalty wages under ORS 652.150.

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Waylon & Willes, Inc.*, 7 BOLI 68, 72 (1988).

#### Exceptions

Respondent's exceptions reiterate a claim that the Bureau wrongfully appropriated the check from the Santiam Fruit Company and, without the permission of Respondent, utilized the proceeds to pay 64 wage claims filed against Respondent. Had the Bureau not done so, the argument goes, Respondent would have had the funds to pay all wage claimants (both groups). The check from the Santiam Fruit Company has relevance to this proceeding only to the extent that it was the source of funds from which

employment of all but 11 is corroborated by Respondent's records. For the sake of argument, even taking a deduction of the amount paid those 11 workers from the total owed by Respondent, the deficit would not be reduced sufficiently, as the total would only be reduced by \$1,244.37. The balance remaining owing would be \$11,604.20.

approximately one-half of the total pool of 121 wage claimants were paid. Having been paid, 64 claimants did not become part of this proceeding. Any disagreement about permission or authority to deposit the check and pay wage claims therefrom is immaterial to the issues involved herein. Accordingly, this portion of Respondent's first exception is rejected. Similarly, the Forum has found that the proceeds from that check were not adequate to pay wages owed to all claimants (see Finding of Fact 58, above, and the discussion of penalty wages, immediately preceding this section). Exclusive dominion over the check would not have assisted Respondent in paying the Claimants herein. The wages owed to all 121 claimants (\$12,848.57) far exceeded the value of the check. The second portion of Respondent's first exception is rejected.

Respondent cites denial of her second request for the postponement of the hearing herein as her second exception. The Forum's ruling on Respondent's postponement request contains the reasons therefor and is a matter of record. See Findings of Fact - Procedural 13 and 15, above. As part of that ruling, the Forum granted Respondent's request to bifurcate the hearing, permitting Respondent's counsel additional time to prepare the defense, while allowing the Agency to secure the testimony of its witnesses, who were only temporarily within the state. Respondent later elected not to

utilize that option. The Forum reaffirms the ruling denying a postponement for the reasons cited therein. Respondent's second exception is rejected.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders ANNA PACHE, aka ANNA KORNILKIN, to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

- 1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR those Claimants listed in Ultimate Findings of Fact 5 and 7 (Tables 1 and 2) herein, as their interests may appear, in the amount of \$54,430.91, representing \$4,480.91 in gross earned, unpaid, due, and payable wages, and \$49,950 in penalty wages; PLUS
- 2) Interest at the rate of nine percent per year on the sum of \$4,480.91 from September 1, 1993, until paid; PLUS
- 3) Interest at the rate of nine percent interest per year on the sum of \$49,950 from October 1, 1993, until paid.

**In the Matter of  
HASKELL F. TALLENT,  
dba Sound Construction of Reno,  
Respondent.**

Case Number 69-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued October 14, 1994.

#### SYNOPSIS

Where Respondent intentionally failed to pay the prevailing wage rate to 12 workers on two public works projects, in violation of ORS 279.350, the Commissioner held Respondent ineligible for public works contracts for three years, pursuant to ORS 279.361 (1), ORS 279.350, 279.361; OAR 839-16-035(1), and 839-16-085(1).

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on August 16, 1994, in the conference room of the Bureau of Labor and Industries Office, 165 E Seventh Ave., Suite 220, Eugene, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Haskell Tallent (Respondent), after being duly notified of the time and place of hearing, failed to appear in person or through a representative.

The Agency called the following witnesses (in alphabetical order):

Harlan Peterson, President, McCormack Construction Co. (by telephone), and Lynne Sheppard, Compliance Specialist, Wage and Hour Division, Bureau of Labor and Industries.

Having fully considered the entire record in this matter, I, Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries, 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 24, 1994, the Agency issued a "Notice of Intent to Make Placement on List of Ineligibles" (Notice of Intent) to Respondent. The Notice of Intent alleged that, in violation of ORS 279.350(1), Respondent intentionally failed to pay the prevailing rate of wage to workers on the following two public works projects:

1. Oregon Department of Transportation, Highway Maintenance Division, Contract No. 2267;
2. Oregon Department of Transportation, Highway Maintenance Division, Contract No. 2268.

2) The Notice of Intent was served on Respondent on February 4, 1994. The notice was served on Respondent's attorney, John Pries, on February 14, 1994.

3) On March 10, 1994, through counsel, the Agency received Respondent's answer to the Notice of Intent. In his answer, Respondent denied that he intentionally failed to pay the prevailing wage rate and asserted that the workers had now been paid the correct

rate. He requested a hearing on the Agency's intended action.

4) On April 21, 1994, the Agency requested a hearing from the Hearings Unit.

5) On May 19, 1994, 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 Hearing Referee. With the hearing notice, the Forum 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 839-50-000 through 839-50-420.

6) On July 19, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by August 8, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency submitted a timely summary. No summary was filed on behalf of Respondent.

7) On August 12, 1994, the Forum issued a notice changing the time for commencement of the hearing on August 16, 1994, from 9 a.m. to 10 a.m.

8) On August 12, 1994, John Pries telephoned the Hearings Referee, advising that he would not be representing Respondent on this matter and that Respondent would not appear at hearing. Pries further represented that Respondent was not seeking a postponement of the hearing.

9) At the time and place set forth in the Notice of Hearing for this matter, Respondent Haskell Tallent did not appear or contact the Hearings Unit. Pursuant to OAR 839-50-330(2), the Hearings Referee waited approximately 35 minutes after the time set for hearing before commencing the hearing. The Hearings Referee found Respondent in default, pursuant to OAR 839-50-330(2), for failure to attend the hearing.

10) The Hearings Referee found from the official file herein that Respondent had received a "Notice of Contested Case Rights and Procedures."

11) Pursuant to ORS 183.415(7), the Agency was 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) The Proposed Order, which included an Exceptions Notice, was issued on September 26, 1994. Exceptions were required to be filed by October 6, 1994. No exceptions were received by the Hearings Unit.

#### FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent owned and operated a construction business, based in Nevada and registered with the State of Oregon, under an assumed business name, Sound Construction of Reno.

Respondent was president of Sound Construction of Reno.

2) On May 15, 1992, the Oregon Department of Transportation (ODOT) first advertised for bid solicitations for the ODOT Maintenance Station Project in Moro, Oregon, a public works project (hereinafter the Moro project), bearing contract number 2267. McCormack Construction Co. was the prime contractor. Respondent bid for and was awarded a subcontract on the Moro project. On December 16, 1992, Respondent signed the subcontract agreement. Contract documents clearly identified the project as one requiring payment of prevailing wage rates (PWR). The Agency's "Prevailing Wage Rates for Public Works Contracts in Oregon" booklet (PWR booklet), effective January 1992, was attached to the contract documents. In order for Respondent to bid on the subcontract, the prime contractor gave Respondent specifications for the job. The specifications included the PWR booklet. Harlan Peterson, president of McCormack Construction Co., reviewed the contract documents and wage determination with Respondent prior to Respondent's bid.

3) On May 15, 1992, the Oregon Department of Transportation (ODOT) first advertised for bid solicitations for the ODOT Maintenance Station Project in Enterprise, Oregon, a public works project (hereinafter the Enterprise project), bearing contract number 2268. McCormack Construction Co. was the prime contractor. Respondent bid for and was awarded a subcontract on the Enterprise project. On December 16, 1992, Respondent signed the subcontract agreement. Contract

documents clearly identified the project as one requiring payment of prevailing wage rates (PWR). The Agency's "Prevailing Wage Rates for Public Works Contracts in Oregon" booklet (PWR booklet), effective January 1992, was attached to the contract documents. In order for Respondent to bid on the subcontract, the prime contractor gave Respondent specifications for the job. The specifications included the PWR booklet. Harlan Peterson, president of McCormack Construction Co., reviewed the contract documents and wage determination with Respondent prior to Respondent's bid.

4) These projects were 100 percent funded by the State of Oregon and were therefore not regulated by the federal Davis-Bacon Act.

5) Moro is located in Sherman County. Enterprise is located in Wallowa County.

6) Respondent employed 12 workers on these projects; namely, Michael W. Butler, Rick W. Conant, Bennie D. Gardner, Cassius R. Greathouse, George W. Hill, Boyd D. McClure, Larry J. Riley, David A. Sherman, Ronald D. Thompson, Jose L. Villanueva, Gregory W. Weaver, and Marshall T. Weaver.

7) Respondent's 12 employees worked on these projects from December 29, 1992, through March 23, 1993. Respondent's workers performed manual labor usually done by carpenters, sheet metal workers, ironworkers, and laborers. The prevailing wage rates, from the January 1992 PWR

booklet, for these classifications in the localities of Moro and Enterprise, were as follows:

#### Moro

Carpenter-group 1  
(Zone 1: ST=\$20.31; OT\*\* = \$28.30)

Sheet metal worker  
(Area 1: ST = \$24.18; OT = \$33.46)

Ironworker  
(ST = \$26.42; OT = \$36.20)

Laborer-group 1  
(Zone 1: ST=\$19.74; OT = \$27.05)

#### Enterprise

Carpenter-group 1  
(Zone 5: ST=\$22.31; OT = \$31.30)

Sheet metal worker  
(Area 3: ST = \$24.82; OT = \$34.70)

Ironworker  
(ST = \$26.42; OT = \$36.20)

Laborer-group 1  
(Zone 4: ST = \$21.44; OT=\$29.60)

8) During the period of performance of these subcontracts, Respondent did not pay 12 workers PWR for their work on the projects. The 12 workers received between \$7.00 per hour and \$12.00 per hour. None of the workers received more than \$12.00 per hour for any work performed on these projects. Each of the 12 workers filed a wage claim against Respondent for his work.

9) Respondent submitted five certified payroll records (CPR) to the Bureau of Labor and Industries for work performed on the two projects herein. Not one of the 12 workers herein was listed on any CPR. Each CPR was signed and certified by Respondent.

10) During the Bureau's investigation of the wage claims, Respondent submitted time cards for 10 of the 12 workers named herein.

11) At the time of hire and during the course of employment on these projects, Respondent told various workers several different reasons for the rates he was paying. The reasons given for the rates were that the rate for unskilled laborers (\$12.00 per hour) was a fair rate no matter what work was performed; that the workers would be paid at the PWR rates; that Respondent would lose money on the job if he paid PWR to workers who were unskilled; and that Respondent did not have to pay PWR.

12) During the investigation of this matter, Respondent gave two reasons for failing to pay PWR on the two public works projects to Compliance Specialist Sheppard. On April 27, 1993, he claimed that he had paid less than the PWR because the workers had asked to be paid less and that they were trainees. On April 28, 1993, Respondent told Sheppard that he had not worked on any PWR jobs in Oregon before, implying ignorance of the law's requirement.

13) On May 27, 1993, while the wage claims were being investigated, Respondent stated to Christine Hammond, Deputy Administrator of the Wage and Hour Division, that he hired local, unskilled workers on the Moro and Enterprise jobs, and should not have to pay them PWR. During this conversation, Respondent twice threatened to fire all his workers and start over again if he had to pay PWR.

14) On August 24, 1993, following the Agency's investigation, the prime

contractor paid the workers their back wages in the total amount of \$19,673.72. Respondent has paid nothing to the prime contractor in reimbursement.

15) The testimony of each Agency witness was entirely 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 consistent with the answers of the other witness as well as the documentary evidence.

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

1) At all times material, Respondent owned and operated a construction business under an assumed business name, Sound Construction of Reno.

2) Respondent bid on and received a subcontract to perform carpentry, sheet metal work, ironwork, and laborer work on the ODOT Maintenance Station Project in Moro, Oregon, a public works project. Respondent knew that prevailing wages were required on the project, and Respondent intentionally paid the workers at wage rates under the appropriate prevailing wage rates for an hour's work in the same trade or occupation in the locality where such labor was performed. Respondent was a free agent. Respondent intentionally failed to pay the prevailing rate of wage to its workers on this public works project.

3) Respondent bid on and received a subcontract to perform carpentry, sheet metal work, ironwork, and laborer work on the ODOT Maintenance Station Project in Enterprise, Oregon, a public works project.

\* "ST" is an abbreviation for "straight time" (regular hourly rate).

\*\* "OT" is an abbreviation for "overtime" (premium rate).

Respondent knew that prevailing wages were required on the project, and Respondent intentionally paid the workers at wage rates under the appropriate prevailing wage rates for an hour's work in the same trade or occupation in the locality where such labor was performed. Respondent was a free agent. Respondent intentionally failed to pay the prevailing rate of wage to its workers on this public works project.

#### CONCLUSIONS OF LAW

1) Respondent employed workers to perform work on two public works projects and is subject to the provisions of ORS 279.348 to 279.363. The Commissioner of the Bureau of Labor and Industries has jurisdiction over this matter.

2) ORS 279.350(1) provides, in part:

"The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed."

OAR 839-16-035(1) provides:

"Every contractor or subcontractor employing workers on a public works project shall pay to such workers no less than the prevailing rate of wage for each trade or occupation, as determined by the Commissioner, in which the workers are employed."

Respondent violated ORS 279.350(1) by failing to pay the prevailing rate of wage to 12 workers employed upon two public works projects.

3) ORS 279.361(1) provides, in part:

"When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS 183.310 to 183.550, determines that a \* \* \* subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works, \* \* \* the \* \* \* subcontractor \* \* \* shall be ineligible for a period not to exceed three years from the date of publication of the name of the \* \* \* subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works."

OAR 839-16-085(1) provides, in part:

"When the Commissioner, in accordance with the Administrative Procedures Act, determines that a \* \* \* subcontractor has intentionally failed or refused to pay the prevailing rate of wages to workers employed upon public works, \* \* \* the \* \* \* subcontractor \* \* \* shall be ineligible to receive any contract or subcontract for public works for a period not to exceed three (3) years."

Respondent intentionally failed to pay the prevailing rate of wage to 12 workers employed upon public works and is subject to the sanction of ORS 279.361.

4) Pursuant to ORS 279.361, and based on the facts set forth herein, the Commissioner has the authority to place the name of Respondent and any firm, corporation, partnership, or association in which he has a financial interest, on the list of persons who are

ineligible to receive any contract or subcontract for public works for a period not to exceed three years from the date of publication of his name on that list. Under the facts and circumstances of this record, her placement of the name of the Respondent on the list for a period of three years is appropriate.

#### OPINION

Respondent failed to appear at the hearing, and thus defaulted to the charges set forth in the Notice of Intent to Make Placement on List of Ineligibles. 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); OAR 839-50-330.

Respondent's only contribution to the record was the answer filed on his behalf by counsel. 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; (1986); *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987). Where an answer contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by 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.

#### Intentional Failure to Pay Prevailing Rate of Wage

Under ORS 279.361, if a contractor "intentionally failed" to pay the prevailing rate of wage when required, then the contractor "shall be ineligible" for up to three years to receive any contract or subcontract for public works. Based on the uncontroverted and credible evidence produced at the hearing, the Forum finds that the Agency has established a prima facie case that Respondent failed to pay PWR to his workers on two public works projects.

Respondent contends the failure to pay was not intentional as he had not previously performed public works contracts in Oregon, was misled into believing that a different classification of laborers allowed a lower rate, and, when he learned the correct rate, he negotiated payment of the deficiency to the workers. These defenses lack merit.

This Forum has never given any weight to a defense based on a lack of experience with prevailing wage practices in Oregon. Respondent, like all employers, is charged with knowing the wage and hour laws governing its activities as an employer. Respondent cannot escape liability with this defense. *See, e.g., In the Matter of Country Auction*, 5 BOLI 256, 267 (1986). The second argument, if it constitutes a defense at all, is not based on the facts present in this record, as Respondent failed to pay even the lowest laborer rate. Finally, Respondent argues that he negotiated the payment of the wage deficiency once the correct rate was known to him. As this Forum has previously held that the payment of back wages

by the contractor, after an Agency investigation and demand, does not negate the violation, the payment of the back wages by another (prime contractor) could hardly do so. See *In the Matter of P. Miller and Sons Contractors, Inc.*, 5 BOLI 149, 155, 159 (1986).

This Forum has previously held that the terms "intentionally" and "willfully" are interchangeable. *P. Miller and Sons Contractors, Inc.*, 5 BOLI at 156 (citing *Starr v. Brotherhood's Relief & Compensation Fund*, 268 Or 66, 518 P2d 1321 (1974)). The Forum has also adopted the Oregon Supreme Court's interpretation of "willful" set out in *Sabin v. Willamette Western Corporation*, 276 Or 1083, 557 P2d 1344 (1976). "Willful," the court said, "amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent."

Here the evidence is conclusive that Respondent knew that these projects were public works contracts subject to prevailing wage rates and either knew or should have known the amount of the applicable prevailing wages. Each of the contracts for public works and the contract specifications had the PWR booklet attached. Harlan Peterson provided Respondent with the contract specifications and went over the contract documents, specifications, and wage determination with Respondent prior to his bid.

Not only were there numerous references in the contract documents and specifications giving notice that contractors were required to comply with the PWR law, but these two projects were manifestly public works, let by

state governmental agencies. There could be no mistake that the two highway projects were public, as opposed to private, works.

Further, the statements made by Respondent to his workers indicate that he was aware that these projects were public works, and he knew that he had to pay prevailing wage rates. Respondent told some workers that they would be paid PWR; he told others that he was not required to pay PWR; he told still others that \$12.00 an hour was the lowest PWR laborer rate and, since the workers were unskilled, he would pay no more than that for any of their work; and he told at least two workers that he would lose money on the projects if he paid PWR. The statement made by Respondent to Compliance Specialist Sheppard that he had paid less than PWR because the workers asked him to do so was clearly untrue and was a particularly inept attempt to shift responsibility, and, in a back-handed manner, revealed his knowledge of the requirement. Respondent's statements to Deputy Administrator Hammond reveal his enmity toward the law's requirement and the lengths to which he would go to avoid the application of the law to his activities.

Finally, and perhaps most significantly, during the performance of these projects, at the same time Respondent was paying workers at rates far below the applicable PWR, Respondent was submitting certified payroll records to the Bureau of Labor and Industries, in which Respondent stated that "all persons employed on said project have been paid the full weekly wages earned" and that

"any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for workers contained therein are not less than the applicable wage rates contained in any wage determination incorporated into the contract; that the classifications set forth therein for each worker conform with work performed."

Respondent signed these certified records, when the record amply demonstrates that such certifications were false at the time he signed them. Not one of the 12 workers identified herein appears on any of the CPRs.

From the above facts, and from the admissions contained in Respondent's answer, the Forum is persuaded that Respondent was aware that the projects were public works projects, and required the payment of PWR. The evidence is conclusive that, despite Respondent's knowledge of that legal requirement, Respondent paid all of his workers far less than the applicable prevailing wage rate for the workers' trades. Respondent knew what he was paying his workers (\$7.00 to \$12.00 per hour), intended to pay his workers those wage rates, and was a free agent.

Therefore, the conclusion is inescapable that Respondent intentionally failed to pay the prevailing rate of wage to workers employed upon public works projects. Pursuant to ORS 279.361, Respondent is ineligible for a period of up to three years from the date of publication of his name on the ineligible list to receive any contract or subcontract for public works. On the basis of the facts in this record, the

Forum finds it appropriate to make Respondent ineligible for a period of three years.

#### ORDER

NOW, THEREFORE, as authorized by ORS 279.361, it is hereby ordered that Haskell Tallent, Haskell Tallent, dba Sound Construction of Reno, and Sound Construction of Reno, or any firm, partnership, corporation, or association in which Haskell Tallent has a financial interest, shall be ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

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**In the Matter of  
HOWARD LEE,  
dba SnoozInn, Respondent.**

Case Number 81-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued October 28, 1994.

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#### SYNOPSIS

Female Complainant was hit or pushed on one occasion by Respondent in conjunction with his correction of her work. A second female employee was also hit or pushed by

Respondent under the same circumstances. The work of Respondent's only male employee was not corrected by Respondent and he was not hit or pushed by Respondent. Five female employees were not hit or pushed by Respondent. The Commissioner found that the Agency did not prove by a preponderance of the evidence that Complainant's protected class membership was the reason for Respondent's action where: there was no evidence that Respondent treated or spoke of women in a demeaning fashion, or treated women less favorably than male employees with regard to compensation, promotional opportunities, and other terms of employment, where most female employees were not treated like Complainant, and where there was but one male employee, who was not similarly situated. ORS 659.030(1)(b), OAR 839-05-005(2)(b).

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, 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 30 and 31, 1994, in the conference room of the offices of the Bureau of Labor and Industries, Suite 1004, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (Agency) was represented by Robert Browning, an employee of the Agency. Debbie K. Russell (Complainant) was present throughout the hearing and was not represented by counsel. Howard Lee (Respondent) was represented by Calvin Keith, Attor-

ney at Law. Respondent was present throughout the hearing.

The Agency called the following witnesses (in alphabetical order): Renay Allee, a friend of witness Deborah Velasquez (by telephone); Terri Bradley, sister of Complainant; James McGuire, former co-worker of Complainant; Ricardo Pascua, former boyfriend of witness Deborah Velasquez; Senior Investigator Donna Renton, Civil Rights Division, Bureau of Labor and Industries; Debbie Russell, Complainant; Deborah Velasquez, former co-worker of Complainant; and Clackamas County Deputy Sheriff Barbara Waggoner. Respondent called the following witnesses (in alphabetical order): Diane Clarke, employee of Respondent; Mary Cooper, employee of Respondent; Barbara Cox, resident manager of the SnoozInn; Howard Lee, Respondent; Evelyn Salberg, employee of Respondent (by telephone); and Elsie Marie Stanton, former employee of Respondent (by telephone).

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 10, 1994, Complainant filed a verified complaint with the Agency, alleging that she was the victim of the unlawful employment practices of Respondent.

2) After investigation and review, the Agency issued an Administrative

Determination finding substantial evidence of unlawful employment practices by Respondent in violation of ORS 659.030(1)(a) and (b).

3) The Agency initiated conciliation efforts between the Complainant and Respondent, conciliation failed, and on July 1, 1994, the Agency prepared for service on Respondent Specific Charges, alleging that Respondent had committed unlawful employment practices in that Respondent treated Complainant differently from male employees in the terms and conditions of employment and constructively discharged Complainant, in violation of ORS 659.030(1)(a) and (b).

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 July 21, 1994, Respondent filed an answer in which he denied the allegations mentioned above in the Specific Charges and stated numerous affirmative defenses.

6) On August 12, 1994, the Hearings Referee issued a discovery order to the participants,\* directing them each to submit a Summary of the Case by August 22, 1994. Pursuant to OAR 839-50-210 and the Hearing Referee's

order, the Agency and Respondent each timely filed a Summary of the Case.

7) On August 22, 1994, Respondent filed a request for testimony by telephone. Respondent filed an amended request for testimony by telephone on August 25, 1994.

8) On August 25, 1994, the Agency filed an addendum to its case summary.

9) On August 26, 1994, the Hearings Referee granted Respondent's request for the telephone testimony of witnesses Evelyn Salberg and Elsie Marie Stanton.

10) On August 26, 1994, the Agency filed a request for the telephone testimony of witnesses Renay Allee and Deputy Barbara Waggoner.

11) On August 29, 1994, the Hearings Referee granted the Agency's request for the telephone testimony of witnesses Renay Allee and Deputy Barbara Waggoner.

12) On August 30, 1994, at hearing, the Agency filed an amended Summary of the Case.

13) A pre-hearing conference was held on August 30, 1994, at which time the Agency and Respondent stipulated to facts that were admitted by the pleadings. Those facts were admitted into the record by the Hearings Referee at the beginning of the hearing.

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

\* "Participant" or "participants" refer to the Agency and the Respondent. OAR 839-50-020(13).

15) Pursuant to ORS 183.415(7), the Agency and Respondent 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.

16) At the end of the Agency's case in chief, Respondent moved to dismiss the Specific Charges because the evidence failed to support the charges. The motion was denied. The Hearings Referee found that there was sufficient evidence on the record from which to establish a prima facie case of an unlawful employment practice in violation of ORS 659.030(1)(a) and (b).

17) On October 11, 1994, the Hearings Unit issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed 10 days for filing exceptions. Exceptions were due by October 21, 1994. Respondent timely filed exceptions, which are dealt with in the Opinion section of this Order. The Hearings Unit received no exceptions from the Agency.

#### FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Howard Lee owned and operated a motel in Wilsonville, Oregon, under the assumed business name SnoozInn, and was an employer in this state utilizing the personal services of one or more employees in the operation of that business.

2) The number of employees employed by Respondent at any given time is seasonal, varying in number between seven and twelve.

3) Complainant is female.

4) Complainant was employed by Respondent as a housekeeper in

December 1992. During the course of her employment, Complainant was promoted to head housekeeper. During all times material herein, Complainant was Respondent's head housekeeper.

5) Complainant worked part-time, averaging between 20 to 30 hours a week.

6) Complainant's duties as head housekeeper included assigning rooms to the housekeepers for cleaning, stripping the linen from beds, laundering and folding the linen and towels, and supervising and assisting housekeepers.

7) Under Respondent's ownership, the motel was usually managed by full-time residential managers employed by Respondent. The managers were most often a married couple. Respondent sometimes checked on the work of the employees when he had one or more managers on staff, but generally left the supervision of the employees to the manager or managers. When there was a manager, Respondent spent between one-half and one hour at the motel each day.

8) Respondent performed the duties of manager when he had no manager or managers on staff. During times material herein, Respondent had no manager on staff between March 6, 1993, when Bev and Joe Kennedy left, and July 23, 1993, when Barbara Cox was hired. Respondent performed the duties of manager between March 6 and July 23, 1993.

9) When Respondent had no manager on staff, he spent a great deal more time at the motel, performing the duties of manager. He made

bank deposits; checked in with the desk clerk for problems; inspected the physical plant for problems requiring attention or repair; answered phone calls; dealt with salesmen; picked up trash; dealt with the payroll service; hired, fired, and scheduled employees; and supervised, instructed, and corrected the employees, including housekeepers and laundry workers. Respondent routinely assigned an employee to check rooms each day, and he personally performed a random check of rooms. Respondent checked in on the laundry about once a day.

10) On busy weekends, or when the motel was full, Respondent, during the period of Complainant's employment, occasionally assisted Complainant in folding laundry when it began to pile up. Respondent folded laundry with Complainant on at least two occasions.

11) James McGuire was employed by Respondent as a part-time maintenance person in 1992 and continued this employment until his retirement at the end of October or November 1993.

12) During Complainant's employment, other than co-manager Joe Kennedy, James McGuire was the only male employed by Respondent.

13) Terri Bradley, Complainant's sister, was hired by Respondent as a housekeeper one week after Complainant's hire and worked part-time until her last shift on September 24, 1993. Terri Bradley rode to and from work each day with Complainant.

14) Deborah Velasquez was employed by Respondent as a housekeeper for one month, during May 1993.

15) In February 1993, while Complainant was folding sheets in the laundry, Respondent entered the laundry, hit Complainant's arm, and pulled a sheet from her grasp. Respondent proceeded to show Complainant how to fold the sheet. Complainant later told Terri Bradley and James McGuire about this incident.

16) On May 16, 1993, while Deborah Velasquez was cleaning a room, Respondent entered the room to check out her work, and, seeing that the bedspread was crooked and the bathroom was not cleaned properly, shoved Velasquez in the back and proceeded to show her how he wanted the work done. On the same date, Velasquez told her boyfriend, Ricardo Pascua, her baby-sitter and friend, Renay Allee, and Complainant what had occurred. On May 18, 1993, Velasquez reported the incident to Deputy Sheriff Waggoner of the Clackamas County Sheriff's Office. On May 6, 1994, Velasquez filed a complaint with the Civil Rights Division of the Bureau of Labor.

17) Velasquez was terminated on May 16, 1993.

18) Complainant told McGuire she had been hit by Respondent long after the fact. McGuire advised Complainant to tell him if it ever happened again, and, if it did, he would go to Respondent. Several weeks later, McGuire asked Complainant if Respondent had hit her again. Complainant indicated that he had not. During the remainder of her employment, Complainant did not again report to McGuire that Respondent had hit her.

19) Other than Complainant, no other female employee told McGuire

she had been hit, shoved, kicked, or pushed by Respondent. No male employee reported to McGuire that he had been hit by Respondent.

20) McGuire's work was not corrected by Respondent during his employment.

21) McGuire was not hit, kicked, pushed, or shoved by Respondent during his employment.

22) On September 21, 1993, Manager Cox gave Complainant a verbal warning for dog feces remaining in a room Complainant had cleaned.

23) Complainant worked her last shift on September 24, 1993, and did not report to work as scheduled on September 27, 1993. Complainant quit without notice to Respondent.

24) Respondent gave Complainant four raises during her employment, the last one coming in August 1993.

25) Barbara Cox, at the time of hearing, had been employed as manager for Respondent since July 23, 1993. Barbara Cox was never hit by Respondent and never heard Respondent make any comments that were demeaning to women.

26) Elsie Marie Stanton worked for Respondent as a laundress during 1993 and left Respondent's employ in July 1994. Respondent never hit her. Stanton did not recall hearing from any other employee that the employee had been hit.

27) Terri Bradley worked for Respondent during the same time period as Complainant and was never hit by Respondent.

28) Mary Cooper worked for Respondent as a desk clerk for two years, during 1992 and 1993. She

was never hit, punched, or slapped by Respondent. Respondent never said anything negative about women in her presence.

29) At the time of hearing, Evelyn Salberg was employed by Respondent as a housekeeper and had been so employed for two and one-half years. She was never hit or threatened by Respondent. No co-worker ever complained to Salberg about being hit by Respondent. Salberg never heard Respondent say anything demeaning about women.

30) At the time of hearing, Diane Clarke was employed by Respondent as a desk clerk and had been so employed for seven years. Respondent has never hit her, and she has never seen Respondent hit any employee or yell at any employee. Respondent allowed all his employees to take pay draws, loaned money to employees free of interest, encouraged employees to advance themselves, including those who started independent cleaning businesses, allowed employees to make free long distance calls and to accept personal calls, bought employees lunch on particularly busy days, and occasionally transported employees.

31) Respondent's housekeeping employees have always been predominately female, a pattern typical of the industry.

32) Respondent has rarely received an application from a male for a housekeeping position. Since purchasing the motel in 1991, Respondent has employed two male housekeepers.

33) Complainant's testimony was not generally credible. It was riddled with inconsistencies and improbabilities. She testified that she was struck, pushed, or kicked on three occasions and told McGuire of two and Bradley of three. McGuire testified that Complainant told him of one incident. Bradley testified that Complainant told her of two incidents. Complainant testified that she was told by McGuire that Cox had been struck by Respondent and felt compelled to quit her job as a result. McGuire denied telling Complainant that Cox had been hit. Cox denied being hit by Respondent and denied telling anyone that she had been hit. According to her calendar, Complainant left her employment two weeks after she alleges she was told that Cox was hit, not the last day she worked as she testified. Complainant's professed reaction to hearing that another employee had been hit – shaking and getting sick to her stomach – was implausible. Complainant testified that she secured a job at Motel Orleans in January 1994, but that the impact of her experience at Respondent's motel was so great that she had to turn around and go home upon seeing the SnoozInn sign near the freeway en route to the new job. She later testified that she did not know what her wages were to be at the Motel Orleans as "things had not gotten that far." Complainant further testified she had never been treated for anxiety prior to her experiences at Respondent's motel. Complainant's medical records contradicted this testimony. Finally, Complainant produced a calendar with transparently self-serving entries which Complainant claimed to have made contemporaneously with the events,

but which appeared to the Forum to have been made long after the events, possibly just before hearing (Claimant testified that she showed no one this calendar until two weeks before hearing).

For the above reasons, Claimant's testimony was untrustworthy and was given less weight whenever it conflicted with credible evidence on the record. In some cases, due to inconsistencies her testimony was not believed even when it was not controverted by other evidence. Complainant's testimony concerning the hit or push by Respondent in February was credited as it was corroborated, in a manner, by the credible testimony of James McGuire, because Respondent was not believed on this point and because of Respondent's similar treatment of Velasquez.

34) Respondent's testimony was not wholly credible. For the most part, his demeanor impressed the Hearings Referee that he was believable. His demeanor was generally calm and forthright. Many of his statements were supported by testimony from other witnesses whom the Hearings Referee had no reason to disbelieve. However, on two important points – whether he pushed, struck, or made any physical contact with either Complainant or Debra Velasquez, and the timing of the termination of Velasquez – his testimony was contradicted by credible evidence and was found to be not credible.

35) James McGuire's testimony was credible. He had no apparent personal stake in this matter. He was straightforward with his answers. He offered specifics when he could and

made no attempt at fabrication when his memory failed.

36) The testimony of Deborah Velasquez was found to be generally credible. Her demeanor was forthright and her memory good. Due to the pendency of her claim against Respondent, her interest in this proceeding and resultant potential for bias was obvious. However, that fact alone was not enough to cause the Hearings Referee to conclude that her testimony was not credible.

37) Diane Clarke's testimony was credible. Her demeanor was forthright. Due to her long-standing employment relationship with Respondent, her potential for bias was obvious. However, that fact alone was not enough to cause the Hearings Referee to conclude that her testimony was not credible. On a collateral point, however, the Forum did not credit her testimony — that she observed Respondent write the check to Velasquez — due to the inconsistency between the date of the check and the fact that Clarke did not work on that date. The Hearings Referee was not sufficiently impressed by other evidence or her demeanor so as to find the remainder of her testimony not credible.

38) Terri Bradley's testimony was given little weight because her memory was weak. She was unable to recall when she commenced work for Respondent, when Complainant told her about being hit by Respondent, or any details of what Complainant had told her about the alleged occurrences. The Forum was left with the impression that she was trying to assist and protect Complainant, her sister. Accordingly, her testimony was given less

weight than other sworn testimony where it conflicted with the other testimony.

39) Elsie Marie Stanton, Mary Cooper, and Evelyn Salberg presented testimony that was internally consistent. There was no dispute of fact among them. All were straightforward in their answers. The witnesses offered specifics when they could and made no attempt at fabrication when their memories failed.

40) Ricardo Pascua's testimony was not totally credible due to the glaring inconsistencies existing between it and the testimony given by Renay Allee, which the Forum has found to be more credible. Pascua testified that he sat next to Velasquez during her telephone conversation with Respondent and testified to a version of that conversation which matched the version advanced by Velasquez. Allee, however, testified that she and Velasquez were alone in the bedroom when the phone conversation took place and that Pascua had not heard the conversation. Pascua was the boyfriend of Velasquez at the time the incident occurred; his testimony struck the Hearings Referee as exaggerated, tending to magnify and distort his role in a later confrontation with Respondent. His testimony was given little weight when it conflicted with any other more credible evidence or inference on the record.

41) The testimony of Renay Allee was credible. She had no ongoing relationship with Velasquez and had no apparent personal stake in this matter. She was straightforward with her answers. She offered specifics when she

could and made no attempt at fabrication when her memory failed.

42) The testimony of the other witnesses was credible. The Hearings Referee observed the demeanor of each witness and found each to be believable.

#### 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) Complainant is female.

4) Respondent hit or pushed Complainant on one occasion, while correcting her work.

5) Respondent hit or pushed Deborah Velasquez on one occasion, while correcting her work.

6) Respondent did not hit or push James McGuire, Respondent's only male employee, and did not correct McGuire's work.

7) Respondent did not hit or push five female employees employed contemporaneously with Complainant.

8) Respondent did not hit or push Complainant because of her sex.

9) Respondent treated Complainant differently than James McGuire because of nondiscriminatory reasons.

10) Complainant voluntarily quit her employment with Respondent; she was not compelled to quit. Complainant last worked for Respondent on September 24, 1993.

#### 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:

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

Respondent did not violate ORS 659.030(1)(a).

4) 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 \* \* \* sex \* \* \* to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

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

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

## OPINION

There are two primary issues in this case. The first is whether Respondent hit, kicked, or pushed Complainant, an issue of fact. The second, predicated on an affirmative answer to the first, is whether a causal connection tied the Respondent's action (hitting or pushing Complainant) to the Complainant's protected class membership. Having found that Respondent did hit or push Complainant on one occasion in February 1993 (Finding of Fact 15), the Forum will address itself to the issue of the causal connection with Complainant's protected class. The Agency alleged that, in violation of ORS 659.030(1)(b), Respondent treated Complainant differently than James McGuire because of Complainant's sex and not because of nondiscriminatory factors.

The Forum has applied the Different or Unequal Treatment Test, as described in OAR 839-05-005(2)(b). Different treatment exists where:

"\*\*\* the Respondent treats members of a protected class differently than others who are not members of the protected class. When the Respondent makes this differentiation because of the individual's protected class and not because of legitimate, nondiscriminatory factors, unlawful discrimination exists. The Complainant, at all times, has the burden of proving that his/her protected class membership was the reason for the Respondent's alleged unlawful action. The Complainant begins this process by showing that he/she was harmed by an action of the Respondent under circumstances

which make it appear that the Respondent treated the Complainant differently than comparably situated individuals who were not members of the Complainant's protected class. The Respondent must then rebut this showing. If the Respondent fails to rebut this showing, the [Civil Rights] Division will conclude that substantial evidence of unlawful discrimination exists. To accomplish the rebuttal, the Respondent has to produce clear and reasonably specific evidence, but does not have to prove, that it acted upon legitimate, non-discriminatory factors. The Complainant must then have a full and fair opportunity to show that the reasons the Respondent gave are a pretext for discrimination. Pretext can be shown directly through evidence that the Respondent was more likely motivated by a discriminatory motive or indirectly by showing that the Respondent's explanation is unworthy of credence."

The Agency presented sufficient evidence to support a prima facie case of unlawful discrimination. Credible evidence showed that Complainant was harmed when Respondent pushed or hit her, and revealed circumstances concerning this physical contact that made it appear that Respondent treated Complainant, who is female, differently than a male employee, James McGuire. Specifically, evidence showed that two female employees, Complainant and Deborah Velasquez, were hit or pushed by Respondent as he corrected their work;

and that the sole male employee was not subjected to this treatment.

In response, Respondent presented the credible testimony of five female employees, employed contemporaneously with Complainant, to show that they, as females, had not been hit or pushed by Respondent; that Respondent made no demeaning comments about women in their presence; and that Respondent provided promotional opportunities, pay advances, loans, free long distance calls, and emergency transportation to all his employees, male and female alike. Respondent, although denying that he hit or pushed Complainant or Velasquez, claimed, arguendo, that Complainant and Velasquez were not similarly situated to McGuire, in that McGuire had not had his work corrected by Respondent, the very situation that appeared to prompt the acts against Complainant and Velasquez.

Complainant was given a full and fair opportunity to show that Respondent's reasons were a pretext for discrimination. The Agency's evidence failed to show that Respondent's reasons were pretextual. No evidence in the record suggests that Respondent was motivated by a discriminatory objective. There is no evidence that Respondent treated or spoke of women in a demeaning fashion or that Respondent treated women less favorably than male employees with regard to compensation; promotional opportunities; access to pay advances, loans, and free long distance calls;

transportation; and encouragement to further themselves. Indeed, evidence demonstrates that Complainant was given a promotion to head housekeeper, considered for a promotion to desk clerk, received four pay raises, was allowed to receive personal calls from her children because she was a single mother, and requested and received pay advances. Given all the evidence in the whole record, and considering particularly the lack of animus toward women, the existence of but one male employee, who was not similarly situated, and the number of female employees who were not treated like Complainant, the Forum does not find that the hitting or pushing of Complainant was more likely motivated by her sex than by a misplaced punitive act connected to the correction of work. The Forum does not condone corporal punishment of employees and does not excuse Respondent for this behavior. The Forum finds, however, that the Agency did not prove by a preponderance of the evidence either that Complainant's "protected class membership was the reason for the Respondent's alleged unlawful action" or that Respondent committed an unlawful employment practice.<sup>\*</sup> Any remedy the Complainant may have against Respondent lies in a different forum.

**Exceptions**

Respondent filed three exceptions to the Proposed Order, two of which turned on the credibility determinations of the Hearings Referee. A hearings referee's credibility findings are

\* As Respondent's acts have not been found to have been motivated by Complainant's sex, Complainant's departure from employment cannot have been a constructive discharge based on treatment due to sex, as required by ORS 659.030(1)(a).

accorded substantial deference by this Forum. Absent convincing reasons for rejecting such findings, they are not disturbed. *In the Matter of Western Medical Systems, Inc.*, 8 BOLI 108, 117 (1989). Here, Respondent presented no convincing reasons to reject the credibility determinations upon which Findings of Fact 15 and 16 were based. It is to be noted that in the context of discrimination law, where the nature of the offense alleged is that it was motivated by the victim's membership in a statutorily protected class, the manner in which other members of that class have allegedly been treated is clearly relevant to the inquiry. To the extent that comparative evidence relating to the protected class at issue may also reflect prior bad acts by Respondent, that evidence will not be excluded for that reason. *In the Matter of Dunkin' Donuts, Inc.*, 8 BOLI 175, 178-79 (1989).

Respondent's third exception relates to the substance of testimony of Diane Clarke. The tape recording of the testimony of Diane Clarke confirms that her testimony — that she observed Respondent write the check — was as set out in Finding of Fact 37. Accordingly, there is no convincing reason to disturb the credibility finding concerning that testimony. Finding of Fact 37 will remain unchanged.

#### ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the complaint and the specific charges filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

**In the Matter of  
JEFTY BOLDEN,  
dba Living Water Reforestation,  
Respondent.**

Case Number 80-94  
Final Order of the Commissioner  
Mary Wendy Roberts  
Issued November 29, 1994.

#### SYNOPSIS

Respondent, a licensed forest labor contractor, failed to file certified payroll records on two forestation contracts, constituting two violations of ORS 653.417(3); failed to furnish workers with written statements of working conditions, rights and remedies on those two contracts, constituting two violations of ORS 653.440(1)(f); and failed to execute written agreements between himself and his workers on those two contracts, constituting two violations of ORS 653.440(1)(g). Noting that the Agency sought a civil penalty of \$500 for each violation as a "repeated" violation, the Commissioner held that the first in a series of violations could not be "repeated." Finding that there was unrefuted evidence that Respondent had subsequently complied with the forest labor contractor statutes, the Commissioner imposed a \$300 penalty for the first in each pair of violations and \$500 for each repeated violation. ORS 658.417(3); 658.440(1)(f), (g); 658.453; OAR 839-15-300(1), (2), (5); 839-15-310(1), (2), (3); 839-15-508(1)(g), (h), (i), (2)(b); 839-15-512(1), (2).

The above-entitled contested case 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 of the State of Oregon. The hearing was held on September 15, 1994, in Suite 220 of the Eugene State Office Building, 165 E Seventh Street, Eugene, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Jefty Bolden, dba Living Water Reforestation (Respondent), was not represented by counsel and was present throughout the hearing. The Agency called no witnesses. Respondent called as witnesses himself and his spouse, Cynthia Bolden.

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

#### FINDINGS OF FACT — PROCEDURAL

1) On May 10, 1994, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice of Intent") to Respondent. The Notice of Intent informed Respondent that the Agency intended to assess civil penalties against him in the total amount of \$3,000 21 days after his receipt of the notice. The Notice of Intent cited the following bases for the Agency's action:

1. Respondent failed on two separate forestation contracts while working as a licensed forest labor

contractor to provide to the Agency certified true copies of all payroll records for work done at least once every 35 days starting from the time work first began on the respective contracts (civil penalty of \$1,000 for two violations of ORS 658.417(3) and OAR 839-15-300).

2. Respondent failed on each of the described forestation contracts while working as a licensed forest labor contractor to furnish workers, at the time they were hired, recruited, or solicited, with a written statement disclosing the terms and conditions of employment with all of the elements contained in Agency form WH-153, or with a written statement describing workers' rights and remedies as required (civil penalty of \$1,000 for two violations of ORS 658.440(1)(f)(I) and OAR 839-15-310).

3. Respondent failed on each of the described forestation contracts while working as a licensed forest labor contractor to execute written agreements between himself and his workers containing the terms and conditions required (civil penalty of \$1,000 for two violations of ORS 658.440(1)(f)(A)-(I)).

2) On May 12, 1994, Respondent received the Notice of Intent by certified mail.

3) On May 23, 1994, received by the Agency June 1, Respondent submitted his letter answer to the Notice of Intent. The letter provided, in part, as follows:

"I am writing in response to the letter I received on May 12, 1994. All

of the charges in the letter were true."

In a note on a faxed copy of his letter, Respondent wrote:

"Note: In addition to the above I would like to request a hearing, Thank you. [signed] Jeffy M. Bolden"

4) On June 23, 1994, the Agency sent the Hearings Unit a request for a hearing date, and on July 8, 1994, the Hearings Unit issued a Notice of Hearing setting forth the time and place of the hearing, which was served on Respondent together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420, regarding the contested case process.

5) On August 1, 1994, the Agency filed a motion for summary judgment, with supporting documents, reciting that the facts describing the violations were uncontested.

6) In accordance with OAR 839-50-150, Respondent had seven days within which to respond to the Agency's motion. No response was received, and on September 9, 1994, the Hearings Referee ruled as follows:

"In its May 10, 1994, notice of intent to assess civil penalties, received by Respondent by certified mail on May 12, 1994, the Agency alleged that Respondent committed six violations of the farm/forest labor contractor statutes as follows:

"Paragraph I: In 1993, Respondent failed to provide certified

true copies of all payroll records for work done as a farm/forest labor contractor at least once every 35 days starting from the time work first began on the forestation or reforestation of lands in this state on U. S. Bureau of Land Management Contract no. 1422H100P3-0508 and on U.S. Forest Service Contract no. 53-04N7-3-21. The Agency sought a civil penalty of \$500 for each of two violations of ORS 658.417(3) and OAR 839-15-300.

"Paragraph II: In 1993, while performing work as a farm/ forest labor contractor on the contracts cited in Count I, Respondent failed to furnish workers at the time they were hired, recruited or solicited, with a written statement disclosing the terms and conditions of employment as contained in Agency form WH-153 or with a written statement describing worker's rights and remedies, all as required by ORS 658.440(1)(f)(I) and OAR 839-15-310. The Agency sought a civil penalty of \$500 for each of two violations.

"Paragraph III: In 1993, while performing work as a farm/ forest labor contractor on the contracts cited in Count I, Respondent failed to execute written agreements between himself and his workers containing the terms and conditions described in ORS 658.440(1)(f)(A-I). The Agency sought a civil penalty of \$500 for each of two violations.

"In a letter answer to the notice of intent, dated May 23, 1994, and received by the Agency June 2, 1994, Respondent states in part: 'I am writing in response to the letter I received on May 12, 1994. All of the charges in the letter were true.' Respondent also assured current and future compliance and asked for a hearing over the penalties assessed.

"The Agency's motion included its argument that the allegations were supported by Respondent's admission, and its further argument that OAR 839-15-512(2) requires the Commissioner to impose a minimum civil penalty of \$500 for each repeat violation. Thus, if the forum grants summary judgment holding that the violations occurred as alleged and admitted, the forum must under the Agency's interpretation impose a minimum civil penalty of \$500 for each offense, since all are alleged to be 'repeated.' (Emphasis in original.)

"This forum grants summary judgment where there are no facts in dispute. In many instances, that can eliminate the necessity for the time and expense of a fact-finding hearing. *In the Matter of Handy Andy Towing, Inc.*, 12 BOLI 284, 286-88, 295-96 (1994); *In the Matter of Efrain Corona*, 11 BOLI 44, 53-57 (1992), *aff'd without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993); *In the Matter of Azul Corporation, Inc.*, 10 BOLI 156, 157 (1992). The Agency's motion

is therefore granted as to the facts alleged and the proposed order in this matter will find that Respondent committed the six violations alleged.

"The Hearings Referee is less willing to grant the Agency's suggested civil penalties. While there are farm/forest labor cases which treat each of a number of violations of the same statute as 'repeated,' there is language in child labor cases suggesting that a prior citation may be necessary to classify all of a number of multiple offenses as 'repeated.' *In the Matter of Panda Pizza*, 10 BOLI 132, 143 (1992)."

"Accordingly, the scheduled hearing of September 15, 1994, in Eugene will convene as scheduled. It will be unnecessary for the Agency to present evidence regarding each of the alleged violations, since I have already found them to be true. However, the Agency should submit at that time a statement of Agency policy regarding the meaning of 'repeated' as used in OAR 839-15-512. Respondent Bolden need not present evidence on the manner in which the violations occurred, or on whether they occurred, since I have already found them to be true. Respondent Bolden should, however, be ready to present evidence and/or argument in possible mitigation, or reduction, of the proposed penalty amounts."

7) At the commencement of the hearing, Respondent stated that he

\* This is not a totally accurate description of the holding in that case; see Opinion section, *infra*.

had received the Notice of Contested Case Rights and Procedures and had no questions about it.

8) 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.

9) The Proposed Order, which included an Exceptions Notice, was issued on September 27, 1994. Exceptions, if any, were due by October 7, 1994. No exceptions were received.

#### FINDINGS OF FACT – THE MERITS

1) During 1993, Respondent was a licensed farm labor contractor, with forestation indorsement.

2) Respondent began work on US Forest Service conifer mulching contract number 53-04N7-3-21 (USFS 3-21), contract price \$13,975, in the Ashland Ranger District of the Rogue River National Forest on May 13, 1993. Respondent worked on USFS 3-21 between May 13 and May 28, 1993, employing up to 13 workers.

3) Respondent began work on US Bureau of Land Management seedling shading contract number 1422H100 P3-0508 (BLM 508), contract price \$14,400, in the Dillard Resource Area of the BLM Roseburg District Office on April 13, 1993. Respondent worked on BLM 508 between April 13 and April 28, 1993, employing up to eight workers.

4) As of November 8, 1993, more than 35 days after April 13, 1993, and more than 35 days after May 13, 1993, there were no copies of certified payroll records filed with the Agency by

Respondent on USFS 3-21 or on BLM 508.

5) In April and May 1993, Respondent did not furnish any workers who worked on USFS 3-21 or on BLM 508, at the time the workers were hired, recruited, or solicited, with a written statement disclosing the terms and conditions of their employment, containing the elements in Agency form WH-153, or with a written statement describing the worker's rights and remedies.

6) In April and May 1993, Respondent did not execute written agreements between himself and his workers who worked on USFS 3-21 or on BLM 508, containing the terms and conditions described by statute.

7) By letters dated June 12, 1991, and September 18, 1991, the Agency notified Respondent that he had not complied with the certified payroll records requirements of ORS 658.417(3) and OAR 839-15-300(2) on USFS contract number 53-04N7-1-30. There were no copies of certified payroll records filed with the Agency by Respondent in 1991 or 1992.

8) Following receipt of the Notice of Intent, Respondent hired an accountant. The accountant has actively worked with the Agency certified payroll records office in bringing Respondent into compliance. Respondent currently supplies WH-153's to each new hire and executes a written agreement with each worker regarding the terms and conditions of each contract before the worker performs work on the contract.

#### CONCLUSIONS OF LAW

1) 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."

OAR 839-15-300 provides, in part:

"(1) Forest Labor Contractors engaged in the forestation or reforestation of lands must, unless otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or the contractor's agent pays employees directly.

"(2) The certified true copy of payroll records shall be submitted at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submissions may be made.

"\* \* \*

"(5) The certified true copy of payroll records shall be submitted to:

Wage and Hour Division  
3865 Wolverine Street, N.E.; E-1  
Salem, Oregon 97310"

By failing to file within 35 days of beginning work, or at any time, certified true copies of payroll records on USFS 3-21, Respondent violated ORS 658.417(3) and OAR 839-15-300.

2) By failing to file within 35 days of beginning work, or at any time, certified true copies of payroll records on BLM 508, Respondent violated ORS 658.417(3) and OAR 839-15-300.

3) ORS 658.440(1) provides, in part:

"Each person acting as a farm labor contractor shall:

"\* \* \*

"(f) Furnish to each worker, at the time of hiring, recruiting, soliciting or supplying, whichever occurs first, a written statement in the English language and any other language used by the farm labor contractor to communicate with the workers that contains a description of:

"(A) The method of computing the rate of compensation.

"(B) The terms and conditions of any bonus offered, including the manner of determining when the bonus is earned.

"(C) The terms and conditions of any loan made to the worker.

"(D) The conditions of any housing, health and day care services to be provided.

"(E) The terms and conditions of employment, including the approximate length of season or period of employment and the approximate starting and ending dates thereof.

"(F) The terms and conditions under which the worker is furnished clothing or equipment.

"(G) The name and address of the owner of all operations where the worker will be working as a result of being recruited, solicited, supplied or employed by the farm labor contractor.

"(H) The existence of a labor dispute at the worksite.

"(I) The worker's rights and remedies under ORS chapters 654 and 656, ORS 658.405 to 658.503 and 658.830, the Service Contract Act (41 U.S.C. secs. 351-401) and any other such law specified by the Commissioner of the Bureau of Labor and Industries, in plain and simple language in a form specified by the commissioner.

"(g) At the time of hiring and prior to the worker performing any work for the farm labor contractor, execute a written agreement between the worker and the farm labor contractor containing the terms and conditions described in paragraph (f)(A) to (I) of this subsection. The written agreement shall be in the English language and any other language used by the farm labor contractor to communicate with the workers."

OAR 839-15-310 provides:

"(1) Every Farm and Forest Labor Contractor must furnish each worker with a written statement of the worker's rights and remedies under the Worker's Compensation Law, the Farm and Forest Labor Contractor Law, and Federal

Service Contracts Act, the Federal and Oregon Minimum Wage Laws, Oregon Wage Collection Laws, Unemployment Compensation Laws, and Civil Rights Laws. The form must be written in English and in the language used by the contractor to communicate with the workers.

"(2) The form must be given to the workers at the time they are hired, recruited or solicited by the contractor or at the time they are supplied to another by the contractor, whichever comes first.

"(3) The Commissioner has prepared Form WH-151 for use by contractors in complying with this rule. The form is in English and Spanish and is available at any office of the Bureau of Labor and Industries."

By failing to furnish workers at the time they were hired, recruited, or solicited on USFS 3-21, with a written statement disclosing the terms and conditions of employment or with a written statement describing the workers' rights and remedies, Respondent violated ORS 658.440(1)(f).

4) By failing to furnish workers at the time they were hired, recruited or solicited on BLM 508, with a written statement disclosing the terms and conditions of employment or with a written statement describing the workers' rights and remedies, Respondent violated ORS 658.440(1)(f).

5) By failing to execute written agreements between himself and his workers containing the working conditions at the time the worker was hired and before the worker performed any

work on USFS 3-21, Respondent violated ORS 658.440(1)(g).

6) By failing to execute written agreements between himself and his workers containing the working conditions at the time the worker was hired and before the worker performed any work on BLM 508, Respondent violated ORS 658.440(1)(g).

7) OAR 839-15-508 provides, in part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

" \* \* \*

"(g) Failing to execute a written agreement with each worker in violation of ORS 658.440(1)(g).

"(h) Failing to furnish each worker with a disclosure statement or copy of a work agreement concerning the terms and conditions of employment in violation of ORS 658.440(1)(f).

"(i) Failing to furnish each worker with a disclosure statement or copy of a written work agreement concerning the terms and conditions of employment in violation of ORS 658.440(1)(g).

" \* \* \*

"(2) In the case of Forest Labor Contractors, in addition to any other penalties, a civil penalty may be imposed for each of the following violations:

" \* \* \*

"(b) Failing to provide certified true copies of payroll records in violation of ORS 658.417(3)."

OAR 839-15-512 provides, in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) Repeated violations of the statutes for which a civil penalty may be imposed are considered to be of such magnitude and seriousness that a minimum of \$500 for each repeated violation will be imposed when the Commissioner determines to impose a civil penalty."

The Commissioner is authorized to impose a civil penalty for each of the violations, including repeated violations, found in paragraphs one through six of these Conclusions of Law.

#### OPINION

The Hearings Referee allowed the Agency's pre-hearing motion for summary judgment. That ruling is confirmed because the Agency's Notice of Intent charged and Respondent admitted to two violations of ORS 658.417(3), two violations of ORS 658.440(1)(f), and two violations of ORS 658.440(1)(g). Thus, there was no issue of fact as to Respondent's guilt to be decided at hearing. A hearing was convened over the nature and extent of the civil penalties to be imposed for the admitted violations.

The Agency's Notice of Intent sought, in accordance with OAR 839-15-512(2), a \$500 civil penalty for each of the violations found, based on the violations being "repeated." ORS chapter 651, which contains the Commissioner's general rule-making authority, and chapter 658, dealing with

farm labor contractors (particularly ORS 658.453, which authorizes civil penalties for certain violations of that chapter), do not specifically address the term "repeated." It is a term introduced under the Commissioner's rule making authority, which is to adopt such reasonable rules, subject to the Administrative Procedures Act, as may be necessary to administer and enforce the statutes over which the Commissioner has jurisdiction.

The meaning of "repeated" must then be either in the rules or in contested case opinions dealing with repeated violations. In farm labor cases, repeated violations have been charged when the Agency was concerned with multiple or serial violations. The Forum has then assessed the "minimum" penalty described in OAR 839-15-512 (2) without regard to which violation came first. See *In the Matter of Xavier Carbajal*, 8 BOLI 206, 223-25 (1990); *In the Matter of Iona Pozdeev*, 11 BOLI 146, 150 (1993).

In a child labor case, however, the Forum discussed "repeated" as used in OAR 839-19-025(5)" as follows:

"'Repeated' is not defined in 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." *In the Matter of Panda Pizza*, 10 BOLI 132, 143 (1992).

The Forum adopts that plain meaning of "repeated" for the purpose of farm/forest labor contractor cases.

Under the definition, a violation cannot be repeated unless it has occurred before. Thus, the first in a series of violations cannot be a repeated violation, but all other like violations occurring thereafter are repeated violations. Any language in prior farm/forest labor cases which might suggest otherwise is hereby modified to reflect this interpretation.

Accordingly, in the instant case, only the second of each pair of violations charged is a repeated violation. Because no charge arose from the 1991 letters, the allegations in the letters did not constitute a first violation.

Subsequent compliance may be considered in mitigation of a civil penalty. The Agency did not refute Respondent's compliance evidence. The Forum is, therefore, imposing a civil penalty of \$300 for each initial violation

\* ORS 651.060(4) provides: "In accordance with any applicable provisions of ORS 183.310 to 183.550, the Commissioner of the Bureau of Labor and Industries may adopt such reasonable rules as may be necessary to administer and enforce any statutes over which the commissioner or the Bureau of Labor and Industries has jurisdiction."

\*\* 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."

of, respectively, ORS 658.417(3), 658.440(1)(f), and 658.440(1)(g). The Forum is imposing the minimum civil penalty of \$500 for each repeat violation of, respectively, ORS 658.417(3), 658.440(1)(f), and 658.440(1)(g).

#### ORDER

NOW, THEREFORE, as authorized by ORS 658.453, Respondent JEFY BOLDEN, dba Living Waters Reforestation, is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND FOUR HUNDRED DOLLARS (\$2,400), 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 herein and the date said Respondent complies therewith. This assessment is the sum of the following civil penalties against said Respondent:

As penalty for violations of ORS 658.417(3), \$300 and \$500;

As penalty for violations of ORS 658.440(1)(f), \$300 and \$500;

As penalty for violations of ORS 658.440(1)(g), \$300 and \$500.