

BOLI ORDERS

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

VOLUME 15

Cited: 15 BOLI

Published by the

OREGON BUREAU OF LABOR AND INDUSTRIES

1997

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Portland, Oregon

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Printed in the United States of America

BOLI ORDERS

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INTRODUCTORY NOTE

This fifteenth 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 March 14, 1996, and March 21, 1997.

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."

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
THOMAS P. MYERS,
dba Chubby's, Respondent.**

Case Number 44-95
Final Order of the Commissioner
Jack Roberts
Issued March 14, 1996.

SYNOPSIS

Complainant, a black person, was subjected to racial harassment and constructively discharged. The Commissioner awarded her \$1,257.50 in back pay and \$20,000 for mental suffering, less an offset for a settlement paid by an alleged successor-in-interest. ORS 659.030(1)(a), (1)(b).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on March 21 and 22, 1995, and on January 9 and 10, 1996, at the office of the Oregon Employment Department, 119 North Oakdale Street, Medford, Oregon. The Bureau of Labor and Industries (the Agency) was represented at all stages of the hearing by Judith Bracanovich, an employee of the Agency. Thomas P. Myers (Respondent), was present throughout the hearing and was represented on March 21 and 22, 1995, by Scott A. Norris, Attorney at Law, and on January 9 and 10, 1996, by Larry B. Workman, Attorney at Law. Alice Ferguson (Complainant) was

present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses: Complainant; Complainant's husband Jack Chadd; Complainant's former co-workers Matt Coughlin, Brenda Dodson, Edith Grimshaw, Patrick Ludden, Theresa Nichols, Rebecca Pinnock-Ward, and Deborah Rand; and Agency Civil Rights Division Senior Investigator Susan Moxley.

The Respondent called the following witnesses: Respondent Thomas P. Myers; Vocational Rehabilitation Consultant Bruce E. McLean; Respondent's former employees Patricia Stedmon, Jennifer McAuliffe, Elaine Keffer, and Kristine Hickman; Respondent's stepfather Richard Taylor, Sr.; Respondent's mother Jacqueline Taylor; Respondent's girlfriend Jeanne Mayer; and Respondent's former customers Ronald Hickman, Dan Stebbins, and Wendell Haynes.

Having fully considered the entire record in this matter, I, Jack 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 28, 1993, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging she was the victim of the unlawful employment practices of Respondent.

2) After investigation, the Agency issued an Administrative Determination finding substantial evidence of an

unlawful employment practice in violation of ORS 659.030 by Respondent.

3) On February 3, 1995, the Agency prepared Specific Charges that were duly served by certified mail on Respondent.

4) 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.

5) On February 23, 1995, Respondent, through counsel, filed an answer.

6) On February 28, 1995, Respondent's counsel issued a subpoena to the Adult and Family Services Division (AFS) commanding AFS to produce all AFS files related to Complainant.

7) On March 3, 1995, the ALJ issued a discovery order to the participants, directing them each to submit a Summary of the Case.

8) On March 7, 1995, the Agency filed a motion to limit discovery by prohibiting Respondent from obtaining Complainant's Adult & Family Services Division (AFS) file absent a showing of relevance. On March 8, 1995, the ALJ conducted a prehearing conference regarding the Agency's motion. During the conference, Respondent counsel argued that the AFS file was relevant in that the records it contained might show that Complainant had a criminal conviction or contain other

impeachment evidence. At the conclusion of the conference, the ALJ granted the Agency's motion and quashed the Respondent's subpoena based on Respondent's failure to establish relevance and confirmed the ruling in writing later that same day. The ALJ also declined to review the AFS file in camera.

9) On March 13, 1995, the Agency filed a Summary of the Case.

10) On March 13, 1995, the Respondent submitted a Summary of the Case. Respondent submitted an addendum on March 15, 1995.

11) On March 21, 1995, the hearing was convened. At the outset of the hearing, the Agency moved to amend the Specific Charges to name Richard Taylor, Sr., and Jackie Taylor as additional Respondents on a successor-in-interest theory based on newly acquired evidence obtained by the Agency on March 19, 1995, of the transfer of Chubby's from Respondent Myers to the Taylors on February 24, 1995. Respondent did not object. The ALJ declined to rule on the Agency's motion at that time and the Agency presented its case. At the start of the second day of hearing, the ALJ granted the Agency's motion, but ruled that the Taylors would have to be served with Amended Specific Charges and have an opportunity to file an answer before the hearing could be reconvened. The Agency moved to further amend the Specific Charges to name Richard Taylor, Jr., as an additional Respondent. Respondent did not object and the motion was granted. The hearing was then adjourned.

12) On April 4, 1995, the Agency prepared Amended Specific Charges

naming Thomas P. Myers, Richard A. Taylor, Jackie Taylor, and/or Richard Taylor, Jr., all dba Chubby's, as Respondents.

13) On April 13, 1995, Respondent Myers, through counsel Norris, filed an answer to the Amended Specific Charges.

14) On April 14, 1995, the hearing was scheduled to reconvene on June 1, 1995.

15) On April 20, 1995, Respondents Taylor, through counsel, filed an answer to the Amended Specific Charges.

16) On May 2, 1995, the Agency requested that a transcript be prepared of the tapes recorded during the hearing on March 21 and 22, 1995. This request was granted on May 17, 1995.

17) On May 18, 1995, the Agency filed a motion to amend the Amended Specific Charges based on newly acquired evidence obtained on May 17, 1995, indicating that Respondents Taylors had sold Chubby's on March 20, 1995. Specifically, the motion sought to delete Jackie Taylor and Richard Taylor, Jr. as Respondents and to add David Graf, Linda Graf, David Stoutenburgh, and Karen Stoutenburgh, each dba Chubby's, as Respondents based on a successor-in-interest theory. At the same time, the Agency moved for a postponement of the hearing based on the addition of the Grafs and Stoutenburghs as new Respondents and the need to serve them with the Second Amended Specific Charges.

18) Respondents did not object to a postponement of the hearing and on

May 19, 1995, the Agency's motion for a postponement was granted.

19) On May 22, 1995, Respondent Myers, through counsel Norris, filed an answer to the Second Amended Specific Charges.

20) On May 25, 1995, Respondents Taylor, through counsel, filed an answer to the Second Amended Specific Charges in which they objected to the addition of Respondents Graf and Stoutenburgh as successors-in-interest to Respondents Myers and Taylors.

21) On May 30, 1995, the Agency's motion to amend the Amended Specific Charges was granted on the basis that the Agency had no way of knowing about the transfer of assets from Respondent Myers to Respondents Taylor and from Respondents Taylor to Respondents Graf and Stoutenburgh until after the hearing had already commenced. At the same time, the hearing was set to reconvene on July 25, 1995.

22) On June 2, 1995, Respondent Taylor, through counsel, filed an answer to the Second Amended Specific Charges.

23) On June 20, 1995, Respondent Myers retained counsel William V. Deatherage to represent him in place of Scott Norris.

24) On June 20, 1995, Respondent Myers requested a postponement of the hearing based on the fact that Myers's new counsel had been previously scheduled to appear at a trial commencing July 25, 1995.

25) On June 23, 1995, the Agency moved for an Order of Default against Respondents Graf and Stoutenburgh

based on their failure to file a timely answer.

26) On June 27, 1995, the ALJ issued an Order of Default to Respondents Graf and Stoutenburgh in which said Respondents were given until July 7, 1995, to request Relief from Default.

27) On June 27, 1995, Respondent Myers's motion for a postponement was granted on the basis that Respondent Myers had not requested a previous postponement, that the request was timely, and there was no reasonable alternative to postponement, given the previous trial schedule conflict on the part of Respondent Myers's counsel.

28) On July 5, 1995, Respondents Graf and Stoutenburgh, through counsel, filed a motion for relief from default, in which it was represented, among other things, that Respondent Taylor sold Chubby's to Graf & Stoutenburgh, Inc., an Oregon corporation.

29) On July 17, 1995, the Agency filed a response to Respondents Graf and Stoutenburgh's motion for relief from default, indicating, among other things, that it would be appropriate to substitute Graf & Stoutenburgh, Inc. for Respondents Graf and Stoutenburgh if documentation was provided to establish ownership of the franchise and business assets in the name of Graf & Stoutenburgh, Inc.

30) On July 20, 1995, Respondents Graf and Stoutenburgh, through counsel, provided an Agreement for Sale showing that Graf & Stoutenburgh, Inc., purchased Chubby's from Respondent Taylor.

31) On July 31, 1995, the Agency requested that "Graf & Stoutenburgh,

Inc." be substituted, by interlineation for Respondents Graf and Stoutenburgh as individuals.

32) On August 1, 1995, the Agency's motion was granted. At the same time, Respondents Graf and Stoutenburgh were relieved of default and the charges against them dismissed. Respondent Graf & Stoutenburgh, Inc., was given until August 11, 1995, to file an answer to the Second Amended Specific Charges.

33) On August 7, 1995, Respondent Graf & Stoutenburgh, Inc., through counsel, filed an answer to the Second Amended Specific Charges.

34) On August 15, 1995, the hearing was scheduled to reconvene on January 9, 1996.

35) On September 19, 1995, all Respondents were notified that the hearing tapes from the first portion of the hearing had been transcribed and that transcription copies were available upon request.

36) On October 17, 1995, W.V. Deatherage withdrew as counsel for Respondent Myers.

37) On December 13, 1995, the ALJ sent out a directive in which all parties were required to submit original or supplemental case summaries and Respondents Taylor and Graf & Stoutenburgh, Inc., were required to inform the ALJ and the Agency, no later than December 18, 1995, which of the Agency witnesses who had already testified they wished to cross-examine.

38) On December 18, 1995, Respondent Taylor requested cross-examination of all of the Agency's

witnesses who had already testified except for Jack Chadd.

39) On December 20, 1995, the ALJ directed the Agency to make these witnesses available for cross-examination when the hearing reconvened.

40) On December 20, 1995, Larry B. Workman, attorney at law, notified all participants that he was now representing Respondent Myers.

41) On December 27, 1995, Respondent Taylor, through counsel, filed a case summary.

42) On December 28, 1995, the Agency filed a supplemental case summary and sent a copy of the Agency's original case summary to Respondents Taylor, Graf & Stoutenburgh, Inc., and Respondent Myers's most recent counsel.

43) On December 28, 1995, Respondent Graf & Stoutenburgh, Inc., through counsel, filed a case summary.

44) On December 28, 1995, Respondent Myers, through counsel, filed a case summary.

45) On December 28, 1995, Respondent Myers, through counsel, filed an answer to the Second Amended Specific Charges.

46) On January 2, 1996, the Agency advised the forum that an agreement had been reached between the Agency and Respondents Taylor and Graf & Stoutenburgh, Inc. and that it intended to file a motion to strike the answer filed by Respondent Myers on December 28, 1995.

47) On January 3, 1996, the Agency filed a motion to strike the answer filed by Respondent Myers on

December 28, 1995 on the basis that an answer had already been filed by Respondent Myers's previous counsel, the failure of the most recent answer to be accompanied by a motion to amend, and its untimeliness.

48) On January 4, 1996, the Agency case presenter, Respondent Myers's counsel, Larry Workman, and the ALJ participated in a prehearing conference in an attempt to resolve the issues raised by the Respondent Myers's December 28, 1995, answer and the Agency's motion to strike. During the conference, Mr. Workman moved to amend the answer and that motion was denied. The ALJ also rescinded the forum's December 20, 1995, ruling directing the Agency to produce its witnesses for cross-examination for the reason that Respondent Myers's previous counsel had already cross-examined them at the first hearing.

49) Other evidentiary issues regarding witness testimony were also resolved, including Mr. Workman's request to call Ms. Bracanovich as a witness to impeach Complainant's testimony based on statements the Complainant may have made to Ms. Bracanovich that contradicted her testimony at the first stage of the hearing. The forum denied this request, indicating that the basis for the ruling would be provided in the Proposed Order. The basis for this ruling is stated in the Opinion.

50) On January 4, 1996, the Agency and Respondents Taylor and Graf & Stoutenburgh, Inc. entered into a Stipulation Order for Dismissal of Claims, leaving Respondent Myers as the lone remaining Respondent.

51) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

52) During the hearing, the Agency moved to amend the amount of back pay sought downward to \$1,257.50, representing back pay from September 6, 1993, through the end of the third week in December 1993, computed as follows: (a) 15 weeks x 14 hours/wk. x \$4.75/hr. = \$997.50, plus (b) 14 weekends x \$40 tips = \$560, less (c) \$300 in interim earnings. The Agency's motion was granted.

53) On February 21, 1996, Respondent, through counsel, filed Exceptions to the Proposed Order.

FINDINGS OF FACT – THE MERITS

1) Beginning July 19, 1993, and continuing throughout the duration of Complainant's employment, Respondent Thomas P. Myers (hereinafter "Respondent") owned and operated a restaurant in Ashland, Oregon, under the assumed business name of Chubby's, and was an employer in the State of Oregon who engaged or utilized the personal services of one or more employees, reserving the right to control the means by which such services were performed.

2) Complainant is African-American, Irish, and English. Complainant appears to be African-American and Respondent was aware that Complainant was African-American while Complainant was employed by Respondent.

3) In or around September 1992, Respondent's stepfather, Richard

Taylor, obtained a franchise from Chubby's, a California-based restaurant chain, and opened a Chubby's restaurant in Ashland, Oregon.

4) Complainant was hired as a waitress when Taylor first opened the Ashland Chubby's (hereinafter "Chubby's"). Complainant worked as a waitress throughout her employment at Chubby's.

5) Shortly after Chubby's opened, Respondent was hired as a waiter with the idea that he would learn the business and eventually assume management functions. Respondent began performing management duties approximately six months after he was hired.

6) On July 19, 1993, Respondent became the sole owner of Chubby's.

7) Complainant and Ervil Jack, a male cook, were the only African-American persons employed by Chubby's during Complainant's tenure of employment. Everyone else, including Respondent, was Caucasian.

8) During Complainant's employment at Chubby's, Respondent referred to Complainant as a "black bitch", a "nigger", a "nigger bitch", and a "stupid nigger" in conversations with employees of Chubby's.

9) During Complainant's employment at Chubby's, Respondent also referred to a Caucasian dishwasher, Charlie Golden, as "my nigger who does nigger work in the back."

10) In August 1993, one of Respondent's cooks who knew he was looking for another cook suggested checking with the Oregon Employment Division. Respondent replied that he had already tried the Division and they

had sent him "nothing but niggers and burns".

11) During Ervil Jack's employment in July or August 1993, Respondent told an employee that he felt uncomfortable hiring Jack because he would be cooking in front of the public and he wasn't sure Ashland would be able to handle having a black man in the kitchen.

12) A number of Respondent's employees, Respondent's stepfather, and some regular customers never heard Respondent make any racial comments about black or African-American individuals.

13) Respondent referred to Complainant as a "stupid nigger" in the presence of Matt Coughlin, one of Respondent's cooks.

14) Respondent never made any racial comments about African-American individuals in Complainant's presence.

15) Respondent had a volatile temper and became easily upset.

16) Respondent was very concerned about employees failing to charge for food and became upset when he suspected that a waitress had not charged a customer for an item of food.

17) Deborah Rand, a waitress and Complainant's co-worker, failed to charge a customer for a food item on one occasion that Respondent was aware of. Respondent verbally counseled her, but did not write her up or threaten her with termination.

18) Theresa Nichols, a waitress and Complainant's co-worker, never failed to charge any customers for food items, but was accused by

Respondent on one occasion of doing so. She was not written up or disciplined on this occasion.

19) Rebecca Pinnock-Ward, a waitress and Complainant's co-worker, forgot to charge a customer for a food item "once in a while," but always caught her error before the customer left. Respondent accused her more than once of giving away food and yelled at her on those occasions and threatened to write her up.

20) Patrick Ludden, one of Respondent's cooks who was in charge when Respondent was not at Chubby's, was instructed by Respondent to check the waitress' tickets to make sure all food items were punched in. There were times Ludden observed that waitresses had failed to write down all food items that had been served to the customer. Ludden communicated these failures to Respondent. Respondent did not issue written warnings in response.

21) Matt Coughlin, another cook employed by Respondent, observed that occasionally a waitress would forget to charge for a food item and that Respondent would get upset when aware of this, sometimes making waitresses make up the difference out of their tips and threatening to write them up.

22) On at least three occasions, Respondent or a cook discovered that Complainant had forgotten to charge a customer for an item of food. On one of these occasions that occurred before Respondent became owner, Respondent yelled at Complainant in front of customers and accused her of "ripping off" Chubby's.

23) On Thursday, August 26, 1993, Nichols told Complainant that Respondent had called Complainant a "fucking nigger" and that Respondent had called Charlie Golden "his nigger" who did "nigger work".

24) Between August 26, 1993, and September 4, 1993, Rand told Complainant that Respondent had called her a "black bitch".

25) Nichols's and Rand's statements shocked Complainant and made her feel hurt and angry. She was upset in part because she realized that these comments had been circulating around behind her back for an undetermined amount of time.

26) Complainant had been a loyal employee and an excellent waitress who felt pride in her work and these statements made her believe that Respondent perceived her as "just a nigger".

27) After August 26, Complainant worked with Respondent on August 28 and 29, 1993, then did not work again until September 4 and 5, on which days Respondent was away from Chubby's on vacation.

28) On August 28, 1993, Complainant forgot to write up a side order of sausage on a customer's ticket. Respondent became aware of this and told Complainant of her error and that he had deducted the price of the sausage from Complainant's tip. Later that day, Respondent instructed Ludden to give Complainant a written warning over the incident, and dictated the wording of the warning to Ludden.

29) Respondent believed that he had the right to fire employees for their shortcomings, that he was obligated to

go through a certain procedure before firing them, and that "to write anybody up was my last resource".

30) At the time of the sausage incident, Respondent told Complainant that she would be fired if she forgot to charge a customer again.

31) On August 28, 1993, Ludden gave Complainant a written warning that stated:

"Improper use of register. All items written on guest checks shall be entered into register using proper procedures. Register tape is then stapled to guest check. Any items that are not on register tape and is given to a customer is considered improper procedures. This improper procedure is in reference to guest check #53101. If this improper procedure continues you will be reprimanded."

32) Complainant was the first waitress to be issued a written warning, a fact Complainant was aware of at the time she received the warning. Complainant was also aware that other waitresses had forgotten to charge for food items and had not been given written warnings.

33) When she received the written warning, Complainant believed that Respondent was either trying to get her to quit or "setting the stage" to fire her.

34) On August 28, 1993, after receiving the written warning, Complainant decided to resign. Complainant telephoned Jack Chadd, her boyfriend at the time and present husband, and stated that she could not work for Respondent any longer knowing that Respondent was referring to her as a

"nigger" and a "black bitch" behind her back. Complainant was crying and very upset during this conversation.

35) Although Respondent was generally perceived to be a harsh employer, Grimshaw, Dodson, and Complainant perceived that Respondent was particularly critical of Complainant.

36) On August 28, 1993, Complainant wrote a resignation letter to Respondent. She delivered this letter to Respondent in person on August 29. The letter read as follows:

"Tom M.;

"It has been brought to my attention, from fellow staff persons, that you have referred to me, using a racial slur, i.e. 'nigger'.

"For this reason and the continual demeaning and disparaging comments you have repeatedly made in regards towards customers, particularly [sic] the elderly and those who either look poor or appear to lead an alternative lifestyle; I can no longer, in good conscience, continue to work for you. I will not work for a company that allows the use of racist terms to be used, particularly, a boss that uses such terms, which I find offensive.

"My last day will be Sept. 5. I regret that I am not able to give a full two weeks notice, but I feel this will allow you to take your vacation as planned, and not cause hardship on you or the other employees.

"Alice Ferguson"

37) Respondent read Complainant's resignation letter when she delivered it. He responded by telling Complainant "I'm sorry to see you go, Alice, because you were a good

worker," but did not deny making the racist statements alleged in Complainant's resignation letter.

38) Complainant did not verbally confront Respondent about the racist statements alleged in her resignation letter because she felt very angry about them and didn't want to "create a scene" in the restaurant.

39) Respondent went on vacation for three days over Labor Day weekend and was absent from Chubby's during those days.

40) After submitting her resignation letter, but before September 5, 1993, Complainant told Grimshaw that she had heard Respondent was referring to her by racial names and that she could no longer work for Respondent. Complainant was upset and in tears during this conversation.

41) After submitting her resignation, but before September 5, 1993, Complainant was told by Christy Pischell, a co-worker, that Respondent had referred to Ervil Jack as a "nigger".

42) During a conversation with Coughlin, Respondent referred to Complainant as a "stupid nigger". Complainant was still employed by Respondent at that time. Coughlin did not report this remark to Complainant.

43) Respondent discharged Ervil Jack and Amy Beard, a white waitress, by failing to schedule them for any work hours based on Respondent's suspicion that one or both were stealing from the till.

44) While working for Respondent, Complainant told Dan Stebbins, one of Respondent's customers, that she couldn't wait to leave Respondent's employment and was going to sue

Respondent for calling her some unspecified names. Stebbins testified "If someone did that to me, I'd quit on the spot."

45) On September 10, 1993, Complainant sent a five page letter, accompanied by a copy of her letter of resignation, to Chubby's corporate headquarters. In the letter, she complained that Respondent had referred to her as a "fucking nigger" and a "black bitch", and that Respondent had referred to Ervil Jack as a "nigger" and Charlie Golden as an "ass-kisser" and "his nigger".

46) On August 27, 1993, Charlie Golden, Respondent's dishwasher, received a written warning that read as follows:

"You were one hour late this morning. You are aware that on Tuesday and Friday it's sceduled [sic] for you to start at 6:00 a.m. so as to complete the boiling out, cleaning and changing of oil in fryer before opening [sic] time. This written counseling is a result of your failure to comply with verbal warnings for excessive tardiness. Your tardiness places undo [sic] burden on your fellow employees. Failure to comply will result in immediate termination."

47) On September 8, 1993, Edith Grimshaw, a cook, received a written warning that read as follows:

"The practices and procedures on use of the time clock and time cards are designed to satisfy compliance with the Federal Wage and Hour Law and to protect the position of both the employee and the company under the law. Removal

of time card by employee from work place is a serious breach of company policy as well as possible violation of Federal Law and will result in disciplinary action (including demotion, suspension without pay, or discharge) being taken against the employee."

48) Starting in February 1994, Wendell Haynes, an African-American male, began coming into Chubby's on a regular basis to eat. At the time, Haynes was employed as a chef at the Ashland Hills Inn, a "gourmet" eating establishment. In May or June 1994, Respondent offered Haynes a job as a cook. Haynes declined the offer because he wanted to be a banquet chef at a fine hotel, whereas Chubby's is a low-priced family style restaurant. Although Haynes testified he considered Respondent to be his friend, except for two occasions, Respondent and Haynes never saw each other except when Haynes was a paying customer at Chubby's. One of those occasions was when Respondent ate dinner at the Ashland Hills Inn and the other was when Respondent contracted with Haynes to cook Thanksgiving dinner for himself and his girlfriend in 1994.

49) Complainant earned \$4.75 per hour while employed by Respondent and averaged \$20 per day in tips. Complainant worked Saturdays and Sundays at the time of her termination, averaging seven hours of work each day, and worked fewer hours one to two other days a week.

50) After her termination, Complainant unsuccessfully sought weekend work at Ashland restaurants until the third week in December 1993,

when she stopped actively seeking work. Complainant collected welfare benefits during this time and also attended school at Southern Oregon State College (SOSC), where she was studying to obtain a secondary teaching certificate. Complainant also earned \$300 performing work at SOSC in this time period. During this time, Complainant was the sole support of her three children who were living with her.

51) After her termination, Complainant had to borrow money from Chadd on several occasions to enable her to pay the rent. This was difficult for Complainant. Because Complainant was a student, her continued receipt of welfare benefits was uncertain from month to month.

52) Complainant's loss of income from Chubby's created a financial hardship for her. She was very upset and angry at Respondent's racial stereotype of her because "a nigger is less than human". Respondent's comments made her feel as though she had been "slapped in the face". After her termination, she felt upset whenever she would see former customers who asked why she was no longer at Chubby's or whenever she passed by Chubby's, which was frequent.

53) Bruce McLean, a vocational rehabilitation counselor in southern Oregon since 1981, testified as an expert witness on Respondent's behalf regarding job openings in the food service industry. Based on his knowledge of the job market in Ashland, McLean testified that in 1993, after Labor Day, it should have taken an experienced waitress no more than two weeks to get a job.

54) Respondent presented no evidence of any specific job openings for waitresses in the food service industry in Ashland from September 5, 1993, through mid-December 1993.

55) The testimony of Rand, Nichols, Dodson, Pinnock-Ward, Luden, Chadd, Coughlin, McLean, Stedmon, McAuliffe, Richard Taylor, Jackie Taylor, Keffer, Stebbins, Mayer, and Haynes was credible.

56) Grimshaw has filed a civil rights complaint against Respondent with the Bureau of Labor and Industries alleging unlawful discrimination and testified that she dislikes Respondent and considers herself a friend of Complainant. Despite this bias, she was found to be a credible witness based on her forthright manner of testimony and the absence of internal inconsistencies in her testimony or prior inconsistent statements.

57) Complainant's testimony was found to be credible based on her forthright manner of testimony, the absence of internal inconsistencies in her testimony or prior inconsistent statements, and the corroborative testimony of other credible witnesses.

58) The testimony of Kristy Hickman and her husband, Ronald Hickman, was not credible. In Ms. Hickman's case, her testimony that Complainant was a poor worker and that she didn't know Complainant was African-American diverged dramatically from that of virtually every other witness. She also testified she worked for Respondent for three months in the summer of 1993, whereas documentary evidence established she only worked two weeks. After offering her opinion as to Complainant's poor work

performance, she then testified, under cross-examination, that she never worked the same shift as Complainant or directly with Complainant. Mr. Hickman similarly testified that his wife worked three to four months for Respondent in the summer of 1993. His testimony that Complainant was "grumpy" towards customers and that Respondent "was mellow" similarly diverged significantly from the testimony of other witnesses. Mr. Hickman testified that he and Respondent are friends who see one another regularly, revealing a bias that was reflected in his testimony.

59) The testimony of Respondent was not entirely credible. In places, he was evasive in answering questions. His testimony that he never made any racial statements is not credible, given the overwhelming amount of testimony to the contrary by other credible witnesses. His testimony that Complainant routinely called him obscene names, e.g., "fucking asshole" and "fucking prick", although uncontroverted, was unbelievable based on the inherent improbability of his explanation as to why he tolerated this behavior. His testimony that he offered Wendell Haynes a job in expectation that Haynes would accept was simply not credible in light of the fact that Haynes was working at the time as a chef at a fine dining establishment and hoped to make a career as a chef at a fine dining hotel, whereas Chubby's was a low-priced family restaurant. Finally, Respondent's testimony that Complainant would not have been terminated for another violation after the August 28, 1993, written warning was controverted by a strong inference

created by Respondent's own testimony that "to write anybody up was my last resource." The Forum has found credible only those portions of Respondent's testimony which were verified by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) Beginning July 19, 1993, and continuing throughout the duration of Complainant's employment, Respondent Thomas P. Myers owned and operated a restaurant in Ashland, Oregon, under the assumed business name of Chubby's, and was an employer in the State of Oregon who engaged or utilized the personal services of one or more employees, reserving the right to control the means by which such services were performed.

2) Complainant, an African-American female, was employed by Respondent's predecessor-in-interest from September 1992 through July 18, 1993, and was employed by Respondent from July 19 through September 5, 1993.

3) During Complainant's employment with Respondent, Respondent referred to Complainant and an African-American co-worker by using racial slurs, e.g., "nigger", in conversations with Complainant's co-workers.

4) On August 26, 1993, one of Complainant's co-workers informed Complainant that Respondent had referred to Complainant, in a conversation with the co-worker, as a "fucking nigger" and in the conversation had called Respondent's white dishwasher "his nigger" who did "nigger work".

5) Between August 26 and September 4, 1993, another co-worker informed Complainant that Respondent

had referred to Complainant, in a conversation with the co-worker, as a "black bitch".

6) Respondent's racial remarks were unwelcome to Complainant and she was shocked and offended by them.

7) On August 28, 1993, Respondent issued a written warning to Complainant for forgetting to charge a customer for a side order of sausage and told Complainant she would be terminated if she made the same mistake again. Complainant was aware that other Caucasian waitresses had forgotten to charge customers for items and that she was the first person to be issued a written warning.

8) On August 28, 1993, Complainant decided to resign because of the racial slurs and because she perceived Respondent was either trying to force her to quit or setting her up for discharge.

9) On August 29, 1993, Complainant gave Respondent a resignation note that accused him of making racial slurs. Respondent read the note and did not deny Complainant's accusation.

10) As a result of Respondent's offensive remarks and the August 28, 1993, written warning, Complainant experienced considerable mental suffering.

11) As a result of her termination, Complainant suffered lost wages, including tips, and experienced considerable mental suffering.

CONCLUSIONS OF LAW

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

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

3) ORS 659.030(1)(b) provides, in part:

"It is an unlawful employment practice for an employer, because of an individual's race * * * to discriminate against such individual in * * * terms, conditions or privileges of employment."

Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(b) by the creation of a hostile, intimidating, and offensive work environment based on Complainant's race.

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

"It is an unlawful employment practice for an employer, because of an individual's race * * * to discharge from employment such individual."

Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(a) by constructively discharging Complainant.

5) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.030, 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

Hostile Work Environment

Complainant alleges that Respondent subjected her to a hostile and offensive working environment based on her race. A prima facie case on this issue in this case contains the following elements:

- (1) The Respondent is an employer as defined by statute;
- (2) The Complainant was employed by Respondent;
- (3) The Complainant is a member of a protected class (race);
- (4) The Respondent engaged in unwelcome conduct directed at Complainant because of Complainant's race;
- (5) The conduct had the purpose or effect of unreasonably interfering with Complainant's work performance or creating an intimidating, hostile, or offensive working environment;
- (6) The Complainant was harmed by the conduct.

In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 252 (1995).

The Agency presented a prima facie case through credible testimony by Complainant and Agency witnesses that Respondent referred to Complainant and two co-workers by racial slurs, that Complainant had knowledge, while still employed by Respondent, that Respondent had made the slurs, and that Complainant found them to be extremely offensive. Respondent's defense that the comments were never made is simply not believable.

Respondent also argues against a hostile environment finding based on

the brief amount of time Complainant remained employed after she became aware of the slurs. This Forum has held in the past that harassing activity of a racial nature must be severe and pervasive enough to create what a reasonable person would find to be an offensive working environment. *In the Matter of Auto Quencher*, 13 BOLI 14, 22 (1994). The Forum's approach to this issue recognizes an inverse relationship between the requisite severity and pervasiveness of harassing conduct. As the severity of the conduct increases, the frequency of the conduct necessary to establish harassment decreases. *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183, 196 (1992). In this case, the only way the conduct might have been more severe would have been for Respondent to call Complainant a "nigger" to her face. His failure to deny that he had made racial slurs towards Complainant, when confronted with Complainant's resignation letter, effected a similar result. Consequently, even though Complainant only worked with Respondent for two days after she learned of the racial slurs and an additional two days at Chubby's when Respondent was absent, the Forum finds that Complainant was subjected to a hostile environment due to the severity of the conduct.

Constructive Discharge

The elements of a constructive discharge are as follows:

- (1) The Respondent must have intentionally created or intentionally maintained discriminatory working condition(s) related to the Complainant's protected class status;

(2) Those working conditions were so intolerable that a reasonable person in the Complainant's position would have resigned because of them;

(3) The Respondent desired to cause the Complainant to leave employment as a result of those working conditions or knew that Complainant was certain, or substantially certain, to leave employment as a result of those working conditions; and

(4) The Complainant did leave the employment as a result of those working conditions.

McGanty v. Staudenraus, 321 Or 532, 557, 901 P2d 841, 856 (1995).

In this case, the Respondent intentionally made repeated references to Complainant in the workplace using racially denigrating terms, e.g., "nigger". Based on statements made by at least one co-worker, Complainant reasonably believed that Respondent had called her a "nigger", the ultimate pejorative for an African-American individual coming from a white supervisor, and made her decision to resign primarily based on this racial slur, with the added impetus of the August 28 written warning, which she perceived as a harbinger of dismissal. *Auto Quencher, supra*, at 21. The Forum finds that a reasonable person in Complainant's position would have resigned under these circumstances. The reasonableness of Complainant's decision to resign was further validated when Respondent did not deny having made the racial slur at the time Complainant submitted her resignation letter. Finally, in this day and age the Forum has no difficulty in imputing knowledge

to Respondent of the substantial certainty that Complainant would quit once she learned of the racial slurs Respondent used when referring to her. Whether or not Respondent intended the comments to be passed on to Complainant is inconsequential; the fact is that they were passed on.

Testimony of Case Presenter

The basis for denying Respondent's request to call the Agency case presenter as a witness is twofold. First, no evidence was ever put on the record to show that Ms. Bracanovich had in fact ever spoken to the Complainant about the issues outside of the hearing or was a witness to any material issue. Consequently, there was no showing of relevancy. Second, although the attorney-client privilege does not exist between an Agency case presenter and a Complainant, even when the case presenter, as in Ms. Bracanovich's case, is a member of the Oregon bar, there is an important policy reason for preventing a Respondent from calling the Agency case presenter to testify as an impeachment witness as to the substance of conversations between the case presenter and the Complainant.

ORS 183.450(7) allows a state agency to be represented at contested case hearings by agency employees with the consent of the Attorney General. The Attorney General has given this consent to the Bureau, and the Bureau has designated individual employees as case presenters to perform this function. At a contested case hearing, the case presenter is authorized to perform every function related to litigation that the Attorney General would perform except presenting legal

argument. ORS 183.450(8), OAR 839-50-230. An essential component of litigation is that the attorney or case presenter representing the client communicate candidly with the client regarding all facts within the client's knowledge that are relevant to the case. Here, although the client is technically the agency, the real party in interest is the Complainant. It is the Complainant who was subjected to the alleged discriminatory conduct and the Complainant who will be the beneficiary of any award of damages, not the agency. It is illogical to assume that the legislature and the Attorney General intended for an agency employee to perform all the essential functions of an attorney except for presenting legal argument and simultaneously intended to place this employee in the untenable position of being subject to examination, either by deposition or during a contested case hearing, as to the substance of any conversations between the employee and the Complainant whose case is being heard. This interpretation of the law would effectively hamstring the agency case presenter in performing the very task the legislature delegated to the case presenter to perform.

Damages

Complainant seeks damages for back pay and mental distress as a result of Respondent's unlawful employment practices.

Back Pay

Complainant testified that she unsuccessfully sought restaurant work with a work schedule similar to the one she held with Respondent from the time of her termination until the end of the third week in December 1993. She

also testified that she earned \$300 in interim alternative employment during that time period and received welfare benefits. Welfare benefits are not deductible from damages owed to an injured party based on the collateral source rule. *In the Matter of Richard Niquette*, 5 BOLI 53, 63 (1986). Complainant's testimony concerning the specifics of her job search was not impeached. In rebuttal, Respondent presented uncontroverted testimony from a vocational rehabilitation expert that a waitress looking for work in the Ashland area in the fall of 1993 should have been able to find work within two weeks. Respondent has the burden of proof to show that Complainant failed to mitigate her damages by seeking an available position for which she was qualified. *In the Matter of RJ's All American Restaurant*, 12 BOLI 24, 31-32 (1993). Evidence of general availability of employment in the food service industry for waitresses is insufficient to meet Respondent's burden of proof on this issue, given Complainant's unimpeached testimony concerning her job search. The Forum finds that Complainant is entitled to back wages as computed in Procedural Finding of Fact 52, a total of \$1,257.50.

Mental Suffering

Complainant testified credibly as to the types and extent of mental suffering she experienced as a result of Respondent's unlawful employment practices. These included shock, anger, hurt, upset, humiliation, and financial hardship. Complainant's mental suffering was verified by other credible witnesses. In a 1994 case before this Forum, the Complainant was awarded \$15,000 for mental suffering damages

based solely on the existence of a hostile work environment created by Respondent's racial slurs, one of which was made directly to Complainant. *Auto Quencher, supra*. This case also involves termination, which created significant financial hardship and other related problems for Complainant, in addition to the emotional distress she experienced from being indirectly subjected to racial slurs. Consequently, the Forum concludes that \$20,000 is an appropriate award of damages for mental suffering.

Offset

On January 4, 1996, the Agency, Richard A. Taylor, Sr., and Graf & Stoutenburgh, Inc., the alleged successors-in-interest in this case, stipulated to the entry of an order in which the alleged successors agreed to pay Complainant \$2,900 in exchange for having the claims against them dismissed with prejudice and Complainant's execution of a general release, with the Agency being entitled to judgment against Richard A. Taylor, Sr., if the sum of \$2,900 was not paid to Complainant in a reasonable period of time. The question here is whether Respondent is entitled to an offset, *i.e.*, a reduction in the amount of damages awarded to Complainant, based on this stipulation.

The purpose of a damage award resulting from charges of unlawful discrimination is to make the Complainant whole. In this case, Complainant's damages have been fixed at \$21,257.50, the amount of damages sought by the Agency to recompense Complainant for her back pay and mental suffering and the gross amount of damages already proposed as an

award in this Opinion. In the related field of tort law, the general rule is that a payment received from one tort-feasor in consideration of a release must be applied in some manner in reduction of the damages recoverable from the other tort-feasors. 66 Am. Jur. 2d, Release § 41. This is based on the rule that an injured party is entitled to only one recovery for a single injury, and a joint tort-feasor is not a collateral source that can be ignored under the collateral source rule. 22 Am. Jur. 2d Damages § 559. In Oregon, this issue was resolved in 1991, where the Court of Appeals held that an injured party who settles a tort claim with a joint tort-feasor before trial and proceeds against the remaining defendant is entitled, upon prevailing, to a judgment for the difference between the settlement and the actual damages. *Dee v. Pomeroy*, 109 Or App 114, 120-21, 818 P2d 523 (1991). The Forum adopts this line of reasoning and concludes that the \$2,900 consideration stipulated to in the Order of Dismissal between the Agency and the alleged successors-in-interest should be subtracted from Complainant's gross damage award of \$21,257.50, making Complainant's net damage award \$18,357.50.

Respondent's Exceptions

Respondent filed exceptions to the Proposed Order's findings and conclusions about lost wages due to the Complainant, the mental suffering award, and the ALJ's ruling that Respondent could not call the Agency case presenter as a witness to testify as to statements made by the Complainant.

First, Respondent contends that the Agency's amendment regarding the amount of lost wages due to the Complainant, as reflected in Finding of Fact 52 (Procedural), should not have been granted for the reason that it is not supported by the evidence. The amendment lowered the back pay sought by the Agency from \$4,918 to \$1,257.50. Although it is true that the representation by the case presenter was the only factual matter offered in supported of the amendment, Respondent's exception is disallowed for the reason that Respondent is not prejudiced, but actually benefits, from the amendment.

Second, Respondent contends that Finding of Fact 50 (The Merits) is in error because it is not supported by any admissible evidence. A review of the record reveals that Complainant testified that she actively sought work subsequent to her termination. There was no specific testimony elicited from Complainant or other evidence presented as to when she stopped looking for work. Respondent bears the burden of showing that Complainant didn't look for work or when Complainant stopped looking for work. Here, the only fact not supported by actual testimony is whether Complainant actually stopped looking for work in "third week in December". This conclusion is not inconsistent with Complainant's testimony as to her mitigation efforts and Respondent has failed to prove otherwise.

Respondent excepts to Proposed Finding of Fact 54 (The Merits) inasmuch as it states Respondent presented no evidence of any "actual" job openings. This finding is inaccurate

and Finding of Fact 54 has been changed to reflect that no evidence was presented of any "specific" job openings.

The reasoning in the Proposed Order denying Respondent the opportunity to examine the Agency case presenter is well-founded and Respondent presents no legal authority to justify modification of the ALJ's ruling.

Finally, Respondent excepts to the computation of the back pay and award of mental suffering. The back pay computation has already been addressed. The mental suffering award is adequately supported by evidence in the record and precedent in this Forum.

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, THOMAS P. MYERS is hereby ordered to:

1) Deliver to the Fiscal Services 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 Alice L. Ferguson-Chadd, in the amount of:

a) ONE THOUSAND TWO HUNDRED FIFTY-SEVEN DOLLARS AND FIFTY CENTS (\$1,257.50), less appropriate lawful deductions, representing wages Complainant lost between September 6, 1993, and December 17, 1993, as a result of Respondent's unlawful practice found herein; PLUS

b) INTEREST AT THE ANNUAL RATE OF NINE PERCENT (9%) on said wages from January 1, 1994, until

paid, computed and compounded annually; PLUS

c) SEVENTEEN THOUSAND ONE HUNDRED DOLLARS (\$17,100), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice found herein; PLUS

d) Interest on said damages for mental suffering at the legal rate, accrued between the date of this Final Order and the date Respondent complies herewith, to be computed and compounded annually.

In the Matter of

TOMAS O. BENITEZ,
dba Tomas Benitez Farm Labor
Contractor, Respondent.

Case Number 09-96
Final Order of the Commissioner
Jack Roberts
Issued March 14, 1996.

SYNOPSIS

Where Respondent failed to pay his tax liabilities in compliance with federal and state laws and owed in excess of \$100,000 in taxes, fees, and assessments to various government agencies and demonstrated by his repeated failure to satisfy outstanding judgments that he lacked the character, competence, and reliability necessary to act as a farm labor contractor, the Commissioner denied Respondent

a farm labor contractor license, pursuant to ORS 658.445. OAR 839-15-145; 839-15-520(2) and (3)(d).

The above-entitled contested case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 14, 1995, in the Bureau of Labor and Industries conference room of the State Office Building, 165 East 7th Avenue, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Tomas O. Benitez (Respondent) was present throughout the hearing and not represented by counsel.

The Agency called as witnesses Jlye Robertson, Administrative Specialist for the Wage and Hour Division Licensing Unit (by telephone); Nedra Cunningham, Compliance Manager for the Wage and Hour Division Farm Labor Unit (by telephone); Eduardo Sifuentez, Compliance Specialist, Wage and Hour Division; and Michael Henderson, Revenue Agent for the Oregon State Employment Department (by telephone).

Respondent called his wife, Paula Benitez, and himself as witnesses.

Vicky Guillen, appointed by the Forum to act as interpreter for Respondent, was present, but did not act as interpreter for Respondent, who the Forum determined at hearing was able to participate in fluent English.

Having fully considered the entire record in this matter, I, Jack 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 July 14, 1995, the Agency issued a Notice of Proposed Refusal to Renew a Farm Labor Contractor's License (Notice) to Respondent. The Notice informed Respondent that the Agency intended to refuse to renew Respondent's farm labor contractor license, pursuant to ORS 658.445(3) and OAR 839-15-520(3)(d). The Agency based its action on Respondent's alleged failure to comply with federal, state, or local laws or ordinances relating to the payment of income taxes, unemployment compensation tax, and other taxes, fees, or assessments by owing \$124,835.32 to the IRS, Oregon Department of Revenue, Oregon Department of Employment, and Marion County, Oregon in unpaid taxes and fees, in violation of OAR 839-15-520(3)(d). The Agency included with its notice a document in Spanish referencing the notice and the necessity of an answer and a Spanish version of the Notice of Contested Case Rights and Procedures.

2) The charging document with its attachments in Spanish were served on Respondent by certified mail on July 17, 1995.

3) By letter dated September 9, 1995, Respondent requested a hearing on the Agency's intended action and submitted his answer in English. In his answer, Respondent admitted the allegations and suggested

mitigating circumstances, which included assertions that he was on a payment plan with his creditors.

4) On September 28, 1995, the Agency requested a hearing from the Hearings Unit.

5) On October 5, 1995, the Hearings Unit issued to Respondent and the Agency a Notice of Hearing, which set forth the time and place of the requested hearing. With the hearings 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 Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420, regarding the contested case process.

6) On November 3, 1995, the ALJ issued a discovery order in Spanish and in English 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 November 10, 1995. The Agency filed its case summary prior to the issuance of the discovery order. Respondent did not file a case summary.

7) In a pre-hearing conference, the Forum determined that Respondent was able to speak and understand English and would not need an interpreter.

8) At the start of the hearing, Respondent said he had received and understood the Notice of Contested Case

Rights and Procedures and had no questions about it.

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

10) On January 31, 1996, the Hearings Unit issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten (10) days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT – THE MERITS

1) Respondent, a sole proprietor, was a licensed farm labor contractor between February 9, 1994, and February 28, 1995, during which time he did business as Tomas Benitez Farm Labor Contractor.

2) On April 8, 1994, Respondent filed a form WH-152 pursuant to OAR 839-15-350 notifying the Agency that between March and October 1994, Respondent had agreements with several farmers to provide crews for strawberry, squash, and garlic harvesting, hoeing and irrigation, tree and crop planting, and Christmas tree harvesting, and that his harvest crew consisted of 20 to 30 workers.

3) By letter dated August 9, 1994, Compliance Manager Cunningham advised Respondent that his license was in jeopardy due to an outstanding judgment for \$4,472.72 recorded by the Employment Department against Respondent. The letter read, in part:

"ORS 658.445 states, 'The Commissioner of the Bureau of Labor and Industries may revoke,

suspend or refuse to renew a license to act as a labor contractor if, (3) The licensee's character, reliability or competence makes the licensee unfit to act a [sic] farm labor contractor.' OAR 839-15-145 (1) states, 'The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules include, but are not limited to, consideration of: (d) Whether a person has unsatisfied judgments or felony convictions.'

"*****

"You must provide one of the following on or before AUGUST 24, 1994:

"1. Written evidence that you have satisfied the judgment, or

"2. Entered into a payment plan to satisfy the judgment (failure to make payments as per the plan could result in license revocation, ORS 658.445 and OAR 839-15-145(1)(b)).

"Note: Failure to provide the information required above may result in the . . . refusal to renew your license, if you are currently licensed."

Cunningham sent a second and final warning letter dated October 27, 1994, to Respondent which reiterated the need for Respondent to cure the judgment either by paying it off or by entering into a payment plan to do so. Respondent did not respond to either letter.

4) On February 24, 1995, Respondent made application for a renewal of his farm labor contractor's license, which was due to expire on February 28, 1995. In response to question

number 21 on the application form, Respondent wrote, "Yes, we have filed Chapter 13. Which is 100% payable every bill we owe will be paid [sic] in full in over the next 3 yr's with this plan."

5) Respondent filed a bankruptcy petition in June of 1994. At the time of his bankruptcy petition, Respondent's total liabilities exceeded \$100,000. Proofs of claim were filed by Respondent's creditors showing that Respondent owed \$94,240.38 to the Internal Revenue Service for back taxes, \$21,921.22 to the Oregon Department of Revenue for back taxes, \$4,681.91 to the Oregon Employment Department for employment taxes owed, and \$19,334.90 to SAIF Corporation for unpaid workers' compensation insurance and fees owed between April 1990 and June 1994. Respondent reported his gross business income for the 12 months prior to filing his petition as \$91,290.

6) Respondent was unable to comply with the Chapter 13 plan to pay off his debts and moved to dismiss the bankruptcy proceeding. His Chapter 13 case was dismissed by the bankruptcy judge on April 27, 1995.

7) In March 1995, Respondent entered into a post-petition agreement with the Oregon Employment Department to pay off amounts due on employment taxes after the bankruptcy filing date. Respondent's payments under the payment schedule were sporadic and short lived. For the duration of Respondent's bankruptcy case and since its dismissal, the Employment Department has received a total

of \$700 for amounts covered under both the Chapter 13 plan and the post-petition agreement. Respondent currently owes the Employment Department's Unemployment Compensation Trust Fund \$6,390.70 for three outstanding judgments (also known as warrants) dating from September 1992 to June 1995.

8) Since the dismissal of his bankruptcy case and at the time of hearing, Respondent's obligations to the IRS, Oregon Department of Revenue, Oregon Employment Department, SAIF Corporation, and other creditors exceed \$100,000.

9) Between February 1994 and February 1995, Respondent did the payroll on only one farm labor contract. His workers were paid directly by the farmers on all other contracts.

10) Some of Respondent's debts accrued before he was licensed in February 1994. After he was licensed in February 1994, Respondent continued to amass federal and state income tax, unemployment compensation tax, various other business related taxes, fees, and assessments. Respondent purchased a video store and relied on his wife to handle the finances for both the video and farm labor businesses. His wife was responsible for tax related payments and the payroll. Respondent knew that the various taxes were not being paid, but did not know that interest and penalties were accruing. Some of the money he made from farm labor contracts was used for video store expenses. Based on advice from the IRS, Respondent filed a Chapter 13 bankruptcy petition in June

1994. He cannot read or write and was dependent on his wife to handle business related matters, including the payment agreements made during and after the bankruptcy proceedings were voluntarily dismissed. Respondent blames, in part, the seasonal nature of farm labor work and the unpredictability of the weather for his inability to keep up payments on his judgments. Respondent's work experience is limited to farm labor and without a farm labor license he foresees an inability to pay his current obligations.

11) Prior to receiving his license, Respondent passed the farm labor contractor examination administered by the Agency's licensing unit. He took the exam in Spanish and was assisted by his wife.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent was a farm labor contractor licensed by the Bureau of Labor and Industries between February 9, 1994, and February 28, 1995.

2) At material times herein, Respondent failed to pay \$94,240.38 in taxes to the Internal Revenue Service.

3) At material times herein, Respondent failed to pay \$21,921.22 in taxes to the Oregon Department of Revenue.

4) At material times herein, Respondent failed to pay \$6,390.70 on three judgments to the Oregon Employment Department for unpaid employment taxes.

5) At material times herein, Respondent failed to pay \$19,334.90 to SAIF Corporation for workers' compensation insurance taxes and fees.

6) At material times herein, Respondent entered into both a Chapter 13 bankruptcy plan and a post-bankruptcy petition plan with the Oregon Employment Department to satisfy the amounts he owed to various governmental agencies and failed to make the payments required under each plan.

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 658.405 to 658.485.

2) ORS 658.445 provides that the Commissioner of the Bureau of Labor and Industries "may revoke, suspend or refuse to renew a license to act as a labor contractor upon the commissioner's own motion or upon complaint by any individual, if.

"(3) The licensee's character, reliability or competence makes the licensee unfit to act as a farm labor contractor."

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.

"(d) Whether a person has unsatisfied judgments ***."

OAR 839-15-520(2) provides:

"[w]hen the applicant for a license or a licensee demonstrates that the applicant's or licensee's character, reliability or competence makes the applicant or licensee

* Question #21 inquires, "Are there any judgments or administrative orders of record against you? If yes is answered to . . . question 21, attach details."

unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the license application be denied or license of the licensee [not be renewed.]"

OAR 839-15-520(3)(d) provides, in part:

"[f]ailure to comply with federal, state or local laws or ordinances relating to the payment of wages, income taxes, social security taxes, unemployment compensation tax or any tax, fee or assessment of any sort" demonstrates that the "applicant's or licensee's character, reliability or competence make the applicant or licensee unfit to act as a Farm or Forest Labor Contractor."

Respondent's unsatisfied judgments involving the failure to pay unemployment compensation tax, federal and state income taxes, and other taxes, fees, and assessments in compliance with state and federal law demonstrate Respondent's unfitness to act as a farm labor contractor. Under the facts and circumstances of this record, and according to the applicable law in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to refuse to renew and may deny a license to Respondent to act as a farm labor contractor.

OPINION

The Agency proposed to refuse to renew Respondent's farm labor contractor license based on Respondent's failure to comply with federal and state laws related to the payment of income taxes, unemployment compensation taxes and other taxes, fees, and assessments, which demonstrate that

Respondent's character, competence, or reliability make him unfit to act as a farm labor contractor. Respondent admits that he has not paid his tax liabilities in compliance with state and federal law. He also admits that the amount he owes various state and federal agencies exceeds \$100,000 and that his sporadic attempts to make payments have failed. Though his demeanor at hearing was penitent, Respondent failed to convince this Forum that he has the character, competence, or reliability to act as a farm labor contractor. Respondent asks the Forum to take into account his lack of education, his reliance on his wife to operate the financial arm of his business, and the seasonal nature of his work, which renders him unable to make payments on the multiple judgments. In light of the ongoing and considerable debt Respondent owes as a result of his failure to comply with state and federal law, those factors tend to enhance rather than negate the risk he poses to potential farm workers should his license be renewed. It is incumbent upon farm labor contractors to meet their financial obligations, particularly those imposed by law. The purpose of the farm labor contracting statutes – to protect the workers – is frustrated where contractors fail to meet their statutory obligation to pay income and unemployment compensation taxes. By failing to meet his tax obligations and allowing the debts to accrue over time resulting in substantial judgments, Respondent seriously jeopardizes his ability to meet a farm labor payroll. That Respondent invested some of his farm labor contracting earnings in a video store enterprise and reportedly grossed over \$90,000

in the year prior to June 1994 suggests that his difficulty in meeting his tax obligations has little to do with the seasonal nature of his business, the predictability of the weather, or Respondent's education level. Establishing the ability to comply with state and federal laws relating to the payment of wages and taxes is elemental in farm labor contractor licensing and Respondent has demonstrated that he cannot be depended on to meet the financial obligations imposed on him by law.

This Forum has consistently held that where the licensee demonstrates that his or her character, reliability, or competence makes the licensee unfit to act as a farm labor contractor, the Commissioner may refuse to renew the license. *In the Matter of Jose Linnan*, 13 BOLI 24 (1994); *In the Matter of Alejandro Lumbreras*, 12 BOLI 117 (1993); *In the Matter of John Mallon*, 12 BOLI 92 (1993); *In the Matter of Clara Perez*, 11 BOLI 181 (1993); *In the Matter of Efrain Corona*, 11 BOLI 44 (1992). Respondent has produced no evidence that he is fit to act as a farm labor contractor. The Forum finds that the great weight of the evidence on the record shows that Respondent does not have the necessary character, competence, or reliability to act as a farm labor contractor and the order below is an appropriate disposition of Respondent's application for renewal of his license.

ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503, the Commissioner of the Bureau of Labor and Industries hereby denies TOMAS O. BENITEZ, dba Tomas Benitez Farm Labor Contractor, a license to act

as a farm labor contractor, effective on the date of the Final Order. TOMAS O. BENITEZ 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).

**In the Matter of
DANNY R. JONES,
dba J. J. Security & Patrol,
Respondent.**

Case Number 10-96
Final Order of the Commissioner
Jack Roberts
Issued March 14, 1996.

SYNOPSIS

Where Respondent submitted an answer to the Order of Determination and requested a hearing, but failed to appear at the hearing, the Commissioner found Respondent in default. The Agency made a prima facie case supporting the Agency's Order of Determination on the record that Respondent willfully failed to pay Claimant all wages due upon termination, violating ORS 652.140(1) and OAR 839-20-030 (overtime wages). The Commissioner ordered Respondent to pay the wages due plus civil penalty wages. ORS 652.140(1); 652.150; 652.360; 653.261(1); OAR 839-20-030(1).

The above-entitled contested case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 12, 1995, 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 Alan McCullough, an employee of the Agency. Tory J. Schroeder (Claimant) was present throughout the hearing. Danny R. Jones (Respondent), after being duly notified of the time and place of this hearing, failed to appear in person or through a representative.

The Agency called as witnesses Tory J. Schroeder, Claimant; Irene Ragan, former Respondent employee; James Orchard, former Respondent employee; and Margaret Trotman, Compliance Specialist, Bureau of Labor and Industries.

Having fully considered the entire record in this matter, I, Jack 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 August 7, 1995, Claimant filed a wage claim with the Agency in which he alleged that he had been employed by Respondent and that

Respondent had failed to pay wages earned and due to him.

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

3) On September 11, 1995, 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 \$1,079.38 in wages and \$1,117 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 September 14, 1995, Respondent filed what is presumed to be an answer to the Order of Determination and requested a contested case hearing. The answer asserted:

"Tory Jason was on a salary, \$300 every two weeks, \$600 a month. Look at the check.* I Captain Jones required for [sic] a hearing. Thank you for your time in this matter."

This Forum has presumed the allegations in the Order of Determination are denied.

5) On October 5, 1995, 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 hearing rules, OAR 839-50-000 to 839-50-420.

6) On November 27, 1995, the Agency moved for an order excluding firearms and other dangerous weapons from the hearings room and adjacent Bureau of Labor and Industries offices. The ALJ found that, as a matter of law, no person, other than a sworn officer of the law, is permitted to possess a firearm or any dangerous weapon while in or on a public building, including the entire state office building and adjacent parking lot, and issued a ruling to that effect on November 29, 1995.

7) On November 30, 1995, the forum received the Agency's request for a discovery order pursuant to OAR 839-50-200 encompassing items requested by the Agency from Respondent on November 16 and 17, 1995, but not received. On November 30, 1995, the ALJ issued by FAX and by first class mail a discovery order for the requested items and a discovery order requiring both participants to submit a summary of the case pursuant to OAR 839-50-200 and 839-50-210. The Agency submitted a timely summary. The discovery orders were directed to Respondent at 9945 SE Oak Street, Suite 106, Portland, Oregon 97216-2341 and 5229 N Cecilia Street, Portland, Oregon 97203. Respondent

did not produce the requested documents nor did he file a summary.

8) At the time and place set forth in the Notice of Hearing for this matter, the Respondent did not appear or contact the Agency or the Hearings Unit. Pursuant to OAR 839-50-330(2), the ALJ allowed Respondent 30 minutes to appear at the hearing. At the end of that time, Respondent had still not appeared or contacted the Agency or the Hearings Unit. The ALJ then found Respondent in default as to the Order of Determination, pursuant to OAR 839-50-330(2), for failure to attend the hearing, and proceeded with the hearing.

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

10) On February 7, 1996, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten (10) days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During times material herein, the Respondent, a person, did business as J.J.J. Security & Patrol, a personal services business located in Portland, Oregon. He employed one or more persons in the State of Oregon.

2) From on or about May 23, 1995, to on or about June 25, 1995, Respondent employed Claimant as a security guard. Respondent furnished the equipment and the uniform Claimant used on the job. Respondent

* The Hearings Unit received only the answer to the charging document. There were no attachments or "check" to "look at" when the answer was forwarded to the Hearings Unit by the Agency.

detailed and controlled how Claimant was to perform his duties. Claimant went through a short period of training to learn the patrol sites and how to make out shift reports. He generally worked a six hour shift six days per week, including weekends, but, on occasion, his shifts extended to between 11 and 14 hours. During his employment, he either patrolled the sites with co-worker Ragan or co-worker Orchard.

3) Respondent and Claimant agreed orally that Claimant's starting pay was \$5.00 an hour. Respondent and Claimant also agreed orally that when Claimant achieved the rank of sergeant, which occurred on May 28, 1995, he was to receive \$5.50 an hour. Claimant was required by Respondent to sign a statement which read:

"J.J.J. Security and Patrol does not pay overtime for work on holidays. All regular time, holidays and weekends, is paid at regular rates. I do, hereby, agree to work the holiday or weekend at regular pay. I do not expect overtime rates."

4) Claimant's first and only paycheck from Respondent was for \$220.37 and dated June 12, 1995. The check did not clear the bank after Claimant's several attempts to cash it and Respondent refused to recompense Claimant for the wage period covered in the check. After Claimant was terminated on June 25, 1995, he was advised by Respondent that he

would receive no paycheck until the uniform issued by Respondent to Claimant was returned to Respondent. Claimant had the uniform cleaned and pressed and turned it over to Agency Compliance Specialist Trotman. Prior to receiving the uniform from Claimant, Trotman sent Respondent a "Notice of Wage Claim" and advised Respondent that:

"TORY SCHROEDER INDICATES HE WILL BRING TO THE BUREAU YOUR JACKET & SHIRT CLEANED. UPON RECEIPT, THE BUREAU WILL FORWARD THE UNIFORM TO YOU."

Respondent returned the letter to Trotman with a handwritten note stating: "No uniform, no check." The note was dated August 10, 1995, and signed "Captain Jones." On August 16, 1995, Trotman sent Respondent the uniform by certified mail and requested that he remit the wages owed Claimant. Respondent did not remit to the Agency any of the wages owed to Claimant. To date, Claimant has not been paid any wages earned, by check or otherwise, since the date of his hire.

5) Claimant's records and testimony show the following information, which is accepted as fact: he worked 191.5 total hours; of the total hours, 9.5 were hours worked in excess of forty hours per week. He earned \$1,064.38* in wages (30 hours x \$5.00 = \$150; 152 hours x \$5.50 = \$836; 9.5

hours x \$8.25 (overtime rate) = \$78.38). Claimant was paid nothing; the balance of earned, unpaid, due and owing wages equals \$1,064.38.

6) Civil penalty wages, computed in accordance with Agency policy, are as follows: \$1,064.38 (the total wages earned) divided by 29 (the number of days worked during the claim period) equals \$36.70 (the average daily rate of pay). This figure of \$36.70 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$1,101.08, rounded to \$1,101* pursuant to Agency policy.

7) Respondent did not allege in his answer an affirmative defense of financial inability to pay the wages due at the time they accrued nor did he provide any such evidence for the record.

8) The testimony of Claimant, in general, was found to be credible. He had the facts readily at his command and his statements were supported by other credible testimony and documentary records. There is no reason to determine the testimony of Claimant to be anything except reliable and credible.

9) The testimony of the other witnesses was credible. The ALJ 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 em-

ployed one or more persons in the State of Oregon.

2) Respondent employed Claimant as a security guard from May 23 to June 25, 1995.

3) During the wage claim period, Respondent and Claimant had an oral agreement whereby Claimant's rate of pay was \$5.00 per hour until May 28, 1995, when he achieved the rank of sergeant and a pay increase to \$5.50 per hour.

4) Claimant's last day worked was June 25, 1995, the same day Respondent terminated Claimant's employment.

5) Claimant worked 191.5 hours, of which 182 were straight time hours (i.e., hours worked up to and including 40 hours per week) and 9.5 hours were overtime hours (i.e., hours worked in excess of 40 hours per week). He worked 29 days.

6) Claimant earned \$1,064.38 in wages. Respondent has not paid Claimant the wages owed and more than 30 days have elapsed from the due date of those wages.

7) Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, equal \$1,101 (Claimant's average daily rate, \$36.70, continuing for 30 days).

8) Respondent made no showing that he was financially unable to pay

conform to the evidence. OAR 839-50-140(2)(c).

* The Agency's original calculation of the civil penalty wages was based on the original calculation of Claimant's earnings of \$1,079.38. The charging document alleged that \$1,117 in civil penalty wages were due, rather than the \$1,101 that the Agency recomputed based on Claimant's actual earnings of \$1,064.38. The Forum amended the charging document to conform to the evidence. OAR 839-50-140(2)(c).

* The Agency originally calculated Claimant's earnings based on \$5.50 per hour for all hours worked. As a result, the charging document alleged that \$1,079.38 was due. The Agency's Wage Transcription and Computation Sheet, an exhibit, which was computed after the charging document issued, reflects Claimant's actual earnings based on both rates he received while employed by Respondent. The Forum amended the charging document to

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) ORS 652.140 provides:

"(1) Whenever an employer discharges an employee, or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately."

"(3) For the purpose of this section, if employment termination occurs on a Saturday, Sunday or holiday, payment of wages is made 'immediately' if made no later than the end of the first business day after the employment termination ***."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid no later than Monday, June 26, 1995, which was the first business day after Claimant's employment was terminated.

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)."

ORS 652.360 provides in part:

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

Respondent was obligated by law to pay Claimant one and one-half times his regular hourly rate of \$5.50, in this case, \$8.25, for all hours worked in

OPINION

Respondent's Default

Respondent filed an answer and a request for hearing, but failed to appear at the hearing and was found to be in default. OAR 839-50-330(1)(b). In a default situation, the Forum's task is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. ORS 183.415(5) and (6); OAR 839-50-330(2); *In the Matter of S.B.I., Inc.*, 12 BOLI 102 (1993); *In the Matter of Mark Vetter*, 11 BOLI 25 (1992).

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 Tom's TV & VCR Repair*, 12 BOLI 110 (1993); *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241 (1993). However, where the answer contains only unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by credible evidence on the record. *Tom's TV, supra*; *Sealing Technology, supra*.

The Agency established a prima facie case. A preponderance of credible evidence on the whole record showed Respondent employed Claimant during the period of the wage claim and willfully failed to pay him all the wages, earned and payable, when due. Credible, persuasive evidence established that Respondent owes Claimant \$2,165.38. Respondent's apparent attempt to exempt himself from the provisions of ORS 653.261 by requiring Claimant to sign an overtime waiver fails. Respondent cannot avoid

excess of 40 hours in a week. Respondent failed to do so. The agreement between Respondent and Claimant to waive overtime pay is void as a matter of law.

5) 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.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

* The Wage Transcription and Computation Sheet prepared by Agency Compliance Specialist Trotman establishes that all of the overtime hours accrued after Claimant's wage rate increased to \$5.50 per hour on May 28, 1995.

the mandate to pay overtime wages by entering into an agreement with an employee, nor can an employee, on his own behalf, waive the employer's statutory duty to pay overtime. *In the Matter of John Owen*, 5 BOLI 121 (1986). Respondent's only articulated defense was an unsworn and unsubstantiated assertion in his answer that Claimant was paid on a salary basis and that does nothing to controvert or overcome the credible evidence in the record.

Penalty Wages

An award of 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.*, 279 Or 1083, 557 P2d 1344 (1976); *State ex rel Nilsen v. Johnson et ux*, 233 Or 103, 377 P2d 331 (1962). Respondent, as an employer, has a duty to know the amount of wages due his employees. *In the Matter of Handy Andy Towing, Inc.* 12 BOLI 284 (1994); *In the Matter of Jack Coke*, 3 BOLI 238 (1983); *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950). The evidence established that Respondent knew he had paid Claimant nothing at the time Claimant was terminated and that he acted voluntarily and as a free agent. Accordingly, Respondent must be deemed to have acted willfully. Respondent did not allege or present any evidence in support of any affirmative defense of financial inability to pay when the wages came due and is therefore

liable for civil 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 (1988). In this case, civil penalty wages amount to \$1,101.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders DANNY R. JONES, dba J.J.J. Security & Patrol, 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 TORY J. SCHROEDER in the amount of TWO THOUSAND ONE HUNDRED AND SIXTY FIVE DOLLARS AND THIRTY EIGHT CENTS (\$2,165.38), representing \$1,064.38 in gross earned, unpaid, due, and payable wages and \$1,101 in penalty wages, less appropriate lawful deductions; PLUS

(2) Interest at the rate of nine percent per year on the sum of \$1,064.38 from June 26, 1995, until paid; PLUS

(3) Interest at the rate of nine percent per year on the sum of \$1,101 from July 26, 1995, until paid.

In the Matter of INDUSTRIAL CARBIDE TOOLING, INC., Respondent.

Case Number 55-95
Final Order of the Commissioner
Jack Roberts
Issued March 20, 1996.

SYNOPSIS

Complainant was not terminated because of his opposition to health or safety hazards or because of his complaint to OR-OSHA where the employer made the decision to terminate Complainant in advance of any knowledge that such a complaint had been filed. ORS 654.005, 654.062; OAR 839-06-005, 839-06-020, 839-06-025.

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 18, 1995 and December 20-21, 1995, in the Conference Room of Suite 220, State Office Building, 365 E 7th, Eugene, Oregon; on January 2, 1996, by telephone; and on January 12, 1996, in the Conference Room of the Bureau of Labor and Industries Office at 3865 Wolverine St., Bldg. E-1, Salem, Oregon.

The Bureau of Labor and Industries (Agency) was represented by Linda Lohr, an employee of the Agency. Terence Glass (Complainant) was

present throughout the September and December portions of the hearing, and was not represented by counsel.

Industrial Carbide Tooling, Inc. (Respondent) was represented by E. Jay Perry, Attorney at Law, on September 18, 1995. Due to a conflict of interest, Mr. Perry withdrew as counsel of record on that date. Janice Goldberg, Attorney at Law, represented Respondent at all subsequent proceedings. George Benson was present throughout the September and December portions of the hearing as Respondent's representative.

The Agency called the following witnesses (in alphabetical order): George Benson, president and sole shareholder of Respondent; Gillian Glass, wife of Complainant; Terence Glass, Complainant; and Bernadette Yap-Sam, Senior Investigator, Civil Rights Division, Bureau of Labor and Industries.

Respondent called the following witnesses (in alphabetical order): Aaron Benson, employee of Respondent and son of George Benson; Benjamin Benson, employee of Respondent and son of George Benson; George Benson, president and sole shareholder of Respondent; Lynn Marcus, legal assistant to E. Jay Perry; Carl Miller, employee of Respondent; E. Jay Perry, initial attorney for Respondent in this proceeding; and James White, employee of Respondent.

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

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On July 14, 1994, Complainant filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment practice of Respondent. He claimed that Respondent discriminated against him because of Complainant's opposition to health and safety hazards in the workplace, in that, on July 7, 1994, Respondent terminated him.

2) The Agency found substantial evidence of the alleged unlawful employment practice of Respondent in violation of ORS 654.062(5)(a).

3) On June 15, 1995, the Agency prepared and duly served on Respondent Specific Charges, alleging that Respondent had committed an unlawful employment practice in that Respondent terminated Complainant's employment because of Complainant's opposition to health and safety hazards in the workplace. The Agency alleged that Respondent's action violated ORS 654.062(5)(a).

4) 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.

5) On June 22, 1995, Respondent's attorney requested a postponement of the hearing. On July 6, 1995, the forum granted the request pursuant to OAR 839-50-150(5)(c). The Administrative Law Judge issued an amended Notice of Hearing setting the hearing for September 19, 1995.

6) On July 6, 1995, Respondent timely filed its answer.

7) On August 22, 1995, the Administrative Law Judge notified the participants that, due to docketing constraints, it was necessary to reschedule the hearing to commence on September 18, 1995, one day earlier than scheduled, and to change the Administrative Law Judge assigned to hear the case. The Agency and Respondent agreed to commence the hearing on September 18, 1995, and on August 24, 1995, the Administrative Law Judge issued an amended Notice of Hearing and Notice of Change of Administrative Law Judge to the participants.

8) Pursuant to OAR 839-50-210 and the order of the Administrative Law Judge, the Agency and Respondent each timely filed a Summary of the Case.

9) A pre-hearing conference was held on September 18, 1995, at which time the Agency and Respondent stipulated to facts which were admitted by the pleadings, as identified in the Agency's Case Summary. Those facts were admitted into the record by the Administrative Law Judge at the beginning of the hearing.

10) At the start of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case

Rights and Procedures and had no questions about it.

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

12) Following the noon recess of the hearing on September 18, 1995, Perry informed the forum and the Agency he had determined during the morning's proceeding that his testimony would be necessary in this matter, and requested leave to withdraw as counsel of record. The request was granted and the hearing recessed in order for Respondent to obtain a new attorney.

13) On October 2, 1995, Janice Goldberg, Attorney at Law, notified the forum that she had been retained to represent Respondent in this matter. During a conference call on the same date, the forum and participants agreed to reconvene the hearing on December 20, 1995.

14) On October 3, 1995, the forum issued a Notice of Continuation of Hearing, and ordered that a copy of the tape recording of the proceedings on September 18, 1995, be provided to Ms. Goldberg, and that a transcription of the tape recording be prepared and provided to both participants.

15) A copy of the tape recording of proceedings on September 18, 1995, was provided to Ms. Goldberg, and a transcription of that tape recording was provided to both participants prior to the resumption of the hearing on December 20, 1995.

16) The hearing was reconvened on December 20, 1995. At the end of the day on December 21, 1995, rebuttal witnesses were unavailable. By agreement, the hearing was continued until January 2, 1996.

17) On January 2, 1996, the hearing was reconvened by telephone to take the testimony of two rebuttal witnesses. By agreement, the hearing was continued until January 12, 1996. On January 3, 1996, the forum issued a Notice of Continuation of Hearing until that date.

18) On January 12, 1996, the hearing was reconvened and concluded.

19) The Proposed Order, which included an Exceptions Notice, was issued on February 12, 1996. On February 16, 1996, the Agency requested an extension of time to March 13, 1996, within which to file exceptions. The request was granted on February 22, 1996. Exceptions were required to be filed by March 13, 1996. On March 13, 1996, the Agency notified the forum that no exceptions would be filed. No Exceptions were received by the Hearings Unit.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Industrial Carbide Tooling, Inc., an Oregon corporation, operated a machine tooling facility in Eugene, Oregon, utilizing the personal services of one or more employees.

2) At all times material, George Benson was the president and sole shareholder of Respondent.

3) Aaron Benson and Benjamin Benson, sons of George Benson, were employed at Respondent.

- 4) Absent exigent circumstances, George Benson was the only person at Respondent with the authority to hire and fire.
- 5) Complainant was employed by Respondent as a machinist between May 1990 and July 7, 1994.
- 6) Complainant was expected to work 40 hours per week. His scheduled hours were from 7 a.m. to 3:30 p.m., with 30 minutes for lunch.
- 7) Six employees, including Complainant, were paid on an hourly basis. These employees were required to punch in and out on a time clock. They were paid from the hours recorded on the time cards. After 1990, the time cards were collected by George Benson every two weeks. The employees were paid every two weeks.
- 8) During times material, Respondent used the payroll services of Advanced Data Processing (ADP).
- 9) Pursuant to Respondent's policy, employees were required to inform George Benson (or, in his absence, Ron Kloida) ahead of time for known absences, to call in for an unexpected absence or tardiness, and to inform Benson before leaving work early.
- 10) Under the impression the information would be conveyed to George Benson, employees often informed Ron Kloida or one of George Benson's sons of their comings and goings if George Benson was unavailable.
- 11) George Benson monitored absences biweekly when he reviewed the time cards. He matched the information he or Ron Kloida had been told by the employees with their time cards.
- 12) When an employee failed to clock in or out, Benson would ask him when he came or left; Benson would accept the time given him by the employee. If an employee failed to call in or came late, Benson would sometimes say something to the employee, sometimes not. Benson would not write up the employee, but would sometimes make a note of the incident and drop it in the employee's file. Benson did not review the notes with the subject employee.
- 13) George Benson is perceived by his employees as a fair employer, with an easy going manner and a lenient management style.
- 14) George Benson finds it difficult to talk with employees about personal-ity issues, to discipline employees, or to terminate employees, and will avoid doing so if he can. His approach with unsatisfactory employees is generally to wait for them to leave employment voluntarily.
- 15) Complainant sustained a cut to his finger on or about July 6, 1992.
- 16) The finger injury did not heal properly. Complainant was given a prescription for a sulfa compound, Septra, in connection with his injury.
- 17) Between September and December 1992, Complainant experienced an outbreak of a rash over his entire body.
- 18) On January 26, 1993, a workers' compensation claim filed by Complainant in relation to the cut finger was denied due to the untimely filing of the claim and Complainant's failure to seek medical treatment on a timely basis.
- 19) The rash outbreak seemed to be related to an allergic reaction to the

sulfa medication prescribed for the cut finger, which medication was curtailed in February 1993.

20) After the curtailment of the medication, the rash continued. In April 1993, Complainant was referred to the Contact Dermatitis Clinic at the Oregon Health Sciences University (OHSU) for a thorough evaluation of his rash. Complainant was accepted for evaluation in May 1993.

21) In April or May of 1993, Complainant told George Benson of his concern that his rash might be caused by something in the workplace and of the possible evaluation at OHSU. Complainant showed George Benson the letter he received from OHSU concerning his acceptance for evaluation. Complainant was given permission to gather substances in the workplace to be used in the evaluation and was provided with the MSDS sheets for the chemicals.

22) Complainant was off work between June 29 and July 29, 1993, in connection with the OHSU testing and evaluation.

23) The testing performed at OHSU included patch tests of substances Complainant worked with at Respondent. These tests were negative.

24) In July 1993, Complainant filed a workers' compensation claim based upon the skin rash. On July 27, 1993, the claim was denied as not work-related or as the consequential condition of the claim previously denied.

25) On July 30, 1993, at Complainant's request, Gillian Glass called the Oregon Occupational Safety and Health Division (OR-OSHA) to obtain information on testing procedures

available for air quality in connection with carbide dust. Following her call, Gillian Glass informed Complainant that she had been told that there were two sides to OR-OSHA – the consultant side for employers and the complaint side for employees – and that in order for an OR-OSHA consultant to be dispatched to an employer's premises to check the air quality, the employer would have to make the request.

26) In early August 1993, Complainant approached George Benson with the information obtained from OR-OSHA, and requested that Benson call OR-OSHA to request that a consultant be sent to Respondent. Benson said he would have someone from his insurance company or SAIF come in. On August 6, 1993, Complainant called the consultant side of OR-OSHA and informed them that his employer was reluctant to take this approach.

27) In September 1993, Complainant again filed a workers' compensation claim based upon the rash. On September 27, 1993, the claim was denied as not work-related or as the consequential condition of the finger claim previously denied.

28) In 1993, Complainant missed a substantial amount of work due to his rash. In the summer of 1993, Complainant experienced an extremely serious flare-up of the rash and was unable to work for a period of time. Carl Miller was hired in September 1993 to help fill in for Complainant's absences.

29) Complainant worked in the machine shop. He worked alone in that shop until Carl Miller, also a machinist, came to work for Respondent in

September 1993. The machine shop was located in the rear of the business, separated from the adjacent saw and cutter department by a wall with a door for ingress and egress. The machine shop had no windows and was approximately 40 feet by 20 feet in dimension. There was an extractor fan in the shop. There was a door to the outside in the rear wall of the machine shop. This door was sometimes left open and sometimes remained closed.

30) The saw and cutter department was located between the office and the machine shop. Most employees worked in the saw and cutter department.

31) Complainant complained about his rash to George Benson and his co-workers from late 1992 through his termination in mid-1994.

32) Complainant was viewed by his co-workers as a constant complainer with a negative attitude. In addition to complaints about his rash, Complainant regularly complained to co-workers about jobs in general, the machinery in the shop, the way things were done at Respondent, George Benson, Complainant's personal life, his doctors, and the inadequate social system in the United States. The deterioration in Complainant's attitude toward work and the rise in the number and type of complaints occurred somewhere between six months and one year before his termination. The negativity, in part, seemed to be linked to the persistence and severity of the rash and his frustration with the inability to find its cause.

33) Co-workers were alienated from Complainant due to his negative attitude and constant complaining.

34) Complainant threatened to quit on more than one occasion. On these occasions, Complainant would pack up his tools and leave the workplace. He would return a day or two later.

35) George Benson received frequent requests from his sons to terminate Complainant. These requests became a daily matter of discussion over the last two to four weeks of Complainant's employment.

36) On June 22, 1994, Complainant filed a health and safety complaint with OR-OSHA by telephone. He complained of poor ventilation and the presence of carbide dust throughout the shop, the absence of a wheel dresser on the knife grinder, unguarded bench grinders, tripping hazards, as well as the presence of extension cords on the floor and hanging from the ceiling. Complainant requested that an inspection be performed.

37) Complainant did not tell anyone at the workplace that he had called OR-OSHA to request an inspection.

38) On June 22, 1994, George Benson reproved Complainant for telling an employee at a neighboring shop where he could and could not park. Furious, Complainant clocked out at 9:30 a.m. and left for the day without informing anyone.

39) On June 24, 1994, Complainant clocked out at 1:00 p.m. and left for the day without advising anyone.

40) On June 27, 1994, Complainant's wife received a threat in connection with the testimony she was to provide in a fraud case the following day. Complainant informed Ron Kloida and left for the day at 1:57 p.m.

41) Complainant accompanied his wife to the fraud trial on June 28, 1994. He did not go to work on that date. Complainant had informed Ron Kloida earlier of his impending absence on this date.

42) George Benson made his decision to fire Complainant on June 28, 1994. He pulled Complainant's time card and copied it. To get advice on the correct procedures for termination, Benson first called his attorney, E. Jay Perry. He learned that Perry was on vacation until after the July 4 holiday weekend. Lynn Marcus, Perry's legal assistant, took the following message at 2:05 p.m. on June 28:

"Employee punched out & left early yesterday - no word to anyone, didn't show up today - happened last week also - needs to know where he stands - since Jay not here - he will try BOLI & if no help - will call tomorrow."

George Benson next made two calls to the United States Department of Labor for information on termination procedures. He did not receive the information he needed. At 2:14 p.m. and again at 3:46 p.m., Benson called the Technical Assistance Unit of the Bureau of Labor and Industries. At 2:30 p.m., Benson called ADP. Not satisfied with the responses he received, Benson decided to wait until Perry's return for advice before terminating Complainant.

43) On June 30, 1994, Complainant was one-half hour late for work.

44) July 4, 1994, fell on a Monday.

45) On July 5, 1994, OR-OSHA inspected Respondent's premises. Benson was informed that the inspection

was the result of an employee complaint. Complainant, George Benson, Aaron Benson, B. Benson, Carl Miller, and James White were all present at the worksite on this date.

46) As the result of the inspection, Respondent was cited by OR-OSHA for violations totaling \$180 in fines. Of Complainant's health or safety complaints, one was substantiated (unguarded bench grinder).

47) Everyone at the workplace assumed that it was Complainant who was responsible for the OR-OSHA complaint and inspection.

48) Aaron Benson made two comments late on July 5, 1994, which convinced Complainant that Aaron Benson believed Complainant was responsible for the OR-OSHA inspection and that Aaron Benson was upset about it.

49) On July 6, 1994, employees were upset with Complainant for having filed a complaint with OR-OSHA. With few exceptions, the employees gave Complainant the cold shoulder. Silence pervaded the business on July 6, 1994.

50) George Benson was concerned about the work atmosphere on July 6, 1994.

51) Complainant came to work two and one-half hours late on July 7, 1994. He did not call in to say he would be late. Complainant called the Bureau of Labor and Industries before coming to work on July 7, 1994.

52) George Benson called his attorney on July 7, 1994, and recounted his long-standing difficulties with Complainant's attendance, the problems with Complainant's constant

complaining about Benson and the company, and the impact of Complainant's attitude on other employees. Benson advised that he wanted to terminate Complainant immediately. Perry advised Benson to write a letter of termination for Perry's review.

53) Benson prepared the termination letter and faxed it to Perry's office. At 2:45 p.m., Perry reviewed the letter and then called George Benson with suggested corrections.

54) Benson made the suggested corrections and retyped the letter. Benson next called ADP in order to obtain the correct amount for Complainant's final paycheck.

55) The final termination letter contained the following text:

"The following is a recap of your attendance for approximately [sic] the last two weeks.

"6-22-94 Clock in at 6:59 AM
Clock out at 9:33 AM

Left premises without advising anyone that you were leaving.

"6-23-94 Clock in at 6:49 AM
Clock out at 3:30 PM

No indication of why you left early previous day.

"6-24-94 Clock in at 6:56 AM
Clock out at 1:00 PM

Did not advise anyone your [sic] leaving early

"6-27-94 Clock in at 6:52 AM
Clock out at 1:57 PM

Did not advise anyone you were leaving early

"6-28-94 Did not report for work or call in

"6-29-94 Clock in at 6:49 AM

Clock out at 3:36 PM

No explanation for previous days [sic] absence

"6-30-94 Entered time by hand at 7:30 AM

Clock out at 3:30 AM

"7-1-94 Clock in at 6:58 AM

Clock out at 3:29 PM

"7-5-94 Clock in at 6:53 AM

Clock out at 3:26 PM

"7-6-94 Clock in at 6:54 AM

Clock out at 3:29 PM

Reportedly sat on stool from 2:45 until you locked your tool box and clocked out.

"7-7-94 Clock in at 9:35 AM

"Your negative & Disruptive [sic] attitude and absences [sic] leaves me no alternative but to [sic] you as of this date. 7-7-94"

56) At the end of his shift on July 7, 1994, when Complainant went to the time clock to punch out, his time card was not there. Complainant went to find George Benson to see if he had it. Benson then gave Complainant the termination letter. While reviewing the letter, Complainant reminded Benson that Complainant had told Ron Kloida about the absence for the court case. That error did not change Benson's mind about terminating Complainant.

57) George Benson terminated Complainant on July 7, 1994, due to Complainant's attendance and negative and disruptive attitude.

58) In 1994, Complainant was out of the workplace due to surgery from February 22 to March 21, 1994. In the

remaining weeks between January 17 and July 2, 1994, Complainant worked 40 or more hours in a week during nine weeks and fewer than 40 hours during 10 weeks.* Excluding the last partial week worked by Complainant before his termination, during his final 10 full weeks of employment at Respondent, Complainant worked fewer than 40 hours during eight weeks.

59) In the 10 weeks in 1994 during which Complainant worked fewer than 40 hours, the only written notations on the time cards (besides "no lunch", which was regularly written on Complainant's time cards) are for April 4 - 5. The written entries on both April 4 and April 5, 1994, read "Absent [sic] No Call".

60) Prior to his termination, George Benson never discussed Complainant's attendance or attitude problem with him.

61) George Benson was generally credible. Despite his obvious memory lapses with dates and sequences and his susceptibility to confusion, his demeanor impressed the Administrative Law Judge that he was believable. In addition, Benson's testimony was corroborated by E. Jay Perry and Lynn Marcus, witnesses found to be credible by the Administrative Law Judge. For the reasons given in the Opinion section of this Order, which are incorporated herein by this reference, Respondent's version of the facts and his reasons for terminating Complainant were credible.

Benson's testimony that he did not form an opinion as to which employee

complained to OR-OSHA, however, was not credible. Because of the nature of the complaint to OR-OSHA, Complainant's steady complaints of the same nature to George Benson, Complainant's earlier request that Benson obtain an air quality inspection from OR-OSHA, and Benson's testimony that none of the other employees was suspected by him of having filed the complaint, the forum finds that Benson's testimony on this point was not credible. Similarly, Benson's testimony that the atmosphere was significantly different on July 6, 1994, was contradicted by Benjamin Benson and Aaron Benson, witnesses found by the forum to be credible, and his testimony was found not to be credible on this point.

62) Complainant was generally credible. For the most part the Administrative Law Judge was impressed by his demeanor that his testimony was believable. However, on some important points his testimony was inconsistent with that of witnesses found to be credible by the forum. For example, on the issue of his relationships with his co-workers, Complainant testified that he thought his relationships were all right until the day following the OR-OSHA inspection. Credible evidence from Aaron Benson, Ben Benson, George Benson, and Carl Miller revealed that the co-workers wanted little to do with Complainant long before the OR-OSHA inspection. Similarly, testimony that the atmosphere was significantly different on July 6, 1994, was contradicted by Benjamin Benson and Aaron Benson, witnesses found by the

* Because Complainant was terminated in the middle of the week ending July 9, 1994, that week was not counted in either category.

forum to be credible, and Complainant's testimony was found not to be credible on this point. In another instance, Complainant testified that he did not work on personal projects while he was on the clock. Yet Aaron Benson and Carl Miller, witnesses found to be credible on this point, testified to their direct observations of Complainant's work on a helicopter and bicycles during working hours. Finally, Complainant testified that during his job search he made it to the interview stage at 50 different locations. The forum finds this testimony inherently incredible, given the time frame of the job search and the status of the timber industry at the time.

63) Carl Miller's testimony was not found to be totally credible due to inconsistencies that existed between his testimony and statements he made to the Agency during its investigation of this case. Thus his testimony was given less weight when it conflicted with other credible evidence on the record.

64) James White's testimony was given little weight because his memory was weak and much of his testimony was directly controverted by credible evidence.

65) The rebuttal testimony of Gillian Glass – that she had overheard E. Jay Perry tell Ben Benson to testify that he could not recall if he was not comfortable telling a lie; and that she had overheard Lynn Marcus tell Ben Benson that her testimony was short because she was a small player in this scheme – was directly contradicted by E. Jay Perry, Benjamin Benson, and Lynn Marcus, who the forum finds were credible witnesses. Because of her

relationship to Complainant, the forum concludes that Gillian Glass misinterpreted the comments made in her presence. Accordingly, the Forum finds that the testimony of Gillian Glass was not credible on these points.

66) The testimony of the other witnesses was credible. The Administrative Law Judge observed the demeanor of each witness and found each to be believable.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent was an Oregon corporation operating a machine tooling business in Oregon, engaging or utilizing the personal services of one or more employees within the state of Oregon. George Benson was Respondent's president and sole shareholder.

2) Complainant was employed by Respondent as a machinist between May 1990 and July 7, 1994.

3) In or around April or May 1993, and on occasions thereafter, Complainant notified George Benson of potential workplace safety and health hazards which Complainant feared might be the cause of his rash; in late July or early August 1993, Complainant requested that Respondent arrange to have the air quality tested for toxins.

4) In opposing health and safety hazards in the workplace, Complainant exercised rights afforded by the Oregon Safe Employment Act.

5) Between late 1992 and his termination, Complainant regularly complained to co-workers about his rash, George Benson, how things were done at Respondent, and the lack of an adequate social care system in the

United States. Co-workers were alienated by Complainant's constant complaints.

6) On June 22, 1994, Complainant called OR-OSHA and reported potential safety and health hazards at Respondent's business premises, and requested that OR-OSHA conduct an inspection. Complainant told no one at Respondent that he had made this call.

7) In filing a complaint with OR-OSHA, Complainant exercised rights afforded by the Oregon Safe Employment Act.

8) On June 28, 1994, George Benson made the decision to terminate Complainant.

9) On July 5, 1994, as the result of Complainant's phone call, OR-OSHA inspected Respondent's premises and cited Respondent for health and safety violations unrelated to air quality.

10) George Benson, along with Complainant's co-workers, assumed that Complainant was responsible for the OR-OSHA inspection.

11) On July 7, 1994, George Benson terminated Complainant, citing absenteeism and a negative and disruptive attitude.

12) Respondent did not terminate Complainant because of his opposition to health and safety hazards in the workplace or because of his complaint to OR-OSHA.

CONCLUSIONS OF LAW

1) ORS 654.005 provides, in pertinent part:

"As used in this chapter, unless the context requires otherwise:

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

"(7) 'Person' means one or more
*** corporations ***"

At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110, and 659.400 to 659.435.

2) ORS 654.062(5)(b) provides, in pertinent part:

"Any employee * * * who believes that the employee has been barred or discharged from employment * * * by any person in violation of this subsection may, within 30 days after the employee has reasonable cause to believe that such a violation has occurred, file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659.040. Upon receipt of such complaint the commissioner shall process the complaint and case under the procedures, policies and remedies established by ORS 659.010 to 659.110 and 659.505 to 659.545 and the policies established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices based upon race, religion, color, national origin, sex or age under ORS 659.030 (1)(f)."

ORS 659.030(1) provides, in pertinent part:

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

"*****

"(f) For any employer, * * * to discharge, * * * any person because the person has opposed any practices forbidden by this section * * *."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein.

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

"(1) ORS 654.062(5) of the Oregon Safe Employment Act (OSEA) generally provides that no person can * * * discharge an employee, * * * because that employee * * *:

"(a) Opposed any practice forbidden by the OSEA;

"(b) Made any complaint under or related to the OSEA;

"*****

"(e) Exercised * * * any right afforded by the OSEA."

OAR 839-06-020 provides, in pertinent part:

"(1) ORS 654.062(5) prohibits discrimination against an employee because he/she 'opposed' health and safety hazards in the workplace. OSEA encourages but does not require an employee to report health and safety hazards to the employer. * * *

"*****

"(5) ORS 654.062(5) protects employees who oppose 'any practice forbidden by' OSEA. 'Any practice forbidden by' OSEA is not limited to practices specifically forbidden by OSEA or the rules promulgated under OSEA * * *. It includes opposition to any condition which, in the judgment of a reasonable person, makes the workplace or the performance of assigned tasks unsafe or unhealthy. However, those conditions which are unsafe or unhealthy only because of unique individual fears or limitations are not forbidden by OSEA."

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

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

"(2) An employee * * * who makes such a complaint is protected from discrimination under ORS 654.062(5). Since ORS 654.062(5) protects the act of making any complaint, protection exists whether or not an actual health or safety hazard existed."

At all times material, Complainant was entitled to the protection of ORS 654.062(5).

4) ORS 654.062(5)(a) provides, in pertinent part:

"It is an unlawful employment practice for any person to bar or discharge from employment * * * any employee * * * because such employee has opposed any practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780, made any complaint * * * under or related to ORS 654.001 to 654.295 and 654.750 to 654.780 * * *"

Respondent did not violate ORS 654.062.

5) The actions, inactions, statements and motivations of George Benson are properly imputed to Respondent.

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

OPINION

The Agency's initial burden of proof requires production of evidence in support of the following elements:

1) Complainant's opposition to a practice forbidden by ORS 654.001 to 654.295 and 654.750 to 654.780, or the filing of a health or safety complaint with OR-OSHA under or related to ORS 654.001 to 654.295 and 654.750 to 654.780.

2) Respondent's knowledge of Complainant's opposition to the forbidden practice or of the filing of the complaint by Complainant.

3) The barring or discharge of Complainant by Respondent.

4) A causal connection between Complainant's opposition to hazards or the filing of a safety complaint and the termination of Complainant's employment.

5) Damages resulting from Respondent's action.

These elements must be considered separately.

ORS 654.062 prohibits adverse employment actions or decisions affecting an employee based on that employee's exercise of rights afforded by the Oregon Safe Employment Act, ORS 654.001 to 654.295, 654.750 to 654.780. Included among the rights protected is the right to notify the employer of any violation of law, regulation, or standard pertaining to safety and health in the place of employment when the violation comes to the knowledge of the employee. ORS 654.062 (1). The evidence in the present case establishes that Complainant discussed perceived safety hazards with George Benson on more than one occasion and that Complainant reasonably believed the objectionable practices were safety violations, which, if they were shown to exist, would be prohibited by ORS 654.001 to 654.295.* In

* This case was argued and submitted on the basis of the lodging of the complaint with OR-OSHA. The opposition expressed to Benson was not argued as the basis of the termination, but was evidence utilized to bolster or demonstrate that George Benson knew who filed the complaint, due to his familiarity with its nature. The forum has found no evidence that Complainant was terminated because of his opposition to safety hazards addressed to Benson.

* The former Accident Prevention Division is now the Oregon Occupational Safety and Health Division (OR-OSHA).

addition, the evidence clearly establishes that Complainant made a health or safety complaint to OR-OSHA under or related to ORS 654.001 to 654.295, a right which is protected by ORS 654.062, whether or not the health or safety hazard actually existed.

The evidence establishes that George Benson had knowledge of Complainant's opposition to safety hazards as the opposition was directly voiced to Benson. The evidence further establishes that Complainant's co-workers uniformly surmised that Complainant had filed the complaint with OR-OSHA, and expressed that belief to George Benson. Because of the nature of the complaint to OR-OSHA, Complainant's steady complaints of the same nature to George Benson, Complainant's earlier request that Benson obtain an air quality inspection from OR-OSHA, and Benson's testimony that none of the other employees was suspected by him of having filed the complaint, the forum infers that George Benson believed that Complainant had filed the OR-OSHA complaint that triggered the safety inspection.

It is not disputed that Complainant was terminated by Respondent on July 7, 1994, or that he suffered damages from Respondent's act, provided that act was attributable to a discriminatory motive.

The primary dispute is whether a causal connection exists between Complainant's opposition to safety hazards or the filing of a safety complaint with OR-OSHA and the termination of his employment by Respondent. Complainant's termination followed the

OR-OSHA inspection by two days. This evidence is sufficient to establish a rebuttable presumption that, absent another explanation, Complainant's employment was terminated due to the safety complaint he filed with OR-OSHA.

Once Complainant has established a prima facie case, Respondent must articulate a legitimate, nondiscriminatory reason for its actions, which then affords Complainant an opportunity to persuade this forum that such reason is pretextual. *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 US 248 (1981). *In the Matter of K-Mart Corporation*, 3 BOLI 194, 199 (1982).

Respondent presented persuasive evidence that the decision to terminate Complainant for legitimate, nondiscriminatory reasons was made on June 28, 1994, and that Complainant was not terminated on that date because George Benson was unable to obtain the advice of his attorney concerning the correct procedures for terminating an employee, and he was not satisfied with the limited information he was able to glean from alternative sources. On June 28, 1994, no one at Respondent knew anything about a telephone complaint made by Complainant to OR-OSHA on June 22, 1994. It was not until July 5, 1994, when OR-OSHA representatives arrived at Respondent's premises, that anyone at Respondent learned that an employee complaint had been filed. Because the termination decision was made prior to July 5, 1994, it could not have been based upon the filing of a safety complaint. Respondent

presented significant evidence tending to establish that the decision to terminate Complainant on June 28, 1994, was based upon Complainant's attendance and attitude problems.

The Agency then had the burden to demonstrate that the reason offered by Respondent was pretextual. 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. To this end, the Agency presented testimony that, at the fact-finding conference held in this matter, George Benson had suggested that the reaction of his employees toward the filing of the OR-OSHA complaint by Complainant may have been a background factor in the termination. The forum is not persuaded that the cold atmosphere generated in the workplace on July 6, 1994, played a determinative or motivating role in either the decision to terminate Complainant or in the time chosen to effectuate the decision. That Benson was concerned about the atmosphere in the shop on July 6, 1994, and did not wish to abide it for long as he had already made the decision to terminate Complainant, did not convert this concern automatically into a motivating factor in either the decision to terminate or in the timing of the termination.

The forum is persuaded that George Benson's desire to talk with his attorney prior to terminating Complainant accounts for the delay in acting on the termination decision, and that Complainant's tardiness on July 7, 1994, coupled with the availability of Respondent's counsel on July 7,

triggered the termination on that date. The forum is not persuaded that Respondent's proffered reasons for the basis and timing of Complainant's termination are pretextual. Accordingly, the Agency has not sustained its burden of proof.

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
LAVERNE SPRINGER,
dba Thumbs Up! Extra Casting,
Respondent.**

Case Number 33-95
Final Order of the Commissioner
Jack Roberts
Issued April 8, 1996

SYNOPSIS

Respondent employer failed to verify the age of a minor employee, failed to file a required employment certificate within 48 hours after hiring the minor, and employed the minor more than 44 hours per week in each of 19 weeks without a special Emergency Overtime Permit. The Commissioner rejected Respondent's claim that the minor was not an employee and imposed civil penalties. ORS 653.305; 653.307;

653.310; OAR 839-21-067; 839-21-220(1)(a) and (3).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on June 8 and 9, 1995, in room 1004 State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Valerie Hodges, an employee of the Agency. LaVerne Springer (Respondent), an individual doing business as Thumbs Up! Extra Casting, was represented by counsel until June 7, 1995, when the Hearings Referee was advised by fax that counsel would not appear. Accordingly, Respondent was not represented by counsel, and personally presented evidence, cross-examined witnesses, and argued her defenses.

The Agency called as witnesses (in alphabetical order): Holly Happenstance (true name Hummer); Agency Compliance Specialist William F. Pick; Coby Porter; Rose Roberts; April Serio; Shari Smith; Stacy Sobiech; and Daniel Lee Stoltz.

Respondent called as witnesses (in alphabetical order): Virginia Briggs; Jessica Holmgren; Katrina Sanders-Payne; Kyle Sheeley; Rod James (true name Roderick J. Skibenes); Felicia Slider; Respondent; Christin Swanson (by telephone); Brian Tanke, (by telephone); Henry Taylor; and Chanda Watts. Although accorded several opportunities throughout the hearing, Re-

spondent was unable to reach Kelly Gabbert to testify by telephone.

Having fully considered the entire record in this matter, I, Jack 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 6, 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 Respondent in the total amount of \$21,000 twenty days after Respondent's receipt of the Notice. The Notice of Intent cited the following bases for the Agency's proposed actions:

"1. Failure to Verify Work Permit at the Time of Hire: One Violation.

Employer failed to verify the age of minor Randy Stoltz (dob 9/26/77), by requiring said minor to produce a work permit at the time of hire (10/1/93), in violation of OAR 839-21-220(1)(a). CIVIL PENALTY OF \$500. AGGRAVATION: Willful violation; failure by employer to take all necessary measures to prevent violations of statutes and rules; lack of difficulty to comply.

"2. Failure to File Employment Certificate: One Violation.

Employer failed to file a completed employment certificate form with the Bureau of Labor and Industries within 48 hours after hiring minor

Randy Stoltz (dob 9/26/77) on or about October 1, 1993, in violation of ORS 653.307, 653.310, and OAR 839-21-220(3). CIVIL PENALTY OF \$500. AGGRAVATION: Willful violation; failure by employer to take all necessary measures to prevent violations of statutes and rules; lack of difficulty to comply.

"3. Employment of Minor to Work More Than 44 Hours Per Week: 20 Violations.

Between October 1, 1993, and April 23, 1994, Employer employed minor Randy Stoltz (dob 9/26/77) to work more than 44 hours per week in each of 20 weeks, without a special Emergency Overtime Permit, in violation of ORS 653.305 and OAR 839-21-067(1). Civil Penalty of \$1,000 per week. AGGRAVATION: Willful violation; failure by employer to take all necessary measures to prevent violations of statutes and rules; lack of difficulty to comply; nature and seriousness of violations. TOTAL CIVIL PENALTY OF \$20,000."

2) Respondent received the Notice of Intent by certified mail on December 12, 1994. Under date of December 23, 1994, Respondent personally answered the Notice of Intent as follows:

"To whom it may concern;

"Thumbs Up! Casting is requesting a contested case hearing.

"1. Thumbs Up! Casting denies all allegations that there was a failure to verify work permit re: Danny Stoltz (referred to as Randy Stoltz in document) He was not an employee of Thumbs Up!

"2. Thumbs Up! Casting denies allegation that we knowingly [sic] failed to file Employment certification re Danny Stoltz (re to as Randy Stoltz). He was not an employee of Thumbs Up! Casting.

"3. Thumbs Up! Casting did not hire Danny Stoltz (re: Randy Stoltz) and he did not work more than 44 hours per week. Danny Stoltz was not an employee of Thumbs Up! Casting.

"Please notify me of contested case hearing.

"Respectfully submitted

"LaVerne Springer"

3) The Agency requested a hearing date. On January 11, 1995 the Hearings Unit issued a Notice of Hearing setting forth the time and place of hearing. The notice 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.

4) On February 1, 1995, the Forum received the Agency's motion for postponement of the hearing from the scheduled date and counsel for Respondent had no objection to a two day delay. On February 2, 1995, the Hearings Referee granted the postponement and on March 8, 1995, the Hearings Referee granted a further postponement to June 1, 1995, based on the agreement of the participants.

5) On April 11, 1995, the Hearings Referee was changed to Warner W. Gregg and the date of the hearing was

changed to June 8, 1995. Counsel for Respondent was advised of these changes.

6) On May 26, 1995, the Forum received notice of the withdrawal of Respondent's original counsel, which contained the information that Respondent would probably handle the matter herself. On June 1, 1995, the Agency filed its Summary of the Case, a copy of which was sent to Respondent.

7) By fax on June 6, 1995, timed at 3:35 p.m., a second attorney notified the Forum that he was retained on that date to represent Respondent and was requesting a set-over of the June 8 hearing. A copy was delivered to the Hearings Referee at 8:30 a.m., June 7. Also on June 7, the Forum received the Agency's response opposing further postponement.

8) The Agency's opposition to further postponement recited the service and answer in December 1994, Respondent's retention of an attorney in mid-January 1995, and continued:

"e. As of approximately 1:45 p.m. on June 6, 1995, [Respondent] indicated that she intended to come to the hearing on June 8, 1995. [Respondent] did not request a postponement at that time.

"d. Although the original hearing date was April 18, the June 8 hearing date has been set since on or before April 11, 1995. [Respondent]'s attorney received notice of this hearing date, mailed April 11.

"2. [Respondent]'s original attorney withdrew on or before May 25, 1995. [Respondent] did not get a new attorney for herself until June 6, 1995. ***

"3. The Agency sent [Respondent] its Case Summaries on June 1, 1995. She received them. The Agency requested a list of [Respondent]'s intended witnesses and exhibits (essentially a case summary) on June 6, which she agreed to provide that day. [Respondent] has produced no Case Summary and no other evidence.

"4. Postponing the hearing will cause considerable delay and some additional expense ****"

The Agency asked that the postponement be denied.

9) On June 7, 1995, the Hearings Referee's ruling on postponement was transmitted by fax to Respondent's second attorney at 1:07 p.m. and read in pertinent part:

"This forum has repeatedly held that a hearing will not be delayed to allow a party to obtain counsel, or because of late retention of counsel, absent good cause for the requested delay. See OAR 839-50-150(5). Similarly, the inability to complete discovery is generally not considered a reason to delay a hearing.

"Respondent was served with the Notices of Intent in December 1994; she submitted an answer denying liability to Claimant on December 23. On January 11, the forum issued a notice setting hearing for April 18, 1995. On January 18, the forum was notified that Respondent was represented by counsel. On February 2, 1995, the Hearings Referee granted an Agency motion, consented to by counsel, to postpone the hearing

to April 20. On March 8, 1995 the Hearings Referee granted an Agency motion, consented to by counsel, and again postponed the hearing to April 20. On April 11, there was a change of Hearings Referee and the undersigned reset the matter for June 8, 1995. On May 25, 1995, the Hearings Referee was advised of the resignation of Respondent's former counsel. On June 1, Respondent was served with the Agency's case summary. Until June 6, the Hearings Referee assumed that Respondent had determined to proceed without an attorney.

"Respondent's motion for postponement is untimely, and does not illustrate good cause. See OAR 839-50-020(9). Respondent's request for postponement is denied, except that the Hearings Referee will delay the starting time one hour. Accordingly, the hearing will proceed as scheduled in room 1004, Portland State Office Building, Portland at 10 a.m., Thursday, June 8, 1995."

10) At 1:57 p.m. on June 7, 1995, the Hearings Referee received by fax from Respondent's counsel the following:

"I am in receipt of your Ruling on Respondent's Request for Postponement. My client has been advised of said Ruling.

"It is impossible to properly prepare for this matter in one day. My client has advised that she will appear pro se and have the record reflect that counsel was not permitted adequate time to prepare for this hearing or conduct any

discovery whatsoever and, therefore, she has not had her legally provided right to adequate counsel. I respectfully request that this letter be read into the record.

"It is my intention to have this matter heard by the Court of Appeals if any penalties are assessed against her in this hearing due to the fact that the Agency postponed this hearing on three separate occasions and when my client asked for one set-over due to the hiring of new counsel, it was denied thereby denying her the right to be represented adequately."

11) Later on June 7, Respondent filed by fax her list of potential witnesses. Also on June 7, Respondent and the Agency entered into a written stipulation allowing the Forum to proceed on the Notices in cases numbered 33-95 and 34-95 in one dual hearing, pursuant to OAR 839-22-055 and 839-50-180. The stipulation was admitted into the record at the commencement of the hearing, as was the Agency's amended Case Summary.

12) 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.

13) At the commencement of the hearing, 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. The Hearings Referee read into the record as requested the letter of

Respondent's attorney partially quoted in Finding of Fact 10 above.

14) At the commencement of the hearing, the Hearings Referee allowed the Agency's motion to amend the Agency's Notice of Intent to reflect that the name of the minor was "Danny Stoltz," rather than "Randy Stoltz," and to amend the allegation of unlawful overtime in count 3 from 20 weeks to 19 weeks. This reduced the sought-after civil penalty to \$19,000. Respondent did not object to the amendment.

15) The Proposed Order, which included an exceptions notice, was issued February 7, 1996. Exceptions, if any, were to be filed by February 27, 1996. No exceptions were received.

FINDINGS OF FACT - THE MERITS

1) Respondent LaVerne Springer did business in Portland beginning in 1992 as "Thumbs Up! Extra Casting." In her business, Respondent kept a list of persons who had expressed interest in performing as extras in various television and motion picture productions in Oregon. Respondent generally charged an annual listing fee of \$20 to persons wishing to be on her casting list. Before opening her office, Respondent had been a casting coordinator on a major production and had about 15 years of experience in entertainment production. She was trained on the east coast, starting as an unpaid intern. She was taught to "pass the torch," that is, give others the same opportunity to learn the business. She is African-American and was particularly interested in providing opportunity to other African-Americans. She denied willfully seeking to employ a minor unlawfully.

2) The film industry is labor intensive. It takes scores of people on the production end to handle location, lighting, makeup, camera, wardrobe, sound, transportation and other services as well as support for the crew, principal actors, and extras, including meals and even sanitary services. For each production there is a daily call sheet generated by the production company, which assigns the various crew. The call sheet also names the main cast members scheduled ("cast and day players"), lists the number and types of extras needed ("atmosphere and stand-ins"), lists the time of day when and where persons in each category are to report, and includes advance shooting information by scene, cast, and location. The daily call sheet was generally available for the next day only after the current day's "shooting" (i.e., filming) was completed.

3) From the call sheet information, an office such as Respondent's developed lists of stand-ins and atmosphere extras for the particular shooting date ("skins") by verifying the availability of and notifying and assigning persons in her files. This involved much telephone work, sometimes late in the evening.

4) Respondent's office also received an overall schedule for the production ("one line schedule") showing the number of projected shooting days with a one line description for each scene planned for each shooting day. The shooting days and days off were numbered consecutively and by calendar date. Production companies were not always successful in adhering to this projected schedule and a project might take longer than planned.

5) Respondent contracted with production companies to find and assign persons for use in scenes to be filmed. The order, or "call," generally specified the number and types of persons needed. Respondent's office was then responsible for matching the needed persons from the list, determining their availability and telling them where to report. This was known as "booking."

6) The accounting department of a production company distributed the vouchers, or time cards, for extras from a payroll company to an extras company. The extras company in turn was responsible for returning the properly filled out voucher and personal documentation to an assistant director so that the production company could submit them to the payroll company for the individual paychecks. Errors were returned to the extras company to be corrected or verified. The payroll company was the employer of record of extras for the purposes of taxes, etc. The extras casting company or individual was paid a daily contract fee. This could be on the basis of billed invoice or an individual functioning as an extras supplier could be paid through payroll.

7) On July 2, 1993, Agency Compliance Specialist Ursula Bessler telephoned Respondent because of an article in the Oregonian newspaper regarding Respondent's intent to offer internships to youths on a film she planned. Respondent told Bessler that interns were usually unpaid and that

she was seeking corporate sponsors to provide some sort of pay or stipend. Bessler advised Respondent that in Oregon, "people could not volunteer their services for a for-profit employer" and that such employers were required to pay employees, including "youngsters," minimum wage.

8) Respondent talked to others in the industry both before and after her July 2 conversation with Bessler and believed that she and Bessler were talking about two different things since she had become convinced that unpaid interns were a standard industry practice.

9) During times material, Daniel Lee Stoltz, born September 26, 1977, was a minor 16 years of age. On or about September 30, 1993, he answered a casting call by Respondent and worked as an extra on a film called "Single Dad."

10) Stoltz had met Respondent on a previous casting call for "Why My Daughter" and was "listed" as an extra. On September 30, he ran some errands for her. At her request, he carried snacks and water from the location service truck to the other extras. At her request, he collected vouchers from the other extras and made sure they were filled out properly in order to get each extra paid.

11) Respondent liked the way Stoltz "pitched in." He showed high energy and knew what to do. She was understaffed and the production allowed no budget for a casting assistant. She asked Stoltz to return on the

* The names of the productions, both theatrical and television films, are generally working titles and may be different from the finished product. Hence, some of the shows mentioned by the witnesses may have had more than one title during or following production.

following day. Either on September 30 or the next day, Respondent told him that she really liked his energy and would like him to work with her. She stated she would have him "book" people in her office and about other duties.

12) Stoltz was thrilled by what he saw as an opportunity to break into show business. He told Respondent that he would love to work with her and mentioned that he had employment at McDonald's. At some time, Respondent spoke with Stoltz's mother and his high school counselor. Respondent told Stoltz that she would work around his schedule and that he could come to her office that night and book people for the next day. He began working in Respondent's office around October 1.

13) Respondent did not ask to see a work permit for Stoltz before she assigned him duties in her office, or at any time. She did not file an employer certificate within 48 hours or at any time.

14) At the office, Respondent gave Stoltz a list of people to call. At first, she made out the lists and did the choosing or picking of people to cast. Stoltz would call them and book them. Respondent wrote down what Stoltz needed to tell them, what they should bring, and where and when to report. He used Respondent's phone, office, and facilities to accomplish these tasks.

15) In the following days on the set of the productions, Stoltz's duties increased rapidly. Knowing that Stoltz knew how to fill out vouchers,

Respondent reviewed them once more and put him in charge of vouchers. She authorized him to sign her initials. He checked the vouchers, made sure they were organized and ran from office to office. From being very specific at first, Respondent eventually gave him a general duty and he carried it out in detail.

16) About the second or third day on the job, Respondent gave Stoltz a pager and a key to her office at 333 NE Russell. After a few days, Respondent would tell Stoltz to return to the office and book a number of persons for the next day. Respondent trained Stoltz and gave him the projects. It eventually became his duty to choose and call the people and book and/or replace them.

17) On the production set, the extras "wrangler" kept the extras together and coordinated their availability for the camera.

18) "Wrangling" the extras was among Stoltz's duties. This involved keeping the group together and quiet. He was given a walkie talkie, and when the production personnel would call for the extras, he would bring them to where they were supposed to be. Respondent left the set many times and left Stoltz in charge of the extras. Inside two months' time, he took full responsibility for everything. He had learned to do everything in Respondent's business except the book-keeping.

19) Stoltz worked in Respondent's office and on the sets of various productions on Respondent's behalf from

October 1, 1993, to May 7, 1994, including "Save the Last Dance For Me," "Imaginary Crimes," "Rose City," "Under Suspicion," "Medicine Ball," and "Mr. Holland's Opus." During that time he had no set schedule. Respondent would call him to come to the office immediately because a large number of extras were needed the next day. Perhaps that number would be increased or decreased during or after he began calling. Generally, he was at the office at 9 a.m. If he was to handle extras on the production set, he was on the set as early as 5 or 6 a.m. He described his job title as "casting assistant."

20) After Stoltz had worked with Respondent for two or three weeks he quit his job at McDonald's and had no money. He "hinted" to Respondent that he needed minimum wage. He asked for gas money. Respondent said she would buy his lunch, which she did for about a week. On later occasions, Respondent would allow Stoltz to keep \$5 of the \$20 listing fees collected on a particular day, usually a big casting call day when new or renewed listings came in. He collected between \$400 and \$500 in this manner.

21) Stoltz was enrolled at Gladstone High School in September 1993 and tried at first to go to his duties with Respondent after school. When Respondent received another casting project ("Save the Last Dance"), she wanted him to assist her full time. He talked to his high school counseling office, telling them it was his dream to work in this business and that he needed to get out of school. The counseling office wanted a letter from Respondent to be sure it was a

legitimate opportunity. Respondent supplied it.

22) Respondent's letter was dated November 5, 1993, and stated:

"To whom it may concern;

"Danny Stoltz is currently working on the film 'Save the Last Dance' as a production assistant (extras casting). He will be responsible for extras on set, filling out payroll vouchers, taking them to set and checking wardrobe. He will also assist in booking extras for scenes.

"Danny's work schedule varies but he will not be working a five (5) week [sic] through Nov 21, 1993.

"Here is the schedule as we know it

"11/8, 9, 11, 12

"week of 15-19 - undetermined

" " " 22-26 - "

"Dec. shooting schedule is forthcoming avg. 3 day per week through 12/19.

"There will be a tutor on set at all times [s] LaVerne Springer

** 2 hrs per day - set school 281-8875"

(Emphasis original.)

23) There was no evidence that a tutor or any sort of school was available to Stoltz during his association with Respondent.

24) There were days that the school would not excuse Stoltz for work. If Respondent called him to work, Stoltz would attempt to obtain an excuse from his mother for illness or a medical appointment so that he could continue to work on the film of the

* Stoltz was uncertain whether he started in the office on the evening of September 30 or October 1, 1993. Exhibit A-1, his claim calendar dated June 7, 1994, shows a start date of October 1, 1993.

moment. Respondent had told him that if he was not available all the days he was needed, she would have to replace him with an assistant that could work all those days.

25) On two productions, "Save the Last Dance" and "Medicine Ball," Respondent attempted to get Stoltz paid by the production company. In each instance, for about a week, he received some pay either as an hourly crew employee or through vouchers as an extra. Neither production was anxious to pay him as a "casting assistant" while they were already paying Respondent for extras casting. In both instances, his duties for Respondent remained the same.

26) Stacy Sobiech "free lanced" as an assistant accountant in the local film industry at times material, working for production companies. Her duties involved payments to vendors and extras, and meal money and petty cash. She knew Stoltz worked for Respondent's extras casting office. She dealt with both Stoltz and Respondent on "Imaginary Crimes," "Under Suspicion," and "Medicine Ball" from November through December 1993 and February through April 1994. Sobiech worked about a 12 hour day during production and extras also worked around 12 hours.

27) Because his mother suggested he was unwise not to do so, Stoltz began keeping track of the time he worked with Respondent. Beginning in early 1994, he marked his hours on a calendar in Respondent's office. When his relationship with Respondent ended, that calendar was left in her office.

28) Respondent was involved with a production company's employment of extras at Grant High School. They received \$1.00 plus lunch. Respondent was not the employer of record. Respondent supplied a record of workers and hours when the Agency investigated, enabling the Agency to obtain wage payment to the extras from the production company. In February 1994, Respondent received a letter from Compliance Specialist Bessler thanking her for her cooperation.

29) Respondent stated she had kept a log of the projects involving Stoltz. She had no record of the time Stoltz worked. On some nights she did not know how late he had been at the office until he mentioned it the next day. She would work some nights due to the volume of work, but other nights she would leave at 9 p.m. and allow Stoltz to finish.

30) On one occasion during the production of "Medicine Ball," Stoltz asked to report late because he was exhausted and needed to sleep in. Respondent refused permission, telling him he needed to be on time. He never asked again. He was usually the first one in and Respondent came and went with no schedule of her own. He was always available to check people in and out.

31) Because of the hours spent working with Respondent, Stoltz missed many classes and had no time for homework. If Respondent paged him during the day, he would skip class or give an excuse of an emergency. His grades went down and he was unable to stay awake when he did attend class. The school counseling office called his parents and he found it

stressful dealing with school and his parents. He lost friends and had little social life.

32) At the time of the hearing, Brian Tanke was production coordinator for a production, "Dead at Sunset." He had been acquainted with Respondent since 1992. He helped his wife as a production coordinator on "Single Dad" in 1993. He was aware that Stoltz was helping Respondent with "Single Dad" and was not a production company crew member. Extras were paid through a different payroll office from the regular crew.

33) At the time of the hearing, Katrina Sanders-Payne had worked in the television, movie, and entertainment industry, both on and off the screen, for 25 years. She had worked as an extra and in several capacities such as director, assistant, and coordinator in production, transportation, and extras casting. After staffing positions with the most qualified people, most departments hire interns to do the errands and legwork. These interns may be paid or unpaid, depending on the budget available. She had used interns in extras casting. Interns learn skills which are a means to break into the business. Film production companies recruit experienced, skilled people. Most interns have asked to work in that capacity. This use of interns is prevalent along the west coast. There were only a few African-Americans working in production. Interns usually do errands, office work, make and receive telephone calls, type, and help keep the extras available and supplied with food and drink. They may be students or they may be seeking a second career. They usually cover their

own expenses, but may eat with the crew. They work as much as 15 to 18 hours per day during a 5 or 6 day week.

34) Shari Smith worked for Respondent about three or four weeks around October 1993. Smith described herself as an "apprentice," a job title suggested by Respondent. Smith worked in Respondent's office, recording the listing of extras, from early morning to late in the evening, 8 to 10 p.m. or later. Respondent paid her one third of the listing fee for each person she signed. It was necessary that she remind Respondent each day of the amount she was owed. Smith also received some mileage and up to two meals per day. Smith's ambition was in the production end of the business.

35) Stoltz was working with Respondent when Smith started. He came in after school and worked until midnight or after. Smith recalled the office as very busy and stressful, requiring long hours. Stoltz, who was not being paid, was knowledgeable and assisted Smith when Respondent was out of the office. Smith was discouraged by Respondent from discussing pay with Stoltz.

36) Smith missed an early call (5:30 a.m.), called Respondent to apologize, and left for a planned family trip. She attempted to again work with Respondent upon her return, but Respondent never returned her calls.

37) At the time of the hearing, Henry Taylor was in the craft services business, that is, he catered snacks for film crews. He was guided into that business by Respondent. He met Stoltz in Respondent's office, where

Stoltz was an intern. Respondent has had "a lot of" interns working for her; that was how they got into the business. Stoltz was good at it. Taylor understood that Stoltz had agreed with his parents that he would work to early evening and then do his homework. Taylor would find him at Respondent's office late at night and encourage him to put school first. Stoltz worked long hours. Taylor entered Respondent's office one morning around 5 or 6 a.m. and found Stoltz on the floor, asleep. Respondent was upset by Stoltz sleeping at the office and took back Stoltz's office key.

38) Stoltz appeared to be a "workaholic," he loved the work and stayed in the office. Stoltz had previously attempted to rearrange the office and Respondent told him that as an intern he couldn't do that. Taylor advised Respondent to get rid of Stoltz.

39) Stoltz did not work in Respondent's office during several weeks in January and February 1994. He had some medical treatment. Respondent, after taking back the office keys, re-stored them and Stoltz's duties. He continued to work with Respondent through May 6, 1994. After that, he was associated briefly with other extras coordinators. He was running his own casting service, "Extras Only," at the time of the hearing. He denied sending any fax transmittals about Respondent.

40) While Stoltz worked in Respondent's office, he worked at her direction. If the production company told him it didn't need him there, that is, that it wasn't going to pay him, he still remained and carried out his duties for Respondent, who told him she needed

him there to check the extras in and out.

41) Holly Happenstance (true name Holly Hummer) worked (under the name Hummer) as an unpaid helper for Respondent from April to September 30, 1993. She had a pending wage claim against Respondent at the time of hearing. She had sought out Respondent upon hearing that Respondent might help her into show business and accepted Respondent's suggestion to work as an intern. She was not a minor at the time. She first knew Stoltz as an extra cast as a teenager. His age was on his listing information. Respondent mentioned that Stoltz was very eager and would be willing to do more work. On September 30, he worked as an extra and also began helping on the set carrying drinks to the other extras.

42) April Serio worked through Respondent's office as an extra and stand-in at times material. She worked on "Save the Last Dance," "Imaginary Crimes," and "Under Suspicion" between October 1993 and for three or four months into 1994. As a stand-in, she often worked 8 to 18 hours a day, reporting as early as 5:15 to 8 a.m., depending on the finishing time for the previous day. Stoltz was present when extras worked, arriving on the set when or before they did and leaving when or after they did. This sometimes meant 16 hours or more.

43) Respondent was not concerned about competition from other extras casting companies, including Stoltz's company, "Extras Only." Respondent treated extras kindly, asking only that they be professional at all times. Extras listed with other casting

companies continued to be called by Respondent, even if not always available.

44) At times material, Rose Roberts was building manager of 333 NE Russell Street, Portland, the site of Respondent's office. She met Stoltz in about September 1993. He worked for Respondent and sometimes called Roberts as an extra. She saw Stoltz working for Respondent when, as building manager, she locked the building in the evening or had occasion to come in late in the evenings and on weekends. She sometimes let him into the building. She discussed with Respondent and Stoltz the late hours required by large casting calls when she needed to lock the building for the evening. Stoltz once called her at 11:30 p.m. to report at 6 a.m. the next day. He was on the set at 6 a.m., and admitted to her he had worked all night. She often spoke to Stoltz about staying in school, but he seemed to think the job was more important.

45) Coby Porter, who was 17 years of age at the time of the hearing, was a close friend of Stoltz for several years and had lived with Stoltz and his family. He spent much time with Stoltz until Stoltz began spending all his time after school until late at night working for Respondent. When Stoltz had opportunity to go somewhere with Porter, he was frequently paged to the office. Porter met Respondent in her office through Stoltz. Respondent was Stoltz's boss and Stoltz was her employee. Stoltz slept in class, appeared very tired, and had difficulty doing his schoolwork. He twice visited Porter around 11:30 p.m., upset and "stressed out," but he continued to

pursue his dream, his connection with show business.

46) Porter worked one day as an extra on "Medicine Ball." He accompanied Stoltz to the set early, before the other extras arrived. Respondent was there and told them not to "hang out" together, that each was working. Porter saw little of Stoltz during that day. They were on the set until 10 p.m., then went back to Respondent's office because Stoltz was told he had to do some work. Respondent was there. Stoltz worked until about 1:00 a.m. Toward the end of Stoltz's association with Respondent, Porter assisted him with copying and distributing some fliers in Salem.

47) At times material, Virginia Briggs and her husband, Harry O. Briggs, were listed with Respondent, worked as extras on several projects, and were listed with other casting agents. She met Stoltz, an ambitious young man of school age who described himself as an intern, at Respondent's office. She noted that he was answering the phone and helping Respondent.

48) At times material, Rod James (true name Roderick James Skibenesh) was listed since February 1993 with Respondent and worked as an extra on seven projects. It was a good professional experience. He was aware of the use of volunteers or interns in the film industry. He met Stoltz on the set of "Dancing With Danger" ("Save the Last Dance") and knew that Stoltz worked for Respondent. He found Stoltz to be demanding, abrasive, and seemingly unhappy. Respondent told Stoltz to treat the extras courteously, without yelling. James worked with

Stoltz on "Under Suspicion" and "Medicine Ball." He worked with other casting agents and was aware that Stoltz had started his own casting company.

49) At the time of the hearing, Felicia Slider worked with Respondent as an intern. She was also employed with the Oregonian newspaper. She was acquainted with Stoltz, whom she met while he worked with Respondent. She was interested in learning about the industry and Stoltz told her about what fascinating work it was. Later, on the set of "Medicine Ball," he showed her what he did as an intern. She knew that interns were unpaid. Stoltz showed her how to complete an extras voucher, and suggested that she could get paid by the production company even when she did not actually work as an extra.

50) Slider found that most work days were eight or nine hours, and was never told to work to 1:00 a.m. or later. She worked evenings on the set, and occasionally finished up at home, but never that late. Slider, Respondent, and Stoltz usually left the set together. Any work Stoltz did beyond that was "on his own." On the sets of "Medicine Ball" and "Under Suspicion," Respondent told him several times to slow down, that he was trying to do too much. Slider thought that Stoltz was too young to work late hours. She was 23 years of age at the time.

51) At times material, Christin Swanson was employed by Lakeside Productions on "Under Suspicion," first as assistant production coordinator and later as production coordinator. Respondent was the contract extras casting provider. Swanson saw a fax from "Extras Only" which listed

experience Stoltz had gained with Central Casting and with Respondent as being experience of "Extras Only." Lakeside had an agreement with Respondent and did not hire Stoltz's firm.

52) Chanda Watts had worked with Respondent as an unpaid intern from August 1994 to early 1995. She knew that Stoltz had been an intern with Respondent. As an African-American, she saw that minorities rarely were featured on camera. Her ambition was to be an actress, and she saw working with Respondent as an opportunity in film production. She saw interns used in all phases of the business including wardrobe, transportation, and other departments. She worked as a wrangler on "Under Suspicion," and was paid by the production company. She subsequently obtained an assignment as a "day player" (she had one line) for which she was paid \$440 a day.

53) After Stoltz terminated with Respondent, Slider and Watts worked as interns with Respondent. Both made telephone calls to extras, who stated that Stoltz had failed to call them for work or had not followed through when they were underpaid or with promises of work. Some preferred not to work again through Respondent's office because they were treated rudely by Stoltz. There had been break-ins at the office and there were files missing. Some extras had paid listing fees to Stoltz which were unrecorded. Respondent relisted them without fee. Generally, a listing expired in 12 months. The unemployed and the homeless were not forced to pay.

54) Jessica Holmgren went to school with Stoltz. He called one day and asked her to fill in as an extra,

stating they needed someone right away. She told him she could not work late because she had school the following day. He insisted that she report. When she eventually had to leave before the days shooting was completed, Respondent was in difficulty with the production company, because Holmgren had appeared on camera.

55) Kyle Sheeley was employed as sales director for a hotel chain at the time of the hearing and also worked with Respondent as an unpaid intern. He had previously worked on films and in early 1993 he contacted Respondent for work in casting. He assisted with extras, organized, found types, and assisted with casting calls. He worked with Stoltz. Respondent spoke to Sheeley and Stoltz regarding accuracy of vouchers. At times, Stoltz would not leave in the evening when Respondent sent him home. In May 1993, Sheeley interviewed potential extras in Salem. At Respondent's direction, Sheeley had marketed in Salem through word of mouth. Meanwhile, Stoltz had distributed unauthorized fliers soliciting extras applications.

56) After Stoltz ceased working for Respondent, Respondent's office received fax transmissions which were sexually and racially derogatory and contained derogatory allegations about Respondent. Some of the productions companies also received these messages, which Respondent believed Stoltz had initiated. Respondent obtained an extras casting contract with Lakeside Productions in spite of their knowledge of negative information circulated about her.

57) In May 1994, Respondent had determined to end Stoltz's relationship with her office and told him not to work on a project located in Salem. He made up some fliers for the project and distributed them in Salem after being told not to do so. His presence in Salem and the development and distribution of the fliers were totally unauthorized. As a result, she asked for the return of the office key and pager.

58) While Stoltz worked in Respondent's office, he worked at her direction. If the production company told him it didn't need him there, that is, that it wasn't going to pay him, he still remained and carried out his duties for Respondent, who told him she needed him there to check the extras in and out. Respondent told him she would pay him on "Save the Last Dance" through her office.

59) Acting as an unpaid intern was seen as a means by which an interested individual could gain experience in and knowledge of the film industry.

60) The production company for "Single Dad" used a camera intern (an adult) who became a paid employee toward the end of the production.

61) Previous to her association with Stoltz, Respondent had seen people of varying ages, from 14 years of age up, used as unpaid interns by production companies. She had seen Stoltz "booking" for another casting office. She knew he was young, but denied knowing he was only 16 years of age and did not consider him to be her employee.

62) William F. Pick was a Compliance Specialist with the Agency at

times material. In the summer of 1994, he investigated the allegations against Respondent regarding Stoltz. He made attempts to obtain records on Stoltz from Respondent, who responded by saying she was being harassed. He obtained a claim calendar from Stoltz. In the Agency's records, he found a "short duration" permit for Respondent covering September 1993, which allowed the hire of up to 50 minors as extras for a maximum of ten days without the necessity of filing individual employment certificates. There was no record of a minor work permit for Stoltz and no minor employment certificate from Respondent regarding hiring Stoltz as her assistant. Based on the claim calendar submitted by Stoltz, Pick found that Stoltz had worked over 44 hours a week on 19 occasions.

63) With the exception of training programs registered with the Agency and certain religious, governmental, or non-profit organizations, no employer in Oregon may accept the volunteer services of an employee. All employees in Oregon, including minors, not covered by these exceptions must be accorded minimum labor standards, including working conditions and minimum wage. Oregon does not recognize voluntary internship in any for profit undertaking as legal.

64) Taylor was a close family friend of Respondent and a father figure to her children. He testified that Stoltz threatened him and Respondent's children after Stoltz ceased working for Respondent. He believed that Stoltz was responsible for derogatory fax messages and had taken client files from Respondent's office for his own

use. He had no proof of this. He thought that Stoltz was a hard worker with poor people skills.

65) Some of Respondent's testimony varied in some respects with other, more credible evidence. Respondent denied keeping Stoltz from attending school, and asserted that she had spoken repeatedly with his parents and his school counselor. Part of Respondent's upset with Stoltz was due to his not keeping record of listings and fees. After May 1994, Respondent was the target of rumors and fax messages which she attributed to Stoltz. Respondent believed she was victimized by two break-ins which she also attributed to Stoltz: one in July when her journal and ledgers came up missing and one in the period between August and October, when she was working daily on a set in Tigard. Her office was thoroughly "trashed" that time, but the only things missing were computer discs of extras files, *i.e.*, listings. She stated she had intended to cooperate with Pick and BOLI's investigation and had some notes regarding the projects involving Stoltz. She retained an attorney but was unaware at the time of the hearing what was done. She testified that there were so many things going on in the late summer of 1994 that she did not clearly recall her conversations with her attorney or her dealings with Pick. At the time of the hearing, Respondent stated she at that time understood the requirements of the law, and intended future compliance, including obtaining or offering only paid positions for interns. When she attempted to get Stoltz a paid position with "Save the Last Dance" she learned his age. Since she had talked

to his parents and his school, she thought it was permissible to get him employment. She stated his age was not listed in her casting records. The Forum has disregarded those portions of Respondent's testimony which were controverted by more credible evidence or inference or which did not bear upon the unlawful employment of a minor.

66) Some of Stoltz's testimony varied in some respects with other, more credible evidence. The Forum has disregarded those portions of his testimony which were controverted by more credible evidence or inference or which did not bear upon Respondent's unlawful employment of a minor.

67) When Stoltz sought the Agency's help in collecting wages from Respondent for his services, he filled out a calendar with the hours he worked each day as best he could recall. He gathered such documents as he had and "tried to construct it as close as I could come to it." He filed the resulting claim calendar with the Agency on or about June 7, 1994. At about the same time, he filled out an Agency complaint form in regard to an alleged child labor violation.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent LaVerne Springer did business as Thumbs Up! Extra Casting, a business wherein she facilitated the assignment of extras for performance in various television and motion picture productions in this state.

2) While so engaged, Respondent utilized the personal services of Daniel Lee Stoltz, who assisted her at her di-

rection and under her instructions from October 1993 to May 1994.

3) While Stoltz assisted Respondent as described, Respondent supplied the office, the office equipment, a pager, and a key to the office, and specified the procedure for doing the job.

4) During times material, Stoltz was a minor 16 years of age. There was no evidence that Respondent was regulated under the Federal Fair Labor Standards Act.

5) Before engaging Stoltz as her assistant, Respondent did not require him to produce a work permit.

6) After engaging Stoltz as her assistant, Respondent did not file a completed Employment Certificate Form with the Bureau of Labor and Industries within 48 hours after first permitting him to work.

7) From about October 1, 1993, through May 6, 1994, Stoltz assisted Respondent in her office or on the location of the described productions for over 44 hours per week during a total of 19 weeks.

8) From about October 1, 1993, through May 6, 1994, Respondent did not establish a regular payday, did not keep records of the hours Stoltz worked, and did not regularly compensate Stoltz for the hours he worked.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was subject to the provisions of ORS 653.305 to 653.370 and the administrative rules adopted thereunder.

2) At times material herein, ORS 653.305 provided:

"(1) The Wage and Hour Commission may at any time inquire into wages and hours or conditions of labor of minors employed in any occupation in this state and determine suitable hours and conditions of labor for such minors.

"(2) When the commission has made such determination, it may issue an obligatory order in compliance with ORS 183.310 to 183.550.

"(3) After such order is effective, no employer in the occupation affected shall employ a minor for more hours or under different conditions of labor than are specified or required by that order, but no such order nor the commission shall authorize or permit the employment of any minor for more hours per day or per week than the maximum fixed by law or at times or under conditions prohibited by law."

At times material herein, ORS 653.307 provided:

"(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.

"(2) Failure by an employer to comply with ORS 653.305 to 653.340 or with the regulations adopted by the Wage and Hour

Commission pursuant to this section shall subject the employer to revocation of the right to hire minors in the future at the discretion of the Wage and Hour Commission, provided that an employer shall be granted a hearing before the Wage and Hour Commission prior to such action being taken.

"(3) All school districts shall cooperate with the Wage and Hour Commission and make available upon request of the commission, information concerning the age and schooling of minors who have applied for or been issued an employment certificate."

At times material herein, ORS 653.310 provided:

"No child under 18 years of age shall be employed or permitted to work in any employment listed in ORS 653.320(2), unless the person employing the child procures and keeps on file and accessible to the school authorities of the district where such child resides, and to the police and the commission an employment certificate as prescribed by the rules and regulations adopted by the Wage and Hour Commission pursuant to ORS 653.307, and keeps a complete list of all such children employed therein."

At times material herein, ORS 653.370 provided, in pertinent part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may impose on 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."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein. Respondent was not regulated under the Fair Labor Standards Act.

3) At times material herein, OAR 839-21-006 provided, in pertinent part:

"As used in ORS 653.305 to 653.360 and in OAR 839-21-001 to 839-21-500, unless the context requires otherwise:

"(5) 'Employ' shall have the same meaning as that which appears in ORS 653.010(1).

"(6) 'Employer' shall have the same meaning as that which appears in ORS 653.010(2)."

At times material herein, ORS 653.010 provided, in pertinent part:

"As used in ORS 653.010 to 653.261, unless the context requires otherwise:

"(3) 'Employ' includes to suffer or permit to work; however, 'employ' does not include voluntary or donated services performed for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer * * * or a religious, charitable, educational, public service or similar nonprofit

corporation, organization or institution for community service, religious or humanitarian reasons or for services performed by general or public assistance recipients as part of any work training program administered under the state or federal assistance laws.

"(4) 'Employer' means any person who employs another person * * *."

At times material, ORS 652.210 provided, in pertinent part:

"As used in ORS 652.210 to 652.230, unless the context requires otherwise:

"(1) 'Employer' means any person employing one or more employees * * *."

"(2) 'Employee' means any individual who, otherwise than as a copartner of the employer, as an independent contractor or as a participant in a work training program administered under the state or federal assistance laws, renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate."

At all times material herein, Respondent was an employer and Daniel Lee Stoltz was her employee.

4) At times material herein, OAR 839-21-220 provided, in pertinent part:

"(1) Unless otherwise provided by rule of the Commission, no minor 14 through 17 years of age shall be employed or permitted to work unless the employer:

* The numbering of the referenced subsections of ORS was changed to (3) and (4), respectively, in 1989. Section 1, chapter 446, Oregon Laws 1989.

"(a) Verifies the minor's age by requiring the minor to produce a Work Permit ***.

"(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."

At times material herein, OAR 839-21-235 provided:

"As used in OAR 839-21-235 to 839-21-246, 'Employment Permit' means the Employment Certificate to minors and the Employment Certificate to employers of minors required by ORS 653.307."

Respondent failed to verify the age of minor Daniel Lee Stoltz, born September 26, 1977, by requiring him to produce a work permit before employing him or permitting him to work on or about October 1, 1993, in violation of ORS 653.307, 653.310, and OAR 839-21-220(1)(a).

5) Respondent failed to file a completed employment certificate form with the Bureau of Labor and Industries within 48 hours after hiring minor Daniel Lee Stoltz, born September 26, 1977, on or about October 1, 1993, in violation of ORS 653.307, 653.310, and OAR 839-21-220(3).

6) At times material herein, OAR 839-21-170 provided, in pertinent 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 ***;

"(b) Home address, including zip code;

"(c) Date of birth;

"(d) Sex and occupation in which the minor is employed ***;

"(e) Time of day and day of week on which the minor's workweek begins;

"(f) Hours worked each workday and total hours worked each workweek;

"(g) Date the minor became employed by the employer and date employment was terminated."

Between October 1, 1993, and May 1994, Respondent failed to keep the required records of the employment of minor Daniel Lee Stoltz, including the hours worked, contrary to OAR 839-21-170.

7) At times material herein, OAR 839-21-067 provided, in pertinent part:

"(1) No employer shall employ minors, except those employed in organized youth camps or those employed in agricultural employment, to work more than 44 hours per week unless a Special Emergency Overtime Permit has been issued therefor by the Wage and Hour Commission."

Between October 1, 1993, and May 1994, Respondent employed Daniel Lee Stoltz, a minor, more than 44 hours per week for each of 19 weeks and possessed no Special Emergency Overtime Permit from the Wage and Hour Commission, in violation of ORS 653.305 and OAR 839-21-067(1).

8) Under ORS 653.370, the Commissioner of the Bureau of Labor and Industries is authorized to assess a civil penalty for each violation of ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder. The civil penalties assessed in the Order below are a proper exercise of that authority.

OPINION

The record in this case contains overwhelming evidence that Respondent was an employer in her work relationship with Daniel Lee Stoltz, a minor 16 years of age, and that Stoltz was her employee.

Where an individual who is not an independent contractor or copartner and who is not a participant in a work training program administered under the state or federal assistance laws renders personal service in this state to another who pays or agrees to pay the individual at a fixed rate, that individual is an employee and the one to whom the service is rendered is an employer. ORS 652.210. There was no evidence that whatever knowledge or training Stoltz received from Respondent was in any way part of a state sponsored or federally sponsored work training program.

The fact that Stoltz was not paid or that there was no agreement to pay him a fixed rate cannot take him out of the definition of "employee" where a minimum wage law required that he be paid a minimum wage. *In the Matter of Martin's Mercantile*, 12 BOLI 262, 273 (1994) (citing *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 44 (1993)). Where the alleged employer has the right to control how the work is performed, furnishes the equipment,

materials, and facilities used by the alleged employee, and the alleged employee cannot hire others to assist with the assigned work, the relationship is one of employer-employee and does not involve an independent contractor. *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264, 273-78 (1982). Where an individual has no ownership interest in the business, has no right to share in the profits, no liability to share any losses, and no right to exert some control over the business, that individual is not a co-owner or copartner of the alleged employer, but is in fact an employee. *Crystal Heart Books*, 12 BOLI at 41-44.

Respondent argued that Stoltz was an unpaid intern, exchanging his volunteer labor for training and knowledge in the film business, and introduced credible evidence that such arrangements were common throughout the film industry. However widespread that type of "training" might have been in the past or elsewhere, it is not lawful in Oregon, whether it involves adult employees or minors.

The Forum has difficulty crediting Respondent's expressed belief that the "intern" system she described was lawful. She had, prior to employing Stoltz, discussed the unpaid intern situation with a representative of the Agency. While she employed Stoltz, she again had notice of the requirement of Oregon law that workers, particularly minors, receive minimum wage when she learned that a token payment plus lunch was not an acceptable pay rate. Respondent denied willfully violating the law. Willfulness is not an element in the violations charged of failing to verify age, failing to file a

completed employment certificate form with the Bureau within 48 hours of hiring Stoltz, or employing him over 44 hours per week without a Wage and Hour Commission special permit, but if it were, that element would be satisfied.

It is not a defense for Respondent that Stoltz willingly and eagerly undertook the "intern" position. The subject statutes and rules were clearly designed to protect minors from their own eagerness and naiveté, and from less than scrupulous potential employers.

The statutes and rules allow this Forum to impose particular penalties. Whatever Respondent's subjective intent, the result was that she obtained free labor at the expense of a child. Any evidence suggesting that the child may have been disloyal or undependable do not mitigate those penalties. Respondent's assurances of future compliance are offset by the continued use of unpaid interns up to the time of hearing. Nothing in this record suggests that anything less than the sanctions sought by the Agency should be imposed.

ORDER

NOW, THEREFORE, as authorized by ORS 653.370, LAVERNE SPRINGER, dba Thumbs Up! Extra Casting, is hereby ordered to deliver to the Bureau of Labor and Industries, Fiscal Services 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 per cent, between a date ten days

after the issuance of the Final Order herein and the date Respondent complies therewith. This assessment is the sum of the following civil penalties against Respondent:

(1) Five Hundred Dollars (\$500) for one violation of OAR 839-21-220(1)(a);

(2) Five Hundred Dollars (\$500) for one violation of ORS 653.307, 653.310, and OAR 839-21-220(3); and,

(3) Nineteen Thousand Dollars (\$19,000) for 19 violations of ORS 653.305 and OAR 839-21-067 (1).

**In the Matter of
TONY CHAN,
dba Wong's Cafe, Respondent.**

Case Number 11-96
Final Order of the Commissioner
Jack Roberts
Issued April 16, 1996.

SYNOPSIS

Employer did not discharge Complainant because she utilized workers' compensation procedures or because she applied for workers' compensation benefits. The Agency failed to prove with credible evidence a causal connection between Complainant's discharge and the fact that Complainant filed a workers' compensation claim and applied for benefits. ORS 659.410; OAR 839-06-105(4)(a).

FINDINGS OF FACT – PROCEDURAL

1) On August 22, 1994, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that she was the victim of the unlawful employment practices of Respondent. After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On October 30, 1995, the Agency prepared for service Specific Charges alleging that Respondent discriminated against Complainant by terminating her from her employment based on her application for benefits, invoking, and utilizing the workers' compensation procedures in violation of ORS 659.410. With the Specific Charges, Respondent was served with 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 Oregon Administrative Rules (OAR) regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings. Both the Notice of Contested Case Rights and Procedures and the Bureau of Labor and Industries Contested Case Hearings Rules (OAR 839-50-130(1)) provide that an answer must be filed within 20 days of the receipt of the charging document. Respondent, through counsel, timely filed an answer on November 16, 1995.

Respondent called the following witnesses in order of appearance: Michael Adams, M.D., Complainant's treating physician (by telephone); Bernadette Yap Sam, Civil Rights Investigator, Bureau of Labor and Industries; Michael Morrell, Complainant's husband (by telephone); Tony Chan, Respondent; and July Morrell, Complainant.

The above-entitled contested case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 5, 1995, in the office of the State of Oregon Employment Department, 801 Oak Avenue, Klamath Falls, Oregon. The Bureau of Labor and Industries (Agency) was represented by Alan McCullough, an employee of the Agency. Tony Chan (Respondent) was present throughout the hearing and represented by Dennis L. Oden, Attorney at Law. July Morrell (Complainant) was present throughout the hearing and was not represented by counsel.

Respondent called the following witnesses in order of appearance: Denise Sinclair, Doreen (Dee) Lilly, and Tony Chan, Respondent.

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

3) On November 17, 1995, the Agency filed a Motion to Amend

Specific Charges to add "Yuk Fu Johnny Chan dba Wong's Cafe" as an additional Respondent. The Agency based its motion on an Opinion and Order issued by the Workers' Compensation Board, which referred to Yuk Fu Johnny Chan as Complainant's employer during times material. On November 20, 1995, the ALJ conducted a prehearing telephone conference to ascertain the extent of Respondent's knowledge of potential additional parties and to determine the necessity of postponing the hearing until additional Respondents could be joined. Respondent requested and was given additional time to provide to the ALJ and the Agency information regarding the existence of additional parties. The Agency shortly thereafter advised the ALJ by telephone that it was withdrawing its motion and on November 28, 1995, the Agency confirmed by telephone that Respondent had been notified of the withdrawal during a perpetuation deposition.

4) On November 20, 1995, the ALJ issued a Discovery Order to the participants, directing them each to submit a Summary of the Case pursuant to OAR 839-50-210.

5) On November 27, 1995, Respondent filed a Motion and Order for Continuance of the scheduled hearing because Respondent's attorney, Dennis L. Oden, was attending a seminar during the week prior leaving him insufficient time to prepare Respondent's case. The ALJ denied Respondent's request, pursuant to OAR 839-50-150(5), because Respondent failed to show good cause for a postponement and because his request was untimely.

6) Pursuant to OAR 839-50-210 and the ALJ's order, the Agency and Respondent each filed a Summary of the Case. On November 28 and December 1, 1995, respectively, the Agency and Respondent each filed an addendum to their case summaries.

7) At the commencement of the hearing, the ALJ admitted and read into the record certain exhibits stipulated to by the Agency and Respondent during a pre-hearing conference.

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

9) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants 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 March 8, 1996. On March 14, 1996, the Agency requested an extension of time to March 28, 1996, within which to file exceptions. The request was granted on March 14, 1996. Exceptions were required to be filed by March 28, 1996. On March 25, 1996, the Agency notified the forum that no exceptions would be filed. No exceptions were received by the Hearings Unit.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent was an owner and operator of Wong's Cafe, a restaurant located in Klamath Falls, Oregon, where Respondent engaged or utilized the

personal services of six or more employees.

2) Respondent has owned the restaurant nine years and shares responsibility for its operation with his brothers and co-owners, Johnny Chan and Steve Chan. All of the brothers cook and maintain the kitchen, but the restaurant management falls primarily on Respondent.

3) Dee Lilly has worked for Respondent between seven and eight years. At times material herein, Lilly, in addition to waiting on tables, was Respondent's "head waitress" responsible for scheduling the other waitresses for their weekly shifts and interviewing prospective waitresses for employment with Respondent. New hires are always introduced to either Respondent or his brother, Johnny Chan, in Respondent's absence, for final approval. Lilly handles the day-to-day waitress management, including assuring that busy periods are covered by adequate staff and that waitresses are scheduled for days off. She also makes arrangements for those who need additional time off. New hires are advised by Lilly of Respondent's policy requiring advance notice, when possible, of the need for additional days off. When sick, the waitresses are asked to give as much notice as possible, but at least two hours notice is advised. When they make arrangements among themselves for trading shifts or substituting for each other, they are required to notify Lilly. Lilly discusses any waitress problems with Respondent, or, in his absence, Johnny Chan.

Although Respondent is the final decision maker regarding discharge, Lilly's recommendations are generally approved by Respondent when supported by a full explanation of the reasons behind the discharge.

4) Complainant was employed by Respondent from October 1, 1993, to June 17, 1994. She was hired as a hostess and soon after put to work as a waitress. At times material, Complainant averaged a 30 hour work week and earned \$4.75 an hour. She usually worked about five days a week. She averaged \$60.00 per week in tips.

5) On March 29, 1994, Complainant woke up experiencing pain and numbness in her hands. After she arrived for her 11:30 a.m. shift, she discussed her condition with two coworkers, Denise and Marilyn, and it was agreed that her co-workers would call someone to cover her shift while she went to the doctor for medical treatment. She was examined by Dr. Stuart, who diagnosed tendinitis, took her off work for two days, and referred her to Dr. Adams for further treatment.

6) Dr. Adams took Complainant off work from approximately April 1, 1994, until he released her for work on May 14, 1994.

7) On April 1, 1994, Complainant filed a workers' compensation claim. She also applied for and received workers' compensation benefits.

8) In an Opinion and Order issued by the Oregon Workers' Compensation Board on March 24, 1995, the

* Throughout the hearing, the employees were referred to and referred to themselves as "waitresses," a term informally stipulated to by Respondent and the Agency.

Referee found that Dr. Adams initially diagnosed Complainant's condition as tendinitis and later, in April 1994, added possible deQuervain's syndrome to his previous diagnoses of thumb and wrist tendinitis. The Referee also found that Dr. Adams's chart notes did not reflect any diagnosis of Renaud's syndrome until after Complainant's workers' compensation claim was denied on June 27, 1995. The Referee concluded that Dr. Adams's opinion on causation was not persuasive "because of his post hoc reasoning, his failure to initially diagnose Renaud's syndrome, his consequent inappropriate treatment, and his diagnosis of deQuervain's syndrome based on the then eminent pain."

9) Lilly was surprised and upset when Complainant filed the claim because she believed that Complainant had lied to her about the condition of her hands. Complainant initially told Lilly and some co-workers that her hand problems were of long standing and preceded her employment with Respondent. The day after she saw Dr. Stuart, Complainant told Lilly she wasn't going to file a claim because she didn't believe it was work related. Lilly's personal opinion at the time Complainant filed her claim was that the claim was not meritorious. Although Respondent was aware of the claim, he left handling the details of the claim up to Lilly and the insurance company.

10) Complainant returned to work as a waitress on May 14, 1994. Neither her hours nor her pay was cut after she returned.

11) Complainant was scheduled for an independent medical

examination (IME) in Portland on Tuesday and Wednesday, June 14 and 15, 1994, her regularly scheduled days off. She was scheduled to be off on Sunday, June 12, and scheduled to work on Monday, June 13, from 11:30 a.m. until 1:30 p.m. Complainant timely arranged to take Monday, June 13, and Thursday, June 16, off so that she could leave on Sunday, June 12, and visit relatives in Washington while in the Portland area. She told Lilly that she and her husband had "things to do" on Friday in Klamath Falls and that she would return from her trip in time for her 5:30 p.m. shift on Friday, June 17, 1994. Lilly asked Complainant to call her on Tuesday or Wednesday and let her know how the exam was going.

12) Complainant called Lilly for the first time on Friday, June 17, 1994, around 11:45 a.m. from Portland to tell her that she would not be able to make it in to work at her scheduled time. Lilly told Complainant that she would try to find someone to cover for her but that Complainant was expected to be there for her evening shift if a replacement could not be found. Lilly and Complainant agreed that Complainant would call Lilly back at 3 p.m. to determine if anyone was found to cover her shift.

13) Complainant called Lilly at 3 p.m. from Roseburg, Oregon, and was advised that Lilly was unable to find a replacement for her and that she was expected to show up for her shift. Complainant was told that if she didn't show up, she "probably" would be fired.

14) Complainant did not show up for her scheduled shift and did not

come into the restaurant at all until approximately one week later to pick up her paycheck. After Complainant failed to appear for her shift and made no effort to communicate with Lilly or Respondent thereafter, Lilly eventually considered Complainant fired.

15) During Complainant's employment with Respondent, neither Respondent nor his brothers treated her badly nor did they discuss her workers' compensation claim with her.

16) Complainant's workers' compensation claim was denied on June 27, 1994.

17) Complainant's testimony was not entirely credible. On important points her testimony was internally and logically inconsistent. For example, when testifying to her damages she stated that she averaged \$60.00 per week in tips. In response to a direct question, she responded that \$30.00 to \$40.00 was the most she ever made in a day. After the noon break, she testified that she was "confused" during her earlier testimony and that she did not average \$60.00 per week but rather made \$60.00 a day in tips. Her initial tip testimony was specific and straightforward in response to specific and straightforward questions. In contrast, her revised testimony was vague and evasive and she failed to reconcile her distinctly different statements regarding her daily tip earnings. The ALJ was left with the perception that she was attempting to inflate her earnings rather than correct a mistake and, as a consequence, Complainant was not believed on that point. In more testimony related to damages, Complainant, at one point, claimed she was physically capable of working as a waitress after

she left her employment with Respondent. At another point she claimed she wouldn't last a week as a waitress because of the continued pain in her hands. In one breath she stated she looked for work after she left Respondent's employment, in the next breath she intimated that it was futile to look for work because she was "in limbo" over her workers' compensation claim and "who's going to hire somebody who is in the middle of a worker's comp claim?" Her inconsistencies regarding her physical abilities rendered her testimony useless as evidence that she suffered economic harm as a result of losing her job. On another important point, Complainant claimed that she was not scheduled to work at 5:30 p.m. on Friday, June 17, 1994, and that Lilly had arranged for someone to work for her that night as well as the previous shifts of that week. However, she admitted that she arranged for time off from work for an extended period from June 12 through June 16, and that she told Lilly she planned to work her scheduled shift on Friday, June 17. She also admitted that she called Lilly about six hours before her Friday shift was to begin and told her that she wouldn't be able to make it in time for her shift. Complainant's husband testified that Complainant called Lilly before noon on Friday after she realized that by the time she made a stop in Roseburg to pick up her dog she would not be able to make it to Klamath Falls in time for her scheduled shift. He also recalled that during the 11:45 a.m. conversation between Complainant and Lilly, Complainant was told that if Lilly was unable to find someone to work for her, Complainant was expected to be there for her

scheduled shift. If she had prearranged to cover the shift and the shift was indeed covered, as she claimed, logic dictates that the call would have been unnecessary. Complainant's actions and admissions contradict her claim that she prearranged with Lilly to have her Friday shift covered by someone else and she was not believed on that point. In other testimony and during the initial investigation, Complainant claimed that when she came back to work on May 14 she was "treated like crap" and told by Lilly that she was going to be treated as a new hire and put to work as a hostess with a cut in hours. Her statements were not corroborated by any other evidence and, indeed, the entire record establishes that she returned to her previous job as a waitress with no apparent problem and no reduction in hours. On a less material point, she testified that when she was referred to Dr. Adams he told her that she had Renaud's Syndrome and that her work was the major contributing cause for her symptoms. Reliable evidence in the record shows, however, that Dr. Adams initially diagnosed tendinitis and his chart notes did not reflect any diagnosis of Renaud's syndrome until after Complainant's workers' compensation claim was denied, which was three months after her initial visit with Dr. Adams. (See Finding of Fact 8.) Complainant's testimony, overall, was inconsistent, uncorroborated for the most part, and self-serving. The Forum has accordingly credited only those portions of her testimony that are verified by or not inconsistent with other credible evidence in the record.

18) Dee Lilly's testimony was generally credible. She responded to questions without hesitation and made no effort to avoid any issue. She did acknowledge a memory deficiency, which was confirmed by tapes containing the testimony she gave during an unemployment hearing in August 1994, and which generally involved how far away and where Complainant was when she called from Portland and Roseburg on June 17, 1994. The assessment of Lilly's credibility was enhanced, however, by her demonstration of forthrightness in making at least one admission against interest in her testimony regarding her feelings about Complainant's claim of injury at the time the claim was filed. Accordingly, the Forum does not find her discredited or impeached on any material point.

19) Dr. Adams' testimony did not address any salient points. He admitted that he had only one contact with Respondent and that it consisted of one short conversation with Lilly for which he could not remember any specifics, thus his opinion regarding Respondent's attitude toward injured workers was not given any weight.

20) Michael Morrell's testimony had a script-like quality and he appeared to be influenced by his relationship with Complainant. Consequently, his testimony was not given much weight except where it was verified by or not inconsistent with other credible testimony.

21) Respondent Tony Chan's testimony was credible. He gave no indication by his demeanor or testimony that he held animosity toward injured workers or toward Complainant in

particular because of her alleged injury. His testimony that he did not discharge Complainant on June 17 was believable. Respondent was not impeached and there is no reason to consider his testimony other than credible.

22) Denise Sinclair was a credible witness. Her demeanor was calm and forthright. She was not discredited or impeached and there is no reason to consider her testimony other than credible.

ULTIMATE FINDINGS OF FACT

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

2) Complainant was a worker employed by Respondent between October 1, 1993, and June 17, 1994.

3) On April 1, 1994, Complainant filed a workers' compensation claim for an occupational disease she alleged arose out of her work with Respondent. She also applied for and received workers' compensation benefits.

4) Complainant was off work from April 1 to May 14, 1994, when she was released by her doctor to return to work.

5) Complainant was scheduled for an IME in Portland on June 14 and 15, 1994, her regularly scheduled days off. She asked for and received additional time off before and after the IME to visit relatives in Washington. She was scheduled to return for her 5:30 p.m. shift on Friday, June 17, 1994. She did not return at that time.

6) Complainant was considered discharged by Lilly when she did not appear for her scheduled shift or for a week thereafter.

7) Complainant was not discharged because she filed a workers' compensation claim or applied for workers' compensation benefits.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435.

2) At all times material, Complainant was Respondent's "worker" within the meaning of ORS 659.410 and OAR 839-06-105(4)(a).

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.040, 659.050, and 659.435.

4) ORS 659.410 provides:

"It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794 and 656.802 to 656.807, or of 659.400 to 659.435 or has given testimony under the provisions of such sections."

Respondent did not violate ORS 659.410 as charged.

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

OPINION

The Agency alleged in its charges that Respondent violated ORS 659.410 by discharging Complainant because she applied for benefits or utilized the workers' compensation procedures. Whether Respondent violated the statute or not turns on credibility. To establish a prima facie case, the Agency must prove by credible evidence the following elements:

- 1) Complainant's application for benefits or utilization of the workers' compensation procedures;
- 2) Respondent's knowledge that Complainant applied for benefits or utilized the workers' compensation procedures.
- 3) The barring or discharge of Complainant by Respondent;
- 4) A causal connection between Complainant's filing of the claim and the termination of Complainant's employment.
- 5) Harm resulting from Respondent's action.

There is no dispute that Complainant utilized the workers' compensation procedures by filing a workers' compensation claim and applying for benefits, which she received until her claim was denied on June 27, 1994. In addition, the evidence establishes that Respondent was aware that Complainant had filed the claim. With regard to Complainant's termination, however, the evidence is somewhat problematic. Complainant claimed she was told by Lilly during the second phone call on June 17 at 3 p.m. that she would be fired if she did not make it in time for her shift. Lilly testified that she said to Complainant that she would "probably"

be fired if she failed to appear for her shift. What is not in dispute is that Complainant did not appear for that particular shift but came in a week later to pick up her paycheck. Although there is no evidence that anything was ever said to Complainant regarding her job status after the 3 p.m. phone call, Lilly later considered and characterized Complainant's departure as a discharge. Consequently, this Forum concludes that Complainant was discharged de facto.

Respondent's liability turns on whether there is a causal connection between Complainant's discharge and the fact that she filed a workers' compensation claim. To prevail, the Agency must present credible evidence establishing that relationship. This Forum has evaluated the testimony of Complainant and those Agency witnesses whose testimony is relevant to causation. That which was inconsistent with other statements of the witness, or with other facts established in the record, has been rejected. The resulting findings simply do not support the Agency's charges. It is not possible to conclude, based on a preponderance of the evidence, that Complainant was discharged because of her utilization of the workers' compensation procedures or her application for benefits. When Complainant filed the claim, Lilly admitted that initially she was upset and that she questioned Complainant's honesty. However, there was no credible evidence that Lilly exhibited any animosity toward Complainant during the period she was off work or after she returned to work in May. The evidence showed that Complainant returned to her

**In the Matter of
FRED MEYER, INC.,
Respondent.**

Case Number 27-95

Final Order of the Commissioner

Jack Roberts

Issued June 12, 1996.

SYNOPSIS

Female Complainant was sexually harassed by male co-worker and discharged when she struck him. Respondent knew of the harassment and failed to take timely or any corrective action. The Commissioner found Respondent liable for tolerating an intimidating and offensive work environment and for Complainant's resulting emotional distress. The discharge was not because of Complainant's sex or in retaliation for opposing the unlawful activity. ORS 659.030(1)(a), (b), and (f); OAR 839-07-550; 839-07-555.

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).

regular job with no cut in hours or pay and when she made timely arrangements in June to take additional time off during the week of her IME she was accommodated by Respondent. Complainant's claim that Lilly arranged to cover Complainant's Friday night shift in addition to the time Complainant requested to be off simply did not square with the evidence in the record. There was absolutely no credible evidence to show a correlation between the fact that Complainant had filed a workers' compensation claim and the fact that Lilly was upset and threatened termination when Complainant called for the second time from Roseburg. In this case, a preponderance of the evidence shows that any motivation that Lilly or Respondent might have had to end the employment relationship with Complainant was driven by the events that transpired over the course of the day on June 17, and not because of a discriminatory animus toward Complainant. Accordingly, the Agency has not sustained its burden of proof.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on May 31, 1995, 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. Fred Meyer, Inc. (Respondent), a corporation, was represented by R. Kenney Roberts, Attorney at Law, Portland. Respondent's corporate representative

Carolyn Harden was present throughout the hearing. Georgia Stack-Rascol (Complainant) was present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses: Complainant; Complainant's former co-workers Wendy Benz, Mary Anne Plute, Ramona Streifel Slattery, Christine Sturdy, and Peggy Weiner.

Respondent called as witnesses the following: Respondent's current employees Jennifer Bierbrauer, Constance (Connie) Clark, Karla McCallister, and LeAnne Woodworth; Division Street store director Carolyn Harden; and former employee David Haines.

Having fully considered the entire record in this matter, I, Jack 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 25, 1994, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondent. After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On November 18, 1994, the Agency prepared for service on Respondent Specific Charges alleging that Respondent discriminated against Complainant in her employment based on her sex in violation of ORS 659.030

(1)(a), (b), and (f). With the Specific Charges, the Agency served on 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; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

3) A copy of those charges, together with items a) through d) of Procedural Finding 2 above, were sent by US Post Office regular mail, postage prepaid, to the Respondent on December 1, 1994. Both the Notice of Contested Case Rights and Procedures (item b) and the Bureau of Labor and Industries Contested Case Hearings Rules (item d) at OAR 839-50-130(1), provide that an answer must be filed within 20 days of the receipt of the charging document. Respondent through counsel obtained an extension of time to answer and on December 22, 1994, Respondent's timely answer was received by the Hearings Unit.

4) On January 25, the Agency filed a motion for postponement. Respondent counsel did not object to postponement and on February 17 the Hearings Referee granted the postponement, reset the hearing, and ordered that each participant submit a summary of the case. Respondent and the Agency each filed a Summary of the Case.

5) At the commencement of the hearing, counsel for Respondent stated that he had reviewed the Notice of Contested Case Rights and

Procedures and had no questions about it.

6) At the commencement of the hearing, pursuant to ORS 183.415(7), the Hearings Referee orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

7) At the commencement of the hearing, the Hearings Referee ruled on Respondent's May 26, 1995, motion to quash an Agency subpoena duces tecum for the personnel files of three potential witnesses, David P. Haines, Mary Ann Plute, and Connie Clark, who were or had been Respondent's employees, and to quash an Agency subpoena duces tecum for the complete file of Respondent's March 1993 investigation involving allegations by Complainant of sexual harassment. Respondent argued that the persons named were not parties, that their personnel files were personal to them and were not relevant to the proceeding, and that disclosure would invade their privacy. Respondent argued further that its internal investigation was privileged as work product containing confidential information and disclosure would have a chilling effect on Respondent's ability to investigate employee complaints. The Agency withdrew its request for the files of Plute and Clark and argued that the file of Haines, as the alleged harasser, was relevant. The Agency argued further that the investigation apparently resulted in different treatment of Haines and Complainant, which could have been based on their respective gender. The Hearings Referee found that the Haines file was relevant for

discovery purposes and ordered that it be made available to the Agency. The Hearings Referee ruled that Respondent's investigation was discoverable since it dealt with the same facts as the hearing. In both instances, the Referee cautioned that the requested items were not automatically admissible, but were subject to the same requirement of relevance and proper foundation as other evidence.

8) The Proposed Order, which included an exceptions notice, was issued December 8, 1995. Exceptions were to be filed by December 18, 1995. Respondent timely filed exceptions under an extension of time on January 29, 1996. They are dealt with in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent was a foreign corporation operating retail stores in Oregon which utilized the personal service of one or more employees reserving to itself the right to control the means by which such service was performed.

2) Complainant, a female, was employed by Respondent from October 11, 1978, to March 26, 1993. In 1993, she was a Person In Charge ("PIC") at the Customer Information desk at Respondent's Division Street store in east Portland. At times material, she earned \$9.65 an hour.

3) At times material, "PIC" was a non-management position with limited authority to direct the work in the absence of a manager. A PIC was an hourly wage employee with no hiring or firing authority who could discipline subordinates only with manager approval. Status as PIC depended on

the length of time the employee had worked for Respondent. Because employees were assigned shifts of varying lengths and starting times throughout the work week, the identity of the PIC varied.

4) The Customer Information (CI) desk, sometimes known as the Customer Service desk, involved assisting customers on returned merchandise, money orders, telephone inquiries, hunting and fishing licenses, and layaways. As described during the hearing, the CI desk was a small, confined rectangular area approximately 7 by 10 feet. The enclosed portion had two levels, the inner one desk height and the outer counter a foot or so higher. It was a crowded area. Access was limited to one entry-way. There was a cubicle, sometimes known as the CCK desk, with a computer just off of the CI desk. There the desk PIC closed and counted cashier tills. The desk PIC approved personal checks, and, in the operations manager's absence, found replacements for workers absent due to illness.

5) Most of the CI desk employees were female, and there was a relaxed atmosphere among them which included joking and banter, some of which was sexual in nature.

6) During January, February, and March 1993, Complainant supervised David P. Haines on the occasions she was PIC and Haines worked all or part of the same shift. Complainant usually worked late afternoon and early evening hours, but sometimes worked other hours.

7) Wendy Benz worked as a cashier at Respondent's Division Street store between November 1989 and

February 1994. In early 1993 she worked the CI desk as the day PIC. She supervised Haines on the occasions that she and Haines worked all or part of the same shift.

8) Constance (Connie) Clark was operations manager at Respondent's Division Street store in early 1993. She scheduled the staffing of the CI desk and all cashiers except grocery. She was the immediate supervisor of the CI desk PICs, including Complainant and Benz. She was a salaried manager.

9) At times material, Carolyn Harden was the store director of Respondent's Division Street store. As such, she was the manager responsible for all departments, and held hiring, firing, and disciplinary authority. She was the immediate supervisor of Clark. In personnel matters, she consulted with Respondent's Human Resources Department manager Carl Wojenowski.

10) Clark worked days as operations manager, approximately 7 a.m. to 3 p.m. Benz worked days and was PIC at the CI desk when Clark was away from the area or in the store office. Complainant often worked evenings, 3 to 11 p.m. Clark usually left work after Complainant reported in. Complainant many times left notes at the end of her shift for Clark.

11) Haines, who was born October 4, 1969, was described by those who worked around him as immature, outspoken, arrogant, mouthy, rude, crude, sarcastic, inexperienced and young, irritating, a jerk, in need of training, a goof off who needed pushing, and like a 16 year old kid.

12) Haines chattered constantly, blurting unthinking remarks, as "did you see those buns?" He made comments daily, 80 percent of which were sexual in nature, in undertone, about a woman's behind or bust size or availability for a couple of drinks. He directed such remarks toward Complainant "a couple of dozen times" in Complainant's presence. Complainant told Benz that she was sensitive about her breasts.

13) Benz told Clark that Haines was not desk material, that he should not be meeting the public because he acted immaturity. She told Clark about the sexual nature of some of his comments. Haines would need pushing at times. He spent time with female customers attempting to get their phone numbers or discussing his or their activities the previous evening. In general, he extended the time of each call. He would start on a subject and not stop. Once he was having a long conversation with a blond girl and Benz told him to get back to work. When the customer finally left, Benz grabbed his shirt front and told him she would "lay him out" if he didn't straighten up his act, *i.e.*, do his work. On another occasion, when Haines was being obnoxious, Benz flipped Haines on the shoulder.

14) Prior to times material, Complainant had rented rooms in her home for short periods to three or four individuals. The last of these moved out about November 1992. At least one of her renters had offset part of his rent by working on the house.

15) Shortly after Haines began working at the CI desk, about December 1992, Complainant overheard that

Haines might need a place to live and asked him if he wanted to rent a room from her. He did not move in.

16) Complainant suggested that Haines could reduce his rental obligation by assisting her with the construction of a cyclone fence around her yard.

17) On another occasion when Complainant had trouble with her automobile, Haines commented that he had repaired his own vehicle when it had similar symptoms. At Complainant's request he checked her car. She asked if he would repair it if she bought the parts and provided "pizza and beer." He declined to repair the car.

18) Ramona Streifel, whose married name at time of hearing was Slatery, worked varying shifts in the apparel section of Respondent's Division Street store at times material. She had contact with Haines and Complainant at the CI desk for layaways and returns. She saw them from two to five days a week. Haines continuously attempted to date her, even after he learned that she had a fiancé. Haines thought he was funny when he said of her nick-name, Mona, "does that mean you moan a lot?" Haines told her that she had "a nice butt." He also commented on her breasts. Streifel wanted to "smack" Haines because of his behavior toward her, which happened once or twice each day they worked together. He repeatedly put his arms around her. She threatened to hit him if he didn't stop, and at least once pushed him away.

19) Mary Becker was Streifel's manager, but Complainant was Haines's PIC. Streifel complained about Haines to Complainant around

the middle of January 1993. At about the same time, Darlene Brown, an apparel department employee, also told Complainant that Haines had brushed against her and spoken to her in a sexual manner. Complainant reported the complaints of Streifel and Brown to Clark in late January. Streifel later complained to Shari Ingles, another CI desk PIC, about Haines.

20) Clark told Complainant to have Haines read the statement on sexual harassment, which was posted on the wall of the CCK area. Complainant did so. Haines reacted by making jokes and Complainant urged him to take it seriously. She reported his reaction to Clark.

21) Following Complainant's conversation with Haines regarding the sexual harassment poster, Haines began subjecting Complainant to sexual comments, comments about her breasts, and brushing against her. He began to refer to her as "Bertha," or "Big Bertha." Complainant repeatedly told him to stop, that he wasn't funny.

22) On an occasion when a customer returned a bra, Haines held it up to himself, then speculated aloud whether it would fit Streifel. He then said to Complainant "that wouldn't fit you, Big Bertha, now would it?" This occurred in front of the customer.

23) When a customer returned a set of mixing bowls, Haines held the smallest top first to his chest and "pranced" around, then indicated the largest bowl was "for Georgia." Complainant asked him to stop, but he did not.

24) In Complainant's perception, Haines stared at her breasts. He

frequently called Complainant "Bertha," which was a reference to her large bust. He touched Complainant frequently, putting his arm around her or putting his hand on her shoulder. Complainant repeatedly told him to leave her alone.

25) When Haines brushed against Complainant in the constricted work space, he always turned it into sexual comment, such as a groan or a statement, "You love it." On such occasions he moved his lower body against her. The comments and touching were daily when they worked together. Once, when he touched her breast, perhaps accidentally, he said something like "More than a handful is not a waste."

26) Complainant told Clark about the bra incident, the mixing bowls, the references to "Bertha," the touching and the comments, "perhaps not each time, but constantly." She asked that Clark talk to Haines, stating his comments and behavior were getting worse. Clark seemed to accept the information, but did nothing. Once she told Complainant, "You're a black belt, smack him." This was in reference to Complainant's training in karate.

27) Streifel told her father about Haines as a joke. Her father met Haines at the store and kidded about Haines wanting to date her. Subsequently, she told her boyfriend about Haines as a concern.

28) Mary Ann Plute began working at Respondent's Division Street store in March 1993, prior to March 23, in variety and home improvement. On her first day of work, Haines began "hitting on" her. He made sexual comments to her about her body, followed

her around; whistled at her and was generally crude. He never touched her. Plute reported Haines to variety assistant manager Bruce Woodworth and the comments and activity ceased. Plute was 16 years of age at the time. She did not go to Harden directly because Harden scared her. Plute perceived Harden as very professional and hard to talk to.

29) There was no evidence that Bruce Woodworth, a salaried member of Respondent's management, reported Plute's complaint regarding Haines to Carolyn Harden.

30) During the months of February and March 1993, Complainant felt demeaned and embarrassed by the comments and behavior of Haines. She worried about who might have heard him, because there were always staff and customers nearby. His behavior, which was unwelcome, adversely affected her work, upsetting her so that she went into a "blur," tuning out other activity. His conduct made it difficult for her to do her job, in that she focused on his comments and couldn't focus on the work. She was very frustrated and upset.

31) Complainant did not report Haines to Carolyn Harden because she believed that her immediate supervisor, Clark, would eventually take care of it. Also, Complainant believed that Harden "hates me." Complainant had previously claimed to Harden that a co-worker wrote an intimidating note to Complainant that Complainant had actually written herself. She understood Harden to say at that time that if her

name was brought up to Harden in the future, Complainant would be the one disciplined. Complainant knew she was wrong to lie about the note and was grateful she was not fired at that time.

32) On the last day she worked for Respondent, March 26, 1993, Complainant went to Clark in tears at the beginning of her shift to complain again about Haines. Clark was checking out in the CCK area. Haines was nearby and approached Complainant from behind. Complainant put up her hand and said "David, stop, don't touch me, don't even come near me." Clark said, "Both of you stop it, I can't take this anymore." When Complainant denied she was doing anything, Clark said "I want both of you to stop it." Clark then continued to check out and left the store.

33) Later on March 26, both Complainant and Haines were inside the CI desk space when Haines answered the telephone at the CI desk. He said, "Bertha? Bertha, no, just a minute, here she is." He turned and offered the phone to Complainant.

34) Complainant heard the reference to "Bertha." As Haines approached with the phone, it appeared to Complainant that he was staring at her breasts and coming at her. She felt trapped and wanted to get away and said something like, "David, stop." Then she slapped him in the face.

35) Complainant felt as she struck Haines that it was not a good decision. She was crying and felt shocked, demeaned, and embarrassed. She

* This quotation is a synthesis of what was said as reported by the caller (Cagle) to Harden, by Bruce Woodworth in a memo to Harden, by Complainant to Harden, by Weiner at hearing, and by Complainant at hearing.

focused on the humiliation she felt from "Bertha" and the way she saw Haines looking at her and "everything else was just a cloud around" her.

36) Complainant knew she was PIC at the desk and that she needed a manager. She called Bruce Woodworth, variety assistant manager, and told him about the telephone call, about Haines referring to "Bertha," and admitted she had slapped Haines.

37) Bruce Woodworth talked to Haines, told him to respect Complainant as his supervisor and keep his distance. Haines told Bruce Woodworth that the remark was made in jest.

38) Bruce Woodworth told both Haines and Complainant to finish out the shift. Both did so.

39) Christine Sturdy had worked at Respondent's Division Street store for nine years at time of hearing. She was employed there at times material and came to the CI desk shortly after Complainant had struck Haines. Complainant was upset and in tears when she told Sturdy that she (Complainant) was unable to work with Haines, that he made rude comments about her breasts. Complainant said that Haines took a phone call and handed her the phone saying "It's for you, Bertha," which was in reference to Complainant's breasts. Complainant said she had pleaded and argued with him previously and told Sturdy that she slapped him. On at least one occasion prior to March 26, Complainant had been upset and in tears when she told Sturdy about Haines being sexually offensive and hard to work with. Sturdy had suggested that Complainant talk to a manager. Sturdy had not heard the term "Bertha" before in regard to

Haines and Complainant. Because she worked in grocery, Sturdy did not have frequent contact with either of them. She did not see or hear anything other than what Complainant reported.

40) Peggy Weiner had worked as a cashier for Respondent 17 years at the time the of hearing. She worked in food at the Division Street store at times material. She had contact with Complainant and Haines when they worked at the CI desk and she counted out at the end of her shift. On March 26 while she was waiting near the desk to be read out of the computer she saw Haines answer the CI desk phone. She heard him say something like "Oh, Bertha" and saw him hand the phone toward Complainant. She saw Complainant move her legs in a kicking motion toward Haines. She then saw Haines put his hand to his face; she never really saw a slap. Weiner had some Emergency Medical Technician training. Haines' injury was not serious. She had not heard the term "Bertha" before.

41) Jennifer Bierbrauer worked at the CI desk during times material. She worked with Complainant and Haines individually, but not together. Haines was sarcastic and may have seemed offensive to some people, but he never offended her by any behavior of a sexual nature. She never observed any such behavior toward others. She was not familiar with the name Bertha.

42) Karla McCallister worked at the CI desk during times material. She worked "not very often" with Complainant and Haines together. Haines was wild and loud, but she never heard him make sexually inappropriate

comments. He never touched her and she never saw him touch Complainant. The people who worked the CI desk were glad when Haines was transferred, because of his irritating behavior.

43) LeAnne Woodworth was a pharmacy employee at Respondent's Interstate store at time of hearing. At times material, she worked on occasion at the Division Street CI desk. Bruce Woodworth is her husband. She worked with Complainant and Haines. She confirmed that Haines was irritating, young, and inexperienced and would have taxed any PIC's patience. He needed coaching, training, and work on his customer skills. She had heard that the term "Bertha" was attributed to Haines, but at time of hearing was uncertain in what context. She never saw Complainant reprimand Haines in front of employees or customers. She described the CI desk employees, who were mostly female, as engaging in lots of bantering and joking, including sexual references and jokes, even though they were trained otherwise. On March 26, she came to the CI desk just as her husband was leaving and Complainant told her she had just hit Haines.

44) When Complainant left at the end of her shift on March 26, she picked up her son from day care and went home. She was depressed and in shock and too upset to sleep. She telephoned a friend several times and cried throughout the night.

45) On March 27, Complainant telephoned Clark early in the morning, shortly after 6 a.m. She told Clark that Haines had been touching her the night before and would not leave her

alone and she struck him. Complainant was upset and told Clark she had not slept and needed to go to her doctor. She didn't think she could work with Haines that day. Clark said that either she or Harden would call Complainant.

46) Later on the morning of March 27, Complainant reached Harden by telephone. Complainant felt lost, ashamed, and shocked at what she had done. Complainant acknowledged she had struck Haines and said she was not sure she could work with Haines that day. She attempted to discuss the incident. Harden preferred a face to face interview and asked Complainant to report to work. Complainant called later stating that she hadn't slept, was ill over the situation, was going to the doctor and would not work that evening. Harden stressed that Complainant must see her before returning to work.

47) Complainant called Harden around 2 p.m. and stated she would work in the morning (March 28) at 10. Harden again stated that Complainant must see her before returning to work. Complainant called back and stated she would be in shortly.

48) Complainant went to Kaiser where she saw a physician and obtained a prescription to calm her and help her sleep. She told the doctor about the stress of the last two months, about the events of March 26, and about her feelings of hopelessness, confusion, and loss. She was advised to follow up with her regular doctor and seek counseling. The physician excused her from work until March 30.

49) Complainant telephoned Harden from the doctor's office in late

afternoon, telling her she would come in that evening. Harden agreed to wait. Complainant telephoned again around 6 p.m., told Harden she had a doctor's excuse from work until Tuesday, March 30, when she could come back to work. She stated she would call Harden Monday afternoon. Harden again stated that Complainant must see her before returning to work.

50) Harden believed that Complainant was being uncooperative and avoiding being interviewed.

51) Complainant had mentioned to Harden that Haines was irritating, immature, and difficult to get along with. There was no evidence that Harden had personal knowledge of Complainant's allegations of sexual harassment prior to March 27, 1993.

52) Beginning March 27 with Haines, Harden interviewed employees about the confrontation between Complainant and Haines. Over the next few days, she interviewed Respondent employees Christine Sturdy, Ramona Streifel, LeAnne Woodworth, Tina Cagle, Connie Clark, Darlene Brown, and Barbara Jones. She consulted with Regional Store Director Larry Gentry and Human Resources Manager Carl Wojenowski, and dealt with Complainant's union representative, Bob Williams.

53) Tina Cagle told Harden that she had called the CI desk to reach Bruce Woodworth, her manager, around 8 p.m. on March 26. She intended to ask him for a break. When Haines answered, Cagle asked "Is Bruce around there?" Haines replied "Bertha? Bertha? No, just a minute, here she is." Cagle again asked if Bruce was around. Cagle could hear

Haines and Complainant arguing, but not what was said. Bruce Woodworth answered and Tina asked for her break. Complainant later told Cagle that Haines stared at Complainant's breasts.

54) Barbara Jones told Harden that Complainant was upset on March 26. Haines told Jones that he had made a stupid comment. Jones did not hear the comment and did not see Complainant strike Haines. Jones witnessed no sexual comments or harassment. She characterized Haines as being like a 16 year old kid with a big mouth.

55) Harden's notes of her interview with Darlene Brown stated, in part:

"Started Fri[day] night - [Complainant] got really upset and she told Darlene that David had brushed up against her and using sexual tones. - Darlene - David has sexually [harassed] me verbally - He had brushed up against me David was talking vulgar - Darlene said get your head out of the gutter - David makes little tiny advances Darlene could care less about it. Never felt the need to speak w/ a supervisor - Heck of a nice guy - carries his 'personality a little too far' -"

56) Streifel was interviewed by Harden on March 29, 1993. She was confused about the reason for the interview. She had not heard about the confrontation between Complainant and Haines and did not know why Harden was asking about them. She told Harden about Haines making sexual remarks to her and that she was offended. She told Harden that she let it go because her boyfriend could take

care of him. Harden told Streifel she didn't think it was a big deal. Streifel never told Harden that the behavior of Haines toward her was not important enough to report.

57) Streifel told Harden about Haines's behavior toward Complainant.

58) On March 30, in the presence of Complainant's union representative, Harden interviewed Complainant, who again admitted striking Haines. Complainant told her about the behavior of Haines over the previous two months. She mentioned his comments on her breasts, his use of the name "Bertha," his touching her and rubbing against her, and his comments of a sexual nature. She stated that Streifel and Brown had said that Haines harassed them. She told Harden that she had reported his sexually harassing behavior over the previous two months to Connie Clark, and Clark's reply about karate. She was vague as to dates of specific incidents and as to exact conversations. She told Harden that she didn't want to get "Connie" in trouble. She stated that Clark said on March 26, "You two just don't start today." She described Haines answering the telephone on March 26 and saying "Oh, Bertha, Bertha she's right here." She told Harden that her "blood boiled" and she hit Haines.

59) Complainant had at times used the name "Stack-Rascol," except at work. She worked for Respondent under her married name of "Rascol." She continued to use that name after being divorced because she disliked her maiden name of "Stack," which she felt subjected her to ridicule due to her appearance. She was heavily built

and large busted. At times material, she was 5 feet, 3 inches tall and weighed about 180 pounds. She was self conscious about her large breasts. Following her employment with Respondent, she used the hyphenated name exclusively. She had breast reduction surgery in August 1993.

60) Complainant had periodically experienced difficulty during her years as Respondent's employee. These included a problem as an assistant manager at the Interstate store, an instance involving a racial slur, difficulties with a worker named Montoya in which she falsified a note, and, more recently, an alleged confrontation with a worker named Laurie Flanagan, and an alleged attendance problem. She also had addressed a complaint as a customer to Respondent's president in early March 1993. None of these situations involved allegations of sexual harassment on the job.

61) Haines transferred to nutrition and subsequently to grocery following the events of late March 1993. Haines wanted a transfer into another department because of the fast pace of the CI desk. In August 1994, Haines received a written warning for "bothering a female employee," a reference to an instance where he whistled at a female employee in front of customers. That was the only formal discipline in his record.

62) Carolyn Harden's testimony regarding her investigation was not wholly credible, in that she selectively slanted the findings from her interviews. Despite the real possibility of future claims, she did not pursue Haines's alleged harassment of Streifel and Brown because, according to her,

Streifel "let it go" and Brown "didn't care." By diminishing the seriousness of the information she obtained from Streifel and Brown, she attempted to maintain the position that Respondent had lacked any notice that Haines was sexually inappropriate to female employees and customers. Her purpose appeared to be to discount any suggestion that Complainant may have had provocation for what she did. While she noted in general what Complainant told her when she was finally interviewed, Harden by that time had determined that since there could be no justification for striking a fellow employee, Complainant's prior experiences with Haines were either not worthy of belief or resulted from Complainant's behavior toward him. She testified to multiple instances of conversations with Complainant in the early months of 1993 with the suggestion being that Complainant could have mentioned difficulties with Haines if they occurred. However, neither through Complainant nor through documentation by calendar notes or otherwise, was there any verification of those conversations other than a reference to Complainant's complaint as a customer and instruction to Complainant regarding lottery process. She stated that Haines was strongly warned verbally as a result of her investigation, but there was no documentation of that, either. She seemed to view negatively Complainant's reluctance to come to work on March 27, even though she knew the nature of the March 26 altercation. The Forum has credited those portions of Harden's testimony which were confirmed by other credible evidence or which were uncontested.

63) At the time of the hearing, Connie Clark was a check examiner in Respondent's main office security. Both she and her husband were longtime Respondent employees. Her testimony was not altogether credible. Initially, she attempted to create the impression that, as operations manager at Division Street in 1993, she was little more than a glorified PIC. She said that she was merely the scheduler for the customer information desk and variety check stands. She thought of herself as a PIC who wrote the schedule, and left discipline or management decisions up to Harden. During the Agency's investigation, she described herself as operations manager in name only. She had hiring, but not firing, authority. As Clark's testimony progressed, she became more and more hesitant and uncertain, particularly as to her status (and responsibility) as a manager and the handling of Haines as an employee. Although she was in and around the work area each working day and saw the employees interact, she was definite about never seeing, hearing, or hearing about sexual remarks or behavior by Haines toward Complainant or other females until March 27 when she learned of the incident of March 26. She stated that she never saw Haines touch Complainant or any other female and never overheard any sexual banter. She acknowledged that both Complainant and Benz reported that Haines was slack in his duties, did not follow through, and had an irritating personality. She stated that Complainant reported she could not complete her own job because Haines didn't complete his. Clark denied that Complainant reported that Haines was

sexually harassing her, that Haines was touching her, or that Haines made sexually offensive comments to her. Clark denied any knowledge that Streifel or Brown ever complained about Haines following, annoying, or sexually harassing them, and denied that Complainant informed her of their problems with Haines. She stated that Complainant complained only about Haines's work performance and that she never told Complainant to read the sexual harassment policy to him or to "smack him." She denied knowledge of Haines's actions and comments toward female employees and customers or that Complainant reported that he called her "Bertha." She saw Complainant and Haines as she was leaving work on March 26, but denied that Haines put his arm around Complainant, that Complainant told him to stop, or that Complainant asked her to stop Haines. She said she did not take information about Haines's work performance to Harden because she thought they could work out the performance problems. She talked to Haines about his goofing off and immature attitude and Haines complained that Complainant belittled and embarrassed him. Clark said she did not bring that up to Complainant because she perceived Complainant as difficult to deal with due to her temper. Because of Clark's demeanor and the content of her testimony in the face of contrary credible evidence of the pervasiveness of the sexually oriented activities of Haines, the Forum has not credited her denials of knowledge of those activities.

64) Clark was described variously by her subordinates as "an OK

manager," or as "too soft, trying to please everybody" or as not consistent.

65) Not all of LeAnne Woodworth's testimony was credible. Much of her testimony was opinion and appeared to be evaluation in light of subsequent events rather than recalled fact. She described the events of March 1993 as long ago and unimportant, "vague and insignificant incidents in my life." She nonetheless described Haines as appearing with a "gigantic swollen hand print on the side of his face" on March 26, although Haines himself described the injury as a not severe "bleeding fat lip" and sought no medical attention. She stated that she believed she was "set up" by Complainant who told her to witness some of Haines's behavior. She stated that Complainant was selectively sensitive about her breasts. She downplayed the sexual content of the jokes at work. She said of Complainant's report to her that Haines commented on Complainant's breasts, "I didn't give it much more credence than if she were just simply annoyed with him." She chose not to believe Complainant's reports to her of sexual harassment by Haines and opined that Complainant struck Haines out of pent-up frustration at his work performance and not because of harassment. She further stated her belief that Complainant should have reported sexual harassment if it existed, that Respondent would have dealt with it, and that Complainant had been unhappy with her job and was using the complaint against Haines as a vehicle to get at Respondent. Accordingly, the Forum has credited only those portions of LeAnne Woodworth's testimony which

were consistent with or confirmed by other, credible evidence.

66) The testimony of David Haines was not credible. His demeanor was brash and impertinent and at times evasive. He denied ever referring to Complainant as "Bertha." He stated that he misunderstood Cagle's call for "Bruce," as "Bertha," and merely repeated what he thought he had heard and that it was not directed at Complainant. He testified that he had not used the term "Bertha" in connection with Complainant. But Cagle heard him say "Bertha? Here she is," Weiner saw and heard him say "Oh, Bertha," and offer the phone to Complainant, and there was evidence that he had used the name previously in connection with Complainant. After he was struck, he told Jones he made a stupid comment, he told Bruce Woodworth that the remark he made was just in jest, and he later admitted to Harden he made a sarcastic remark. Haines denied touching Complainant or any other female employee, and denied sexual comments to or about anyone, but there was credible evidence to the contrary. He stated he called the police after the slap, but there was no other evidence of that. He said that only Complainant found any fault with his job performance. There was no evidence that Complainant embarrassed Haines in front of customers and staff regarding his job performance as Haines claimed. Based on his demeanor as a witness and on the content of his testimony, the Forum has credited only those portions of David Haines's testimony which were verified by other, credible evidence.

67) Complainant's testimony was in some respects inconsistent and unreliable. She was at times vague or unresponsive, and at other times she clearly evaded answering. She responded "I don't remember" to many questions in such a way as to make it unclear whether she didn't remember what was said or done on a particular occasion, whether she didn't remember the occasion at all, or whether there was no such occasion. However, much of the vagueness or equivocation involved her prior work history with Respondent and was not relevant to the harassment alleged except as a framework from which to gauge the credibility of her allegations. The Forum finds that, while some of Complainant's testimony was unconvincing, there was independent credible evidence confirming the harassment and its effect. In that regard, Complainant was a credible witness.

68) For two months before the incident of March 26, the unwelcome behavior of Haines toward Complainant caused her severe mental distress characterized by feeling demeaned, embarrassed, under stress, and frustrated. At times she was in tears and things were a blur; she was upset and unable to concentrate on her work. When the behavior didn't cease, she felt trapped and helpless. She was very frustrated. She was adversely affected by the sexual nature of the ridicule to which Haines subjected her in touching her and by the humiliation she felt from Haines calling her "Bertha" and staring at her breasts. She experienced long-lasting distress and self-doubt attributable to the behavior of

Haines, separate and apart from the disappointment of losing employment.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent was a foreign corporation operating retail stores in Oregon which utilized the personal service of one or more employees, reserving to itself the right to control the means by which such service was performed.

2) Complainant, female, was employed by Respondent between 1978 and March 26, 1993, and in 1993 was a Person In Charge ("PIC"), a non-management position, at the Customer Information (CI) desk at Respondent's Division Street store in east Portland. Constance Clark, operations manager, was the manager of the CI desk and Complainant's direct supervisor.

3) David Haines was employed by Respondent in 1993 at the Customer Information desk at Respondent's Division Street store. Complainant and Wendy Benz, another non-management employee, supervised Haines when each acted as PIC subject to Clark's overall supervision.

4) During January through March of 1993, Haines engaged in a continuing course of verbal and physical conduct of a sexual nature toward Complainant and other female employees and customers due to their female sex. This conduct was characterized by sexually suggestive speech toward Complainant and other females, by touching Complainant's body, thrusting his body against hers, placing his arm around Complainant and other females, referring to Complainant's large breasts, and calling Complainant "Bertha" or "Big Bertha," which was in

reference to her large bust. This conduct was unwelcome.

5) The sexually oriented conduct of Haines was pervasive. Complainant repeatedly told Haines to stop. She repeatedly reported his unwelcome activity to Clark.

6) Respondent took no action to correct, modify, or prevent the unwelcome behavior of Haines.

7) On March 26, after Haines had earlier once again subjected Complainant to unwanted sexual touching and comment, Complainant slapped him when he referred to her as "Bertha" in receiving a telephone call.

8) Respondent discharged Complainant for striking a coworker.

9) The sexually oriented conduct of Haines caused Complainant severe and long-lasting emotional distress.

10) Complainant was sensitive about being short and large busted to the extent that she avoided using her maiden name of "Stack." She subsequently had breast reduction surgery.

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 or will be performed.

"(12) 'Person' includes one or more *** corporations ***."

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 Bruce Woodworth, Constance Clark, and Carolyn Harden are properly imputed to Respondent herein.

4) 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. ***

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

"(f) For an employer *** to discharge *** any person because the person has opposed any

practices forbidden by this section *** or has attempted 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

"(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."

The activities of David Haines, consisting of unwelcome sexual advances and unwelcome verbal and physical conduct of a sexual nature directed toward Complainant because of her sex, created an intimidating, hostile, and offensive working environment, contrary to OAR 839-07-550.

5) Respondent did not discharge Complainant because of her sex.

6) Respondent did not discharge Complainant because she opposed or attempted to oppose unlawful employment practices.

7) 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.

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

OAR 839-07-565 provides:

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

The failure of Respondent to take immediate and appropriate, or any, action to correct the sexually harassing activities of Haines toward Complainant made the resulting intimidating, hostile, and offensive working environment an explicit term or condition of Complainant's employment in violation of ORS 659.030(1)(b).

8) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), 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

Respondent's Failure to Act

The Agency alleged in its Specific Charges that Complainant, a female, in January through March 1993, while she acted as a person in charge, was subjected to unwelcome offensive conduct of a sexual nature in the workplace by David Haines, a male employee whom she supervised. It was further alleged that this conduct was reported to Respondent's management and that Respondent failed to take immediate and appropriate corrective action, thereby created an intimidating, hostile, and offensive working environment and in violation of ORS 659.030(1)(b). The Forum finds that the Agency has established these allegations by a preponderance of the evidence.

This was not a case of a single, isolated incident of offensive behavior on the part of Haines. The credible testimony suggests that his sexually offensive conduct had frequently been directed at Complainant and at other females at Respondent's store in the presence of staff and customers, usually at or near the CI desk. Despite Clark's testimony to the contrary, the more credible testimony suggests that

she should have been alerted both by the pervasiveness of Haines's conduct and by Complainant's protests that Haines was engaging in an ongoing course of sexually offensive behavior to which the employer was obligated to respond with immediate, appropriate corrective action. The Forum has found that Respondent's failure to act created a sexually intimidating and offensive work environment, which became a condition of Complainant's employment.

Complainant's Discharge

The Specific Charges alleged that on March 26, 1993, when Haines again made sexually disparaging comment about Complainant's breasts and advanced toward her, she hit him, and that Respondent discharged Complainant on March 31. It was alleged alternatively that Complainant's discharge was in retaliation for opposing unlawful practices, violating ORS 659.030(1)(f), or was discriminatory in that the male employee was not disciplined, violating ORS 659.030(1)(a). The Forum finds that Complainant struck Haines under the circumstances and for the reason described, but that the subsequent discharge was supported by a legitimate, non-discriminatory reason.

Complainant was distressed and brought to tears by the behavior of Haines. That behavior was pervasive, was noted by others in the workplace, and was timely reported by Complainant, but it did not cease or diminish. Her distress and frustration continued when she perceived that nothing was happening to correct the situation. Due to her distress and frustration, she unwisely resorted to self-help on

March 26. While Complainant may well have felt trapped, Bruce Woodworth, a manager, was almost immediately available and answered the telephone call from Cagle which Haines intercepted. The Forum cannot find that Complainant's action in striking Haines, however understandable, was justified. Respondent discharged Complainant for striking a fellow employee in the workplace and not because she was female or because she had opposed an unlawful practice.

Damages

Where an individual, because of the individual's sex, is subjected to unwelcome sexually oriented verbal and physical behavior on the job in such circumstances that the employer knows or should know of the offensive behavior and takes no action to correct or eliminate the offensive behavior, that employer is liable for harm caused to the individual. That is the case here. Complainant was subjected to over two months of sexually offensive behavior on the part of Haines. That behavior caused Complainant severe mental distress. She felt demeaned, humiliated, embarrassed, and, when the behavior was not corrected after Respondent should have known of it, she felt frustrated and helpless. Her work was adversely affected and she was embarrassed in the extreme by the sexual nature of the ridicule and by the humiliation to which Haines subjected her. The Forum has found that she experienced long-lasting distress and self-doubt attributable to this behavior. The Forum is awarding \$20,000 as appropriate

compensation for Complainant's emotional distress.

Respondent's Exceptions

Respondent did not except specifically to individual findings or conclusions of the Proposed Order, but rather questioned generally the findings of historical fact and the imputation of liability therefrom. The Forum has reexamined the evidence, adding Finding of Fact (FOF) 5 and expanding Proposed FOF 11, 12, 18, 21, and 23 (now renumbered FOF 13, 12, 19, 22, and 24) as a result.

Respondent's unspecific exceptions can be grouped into three broad categories: 1) the evaluation of Connie Clark's testimony; 2) the finding of "pervasiveness of the sexually-oriented activities of Haines"; and 3) the credibility of Complainant.

1) Clark's testimony

The witness testified in a manner intended to distance herself from any responsibility for or knowledge of the objectionable activities of Haines or of their effect upon Complainant. She attempted to convey the impression that she was a mere scheduler without knowledge of or responsibility for the day to day interaction among her subordinates. She appeared to be a non-confrontive individual who was uncertain how to handle Complainant's concerns. The Forum noted that her schedule and that of Complainant did not always coincide, but that does not explain her professed lack of knowledge of the behavior of Haines which was reported by Benz, who did not confine that report to immaturity. Benz may not have been offended by Haines's sexual comments, but she

reported them. Haines and Complainant worked at times with Benz, which accounts for Benz's observations of their interaction. It follows that they worked some days while Clark was in the store. If Benz could characterize the environment at the CI desk as one that accepted sexual jokes, banter, and behavior, it is inconceivable that Clark could not know about that environment or about the participation of Haines in it.

2) The finding of pervasiveness

Several witnesses testified about the atmosphere at the CI desk regarding the sexual jokes, banter, and behavior. There was evidence of the ongoing sexually oriented actions and comments of Haines during times material from several sources in addition to Complainant (Benz, Streifel, Plute, and Brown's statement to Harden). Again, it is inconceivable that Respondent's management was unaware of that environment or of the participation of Haines.

3) Complainant's credibility

The Hearings Referee found that some of Complainant's testimony was unconvincing, but that there was independent credible evidence confirming the harassment and its effect upon her, and that she was a credible witness in that regard. Reexamination of the evidence fails to disclose a reason for changing that finding.

Respondent's exceptions are disallowed.

ORDER

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

found, Respondent FRED MEYER, INC., is hereby ordered to:

1) Deliver to the Fiscal Services 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 Georgia Stack-Rascol in the amount of:

a) TWENTY THOUSAND DOLLARS (\$20,000), representing compensatory damages for the mental and emotional distress suffered by Georgia Stack-Rascol as a result of Respondent's unlawful practice found herein, and

b) Interest at the legal rate on the sum of \$20,000 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

DANNY R. JONES,

**dba J.J.J. Security & Patrol,
Respondent.**

Case Number 48-95

Final Order of the Commissioner

Jack Roberts

Issued June 12, 1996.

SYNOPSIS

Respondent willfully failed to pay Claimants all wages due upon

termination. The Commissioner ordered Respondent to pay the wages owed plus civil penalty wages. ORS 652.140(1); 652.150; OAR 839-20-030.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 21, 1995, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon, beginning at 9:05 a.m.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Arthur Murphy (Claimant Murphy) and Gloria James (Claimant James) were present and testified. Danny R. Jones (Respondent), was present for a portion of the hearing and not represented by counsel. He left the hearing before it was concluded, as hereinafter recited.

The Agency called as witnesses Claimant James, Claimant Murphy, and Agency Compliance Specialist Margaret Trotman. Respondent called former employee Jeffrey S. Jones.

Having fully considered the entire record in this matter, I, Jack 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 July 28, 1994, Claimant Murphy filed a wage claim with the Agency in which he alleged that he had been employed by Respondent, who had failed to pay wages earned and due to him. At the same time he filed the wage claim, Claimant Murphy assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

2) On October 30, 1994, Claimant Melvin Meaney filed a wage claim with the Agency in which he alleged that he had been employed by Respondent, who had failed to pay wages earned and due to him. At the same time he filed the wage claim, Claimant Meaney assigned to the Commissioner, in trust for Claimant, all wages due from Respondent.

3) On December 24, 1994, Claimant James filed a wage claim with the Agency in which she alleged that she had been employed by Respondent, who had failed to pay wages earned and due to her. At the same time she filed the wage claim, Claimant James assigned to the Commissioner, in trust for Claimant, all wages due from Respondent.

4) On February 28, 1995, through the Sheriff of Multnomah County, the Agency served on Respondent at 5229 N Cecelia Street, Portland, Order of Determination number 95-014 (Determination Order), based upon the wage claims filed by Claimants and the Agency's investigation. On March 8, 1995, through the Sheriff of Multnomah County, the Agency served Determination Order 95-014 on Respondent at

9945 SE Oak, Portland. The Determination Order found that Respondent owed a total of \$16 in wages and \$1,020 in civil penalty wages to Claimant Murphy, \$32.50 in wages and \$788 in civil penalty wages to Claimant Meaney, and \$328.20 in wages and \$981 in civil penalty wages to Claimant James. 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 an answer to the charges.

5) In early March 1995, Respondent filed a document presumed to be an answer to the Determination Order and requested a contested case hearing. The document was on letterhead of "J. J. J. Security & Patrol, 9945 SE Oak Street, Suite 106, Portland, Oregon 97216-2341" and asserted:

"1. I [,] J.J.J. Security Request A Hearing On Melvin Eric Meaney was paid. Melvin cash the check. No paper work on the rest.

"2. Arthur E. Murphy was paid. Wage and Hour got the money order. No paper work on the rest.

"3. Gloria Kaye James was not paid because key to build Gloria got. Uniform not clean. Request ful [sic] hearing.

"Captain Jones"

The allegations in the Determination Order are presumed to be denied.

6) On April 4, 1995, at the Agency's request, the Hearings Unit issued a Notice of Hearing to Respondent, Claimants, and the Agency indicating the time and place of hearing. With the Notice of Hearing, the Forum sent Respondent 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 hearing rules, OAR 839-50-000 to 839-50-420.

7) The hearing was postponed and on August 10, 1995, an amended notice of hearing was issued setting a new time and place of hearing.

8) Pursuant to OAR 839-50-210 (1), the Agency filed a Summary of the Case on September 5, 1995. Respondent did not file a case summary.

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

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

11) During the hearing, in order to accommodate the work schedule of a witness, the ALJ allowed Respondent to present the witness, Jeffrey Jones, out of order during the Agency's case.

12) A proposed order, which contained an exceptions notice, was issued April 19, 1996. Exceptions were due April 30, 1996. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent, an individual, did business as J.J.J. Security & Patrol, a personal services business located in Portland, Oregon. He utilized the personal services one or more persons in the State of Oregon.

2) From on or about May 27, 1994, to on or about July 2, 1994, Claimant Murphy worked for Respondent as a security guard. Respondent furnished the equipment and the uniform Claimant used on the job. Respondent detailed and controlled how Claimant was to perform his duties. Some of his work for Respondent was by car and some on foot. He was not paid for the period June 21 through July 2, 1994.

3) Claimant Murphy worked 10 p.m. to 4 a.m., 6 hours on June 21; 10 p.m. to 4 a.m., 6 hours on June 22; 10 p.m. to 6 a.m., 8 hours on June 25; 10 p.m. to 6 a.m., 8 hours on July 1; and 10 p.m. to 6 a.m., 8 hours on July 2. June 21 and 22 were in a car, doing "drive by" checks of client businesses in northeast Portland. June 25 and July 1 and 2 were on site at a marina in northeast Portland.

4) Jeffrey S. Jones (no relation to Respondent) worked for Respondent at times material as a site supervisor with the title of lieutenant. He did some patrol duty and checked on other officers to make sure they were doing their jobs and correctly filling out paperwork. He acknowledged that officers recording "drive bys" had several different locations per shift to check and that the record of only one client did not reflect total hours worked on that shift.

5) Forms entitled "Officer's Daily Report" (referred to in testimony as "shift reports") were used by Respondent's officers to record activity during their shifts. They included spaces for entry of client, location, officer's name and station, hours, and various activities.

6) Shift reports which Claimant Murphy submitted to Respondent were changed by Respondent to reflect fewer hours than Claimant stated he had worked.

7) Claimant Murphy was discharged on July 2, 1994. On or about November 23, 1994, through the Agency, he received a money order in the amount of \$108.36 from Respondent, which contained the notation "32 hours."

8) From on or about October 24, 1994, to on or about October 26, 1994, Claimant Meaney worked for Respondent as a security guard. Respondent furnished the equipment and the uniform Claimant used on the job. Respondent detailed and controlled how Claimant was to perform his duties. Some of his work for Respondent was by car and some on foot.

9) Claimant Meaney worked 9:30 p.m. October 24 to 3 a.m., October 25, 5½ hours, and 10 p.m. October 25 to 3 a.m., October 26, 5 hours. He was to be paid \$5.00 an hour. Claimant Meaney was discharged on October 26, 1994. Respondent paid him \$20.00 in a check dated October 31, 1994.

10) Meaney worked with Jeffrey Jones on October 24 on what Jeffrey Jones described as a "ride along." By that was meant that Meaney would just learn the route, observe what Jeffrey Jones did, and would not be paid. Respondent did not pay untrained new employees for this training time. Respondent did not retain an untrained new employee without such training.

11) The \$20.00 check which Respondent paid to Meaney dated

October 31, 1994, was noted "One Day Work" and "Sub Contract Labor." Respondent sometimes paid individuals as subcontractors, or independent contractors, so that he did not have to take out state and federal withholding or FICA.

12) From on or about December 1, 1994, to on or about December 16, 1994, Claimant James worked for Respondent as a security guard. Respondent furnished the equipment and the uniform Claimant used on the job. Respondent detailed and controlled how Claimant was to perform her duties. Some of her work for Respondent was by car and some on foot.

13) Claimant James worked 8 a.m. to 2:30 p.m. December 1, 2, 3, 4, 5, 6, and 8, six hours each; 11 a.m. to 5:30 p.m., December 9, 10, 11, 12, 13, 14, and 16, six hours each; total 84 hours. She was to be paid \$5.45 an hour. Respondent paid her through December 4. She was not paid for the period December 5 through 16, 1994, a total of 60 hours. Claimant James was discharged on December 18, 1994.

14) Claimant James signed no documents allowing deductions from her pay for cleaning. She signed a W-4 claiming to be exempt from state and federal withholding. The only deduction she anticipated was for social security. She signed a receipt for uniform items, but not a statement that she would pay for cleaning. The W-4 form she signed had been altered after she signed it.

15) During the Agency's examination of Claimant James, Respondent interrupted the proceedings with the following statements:

"Uh, excuse me, your honor. We don't have to go through Gloria. I know I owe Gloria some money. I owe her her whole check. To save time, her check is right here. We don't have to go through all this. I'm going to state this one time: Gloria is not getting her check until I get \$9.00 for cleaning fee. Her check is right here, your honor, so we can save time."

and

"Her check came to \$286.10; it's been sitting in my office since 12-23-94 and she's not gettin' it 'til I get my cleaning fee."

16) Following those statements, Respondent stated he would stipulate that the gross amount of Claimant James's wages owed was \$359.10.*

17) During the hearing, Respondent was advised that a deduction for cleaning fee was not a legal deduction. Respondent stated he would not change his policy.

18) During the hearing, at approximately 11:15 a.m., Respondent left the hearings room voluntarily, stating that he had a company to run and that he didn't like liars. The ALJ stated that the hearing would continue for the purpose of making a record.

19) At times material, Margaret Trotman was a Compliance Specialist for the Wage and Hour Division of the Agency. She investigated the wage claims of the three claimants herein.

* This is more than Claimant James stated was owed; the Forum has disregarded this figure. See OPINION below.

** There was an arithmetic error on the Agency Wage Transcription and Computation Sheet, crediting gross wages as \$170, which resulted in reduced figures for the unpaid wages and for the civil penalty wages. The Forum has recalculated both and amended both to conform to the proof. See OPINION below.

She obtained documents and corresponded with Respondent.

20) On January 26, 1995, Trotman returned two keys, two badges, one coat, and one shirt to Respondent on behalf of Claimant James by certified mail. She also sent a letter listing those items and advising Respondent that deductions for cleaning are illegal. Trotman's letter made demand for \$328.20. She received the letter back with the following notation:

"P.S. I got the keys 2 badge. there will not be a check Shirt not clean Coat not clean 9 dollars to clean"

21) Claimant Murphy's records and testimony show the following information, which is accepted as fact. He worked 36 total hours. He earned \$180 in wages (36 hours x \$5.00 = \$180). Claimant Murphy was paid on or about November 23, 1994, for 32 hours (net money order \$108.36 on a gross of \$160 less \$6 for cleaning and uniform); the balance of earned, unpaid, due, and owing wages equals \$26.00.**

22) Civil penalty wages due Claimant Murphy, computed in accordance with Agency policy, are as follows: \$180 (the total wages earned) divided by 5 (the number of days worked during the claim period) equals \$36.00 (the average daily rate of pay). This figure of \$36.00 is multiplied by 30 (the number of days for which civil penalty

wages continued to accrue) for a total of \$1,080.

23) Claimant Meaney's records and the testimony show the following information, which is accepted as fact. He worked 10½ total hours. He earned \$52.50 in wages (10½ hours x \$5.00 = \$52.50). Claimant Meaney was paid \$20.00 on or about October 31, 1994. The balance of earned, unpaid, due and owing wages equals \$32.50.

24) Civil penalty wages due Claimant Meaney, computed in accordance with Agency policy, are as follows: \$52.50 (the total wages earned) divided by 2 (the number of days worked during the claim period) equals \$26.25 (the average daily rate of pay). This figure of \$26.25 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$787.50, rounded to \$787 pursuant to Agency policy.

25) Claimant James's records and testimony show the following information, which is accepted as fact. She worked 84 total hours during the claim period. She earned \$457.80 in wages (84 hours x \$5.45 = \$457.80). Claimant James was paid \$129.60 gross; the balance of earned, unpaid, due, and owing wages equals \$328.20 (\$457.80 - \$129.60 = \$328.20).

26) Civil penalty wages due Claimant James, computed in accordance with Agency policy, are as follows: \$457.80 (the total wages earned) divided by 14 (the number of days worked during the claim period) equals \$32.70 (the average daily rate of pay). This figure of \$32.70 is multiplied by 30

(the number of days for which civil penalty wages continued to accrue) for a total of \$981.

27) Respondent did not allege in his answer an affirmative defense of financial inability to pay the wages due at the time they accrued nor did he provide any such evidence for the record.

28) The testimony of Claimants Murphy and James, in general, was found to be credible. Their statements were supported by other credible testimony and documents. There is no reason to determine the testimony of either Claimant to be anything except reliable and credible.

29) In general, the testimony of Jeffrey Jones, most of which was elicited by Respondent, was found to be credible. At Respondent's urging, he clearly outlined employment practices of Respondent, which the ALJ found were in violation of the wage statutes involved in this proceeding.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent, an individual, utilized and controlled the personal services of one or more persons in the State of Oregon who were not co-partners or independent contractors. ORS 652.310(1) and (2); 653.010(3) and (4).

2) Respondent employed Claimant Murphy as a security guard from May 27, 1994, to on or about July 2, 1994, at \$5.00 per hour. Claimant Murphy worked 36 hours in five days, earning \$180.

* Because the \$129.60 paid did not entirely offset the earnings for December 1 to 4, the Forum has used the entire period in computing the wages still owed.

3) Respondent paid Claimant Murphy for 32 hours less deductions for cleaning. Respondent owes Claimant Murphy \$26.00 in earned, unpaid, due, and owing wages and more than 30 days have elapsed from the due date of those wages.

4) Respondent employed Claimant Meaney as a security guard on October 24 and 25, 1994, at \$5.00 per hour. Claimant Meaney worked 10½ hours in two days, earning \$52.50.

5) Respondent owes Claimant Meaney \$52.50 in earned, unpaid, due, and owing wages and more than 30 days have elapsed from the due date of those wages.

6) Respondent employed Claimant James as a security guard from December 1 to 16, 1994, at \$5.45 per hour. Claimant James worked 84 hours in 14 days, earning \$457.80, of which 129.60 was paid.

7) Respondent owes Claimant James \$328.20 in earned, unpaid, due, and owing wages and more than 30 days have elapsed from the due date of those wages.

8) Respondent attempted to withhold from these employees' wages his costs for uniform cleaning.

9) Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, total \$1080 for Claimant Murphy.

10) Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, total \$787 for Claimant Meaney.

11) Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, total \$981 for Claimant James.

12) There was no evidence that Respondent was financially unable to

pay the wages of the respective Claimants at the time they accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

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

3) At times material herein, ORS 652.140 provided in part:

"(1) Whenever an employer discharges an employee, or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately.

"(3) For the purpose of this section, if employment termination occurs on a Saturday, Sunday or holiday, payment of wages is made 'immediately' if made no later than the end of the first business day after the employment termination ***"

Respondent violated ORS 652.140(1) by failing to pay Claimant Murphy all wages earned and unpaid no later than Tuesday, July 5, 1994, which was the first business day after Claimant's employment was terminated.

4) Respondent violated ORS 652.140(1) by failing to pay Claimant Meaney all wages earned and unpaid no later than Thursday, October 27, 1994, which was the first business day

after Claimant's employment was terminated.

5) Respondent violated ORS 652.140(1) by failing to pay Claimant James all wages earned and unpaid no later than Monday, December 19, 1994, which was the first business day after Claimant's employment was terminated.

6) At times material herein, ORS 652.150 provided:

"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 each Claimant when due as provided in ORS 652.140.

7) At times material herein, ORS 652.610 provided in part:

"(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."

By withholding a portion of earned wages to reimburse the expense of uniform cleaning, Respondent violated ORS 652.610.

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 each Claimant's respective earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

Respondent's Admissions

Respondent chose to appear without counsel and to examine and cross-examine witnesses himself. In the course of questioning witnesses, despite cautions from the ALJ and the objections of the Agency, Respondent made declarative statements rather than asking questions. Respondent was not under oath and his self serving statements have been disregarded.

But the Forum has taken as true those statements which were to Respondent's economic disadvantage. Thus, the Forum finds as fact that Respondent made a practice of willfully delaying or denying payment of wages until uniforms were returned clean, of utilizing employee time as unpaid "training time," and of paying short-term employees as "independent contractors" in order to avoid withholding. Although he had asserted no counterclaim or offset, Respondent attempted to establish that Claimant Murphy had somehow come into possession of and was holding Respondent's vehicle and cellular telephone, and that Claimants Murphy and Meaney had claimed more time than they had worked. The information he obtained in this regard was unpersuasive and had little to do with the failure to pay wages.

Prima Facie Case

If Respondent had not attended the hearing, the Forum's task would have been to determine if a prima facie case supporting the Agency's Determination Order was made on the record. ORS 183.415(5) and (6); OAR 839-50-330 (2); *In the Matter of S.B.I., Inc.*, 12 BOLI 102 (1993); *In the Matter of Mark Vetter*, 11 BOLI 25 (1992). His presence for a portion of the hearing did not lessen the Agency's burden in this regard.

The Agency established a prima facie case. A preponderance of credible evidence on the whole record showed Respondent employed each Claimant during the period of the respective wage claims and willfully failed to pay all the wages, earned and payable, when due.

Claimants as Employees

All of these Claimants were employees of Respondent working for an agreed fixed rate based on the time spent. By finding that Claimant Meaney was an employee, the Forum has necessarily found that he was not an independent contractor. Respondent controlled the hours, location, tasks, and the manner in which Claimant's tasks were accomplished, and initially proposed an hourly rate. Respondent could not change the character of the employment relationship by noting "Sub Contract Labor" on a check.

Unlawful Deductions

The Agency's evidence established, and Respondent's statements verified, that Respondent habitually delayed or refused payment of wages to a departing employee until that employee's uniforms were returned to him dry cleaned. That is a violation of ORS 652.610, about which this Forum has said:

"The legislature intended two things: (1) that any withholding beyond that required by law or bargaining agreement must be authorized in writing and be for the employee's benefit; and (2) that the employer could not be the ultimate recipient. Those changes in the statutory language did not change the statutory intent enunciated by the Court of Appeals opinion and Judge Gillette's concurrence in [*Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164 (1983)] that the duty on the employer to pay remains absolute. That is still the message of ORS 652.140." *In the Matter of*

Handy Andy Towing, 12 BOLI 284, 295 (1994).

Amendment of Claim

Respondent's presentation of a defense was incomplete because he absented himself from the hearing before the Agency had completed its case. However, because he responded to the Determination Order and the Notice of Hearing, he was not in default. He had opportunity to cross-examine and even presented a witness. He was present when the testimony upon which the Forum bases the amendment of Claimant Murphy's earnings was admitted.

Respondent was also present when Claimant James testified. His statement which suggested that he owed her approximately \$30.00 more than either her testimony or the Agency's documentation supported has been disregarded as an emotional misstatement.

Penalty Wages

An award of 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 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.*, 279 Or 1083, 557 P2d 1344 (1976); *State ex rel Nilsen v. Johnson et ux*, 233 Or 103, 377 P2d 331 (1962). Respondent, as an employer, had a duty to know the amount of wages due his employees. *In the Matter of Handy Andy Towing, Inc.*, *supra*; *In the Matter of Jack Coke*, 3 BOLI 238 (1983); *McGinnis v. Keen*, 189 Or 445,

221 P2d 907 (1950). The evidence established that Respondent knew what he had paid each Claimant at the time each Claimant was terminated, and that he acted voluntarily and as a free agent. Accordingly, Respondent acted willfully. There was no defense of financial inability to pay when the wages came due, and Respondent is therefore liable for civil penalty wages under ORS 652.150 as outlined in the Order below.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders DANNY R. JONES, dba J.J.J. Security & Patrol, to deliver the following to Bureau of Labor and Industries, Fiscal Services Office Suite 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109:

(1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR ARTHUR MURPHY in the amount of ONE THOUSAND ONE HUNDRED SIX DOLLARS (\$1,106), less appropriate lawful deductions, representing \$26.00 gross earned, unpaid, due, and payable wages and \$1,080 in penalty wages; plus

(a) Interest at the rate of nine percent per year on the sum of \$26.00 from July 5, 1994, until paid; plus

(b) Interest at the rate of nine percent per year on the sum of \$1,106 from August 4, 1994, until paid; and

(2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR MELVIN MEANEY in the amount of EIGHT HUNDRED THIRTY-NINE DOLLARS AND FIFTY CENTS (\$839.50), less appropriate

lawful deductions, representing \$52.50 in gross earned, unpaid, due, and payable wages and \$787 in penalty wages; plus

(a) Interest at the rate of nine percent per year on the sum of \$52.50 from October 27, 1994, until paid; plus

(b) Interest at the rate of nine percent per year on the sum of \$787 from November 26, 1994, until paid; and

(3) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR GLORIA JAMES in the amount of ONE THOUSAND THREE HUNDRED NINE DOLLARS AND TWENTY CENTS (\$1,309.20), less appropriate lawful deductions, representing \$328.20 in gross earned, unpaid, due, and payable wages and \$981 in penalty wages; plus

(a) Interest at the rate of nine percent per year on the sum of \$328.20 from December 19, 1994, until paid; plus

(b) Interest at the rate of nine percent per year on the sum of \$981 from January 18, 1995, until paid.

**In the Matter of
MANUEL GALAN,
Erlinda Galan, and Staff, Inc.,
Respondents.**

Case Number 07-96

Final Order of the Commissioner

Jack Roberts

Issued July 10, 1996.

SYNOPSIS

Where the individual Respondents were the majority shareholder and the operational manager of the unlicensed Respondent corporation, the Commissioner held both liable together with the corporation for acting as a forest/farm labor contractor without a license, and imposed a civil penalty against each Respondent. Where the unlicensed corporate Respondent recruited workers in Oregon for work in another state, failed to provide them with disclosure statements about working conditions, failed to execute written work agreements, and misrepresented lodging expenses, the Commissioner assessed a civil penalty against the corporate Respondent and majority shareholder for each violation. The Commissioner ordered that the right of all three Respondents to obtain farm labor contractor licenses in Oregon be suspended for three years, in accordance with a prior Consent Order. ORS 658.405(1); 658.407(3); 658.410(1),(2)(c) and (d); 658.417(1); 658.440(1)(d), (f), (g), and (3)(b); 658.453(1)(a), (c), and (2); 659.501; OAR 839-15-004(5)(a) and (e); 839-15-507; 839-15-508(1)(a), (f), (g), (h), and (l); 839-15-510(1), (2), and

(4); 839-15-512; 839-15-520(3)(a), (c), (i), and (4).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on October 25, 26, and 27, 1995, in a conference room of the Oregon Employment Department, 119 N Oakdale, Medford, and on December 1, 1995, in room 1004 State Office Building, 800 NE Oregon Street, Portland. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Manuel Galan (Respondent M. Galan) and Erlinda Galan (Respondent E. Galan) were present and, together with Staff, Inc. (Respondent corporation), were represented by Douglas Wilkinson, Attorney at Law, Springfield. Charles Sheldon, Medford, appointed by the Forum and under proper affirmation, acted as interpreter for the Spanish speaking witnesses. Respondent E. Galan, at the request of counsel and with permission of the ALJ, assisted with some translation.

The Agency called as witnesses (in alphabetical order): Respondent M. Galan; forest workers Jaime Mancilla, Perfecto Mancilla, Rodrigo Mancilla, Debbie Martinez, Luis Orlando Montoya, and Gabriel Campuzano; United States Forest Service (USFS)

Contracting Officer Stephen M. Patton; forest worker Juan Luis Pelayo; Agency Compliance Specialist Raul Ramirez; Summitt Forest foreman Celestino Rodriguez; and Respondent corporation foreman Guadalupe Zamora.

Respondent called as witnesses (in alphabetical order): Agency Compliance Supervisor Nedra Cunningham; Respondent M. Galan; Respondent E. Galan; labor contractor Antonio Osorio (by telephone); and Respondent corporation foreman Justo Zavala.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, make the following Rulings on Motions and Objections, 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 16, 1995, the Agency issued a "Notice Of Intent To Assess Civil Penalties And To Enforce Provisions Of Consent Order" (Notice of Intent) to Respondents Staff, Inc., M. Galan, and E. Galan. The notice informed Respondents as follows:

"THIS WILL NOTIFY YOU that the Commissioner of the Bureau of Labor and Industries ('Commissioner') intends to assess civil penalties against Staff, Inc., Manuel Galan and Erlinda Galan ['Respondents'] in the amount of \$252,000.00, pursuant to ORS

* Because the manner in which Respondents were charged was an issue (See, Rulings on Motions, *infra*), the Forum has set out the charging portions of the Notice of Intent exactly as they appear, except for substitution of "Respondent" for "Contractor" and elimination of repetitive references to the Consent Order.

658.453(1) for violations of Chapter 658, Oregon Revised Statutes and rules adopted pursuant thereto. The Commissioner further seeks to enforce the terms and conditions of the Consent Order executed by the Commissioner and [Respondents] on March 11, 1994, by extending the period [Respondents] are prevented from applying for a license for an additional three year period from the date the Commissioner finds [Respondents] in breach of the Consent Order and unfit to act as forest labor contractors.

THE BASIS FOR THE PROPOSED CIVIL PENALTIES AND ENFORCEMENT OF THE CONSENT ORDER IS AS FOLLOWS:

1. Failure To Comply With The Terms and Provisions Of A Legal and Valid Agreement Entered Into With The Commissioner In Contractors' Capacity As Farm Labor Contractors. (Fifteen Violations) From March 11, 1994, and thereafter in 1994, [Respondents] engaged in forest labor contracting activities in Oregon and repeatedly violated the provisions of ORS chapter 658 by acting as forest labor contractors without a license, willfully making false, fraudulent or misleading statements to workers regarding the terms and conditions of their employment, and by failing to furnish workers with disclosure

statements and copies of work agreements, thereby breaching the terms and conditions of the Consent Order executed by [Respondents] on March 11, 1994, * * * [by reference incorporated herein], a legal and valid agreement entered into with the Commissioner in their capacity as forest labor contractors, in violation of ORS 658.440(1)(d). Civil Penalty of \$30,000. (Five violations per [Respondent] @ \$2,000 per violation).

"2. Acting As A Forest Labor Contractor Without A Valid License Or Indorsement Issued By The Commissioner And In Violation Of A Valid Consent Order Executed On March 11, 1994. (Three violations) In or around April, 1994, [Respondents] through their agent, Antonio Bernal Osorio, recruited, solicited, supplied or employed workers in Oregon to perform labor upon [Respondents'] forestation contract with the U.S. Forest Service (USFS) on the Tongass National Forest in Ketchikan, Alaska Contract No. 52-0116-4-00279. At all times material, [Respondents] did not possess a valid forest labor contractor license, in violation of ORS 658.410, ORS 658.415, ORS 658.417 and in breach of the terms and conditions of [the above] Consent Order * * * [.] Civil

Penalty of \$6,000. (\$2,000 per [Respondent])

"3. Acting As A Forest Labor Contractor Without A Valid License Or Indorsement Issued By The Commissioner And In Violation Of A Valid Consent Order Executed On March 11, 1994. (Three violations) In or around June, 1994, [Respondents], for an agreed remuneration or rate of pay, recruited, solicited, supplied or employed 14 or more workers in Oregon to perform labor upon [Respondents'] forestation contract on the El Dorado National Forest in Placerville, California, USFS Contract No. 53-91U9-4-1C04. At all times material, [Respondents] did not possess a valid forest labor contractor license, in violation of ORS 658.410, 658.415, 658.417 and in breach of the terms and conditions of [the above] Consent Order * * * [.] Civil Penalty of \$6,000. (\$2,000 per [Respondent])

"4. Failure To Furnish 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 Contractor To Communicate With Workers Containing The Terms And Conditions Of Employment And A Statement Of The Workers' Rights and Remedies. (42 Violations) [Respondents], In or around June, 1994, solicited and recruited at least 14 workers in Medford, Oregon, to perform labor on [Respondents'] forestation contract in Placerville, California, USFS Contract No. 53-91U9-4-

1C04, and failed to furnish each worker a written statement in English and Spanish containing the terms and conditions of employment and a statement of the workers' rights and remedies, in violation of ORS 658.440(1)(f) and in breach of the terms and conditions of [the above] Consent Order * * * [.] Civil Penalty of \$42,000. (14 violations per [Respondent] @ \$1,000 per violation)

"5. Failure To Execute A Written Agreement Containing The Terms And Conditions Of Employment For Each Worker At The Time Of Hire Or Prior To Work Being Performed. (42 violations) [Respondents], in or around June, 1994, employed at least 14 workers in Medford, Oregon, to perform labor on [Respondents'] forestation contract in Placerville, California, USFS Contract No. 53-91U9-4-1C04, and failed to execute prior to hire or prior to work being performed, a written agreement between [Respondents] and each worker in English and Spanish containing the terms and conditions of employment, in violation of ORS 658.440(1)(g) and in breach of [the above] Consent Order * * * Civil Penalty of \$84,000. (14 violations per [Respondent] @ \$2,000 per violation)

"6. Willfully Making A False, Fraudulent Or Misleading Representation To Workers About The Terms And Conditions Of Employment. (42 violations) In or around June, 1994, [Respondents] recruited and hired at least 14 workers in Medford, Oregon, to perform

* The foregoing portion of Paragraph I was amended at hearing to read "failing to furnish workers with disclosure statements and failing to execute written work agreements, thereby breaching"

** The foregoing portion of Paragraph II was amended in the Proposed Order to "through their agent, Antonio Bernal Osorio, or by entering into a sub-contract with Antonio Bernal Osorio, recruited, solicited,"

labor on [Respondents'] forestation contract in Placerville, California, USFS Contract No. 53-91U9-4-1C04, and at the time of hire made oral representations, through an agent, to each worker that [Respondents] would pay hotel expenses for each worker for the duration of their work on the contract in California; [Respondents] subsequently deducted hotel expenses from each worker's paycheck after the workers relocated in California having willfully misrepresented the terms and conditions of the workers' employment, in violation of ORS 658.440(3)(b) and in breach of [the above] Consent Order ** * [.] Civil Penalty of \$84,000. (14 violations per [Respondent] @ \$2,000 per violation)

"7. Failure To Adhere To The Terms And Conditions Of A Consent Order Executed By [Respondents] And The Commissioner On March 11, 1994. After March 11, 1994, [Respondents] repeatedly engaged in the forest labor contracting activities cited above in paragraph 1 through 6, realleged and incorporated herein, and violated the provisions of ORS Chapter 658, the Commissioner's rules adopted pursuant thereto and the terms, conditions and representations of the Consent Order ** * [of] ** * March 11, 1994. In the Consent Order, [Respondents] agreed to refrain from engaging in forest labor contracting activities for a two year period beginning March 11, 1994, and agreed that any violations of the aforementioned Consent Order would result in 'the

denial of a forest/farm labor contractor license ** * without any further proceeding based upon the admissions contained herein, which denial shall, for a period of three years from the date of the breach of this agreement, operate to further bar any application for a forest/farm labor contractor license. ** * ' [Respondents'] actions set forth in allegations 1 through 6, including their failure to adhere to the terms and conditions of the Consent Order, demonstrate that their character, reliability or competence make them unfit to act as forest labor contractors. ORS 658.420(1) and OAR 839-15-520(3)(a)(c) & (i).

"THE BASIS FOR ENHANCED PENALTIES IS AS FOLLOWS:

"[Respondents] expressly admitted in the [above] Consent Order ** * to previous violations of ORS 658.410, 658.415, 658.440(3)(e), 658.417(3) and 658.440(1)(g) and have continued to violate the provisions of ORS chapter 658; [Respondents] have demonstrated, in spite of their knowledge of past and present violations, and, by their continued breach of the terms and conditions of the Consent Order, a willful disregard for Oregon's forest labor contracting laws; the magnitude and seriousness of the foregoing violations warrant maximum civil penalties."

The Notice of Intent was served on Respondent corporation through its registered agent by certified mail on August 18, 1995, and on Respondents M. Galan and E. Galan, personally, by

the Deschutes County Sheriff on August 22, 1995.

2) On September 6, 1995 Respondents through counsel answered the Notice of Intent as follows (eliminating caption and cause):

"REQUEST FOR HEARING

"Staff, Inc., Manuel Galan and Erlinda Galan (hereinafter 'Respondents') hereby request a hearing in the above entitled matter. The notice of intent to assess civil penalties was delivered to the registered agent on August 18, 1995.

"ANSWER

"Respondents deny the allegations contained in paragraphs 1-7 of the notice of intent to assess civil penalties and to enforce provisions of consent order and the whole thereof.

"AFFIRMATIVE DEFENSES

"1. The Commissioner has no jurisdiction for events outside the state of Oregon.

"2. At all material times, Antonio Bernal Osorio, aka Sierra Grande Reforestation was an independent contractor.

"MOTION TO AMEND

"Respondents move for an opportunity to amend the answer and affirmative defenses, after discovery has been conducted."

3) The Agency requested a hearing date. On September 12, 1995, 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 ALJ, 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 the Agency's administrative rules regarding the contested case process - OAR 839-50-000 through 839-50-420.

4) On September 15, 1995, the Forum received by fax Respondents' motion dated September 14 requesting a postponement of the hearing scheduled for October 17 in Medford. The motion was based on a recitation of counsel's work load for September and October, counsel's personal plans to be out of state in mid-October, and anticipated need for additional time for discovery. On September 19, the Agency filed objections to postponement, to which Respondents replied by fax on September 20.

5) On September 22, 1995, the ALJ found that Respondents' motion did not meet the "good cause" standard in that it cited conflict with counsel's personal plans and workload but did not recite a previously scheduled conflicting appearance before another forum. Respondents' reply had detailed desired discovery encompassing 60 days, which the ALJ found to be an unacceptable delay. The ALJ denied the motion as tendered, but delayed the hearing until October 25 in Medford.

6) On September 29, 1995, the Agency moved for appointment of a Spanish speaking interpreter based on the anticipated presentation of several Agency witnesses who could not speak or understand English. The Agency suggested that a particular Agency employee be appointed. On October 2, by fax, Respondents

acknowledged the necessity for an interpreter, objected to appointment of Agency staff for that purpose, and requested an interpreter for Respondent M. Galan "who has difficulty speaking and understanding the English language." Respondents also requested that the location of the hearing be changed from Medford to Bend, citing Respondents' residence in Redmond.

7) On October 5, 1995, the Agency objected to changing the hearing location because most of the Agency's witnesses were from the Medford area. The Agency agreed with Respondents' suggestion for appointment of "a non-employee interpreter," but objected to Respondent M. Galan's use of an interpreter.

8) On October 6, 1995, the ALJ ruled as follows:

"The proper standard for appointment of an interpreter is that the person involved in a contested case hearing *cannot* speak or understand the English language." OAR 839-50-300(1). [Emphasis supplied]. Mere difficulty is not enough. [Noting that this forum found in a prior proceeding that Respondent M. Galan speaks and understands English, the ALJ appointed] Charles Sheldon, Medford, who is not an Agency employee, to act as interpreter for the Agency witnesses in this case."

Also on October 6, 1995, the ALJ denied Respondents' motion to change the place of hearing and issued a Discovery Order calling for the filing of Case Summaries, as required by OAR 839-50-210, to be delivered no later than October 23.

9) On October 20, 1995, by fax, Respondents again moved to postpone the hearing for at least 60 days and for depositions. The motion was supported by the affidavits of counsel, of Tim Grundeman, and of Respondent E. Galan which incorporated a letter to counsel from Respondent M. Galan. In addition to outlining desired discovery and naming several witnesses which Respondents were unable to locate, the submissions suggested bias on the part of the Forum and the Agency, and requested time to depose Agency employees Raul Ramirez and Nedra Cunningham.

10) Also on October 20, 1995, the ALJ ruled as follows, in pertinent part:

"Respondents' motion alleges a refusal by the Agency to cooperate in discovery (by allowing interview of an Agency employee), difficulty in contacting potential witnesses, inadequate time to prepare a defense, and a need to depose Agency personnel.

"I find no evidence in the files and records of this case indicating any attempt by Respondents to subpoena witnesses for deposition or to obtain a discovery order therefor since my September 22 ruling herein. That ruling partially granted Respondents' postponement request of September 14, 1995, and reset the hearing from October 17 to its current setting of October 25. Whatever the Agency's posture may be regarding interview of its employees, those employees may be subpoenaed for deposition where necessary.

RULINGS ON MOTIONS AND OBJECTIONS

Agency Motion to Amend

At the commencement of the hearing, the Agency moved to amend paragraph 2 of the Notice of Intent. Based on the answer and case summary of Respondent, the Agency sought to have the paragraph read "through their agent, Antonio Bernal Osorio, or by entering into a subcontract with Antonio Bernal Osorio, recruited, solicited, * * * etc." The Agency argued that entering into a subcontract with another for forestation labor brought Respondents under the ORS 658.405(1) statutory definition of farm labor contractor, for which they held no license. Counsel for Respondent objected on the ground that the subcontract involved forestation of lands outside the state of Oregon over which the Commissioner has no jurisdiction, and that the statute and the rule, OAR 839-15-004(5)(e), refer to land within the state. The Forum took the matter under advisement, to be ruled upon in the Proposed Order. For reasons more fully explained in the Opinion section of this Order, the Agency's motion was granted. That ruling is confirmed.

Respondents' Motion to Clarify the Number of Violations Alleged

At the commencement of the hearing, counsel for Respondent requested a clarification of the "Five violations per [Respondent]" alleged in paragraph 1 of the Notice of Intent. The Agency responded that the five violations tracked the allegations in paragraphs 2 through 6, that is, acting as a forest labor contractor without a license (paragraphs 2 and 3), failure to furnish disclosure statements (paragraph 4), failure to

"Respondents' request for further postponement is denied. Failure to complete discovery is not a reason to delay hearing where the participants do not agree on the delay. Also, I find that the type of information being sought by the investigator, Grundeman, is not material to the violations alleged in this case. Finally, if Respondents' motion is intended to be a motion for discovery as to the witnesses Cunningham and Ramirez, that motion is denied as untimely. The hearing will proceed on October 25, 1995, as scheduled."

11) The Agency and Respondents timely filed their respective case summaries. At the commencement of the hearing, Respondents' counsel stated that Respondents had received the Notice of Contested Case Rights and Procedures and had no questions about it.

12) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) At the commencement of and during the hearing, the ALJ made rulings on certain motions of the participants which are set out in a separate section of this Order.

14) The proposed order, containing an exceptions notice, was issued April 12, 1996. Exceptions were due April 22, 1996. Under a timely requested extension of time, Respondents filed exceptions by fax on May 22, 1996, and by mail thereafter. Respondent's exceptions are dealt with in the Opinion section of this Order.

execute written agreements with workers (paragraph 5), and making false, fraudulent, or misleading statements to workers regarding terms and conditions of employment (paragraph 6). Counsel acknowledged this explanation, and the ALJ announced that he would treat the allegation in paragraph 1, which read "failing to furnish workers with disclosure statements and copies of work agreements, thereby breaching * * *" as if it read "failing to furnish workers with disclosure statements and failing to execute written work agreements, thereby breaching * * *." That ruling is confirmed.

Respondents' Motion to Require Clear and Convincing Quantum of Proof

At the commencement of the hearing, counsel for Respondents moved for a ruling that the quantum of proof required to impose the sanction sought in paragraph 7 of the Notice of Intent (*i.e.*, further suspension of Respondents' right to apply for a forest/farm labor contracting license) should be "clear and convincing," rather than a preponderance. Respondents cited *Bernard v. Dental Examiners*, 2 Or App 22, 465 P2d 917 (1970), and *Van Gordon v. Board of Dental Examiners*, 52 Or App 749, 629 P2d 848 (1981), as standing for the proposition that where fraud or misrepresentation is alleged, clear and convincing evidence is required for revocation of a license. The ALJ stated that he would consider whether the clear and convincing standard applied. For reasons more fully set out in the Opinion section below, the Forum has used preponderance of evidence as the standard of proof in this matter. That ruling is confirmed.

Respondents' Motion to Postpone

At the commencement of the hearing, Respondents filed a written motion renewing their motion to postpone the hearing for at least 60 days, alleging that Respondents were being denied an opportunity to prepare a defense. Counsel cited Respondents' previous postponement motions in support. Counsel also sought postponement, at least of a final decision, until the Agency has adopted rules defining recruiting, soliciting, and supplying as they are used in ORS 658.405. The ALJ pointed out that these terms had been defined in *In the Matter of Leonard Williams*, 8 BOLI 57 (1989), which was an example of rulemaking in a contested case. Counsel argued that there must be rulemaking procedures as set forth by statute. The ALJ denied any postponement based on the need for rulemaking. That ruling is confirmed.

As to the other portion of the motion for postponement, Respondents claimed to be prejudiced by proceeding with the hearing due to their failure to locate Justo Zavala, the alleged recruiter of workers. Counsel termed Zavala's testimony as critical on the issue of his authority and whether he had informed Respondents of the source of the workers. Zavala was also considered critical for refutation of witness statements or testimony expected from the Agency. The ALJ ruled that the hearing would proceed with the available witnesses, that if it appeared at the close of testimony that Respondents would be unduly prejudiced by the unavailability of Zavala, and upon showing of efforts to locate him and an indication of later

availability, the ALJ would extend the hearing to reconvene on a later date for his testimony. At the close of testimony on October 27, the ALJ adjourned the hearing to a date to be agreed to take testimony of Zavala and of Antonio Osorio. The reconvenement on December 1, 1995, at which Zavala and Osorio testified, is considered by the Forum to have cured any prejudice to Respondents which might have been attributed to proceeding with the hearing on October 25. That ruling is confirmed.

Respondents' Objections to Certain Evidence

During the hearing, counsel for Respondents objected continuously to questions and responses dealing with living conditions at the job site in Alaska. Initially, because the evidence tended to touch upon the reasons for work stoppage and to identify who was dealing on behalf of what contractor, the ALJ admitted such inquiries and responses, over Respondents' objections. In addition, it appears that the proof adduced may illustrate the character, competence, and reliability of Respondents as forest labor contractors, a statutory area of concern for the Commissioner. The objections were properly overruled.

FINDINGS OF FACT – THE MERITS

1) Respondent Staff, Inc., is an Oregon corporation registered with the State of Oregon Secretary of State. All shares of the corporation are owned by Respondents M. Galan and E. Galan. The corporate address in 1994 was in Madras, Oregon, and at the time of hearing was in Redmond, Oregon. At times material, Respondent

corporation was engaged in labor contracting.

2) Respondent corporation and Respondents M. Galan and E. Galan were among respondents accused of violations of the Oregon farm and forest labor contracting statutes (ORS chapter 658) in prior enforcement proceedings which were resolved by a Consent Order wherein the Commissioner agreed to forego further action in exchange for payment by the respondents in that case of a civil penalty of \$40,000 and for the provision that the respondents in that case, including Respondents herein, be prohibited from performing forest/farm labor activities in Oregon for a period of two years from the date of the Consent Order. Respondents herein further agreed in the Consent Order that their failure to comply with ORS chapter 658 and the Consent Order would be a breach of the agreement, the penalty for which would be the further denial of a forest/farm labor contractor license to them for a period of three years from the date of the breach of the agreement. That Consent Order was signed by Respondents M. Galan and E. Galan, for themselves and Respondent corporation, on March 4, 1994, and was signed on behalf of the Commissioner on March 11, 1994.

3) At times material, Antonio Osorio, Reedsport, Oregon, was an Oregon licensed forest/farm labor contractor since 1986, doing business as Sierra Grande Reforestation. He had his own tools, equipment, and vehicles, hired and fired workers, filed tax returns for Sierra Grande and carried his own workers' compensation and liability insurance.

4) At times material and at the time of hearing, Stephen M. Patton worked as a contracting officer, USFS, Region X, Tongass National Forest, Ketchikan, Alaska. He advertised, awarded, and administered 20 to 35 forestation contracts annually, some of which were seasonal and others were year around. Forestation contracts awarded by USFS require satisfactory completion of the work within specific time periods. Failure of a successful bidder to make timely progress is a ground for cancellation of the contract, with costs of rebidding and delay chargeable to the defaulting contractor. USFS awards forestation contracts based on sealed bids from the lowest responsible, responsive bidder. This involves a routine responsibility survey of the bidder which has a number of elements, including a satisfactory past record. In checking Respondent corporation's past performance pursuant to its November 1993 bid on a Tongass contract, Patton learned from another USFS contract officer of BOLI's enforcement action. From BOLI he learned of the disposition by Consent Order. With approval from USFS headquarters, Patton awarded contract #52-0116-4-00279 to Respondent corporation on March 25, 1994.

5) Respondent M. Galan was known to Patton and to the other USFS contract officers with whom Patton spoke as the principle or person in charge for Respondent corporation. A contract award letter identifying the Contract Officer's representative, Evan Duke, who would be the on-site administrator for contract #52-0116-4-00279, and outlining the information needed from Respondent corporation before

an actual notice to proceed would be issued, was prepared for certified mailing to Respondent M. Galan in Madras, Oregon. Duke designated inspectors for the project. A pre-work conference was arranged by telephone for April 1, and Respondent M. Galan picked up and signed for the award letter packet at the USFS office in Ketchikan on April 1, 1994.

6) The pre-work meeting is routinely the opportunity for USFS administrators to meet with a contractor and any subcontractors and foremen. Information concerning the administration of the individual contract, use of undocumented workers, safety, methods of payment, camping regulations, and the like are discussed. Respondent M. Galan was alone on April 1. In response to a specific inquiry, he stated he did not plan to subcontract. He did not identify a foreman or designate an authorized representative. He did indicate an intent to be ready to proceed in about two weeks.

7) Osorio met Respondent M. Galan at a forest/farm labor camp operator bond meeting on or about March 9, 1994, in Woodburn, Oregon. At that time and later in March, they discussed a forestation contract which Respondent M. Galan had bid on with USFS in the Tongass National Forest near Ketchikan, Alaska. The contract was awarded to Respondent corporation.

8) Osorio entered into a subcontract agreement with Respondent M. Galan regarding contract # 52-0116-4-00279 on or about April 18, 1994, in Roseburg, Oregon. Osorio signed for Sierra Grande Reforestation as subcontractor and Respondent M. Galan

signed for Respondent corporation as contract holder.

9) On April 18, USFS sent to Respondent corporation at PO Box 88, Madras, attention of Respondent M. Galan, a notice to proceed with contract # 52-0116-4-00279.

10) Receiving no response to the notice to proceed, Patton and COR Duke, by correspondence and telephone, attempted to reach Respondents regarding commencement of work on the contract. These attempts included notice that the failure to begin within 30 days of the notice to proceed jeopardized timely completion of the contract. A certified mailing sent May 25 gave Respondents 10 days from receipt to cure the defect or face default termination of the contract. That mailing to PO Box 88, Madras, attention of Respondent M. Galan, was received for on June 7 after Patton spoke by telephone with Respondent E. Galan on June 6.

11) Osorio was aware that the Tongass contract had a start date of April 21, but he knew that Respondent M. Galan was occupied with contracts in California and Idaho and could not go to Alaska immediately. Osorio was reluctant to start the job without the prime contractor being there. It was not until June that he and a crew went to Alaska.

12) At times material, Nedra Cunningham was a Compliance Supervisor with the Wage and Hour Division of the Agency. Among her duties was supervision of the farm labor unit (FLU), including Raul Ramirez. She was a spectator in the hearing of this case and had observed other farm labor and wage claim hearings. She

had no unusual special interest in this case or these Respondents.

13) At times material, Raul Ramirez was a Compliance Specialist with the farm labor unit of the Agency in Medford. He did farm labor investigations in the area and also handled wage claims. He had been so employed for about five months when he received a telephone call in July 1994 from his supervisor, Cunningham, directing him to question some farm laborers at the Vali Hai Motel. Although it was normally his day off, he went to the motel and spoke with several of the eight workers there. He had come from the grocery store and offered a beer to each of two workers. He was reprimanded for doing so when Cunningham learned about it. None of the workers there had any claims.

14) Ramirez eventually was in touch with several workers who had completed a job for Respondent corporation in Placerville, California. They alleged unauthorized deductions by the employer for lodging. Ramirez obtained statements and contacted Respondents regarding the claims.

15) Justo Zavala was employed in Idaho by Respondent corporation as a foreman in late May 1994. As a foreman for Respondent corporation, Zavala's duties included on site administration, hiring, firing, and keeping workers' time. He was directed by Respondent M. Galan to go to Placerville, California, and obtain a crew to work on a Respondent corporation contract with the USFS in the El Dorado National Forest.

16) Respondent M. Galan did not tell Zavala not to use Oregon workers. He told Zavala to hire a certain

Gustavo and his crew in Placerville. When Zavala could not find Gustavo in Placerville, he called an acquaintance in Medford, who sent him to Celestino Rodriguez.

17) Celestino Rodriguez was head foreman with Summitt Forests, Inc., in the Medford area. He lived in Gold Hill. On or about June 2, 1994, Zavala phoned him looking for workers, then came to his house. Rodriguez called Juan Pelayo, a Summitt foreman who also lived in Gold Hill and whose crew had just finished a job. By telephone, Pelayo notified some members of his crew who talked to others about the possibility of work in California. Rodriguez also notified some workers.

18) In the experience of those who had worked for Summitt Forests, Inc., lodging expenses were usually paid for by the employer when the contract was out of town.

19) Zavala told Pelayo and other workers to whom he talked directly that the job included payment for the motel. All of the workers believed when they left Medford for Placerville that the job included payment for the motel.

20) 14 workers from the Medford area accompanied Zavala in Respondent corporation's van to Placerville on or about the evening of June 2, 1994. These included Roberto (or *Renato*) Mancilla (*Ibarra*), Perfecto Mancilla (*Ibarra*), Demetrio Montolla (or *Montoya*), Cipriano Santos (*Gutierrez*), Juan Jose Cortez (*Reyes*), Gabriel Campuzano (*Patino*), Martin Figueroa,

Rodrigo Mancilla (*Rivera*), Jaime Mancilla (*Soberanis*), Oscar Mancilla (*Valdorino*), Norberto Ramos, Julio Garcia (*Bautista*), Amulfo (*Cortez*) Vargas and Juan Luis (*Delgado*) Pelayo. They began work on June 3 and worked in Placerville through June 22.

21) Form WH-151 is an Agency form headed "Rights of Workers." It is intended to be receipted for by each worker before each job begins and explains the rights of workers and responsibilities of labor contractors in Oregon. It explains that contractors must be licensed, provide written agreements and notice of rights to workers, have a bond, pay and give notice of the minimum wage, and it explains that workers have legal rights, may make a claim for unpaid wages or for on-the-job injuries, may earn unemployment benefits, and are protected against discrimination. It includes the address of each Agency office. Form WH-151S is the same form in Spanish.

22) Form WH-153 is an Agency form headed "Agreement Between Contractor and Workers (To be executed by both parties)." It is intended to memorialize between the labor contractor and the worker such items as rate of pay, bonus, personal loans, housing, health and day care services, employment conditions, equipment and clothing, the existence of any labor dispute, the owner of the land, any other working conditions, and acknowledgment of the WH-151 rights and remedies form and provisions of the

* The workers who testified are of Hispanic extraction, and sometimes used the paternal-maternal form in stating their names as witnesses and on work documents, and in stating the names of other workers. The Forum has used their testimony plus paycheck copies and the foreman time records in identifying the workers listed in this Finding of Fact.

federal service contract act, if applicable. It is intended to be signed by each worker and the contractor before each job begins. Form WH-153S is the same form in Spanish.

23) Sometime after the group from Medford arrived in California, about the second day, Zavala had the workers sign forms which they understood were applications. These forms were blank, i.e., typed, unmarked, and without written entries when they were signed.

24) Zavala acted as foreman in Placerville for two or three days and then returned to Idaho. Guadalupe Zamora, another foreman employed by Respondent corporation, then became foreman over the workers Zavala had transported to Placerville from Medford.

25) Zamora soon heard from some of the Oregon workers that Zavala had promised payment for their motel in addition to wages. Zamora told them that the boss didn't usually pay for the hotel, but that he might if there was a profit on the job. Respondent corporation had paid hotel expense on past contracts based on quality work.

26) Zavala acknowledged in his testimony that he may have suggested payment of the motel if there was a profit. Respondent E. Galan stated to the Agency investigator in August 1994 that the workers were told that the motel would be paid if quality work was done. Respondent M. Galan wrote to

the Agency "we had only told the foreman that we would pay lodging as a bonus for ahead-of-schedule production if it occurred on that job."

27) The workers who went to Placerville knew they were hired by "Justo" (i.e., Zavala) and most were aware that they were working for "Galan." None had heard of Staff, Inc.

28) Respondents' files contained WH-153S forms bearing the apparent signatures of 11 of the 14 workers transported to Placerville by Zavala. Of the 11 signed forms, two were dated "6-3-94" (Campuzano, Ren. Mancilla), five were dated "6-2-94" (P. Mancilla, Cortez (*Reyes*), Rod. Mancilla, Vargas, Pelayo), and four were not dated (Montoya, Figueroa, J. Mancilla, O. Mancilla). Three WH-153S forms had no signature (Santos (*Gutierrez*), Ramos, and Garcia (*Bautista*)). All had the box opposite "No hay bonos" (There will be no bonuses) and "Este contratista no provee estos servicios" (Housing, health and day care services are not provided) marked. However, on the line reading "Sestos servicios se proveen bajo estas condiciones: (Solamente, el precio justo de la vivienda podra deducirse del sueldo)" (Housing, health and/or day care services are provided under the following conditions (Only the fair market value of housing may be deducted from wages), all had the word "hotel" inserted. None were signed by or on behalf of the contractor.

* Respondents submitted W-4 and I-9 forms for Julio Cesar Garcia, ss# [REDACTED], dated 6-16-94; this is not the Julio Garcia (on the 6-3-94 foreman record Julio G. Bautista, ss# [REDACTED]) identified as accompanying Zavala from Medford to Placerville.

** The translations quote the English equivalent from the WH153 and are not exact.

29) Respondent corporation's pay records indicate that of the 14 workers transported to Placerville by Justo Zavala, all except Julio Garcia (*Bautista*) had \$87 deducted from their pay for "Employee hotel" for the pay period "06/03/94 - 06/10/94."

30) On June 17, 1994, Respondent M. Galan telephoned Patton to advise that a crew consisting of a foreman and eight workers would arrive within two days. He identified the foreman as Antonio Osorio. Patton allowed work to proceed, but expected timely completion even though work was started two months late.

31) Osorio and five workers arrived in Alaska on June 19, 1994. Patton advised Osorio by telephone to meet COR Duke early the next day.

32) If a contractor is not on site, USFS requires that the contractor designate a representative with specific areas of authority to act in the contractor's absence. Respondent M. Galan designated Osorio as Respondent corporation's representative by fax on June 20, 1994, with authority to act in all areas of the contract, including payment matters.

33) On June 21, 1994, COR Duke determined that the camp site did not meet USFS minimum standards for worker housing; the single trailer leaked, was too small to adequately house the workers, and sanitation facilities were inadequate. Duke suggested a second trailer and a toilet facility. Duke suspended work. Both notices were accepted by Osorio on behalf of Respondent corporation. On June 23, Duke allowed work to resume so long as the workers were not housed in the trailer. Osorio received

for that notice, addressed to Respondent corporation.

34) Osorio left Alaska after one week. Patton's office received by fax on or about June 25, 1994, a designation of contract representative designating Peter Storf to act for Respondent corporation. It was signed by Respondent M. Galan.

35) The crew that had accompanied Osorio stayed several nights in a motel in Klawock, AK, about 1½ to 2 hours driving time away from the job site near Thome Bay. They spent the night of July 28, 1994, at the work site after being told to leave the motel.

36) Patton visited the job site on June 29, 1994. He found numerous violations of federal law, including the presence of undocumented workers, and again the job was suspended. He noted that Osorio was not on site and he could not locate Peter Storf. He did speak with Patrick Petersdorf, who stated he did not know Respondent M. Galan. Patton found that the five workers present had been recruited in and transported from Oregon by Osorio. They did not know of "Staff, Inc." or Respondent M. Galan.

37) Patton wrote to Respondent M. Galan the next day, outlining his findings and urging him to resolve the numerous problems of documentation, housing, and work progress. He asked that Respondent explain how the workers could be recruited in Oregon.

38) On July 1, 1994, in Ketchikan, Patton met with Respondent M. Galan, who gave him a copy of the subcontract agreement between Osorio and Respondent corporation. This was the

first Patton knew about a subcontract. Patton did not receive a copy that Respondent M. Galan stated had been sent to Patton in April.

39) At times material, Luis Orlando Montoya lived in Roseburg, Oregon. In May 1994, he was working for Osorio in Klamath Falls, Oregon, when he learned that Osorio wanted a thinning crew to work in Alaska. Together with four or five other workers, he traveled with Osorio from Oregon to the job in Alaska. Osorio told them that the job would pay good money and that they would camp out in camp trailers at the job site near Thome Bay in the Tongass National Forest. Osorio brought one trailer to the site in Alaska. Montoya worked about a week when the USFS shut down the job. Shortly after that, Montoya met Respondent M. Galan. Respondent M. Galan spoke with Montoya and Patrick Petersdorf, another worker. Neither was working. Respondent M. Galan mentioned that he would pay \$10 an hour for workers. Montoya was not sure who Respondent M. Galan was, but he was unwilling to work in Alaska for \$10 an hour. He returned home and filed a wage claim against Osorio. When he was finally paid, he was paid by Osorio. He did not work for Respondent M. Galan or for Respondent corporation.

40) Osorio recruited the workers who accompanied him to Alaska in Oregon. He paid, or was responsible for paying, those workers. He did not recruit or supply workers to Respondent corporation or to Respondent M. Galan. A dispute arose between Osorio and Respondent M. Galan concerning the furnishing of camping facilities.

41) On July 6, 1994, Patton again wrote to Respondent M. Galan, reviewing the problems found together with his findings that documentation presented by Osorio was incomplete. Patton questioned the validity of the April subcontract agreement because Osorio's alleged employee Petersdorf had been designated as Respondents' contract representative. Patton stated that the work suspension would remain in effect until the identified problems were resolved.

42) In a meeting several days later at the Thome Bay Ranger Station, Patton was told by Respondent M. Galan that a second trailer was on site for housing. Respondent M. Galan submitted documents for a crew of six who were hired in California. Since it appeared that the deficiencies were corrected, Patton issued a resume work order on July 11.

43) After Osorio returned to Oregon, he again went to Alaska in July and completed his subcontract with Respondent corporation.

44) Because it appeared that workers on Respondent corporation's contract with the USFS in the El Dorado National Forest had been recruited in Medford and transported to California to work, Ramirez told Respondent M. Galan during that investigation that Respondents may have violated the law and the outstanding Consent Order.

45) Respondent M. Galan was vice president of and functioned as operations manager for Respondent corporation at times material. He held less than 50 percent of the shares of the corporation, but made the operational and proprietary decisions. He denied telling Patton that Osorio was

Respondent corporation's foreman and insisted that he had forwarded a copy of the subcontract to Patton in late April. He stated that the delay in starting the Alaska work was due to other contracts in Idaho and California, and to the difficulty in coordinating Osorio's crew and the ferry schedule. He stated that the problem over the living arrangements at Thorne Bay were due to Osorio's failure to provide a second trailer. He did not consider his dealings with Osorio to be in violation of the Consent Order because the work was in Alaska. He testified that Respondents had attempted to abide by the Consent Order through better accounting and not bidding on Oregon forestation jobs. He did bid on pesticide, herbicide, and certain animal control work in Oregon as well as elsewhere, because those activities were not considered to be forestation or reforestation. He denied any intent to violate the law or the Consent Order, and insisted that he was unaware that Zavala had recruited workers in Oregon. He resented the Agency's inquiries and was convinced that the Agency and its employees were focusing on Respondent corporation and his family and ignoring other contractors. He pointed to the maximum penalties sought by the Agency as evidence of Agency bias. He testified to his impression that the Agency did not help contractors avoid violations, that Agency personnel intentionally provided federal contracting officer representatives and the Small Business Administration (SBA) with adverse information about Respondent corporation, and that as a result Respondent corporation had lost contracts upon which it was low bidder. He stated that

Respondent corporation's gross income had been reduced markedly because of the Agency's actions. On cross examination he acknowledged that some of Respondents' difficulties with SBA, USFS, and USDOL were not traceable to actions of the Agency. He blamed cultural differences, poor paper work, and limited education rather than any intent to evade regulation. He admitted he had not asked the Agency for guidance, again stating his belief that the Agency did not help contractors. He characterized the violations alleged as merely a few unsigned documents. Although he admittedly was not present at Placerville at the time, he insisted that the workers there were timely provided with proper pre-work documents and information regarding the lodging deductions. The Forum has carefully weighed his testimony as to content and consistency and has credited those portions verified by other credible evidence.

46) Respondent E. Galan was president and secretary of the corporate Respondent at times material. She held over 50 percent of the shares of the corporation and was the majority shareholder. She disagreed with the violations charged in the original proceeding and testified to Respondents' efforts to avoid violating the Consent Order, including limiting Oregon business activity to non-forestation contracts, having separate bookkeeping services in each state, and confining hiring on forest work outside Oregon to workers not living in Oregon. She, too, believed that Agency personnel had been targeting her corporation and particularly cited Cunningham as trying

to put Respondent corporation out of business. She suggested that the corporation had lost as many as 10 herbicide or pesticide contracts due to delays of SBA processing caused by information originating with BOLI. She felt that BOLI had lost focus, that it was wrong for Cunningham and Ramirez to solicit wage claims, and that fining contractors was not helping employees, but was just a way for BOLI to get money. Somewhat inconsistently, she said others who recruited illegally were not pursued by BOLI. She also stated that Respondents had received no assistance or training from the Agency and believed that all contractors had trouble with paper work. She acknowledged that Respondents sometimes made mistakes and had not sought the Agency's assistance because of distrust. On cross examination, she admitted that several specific problems involving Respondent corporation and federal and other regulatory offices outside Oregon were not connected with the Agency. The Forum has carefully weighed her testimony as to content and consistency and has credited those portions verified by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent Staff, Inc., an Oregon corporation, engaged in labor contracting, was registered with the Oregon Secretary of State, and was owned by Respondents M. Galan and E. Galan. Respondent E. Galan, its president and secretary, held over 50 percent of the shares and Respondent M. Galan was vice president and operations manager. The corporate address in 1994 was in Madras, Oregon.

2) Respondent corporation and Respondents M. Galan and E. Galan were subject to a Consent Order (Order) wherein the Commissioner required that said Respondents be prohibited from performing forest/farm labor activities in Oregon for a period of two years from March 11, 1994, the date of the Order. The Order further provided that Respondents agreed and stipulated that Respondents' failure to comply with ORS chapter 658 and the Order would be a breach of their agreement for the Order, the penalty for which would be the further denial of a forest/farm labor contractor license for a period of three years from the date of the breach.

3) At times material, Respondent corporation was not licensed as a forest labor contractor in Oregon.

4) At times material, Respondent M. Galan was not licensed as a forest labor contractor in Oregon.

5) At times material, Respondent E. Galan was not licensed as a forest labor contractor in Oregon.

6) At times material, Antonio Osorio was licensed as a forest labor contractor in Oregon.

7) In April 1994, Respondent M. Galan entered into a subcontract with Antonio Osorio in Oregon for forestation work in Alaska on USFS forestation contract # 52-0116-4-00279.

8) In June 1994, Antonio Osorio sought workers for the purpose of establishing a direct employer-employee relationship in Oregon and transported them to Alaska to work for Osorio; they were not recruited for or by Respondent corporation or Respondent M. Galan.

9) In June 1994, Justo Zavala, an employee of Respondent corporation, was directed by Respondent M. Galan to hire workers for Respondent corporation on a USFS contract in Placerville, California. Zavala, for the purpose of establishing a direct employer-employee relationship between the workers and Respondent corporation, gave oral notice to 14 workers in and around Medford, Oregon, of employment availability and the steps necessary to obtain it, and transported them to California to work for Respondent corporation.

10) At the time the 14 workers from Oregon were recruited, Zavala did not furnish them with a written description of the terms and conditions of the employment for which they were hired.

11) At the time the 14 workers from Oregon were hired and before work began, neither Respondent corporation nor any employee or representative of Respondent corporation executed a written agreement with the workers describing the terms and conditions of the employment for which they were hired.

12) At the time the 14 workers were recruited, they were told that their hotel expenses would be paid by the employer. The hotel expenses were deducted from the paychecks of 13 of the workers for the work in Placerville.

CONCLUSIONS OF LAW

1) At times material herein, ORS 658.407 provided, in part:

"The Commissioner of the Bureau of Labor and Industries shall administer and enforce ORS 658.405 to 658.503 and 658.830, and in so doing shall:

"(3) Adopt appropriate rules to administer ORS 658.405 to 658.503 and 658.830."

2) At times material herein, ORS 658.501 provided:

"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, the recruitment of workers outside of this state to perform work in whole or in part within this state, the housing of workers in this state for work in another state, the housing of workers from another state in connection with work to be performed in this state, the transportation of workers through 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 Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein, including but not limited to the recruitment of workers in Oregon to work elsewhere, transportation of such workers to another state, and provisions of Oregon law pertaining to payment, terms, conditions, disclosure and record keeping and related matters for such workers.

3) At times material herein, ORS 658.405 provided 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, * * * or who enters into a subcontract with another for any of those activities."

At times material herein, OAR 839-15-004 provided:

"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

"(e) Any person who subcontracts with another for the forestation or reforestation of lands."

At times material herein, ORS 658.417 provided:

"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."

At times material herein, ORS 658.410 provided, in pertinent part:

"(1) * * * 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). * * *

"(2) Farm labor contractor licenses may be issued by the commissioner only as follows:

"(c) To the majority shareholder or majority shareholders of a corporation that is licensed to operate as a farm labor contractor.

"(d) To a corporation whose majority shareholder or majority shareholders are also licensed to operate as a farm labor contractor and that is authorized to do business in Oregon by the Office of Secretary of State."

As a person acting as a farm labor contractor in the State of Oregon with regard to the forestation or reforestation of lands, Respondent M. Galan was and is subject to the provisions of ORS 658.405 to 658.503. As a person acting as a farm labor contractor in the State of Oregon with regard to the forestation or reforestation of lands, Respondent corporation was and is subject to the provisions of ORS

658.405 to 658.503. As majority shareholder of a corporation so acting, Respondent E. Galan was and is subject to the provisions of ORS 658.405 to 658.503.

4) The actions, inactions, statements and motivations of Justo Zavala, Respondent M. Galan, and Respondent E. Galan are properly imputed to Respondent corporation herein.

5) On April 18, 1994, by entering into a forestation subcontract in Oregon, Respondent M. Galan acted as a forest labor contractor without a license to do so, violating ORS 658.410. By entering into a forestation subcontract in Oregon, Respondent corporation acted as a forest labor contractor without a license to do so, violating ORS 658.410. As majority shareholder of a corporation entering into a forestation subcontract in Oregon, Respondent E. Galan acted as a forest labor contractor without a license to do so, violating ORS 658.410.

6) At times material herein, ORS 658.440 provided, in part:

"(1) Each person acting as a farm labor contractor shall:

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor.

"(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 child 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. :S2. 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.

"(3) No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

"(b) Willfully make or cause to be made to any person any false, fraudulent or misleading representation, or publish or circulate any false, fraudulent or misleading information concerning the terms, condition or existence of employment at any place or by any person."

In June 1994, by recruiting workers in and around Medford, Oregon, and transporting them to California to work for Respondent corporation, Respondent corporation violated ORS 658.410. In June 1994, as majority shareholder of a corporation recruiting workers in Oregon and transporting them to California, Respondent E. Galan violated ORS 658.410.

7) In June 1994, by failing to furnish 14 workers from Oregon at the time they were recruited with a written description of the terms and conditions of the employment for which they were

hired, Respondent corporation violated ORS 658.440(1)(f) 14 times. In June 1994, as majority shareholder of a corporation which failed to furnish 14 workers from Oregon at the time they were recruited with a written description of the terms and conditions of the employment for which they were hired, Respondent E. Galan violated ORS 658.440 (1)(f) 14 times.

8) In June 1994, by failing to execute a written agreement with the 14 workers from Oregon at the time they were hired and before work began containing the terms and conditions of the employment, Respondent corporation violated ORS 658.440(1)(g) 14 times. In June 1994, as majority shareholder of a corporation which failed execute a written agreement with the 14 workers from Oregon at the time they were hired and before work began containing the terms and conditions of the employment, Respondent E. Galan violated ORS 658.440(1)(g) 14 times.

9) In June 1994, by misrepresenting to 14 workers from Oregon when they were recruited that their hotel expenses would be paid by the corporation and thereafter deducting the hotel expenses from the paychecks of 13 of the workers, Respondent corporation violated ORS 658.440(3)(b) 13 times. In June 1994, as majority shareholder of a corporation which misrepresented to 14 workers from Oregon when they were recruited that their hotel expenses would be paid by the corporation and thereafter deducted the hotel expenses from the paychecks of 13 of the workers, Respondent E. Galan violated ORS 658.440(3)(b) 13 times.

10) On April 18, 1994, Respondent corporation, Respondent M. Galan, and Respondent E. Galan each breached the Consent Order agreement of March 11, 1994, a legal and valid agreement with the Commissioner entered into in their capacity as forest labor contractors. Each Respondent thus violated ORS 658.440(1)(d). In June 1994, Respondent corporation and Respondent E. Galan each breached the Consent Order agreement of March 11, 1994, four more times and thus each violated ORS 658.440(1)(d) four times.

11) At times material herein, 658.453 provided in part:

"(1) 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), (2)(c) or (3).

"(2) Civil penalties under this section shall be imposed as provided in ORS 183.090."

At times material herein, OAR 839-15-507 provided:

"Each violation is a separate and distinct offense. In the case of continuing violations, each day's continuance is a separate and distinct violation."

At times material herein, OAR 839-15-508 provided 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);

"(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);

"(j) Willfully making or causing to be made any false, fraudulent or misleading information concerning the terms, conditions or existence of employment in violation of ORS 658.440(3)(b).]"

At times material herein, OAR 839-15-510 provided 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 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.

"(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."

At times material herein, OAR 839-15-512 provided, 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.

"(4) The civil penalties set out in sections (2) and (3) of this rule shall be in addition to any other penalty imposed by law or rule.

"(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to OAR 839-15-510."

At times material herein, OAR 839-15-520 provided, in part:

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

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

"(c) Willful violation of the terms and conditions of any work agreement or contract;

"(i) Willfully make or cause to be made to any person any false, fraudulent or misleading representation, or publish or circulate any false, fraudulent or misleading

information concerning the terms, conditions or existence of employment at any place or by any person."

The Commissioner of the Bureau of Labor and Industries is authorized to impose civil penalties for the violations described herein and the penalties imposed in the Order below is a proper exercise of that authority. The Commissioner of the Bureau of Labor and Industries is authorized to deny or prohibit application for a forest/farm labor contractor license based on the character, competence, and reliability of Respondents to act as forest/farm labor contractors as exhibited by the violations described herein and the disposition in the Order below is a proper exercise of that authority.

OPINION

The Agency brought this enforcement action based on alleged violations of the forest/farm labor contracting statutes and administrative rules and of a pre-existing Consent Order entered into by Respondents in their capacity as forest/farm labor contractors.

1) Commissioner's jurisdiction

During the hearing, Respondents argued that the statute, ORS 658.405 (1), and the rule, OAR 839-15-004 (5)(e), defining farm labor contractor refer to land within this state and that the subcontract in this case involved forestation of lands outside the state of Oregon over which the Commissioner had no jurisdiction. The law is otherwise. The Commissioner, in 1989, adopted the October 1988 proposed order of the Hearings Referee which

found, on facts arising in 1986 and 1987:

"The fact that the forestation or reforestation work was in the State of Alaska is not material. 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 situate, is a forest labor contractor activity requiring a valid farm labor contractor license with appropriate endorsement." *In the Matter of Leonard Williams*, 8 BOLI 57, 73 (1989). (Emphasis in original.)

The Oregon Court of Appeals, in a case involving facts arising prior to 1989, decided that the Oregon Farm Labor Contractors Act (*then* ORS 658.405 to 658.485) applied to contracts entered into in Oregon between Oregon employees and Oregon employers for reforestation in Idaho. *Perez v. Coast to Coast Reforestation Corp.*, 100 Or App 115, 785 P2d 365 (1990). Finally, the Oregon legislature adopted section 9, chapter 164, Oregon Laws 1989, effective May 23, 1989, since codified as ORS 658.501. That statute, quoted in the Conclusions of Law above, provides that the Farm Labor Contractors Act, (ORS 658.405 to 658.503 and 658.830) applies "to all transactions, acts and omissions of farm labor contractors * * * including but not limited to" recruitment, housing, transportation, payment, disclosure

and record keeping involving workers in Oregon working elsewhere or workers from another state working in Oregon (emphasis supplied). Entering into a subcontract in Oregon for the forestation of lands, in Oregon or elsewhere, is a transaction to which the Act applies. The Agency's motion to amend its Notice of Intent was properly granted.

2) Assessment of penalties

The Agency has charged Respondent corporation and its owners, the Respondents Galan, with multiple statutory violations, which also form violations of the Consent Order of March 11, 1994. The Agency seeks to hold Respondent corporation, together with each individual Respondent, liable for civil penalties for each unlawful act found. The Agency also seeks the imposition of the agreed upon sanction for breach of the Consent Order.

Respondents describe this action as follows:

"The agency seeks to enforce the terms of a consent order. In the consent order, the agency and Respondent [*sic*] have agreed that the consent order shall control penalties until Respondents are licensed. Thereafter, the penalties shall be provided by law and not the consent order [citing page 4, lines 17-18 of the consent order]. The consent order provides that the penalty for any breach of the consent order shall be denial of a license to Respondents for a

period of three years [citing page 4, line 6-12 of the consent order]."

Respondents frame the issue regarding assessment of penalties as follows:

"Can majority shareholders of a corporation be held liable for corporate activities in which they did not knowingly or willfully participate?"

Respondents point out that Oregon corporation law provides that personal liability of a corporate shareholder for acts or debts of the corporation cannot be based on mere shareholder status (ORS 60.151(2)) and then notes examples of civil penalty and criminal statutes which limit liability of an individual agent or board of an organization to conduct personally engaged in by that individual.

The Agency's statement of policy* states that Agency policy holds a corporation engaging in forest/farm labor activity and its majority shareholder(s) equally liable for violations of the Farm Labor Contractors Act, based upon ORS 658.410(2)(c) and (d). That statute, reiterated as OAR 839-15-135 (1)(c) and (d), requires that both a corporation and its majority shareholder(s) must be licensed to operate as a farm labor contractor. The legislature has clearly expressed an intent to hold a majority shareholder (or majority shareholders) responsible together with the majority shareholder's corporation for forest/farm labor activities,

* Under OAR 839-50-230, the Agency Case Presenter may not make legal argument, but may address the application of facts to the statutes and rules directly applicable to the issues in the case, their literal meaning, and prior agency action. The Forum may request a statement of Agency policy regarding any statute or administrative rule at issue in the case. OAR 839-50-400.

including violations." This forum has previously stated:

"ORS 658.410(2) clearly sets out that the majority shareholder's license is a derivative of the license issued to the corporation. There is but one license, not two or more, where a corporation is the licensee. To treat the majority shareholder separately from the corporation would defeat the apparent purpose of the statute." *In the Matter of Robert Gonzalez*, 12 BOLI 181, 198 (1994).

The statute requires that Respondent corporation and its majority shareholder be licensed in order to engage in forest/farm labor activity. Limiting penalty for unlicensed activity to the corporation would defeat the apparent purpose of the statute. Respondent Erlinda Galan, as majority shareholder, is liable for the corporate violations herein. As to her, knowledge and/or participation are not elements. Respondent Manuel Galan is liable only for those violations in which he actively participated (acting as a contractor by executing the subcontract, which also violated the Consent Order) and is not liable as a mere shareholder.

The Notice of Intent provides in part:

"The Commissioner further seeks to enforce *** the Consent Order *** by extending the period [Respondents] are prevented from applying for a license for an additional three year period from the date the Commissioner finds [Respondents] in breach of the

Consent Order and unfit to act as forest labor contractors.

"The Commissioner further seeks to enforce the terms and conditions of the Consent Order executed by the Commissioner and [Respondents] on March 11, 1994, by extending the period [Respondents] are prevented from applying for a license for an additional three year period from the date the Commissioner finds [Respondents] in breach of the Consent Order and unfit to act as forest labor contractors."

The Consent Order itself recites in part:

"Whereas, [Respondents] *** further understand and agree that any violation of *** this Consent Order shall be a breach of a legal and valid agreement entered into with the Commissioner, the penalty for which *** shall be the denial of a forest/farm labor contractor license to [Respondents] *** which denial shall, for a period of three years from the date of the breach of this agreement, operate to further bar any application for a forest/farm labor contractor license by [Respondents]; and,

"Whereas, it will be necessary for [Respondents] to make application to become licensed under the provisions of ORS Chapter 658 two years from the date this Consent Order is signed by all participants, and, if licensed, any penalties imposed for violations

thereafter shall be provided by law and not this agreement[.]"

The Forum finds that the plain language of the Consent Order agreement provides for further denial of the right to apply for a forest/farm labor contractor license for a three year period "from the date of the breach" of the agreement, not, as alleged in the Notice of Intent, "for an additional three year period from the date the Commissioner finds [Respondents] in breach." Thus the further suspension imposed in the Order below dates from April 18, 1994, the date of the breach of the agreement, and not from the date of this Order.

3) Respondents' Motion to Require Clear and Convincing Quantum of Proof

The Forum has used preponderance of evidence as the standard of proof in this matter, thus effectively denying Respondents' motion to require clear and convincing evidence in order to impose the sanction of further suspension of Respondents' right to apply for a forest/farm labor contracting license. In their post-hearing Memorandum of Law, Respondents acknowledge that *Sobel v. Board of Pharmacy*, 130 Or App 374, 882 P2d 606, rev den 320 Or 588, 890 P2d 994 (1995), appears dispositive in holding that a license could be denied upon a showing of fraud by a preponderance of evidence, but argue that the "holding is not applicable *** because of the serious consequences visited upon Respondents in the event the agency prevails." Counsel cites *Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 110, 570 P2d 52 (1977), and *Thornton v. Johnson*, 253 Or 342, 454 P2d

647(1969), in support of the proposition that a higher level of proof is required when a violation takes on the characteristics of a criminal proceeding and subjects the party to stigma for the violation. Counsel then posits that since some of the violations alleged could be prosecuted for criminal penalties under ORS 658.991, "[a]s a result [of] a finding *** that Respondents have violated the statute as alleged the Respondents will suffer the stigma of engaging in conduct for which there are criminal penalties despite proof not being beyond a reasonable doubt. *** This is certainly a matter of seriousness for which the quantum of proof 'clear and convincing' is appropriate rather than preponderance."

Whatever the rationale in those earlier cases, *Sobel* clearly distinguishes between license application (*i.e.*, qualifying for a license) and license revocation (loss of an existing license). Since the sanction in this case, as in *Sobel*, involves application (*i.e.*, qualification) and not the loss of an existing license, preponderance is the proper standard.

4) Rulemaking

During the hearing, Respondents sought postponement of a final decision until the Agency adopted rules by formal rulemaking procedures defining recruiting, soliciting, and supplying as they are used in ORS 658.405. The ALJ denied any postponement based on the need for rulemaking, citing the fact that "recruit" and "solicit" were defined in *In the Matter of Leonard Williams*, 8 BOLI 57, 73 (1989), an example of rulemaking in a contested case. Counsel argued that there must be formal rulemaking procedures as

* Section 2, chapter 164, Oregon Laws 1989, amending ORS 658.410(c) and (d).

set forth by statute, and renewed that argument in Respondents' post-hearing Memorandum of Law.

Respondents concede that if an agency is given authority to interpret the law it may do so through contested case proceedings, *Trebesch v. Employment Division*, 300 Or 264, 710 P2d 136 (1985), and that announcement of a general policy applicable in the contested case and like cases may be relied on in subsequent cases, ORS 183.355(5). But Respondents argue that since the Agency's own rule, OAR 839-15-000, does not provide specifically for rule making through contested case decisions, there is no authority for rule making by case decisions. Respondents' view of the Commissioner's authority is too narrow. As the official with comprehensive review powers to consider interpretations of law in final contested case decisions under the Farm Labor Contractors Act, the Commissioner may interpret a statutory term in a contested case. *Trebesch, supra*; ORS 183.550(5).

5) Mitigation

During the hearing, the ALJ took testimony from both of the individual Respondents which was represented to be mitigating in nature directed toward reducing the sought after civil penalties if the Forum found Respondents in violation. Brief summaries of that testimony are contained in Findings of Fact 45 and 46. For the most part, that testimony asserts Respondents' difficulties with contracting in general and with the Agency in particular, and suggests that the Agency was

focusing unduly on Respondents. Such representations do nothing to mitigate penalties. As this Forum observed earlier in a similar case:

"The Commissioner, in a prior proceeding, allowed Respondent corporation to continue operating as a forest labor contractor upon solemn assurance that certain conditions would be met. Respondent could not, after that, expect that it would not be the subject of the Agency's further scrutiny in order to assure that the conditions were met." *In the Matter of Robert Gonzalez*, 12 BOLI 181, 200 (1994).

6) Respondents' Exceptions

Respondents filed voluminous exceptions, dealing with each of the 47 listed Proposed Findings of Fact – The Merits (PFOF). Respondents agreed with some of these, which are unchanged and are now appear as Findings of Fact – The Merits (FOF) 1, 3, 5, 9, 18, 21, 24, 26, 31, 42, and 43.*

Respondents agreed in substance with a number of other PFOF. Then, in each instance, Respondents questioned the relevance or total accuracy of each statement. Some of Respondents' argument in this regard involved evidence not contained in the hearing record. The Forum has carefully examined the record and found that each of these findings was an accurate and relevant recitation of events based on the evidence in the record. These are unchanged and are now FOF 7, 8, 10, 13 through 15, 20, 22, 31, 32 through 37, 40, and 44 through 46.

Respondents excepted to the accuracy and/or meaning of the remaining PFOF. All were considered and remain unchanged except where noted:

PFOF 2:

Respondents' exception to this finding consists of two typewritten pages describing the circumstances of the prior proceeding as viewed by Respondents, including allegations of being misled by the Agency and the USFS, of being victimized by fraudulent wage claims and an incompetent bookkeeper, and reciting their reasons for entering into the Consent Order. These allegations were on the record of the present proceeding as testimony in mitigation. None of them detracted from the accuracy of the subject finding of fact, nor were they relevant to the recitation of the existence of the Consent Order.

PFOF 4:

Respondents' exception claims an intent between the Agency and USFS to adversely affect their operation. Respondents point to the Agency supplying USFS with a copy of the Consent Order and certain cooperation between the two agencies. The finding is correct in acknowledging that Respondents' bid was in November 1993, and in explaining why Patton awaited approval from USFS headquarters before approving the bid.

PFOF 6:

Respondents except to this finding as being inaccurate, in that:

"Patton stated in his testimony that subcontracting was not discussed in the April 1, 1994, prework meeting, yet admitted under cross-

examination that his notes from that meeting indicated that subcontracting was on of the issues covered * * *."

Patton testified that Respondent Galan stated on April 1 that he did not plan to subcontract. Respondents' view of the evidence is in error.

PFOF 11:

Respondents except to this finding as being

"brought up for the purpose of attacking the credibility and responsibility of Respondents through the unavoidable delays in starting the contract."

They acknowledge that the finding is an accurate recitation regarding the history of the Alaska contract which Respondent M. Galan signed in Oregon.

PFOF 12:

Respondents exception to this finding addresses the portion which found that Cunningham had no unusual special interest in this matter. The exception argues how the Forum should view the assignment of an investigator to evaluate a suspected infraction. There was no evidence adduced that even suggested that Cunningham was doing anything but her job.

PFOF 17 (now 16):

Respondents exception here attempts to disclaim responsibility for Zavala's Oregon activity. He was clearly Respondents' agent. Ultimate Finding of Fact 9, to which Respondents did not except, is based on this finding.

* There was no PFOF 16; thus, PFOF 17 to 47 have become FOF 16 to 46 herein.

PFOF 18 (now 17):

This finding has been revised to more accurately reflect how some of the workers were notified of the opportunity in California.

PFOF 20 (now 19):

Respondents except to the statement that all of the workers believed "that the job included payment for the motel." Respondents point out that not all of the workers were available to testify, and suggest that they might have been located if Respondents had more time. The inference from the available testimony was that "when they left Medford for Placerville" the workers thought the motel was included. Respondents attempted no showing that a delay in hearing date might produce further witnesses, other than Osorio and Zavala, for whom delay was granted.

PFOF 24 (now 23):

Respondents except to this finding as not being supported by the evidence. Respondents then offer possible explanations, not on the record, regarding photocopying batches of forms. The workers' testimony remains that the forms they saw were blank, and that they received them about the second day of work. In addition, Zavala testified that the forms he gave the workers were given to them in California. The available credible evidence supports the finding.

PFOF 26 (now 25):

Respondents except to the implication of unanimity suggested by "the workers." This finding has been revised to more accurately reflect how Zamora learned from some Oregon workers of the hotel dispute.

PFOF 28 (now 27):

Respondents except to this finding as not being in accordance with the evidence. The available credible evidence supports the finding.

PFOF 29 (now 28):

Respondents' exception to this finding seems to be that only five of the forms were introduced by the Agency. The Forum must use all of the evidence on the whole record, and therefore included the exhibits introduced by Respondents. Respondents also argue that the lack of signature by the contractor is not significant. ORS 658.440(1)(g) requires a person acting as an Oregon farm labor contractor to execute a written agreement between the worker and the contractor containing the terms and conditions in 658.440(1)(f). That means the contractor (or authorized agent) must sign the agreement.

PFOF 30 (now 29):

Respondents' exception to this finding is without merit.

PFOF 39 (now 38):

Respondents' exceptions here are based on their assertion of having earlier sent a copy of the subcontract to Patton. Patton did not receive it.

PFOF 40 (now 39):

Respondents deny that M. Galan was offering work to Montoya, or that Montoya and Petersdorf were out of work at the time. The testimony on the record supports the finding.

PFOF 42 (now 41):

Respondents' exception to this finding recites, in part:

"Patton's apparent confusion regarding the subcontract

agreement was not through any inconsistency or improper action on the part of Respondents or Osorio and may have been influenced by his communications with BOLI in Oregon. He appeared to be trying very hard to find violations that he could blame on Staff Inc. that would indicate Staff Inc. was violating the Consent Order in Oregon."

It did not appear from the evidence that finding violations required unusual effort, or that Patton was motivated beyond assuring compliance with federal law.

Respondents excepted to Proposed Ultimate Findings of Fact 10 through 12. These were based on the individual findings of fact, which are substantially unchanged herein.

Respondents' exception to the Proposed Conclusions of Law renews the argument that the majority shareholder should not be automatically liable for violations by the corporation. The Forum adheres to its ruling recited under "2) Assessment of Penalties," above. A majority shareholder, as well as the corporation, must qualify for a license. Neither may be licensed without the other. It follows that a corporate violation affects the majority shareholder's license status as well as that of the corporation.

Respondents argue that because the Osorio subcontract was performed in Alaska and Respondent Staff could also legally perform there, the subcontract could not violate Oregon law. But the subcontract was executed (signed) in Oregon by Respondent Manuel Galan, who had no Oregon license, acting on behalf of Respondent Staff,

which had no Oregon license. OAR 839-15-004 provides that "Forest Labor Contractor" means "Any person who subcontracts with another for the forestation or reforestation of lands." ORS 658.501 applies ORS 658.405 to 658.503 to "all transactions, acts and omissions of farm labor contractors." That includes forestation subcontracts executed within the state.

Respondents excepted to the Opinion section as well as to the proposed penalties. They state concerning the recruitment by Zavala in Medford that:

"Justo did not knowingly violate the law because he did not know the act he committed was illegal. Respondents did not knowingly or willfully violate the law because they had neither knowledge or control over Justo's actions."

Respondents argue that they did not anticipate the possibility that Zavala would go to Oregon,

"so did not instruct him not to do what it did not occur to them he might possibly do. Under these circumstances, there should be no violation on behalf of Respondents or at least, mitigating circumstances requiring a minimal penalty, if any."

Zavala was clearly the agent of Respondent corporation, assigned to that duty by the corporate general manager. The result of his recruitment efforts were accepted and utilized by the corporation. Whether attributable to knowledge or oversight, the violations occurred. Respondents consider the penalties too severe, and argue that the other violations found are "nit-

picking" over "letter of the law" details which are unclear to ordinary people." They suggest that all currently licensed contractors would have some type of violation.

All of Respondents' exceptions having been considered, the Forum finds no reason to disturb the penalties proposed.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, Respondents Staff, Inc., Manuel Galan, and Erlinda Galan are hereby ordered to deliver to the Bureau of Labor and Industries, Fiscal Services Office Suite 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 SIXTY-EIGHT THOUSAND DOLLARS (\$168,000), plus any interest thereon which accrues at the annual rate of nine percent, between a date ten days after the issuance of this Final Order and the date said Respondents comply herewith. This assessment is made as civil penalty against said Respondents as follows:

Against Respondent Staff, Inc.:

- for five violations of ORS 658.440(1)(d), \$10,000 (\$2,000 per violation);
- for two violations of ORS 658.410, \$4,000 (\$2,000 per violation);
- for 14 violations of ORS 658.440(1)(f), \$14,000 (\$1,000 per violation);
- for 14 violations of ORS 658.440(1)(g), \$28,000 (2,000 per violation);

- for 13 violations of ORS 658.440(3)(b), \$26,000 (\$2,000 per violation);
- (total \$82,000);

Against Respondent Manuel Galan:

- for one violation of ORS 658.440(1)(d), \$2,000;
- for one violation of ORS 658.410, \$2,000;
- (total \$4,000);

Against Respondent Erlinda Galan:

- for five violations of ORS 658.440(1)(d), \$10,000 (\$2,000 per violation);
- for two violations of ORS 658.410, \$4,000 (\$2,000 per violation);
- for 14 violations of ORS 658.440(1)(f), \$14,000 (\$1,000 per violation);
- for 14 violations of ORS 658.440(1)(g), \$28,000 (2,000 per violation);
- for 13 violations of ORS 658.440(3)(b), \$26,000 (\$2,000 per violation);
- (total \$82,000).

AND, FURTHER, as authorized by ORS 658.405 to 658.503 and the Consent Order agreement dated March 11, 1994, the Commissioner of the Bureau of Labor and Industries does hereby bar and prohibit any application for a forest/farm labor contractor license by Respondents Staff, Inc., Manuel Galan, and Erlinda Galan, or any of them, for a period of three years from April 18, 1994, the date of the initial breach of said Consent Order agreement.

In the Matter of
MARK A. JOHNSON
and April J. Johnson, dba Budget
Carpet Cleaning, Respondents.

Case Number 35-96

Final Order of the Commissioner

Jack Roberts

Issued August 23, 1996.

SYNOPSIS

Respondents failed to pay Claimant all wages due upon termination, in violation of ORS 652.140(1). Respondents' failure to pay the wages was willful, and the Commissioner ordered Respondents to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(1), 652.150.

Pursuant to notice, a hearing was convened on Wednesday, July 17, 1996, in Eugene, Oregon, before Administrative Law Judge Douglas A. McKean. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, a Case Presenter with the Agency. Linda L. Maxwell (Claimant) was present throughout the hearing. Mark A. Johnson and April J. Johnson (Respondents), after being duly notified of the time and place of this hearing, failed to appear in person or through a representative.

The Agency called as witnesses the Claimant and Lynne Sheppard, a Compliance Specialist with the Wage and Hour Division of the Agency. Administrative exhibits X-1 through X-5 and Agency exhibits A-1 through A-9 were offered and received into evidence. Following the receipt of a

Statement of Agency Policy, the record closed on July 29, 1996.

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

FINDINGS OF FACT – PROCEDURAL

1) On October 20, 1995, Claimant filed a wage claim with the Agency. She alleged that she had been employed by Respondents and that they had failed to pay wages earned and due to her. Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondents.

2) On March 25, 1996, the Agency served on Respondents an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination asserted that Respondents owed Claimant a total of \$158 in wages and \$1,740 in civil penalty wages. The Order of Determination required that, within 20 days, Respondents either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

3) On April 11, 1996, Respondent Mark Johnson filed an answer to the Order of Determination. He requested a contested case hearing and asserted that Claimant was paid in full for all services performed.

4) On June 19, 1996, the Hearings Unit issued a Notice of Hearing to the

Respondents and the Agency indicating the time and place of the hearing. On July 10, 1996, the Agency personally served a copy of the Notice of Hearing on Respondent April Johnson.

5) At the time and place set forth in the Notice of Hearing for this matter, Respondents did not appear or contact the Agency or the Hearings Unit. Pursuant to OAR 839-50-330(2), the Administrative Law Judge waited 30 minutes before resuming the hearing. At that time, Respondents had still not appeared or contacted the Agency or the Hearings Unit. The Administrative Law Judge then found Respondents in default as to the Order of Determination and proceeded with the hearing.

6) The Administrative Law Judge left the record open until July 31, 1996, to allow the Agency to submit a Statement of Agency Policy. The document submitted by the Agency was received as an exhibit on July 29, 1996.

7) On July 30, 1996, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT – THE MERITS

1) Respondents, husband and wife, operated a carpet cleaning business together as partners, doing business as Budget Carpet Cleaning. They employed Claimant in 1994 as a telemarketer. Her job duties included calling potential customers from a list supplied by Respondents, taking orders, and making appointments for carpet cleaning.

2) In May 1995, Respondent Mark Johnson again hired Claimant as a telemarketer. Her job duties and her compensation agreement were the same as they had been in 1994. She worked in Respondents' office and used Respondents' supplies and telephones. Respondents exercised control over the scope and method of Claimant's solicitation. She derived no benefits other than wages and bonuses for her work.

3) Under their employment agreement, Respondents paid Claimant \$4.75 per hour during weeks that she solicited fewer than 10 orders. They paid her \$5.25 per hour during weeks that she solicited between 10 and 14 orders, \$6.25 per hour during weeks that she solicited between 15 and 19 orders, \$7.25 per hour during weeks that she solicited between 20 and 24 orders, and \$10 per hour during weeks that she solicited 25 or more orders. In addition, she received a bonus of \$1 for each order in which the carpet cleaning was scheduled for the next business day. She also received a \$5 bonus each day that she solicited 5 or more orders. Orders that were canceled did not count.

4) Respondents' manager, Bill Barth, discharged Claimant on September 25, 1995. During the week of September 18 to 22, 1995, Claimant worked 19.5 hours and took 23 orders. Thus, for that week her rate of pay was \$7.25 per hour and she earned \$141.38 (19.5 hours times \$7.25 per hour). In addition, she earned \$13 in bonuses during that week. On September 25, 1995, she worked for one half hour. Thus her rate of pay was \$4.75 per hour and she earned \$2.38.

The total amount earned from September 18 to 25, 1995, was \$156.76 (\$141.38 plus \$13 plus \$2.38). Respondents have not paid Claimant anything for her work during the period September 18 to 25, 1995, despite her demands to an office manager and Respondent Mark Johnson.

5) Claimant's testimony was credible based on her attitude, appearance, and demeanor. She had the facts readily at her command and her statements were supported by documentary records.

ULTIMATE FINDINGS OF FACT

1) Respondents, as partners, employed Claimant from September 18 to 25, 1995.

2) Respondents discharged Claimant on September 25, 1995. At that time, they owed Claimant \$156.76 in earned and unpaid compensation for 20 hours' work.

3) Respondents willfully failed to pay Claimant her earned, due, and payable compensation. They have not paid her the compensation owed and more than 30 days have elapsed from the due date of those wages.

CONCLUSIONS OF LAW AND OPINION

Default

The Respondents failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine whether a prima facie case supporting the Agency's Order of Determination has been made on the record. See also OAR 839-50-330. In addition, where a 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 wherever they are controverted by other credible evidence on the record. *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987).

Wages Due

ORS 652.140(1) provides:

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

The Agency has established a prima facie case. The preponderance of the credible evidence on the whole record shows that Respondents violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after the discharge, that is, not later than September 26, 1995. That evidence, which established that Respondents owe Claimant \$156.76, was credible, persuasive, and the best evidence available, given Respondents' failure to appear at the hearing. Having considered all the evidence on the record, the prima facie case has not been effectively contradicted or overcome.

Civil Penalty

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 hourly rate for eight hours per day 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."

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). As employers, Respondents had a duty to know the amount of wages due their employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983).

Claimant testified credibly that she asked the office manager for her pay on Friday, September 29, 1995 (the next regular payday after her discharge) and refused to accept only \$90 as her final pay. The next Wednesday she talked with Respondent Mark Johnson about her final pay. He refused to pay her anything, claiming that she had come back to work

late after a break and that she had already received her final pay. All of the persuasive evidence contradicts those claims. The record establishes that Respondents either knew or, by exercising reasonable diligence, should have known that they had not paid Claimant all earned wages when due as provided in ORS 652.140. Respondents intentionally did not pay Claimant her final pay and they acted as free agents. Respondents must be deemed to have acted willfully under this test, and thus they are liable for penalty wages under ORS 652.150.

Claimant earned \$156.76 (including the \$13 bonus) by working 20 hours during the wage claim period (September 18 to 25, 1995). It is the Agency's policy to include the amount of bonuses earned during the wage claim period in civil penalty computations.

"The previous version of ORS 652.150 specified that, where civil penalty wages were appropriate, 'the wages or compensation * * * shall continue * * * at the same rate until paid'. Under this language, Agency policy was to include bonuses as 'compensation' earned over the period of the wage claim in calculating average daily earnings, which were then multiplied by 30 to arrive at the civil penalty wages due. See [Agency Field Operations Manual, 'Penalty Wage Computation,' dated December 9, 1994]. ORS 652.150 was amended in 1995 to limit the amount of daily earnings that could be used in computing civil penalty wages. However, the former language describing the type of earnings that were to form the basis of

civil penalty wage calculations — 'wages or compensation' — remained unchanged. Likewise, the Agency's policy of considering bonuses as 'compensation' under the statute and including them in calculating civil penalty wages due remains unchanged." Statement of Agency Policy, July 23, 1996.

In addition to her bonus, Claimant earned wages during the wage claim period at two different hourly rates: 19.5 hours at \$7.25 per hour and 0.5 hours at \$4.75 per hour. To calculate the civil penalty under ORS 652.150 (1995), Claimant's compensation "shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced[.]" for up to 30 days. When more than one hourly rate is paid during a wage claim period (and, as here, when a bonus is paid in addition to the hourly rate of pay), the Agency's policy is to calculate an average hourly wage as a base factor for computing the civil penalty wage.

"Prior to the 1995 amendment, [ORS 652.150] provided for civil penalty wages up to 30 days of the employee's average daily wage ('same rate') during the wage claim period. Agency policy was to compute the average daily wage by determining the total wages earned over the period of the wage claim, dividing that figure by the number of days worked to arrive at the average daily wage, then multiplying that figure by 30. See [Agency Field Operations Manual, 'Penalty Wage Computation,' dated December 9, 1994]. The 1995 amendment requires

that an average hourly wage ('same hourly rate'), in contrast to an average daily wage, be used as a base factor in computing civil penalty wages.

"Agency policy is to use the same equation to compute the average hourly wage during the wage claim period, no matter how many wage rates applied. As a starting point, only the wage rates used and wages earned during the actual wage claim period are used to determine the average hourly wage. The equation is as follows: Total earned during the wage claim period divided by the total number of hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days." (Emphasis original.) Statement of Agency Policy, July 23, 1996.

In this case then, civil penalties are calculated as follows: \$156.76 (total earned during the wage claim period) divided by 20 hours (total number of hours worked during the wage claim period) equals \$7.84 per hour (average hourly wage), multiplied by 8 (hours) equals \$62.72. I conclude that this is "the same hourly rate for eight hours per day" as required by ORS 652.150. "[I]n no case shall such wages or compensation continue for more than 30 days from the due date." ORS 652.150. Respondents have failed to pay Claimant her earned compensation for more than 30 days from the due date, and therefore the penalty continues for the maximum 30 days. \$62.72 times 30 (days) equals \$1,881.60, rounded to the nearest dollar, \$1,882, per Agency policy. *In the*

Matter of Martin's Mercantile, 12 BOLI 262, 275 (1994).

In its Order of Determination, however, the Agency proposed a civil penalty of \$1,740 based on \$7.25 per hour times 8 hours, which equals \$58, times 30 days. This computation is erroneous because it does not take into account the \$13 bonus that Claimant earned, nor does it account for the half hour of work at the \$4.75 hourly rate of pay. Even though the amount prayed for (\$1,740) is \$142 less than the correct civil penalty (\$1,882) calculated under the facts found and Agency policy, it is well-settled that in a default situation the Order of Determination sets the limit on the relief the Forum can award. *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987). Therefore, the maximum civil penalty the Forum can award is \$1,740 as prayed for in the Order of Determination.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders MARK A. JOHNSON and APRIL J. JOHNSON 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 LINDA L. MAXWELL in the amount of ONE THOUSAND EIGHT HUNDRED NINETY SIX DOLLARS AND SEVENTY SIX CENTS (\$1,896.76), less appropriate lawful deductions, representing \$156.76 in gross earned, unpaid, due, and pay-

able wages, and \$1,740 in penalty wages; plus

2) Interest at the rate of nine percent per year on the sum of \$156.76 from October 1, 1995, until paid; plus

3) Interest at the rate of nine percent per year on the sum of \$1,740 from November 1, 1995, until paid.

**In the Matter of
HART INDUSTRIES, INC.
and Hart Logistics Co., Inc.,
Respondents.**

Case Number 28-96

Final Order of the Commissioner

Jack Roberts

Issued September 18, 1996.

SYNOPSIS

Where the scheduled hearing was canceled when Respondents agreed to a Consent Order requiring payment of certain wages by a date certain, and agreed that if the payment was not made in full when due, the Commissioner could proceed, without notice, to issue a Final Order against Respondents for the wages owing and penalty wages, plus interest, and where Respondents thereafter endorsed the order through counsel, but failed to pay the wages, the Commissioner entered an order based upon the disposition agreed to and for the sums specified. ORS 652.332; OAR 839-50-220(4) and (5).

The above-entitled contested case was scheduled for hearing before Judith A. Bracanovich, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon, on May 21, 1996, in 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 Linda Lohr, Case Presenter with the Agency. Richard E. Fowlks, attorney at law, represented Respondents Hart Industries, Inc., a corporation, Hart Logistics Co., Inc., a corporation, and Tom Jeffrey Kasinger, an individual, in this forum and in correspondence with the ALJ.*

Having fully considered the entire record in this matter, I, Jack Roberts, make the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1) On October 16, 1995, Claimant Tracy Carruth filed a wage claim with the Agency. She alleged that she had been employed by Respondents and that Respondents had failed to pay wages earned and due to her. At the same time she filed her wage claim, Claimant Carruth assigned to the Commissioner of Labor, in trust for Claimant Carruth, all wages due from her employer.

2) In November 1995, Claimant Norman Rombach filed a wage claim with the Agency. He alleged that he had been employed by Respondents and that Respondents had failed to

pay wages earned and due to him. At the same time he filed his wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant Rombach, all wages due from his employer.

3) On January 29, 1996, through the Sheriff of Multnomah County and the Sheriff of Clackamas County, the Agency served on Respondents an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination found that Respondents owed Claimant Tracy Carruth \$750 in unpaid wages and \$1,875 in civil penalty wages, together with the interest thereon; and that Respondents owed Claimant Norman Rombach \$1,500 in unpaid wages and \$2,076 in civil penalty wages, plus interest thereon. The Order of Determination reflects a combined total owing of \$2,250 in wages and \$3,951 in civil penalty wages, together with the interest thereon.

4) The Agency's Order of Determination provided that Respondents could, within 20 days, file an answer to the Order of Determination and request a contested case hearing in connection therewith.

5) On February 16, 1996, following an extension of time, Respondents, through their attorney, filed an answer to the Order of Determination. Respondents' answer did not contain a request for a contested case hearing. Following an additional extension of time, Respondents filed a timely

* Pursuant to the stipulation of the participants, Tom Jeffrey Kasinger was not the employer at times material herein, and he is not personally liable for the agreed payment herein; accordingly, his name has been deleted from the caption.

request for a contested case hearing and an amended answer to the charges.

6) On April 18, 1996, the Agency sent the Hearings Unit a request for a hearing date. On April 19, 1996, the Hearings Unit issued a Notice of Hearing to the Respondents, 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 25, 1996, the forum notified Respondents and the Agency that a new ALJ had been designated to hear the contested case.

8) On April 25, 1996, the ALJ issued a discovery order to the participants directing them each to submit a summary of the case by May 13, 1996. The participants substantially complied with the case summary order.

9) On May 21, 1996, the participants appeared for hearing. Based upon their mutual desire to explore a disposition short of formal hearing, the ALJ temporarily delayed commencement of the hearing.

10) Upon reconvening on May 21, the Agency announced the following disposition of the case, to which counsel for Respondents agreed:

As an alternative to further hearing, the participants agreed to a Consent Order providing as follows:

1. Except for the employer status of Tom Jeffrey Kasinger,

Respondents stipulated to all material facts contained within the Agency's Order of Determination, including the amount of wages and civil penalties owed, less lawful deductions, plus interest at the legal rate per annum;

2. The participants stipulated that Respondents Hart Industries, Inc. and Hart Logistics Co., Inc. were the employer of Claimants during times material, and that Respondent Kasinger was not personally liable as an employer;

3. That if Respondents pay in full the wages owed, \$2,250, within 60 days of the date of execution of the Consent Order herein, the Agency would waive payment of the civil penalties and all interest otherwise due;

4. That if Respondents fail to pay in full the wages owed within 60 days of the date of execution of the Consent Order, the Consent Order, Order of Determination, and record herein shall become the basis for a Final Order.

11) On May 21, 1996, the ALJ approved the settlement outlined in Finding of Fact 10, allowed the participants 10 days from May 21 to submit the signed Consent Order, and allowed Respondents 60 days from the date of submission of the signed Consent Order to fully execute the settlement by payment of the stipulated amount to the Agency as assignee of the Claimants. The ALJ admitted as exhibits all of the described pleadings and correspondence, including Agency Exhibits A-1 through A-15, which, together with the record of the proceedings of May 21, and Exhibits X-13 through X-17,

admitted subsequent to May 21, constitute the entire record herein.*

12) On May 30, 1996, the Agency requested, and was granted, an extension until June 7, 1996, within which to file the fully signed Consent Order.

13) On June 7, 1996, the Agency submitted to the Hearings Unit the fully signed Consent Order, which final signature, as evidenced by the signature of Christine Hammond, the Administrator of the Wage and Hour Division, was executed on June 7, 1996.

14) On June 12, 1996, the forum confirmed the cancellation of hearing herein, and affirmed that the file of the Hearings Unit would remain open, due to the contingent terms of the Consent Order.

15) Respondents had not made the agreed upon wage payment of \$2,250 as of August 20, 1996, or at any time up to the date of the Proposed Order.

16) More than 60 days have elapsed since June 7, 1996.

17) The Proposed Order, which contained an Exceptions Notice, was issued August 27, 1996. Exceptions were due by September 6, 1996. No exceptions were received.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter, pursuant to ORS 652.110 to 652.405.

2) OAR 839-50-220 provides, in part:

"(4) Where a case is settled within ten days before or on the date set for hearing, the terms of the settlement shall be placed on the record, unless fully executed settlement documents are submitted on or before the date set for hearing.

"(5) Where settlement terms are placed on the record because settlement documents are incomplete, * * * fully executed settlement documents must be submitted to the hearings unit within ten days after the date set for hearing. Where a party fails to submit the settlement documentation within ten days after the date set for hearing, the terms of the settlement set forth on the record shall constitute the basis for a final order."

OAR 839-50-240 provides, in part:

"The commissioner designates as hearings referees those employees who are employed by the agency as hearings officers * * *. The commissioner delegates to such designee the authority to:

"*****

"(9) Decide procedural matters, but not grant motions for summary judgment or other motions by a party which involve final determination of the proceeding, but to issue a proposed order as provided for in these rules."

Respondents' failure to fully execute the settlement by payment of the stipulated amount to the Agency, as assignee of the Claimants, within 60 days

* The forum, on its own motion, has admitted Exhibits X-13 through X-16 into the record.

of the final signature on the Consent Order, constitutes failure to submit fully executed settlement documentation and non-compliance with the substance of the agreement, allowing the terms of settlement as placed on the record to form the basis for a final order.

3) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay Claimants their earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders HART INDUSTRIES, INC. and HART LOGISTICS CO., INC., jointly and severally, 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 TRACY CARRUTH in the amount of TWO THOUSAND SIX HUNDRED TWENTY-FIVE DOLLARS (\$2,625), less appropriate lawful deductions, representing \$750 in gross earned, unpaid, due, and payable wages and \$1,875 in penalty wages; plus

(a) Interest at the rate of nine percent per year on the sum of \$750 from October 1, 1995, until paid; plus

(b) Interest at the rate of nine percent per year on the sum of \$1,875 from November 1, 1995, until paid.

(2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR NORMAN ROMBACH in the amount of THREE THOUSAND FIVE HUNDRED SEVENTY-SIX DOLLARS (\$3,576), less appropriate lawful deductions, representing \$1,500 in gross earned, unpaid, due, and payable wages and \$2,076 in penalty wages; plus

(a) Interest at the rate of nine percent per year on the sum of \$1,500 from October 1, 1995, until paid; plus

(b) Interest at the rate of nine percent per year on the sum of \$2,076 from November 1, 1995, until paid.

=====

**In the Matter of
GEOFFROY ENTERPRISES, INC.,
dba Babe's Cabaret, and Richard D.
Geoffroy, Respondents.**

Case Number 16-96
Final Order of the Commissioner
Jack Roberts
Issued September 30, 1996.

SYNOPSIS

Two wage claimants, who worked as nude dancers at Respondents' bar, were employees and not independent contractors. Respondents failed to pay Claimants all wages due upon termination in violation of ORS 653.025(3).

(minimum wages) and 652.140(1) and (2). Respondents' failure to pay the wages was willful, and the Commissioner held Respondents liable for civil penalty wages, pursuant to ORS 652.150. ORS 652.140(1) and (2), 652.150, 653.025(3), 653.045, 653.055(1).

The above-entitled contested case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 28 and 29, 1996, in the Bureau of Labor and Industries conference room of the State Office Building, 165 E. 7th Avenue, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Melody Ann Cornelius (Claimant Cornelius) was present throughout the hearing. Jennifer Huston Brown (Claimant Brown) was present during the first day of the hearing, but not on the second day. Geoffroy Enterprises, Inc., dba Babe's Cabaret (Respondent GEI) and Richard D. Geoffroy (Respondent Geoffroy) were represented by Brian Cox, Attorney at Law. Richard D. Geoffroy was present throughout the hearing.

The Agency called as witnesses Claimant Cornelius; Claimant Brown; Alan Nott, Respondents' former disk jockey; and Eduardo Sifuentez, Compliance Specialist for the Agency.

Respondent called as witnesses Rebecca Lynn Driessen, a nude dancer at Babe's Cabaret; George

Turney III, doorman for Babe's Cabaret; and Richard D. Geoffroy.

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

FINDINGS OF FACT – PROCEDURAL

1) On July 28, 1995, Claimant Cornelius filed a wage claim with the Agency. She alleged that she had been employed by Respondents and that Respondents had failed to pay wages earned and due to her. 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 Respondents.

2) On October 23, 1995, Claimant Brown filed a wage claim with the Agency. She alleged that she had been employed by Respondents and that Respondents had failed to pay wages earned and due to her. 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 Respondents.

3) On September 27, 1995, through certified mail, the Agency served on Respondents an Order of Determination based upon the wage claim filed by Claimant Cornelius and the Agency's investigation. The Order of Determination found that Respondents together owed a total of \$8,122 in wages and \$855 in civil penalty wages. The Order of Determination required that, within 20 days,

Respondents either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

4) On September 28, 1995, Respondents, through their attorney, filed an answer to the Order of Determination. Respondents' answer also contained a request for a contested case hearing in this matter. Respondents' answer denied that Respondent owed Claimant Cornelius unpaid wages or civil penalty wages, and further set forth the affirmative defenses that Richard D. Geoffroy was not the real party in interest, that Claimant Cornelius was an independent contractor, that Claimant Cornelius had filed the wage claim for the purposes of harassing Respondents, and that any monies owed Claimant Cornelius had been previously paid.

5) On November 11, 1995, through certified mail, the Agency served on Respondents an Order of Determination based upon the wage claim filed by Claimant Brown and the Agency's investigation. The Order of Determination found that Respondents owed a total of \$3,363 in wages and \$855 in civil penalty wages. The Order of Determination required that, within 20 days, Respondents either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

5) On November 21, 1995, Respondents, through their attorney, filed an answer to the Order of Determination. Respondents' answer also contained a request for a contested case hearing in this matter. Respondents' answer denied that Respondents owed Claimant Brown unpaid wages

or civil penalty wages, and further set forth the affirmative defenses that Richard D. Geoffroy was not the real party in interest, that Claimant Brown was an independent contractor, that Claimant Brown had filed the wage claim for the purposes of harassing Respondents, and that any monies owed Claimant Brown had been previously paid.

6) On January 31, 1996, at the Agency's request, the Hearings Unit issued a Notice of Hearing to the Respondents, 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 February 20, 1996, the ALJ 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 March 11, 1996. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary.

8) On March 8, 1996, the Agency case presenter made an oral motion on behalf of the Agency and Respondents for postponement of the hearing based on additional time required to complete discovery. The motion was

granted and the hearing was reset to convene on March 28, 1996. The due date for case summaries was revised to March 19, 1996.

9) The Agency and Respondents each submitted a timely case summary.

10) On March 20, 1996, Respondents submitted an addendum to their case summary and moved that the hearing be reset for hearing before an ALJ who was not located in the same office as the Agency Case Presenter, citing perceived inappropriate communications between the Case Presenter and ALJ by Respondents' counsel as the basis for the motion.

11) On March 21, 1996, the ALJ denied Respondents' motion to reset the hearing before a different ALJ on the basis that the perceptions of Respondents' counsel were mistaken.

12) At the commencement of the hearing, Respondents' counsel stated he had received the Notice of Contested Case Rights and Procedures and had no questions about it.

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

14) At the conclusion of the hearing, the ALJ requested that Respondents and the Agency submit closing arguments in writing by April 29, 1996. Written closing arguments were timely submitted by both parties.

15) During the hearing, the ALJ made rulings on certain motions of the participants which are set out in the

next section of this Order. These rulings are hereby confirmed.

16) On May 10, 1996, Respondent GEI filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, staying the issuance of an Order against Respondent GEI.

17) On June 28, 1996, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten (10) days for filing exceptions. The Hearings Unit received no exceptions.

RULINGS ON MOTIONS AND OBJECTIONS

Agency Objection to Certain Evidence

At the outset of the hearing, the Agency objected to the presentation of any evidence by Respondents purporting to show that any party other than Respondents owned Babe's Cabaret ("Babe's") during the period encompassed by the Claimants' wage claims, claiming prejudice based on inability to prepare due to lack of prior notice of this affirmative defense. Respondents' counsel confirmed that Respondents intended to present evidence tending to show that Kim Burnett, Rick Geoffroy, or Jim Hansen were owners and real parties in interest, based on a lawsuit filed three months earlier against Respondent Geoffroy in which Hansen asserted ownership of Babe's based on an assignment from Burnett and Geoffroy. Respondents' counsel confirmed that he had been aware of this lawsuit for three months, but had not brought it to the Agency's attention prior to the morning of the hearing. The ALJ ruled that Respondents would not be allowed to present any evidence

showing that anyone besides Respondents were owners of Babe's during the period encompassed by the Claimants' wage claims, citing prejudice to the Agency and Respondents' failure to raise this affirmative defense issue in their answers or case summary.

Agency Objection to Respondents' Proffered Memorandum of Law

At the outset of the hearing, Respondent offered the Forum a Memorandum of Law concerning the legal definitions of "employee" and "independent contractor". The Agency objected to their submission. The ALJ postponed ruling on the matter until the close of the hearing. At the close of the hearing, the ALJ ruled that the Memorandum would not be accepted. Subsequently, the Memorandum was submitted and accepted by the Forum as part of Respondents' Closing Argument.

Agency Motion to Amend

At the conclusion of the Agency's case, the Agency moved to amend the Order of Determination related to Claimant Cornelius to lower the amount of wages claimed due and owing to \$5,900. The motion was granted.

FINDINGS OF FACT – THE MERITS

1) Respondent Geoffroy opened Babe's Cabaret as a nude dancing bar in Eugene, Oregon, in February 1994 and operated Babe's as a sole proprietorship, with himself as the sole owner, through June 6, 1995. On June 7, 1995, Geoffroy Enterprises, Inc. (GEI), an Oregon corporation, assumed ownership of Babe's. Respondent Geoffroy was GEI's corporate president,

sole shareholder, and the manager of Babe's.

2) Respondent Geoffroy employed Kim Burnett, his daughter-in-law, as manager of Babe's from the time Babe's opened until the end of November 1994. During that time, Geoffroy lived in Arizona and infrequently came to Eugene.

3) Claimants Cornelius and Brown had both worked as nude dancers at Jiggles and the Great Alaska Bush Company, other nude dancing establishments in Eugene owned by Jim Hansen, immediately prior to working at Babe's Cabaret.

4) Prior to Babe's opening, Burnett solicited Claimants and a number of other nude dancers who had worked at Hansen's establishments to work at Babe's, promising some dancers wages and other normal employee benefits, such as workers' compensation coverage, at the time of hire and promising others wages in the future for their work at Babe's. Claimants had not received wages at Hansen's establishments and the issue of whether or not they were entitled to receive wages for their work at Hansen's establishments was being litigated at that time.

5) At Burnett's request, both Claimants filled out employment applications, W-4 forms, and INS Employment Eligibility Forms before starting work at Babe's.

6) Claimant Cornelius danced at Babe's from February 19, 1994, through July 18, 1995. She regularly worked Tuesday through Friday nights, six hours each night. She danced under the stage name

"Melody". She also worked as a cocktail waitress for a brief period of time in January 1995, which was reflected on Babe's payroll records.

7) Claimant Brown danced at Babe's from February 19, 1994, through April 7, 1995. She regularly worked Friday and Saturday nights, six hours each night. She danced under the stage name "Jenny".

8) Neither Claimant maintained a contemporaneous record of the specific hours and dates they worked at Respondents.

9) Respondents did not maintain a record of the specific hours and dates Claimants or any other dancers worked for Respondents.

10) Alan Nott, Respondents' principal disk jockey, maintained a notebook from May 3, 1994, through June 21, 1995, in which he accurately wrote down what time dancers were scheduled to start work each night, the order in which they appeared in the nightly dance rotation, and the songs to which they danced. Nott regularly worked Tuesday through Friday, from 6 p.m. until closing, which varied from 2 a.m. until 2:30 a.m.

11) Approximately two dozen dancers worked at Babe's at any given time while Claimants worked there. Other than the wage claimants and Rebecca Lynn Driessen, who had worked for Respondents since February 1994, there was no specific testimony presented showing how long other dancers had worked for Respondents.

12) Respondents' policy throughout Claimants' work at Babe's was that dancers were prohibited from dancing

at any of Jim Hansen's establishments if they wanted to continue working at Babe's. However, on rare occasions dancers danced at other nude dancing establishments for brief periods of time.

13) Respondent had several primary set shifts for which dancers were scheduled to work: 11:30 a.m. to 6 p.m., 4 p.m. to 10/12 p.m., 6 p.m. to midnight/2 a.m., and 8 p.m. to 2 a.m.

14) Dancers, including Claimants, requested the days and shifts they wanted to work by writing down their shift requests on a piece of paper and placing it in an envelope provided by management prior to the next week's schedule being posted.

15) Dancers, including Claimants, were generally given the shifts they requested, but sometimes management would ask dancers to work unpopular shifts if not enough dancers had signed up for those shifts.

16) Dancers, including Claimants, were expected to perform several kinds of dances while working at Babe's: (a) Individual "stage" dances, which consisted of 8 to 10 minutes of dancing to two different songs on stage while in a set rotation with all other dancers working at the time; (b) "Table" dances, which were dances performed by individual dancers at a customer's table, at the customer's request; and (c) "Party" dances, where all dancers were required to perform simultaneously for the benefit of one or more customers, typically for a bachelor or birthday party.

17) Dancers, including Claimants, received tips from customers for "stage" dances and table dances, but were required to perform "party"

dances for free. There was a minimum tip of \$5 for a topless and \$10 for a nude "table" dance that was set by management, although the dancers could receive a larger tip for "table" dances. Babe's received \$15 to \$25 for "party" dances, of which the dancers received nothing.

18) Dancers, including Claimants, received greater tips from "table" dances than "stage" dances. However, if a dancer's turn in the rotation for "stage" dances came up while the dancer was doing a "table" dance, the dancer had to abandon the "table" dance and perform her "stage" dance.

19) The 8 to 10 minutes each dancer danced on stage in rotation was a period of time that was set by management, over which dancers had no control.

20) Dancers provided their own costumes, but were asked by management to change costumes during shifts.

21) Dancers, including Claimants, generally chose the songs to which they danced. These songs were played from CD's (compact disks) that either belonged to Babe's or the individual dancer. However, management reserved the right to censor songs, and in fact prohibited some songs from being played based on their style and content.

22) There were three stages at Babe's upon which nude dancing was performed. Dancers, including Claimants, had no control over the number of stages that were open at any given time.

23) Although Babe's served alcohol and food and had pool tables,

television, and darts, nude dancing was the primary form of entertainment. Babe's could not have remained in business without nude dancing.

24) Dancers did not need any specialized training or prior experience to work as nude dancers at Babe's.

25) Dancers, including Claimants, had no money invested in Babe's and no opportunity for profit or loss.

26) Claimants did not believe they could hire anyone to perform, or help perform, their work at Babe's.

27) Respondents provided the stages, tables, lights, and stereo that the dancers, including Claimants, used in their performances, as well as the building in which the dances were performed.

28) Respondents advertised nude dancing in local periodicals. The Claimants never advertised themselves as nude dancers while they worked at Babe's. However, Claimants were never told they couldn't advertise themselves.

29) Dancers, including Claimant Cornelius, sometimes left Babe's between stage rotations. Sometimes they were warned about leaving Babe's too much.

30) Dancers, including Claimants, could leave work before their scheduled shift ended, but were expected to get permission first from Respondents' doorman, bartender, or manager.

31) Dancers, including Claimants, were expected to "tip out" the bartender, doorman, and disk jockey by giving them approximately 10 percent of their tips. Burnett told Claimant Cornelius there would be repercussions, including not being allowed to

leave early, or retaliation from the bartender, doorman, or disk jockey if she didn't "tip out".

32) Dancers, including Claimants, regularly "tipped out" the bartender, doorman, and disk jockey.

33) While Claimants worked at Babe's, management held periodic "staff" meetings that the bar staff, disk jockey, doorman, and dancers were required to attend.

34) Respondents also brought in "feature" nude dancers. Respondents contracted with these dancers to perform a specific number of days and hours and advertised their appearance. These dancers would perform longer stage sets and were allowed greater latitude in their physical contact with customers than Claimants and Respondents' other regularly scheduled dancers.

35) Every February, a loggers' convention (Loggers) is held in Eugene for several days. Loggers was the most lucrative time of year for dancers at Babe's in 1994 and 1995. Claimants did not attend a "staff" meeting held just before Loggers in February 1995. As a result, they were barred by management from dancing at Babe's during the Loggers. By arrangement of Babe's management, both claimants danced at the Silver Dollar Saloon in Eugene during Loggers.

36) "Staff" meetings were conducted by management, who discussed OLCC regulations and "house rules" that applied to dancers and other persons employed by Respondents.

37) Nott kept notes of "staff" meetings held on July 18, 1994, October 10, 1994, February 8, 1995, and

February 12, 1995. During the meetings, Nott wrote down "what was essentially said" in the same notebook in which he wrote down the time dancers were scheduled to start work each night, the order in which they appeared in that night's dance rotation, and the songs to which they danced.

38) Kim Burnett presided over the July 18, 1994, and October 10, 1994, "staff" meetings. Respondent Geoffroy was living in Arizona at the time and not actively managing Babe's and did not participate in these meetings. On December 1, 1994, Respondent Geoffroy began actively managing Babe's and actively managed Babe's throughout the remainder of Claimants' work at Babe's. Respondent Geoffroy was present at the February 8 and 12, 1995, meetings.

39) Some of the "house rules" applicable to dancers that were discussed at the July 18, 1994, "staff" meeting were as follows:

"(6) 'Trips' [by dancers] to store are to be cut back to one trip/night.

"(7) You ask for the shifts, you must work them, or you will be fined.

"(8) Do not go to the store in your costumes. You must wear street clothes.

"(14) Boyfriends are allowed in only to drop you off and pick you up.

"(31) Table dance prices. \$10.00 minimum. D.J.s are to announce this.

"(34) Dancers wanting to go home when there are no costumers [sic]. Summertime is slow. Work with it."

40) Some of the house rules applicable to dancers that were discussed at the October 10, 1994, "staff" meeting were as follows:

"(5) 'Going to the store' – Dancers abusing the privilege [sic].

"(6) Clothing on floor – one outfit per night? Change your costumes more often.

"(7) Day girls – no more table dances in far corner until doorman shows up."

41) Some of the house rules and statements applicable to dancers that were discussed at the February 8, 1995, "staff" meeting were as follows:

"(5) Kim is in charge of the dancers, and they are now employees."

41) Some of the house rules and statements applicable to dancers that were discussed at the February 12, 1995, "staff" meeting were as follows:

"– Dancers – tip our doormen, via Dick. They cover your asses.

"– No stage dances during Loggers.

"– No V.I.P. from bookings during Loggers.

"– Do not go outside alone. A doorman will walk you out.

"– Boy Friends [sic] are allowed in the building only 30 min. after he drops you off, or 30 min. before he picks you up.

"– Notes w/Dick¹

"– House Rules

"(1) Phone in if you will be late, or absent, 1/2 hr. before your scheduled shift. If you don't call: 1st

time warning; second time suspensions [sic]; 3rd time fired.

"(5) If a customer grabs you, use discretion about hitting him.

"(11) See previous note about boyfriends.

"(14) Dancers will be paid from the time you are ready to dance until the time you finish your last set?"

42) Claimant Cornelius worked 1,242 hours at Babe's. This number of hours was arrived at by calculating the total number of hours she would have worked at her regular schedule (see Finding 6), and subtracting those days she could recall being absent, plus any additional Tuesdays, Wednesdays, Thursdays, or Fridays in which her name had not been written down in Nott's notebooks.

43) 84 of the hours worked by Claimant Cornelius were worked after June 6, 1995.

44) Claimant Cornelius earned a total of \$5,899.50 while working at Babe's. This sum was arrived at by multiplying 1,242 hours worked by \$4.75 per hour. \$5,500.50 of this sum was earned between February 19, 1994, and June 6, 1995.

45) Claimant Brown worked 708 hours at Babe's. This number of hours was arrived at by calculating the total number of hours Brown would have worked at her regular schedule (see Finding 7), and subtracting those days Brown could recall being absent, plus any additional Fridays and Saturdays which Nott had worked and not written down her name in his notebooks.

46) Claimant Brown earned a total of \$3,363 while working at Babe's. This sum was arrived at by multiplying 708 hours worked by \$4.75 per hour.

47) At times material, the minimum wage in Oregon was \$4.75 per hour, pursuant to ORS 653.025(3).

48) Claimant Cornelius's last day of work at Babe's was on July 18, 1995. Respondent Geoffroy told her she would not be scheduled for work again after she sent a written demand to him for her wages on July 19, 1995.

49) Claimant Brown quit work at Babe's on April 7, 1995, without prior notice.

50) Claimants were not paid any wages for their work as nude dancers at Babe's.

51) Civil penalty wages were computed, in accordance with Agency policy, as follows: 6 hours (average number of hours worked each day) x \$4.75 = \$28.50 (average daily rate of pay) multiplied by 30 days = \$855.² This figure is set forth in the Order of Determination.

52) Respondents did not allege in their answers an affirmative defense of financial inability to pay the wages due at the time they accrued; nor did they provide any such evidence for the record.

53) The testimony of Claimant Cornelius was found to be generally credible, except that the Agency's summary of her hours worked, based primarily on Nott's records, showed she missed considerably more work than she testified to. The remainder of

her testimony was found to be credible.

54) The testimony of Claimant Brown was found to be 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 Brown to be anything except reliable and credible.

55) The testimony of Alan Nott was found to be credible. He had the facts readily at his command, and his statements were supported by his contemporaneous, handwritten, uncontroverted notes. There is no reason to determine the testimony of Nott to be anything except reliable and credible.

56) The testimony of Eduardo Sifuentez was found to be credible. He had the facts readily at his command, his computations were accurate, and he was readily able to explain the basis of his computations. There is no reason to determine the testimony of Sifuentez to be anything except reliable and credible.

57) The testimony of Rebecca Driessen was not entirely credible. At the time of her testimony, she was still working at Babe's. Her testimony was inconsistent on important points, and she tended to shade her testimony to favor Respondents. Her testimony was sometimes contradicted by the testimony of other witnesses, including Turney and Geoffroy. For example, she testified that attendance at "staff" meetings was not mandatory, a statement that was contradicted by every other witness, including herself when

1

"Dick" is Respondent Geoffroy.

2

Both Claimants worked six hours per day and are entitled to the same civil penalty wages.

she subsequently testified that sometimes signs announcing the meetings were entitled "Mandatory Meeting." She testified that she had gone out for drinks with Claimant Cornelius, usually "more than 15 minutes", then later testified that she couldn't specifically recall how long Cornelius left Babe's for during her shift. Her memory, particularly with regard to "house rules", was selective. Finally, her demeanor was suspect, in that she became progressively more uncomfortable as she was asked specific questions. Accordingly, the Forum has disbelieved all of her testimony except that which was corroborated by other credible evidence or was uncontested.

58) The testimony of George Turney III was generally credible, with one significant exception. He testified that attendance at "staff" meetings was mandatory, but that there were no consequences for failure to show up. Based on his position at Babe's, he had to have been aware that both Wage Claimants were barred from working at Babe's during the lucrative 1995 loggers convention based solely on their failure to attend a "staff" meeting.

59) The testimony of Richard D. Geoffroy was inconsistent on important points, contradicted other credible testimony, and on one critical point (transfer of assets) was simply unbelievable. For example, he testified that he never referred to dancers as "employees" and did not recall being at a "staff" meeting where that was announced. Yet Nott's notes from the February 8, 1995, "staff" meeting which Geoffroy attended, indicates dancers were told they "are now employees". He testified

that a "set number of dancers" could sign up for a shift, then later denied having made that statement. He denied conducting a "staff" meeting on February 12, 1995, where dancers were told the consequences of being touched, for not showing up for work, and where other house rules were reiterated. However, Nott's notes and testimony reveal that Geoffroy in fact made these statements. Finally, Geoffroy's assertion that all of his ownership interest in Babe's was transferred to Respondent GEI on July 7, 1994, the date GEI incorporated, is simply unbelievable in light of documents showing that GEI did not apply for a liquor license until late March 1995, that the document purporting to transfer all of Geoffroy's assets to GEI on July 7, 1994, was not executed until July 8, 1995, and that Geoffroy did not transfer the lease rights to the property on which Babe's was physically located until June 7, 1995. Accordingly, the Forum has disbelieved all of his testimony except that which was corroborated by other credible evidence or was uncontested.

ULTIMATE FINDINGS OF FACT

1) From February 19, 1994, through June 6, 1995, Respondent Geoffroy was a person doing business as Babe's Cabaret, a nude dancing bar, in the State of Oregon, and engaged the personal services of one or more persons in the operation of that business.

2) From June 7, 1995, through July 18, 1995, Respondent GEI was an Oregon corporation engaged in the operation of Babe's Cabaret, a nude dancing bar, and engaged the

personal services of one or more persons in the State of Oregon.

3) During the period of the wage claim, Claimant Cornelius was not an independent contractor. Respondents exercised significant control over her work. Her investment in the business was minor, consisting primarily of her costumes. Her opportunity for profit and loss was determined to a significant degree by Respondents. The performance of her job required little skill. She was retained for an indefinite period and worked for 16 months before her termination. As a matter of economic reality, she was dependent upon Respondents.

4) Between February 19, 1994, and June 6, 1995, Respondent Geoffroy suffered or permitted Claimant Cornelius to render personal services to him wholly in this state.

5) Between June 7, 1995, and July 18, 1995, Respondent GEI suffered or permitted Claimant Cornelius to render personal services to it wholly in this state.

6) During the period of the wage claim, Claimant Brown was not an independent contractor. Respondents exercised significant control over her work. Her investment in the business was minor, consisting primarily of her costumes. Her opportunity for profit and loss was determined to a significant degree by Respondents. The performance of her job required little skill. She was retained for an indefinite period and worked for 14 months before her termination. As a matter of economic reality, she was dependent upon Respondents.

7) Between February 19, 1994, and April 7, 1995, Respondent Geoffroy suffered or permitted Claimant Brown to render personal services to him wholly in this state.

8) The state minimum wage during 1994-1995 was \$4.75 per hour.

9) During the period February 19, 1994, to June 6, 1995, Claimant Cornelius earned \$5,500.50. Respondent Geoffroy owes Claimant Cornelius \$5,500.50 in earned and unpaid compensation.

10) During the period June 7, 1995, to July 18, 1995, Claimant Cornelius earned \$399. Respondent GEI owes Claimant Cornelius \$399 in earned and unpaid compensation.

11) During the period February 19, 1994, and April 7, 1995, Claimant Brown earned \$3,363. Respondent Geoffroy owes Claimant Cornelius \$3,363 in earned and unpaid compensation.

12) Claimant Cornelius ceased her employment with Respondent Geoffroy on June 6, 1995.

13) Claimant Cornelius was discharged from her employment with Respondent GEI on or about July 21, 1995.

14) Claimant Brown quit her employment with Respondent Geoffroy on April 7, 1995.

15) Respondent Geoffroy willfully failed to pay Claimant Cornelius \$5,500.50 in earned, due, and payable wages after she ceased employment with Respondent Geoffroy on June 6, 1995, and more than 30 days have elapsed from the due date of those wages.

16) Respondent GEI willfully failed to pay Claimant Cornelius \$399 in earned, due, and payable wages immediately when she was discharged, and more than 30 days have elapsed from the due date of those wages.

17) Respondent Geoffroy willfully failed to pay Claimant Brown \$3,363 in earned, due, and payable wages within five days, excluding Saturdays, Sundays and holidays, after she quit, and more than 30 days have elapsed from the due date of those wages.

18) Both Claimants had an average daily rate for the wage claim period of employment of \$28.50. (6 hours per day x \$4.75/hr. = \$28.50.) Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, equal \$855 (Claimants' average daily rate, \$28.50, continuing for 30 days).

19) Respondents did not allege in their answers an affirmative defense of financial inability to pay the wages due at the time they accrued. Respondents did not provide any such evidence for the record at the hearing.

CONCLUSIONS OF LAW

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

2) Before the start of the contested case hearing, the Forum informed Respondents of their rights as required by ORS 183.413(2). The ALJ complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

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 ***."

4) 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, Respondents were employers and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

4) ORS 653.025 requires that:

"[F]or 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."

Respondents failed to pay Claimants the minimum wage rate of \$4.75 for each hour of work time.

5) ORS 652.140(1) provides:

"Whenever an employer discharges an employee, or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately."

Respondent Geoffroy violated ORS 652.140(1) by failing to pay Claimant Cornelius all wages earned and unpaid immediately upon her cessation of employment with him on June 6, 1995. Respondent GEI violated ORS 652.140(1) by failing to pay Claimant Cornelius all wages earned and unpaid immediately upon Claimant Cornelius's discharge.

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 Geoffroy violated ORS 652.140(2) by failing to pay Claimant Brown 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 Geoffroy is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant Brown as provided in ORS 652.140. Respondents Geoffroy and GEI are jointly liable for the civil penalty sought by the Agency for willfully failing to pay all wages or compensation to Claimant Cornelius when due as provided in ORS 652.140.³

³ The Order of Determination in Claimant Cornelius's case named both Respondents as an "Employer" and sought penalty wages in the total amount of \$855. The Forum notes that each Respondent, as a separate employer, is technically liable for a separate \$855 in penalty wages, inasmuch as the computation of penalty wages is tied to the date that a Claimant ceases working for an individual employer. Claimant Cornelius ceased working for Respondent Geoffroy on June 6, 1995, by virtue of the transfer of ownership of Babe's and has not been paid by Respondent Geoffroy, then ceased working for Respon-

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 Respondents to pay Claimants their earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

Claimants Worked As Employees

Respondents contend that Claimants were not employees, but independent contractors. The Agency takes the opposite position.

In the past, this Forum has relied on Oregon case law⁴ that focuses on the employer's retained right (emphasis added) to control the details and manner of performance of the claimant's work to determine whether wage claimants were employees or independent contractors.⁵ Three primary questions have been asked to determine the employer's retained right of control.⁶ Those questions, and their applicability to this case, are outlined below.

(1) Did the Employer have the right to detail how the Claimants would perform their work, or did the Claimants use their own methods, with the Employer having no control except as to the ultimate result?

Respondents determined the rotation of dancers on stage, the length of time each dancer could dance, the number of stages that were open, and retained the right to censor the dancer's choice of songs. Respondents set the minimum fee for "table" dances and required dancers to interrupt the more lucrative table dances if their turn in the stage rotation came up while they were table dancing. Respondents required all dancers to perform "party" dances for free. Dancers decided which costumes they would wear, but were told to wear more than one costume per shift. Respondents retained the right to regulate how often dancers could leave the premises. The only part of the job Claimants and other dancers retained absolute control over was the content of their choice of costumes and content of their dances, subject to OLCC and vice regulations.

(2) Could the Claimants employ workers to perform, or help perform, the Claimant's work for the Employer?

No evidence was presented to show that Claimants or other dancers ever employed anyone either to

perform or help perform their work. However, due to the personal nature of the dancers' work and the working arrangements at Babe's, it strains the imagination to determine a capacity in which they could have employed someone to perform, or assist in performing their work.

(3) Who furnished the equipment, tools and materials the Claimants used in the work they performed for the Employer?

Claimants furnished their own costumes and bodies, and occasionally their own CDs. Respondents furnished the building, the stage, the lights, the stereo system, most of the CDs, and the inventory of beverages and refreshments.

The answers to these questions establish that Respondents retained the right to control and direct the details and manner in which Claimants performed their work to a substantial degree. Under the *All Season* tests⁷, the Forum concludes that Claimants were employees, not independent contractors.

In its review of *All Season* and prior cases in which the *All Season* tests have been applied,⁸ the Forum finds that the tests are inherently impractical in the wage claim setting. This problem was first noted in *All Season*, where the forum found it could only

determine the employer's retained right to control the detail of how claimant performed his work by looking "to what actually occurred between the Claimant and the Employer."⁹ This was because there was no explicit agreement as to this right. Likewise, whether or not the claimant could employ workers to perform, or help perform, the claimant's work for the employer could only be inferred from the circumstances, including the claimant's subjective belief, because there was no specific agreement between the claimant and employer.¹⁰

The Forum now abandons the *All Season* standard and in its place adopts the "economic reality" test used by federal courts for determining employee status under the Fair Labor Standards Act (FLSA). The FLSA test eliminates the problems cited above in applying the *All Season* tests by focusing on what actually occurred. Whereas the tests adopted by the Forum in *All Season* involved interpretations of statutes dealing with workers' compensation issues¹¹ and tax law,¹² the FLSA test is specifically tailored to the resolution of wage claims. In addition, the relevant definitions of "employer" and "employ" in ORS chapter 653 were taken from the FLSA.¹³ While federal case law interpreting federal statutes and regulations that are similar to Oregon's laws are not

dent GEI six weeks later and has not been paid.

⁴ *Bowser v. State Industrial Accident Commission*, 182 Or 42 (1947); *Butts v. State Industrial Accident Commission*, 193 Or 417 (1951); *Oremus v. Oregon Publishing Company, et al*, 11 Or App 444 (1972). *Herff Jones Co. v. Tax Commission*, 247 Or 404 (1967). *Bowser*, *Butts*, and *Oremus* interpreted statutes dealing with workers' compensation issues. *Herff Jones* interpreted taxation law.

⁵ *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264 (1982).

⁶ *Id.* at 278.

⁷ *Id.*

⁸ *In the Matter of Martin's Mercantile*, 12 BOLI 262 (1994); *In the Matter of U.S. Telecom International*, 13 BOLI 114 (1994).

⁹ *All Season*, 2 BOLI at 274.

¹⁰ *Id.* at 275.

¹¹ *Bowser*, *Butts*, *Oremus*, *supra* at n.4.

¹² *Herff Jones*, *supra* at n.4.

¹³ *Northwest Advancement v. Bureau of Labor*, 96 Or App 133, 136 (1989), *rev den* 308 Or 315 (1989).

binding on the Forum, they are instructive and may be adopted as precedent in Oregon cases.¹⁴

Federal courts have adopted an expansive interpretation of the definition of "employer" under the FLSA in order to effectuate "its broad remedial purposes."¹⁵ In *Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993), a case similar to this one, the court used the "economic reality" test to determine that nude dancers were employees under the FLSA. The focal point of the test was "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services".¹⁶ The court considered five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative. Those factors were:

- "(1) The degree of control exercised by the alleged employer;
- "(2) The extent of the relative investments of the worker and alleged employer;
- "(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;
- "(4) The skill and initiative required in performing the job;
- "(5) The permanency of the relationship."¹⁷

This test is both easier to apply and more directly related to the definitions of "employer" and "employ" in ORS chapter 653 than the "retained right to control" test. The Forum adopts the "economic reality" test as articulated in *Circle C Investments, Inc.*, for use in this and future wage claim cases to determine whether a claimant is an employee or independent contractor.

Application of the "economic reality" test to this case yields the following results:

(1) The degree of control exercised by the alleged employer.

Dancers (this term hereafter includes Claimants) were required to attend employee meetings, with consequences if they failed to attend. Dancers were limited in the number of times they could leave Respondents' premises during their shifts. Respondents exercised censorship over the dancers' choice of songs. Respondents established shifts with specific hours, from which dancers could choose which shift to work. Respondents determined the rotation of dancers on stage, the length of time each dancer could dance, and the number of stages that were open. Respondents set the minimum fee for "table" dances and required dancers to interrupt the more lucrative table dances if their turn in the stage rotation came up while they were table dancing. Dancers decided which costumes they

would wear, but were told to wear more than one costume per shift. In contrast, the only parts of the job dancers absolutely controlled were the types of costume they wore and the content of their dances, subject to OLCC and vice regulations. In short, Respondents exercised control over the claimants and other dancers in a number of significant ways that indicate an employer-employee relationship.

(2) The extent of the relative investments of the worker and alleged employer.

Dancers furnished their own costumes and bodies, and occasionally their own CDs. Respondents furnished the building, the stage, the lights, the stereo system, and most of the CDs. Respondents also owned the liquor license, the inventory of beverages and refreshments, and advertised in the local media. The dancers' investment was minor relative to Respondents' and indicates employee status.

(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer.

Respondents' responsibility for advertising, location, business hours, maintenance of facilities, aesthetics, and inventory of beverages and food played a significant role in attracting customers to the business. Once customers arrived at Respondents' business, a dancer's initiative, hustle, and costume significantly contributed to the amount of her tips. The record does not establish which of these factors contribute most substantially to a

dancer's opportunity for profit. However, dancers could only earn a profit or suffer a loss (which would presumably be limited to receipt of insufficient tips to cover costume expenses) because Respondents provided them with facilities in which to dance. This indicates an economic dependence by the dancers on Respondents.

(4) The skill and initiative required in performing the job.

Dancers required no specialized training or prior experience to perform their duties. Their initiative was limited to decisions involving costumes, dance routines, and the development of and maintenance of a rapport with customers. These facts indicate employee status.

(5) The permanency of the relationship.

Claimant Brown had worked at Babe's for 14 months and Claimant Cornelius for 16 months when they stopped working at Babe's. Rebecca Driessen had worked at Babe's for 26 months as of the date of the hearing. These lengths of tenure are indicative of employee status.

After analyzing these factors, the Forum concludes that here, as in *Circle C Investments, Inc.*, "the economic reality is that the dancers are not in business for themselves but are dependent upon finding employment in the business of others."¹⁸ Consequently, the dancers must be considered to be employees, not independent contractors.

Hours Worked

ORS 653.045 requires an employer to maintain payroll records.

¹⁴ *In the Matter of Kenneth Williams*, 14 BOLI 16, 25 (1995); *In the Matter of C & V, Inc.*, 3 BOLI 152, 160 (1982).

¹⁵ *Hale v. State of Arizona*, 967 F2d 1356 (9th Cir 1992), *rehearing granted, on rehearing* 993 F2d 1387, *cert den* 114 S Ct 386 (1993); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F2d 748 (9th Cir 1979).

¹⁶ *Circle C Investments, Inc.*, 998 F2d 324, 327 (5th Cir 1993).

¹⁷ *Id.*

¹⁸ *Id.* at 329.

Where the Forum concludes that a claimant was employed and was improperly compensated, it becomes the burden of the Respondent to produce all appropriate records to prove the precise amounts involved.¹⁹ Where the employer produces no records, the Commissioner may rely on the evidence produced by the Agency "to show the amount and extent of [claimant's] work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate."²⁰ Based on these rulings, the Forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimant.

Here, neither Respondents nor the Claimants maintained any contemporaneous record of hours or dates worked by the Claimants. At the Agency's direction, Claimants recreated a record of hours worked based on their regular work schedule. When Respondents produced notebooks kept by their disk jockey reflecting most of the days that Claimants were present or absent, the Agency and Claimants conceded that it was an accurate record and modified the wage claims accordingly. There was no evidence presented of any specific dates that either Claimant was absent except those dates testified to by Claimants or those shown in Nott's notebooks. Consequently, the Forum accepts those dates contained in Exhibits A-34 and A-39 as the dates actually worked by

Claimants. As for the hours worked on each of those dates, Respondents presented no evidence to contest Claimant Brown's claim for hours worked, but presented testimony that Claimant Cornelius worked fewer hours than those claimed because she took long breaks and sometimes left early. Claimant Cornelius herself acknowledged that she left Babe's during shift and left work early on occasion. However, the forum has no way of determining which days she left Respondents' premises during her shift, how long she left for, when she left early, and at what time she left. The burden is on Respondents to provide this evidence, and it has not been provided due to their failure to maintain records or produce persuasive "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence."²¹ Therefore, the forum accepts those hours contained in Exhibits A-34 and A-39 as the hours actually worked by Claimants.

Wages Due

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] 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 * * *." In this case, it is undisputed that Respondents paid Claimants nothing. Therefore, Respondents owe Claimants Cornelius and Brown

unpaid wages in the respective amounts of \$5,899.50 and \$3,363, plus penalty wages.

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 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.²² Respondents, as employers, had a duty to know the amount of wages due to their employee.²³ Here, evidence established that Respondent Geoffroy or his agent knew he was not paying Claimants wages for their work and intentionally failed to pay any wages. Likewise, Respondent GEI, through its agent Richard D. Geoffroy, had knowledge that Claimants were not being paid wages for their work and intentionally failed to pay any wages. Evidence showed that Richard D. Geoffroy, as a Respondent and as an agent for Respondent GEI, acted voluntarily, and was a free agent. Respondents must be deemed to have acted willfully under this test, and thus are liable for penalty wages under ORS 652.150.

The only way an employer who has willfully failed to pay termination wages when due can avoid liability for penalty wages is to plead and prove the affirmative defense that the employer was financially unable to pay the

employee the wages when due. It is a respondent's burden to show the respondent's financial inability to pay a claimant's wages.²⁴ Here, Respondents failed to either plead the defense in their answers or present evidence in support of that defense at the hearing. Consequently, Respondent Geoffroy is liable for \$855 penalty wages to Claimant Brown, and Respondent Geoffroy and Respondent GEI are jointly liable for \$855 in penalty wages to Claimant Cornelius.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders RICHARD D. GEOFFROY 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 MELODY CORNELIUS in the amount of \$6,355.50, less appropriate lawful deductions, representing \$5,500.50 in gross earned, unpaid, due, and payable wages and \$855 in penalty wages; plus

a) Interest at the rate of nine percent per year on the sum of \$5,500.50 from July 21, 1995, until paid; plus

b) Interest at the rate of nine percent per year on the sum of \$855 from August 21, 1995, until paid.

¹⁹ *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989).

²⁰ *Anderson v. Mt. Clemens Pottery Co.*, 328 US at 687-88.

²¹ *Id.*

²² *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

²³ *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242-43 (1983).

²⁴ 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).

2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JENNIFER HUSTON BROWN in the amount of \$4,218, less appropriate lawful deductions, representing \$3,363 in gross earned, unpaid, due, and payable wages and \$855 in penalty wages; plus

a) Interest at the rate of nine percent per year on the sum of \$3,363 from April 14, 1995, until paid; plus

b) Interest at the rate of nine percent per year on the sum of \$855 from May 14, 1995, until paid.

**In the Matter of
SCOTT NELSON
and Summitt Forests, Inc.,
Respondents.**

Case Number 06-97
Amended Final Order of the
Commissioner
Jack Roberts
Issued December 3, 1996.

SYNOPSIS

Where two farm labor contractors, an individual and his corporation, underreported their Oregon payroll to their workers' compensation insurer and thereby substantially underpaid their Oregon workers' compensation insurance premiums, they failed to make sufficient workers' compensation insurance premium payments when due. While Respondents' actions

justified a sanction up to and including revocation of their license, the Commissioner granted Respondents a one year provisional license on the condition that they provide the Commissioner with information about their current workers' compensation insurance coverage and premium payments and pay the Bureau of Labor and Industries \$45,000 for use in administering and improving compliance with farm labor contractor laws. ORS 658.445(3); former OAR 839-15-145 (6) and 839-15-520(2), (3)(j).

Pursuant to notice, a hearing was held on September 5 and 6, 1996, in Salem, Oregon, before Administrative Law Judge Douglas A. McKean. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Scott R. Nelson (Respondent Nelson) and Summitt Forests, Inc. (Respondent Summitt) were represented by James Mountain, Attorney at Law. Mr. Nelson was present throughout the hearing on his own behalf and as Respondent Summitt's representative.

The Administrative Law Judge (ALJ) received administrative exhibits X-1 to X-37; Agency exhibits A-1 to A-15, A-17 to A-23 (pp. 3 to 7), A-25 (pp. 1 to 6, 10), and A-27 to A-33; and Respondents' exhibits R-1 to R-7. The Agency withdrew exhibits A-16, A-23 (pp. 1 and 2), A-24, A-25 (pp. 7 to 9), and A-26.

The Agency called John Hegener, Audits Manager, SAIF Corporation, as its witness. Respondents called the following witnesses (in alphabetical order): Mike Backen, a forester with

Boise Cascade Corporation; John Booten, Ombudsman for Small Business, Department of Consumer and Business Services; Douglas Hunter, an insurance broker; Scott R. Nelson, Respondent; Glen Novak, a forester with Boise Cascade Corporation; David Seifers, forestry consultant; and Daisey Walker, office manager for Respondent Summitt. The record closed on September 6, 1996.

Having fully considered the entire record in this matter, I, Jack 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 April 25, 1996, the Agency issued a "Notice of Proposed Revocation of Farm Labor Contractor License" to Respondents. The basis for the proposal was Respondents' alleged failure to provide workers' compensation insurance or to make workers' compensation insurance premium payments when due. Respondents filed an answer and requested a hearing.

2) On July 10, 1996, the Hearings Unit issued to Respondents and the Agency a "Notice of Hearing." With the hearing notice, the Hearings Unit sent 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 administrative rules regarding the contested case process – OAR 839-50-000 through 839-50-420. At the participants' request, the ALJ later changed the location of the hearing

and, on his own motion, changed the time for convening the hearing.

3) On July 17, 1996, the Agency filed a motion to amend its Notice of Proposed Revocation. Respondents filed a response, moved to dismiss the notice, and moved to postpone the hearing. The Agency responded. Following a conference call, the Administrative Law Judge granted the motion to amend the Notice of Proposed Revocation, granted the motion for postponement, and denied the motion to dismiss. As amended, the Notice of Proposed Revocation alleged that between March 1991 and September 1992, Respondents failed to make sufficient monthly workers' compensation insurance premium payments when due, which demonstrated that Respondents' character, competence, and reliability made them unfit to act as a farm labor contractor. Respondents filed an answer to the amended notice.

4) On July 25, 1996, the Agency filed a motion for partial summary judgment. After an extension of time, Respondents filed a response and a cross-motion for summary judgment. The Agency replied and responded to the cross-motion. Following oral argument, the ALJ granted the Agency's motion for partial summary judgment and denied Respondents' cross-motion.

5) The ALJ 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. The Agency and Respondents each submitted a timely summary and later supplemented it. In their summary, Respondents moved to dismiss the charging document. The

Agency responded and moved to disallow the testimony of Respondents' expert witness. Respondents responded and filed a hearing memorandum. Following oral arguments, the ALJ denied both motions during the hearing.

6) At the start of the hearing on September 5, 1996, Respondents' attorney said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

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

8) On September 13, 1996, the Hearings Unit issued a Proposed Order in this matter. Respondents filed timely exceptions. The ALJ denied Respondents' request for oral argument. Respondents' exceptions have been addressed throughout this final order.

9) On September 27, 1996, the Commissioner issued a Final Order. On September 30, 1996, Respondents filed a Petition for Judicial Review and requested an order staying the enforcement of the final order pending resolution of the appeal. Following negotiations, Respondents and the Commissioner entered into a Settlement Agreement and the Commissioner withdrew the final order for reconsideration. On reconsideration, the Commissioner issues this Amended Final Order in which (1) the findings of fact,

conclusions of law, and opinion remain unchanged from the original final order, and (2) the "Order" section has been amended to reflect the terms of the Settlement Agreement.

FINDINGS OF FACT – THE MERITS

1) From 1983 to 1988, Respondent Nelson, a natural person, did business as Summitt Enterprises from Ashland, Oregon, where he lived. He was licensed by the Agency with a special indorsement authorizing him to act as a farm labor contractor with regard to the forestation or reforestation of lands. On February 13, 1987, Respondent Nelson voluntarily canceled the assumed business name of Summitt Enterprises.

2) On February 13, 1987, Summitt Enterprises, Inc. (SEI) was incorporated in Oregon. Respondent Nelson was SEI's president and registered agent. His wife, Paula Nelson, was the corporate secretary. SEI's principal office was in Ashland. Respondent Nelson and SEI were jointly licensed by the Agency to act as a farm labor contractor with regard to the forestation or reforestation of lands.

3) In January 1989, the Agency wrote Respondent Nelson regarding SEI's failure to submit any certified payroll reports concerning SEI's 1988 contracts.

4) During the period October 1, 1988, through September 30, 1989, SAIF Corporation (SAIF) provided a workers' compensation insurance policy to SEI. During that time, SEI had contracts in Oregon worth around \$742,000 and reported \$92,083* in

payroll to SAIF. SEI also had contracts in California worth around \$545,000 and reported \$593,000 in payroll to California's state workers' compensation fund. At all times material, California's workers' compensation insurance rates for reforestation workers were less than Oregon's rates. Respondent Nelson reported Oregon workers' payroll to the California state compensation fund rather than to SAIF in order to pay California's lower workers' compensation insurance premiums. SAIF conducted a final premium audit during November 1989 to March 1990 for the policy period October 1, 1988, through September 30, 1989. In April 1990, SAIF sent Respondent Nelson a Final Premium Audit Billing for \$262,128. The additional premiums billed resulted primarily from adjustments for unreported payroll for Oregon reforestation workers. In May 1990, SAIF notified Respondent Nelson that \$255,392 had to be paid by June 13, 1990, or SAIF would cancel SEI's workers' compensation insurance policy. On June 13, 1990, SAIF canceled the policy. SEI appealed the final premium audit billing to the Director of the Department of Insurance and Finance (DIF). In November 1990, Respondent Nelson, on behalf of SEI, entered into an agreement and stipulated order wherein he agreed that SEI "failed to properly report payroll to SAIF Corporation, and failed to maintain verifiable payroll records, all as required by the policy terms[.]" SEI paid SAIF \$279,745, representing \$255,392 in premium assessments plus interest and a penalty. The order confirmed SAIF's audit and dismissed SEI's appeal.

5) In November 1989, Respondent Nelson incorporated a new company, Summitt Forests, Inc. (Respondent Summitt), in California. Respondent Nelson was the president, the registered agent, and (with his wife) the owner of the corporation. Paula Nelson was the corporate secretary. From November 1989 to September 30, 1996, Respondent Nelson and Respondent Summitt were jointly licensed by the Agency with a special indorsement authorizing them to act as a farm labor contractor with regard to the forestation or reforestation of lands. At times material, Respondent Summitt maintained its office and clerical staff in the Ashland area, but it had a post office box in Yreka, California. It's telephone number was Respondent Nelson's telephone number in Ashland. Respondent Summitt used an Oregon bookkeeper, an Oregon accountant, an Oregon payroll service, and an Oregon business insurance agent. It had its vehicles registered in Oregon and had its bank accounts with the Ashland branch of United States National Bank. Until October 1992, Respondent Nelson employed a secretarial service to pick up Respondent Summitt's mail from the Yreka post office box and ship it to him in Ashland. Respondent Nelson's intent was to set up a California base of operation so that newly hired employees would be considered California employees.

6) Between March 1, 1991, and September 4, 1992, Wausau Insurance Companies (Wausau) provided a workers' compensation insurance policy to Respondent Summitt. Monthly premiums were billed based on

* Of this \$92,083, only \$29,124 represented payroll for workers engaged in reforestation and related activities. The remaining payroll was for shop em-

Respondent Nelson's estimates of Oregon payroll. From those estimates, between March 1, 1991, and September 1, 1992, Wausau billed and Respondent Summitt paid \$57,455* for the policy. Beginning in June 1992, Wausau audited Respondent Summitt's records. The payroll records were not auditable because they were incomplete, inaccurate, inconsistent, and incapable of independent verification. Following the final premium audit, Wausau sent Respondent Summitt two billings: one for \$561,062 in additional premiums for the policy period March 1, 1991, to March 1, 1992; and the other for \$287,233 in additional premiums for the policy period March 1, 1992, to the policy cancellation date of September 4, 1992. Respondent Summitt appealed both billings to the Department of Consumer and Business Services (DCBS), which was formerly DIF. On March 1, 1996, DCBS issued a final order directing Wausau to modify the final premium audit billing consistent with the order (reducing the premium for certain payments made to Barrett Business Services, to subcontractors, and to employees working in Washington). Because Respondents' records were not auditable, DCBS permitted Wausau to base the workers' compensation insurance premiums on its estimate of Respondent Summitt's payroll being equal to 50 percent of contract receipts. Wausau issued a revised premium billing of around \$538,000. Respondents and Wausau

settled the matter for \$475,000, which Respondents paid around August 30, 1996.

7) During the period March 1991 to September 1992, Respondent Summitt employed supervisors, who were responsible for supervising foremen, who, in turn, were responsible for supervising the workers. Respondent Summitt employed many workers who were citizens of Mexico but who worked in the United States for approximately 10 months a year. During the reforestation season, the workers often shared living quarters in Oregon with co-workers, local friends, or relatives. They frequently used a friend's or relative's mailing address as their own. Respondent Summitt provided vehicles, usually vans, to its foremen. The foremen were authorized to use the vans to transport new workers from Oregon to Yreka, California, to hire the new workers, and then to return them to Oregon. The foremen signed up the new Oregon workers at California restaurants. Respondent Nelson intended to create the appearance that Respondent Summitt was a California company and that, by using a California hiring location, the workers were residents of California. Respondent Nelson attempted to establish California residency for the workers to avoid paying workers' compensation insurance premiums to Wausau within the state of Oregon.

8) From April 8, 1991, to June 17, 1992 (when it canceled the contract), Barrett Business Services (Barrett) contracted with Respondent Summitt to provide leased employees to Respondents for reforestation work. The contract established that Summitt and Barrett were "joint employers" for purposes of the applicable workers' compensation laws, and required Respondent Summitt to maintain workers' compensation insurance on the leased employees. Respondent Summitt was responsible for the day-to-day supervision of the joint employees. Through the way he reported payroll, Respondent Nelson attempted to change the workers' status on each job. He attempted to limit the amount of time that Respondent Summitt called itself the employer on a given contract to under 30 days, and then he subcontracted out the remaining days of the work performed on the contract. "On day 30, that laborer was assigned to Barrett as a leased employee but continued working under the same supervisor. Nelson attempted to change that laborer's status by assigning him to Barrett, and Nelson hoped that under those circumstances the laborer was no longer a Summitt employee despite the fact that the laborer performed the same function, for the same supervisor as the previous day. In the latter circumstance, Barrett would have reported the payroll to its insurer, [Respondent Summitt] would not have reported the laborer's payroll to Wausau." By doing this, Respondent Nelson expected to be exempt from Oregon's workers' compensation law and instead pay California's lower workers' compensation premium rates, thereby decreasing his insurance

costs. He also took advantage of lower workers' compensation insurance rates paid by Barrett. Under this plan, Respondent Summitt could only work up to 30 days at an Oregon site and remain exempt from paying Oregon workers' compensation insurance. The plan depended on the workers being California workers. On some Oregon contracts, Respondent Summitt's employees worked more than the 30-day limit. From Respondents' records, it was not possible to determine how long employees worked on any one contract in Oregon or whether employees worked at a single location for no more than 30 days. Respondent Nelson advised a payroll service how to divide the payroll for purposes of reporting amounts to more than one state.

9) In November 1992, an Agency investigation showed that Respondent Summitt's certified payroll reports failed to provide information required by law.

10) From September 7, 1992, to October 16, 1993, Respondent Summitt had no Oregon workers' compensation insurance. During that time, Respondent Summitt employed Oregon workers to work on at least 10 reforestation contracts in Oregon. These workers were not California workers temporarily working in Oregon. In June 1993, the Department of Insurance and Finance issued a "Proposed and Final Order Declaring Noncompliance and Assessing a Civil Penalty" to Respondent Summitt. DIF found that Respondent Summitt was in violation of Oregon workers' compensation laws as a noncomplying subject employer and ordered Respondents to pay a \$1,000 civil penalty. Respondents

* Respondent Summitt paid a total of \$81,795 to Wausau during this period. However, this amount included \$24,340 in premiums paid for employees working in Idaho from May 1 to September 1, 1992. Subtracting this amount from the total paid leaves \$57,455, representing the total premium paid based on Respondent Summitt's estimated Oregon payroll for the period March 1, 1991, to September 1, 1992.

requested a hearing. In March 1994, the matter was dismissed after Respondent Summitt entered into a stipulation wherein, without admitting that it was a noncomplying employer, it paid the \$1,000 civil penalty.

11) At the time of hearing, Respondent Summitt had a good financial reputation, which included paying its bills on time (including the bills of its current workers' compensation insurer). Respondents' reforestation work was of high quality and timely performed. They hired good employees, took good care of the employees, and kept the equipment in good repair. Respondent Nelson communicated well with his staff and business contacts and took care of problems quickly. He was involved with his community as a volunteer and coach.

ULTIMATE FINDINGS OF FACT

1) During times material, Respondents were licensed as a farm labor contractor, doing business in Oregon. Respondent Summitt was an Oregon employer.

2) During times material, Respondents intentionally and repeatedly reported Oregon reforestation employees as California employees in order to pay California's workers' compensation insurance premiums rather than Oregon's premiums. They intentionally underestimated and underreported Respondent Summitt's Oregon payroll to its Oregon workers' compensation insurers. Respondents did so to decrease workers' compensation insurance costs in Oregon.

3) As a consequence of intentionally underestimating and underreporting Respondent Summitt's Oregon

payroll to its workers' compensation insurer, Respondents failed to make sufficient workers' compensation insurance premium payments when due.

4) Respondents' character, reliability, and competence make them 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 the persons herein. ORS 648.405 to 658.503.

2) The actions, inactions, and statements of Respondent Nelson are properly imputed to Respondent Summitt. Since Respondent Nelson was Respondent Summitt's owner and president during all times material herein, and his actions, inactions, and statements were made within the course and scope of that employment or agency, Respondent Summitt is responsible for those actions, inactions, and statements.

3) Respondent Summitt was not exempt from providing Oregon workers' compensation insurance coverage for its Oregon employees. ORS 656.126(2); OAR 436-50-055. *In the Matter of Summitt Forests, Inc. v. NCCI and Wausau Underwriters Insurance Company*, # INS 92-10-031 (3-1-96).

4) Pursuant to ORS 658.445(3), the Commissioner of the Bureau of Labor and Industries has the authority to and may revoke Respondents' license to act as a farm labor contractor if the "licensee's character, reliability or competence makes the licensee unfit to act as a farm labor contractor."

Former 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:

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

Former OAR 839-15-520 provides in part:

"(2) When the * * * licensee demonstrates that the * * * licensee's character, reliability or competence makes the * * * licensee unfit to act as a Farm or Forest Labor Contractor, the Commissioner shall propose that the * * * license of the licensee be suspended, revoked or not renewed.

"(3) The following actions of a Farm or Forest Labor Contractor * * * licensee or an agent of the * * * licensee demonstrate that the * * * licensee's character, reliability or competence make the * * * licensee unfit to act as a Farm Labor Contractor:

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

Respondents failed to make sufficient workers' compensation insurance premium payments when due. The forum has considered the manner, duration, and extent of Respondents' conduct in so failing to make these payments. The forum has also considered the evidence presented by Respondents bearing on their character, reliability,

and competence. Under the facts and circumstances of this record, and pursuant to the applicable law and rules, Respondents have demonstrated their unfitness to act as a farm or forest labor contractor, and their license must be revoked.

OPINION

1. Summary Judgment Granted to the Agency

Pursuant to OAR 839-50-150 (4)(a)(A), the Agency filed a motion for summary judgment on the issue of whether Respondents paid sufficient workers' compensation insurance premium payments when due. The Agency asserted that the final order of the Department of Consumer and Business Services, *In the Matter of Summitt Forests, Inc. v. NCCI and Wausau Underwriters Insurance Company*, # INS 92-10-031 (3-1-96), should be given preclusive effect on this issue. The Administrative Law Judge granted that motion. Subsection (c) of OAR 839-50-150(4) provides that, where the Administrative Law Judge grants the motion, the decision shall be set forth in the proposed order. This order has been issued according to that procedure.

A. Issue Preclusion

Since this case involves the preclusive effect of an administrative proceeding, it is governed by the common law. *Nelson v. Emerald People's Utility District*, 318 Or 99, 104, 862 P2d 1293, 1296 (1993). A DCBS decision on an issue may preclude relitigation of the issue in this proceeding if five requirements are met. *Nelson*, 318 Or at 104, 862 P2d at 1296; *Fisher Broadcasting, Inc. v. Department of*

Revenue, 321 Or 341, 898 P2d 1333 (1995). The five requirements are:

1. The issue in the two proceedings is identical.

As noted above, the issue is whether Respondents made sufficient workers' compensation insurance premium payments when due. The Agency contends that this issue was fully litigated before DCBS and the doctrine of issue preclusion (or collateral estoppel, as referred to in OAR 839-50-150(4)(a)(A)) applies to preclude relitigation of it. Respondents contend, in part, that this issue was not before DCBS – that the issue there was whether Respondents' workers' compensation insurance carrier overbilled Respondents following a final premium audit.

It's true that the issue as framed by the Agency is not stated expressly in the DCBS order. However, the forum does not believe that, to serve as the basis for issue preclusion, the issue has to appear expressly in the DCBS final order. See, for example, *State v. McAllister*, 72 Or App 611, 696 P2d 1138, 1140 (1985). I find that the narrower issue – whether Respondents made sufficient workers' compensation insurance premium payments – was actually and necessarily included in the decision of DCBS. Of course, DCBS decided many other issues along the way, including whether the reforestation workers employed by Respondents were California workers temporarily working in Oregon or Oregon workers temporarily working in other states. But an ultimate fact decided was that Respondents failed to make sufficient workers' compensation insurance premium payments during

the policy period (due to the underreporting of Oregon payroll). Although DCBS ordered Wausau to reduce elements of the final premium audit billing, Wausau's final billing (after the DCBS final order) was for \$538,000 in additional premiums due for the policy period – that is, premiums in addition to the \$57,455 Respondent Summitt paid previously on the basis of its underreported Oregon payroll.

Because I narrowed the issue above, this leaves the question of when the premium payments were due. Wausau did not determine that additional premiums were due until after it had conducted the final premium audit. The audit program and an appeal process are established by the insurance contract and by statute. See ORS 737.318 and 737.505. In its order, DCBS did not expressly decide when the additional premiums found owing were due. Respondents argue that this question was not before DCBS and that, under the statutory scheme, premiums found due following a final premium audit are not due retroactively; they are due after they are billed. Therefore, Respondents argue, the issues are not identical as between the two proceedings, the requirements of issue preclusion have not been met, and summary judgment should not be granted.

Respondents argue further that they made each of the monthly premium payments when due and that, following their appeal of the final premium audit billing, they promptly settled with the insurer and paid the settlement amount. The Agency argues that the additional premium amounts were due at the time they

accrued, where Respondents avoided paying the correct premium during the policy period by charging Oregon workers performing reforestation work in Oregon to Respondent Summitt's California workers' compensation insurance policy. Citing *In the Matter of Efrain Corona*, 11 BOLI 44 (1992), *aff'd without opinion*, *Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993), the Agency argues that this "premium-due-as-accrued" rationale was implicitly adopted by this forum under the facts in *Corona* where, following a final premium audit, the contractor owed some \$600,000 in premiums as a result of underreporting payroll during the three policy years in question, notwithstanding that the contractor made timely monthly premium payments. The Commissioner held in that case that the contractor failed to make the \$600,000 in workers' compensation insurance premium payments over the three years, or, in other words, when due, citing OAR 839-15-520(3)(j). *Corona*, 11 BOLI at 56-57.

The Commissioner has interpreted the rule and the meaning of "when due." Where a farm labor contractor has underreported payroll during the period of a workers' compensation insurance policy and, after a final premium audit, where additional premiums are found due, those additional premiums were due as they accrued. This interpretation recognizes that if the contractor had correctly reported his actual payroll to his insurer, he would have been making additional premium payments throughout the period of the policy.

Applying the rule, as interpreted, to the facts of this case leads to the following conclusion: Respondents failed to make workers' compensation insurance premium payments when due as a result of underreporting Respondent Summitt's Oregon payroll to Wausau during the policy period.

Accordingly, I find that the issue in the two proceedings – whether Respondents paid sufficient workers' compensation insurance premium payments – is identical. Concerning whether the premiums were paid when due, by decision of the forum, I grant summary judgment to the Agency based on the rule as interpreted and applied to the facts in this case. OAR 839-50-150(4)(a) (providing that the Administrative Law Judge may grant summary judgment on his own motion as to all or any part of the issues raised in the pleadings).

2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.

Respondents contend that what was litigated before DCBS was whether Wausau overbilled them for workers' compensation insurance coverage. The Agency contends that what was litigated was whether additional premiums were owed by Respondent Summitt to Wausau.

As found in the previous section of this Opinion, the issue of whether Respondents paid sufficient workers' compensation insurance premium payments was not expressly articulated by DCBS. However, while the issue before DCBS may be expressed as whether Wausau overbilled Respondent Summitt or whether Respondent Summitt owed additional

premiums, I find that the issue — whether sufficient workers' compensation insurance premium payments were made during the policy period — was actually and necessarily litigated and was essential to a final decision on the merits in the DCBS proceeding. DCBS found that Respondents misrepresented their Oregon workers' payroll to the California insurance fund and that their payroll records were not auditable. As a result, DCBS estimated Respondent Summitt's Oregon payroll to be 50 percent of its Oregon contract receipts. Although it ordered Wausau to adjust its final billing, DCBS effectively affirmed that Respondent Summitt owed over half a million dollars in additional premiums. This determination that additional premiums were owed, or, put another way, that Respondents had made insufficient premium payments during the period of the policy, was essential to the final decision on the merits. I find that this requirement for issue preclusion has been met.

3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue.

Respondents again contend that the issue before DCBS was not whether they made sufficient workers' compensation insurance premium payments when due. They argue that they did not have the opportunity to litigate their fitness of character. The Agency contends that DCBS fully and fairly heard Respondents' evidence and legal arguments about whether additional premiums were owed, along with the other issues, including whether Respondent Summitt was an Oregon or California employer.

After reviewing the proposed and final orders issued by DCBS, I am satisfied that Respondents had a full and fair opportunity to be heard on the issue before me. The DCBS hearing was held before a hearings officer over the course of five days. Respondents were represented by counsel, as were Wausau and NCCI. Respondents had strong reasons, given the amount of additional premiums billed, to litigate aggressively. Respondents filed extensive exceptions to the proposed order, and the Insurance Commissioner heard oral argument on the exceptions. Respondents' fitness of character was not an issue before DCBS, but it likewise is not an issue on which issue preclusion or summary judgment has been sought. I conclude that this requirement for issue preclusion has been met.

4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding.

Respondents acknowledge that they were parties to the DCBS proceeding. They contend, however, that they were the petitioner in that proceeding and claim it is unfair to use their partial failure to carry their burden before DCBS as a sword by the Agency to use summarily to revoke their license.

The only question here is whether Respondents were parties to the prior proceeding. They were. It does not matter that they were petitioners. Their other claim is unpersuasive. This requirement for issue preclusion has been met.

5. The prior proceeding was the type of proceeding to which this forum will give preclusive effect.

"Some, but not all, types of administrative proceedings are appropriate to establish issue preclusion. Whether an administrative decision has a preclusive effect depends on: (1) whether the administrative forum maintains procedures that are 'sufficiently formal and comprehensive'; (2) whether the proceedings are 'trustworthy'; (3) whether the application of issue preclusion would 'facilitate prompt, orderly and fair problem resolution'; and (4) whether the 'same quality of proceedings and the opportunity to litigate is present in both proceedings.'" *Nelson*, 318 Or at 104, 862 P2d at 1297 (citations omitted).

Respondents contend that this requirement has not been met because DCBS's predecessor agency, DIF, refused to give preclusive effect to its own ruling from a prior premium audit proceeding, citing *Bruer's Contract Cutting v. National Council on Compensation Insurance*, 116 Or App 485, 489, 841 P2d 690 (1992).

The Agency contends that the DCBS proceeding had sufficient safeguards, had formal and comprehensive procedures, was trustworthy, and provided the same opportunity to litigate as this forum, and that application of issue preclusion would facilitate prompt, fair, and orderly problem resolution. It argues that the DCBS proceeding is appropriate to establish issue preclusion and the DCBS decision should have preclusive effect.

Further, the Agency contends that, under the premium audit appeal process established by statute, an employer may appeal each audit for each policy year, even though the same issues (such as whether a travel expense allowance is part of payroll, as in *Bruer's*) are involved in successive audits and even though earlier audit appeals (involving the same issues) may have become final. For this reason, determinations on issues made in previous premium audit appeals do not have preclusive effect on those issues in subsequent audit appeals. However, the Agency argues, this does not mean that a determination made in an audit appeal is not final and is not entitled to preclusive effect (by DCBS or any other agency) regarding that audit. In other words, a determination made in a final order (for example, about an issue in a 1992 audit) is final and is entitled to preclusive effect regarding that 1992 audit, subject to the insured's right to appeal that order. Thus, even though an issue may arise in a 1996 audit that also arose in the 1992 audit, and the 1992 audit appeal determination may not preclude relitigation of the issue as presented in the 1996 audit, the insured is not permitted to relitigate the 1992 audit. The final order from the 1992 audit is final and should have preclusive effect as to the 1992 audit issues.

I have reviewed the DIF proposed and final orders in *In the Matter of Bruer's Contract Cutting*, Case No. 88-1-3 (Final Order 6-30-89) (regarding a policy period April 1985 to March 1986); the Oregon Court of Appeals case *Bruer's Contract Cutting v.*

* This case was attached to the Agency's summary judgment reply brief,

National Council on Compensation Insurance, 116 Or App 485, 489, 841 P2d 690 (1992) (regarding the policy period April 1986 to March 1988); and the order on remand from the just-cited court of appeals case, *In the Matter of the Petition of Bruer's Contract Cutting*, Case No. 89-03-016 (1993) (regarding the same policy period, April 1986 to March 1988).^{*} In the court of appeals case, DIF's interpretation of ORS 737.318 was that the Legislature intended that an employer retain the right to appeal the results of audits for each policy year and each insurer. The court agreed with that interpretation and, after quoting the DIF order ("Issue preclusion does not apply in the final audit billing appeal process"), the court stated, "Issue preclusion does not prevent [DIF] from considering the estoppel claim." *Bruer's*, 116 Or App at 489, 841 P2d at 692. The court decided that issue preclusion did not apply to the estoppel claim on the basis of DIF's interpretation of ORS 737.318 and on the basis that the parties had not litigated the estoppel claim in a prior DIF proceeding (*citing Drews v. EBI Companies*, 310 Or 134, 139, 795 P2d 531 (1990)).

I am persuaded that issue preclusion does not apply to bar relitigation of issues in successive audit appeals. However, I am also persuaded that issue preclusion may apply to an issue decided in an audit appeal when that issue arises in another proceeding dealing with the same audit. This is a different situation than the one considered in *Bruer's*. In this proceeding, the

Agency seeks to preclude the relitigation of an issue that was decided in Respondents' 1992 audit (that is, whether Respondents made sufficient workers' compensation premium payments during the policy period) in a BOLI proceeding focusing on the same audit period. The BOLI proceeding was not held pursuant to the requirements of ORS 737.318 or 737.505. Thus, I do not find the reasoning or holding in *Bruer's* dispositive here. That being so, I turn to the other questions to be considered under this requirement for issue preclusion.

It appears to me from the contents of the DCBS proposed and final orders in *In the Matter of Summitt Forests, Inc. v. NCCI and Wausau Underwriters Insurance Company* and from ORS 183.315 (which does not exempt DCBS from the contested case procedures in the Administrative Procedures Act) that DCBS maintains procedures that are sufficiently formal and comprehensive. Given those procedures, as well as the administrator's review of Respondents' exceptions and of the record, and the reasoning described in the final order, I am satisfied that the DCBS proceeding was trustworthy. I also find that application of issue preclusion would facilitate prompt, orderly, and fair problem resolution because (1) DCBS already spent five days hearing evidence on the same factual issues that this forum would have to consider (and thereby saved the participants the time and expense of presenting that evidence again), (2) the Agency properly waited until DCBS

issued a final order, thereby permitting the orderly consideration of this common issue by this forum, and (3) it allows an agency with greater expertise in workers' compensation insurance matters to consider and decide an issue first, and then allows this forum to rely on that expertise and rule consistently, which promotes fairness. Finally, it appears that the Administrative Procedures Act applies to both agencies' contested case hearing processes. Both agencies hold hearings after due notice; both permit the parties to be represented by counsel and to present evidence, arguments, motions, and exceptions; both issue proposed orders and receive exceptions to those orders; both issue final orders following a review of the record and exceptions by the appropriate official. In each proceeding, Respondents had a strong incentive to litigate the issues aggressively. I do not find that, by providing a summary method of resolving disputed issues in the context of the contested case hearing process, the Bureau has impermissibly or improperly diminished the quality of the proceedings or the opportunity to litigate. I conclude that the same quality of proceedings and the opportunity to litigate is present in both proceedings. Accordingly, I find that this requirement for issue preclusion has been met.

B. Conclusion

I conclude that all requirements of issue preclusion have been met. The Agency's motion for summary

judgment is granted. As stated in the Ultimate Findings of Fact above, Respondents failed to make sufficient workers' compensation insurance premium payments when due.

2. Summary Judgment Denied to Respondents

Respondents requested summary judgment on the basis of issue preclusion, relying on a ruling in Lane County circuit court granting summary judgment in favor of Respondent Summitt against Northwest Reforestation Contractors Association, Inc. *et al.*^{*}

Applying the same requirements for issue preclusion discussed above, the outcome of Respondents' motion is determined by the fourth question — was the party sought to be precluded a party or in privity with a party to the prior proceeding. Respondents contend that Northwest Reforestation Contractors Association sent a letter to the Agency complaining about Respondents, and thus the association became the Agency's complainant in this proceeding. Further, they argue, the association was acting as a private attorney general attempting to enforce statutes that the Commissioner is authorized to enforce. Thus, the argument goes, the Agency was somehow a party or in privity with the association in the circuit court case. The Agency contends that it was neither a party nor in privity to a party in the court case, it had no control over the association in the litigation, and the association is not

^{*} which in turn was marked for hearing as an administrative exhibit.

^{*} This case was also attached to the Agency's summary judgment reply brief and marked for hearing as an administrative exhibit.

^{*} *Northwest Reforestation Contractors Association, Inc. et al v. Summitt Forests, Inc.*, Case No. 16-93-09532 (Order granting summary judgment dated September 21, 1994). The motion, order, and judgment were submitted as an exhibit attached to Respondents' cross-motion for summary judgment, which in turn was marked for hearing as administrative exhibit.

the Agency's complainant in this contested case.

I find that the Agency was neither a party nor in privity to a party in the circuit court case. Accordingly, that requirement of issue preclusion has not been met and the motion for summary judgment must be denied.

3. Motion to Dismiss Denied

On July 31, 1996, Respondents moved to dismiss the charging document because it failed to state a claim. The Agency's Notice of Proposed Revocation sought to revoke Respondents' license because they failed to make "sufficient" workers' compensation insurance premium payments when due. Respondents contended that the phrase "sufficient payment" was a "nullity" because "sufficient" had no basis in the statutes and was neither used nor defined in the Agency's rules. Respondents relied on *Megdal v. Board of Dental Examiners*, 288 Or 293, 320, 605 P2d 273 (1980). Respondents also claimed that their state and federal constitutional rights, as well as principles of administrative law, would be violated if the Agency revoked their license based on this notice. The Administrative Law Judge denied the motion, finding that the notice adequately stated a claim. Further, the ALJ said he needed "more than a one-sentence conclusion that Respondents' rights are being violated before [he could] fairly consider such claims."

At hearing, Respondents renewed their motion to dismiss for failure to state a claim. Again, relying on *Megdal*, they argued that there was no basis in the statutes or rules for revoking their license on the ground that they

did not make "sufficient" premium payments. They argued further that, even if the Agency had properly "adopted a rule that the failure to make a 'sufficient' premium payment is grounds for revoking a license, that rule also is inconsistent with the legislative policy of ORS 658.445(3)." They claim that the statutes and rules provide no guidance on what constitutes "sufficient" payment, and therefore whether a failure to make sufficient payments will result in revocation "is a matter that is left entirely to the Forum's purely *ad hoc* discretion. That violates Article I, section 20 of the Oregon Constitution and the Due Process Clause of the Fourteenth Amendment." Respondents' Hearing Memorandum, at 9-11.

At hearing, the Agency argued that "sufficient" is an elastic term that is appropriately developed on a case-by-case basis. The Agency compared the instant case to *Corona*, wherein the contractor failed to make "sufficient" premium payments during a three year period and, following a final premium audit and appeal, the insurer billed the contractor for around \$600,000 in additional premiums.

The ALJ denied Respondents' motion, ruling that the Commissioner had established in a previous contested case that failure to make sufficient workers' compensation insurance premium payments when due was a basis for determining whether someone had the requisite character, reliability, or competence to act as a farm labor contractor.

The facts here are unlike the facts in *Megdal*, where the Board of Dental Examiners had not made a rule proscribing the kind of conduct charged.

Here, the Commissioner has adopted a rule stating that, when assessing a person's character, reliability, or competence, the Agency will consider whether the person made workers' compensation insurance premium payments when due. OAR 839-15-145(6). The Commissioner adopted another rule providing that failure to make workers' compensation insurance premium payments when due demonstrates that the person is unfit to act as a farm labor contractor. OAR 839-15-520(3)(j).

The Agency is entitled to interpret these rules, and its interpretation of its own rules is entitled to deference. *1000 Friends of Oregon v. LCDR (Lane Co.)*, 305 Or 384, 390-91, 752 P2d 271, 275 (1988) (the legislative choice to entrust the agency both with setting standards and with applying them can imply that the agency's view of its standards is to be given some appropriate respect).

In *Corona*, the contractor had made monthly premium payments, but, because he underreported his payroll, he underpaid his premiums by around \$600,000 during the policy period. The Commissioner held that this demonstrated a failure to make workers' compensation insurance premium payments when due. The Commissioner made it clear that, when determining a farm labor contractor's fitness to be licensed, the Agency will consider whether the licensee made *sufficient* workers' compensation insurance premium payments when due. In Respondents' case, the forum is applying the same law as was applied in *Corona*. In other words, this case represents the application of existing law

and rules to a situation factually similar to *Corona*.

Given the similarities between the facts in *Corona* and those found here, I conclude that the ALJ's ruling was correct and Respondents' rights have not been violated. The ruling denying Respondents' motion to dismiss is affirmed.

4. Estoppel

In their answer, Respondents contend that the Commissioner is estopped from revoking their license for the reason alleged in the amended Notice of Proposed Revocation because, at the time of the answer, those allegations related "to a currently ongoing premium audit appeal process and are properly and exclusively within the jurisdiction of DCBS and/or the Oregon Court of Appeals."

The Agency argues that the appeal of the DCBS final order (now apparently dismissed with the settlement of Wausau's final billing) does not affect the order for purposes of issue preclusion. The Agency also argues, in effect, that the matters alleged are matters within the jurisdiction of the Commissioner even if they are the subject of the DCBS litigation.

Given the Satisfaction of Judgment filed with DCBS, this issue may be moot. Nevertheless, if it is not moot, I find that the Agency is not estopped from seeking to revoke Respondents' license. A pending appeal does not affect the finality of a judgment for purposes of claim or issue preclusion. *Hickey v. Settlemier*, 116 Or App 436, 841 P2d 675 (1992), *aff'd in part, rev'd in part*, 318 Or. 196, 864 P2d. 372 (1993); *and see Corona*, 11 BOLI at 57

(citing cases for the same proposition). Further, the Commissioner clearly has jurisdiction to decide whether a licensee has the requisite character, reliability, and competence to act as a farm labor contractor. Whether a licensee is providing workers' compensation insurance coverage is a substantive matter that is influential in the Commissioner's decision whether to grant or deny a license. *In the Matter of Z and M Landscaping, Inc.*, 10 BOLI 174, 181 (1992). The Commissioner has by rule and final order also made it clear that properly paying for workers' compensation insurance is a matter the Agency will consider when assessing a licensee's character, reliability, and competence. I conclude that the factual matters alleged in this case are within the Commissioner's jurisdiction, notwithstanding that the same issues were once before DCBS.

5. Sanctions

A. Civil Penalty

In their hearing memorandum, Respondents contend that a civil penalty is not authorized here because there is no statutory authority to assess a civil penalty for failure to make sufficient workers' compensation insurance premium payments when due, and because the Agency's Notice of Proposed Revocation stated that it was seeking only revocation of Respondents' license. Yet at hearing, Respondents argued that it would be permissible for the forum to assess a civil penalty in lieu of revoking their license.

The Agency contended that, while a civil penalty is permissible (as acknowledged by Respondents at hear-

ing), it is not appropriate under the facts of this case.

ORS 658.453 is the Commissioner's statutory authority for assessing a civil penalty. In subsection (1), the statute specifies the violations for which a civil penalty may be assessed. OAR 839-15-508 similarly lists the violations for which the Commissioner may impose a civil penalty. Neither the statute nor the rule lists a failure to make workers' compensation insurance premium payments when due as a basis for assessing a civil penalty.

OAR 839-15-520 addresses violations for which a license may be denied, suspended, revoked, or not renewed. It provides in section (8) that, "Nothing in this rule shall preclude the Commissioner from imposing a civil penalty in lieu of denying or refusing to renew a license application or in lieu of suspension or revocation of a license." This forum has previously ruled that, even when revocation is the only sanction proposed, the Administrative Law Judge may take evidence of mitigating and aggravating circumstances for consideration in assessing a civil penalty under ORS 658.453 and OAR 839-15-520(8), to determine which sanction is appropriate. *See, for example, In the Matter of Clara Perez*, 11 BOLI 181, 194-95 (1993); *Corona*, 11 BOLI at 58.

In this case, however, a civil penalty is not an available sanction. As the forum said in both the *Perez* case and the *Corona* case, the "Commissioner may impose any sanction authorized by statute." In those cases, violations were alleged for which a civil penalty was authorized by ORS 658.453. This is not the case here.

Here, neither the statute nor the rule lists a failure to make workers' compensation insurance premium payments when due as a basis for assessing a civil penalty. Respondents' assertion at hearing that a civil penalty would be an appropriate sanction in lieu of revocation cannot confer such authority on the Commissioner. Accordingly, a civil penalty is not a sanction available in this case.

B. Revocation

Respondents contend that revocation is an unjust, inappropriate, and grossly disproportionate sanction in this case given: the misuse by this forum of the final premium audit appeal, the age of the alleged events, the fact that Respondent Nelson sought only to attain a legal economic advantage by adjusting his insurance costs, and the preponderance of evidence showing Respondents' high character, reliability, and competence.

The Agency contends that revocation is the appropriate sanction because Respondents intentionally lowered their Oregon workers' compensation insurance costs by misreporting their Oregon workers' payroll to California, and they did so in a way that was directly contrary to and in circumvention of the intention of the Oregon Legislature and the workers' compensation statutes. The Agency contends that Respondents intentionally misreported the Oregon workers' payroll to California and failed to maintain verifiable records both before and after Wausau was the insurer. These actions, according to the Agency, demonstrate that Respondents' character, reliability, or competence make them unfit to act as a farm labor contractor.

The preponderance of the evidence in the whole record demonstrates that Respondents intentionally and over a period of years circumvented Oregon's workers' compensation insurance system by misclassifying and misreporting Oregon workers as California workers, thereby reducing Respondents' Oregon workers' compensation insurance costs.

After he admitted in the settlement with SAIF that he failed to report the workers properly and failed to keep verifiable records, Respondent Nelson continued to do the same thing with Wausau. At hearing he denied the substance of his admissions to SAIF. I found Respondent Nelson's testimony that he thought his records were verifiable and that he thought he was following the requirements of the law not credible.

The preponderance of evidence is persuasive that Respondents knowingly recruited and employed Oregon workers to work on contracts in Oregon. Hauling them across the border to California and having them sign a form does not make them California workers. I am persuaded that Respondent Nelson was not merely trying to lawfully avoid paying Oregon's workers' compensation insurance, he was deliberately evading compliance with the letter and the spirit of the Oregon workers' compensation insurance laws. These were not the innocent mistakes of a young entrepreneur. These were calculated efforts by Respondent Nelson to create an illusion of something that was untrue — that Respondent Summitt was a California employer employing California

workers. All the credible evidence exposes the illusion. The lesson Respondent Nelson appears to have learned from his experience with SAIF was that he needed to create a better illusion. He created Respondent Summitt, which he incorporated in California; he established a California post office box to create the illusion of a place of business in California; and he made up a form for Oregon workers to sign in California to create the illusion that these were California workers. All of this was done to disguise the truth. After Respondent Summitt's insurance policy with Wausau was canceled, Respondents continued to recruit and employ Oregon workers to work in Oregon, and they did so without any workers' compensation insurance in Oregon. Respondents' claim that these workers were all covered by California insurance was unsupported by any evidence aside from Respondent Nelson's testimony. Whether the claim is true or not, the fact remains that Respondents continued to employ Oregon workers and, apparently, misclassify and misreport them to California. This does not reassure the forum that Respondents changed their manner of operating even after the Wausau audit.

The forum was impressed by witnesses' testimony concerning Respondents' general treatment of workers and the quality of Respondent Summitt's services. It is admirable that Respondent Nelson is active in his community and as a coach for children's sports. However, the Commissioner has made it clear in rulemaking and in contested case hearings that failure to make sufficient workers'

compensation insurance premium payments when due is an action that may demonstrate a licensee's lack of fitness to act as a farm labor contractor. Former OAR 839-15-145(6), 839-15-520(3)(j); *Corona*, 11 BOLI at 57-60. Under the facts found in this case concerning their failure to make sufficient premium payments when due – which demonstrate the intentional manner in which Respondents evaded the law, the ongoing nature of that behavior, its duration, and the magnitude of those actions – I conclude that Respondents' character, reliability, and competence demonstrate that they are unfit to act as a farm labor contractor. Accordingly, pursuant to ORS 658.445(3) and OAR 839-15-520(3)(j), revocation of their license is the appropriate sanction.

6. Respondents' Exceptions

Respondents take exception to the forum's decision to grant summary judgment to the Agency. Many of their arguments are the same ones they made in opposition to the motion. Those arguments have been addressed in section 1 of the opinion above.

Respondents also argue that additional issues were before this forum that were not before DCBS, to conclude that the issues in the two proceedings were not identical. However, the issues Respondents raise either were not issues before the forum or were matters discussed apart from summary judgment. For example, Respondents claim that an issue presented in this proceeding was whether the manner of Respondents' underlying conduct and their subjective intentions are reprehensible. (Respon-

dents' exceptions, at 8.) That issue was not before the forum. On summary judgment, the issue was whether Respondents made sufficient workers' compensation insurance premium payments when due. Facts about Respondents' manner of reporting their payroll and paying their insurance premiums were relevant to the issue before the forum and DCBS, but there was no issue about whether their conduct or intentions were reprehensible. Respondents' intentions were relevant when determining their character, reliability, and competence, but not when determining whether they made sufficient premium payments. Respondents raise false issues and their arguments based on them are without merit.

Respondents also claim that the issue in the two proceedings was not identical because the forum narrowed the issue and granted summary judgment *sua sponte* on the remaining question concerning when the payments were due. However, the forum did not decide that remaining issue – concerning when the payments were due – under the doctrine of issue preclusion. The forum decided that question separately, on its own motion. The forum holds that the identical issue (as narrowed for purposes of issue preclusion) was decided in the two proceedings.

On the other requirements of issue preclusion, Respondents raise similar arguments and false issues. For example, Respondents argue that they did not have a full and fair opportunity to litigate the so-called rule announced in *Corona* during the DCBS proceeding. However, the Agency did not

announce a new rule in the *Corona* case. See section 3 of the opinion. For purposes of issue preclusion, the issue litigated – whether Respondents made sufficient workers' compensation insurance premium payments – did not require Respondents to litigate any *Corona* rule. The issue was a factual one. Between March 1, 1991, and September 4, 1992, did Respondents make sufficient premium payments? They paid \$57,455. Following the premium audit, Wausau billed them for \$848,295 more. Although DCBS ordered Wausau to make adjustments in that billing, DCBS agreed with Wausau that Respondents had misreported Oregon workers on their California payroll, that it was appropriate for Wausau to estimate Respondent Summitt's payroll at 50 percent of its contract receipts, and that Wausau could again bill Respondents for additional premiums. While the DCBS final order did not use the words "Respondents made insufficient workers' compensation insurance premium payments," DCBS clearly reached that conclusion. After the final order issued, Wausau billed Respondents for an additional premium of \$538,000 and settled for \$475,000. Litigating this issue before DCBS did not require Respondents to litigate any *Corona* rule. The Agency applied the same rules in both this case and the *Corona* case.

Regarding Respondents' exception to the forum's granting summary judgment "*sua sponte*" on the issue of when the premium payments were due, the forum has explained its reasoning in section 1.A.1., above. Respondents argue that a determination of when premiums are due should be

consistent with the workers' compensation statutory scheme and the insurance contract. The forum disagrees. In situations where a farm labor contractor intentionally underreports payroll and therefore underpays premiums during a policy period, the Commissioner finds that the contractor has not made premium payments when due. Additional premiums paid after an audit are based on payroll earned during the policy period. If the contractor had properly reported the payroll as it accrued, the premiums would have been billed and paid during the policy period, "when due." Simply because the workers' compensation statutes and insurance contracts allow for the payment of these additional premiums after an audit does not mean that the Commissioner must be blind to the reasons why the premiums were not paid during the policy period when they would have been due, but for the underreporting of payroll. Accordingly, the Commissioner rejects Respondents' arguments.

Regarding Respondents' exception to the ruling denying their motion for summary judgment, the forum stands by the ruling. Respondents contend that the Agency was in privity with the plaintiffs in the *Northwest Reforestation Contractors Assoc. Inc. v. Summitt Forests, Inc.* (NRCA) circuit court case "because those plaintiffs essentially were acting as the Agency's complainant and were acting in the Agency's place as private attorneys-general." Plaintiffs brought that case under ORS 658.475, which gives any person the right to sue farm labor contractors to enjoin them from committing future violations of farm labor contractor laws.

The Agency recognizes that statutory right of private persons, but such recognition does not make the Agency a party in every such suit, nor does it place the Agency in privity with those persons. Respondents cited the NRCA court of appeals case (CA A86294, slip opinion issued August 28, 1996) in their case summary and their hearing memorandum. I have taken official notice of the court of appeal's decision and the fact that the Bureau of Labor and Industries filed an *amicus curiae* brief in the case. I do not find, however, that the Agency became a party to or in privity with a party in that case by filing an *amicus* brief. To the extent that Respondents present new facts in their exceptions that were not part of the record, those facts were not considered by the Commissioner in preparing the final order. OAR 839-50-380(1). This exception has no merit.

Respondents' exception concerning the denial of their motion to dismiss has been addressed, in part, in section 3 of this opinion. In their original motion and in their renewed motion, Respondents contended that the Agency's charging document failed to state a claim for revocation. They argued that the Commissioner does not have the authority to revoke a license for failure to make "sufficient" monthly workers' compensation insurance premium payments. To the extent that Respondents raise new issues in their exceptions, those issues have not been considered by the Commissioner. OAR 839-50-380(1). Respondents' argument that a failure to pay premiums for the correct number of workers is not a violation of ORS

658.417(4) (citing the minority view in the NRCA appellate case) has no merit. In its amended notice, the Agency did not allege a violation of ORS 658.417(4). Respondents' arguments that the rules are "subject to impossibly huge variations" are likewise without merit. When determining the fitness of farm labor contractors to be licensed, the Commissioner may appropriately assess on a case-by-case basis whether sufficient premium payments have been made when due, relying on such factors as the proportion between paid and unpaid premiums, the reason for underpayment, and the length of time the premiums went underpaid. Finally, Respondents' rights against *ex post facto* laws have not been violated. Even if the constitutional prohibitions against *ex post facto* laws applied in this administrative proceeding, which they do not, Respondents have not been subjected to retrospective rules." As noted in section 3 above, the forum is applying the same law here – ORS 658.445(3), OAR 839-15-145, and 839-15-520(3) – as it applied in *Corona*. These rules were in effect during all times material in this case.

Respondents' exception regarding the forum's estoppel ruling is without merit.

Regarding the exceptions to findings of fact, the forum made minor revisions to clarify the findings. Respondents argue that the ALJ did

not explain why he chose some evidence over other evidence and why he ignored certain inferences. Where there is conflicting evidence in the record, the forum need not discuss why it chose which evidence to believe. Likewise, if from a basic finding of fact the forum could rationally infer a further fact, the forum need not explain the rationale by which the inferred fact is reached. *Dennis v. Employment Division*, 302 Or 160, 169-70, 728 P2d 12, 18 (1986). Respondents also suggest findings of facts the forum finds irrelevant. They suggest inferences the forum declines to draw. The basic and ultimate findings of fact are supported by a preponderance of credible evidence in the whole record.

In challenging the second ultimate finding of fact, which Respondents claim is irrational, they ask,

"Why would Respondent Nelson go to all the trouble of transporting workers to California to have them sign up for work, of training workers in California, of entering into a lease contract with Barrett, of hiring a California employee to retrieve mail, of opening a California post office box, and of registering vehicles in California, if not to actually ensure their California status and the California status of their workers?"

The answer is: To disguise Oregon workers as California workers to avoid paying higher workers' compensation

* The constitutional prohibitions against *ex post facto* laws are generally confined to penal statutes. *Megdal v. Oregon State Board of Dental Examiners*, 288 Or 293, 605 P2d 273, 275-76 (1980); *Brown v. Multnomah County District Court*, 280 Or 95, 570 P2d 52, 54 (1977); *Kilpatrick v. Snow Mountain Pine Co.*, 105 Or App 240, 243, 805 P2d 137, 139 (1991). The prohibitions do not apply here.

insurance premiums in Oregon. The lengths and expense to which a person is willing to go in pursuit of a scheme is a reflection of the benefit that would accrue from getting away with it, not evidence of its legitimacy. Respondents argue that, "Substantial evidence in the whole record establishes that Respondent Nelson honestly believed that the actions which were taken were sufficient under the law." To the contrary, the preponderance of evidence in the whole record establishes that Respondent Nelson sincerely hoped that his actions were sufficient to allow him to get away with paying California workers' compensation rates to cover Oregon workers. An Oregon contractor who schemes to misrepresent its status as a California employer or its Oregon workers as California workers in order to avoid paying the workers' compensation insurance rates that its competitors must pay has not demonstrated the requisite character, reliability, or competence to act as a farm labor contractor.

Respondents' exceptions to the conclusions of law repeat many of their arguments concerning the rulings on summary judgment and the motion to dismiss. Those arguments have been addressed above.

Finally, Respondents take exception to the decision to revoke their license and the holding that a civil penalty is not an available sanction in this case. The forum's reasoning on these issues is given in section 5 of the opinion. Respondents' exceptions do not persuade me to change those decisions.

AMENDED ORDER

NOW, THEREFORE, having found facts that justify a sanction up to and including revocation of Respondents' farm labor contractor license;

As authorized by ORS 658.405 to 658.503 and pursuant to the terms of a Settlement Agreement entered into by Respondents Scott R. Nelson and Summitt Forests, Inc. and the Commissioner of the Bureau of Labor and Industries on November 15, 1996, the Commissioner makes the following order:

(1) The Commissioner agrees to license Respondents for one year effective October 1, 1996, provided the Commissioner determines that Respondents meet all statutory and regulatory requirements. Said license, and the first one year renewal of said license, if granted, would be provisional, subject to the following conditions:

(a) Respondents acknowledge and agree to comply with the interpretation of the agency rule applied in *In the Matter of Efrain Corona*, 11 BOLI 44 (1992), that a substantial underpayment of workers' compensation premiums because of under-reporting of payroll constitutes a failure to make workers' compensation payments when due; and

(b) Respondents contemporaneously provide the Commissioner with a copy of any report submitted by Respondents to Respondents' workers' compensation insurance carrier for purposes of determining premium billings; and

(c) Respondents annually provide the Commissioner with a copy of Respondents' estimated payroll

reported to Respondents' workers' compensation insurance carrier for assessment of annual premium for each policy year; and

(d) Respondents notify the Commissioner within one business day of:

i. Any notice by Respondents to their workers' compensation insurer of Respondents' intent to cancel or in any way modify Respondents' workers' compensation coverage; or

ii. Any notice by Respondents' workers' compensation insurer to Respondents of insurer's intent to cancel or in any way modify Respondents' workers' compensation coverage; and

(e) If Respondents' workers' compensation insurance is canceled, Respondents provide the Commissioner, within two business days of giving to the insurer or receiving from the insurer notice of said cancellation, evidence of Respondents' continued coverage under the same insurer or replacement coverage under another qualified insurer; and

(f) Respondents monthly provide the Commissioner with copies of any and all bid awards and ongoing contracts for forestation work with public entities, and notification of forestation contracts with private entities; and

(g) Respondents comply with all laws and rules regulating farm labor contractors.

(2) Respondents understand and acknowledge that upon proof of Respondents' failure to comply with items (1) (a), (b), (c), (d), (e) or (f) of this Amended Order, the Commissioner may immediately revoke Respondents'

license and not issue Respondents a license prior to October 1, 1998.

(3) Respondents agree to pay:

(a) \$30,000 to the Bureau of Labor and Industries to be used for the administration of farm labor contractor statutes and rules; and

(b) \$15,000 to the Bureau of Labor and Industries to be used for technical assistance to promote and improve compliance with laws regulating farm labor contractors.

**In the Matter of
MOHAMMAD NAWAZ KHAN,
dba Khan Farm Labor Contractor,
Respondent.**

Case Number 25-95
Final Order of the Commissioner
Jack Roberts
Issued December 10, 1996.

SYNOPSIS

Respondent, a farm labor contractor in Oregon and California, failed to pay Oregon workers all money entrusted to him for that purpose; failed to provide those workers with notices of rights and remedies, written agreements regarding terms and conditions of employment, and itemized deductions statements; and failed to provide to the Agency annual reports of farmers with whom Respondent contracted. The Commissioner assessed civil penalties of \$53,000 for the

violations. ORS 658.405; 658.407; 658.410; 658.440(1)(c), (e), (f), (g), and (h); 658.453; OAR 839-15-125; 839-15-310; 839-15-350; 839-15-370; 839-15-508(1)(a), (b), (e), (g), (h), (j), and (s); and 839-50-300.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on July 11 and 12, 1995, in a conference room of the Oregon Employment Department, 119 N Oakdale, Medford. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Mohammad Nawaz Khan, dba Khan Farm Labor Contractor (Respondent), was present and was represented by David C. White, Attorney at Law, Portland. Riaz Khan, Sacramento, was appointed by the Forum and under proper affirmation, acted as interpreter for the Punjabi speaking witnesses. Maria Carillo, Klamath Falls, was appointed by the Forum and under proper affirmation acted as an interpreter for a Spanish speaking witness.

The Agency called as witnesses, in order of appearance: Respondent; southern Oregon farmers James L. Moore and Dan and Tammy Shuck; Agency Compliance Specialists Eduardo Sifuentez and Raul Ramirez; and Respondent foreman Eliasar Castillo.

Respondent called as witnesses, in order of appearance: farm workers

Dilbagh Singh and Balbir Kaur Singh, and Respondent's bookkeeper Rana Khan.

Having fully considered the entire record in this matter, I, Jack 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 October 26, 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 Commissioner intended to assess civil penalties against Respondent totaling \$288,500 pursuant to ORS 658.453. As the basis for this action, the Agency alleged substantially as follows:

1. In 1993, while licensed as a farm labor contractor (FLC), Respondent failed to pay wages when due with funds entrusted to Respondent for that purpose to 19 persons employed by respondent in Oregon, violating ORS 658.440(1)(c) and OAR 839-15-508(1)(g). The Agency alleged that these violations were aggravated by being willful, intentional, repeated, and numerous and sought a penalty of \$1,000 per violation, or \$19,000.

2. In 1993, while licensed as an FLC, Respondent failed to furnish to at least 105 workers at the time

they were hired, recruited, or solicited a written statement describing the worker's rights and remedies as required by statute, violating ORS 658.440(1)(f) and OAR 839-15-310. The Agency alleged that these violations were aggravated by being willful, intentional, repeated, and numerous and sought a penalty of \$500 per violation, or \$52,500.

3. In 1993, while licensed as an FLC, Respondent failed to execute written agreements between Respondent and at least 105 workers containing the terms and conditions listed in ORS 658.440(1)(f) at the time they were hired and before they performed any work for Respondent, violating ORS 658.440(1)(g) and OAR 839-15-508(1)(g). The Agency alleged that these violations were aggravated by being willful, intentional, repeated, and numerous and sought a penalty of \$500 per violation, or \$52,500.

4. As of April 30, 1993, Respondent failed to file any form showing the dates, types and location of work, and the name of the farmer contracted with by Respondent in Oregon in 1992, and as of April 30, 1994, Respondent failed to file any form showing the dates, types and location of work, and the name of the farmer contracted with by Respondent in Oregon between May 1, 1993, and April 30, 1994, violating ORS 658.440(1)(e) and OAR 839-15-350. The Agency alleged that these violations were aggravated by being willful and repeated

and sought a penalty of \$500 per violation, or \$1,000.

5. In 1993, while licensed as an FLC, Respondent failed to furnish to at least 75 workers employed by Respondent itemized statements of earnings and deductions (WH-154) as required at the time Respondent paid the workers, violating ORS 658.440(1)(h) and OAR 839-15-370. The Agency alleged that these violations were aggravated by being willful and repeated and sought a penalty of \$500 per violation, or \$37,500.

6. In June and July 1994, Respondent, while unlicensed, recruited, solicited, and supplied 32 workers to perform farm labor for James Moore in Merrill, Oregon, violating ORS 658.453(1)(a) and OAR 839-15-125. The Agency alleged that these violations were aggravated by being willful and repeated and by Respondent's knowledge of the license expiration and sought a penalty of \$2,000 per violation, or \$64,000.

7. In June and July 1994, Respondent, while unlicensed, recruited, solicited, and supplied 29 workers to perform farm labor for Daniel and Tammy Shuck in Merrill, Oregon, violating ORS 658.453(1)(a) and OAR 839-15-125. The Agency alleged that these violations were aggravated by being willful and repeated and by Respondent's knowledge of the license expiration and sought a penalty of \$2,000 per violation, or \$58,000.

8. In June and July 1994, Respondent, while acting as a farm labor

* Punjabi is one of several languages or dialects spoken in Pakistan and India and was the native tongue of Respondent's family and some of Respondent's workers.

contractor as described in counts 6 and 7, failed to carry a labor contractor's license, violating ORS 658.440(1)(a). The Agency alleged that these violations were aggravated by being willful and repeated and by Respondent's knowledge of the violations and sought a penalty of \$2,000 per violation, or \$4,000.

The Notice of Intent was served on Respondent by certified mail at 8346 Bailey Road, Yuba City, CA 95993 on October 29, 1994, and by certified mail at PO Box 704, Yuba City, CA 95993 on November 2, 1994.

2) On November 14, 1994, Respondent through counsel answered the Notice of Intent by denying each of the eight counts, reserving the right to amend the answer to state affirmative defenses, and requested a contested case hearing.

3) The Agency requested a hearing date and on January 5, 1995, the Hearings Unit issued to Respondent and the Agency a Notice of Hearing setting forth the time and place of the requested hearing and the designated Hearings Referee, 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 the Agency's administrative rules regarding the contested case process – OAR 839-50-000 through 839-50-420.

4) On January 27, 1995, the forum received Respondent's motion requesting a postponement of the hearing scheduled for February 28, 1995, due to Respondent's absence from the United States, and the hearing was reset to May 16, 1995. On April 26,

1995, Respondent's counsel again sought a postponement due to Respondent's continued absence from the country due to a death in the family. Over the Agency's objection, the Hearings Referee reset the hearing to July 11, 1995.

5) On June 16, 1995, Respondent's counsel moved for appointment of a Pakistani speaking interpreter based on Respondent's limited English and the anticipated presentation of non-English speaking witnesses from Pakistan or India. On June 29, 1995, the Agency objected, citing affidavits of Agency staff concerning Respondent's dealing with the Agency in English. The Agency had no objection to a Punjabi speaking interpreter for the witnesses.

6) The Agency and Respondent timely filed their respective case summaries.

7) On July 7, 1995, the Hearings Referee, relying on the OAR 839-50-300 provision that "a person who cannot speak or understand the English language * * * is entitled to a qualified interpreter," ruled as follows:

"Respondent has obtained a license as a farm labor contractor using the Agency's forms printed in English. He is represented by counsel. The forum finds no necessity for providing him with an interpreter. The witnesses are a different matter. Assuming that some or all of them have difficulty with English, a failure to have an interpreter available might adversely affect Respondent's defense."

The Referee stated his intent to have a Punjabi speaker for the witness testimony available beginning at a time certain for Respondent to present his Punjabi speaking witnesses, out of order if necessary. The interpreter could then clarify any problems in understanding that may have arisen earlier and the interpreter's services may be limited to a portion of the proceeding.

8) Beginning in mid-June 1995 and continuing until the date of hearing, the forum attempted to obtain the services of a Punjabi speaking interpreter, either in Medford or elsewhere in Oregon. No professional interpreter with the requisite skills in the needed dialect was available. Out of necessity, the Hearings Referee appointed Riaz Khan, a brother of Respondent, to serve as interpreter for the witnesses speaking Punjabi. During the hearing, the Hearings Referee appointed Maria Carillo to serve as interpreter for Elisasar Castillo, a Spanish speaking witness.

9) At the commencement of the hearing, Respondent's counsel stated that Respondent had received the Notice of Contested Case Rights and Procedures and had no questions about it.

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

11) During the hearing, the Agency and Respondent stipulated that the testimony of farm workers Khurshid Ahmad, Aetar Singh, and Daljit Kaur, all of whom had worked for

Respondent since 1992 and all of whom were available as witnesses, would be substantially similar to that of Dillbagh Singh and Balbir Kaur Singh and therefore cumulative.

12) At the close of the hearing on July 12, 1995, the participants agreed to submit the case on written argument and the Hearings Referee announced a schedule for submitting argument. Submissions were timely received under that schedule and the record closed August 14, 1995.

13) The proposed order, containing an exceptions notice, was issued June 26, 1996. Exceptions were due July 6, 1996. On July 3, 1996, the Hearings Referee extended the due date for exceptions to July 31, 1996. Respondent timely filed exceptions, which are dealt with in the Opinion section of this order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Mohammad Nawaz Khan, doing business as Khan Farm Labor Contractor, utilized the personal services of persons within this state in connection with the production or harvesting of farm products for an agreed remuneration or rate of pay. He speaks English and Punjabi.

2) At times material, Eduardo Si-fuentez was employed as a Compliance Specialist with the Wage and Hour Division of the Agency. His duties included investigation of wage claims and of alleged violations of wage and hour laws including farm labor contracting laws. He was stationed in Eugene, but covered some work in southern Oregon. He is fluent

in English and Spanish; he does not speak Punjabi.

3) At times material herein, Raul Ramirez was a Compliance Specialist with the Farm Labor Unit of the Wage and Hour Division of the Agency. He began his duties, which included investigation of wage claims and of alleged farm labor violations, in March 1994 in Medford. He is fluent in English and Spanish; he does not speak Punjabi.

4) Ramirez was familiar with farm labor contracting through his position with the Agency, through his family, which included a labor contractor, and from working on farms. It is common among persons of Hispanic extraction to use the paternal-maternal form in stating their names and the names of other workers or to use either or both names.*

5) In July 1993, Sifuentez received a telephone complaint that farm workers were being paid California minimum wage while working in Oregon. In 1993, minimum wage in California was \$4.25 an hour and minimum wage in Oregon was \$4.75 an hour.

6) Form WH-151 is an Agency form headed "Rights of Workers." It is intended to be receipted for by each worker before each job begins and explains the rights of workers and responsibilities of labor contractors in Oregon. It explains that contractors must be licensed, provide written agreements and notices of rights to workers, have a bond, pay and give notice of minimum wage, and explains that workers have legal rights, may make claim for unpaid wages or for on the job injuries, may earn

unemployment benefits, and are protected against discrimination. It includes the address of each Agency office. Form WH-151S is the same form in Spanish.

7) Form WH-153 is an Agency form headed "Agreement Between Contractor and Workers (To be executed by both parties)." It is intended to memorialize between the labor contractor and the worker such items as rate of pay, bonus, personal loans, housing, health and day care services, employment conditions, equipment and clothing, the existence of any labor dispute, the owner of the land, any other working conditions, and acknowledgment of the WH-151 rights and remedies form and provisions of the federal service contract act, if applicable. It is intended to be signed by each worker and the contractor before each job begins. Form WH-153S is the same form in Spanish.

8) Oregon farm labor contractors are required by statute to furnish each worker with an itemized written statement of earnings and deductions each time the worker is paid.

9) On July 21, 1993, Sifuentez interviewed Deloris Gallaga, Martin Gallaga, and Rueben Pallacios at the Starr Inn in Doris, California. They each stated that they had worked for Respondent in both Oregon and California for \$4.25 an hour, were paid in cash, and were not given a written statement of deductions. They each stated that they had not received written statements of their rights and remedies (WH-151) and had not received written agreements signed on behalf of Respondent containing the

terms and conditions of employment (WH-153) at the time of hire and before any work was performed. They were not working on July 21 because their transportation had broken down. They stated that their co-workers would be available in the evening.

10) On the evening of July 21, 1993, Sifuentez returned to the Starr Inn and interviewed Doroteo Avila, Roque Avila, Jovito Campos, Alberto Castillo-Garcia, Guillermo Cervantes, Refubio Flores, Juan Gonzales, Lorenzo Gonzales, Jose Gonzalez, Juan Guyardo, Humberto Hernandez, Mardento Hernandez-Delgado, Hilario Lora, Gilberto Martinez, Pedro Morado, Isaac Morales, Alfredo Rosales, Roberto Zamudia, and Simon Zamudia. All claimed to have worked in Oregon for Respondent under a foreman named Lala. They stated that they were transported by bus to a job site north of Klamath Falls, Oregon. They did not know the farmer's name. All stated that they were paid \$4.25 an hour in cash and were not given a written statement of deductions. All stated that they had not received written statements of their rights and remedies (WH-151) and had not received written agreements signed on behalf of Respondent containing the terms and conditions of employment (WH-153) at the time of hire and before any work was performed.

11) On July 29, 1993, Sifuentez met with Respondent and Rana Khan at the Agency's Medford office. He had requested payroll records and information covering Respondent's work in Oregon in 1993. Respondent supplied a lists of workers paid by check and a list of cash payments. Thereafter, Sifuentez continuously asked

Respondent for documentation of hours worked in Oregon, payments made, and deductions provided to the workers. On or about August 3, 1993, Respondent submitted a revision of those lists, showing additional workers paid.

12) Sifuentez understood Respondent to say on July 29, 1993, that neither Respondent nor his foreman or bookkeeper had given out the WH-151 and WH-153 forms to the workers in 1993. Respondent also said that workers who were paid cash received no listing of deductions.

13) On August 12, 1993, Sifuentez wrote to Respondent listing 36 individuals whom he had determined had worked for Respondent in Oregon and had not been paid the minimum wage of \$4.75 an hour. The list included those persons Sifuentez had interviewed at the Starr Inn. His letter also questioned the total number of workers who had worked in Oregon for Respondent because Sifuentez had developed information showing over 50 workers in Oregon on several days in July and over 80 workers on three occasions. He asked for further documentation. Finally, Respondent submitted a final revised list of workers for 1993 in Oregon.

14) At times material herein, Rana Khan resided in Yuba City, California, where his normal occupation was with an engineering firm. Beginning in 1993, he acted as bookkeeper for Respondent on an on-call basis. He is Respondent's brother-in-law. In 1994, he also acted in a bookkeeping capacity for Dan and Tammy Shuck. He speaks English and Punjabi.

* See footnote, Finding of Fact 29, *infra*.

15) Rana Khan began his book-keeper duties with Respondent after the 1993 labor season started. He located temporarily in Doris. In 1993, the foreman on the job kept track of the number of hours worked by each worker and turned that in to the book-keeper. Workers were paid each two weeks. Lala was the main foreman and knew whether the work was in California or Oregon. Lala also was in charge of giving written rights of workers (WH-151) and work agreements (WH-153) to the workers. He was out of the country at the time of hearing and was not available. He had the original records of work location and distribution of documents with him.

16) Rana Khan prepared the lists of workers and payments submitted to Sifuentez in July 1993 using available records. The lists were revised and expanded as Rana Khan compiled them and more work was performed. They included only those who worked in Oregon. He denied that either he or Respondent told Sifuentez in July 1993 that WH-151 and WH-153 forms were not provided to the workers in 1993.

17) Respondent gave out the WH-151 and WH-153 forms to some of the workers in 1993. He could provide no record of the written receipt by each worker. He denied that he told Sifuentez in July 1993 that WH-151 and WH-153 forms were not provided to the workers.

18) Respondent acknowledged that he had not filed a record of farmers with whom he contracted in 1992 or in 1993. He testified that the work for each farmer was of short duration and did not involve written contracts because the farmers would not bother

with written contracts for only a few days work. He stated his belief that the annual requirement for such reports referred only to written contracts.

19) Rana Khan discussed the wages claimed by Deloris Gallaga with the worker. An additional payment was made, satisfying that claim. The claims of Martin Gallaga and Rueben Pallacios were also resolved.

20) Sifuentez pursued wages claims for 19 of the 22 persons interviewed at the Starr. When Respondent did not respond with payment, Sifuentez initiated a claim against Respondent's bond with Amwest Surety. Amwest demanded documentation, which Sifuentez supplied on March 11, 1994.

21) On or about March 17, 1994, Amwest officially advised Respondent in writing of the Agency's claim against the bond, asking for resolution or defenses. When it did not receive a satisfactory response, Amwest eventually paid a total of \$3,750 to the Agency for the 19 workers listed in the Agency's March 11 letter. At the time of the hearing, 11 of those individuals had been located and paid by the Agency.

22) Sifuentez determined that a total of 105 individuals had worked for Respondent in Oregon in 1993. He arrived at this number from the records Respondent provided, from the persons he interviewed, and from a list of workers provided by Deloris Gallaga. He assumed that those listed on Respondent's records were Oregon workers because he had asked for Oregon records. Relying on Respondent's statement that required documents were not provided, he also determined that Respondent violated each

document requirement for each worker.

23) Some workers who worked for Respondent in 1993 received forms listing their rights (WH-151) and forms of agreement disclosing terms and conditions of each job (WH-153) through Respondent. While the workers did not read English, their children did and the forms were explained to them by the children. These workers knew the Oregon and California minimum wage and where to go to seek assistance with wages. They were consistently provided with statements of earnings and deductions, which were read to them by their children. Once a job was completed and they were paid for it, they did not keep the documents. They worked for Respondent in Oregon in 1993 but did not work for Respondent in Oregon in 1994.

24) The workers whom Respondent provided to the Oregon farmers in 1993 performed thinning and weeding of sugar beets. Respondent billed for these services by listing the number of workers provided and hours worked for each day. The number of workers multiplied by the hours worked by the crew each day was then multiplied by an hourly rate (\$4.75 in Oregon). The foreman's services were billed at \$5.00 an hour. The total charge for workers and foreman were added together and then 25 percent of that figure was added for FICA, workers compensation, unemployment, and Respondent's commission. It was this final total that was billed to and paid by the farmer.

25) At times material, James Moore was a farmer in Klamath

County, Oregon, and Modoc and Siskiyou counties in California. In 1993, he retained Respondent to provide labor for his sugar beet operation in Oregon. He was satisfied with Respondent's crew and services and planned to use him again in 1994. Moore then learned that Respondent had no 1994 Oregon license.

26) At times material, Dan and Tammy Shuck farmed land northeast of Merrill, Oregon, and south of Tulelake in California. In 1993, they retained Respondent to provide labor for their sugar beet operation in Oregon. They were satisfied with Respondent's crew and services and planned to use him again in 1994.

27) In June 1994, Ramirez received an allegation that Respondent was working in Oregon near Klamath Falls. He checked for the presence of a work force in the Merrill and Malin areas near Klamath Falls. He knew that farmers needed labor in June and July for weeding and thinning sugar beets.

28) Ramirez interviewed Moore in mid-June 1994. Moore was upset with the Agency over Respondent's unlicensed status, believing it was due to an increased bonding requirement. He had difficulty locating labor and his crops needed work. He asked Ramirez about hiring workers who also worked for Respondent. Ramirez told him he could hire available workers, but could not use Respondent as a source. Ramirez explained the law and supplied Moore with written definitions of farm labor contractor activity. Moore was upset due to difficulty in getting labor and perceived Ramirez as accusatory and unsympathetic.

29) Respondent was doing work for Moore in California in June 1994 and Moore learned of an idle crew through its foreman, "Alvaro." Moore told "Alvaro" there was Oregon work. Workers showed up and Moore hired them directly. Moore's CPA cut the individual workers' paychecks for Moore's signature and handled withholding and taxes. Moore paid "Alvaro" only as a foreman and not for supplying workers. He did not pay Respondent for supplying workers in 1994.

30) On June 30, 1994, Ramirez spoke with four workers in Oregon south of Klamath Falls. Jueventino Alvarado, Genovva Orosco, Hugo Orosco, and Jose Ortega all stated they had been working on the Shuck property in Oregon. They said they had been recruited by Serefino Alvaro Pina, a foreman for Respondent, and that they had worked for Respondent. They had paychecks signed by Dan Shuck, but were convinced they had worked for Respondent. They were reporting that day to work for Respondent in California.

31) In June 1994, Jefferson State Plumbing, Merrill, Oregon, provided portable toilets to the Shuck property. The toilets were ordered by Pina, who Jefferson State knew had worked for Respondent as a foreman, and were billed to Respondent.

32) On or about June 30, 1994, Ramirez spoke with Dan Shuck, who stated he had hired and paid the farm laborers himself. Ramirez understood him to say that he had used Respondent's services and prepared a

statement for Shuck's signature. On July 25, 1994, when Ramirez again met with the Shucks, Dan Shuck denied that he had said he used Respondent in 1994 and refused to sign a statement.

33) When the Shucks learned that Respondent had no 1994 license, they hired workers directly. They dealt with Serefino Pina, who had also been a foreman for Respondent. They hired Rana Khan to do the paperwork. They did not know where Pina obtained the workers. They paid Rana Khan as a bookkeeper and paid Pina as a foreman; neither was paid any sum for supplying workers. They did not pay Respondent for supplying workers in 1994.

34) Eliasar Castillo worked for Respondent as a foreman in 1994, from about May to August. He was hired by Felipe Mendoza, who acted as Respondent's general manager and who showed him the various work locations. Serefino Pina was also a foreman, with the same duties of making sure that the workers did their jobs. The workers provided their own transportation. Castillo lived in Klamath Falls and knew where the Oregon-California state line was located. He was aware that Respondent was prohibited from working in Oregon. He stated that there was some work in Oregon, but not for Moore or the Shucks. He did not recall giving pre-work documents to workers in Oregon. He did recall that all checks for his services and for his crew came from Respondent through Rana Khan. He stated he was told by another brother

of Respondent to say in Oregon that the farmer was paying him.

35) Respondent and Rana Khan were not altogether credible. Neither could satisfactorily explain the lack of resistance to the bonding action. Both testified under solemn affirmation that their Oregon workers in 1993 received required worker's rights and disclosure statements and also were given statements of deductions, but admitted there were no copies in their files, which they attributed to the disappearance of the foreman Lala. Both testified that Sifuentez was confrontive and seemed to have decided that Respondent had violated the law. Respondent admitted that he had not filed the required annual listing of Oregon contracts, but stated that he thought only written contracts need be reported. On the other hand, there was evidence from some workers that they routinely received the required documents. The forum has credited only so much of the testimony of Respondent and Rana Khan as was not overcome by more credible documents or testimony.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent Mohammad Nawaz Khan utilized the personal services of persons within this state in connection with the production or harvesting of farm products for an agreed remuneration or rate of pay.

2) Respondent was a licensed farm labor contractor in Oregon and in California through May 30, 1993. Respondent was not licensed in Oregon after May 1993.

3) In 1993, Respondent failed to pay wages when due that had been

entrusted to him for that purpose to 19 persons who had worked for Respondent in Oregon.

4) In 1993, Respondent failed to furnish to each of 22 workers at the time they were hired a written statement describing the workers' rights and remedies.

5) In 1993, Respondent failed to execute written agreements, containing the terms and conditions of employment, between himself and each of 22 workers at the time of hire and before any work was performed.

6) On or after April 30, 1993, Respondent failed to file with the Bureau of Labor and Industries written information showing dates, types, and location of work for each farmer with whom Respondent contracted in Oregon in 1992.

7) On or after April 30, 1994, Respondent failed to file with the Bureau of Labor and Industries written information showing dates, types, and location of work for each farmer with whom Respondent contracted in Oregon in 1993.

8) In 1993, Respondent failed to furnish to each of 22 workers at the time they were paid with an itemized statement of deductions taken from the workers' pay.

9) Respondent did not recruit workers to perform farm labor for James Moore in Merrill, Oregon, in June and July 1994.

10) Respondent did not recruit workers to perform farm labor for Dan and Tammy Shuck in Merrill, Oregon, in June and July 1994.

* The forum infers from other evidence that this was Serefino Alvarado (or Alvaro) Pina, aka Serefino Pina, aka Serefin Alvarado.

11) Respondent did not carry an Oregon farm labor contractor's license in 1994.

CONCLUSIONS OF LAW

1) At times material herein, ORS 658.405 provided, in part:

"(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 * * *. However, 'farm labor contractor' does not include:

"(a) Farmers ***."

At times material herein, ORS 658.407 provided:

"The Commissioner of the Bureau of Labor and Industries shall administer and enforce ORS 658.405 to 658.503 and 658.830, and in so doing shall:

"(1) Investigate and attempt to adjust equitably controversies between farm labor contractors and their workers with respect to claims arising under ORS 658.415 (3).

"(2) Take appropriate action to establish the liability or lack thereof of the farm labor contractor for wages of the employees of the farm labor contractor and if appropriate proof exists of liability for wages the commissioner shall pay the same or such part thereof as the commissioner has funds on deposit or cause the surety company to forthwith pay the entire liability or such part thereof as the sums due under the bond will permit.

"(3) Adopt appropriate rules to administer ORS 658.405 to 658.503 and 658.830."

At times material herein, ORS 658.410 provided, in part:

"(1) Except as provided by ORS 658.425, 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."

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

2) At times material herein, ORS 658.440 provided, in part:

"(1) 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."

Respondent's failure in 1993 to promptly pay 19 workers all money entrusted to him for that purpose constituted 19 violations of ORS 658.440 (1)(c).

3) At times material herein, ORS 658.440 provided, in part:

"(1) 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 child 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. :S2. 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."

At times material herein, OAR 839-15-310 provided

"(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 occurs 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."

Respondent's failure to provide to each of 22 workers in 1993 the disclosure statements required by ORS 658.440 (1)(f) constituted 22 violations of that statute.

4) At times material herein, ORS 658.440 provided, in part:

"(1) Each person acting as a farm labor contractor shall:

"(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."

At times material herein, OAR 839-15-360 provided, in part:

"(1) Farm * * * Labor Contractors are required to file information relating to work agreements between the Farm * * * Labor Contractors and their workers with the Bureau.

"(2) The Commissioner has developed Form WH-153 which, in conjunction with Form WH-151, * * * can be used to comply with this rule. Farm * * * Labor Contractors may use any form for filing the information so long as it contains all the elements of Form WH-153 and Form WH-151.

"*****

"(4) Farm * * * Labor Contractors are required to furnish their workers with a written statement disclosing the terms and conditions of employment, including all the elements contained in Form WH-151 and * * * to execute a written agreement with their workers prior to the starting of work. The written agreement must provide for all the elements contained in Form WH-153. * * * A copy of the agreement must be furnished to workers

prior to the workers starting work."

Respondent's failure to execute with each of 22 workers in 1993 the written agreement containing the terms and conditions of employment as required by statute constituted 22 violations of ORS 658.440(1)(g).

5) At times material herein, ORS 658.440 provided, in part:

"(1) Each person acting as a farm labor contractor shall:

"*****

"(e) File with the Bureau of Labor and Industries, as required by rule, information relating to work agreements between the farm labor contractor and farmers and between the farm labor contractor and workers or information concerning changes in the circumstances under which the license was issued."

At times material herein, OAR 839-15-350 provided:

"(1) Farm Labor Contractors are required to file information relating to their agreements with farmers with the Bureau.

"(2) The Commissioner has developed Form WH-152 which can be used to comply with this rule. Farm Labor Contractors may use any form for filing the information so long as it contains all the elements of Form WH-152.

"(3) Farm Labor Contractors must file this information with the Bureau by April 30 of each year. Amended or updated information may be filed at any time. All information must be filed with the Wage and Hour Division, Farm

Labor Unit, 3865 Wolverine Street, N.E., Salem, OR 97310."

Respondent's failure to file a form WH-152 or its equivalent by April 30, 1993, for 1992 constituted a violation of ORS 658.440(1)(e).

6) Respondent's failure to file a form WH-152 or its equivalent by April 30, 1994, for 1993 constituted a violation of ORS 658.440(1)(e).

7) At times material herein, ORS 658.440 provided, in part:

"(1) Each person acting as a farm labor contractor shall:

"*****

"(h) Furnish to the worker each time the worker receives a compensation payment from the farm labor contractor, a written statement itemizing the total payment and amount and purpose of each deduction therefrom, hours worked and rate of pay or rate of pay and pieces done if the work is done on a piece rate basis, and if the work is done under the Service Contract Act (41 U.S.C. :S2. 351-401) or related federal or state law, a written statement of any applicable prevailing wage."

At times material herein, OAR 839-15-370 provided, in part:

"(1) Farm and Forest Labor Contractors are required to furnish each worker, each time the worker receives a compensation payment from the contractor, a written itemized statement of earnings. The written itemized statement must include:

"(a) The total gross payment being made;

"(b) The amount and purpose of each and every deduction from the gross payment;

"(c) The total number of hours worked during the time covered by the gross payment;

"(d) The rate of pay;

"(e) If the worker is paid on a piece rate, the number of pieces done and the rate of pay per piece done;

"(f) The net amount paid after any deductions.

"(2) If the worker is being paid for work done under any law which requires the payment of a prevailing rate of wage (such as the Federal Service Contract Act, Davis-Bacon Act or state prevailing wage law), Farm and Forest Labor Contractors must furnish the worker with a written statement specifying the amount to the prevailing wage rate required to be paid.

"(3) The Commissioner has prepared Form WH-154 which contains all the elements required by, and can be used to comply with, this rule. Farm and Forest Labor Contractors may use any form for furnishing this information to workers so long as it contains all the elements of Form WH-154."

Respondent's failure in 1993 to furnish to each of 22 workers at the time they were paid with an itemized statement of deductions taken from the worker's pay constituted 22 violations of ORS 658.440(1)(h).

8) At times material herein, OAR 839-15-125 provided:

"No person may perform the activities of a Farm or Forest Labor Contractor without first obtaining a temporary permit or license issued by the Bureau. No person may perform the activities of a Forest Labor Contractor or operate a farm-worker camp without first obtaining a special indorsement from the Bureau authorizing such performance. Unless otherwise specifically exempt, and except for cooperative corporations, no person may perform the duties of a farm or forest labor contractor or operate a farm-worker camp under a license issued to be corporation unless the person is also licensed to perform such duties."

Respondent did not act as a farm labor contractor for James Moore in Merrill, Oregon, in June and July 1994, and did not violate ORS 658.410 and OAR 839-15-125.

9) Respondent did not act as a farm labor contractor for Dan and Tammy Shuck in Merrill, Oregon, in June and July 1994, and did not violate ORS 658.410 and OAR 839-15-125.

10) At times material herein, ORS 658.440 provided, in part:

"(1) 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 was not required to carry an Oregon farm labor contractor's license in 1994 and did not violate ORS 658.440(1)(a).

11) At times material herein, ORS 658.453 provided, in part:

"(1) 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)***."

At times material herein, OAR 839-15-508 provided, 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;

"(b) Failure of the farm or forest labor contractor to, before beginning work on any contract or other agreement:

"(A) Display the license or temporary permit to the person to whom workers are to be provided, or to the person's agent; or

"(B) Provide to the person to whom workers are to be provided, or to the person's agent, a copy of the license or temporary permit pursuant to ORS 658.453(f) [sic].

"*****"

"(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);

"*****"

"(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);

"*****"

"(j) Failing to furnish each worker with an itemized deduction statement and statement as to the rate of wage to be paid and other information in violation of ORS 658.440(1)(h);

"*****"

"(s) Failing to carry the license in violation of ORS 658.440(1)(a).]"

The Commissioner of the Bureau of Labor and Industries is authorized to impose civil penalties for violations of ORS 658.405 to 658.503 and 658.830. The penalties imposed in the Order below is a proper exercise of that authority.

OPINION

As the result of separate investigations initiated in 1993 and 1994, the Agency brought multiple charges of violations of the Oregon Farm Labor Contractor Act (ORS 658.405 to 658.503) against Respondent. For 1993, Respondent was charged with failure to pay wages when due to 19 persons employed by respondent in Oregon with funds entrusted to Respondent for that purpose, with failure

to furnish to 105 workers at the time they were hired, recruited, or solicited a written statement describing the worker's rights and remedies, with failure to execute written agreements between Respondent and 105 workers containing working terms and conditions, with failure to furnish to 75 workers employed by Respondent required itemized statements of earnings and deductions at the time Respondent paid them, and with failure to file a form showing the dates, types, and location of work and the name of the farmer contracted with by Respondent in Oregon in 1992 and in 1993. For 1994, Respondent was charged with recruiting, soliciting, and supplying 32 workers to perform farm labor for James Moore in Merrill, Oregon, while unlicensed, with recruiting, soliciting, and supplying 29 workers to perform farm labor for Daniel and Tammy Shuck in Merrill, Oregon, while unlicensed, and with failure to carry a labor contractor's license while acting as a farm labor contractor as described. The Agency sought a civil penalty for each violation, including a penalty as to each individual worker involved in each violation.

It is the Agency's burden to establish by a preponderance of the evidence that Respondent violated the statutes in the manner described. *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, 780 P2d 743 (1989), *rev den* 308 Or 660, 784 P2d 1101 (1989). Thus, the Agency must present evidence inferring that the fact of violation is "more probably true than false." *In the Matter of Sunnyside Inn*, 11 BOLI 151 (1993). Using this standard, it was established to the forum's satisfaction by a preponderance of

evidence on the whole record that Respondent in 1993 failed to pay wages when due to 19 Oregon employees with funds entrusted to Respondent for that purpose:

1. Respondent billed the services of workers in Oregon at \$4.75 an hour in 1993 and was paid at that rate by Oregon farmers.
2. 19 workers in Oregon were initially paid \$4.25 an hour.
3. The Agency made claim for the differential against Respondent's bond.
4. The bond claim was paid.

It was established by a preponderance of evidence on the whole record that Respondent in 1993 failed to furnish to 22 workers at the time they were hired, recruited, or solicited with a written statement describing the worker's rights and remedies:

1. Respondent hired, recruited, or solicited workers in Oregon in 1993.
2. 22 of Respondent's workers in Oregon stated that they did not receive a written statement describing their rights and remedies when they were hired, recruited, or solicited.
3. Respondent had no record of providing the required statement to those 22 workers.
4. Respondent had no record of providing the required statement to as many as 83 additional workers, but some of these, though not all, received such statements.

It was established by a preponderance of evidence on the whole record that Respondent failed to execute

written agreements containing working terms and conditions between himself and 22 workers in 1993:

1. Respondent hired and employed workers in Oregon in 1993.
2. 22 of Respondent's workers in Oregon stated that Respondent failed to execute written agreements containing working terms and conditions between himself and the 22 workers.
3. Respondent had no record of executing written agreements containing working terms and conditions between himself and those 22 workers.
4. Respondent had no record of executing written agreements containing working terms and conditions between himself and as many as 83 additional workers, but some of these, though not all, received such agreements.

It was established by a preponderance of evidence on the whole record that Respondent failed to file any report showing the dates, types, and location of work and names of farmers contracted with in Oregon for 1992 or 1993.

1. Respondent admitted he had filed no annual report of farmers contracted with for 1992 or 1993.

It was established by a preponderance of evidence on the whole record that Respondent failed to furnish to 22 workers employed by Respondent in 1993 itemized statements of earnings and deductions as required at the time Respondent paid the workers:

1. Respondent employed workers in Oregon in 1993.

2. 22 workers employed by Respondent in Oregon stated that Respondent failed to furnish them with itemized statements of earnings and deductions as required at the time Respondent paid them.

3. Respondent had no record of furnishing those 22 workers itemized statements of earnings and deductions.

4. Respondent had no record of furnishing itemized statements of earnings and deductions to as many as 53 additional workers, but some of these, though not all, received such agreements.

It was not established by a preponderance of evidence on the whole record that Respondent in 1994, while unlicensed, recruited, solicited, and supplied 32 workers to perform farm labor for James Moore in Merrill, Oregon:

1. Respondent was not licensed in Oregon in 1994.
2. Respondent denied employing workers in Oregon in 1994.
3. James Moore denied using Respondent as a contractor in Oregon in 1994.
4. One of Respondent's foremen stated that there was some work in Oregon in 1994, but not for Moore.
5. Moore hired workers in Oregon in 1994 who had also worked for Respondent in California.
6. Moore paid those workers directly; there was no record that Moore paid anything to Respondent in 1994.

It was not established by a preponderance of evidence on the whole

record that Respondent in 1994, while unlicensed, recruited, solicited, and supplied 29 workers to perform farm labor for Daniel and Tammy Shuck in Merrill, Oregon.

1. Respondent was not licensed in Oregon in 1994.
2. Respondent denied employing workers in Oregon in 1994.
3. Daniel and Tammy Shuck denied using Respondent as a contractor in Oregon in 1994.
4. One of Respondent's foremen stated that there was some work in Oregon in Oregon in 1994, but not for the Shucks.

5. The Shucks hired workers in Oregon in 1994 who had also worked for Respondent in California.

6. The Shucks paid those workers directly.

7. Four of Respondent's workers stated that they worked in Oregon in June 1994 for Respondent, but their paychecks were issued by the Shucks.

8. The Shucks hired Rana Khan as a bookkeeper in 1994; there was no evidence that the Shucks paid anything to Respondent or to Rana Khan for supplying workers in 1994.

It was not established by a preponderance of evidence on the whole record that Respondent in 1994 acted as a farm labor contractor and failed to carry a labor contractor's license.

In formulating its factual findings, the forum has confined itself to the record, as it is obligated to do. It would be speculative to predicate from 50 to

80 individual violations of supplying worker documents upon Respondent's alleged admissions to the investigator, which Respondent later recanted at hearing, particularly where the workers who testified stated that such documents were generally supplied to them. Similarly, where the farmers and Respondent deny contracting in Oregon in 1994, the opinion of absent workers that they worked for Respondent, although paid by the farmer, and the statement of a foreman regarding work for other farmers in Oregon is insufficient to overcome those denials. Based on the forum's evaluation of the evidence, the Order below is appropriate.

Respondent's Exceptions

Respondent excepted to the findings and conclusions of the Proposed Order as follows: Exception:

1. 19 violations of ORS 658.440(1)(c) in 1993 (failing to pay when due all monies entrusted to him for that purpose);
2. 22 violations of ORS 658.440(1)(f) (failing to furnish 22 workers written statements of their rights and remedies);
3. 22 violations of ORS 658.440(1)(g) (failing to execute written agreements containing labor terms and conditions);
4. 22 violations of ORS 658.440(1)(h) (failing to furnish workers with written statements itemizing deductions from their pay);
5. Respondent admitted to two violations of ORS 658.440(1)(e)

(failure to file forms regarding contracts with farmers in 1992 and 1993), but excepted to the civil penalty proposed of \$500 per violation as "an unconscionable abuse of agency discretion" for "technical, paperwork violations."

Respondent argues that the failure to pay count was based on unrecorded and undocumented interviews of persons who did not testify and did not otherwise make claim against Respondent. Respondent also noted an "inability to rebut the allegations due to a missing former foreman and missing records, and to a bonding company action of which Respondent had no notice." In the latter regard, Respondent claims no prior notice and no opportunity to defend the bonding action, stating "It is undisputed that the bonding company addressed its notice to respondent incorrectly and the notice was not delivered to respondent," and that BOLI "made no effort to notify respondent of the claim against the bond."

The Agency investigator interviewed 22 individuals who had worked for Respondent in Oregon in 1993; all indicated they had not received the rights and remedies statements, executed written agreements containing labor terms and conditions, or been furnished with written statements itemizing their deductions. All 22 told the investigator that they had received the lower California wage for their Oregon work. Three of these were later paid when they confronted Respondent directly. The remaining 19 were paid by the bonding company.* Respondent

testified to receiving notice of the bonding action and discussing it with the Agency investigator. The Agency evidence regarding these 22 interviews was hearsay, but nothing on this record indicates that it was anything but reliable. Respondent's exceptions 1 to 4 are overruled.

As to the amount of civil penalty of \$500 for each admitted violation of ORS 658.440(1)(e), ORS 658.453 authorizes the Commissioner to impose a penalty of up to \$2,000 for each violation. The penalties imposed herein are reasonable, and Respondent's exception 5 is overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, Respondent MOHAMMAD NAWAZ KHAN, dba Khan Farm Labor Contractor, is hereby ordered to deliver to the Bureau of Labor and Industries, Fiscal Services Office Suite 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 FIFTY-THREE THOUSAND DOLLARS (\$53,000), plus any interest thereon which accrues at the annual rate of nine percent between a date ten days after the issuance of this Final Order and the date said Respondent complies herewith. This assessment is made as civil penalty against said Respondent as follows: for 19 violations of ORS 658.440(1)(c), \$19,000 (\$1,000 per violation); for 22 violations of ORS 658.440(1)(f), \$11,000 (\$500 per violation); for 22 violations of ORS 658.440(1)(g), \$11,000 (\$500 per violation); for two violations of ORS 658.440(1)(e), \$1,000 (\$500 per

violation; for 22 violations of ORS 658.440(1)(h), \$11,000 (\$500 per violation; total \$53,000.

**In the Matter of
A.L.P. INCORPORATED,
dba A.L.P. Incorporated, a Corporation of Idaho, dba Red-Eye Hut, Inc.,
and Allen L. Pieper, Respondents.**

Case Number 05-96

Final Order of the Commissioner

Jack Roberts

Issued January 8, 1997.

SYNOPSIS

Female complainant was employed by corporate respondent and was sexually harassed by individual respondent, owner of the corporation. The Commissioner found the corporate respondent, together with the individual respondent who aided the unlawful practice, liable for complainant's resulting emotional distress. ORS 659.030 (1)(b) and (g); OAR 839-07-550(1) and (3); 839-07-555(1) and (3).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 4, 1996, in a conference room of the offices of the Employment Department, 375 SW 2nd Avenue,

* The gross amount was paid to BOLI. At the time of the hearing, 11 of the 19 workers had actually collected checks from the Agency.

Ontario, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. A.L.P. Incorporated, dba Red-Eye Hut, Inc., (Respondent A.L.P.) and Allen L. Pieper (Respondent) were represented by William C. Tharp, Attorney at Law, Ontario. Respondent was present throughout the hearing on his own behalf and as the representative of Respondent A.L.P. Teresa Getman (Complainant) was present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses: Complainant, Complainant's aunt Rebecca Ramirez, Complainant's friend Rebecca Smith, Complainant's husband Randy Getman, and Agency Senior Investigator Susan Moxley (by telephone).

Respondents called the following witnesses: Respondent, Respondents' former employee Roberta Leija, Respondents' neighboring shopkeeper Charlotte O'Leary, and Respondent's friend Wes Sessums.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, make the following Rulings on Motions and Objections, 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 24, 1994, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondents. After investigation and review, the Agency issued

an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On August 28, 1995, the Agency prepared for service on Respondents Specific Charges, alleging that Respondents discriminated against Complainant in her employment based on her sex in violation of ORS 659.030(1)(a), (b), and (g). With the Specific Charges, the Agency served on 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; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

3) A copy of those Charges, together with items a) through d) of Procedural Finding 2 above, were sent by US Post Office certified mail, postage prepaid, to the Respondents and their counsel on August 31, 1995. Both the Notice of Contested Case Rights and Procedures (item b) and the Bureau of Labor and Industries Contested Case Hearings Rules (item d) at OAR 839-50-130(1), provided that an answer must be filed within 20 days of the receipt of the charging document. US Post Office certified mail return receipts showed delivery on September 2, 1995.

4) On September 22, 1995, Respondents through counsel timely filed their answer wherein Respondents admitted employing Complainant, a female, in Oregon and that Respondent was her immediate supervisor.

Respondents denied any unlawful employment practices or damages to Complainant based on Complainant's female sex.

5) On October 6, 1995, the Forum issued a discovery order requiring each participant to submit a summary of the case pursuant to OAR 839-50-200 and 839-50-210. Respondents timely submitted their case summary. The Agency sought a resetting of the hearing and after discussions with the participants, the ALJ set the hearing for January 3, 1996.

6) On November 21, 1995, the matter was postponed on the ALJ's motion after discussion with the participants to January 4, 1996, and the due date for case summaries was extended. Thereafter, the Agency filed its case summary and Respondents filed an additional list of witnesses prior to the hearing.

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

8) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) At the commencement of the hearing, the Agency moved to dismiss the portion of the Specific Charges

alluding to constructive discharge and economic damages for lost wages. The ALJ granted the Agency's motion.

10) At the commencement of the hearing, Respondents filed a written motion to dismiss, a copy of which was served on the Agency. The ALJ denied Respondents' motion in its entirety. The ALJ's reasoning upon this motion and upon counsel's other objection is contained in the section entitled "Rulings on Motions and Objections" below.

11) The proposed order, containing an exceptions notice, was issued August 7, 1996. Exceptions were due August 19, 1996. Respondents and the Agency timely filed exceptions which are dealt with in the Opinion section of this order.

RULINGS ON MOTIONS AND OBJECTIONS

Respondents' written motion to dismiss was based on a purported lack of statutory authority for this forum to grant non-economic damages and contained a jury trial demand. The ALJ denied Respondents' motion in its entirety based on case law confirming the Commissioner's authority through ORS 659.060 and 659.010 to issue, after hearing, an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. Such effects include any economic or non-economic damage suffered by a complainant because of the practice.* That ruling is confirmed.

* "The statutes and rules upon which this contested case proceeding is based provide for redress of the Complainant's grievance through administrative procedures." *In the Matter of Dunkin' Donuts, Inc.*, 8 BOLI 175 (1989), citing *Schipporeit v. Roberts*, 308 Or 199, 778 P2d 953 (1989); *Holien v. Sears, Roebuck and Co.*, 298 Or 76, 689 P2d 1292 (1984); *City of Portland v. Bureau*

At the commencement of the hearing, counsel for Respondents orally objected to the fact that the Case Presenter and the ALJ were both employees of the convening authority, the Commissioner. Counsel argued that this was inherently unfair. The ALJ explained that the Case Presenter represented the Agency and the Agency's view and finding from its investigation. The ALJ explained further that Respondents were entitled to a hearing de novo, that neither the forum nor Respondents were bound by the Agency's initial determination, and that it was the Case Presenter's duty to present to the ALJ original evidence of the facts so that the ALJ could determine whether the Agency made the right interpretation when it said that Respondents had committed unlawful employment practices. The ALJ further noted that it was a commonality of

administrative law that the individual prosecuting and the individual decision maker both be employees of the same entity. Respondents made no showing of actual bias.^{*} Respondents' objection was noted and overruled. That ruling is confirmed.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent A.L.P. was an Idaho corporation doing business in Oregon as A.L.P. Incorporated, a corporation of Idaho, which did business at 247 S. Oregon Street, Ontario, Oregon, as Red-Eye Hut, a retail smoke shop and tobacco store. Respondent Pieper was owner and president of the corporation. Respondent A.L.P. utilized the personal services of one or more individuals, reserving the right to control the means by which such service was performed.

of Labor and Industries, 298 Or 104, 690 P2d 475 (1984); *Gaudry v. Bureau of Labor*, 48 Or App 589, 617 P2d 668 (1980); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (remanded on other grounds); *School District No. 1 v. Nilsen*, 271 Or 461, 534 P2d 1135 (1975); *Williams v. Joyce*, 4 Or App 482, 479 P2d 513 (1971).

"Where respondent's adverse employment decision is the primary reason for complainant's mental suffering, * * * this forum may award compensation." *In the Matter of Portland General Electric*, 7 BOLI 253 (1988); *aff'd*, *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).

"[Employer] also contends that the Commissioner's award of damages is unconstitutional because it violates [employer's] right to a jury trial guaranteed by Article I, section 17 and Article VII, section 3 of the Oregon Constitution. This argument was considered and rejected in *Williams v. Joyce*, 4 Or App at 500-502, 479 P2d 513, and we have no reason to reconsider that holding." *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (remanded on other grounds).

* The mere fact that a hearings referee is an employee of the agency is insufficient to prove bias or prejudice. *In the Matter of Jose Linan*, 13 BOLI 24 (1994); *In the Matter of Clara Perez*, 11 BOLI 181 (1993).

Administrative agencies typically investigate, prosecute, and adjudicate cases within their jurisdiction. This combination of functions by itself does not violate due process. *Perez, supra*, citing *Fritz v. OSP*, 30 Or App 1117, 569 P2d 654 (1977); *Withrow v. Larkin*, 421 US 35 (1975); *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 514 P2d 888 (1973), *rev den* (1974).

2) At times material between May and late July 1994, Complainant, a female, was employed as a retail clerk at the Red-Eye Hut. She was the only employee and Respondent was her immediate supervisor.

3) Red-Eye Hut had for sale such items as briar pipes, meerschaum pipes, metal pipes, bongs, waterpipes, pipe tobacco, pipe parts, scales, packaging equipment, coffee, cigars, cigarettes, incense, love oils, and Harley Davidson clothing.

4) In a separate area at the rear of the store, Red-Eye Hut also had for sale what Respondent identified as "adult toys and gifts," which included such items as vibrators and dildos.^{*}

5) Red-Eye Hut was described by witnesses as a "head shop,"^{**} dealing in "drug paraphernalia."

6) The portion of Red-Eye Hut which had for sale the "adult toys and gifts," was described by Complainant as an "adult book store."

7) There were no adult magazines or books for sale at Red-Eye Hut, other than two coloring books. Respondent occasionally sold sexually explicit movies on order, but had no display for them and no viewing facilities.

8) Randy Getman was Complainant's husband. He encouraged Complainant to accept a job at Red-Eye Hut in late May 1994 after he learned from Respondent of an opening for a clerk and mentioned that Complainant

might be interested. Complainant and her husband needed the income and employment was not plentiful in Ontario.

9) Both Complainant and her husband had been in the Red-Eye Hut. Before Complainant went to work there, neither was aware of the sexually oriented items for sale in the back.

10) Rebecca Ramirez is Complainant's aunt. She had lived in the Ontario area since 1942 and was acquainted with Respondent and the Red-Eye Hut as a customer. She advised Complainant against working there because of the allegedly drug-related items sold. She was not aware of the sexually oriented merchandise. She had observed Respondent's interaction with women. As a customer, she had heard him say of some female customers who had just left "there goes a bunch of bitches." On another occasion, Ramirez was near the shop when Respondent saw another woman walking down the street and remarked "boy, look at her boobs, aren't they nice?"

11) Rebecca Smith had lived in Ontario for 11 years and resided there in 1994. She met Complainant through Randy Getman and became her friend. She had worked at a bar near the Red-Eye Hut, had been in the shop, and knew Respondent by sight. At the time, she was not aware of the sexually oriented merchandise.

* dildo *n.* a device of rubber, etc., shaped like an erect penis and used as a sexual stimulator. *Webster's New World Dictionary, 2nd College Edition*, 1986.

** head shop *n. Colloq.* a shop selling items, as posters, incense, marijuana pipes, etc., thought to appeal especially to those in the counterculture. *Webster's New World Dictionary, 2nd College Edition*, 1986.

12) On her first day of work for Respondent, Complainant told a customer that the shop did not sell "adult" items. Respondent corrected her and showed her where those products were. She was offended by the nature of that merchandise, but did not tell Respondent and continued to work there.

13) Also, on or near her first day, because she was unfamiliar with what she termed as the "drug paraphernalia" business, Respondent yelled at her in front of customers: "How many god-damn times do I have to tell you what part goes with what part?"

14) As the employment continued, Respondent never called Complainant by name. In front of customers, he would refer to her as "a dumb blonde," "a dumb fucking blonde bitch," and "a dumb broad."

15) Respondent personally price-marked all of the sexually oriented merchandise, which he stated formed only one quarter of one percent of his sales.

16) On one occasion when Respondent was unpacking a shipment of sexually oriented merchandise, he placed a dildo on the counter and told Complainant that her husband had just been replaced.

17) Complainant was offended by the remark, but just shrugged and walked away. By that time in her employment, she thought that confronting Respondent would just make matters worse.

18) When Complainant wanted to buy some diet pills sold in the shop, Respondent told her she didn't need diet pills, she just needed to have more sex with her husband. On another

occasion when she came to work looking "grumpy," Respondent told her she needed to start getting laid every morning before coming to work because it was a proven fact that it put people in a good mood, and if she ever was in court, she should be sure the judge had been laid that morning.

19) Complainant was offended by these remarks, but did not tell Respondent because she believed he had a sharp tongue and had a bad opinion of women. When he was annoyed, Respondent threatened to "bitch slap" her. Complainant had not heard that term before and was unsure of its meaning; to her, it meant that he would slap her.

20) Respondent commented on women customers with remarks like "look at the tits on her" or "look at the ass on her" or "she used to be my girlfriend, she was really good in bed." He remarked on the size of Complainant's sister-in-law's behind. Each time, Complainant was offended but did not tell Respondent.

21) Respondent's daughter, a child about four years of age, was sometimes in the shop. Complainant read to her, bought her puzzles, and took her to lunch. One day, the little girl was going to the circus with her father and Complainant bent down to ask her about seeing the elephants. When Complainant asked if her daddy was going to buy her an elephant, Respondent slapped Complainant on top of the head. Complainant said nothing, although it hurt.

22) Some days later, Respondent again slapped Complainant on the top of the head. Complainant said that it

hurt and Respondent told her to stop whining.

23) One day when Complainant had parked her car in front of the shop late in the day, Respondent grabbed her by both arms, applied pressure, and called her "a real stupid fucking dweeb" for blocking the parking space.

24) Ramirez saw a bruise on Complainant's arm which Complainant told her was from Respondent grabbing her.

25) On July 27, 1994, there were three visitors in the shop from Boise. Respondent announced he was going to take a nap. When Complainant turned to look at him, he slapped her, telling her not to look at him like that. She felt the slap across her cheek, but it left no mark. She noted the date on her calendar and made an appointment to consult an attorney.

26) Complainant told the attorney about being struck and about Respondent's treatment of her. The attorney mentioned sexual harassment and suggested that she consult the Bureau of Labor and Industries.

27) On July 30, 1994, near closing time, Complainant was shutting the cash register drawer when she saw Respondent's hand near the drawer and stopped. He slapped her across the face and said "you thought you were going to get to slam my fingers in the drawer, didn't you?" The shop closed and she left.

28) Complainant again consulted the attorney, who confirmed that she had a right to quit. He told her to go to

the police. The police took a report and sent her to the District Attorney. The District Attorney sent her to the Bureau of Labor and Industries.

29) Complainant reported each of Respondent's remarks and physical actions during her employment to her husband as they occurred. She told him about the sexual remarks and about being hit. Her reports to him were tearful and she was visibly upset. She repeatedly told her husband, "I really don't want to go to work today." Randy Getman repeated that they needed the money. She did not return to work after July 30.

30) Complainant called Ramirez daily while she worked for Respondent. Complainant told Ramirez about Respondent's remarks, such as about getting more sex, and about being hit on the head and slapped. She complained of stomach upset, nausea, and inability to sleep. Ramirez repeatedly advised Complainant to quit because she feared for her safety. Complainant told her that she and Randy needed the income.

31) On a day when Ramirez was meeting Complainant for lunch, she observed Complainant ask Respondent a question while waiting on a customer. Respondent rolled his eyes and said "there's a dumb blonde for you."

32) Complainant reported the incident of the dildo on the counter to Ramirez on the day it occurred. That was the first Ramirez knew that the Red-Eye Hut had sexually oriented merchandise for sale.

* dweeb, no dictionary definition; presumably a noun with a negative connotation, not known to be gender specific.

33) Complainant spoke with Smith several times after beginning work at the Red-Eye Hut, usually by telephone. Complainant was upset about selling the sexual merchandise. She told Smith about the sexual remarks and about being slapped. She told Smith about the dildo on the counter and the remark about her husband. Smith was away on vacation for three weeks in July 1994. When she returned, Complainant reported more slaps. Smith was relieved when Complainant quit.

34) At the time of the hearing, Complainant was 4 feet 8 inches tall and weighed 105 pounds. Respondent appeared to be approximately 6 feet 5 inches tall, weighing above 270 pounds.

35) On some days, Respondent played cribbage with a friend during business hours at the shop at a desk to the left of the front door. He identified his cribbage playing friends as Wes Sessums and Bud Haselow.

36) Roberta Leija worked for Respondent as a clerk at the Red-Eye Hut in the early 1980's. She did not recall rude language or sexual comments, and had no problems with him as an employer.

37) Charlotte O'Leary ran the Seams Right Sewing Center next door to the Red-Eye Hut. She knew Respondent for a number of years, spoke with him almost daily and had some social contact such as dinners and visits. She considered him big and loud but a good friend. She knew of no sexual advances by Respondent involving his employees or his customers. She knew Complainant, but had no information regarding Complainant's allegations.

38) Wes Sessums played cribbage with Respondent at the front desk near the door of the Red-Eye Hut. He never saw Respondent be abusive to an employee. He never heard Respondent use the term "bitch slap" toward an employee. To Sessums, the term was "just words," used during the cribbage games. He remembered Complainant had worked there, although he thought that she was only present a few times when he played cribbage. He stated he joked with Respondent about getting laid in the early morning. He did not recall any remarks by Respondent about women customers.

39) Complainant did not recall Sessums. Respondent's usual cribbage partner was an older, balding man. He was the only one Complainant saw playing cribbage with Respondent.

40) Randy Getman does not confront unpleasant situations. He tries to avoid them and stated that he is physically a coward. At no time prior to Complainant's leaving Respondent's employ did he discuss or attempt to discuss Complainant's concerns with Respondent. He eventually told Respondent that she would not be back. He also stated about Complainant's situation with Respondent that "it was a bunch of bullshit." At hearing he stated that he meant that it should not have happened, not that her claims were unfounded. He was not a forceful witness, but the bulk of his testimony was confirmed by other credible evidence and was therefore credible.

41) Respondent's testimony was not totally credible. He denied any of the hitting alleged by Complainant, except an instance where she was getting

something from a counter below the cash register and he put his hand on her head to keep her from bumping into the drawer. He insisted that the remarks about women customers, frequency of sex, and about judges were made to "Wes" during cribbage. When Sessums did not recall all of the remarks, Respondent testified that there was another frequent cribbage player, Haselow, to whom he may have commented and that he was unaware that Complainant could hear his remarks, explaining that "when you're playing cards, you're not aware (i.e., of who is listening)." His explanations lent credence to Complainant's accounts of events. After stating that he unpacks, identifies, and price-marks each item in the adult toys and gifts inventory, he stated he didn't know whether the two coloring books in the adult section were sexually oriented. He denied using "bitch slap" except in the cribbage games, stated that it was a term he picked up while working in construction that had no particular meaning, except as a false threat. He stated that he offered to handle sales of the sexual merchandise if it made Complainant uncomfortable, and insisted that Complainant and her husband knew of the adult merchandise before she worked there. Based upon these inconsistencies and his demeanor, the forum has credited only so much of Respondent's testimony as was verified by other reliable evidence.

42) Complainant's testimony was generally credible. She testified to a sequence of events which she had contemporaneously reported to her aunt, her husband, and her friend. The events she recited were consistent

with the reports they recalled. There was no reliable evidence tending to suggest a reason for disbelieving her.

43) During her employment at the Red-Eye Hut, Complainant was able to function as cashier, but she felt horrible. She was extremely careful at work; "it was like walking on glass with him." She felt sick all the time. She was sick to her stomach each morning before going to work; she hated to go to work because of the intimidation and offensive comment. She was tearful and tied up in knots because she had to face another day. She did not seek medical advice. Her emotional upset diminished following termination of the employment.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent A.L.P. was a foreign corporation doing business as the Red-Eye Hut, a retail tobacco shop in Oregon which utilized the personal service of one or more individuals reserving to itself the right to control the means by which such service was performed.

2) At times material herein, Respondent was the owner and president of Respondent A.L.P.

3) Complainant, female, was employed at the Red-Eye Hut from May to July 30, 1994. Respondent was her immediate supervisor.

4) In addition to tobacco and smoking utensils, the Red-Eye Hut had for sale sexually oriented adult toys and gifts. Complainant learned of them on her initial day of work.

5) Complainant was offended by the sexually oriented merchandise, but needed the job; she did not tell Respondent that she was offended.

6) Respondent subjected Complainant to demeaning, sexually offensive comments on a frequent basis, including references to her sex life and to his own.

7) Respondent often threatened to "bitch slap" Complainant, which put her in fear.

8) Respondent physically struck Complainant on the top of the head and across her face.

9) Complainant's attendance and performance as sales clerk were satisfactory. She did not provoke Respondent into violence.

10) The intimidation and harassment based on Complainant's sex caused Complainant extreme and continuing emotional distress, characterized by tears, stomach aches, sleeplessness, and upset nerves.

11) Complainant finally quit the job by not returning after July 30, 1994. After she quit, her emotional upset eventually diminished.

CONCLUSIONS OF LAW

1) At times material herein, ORS 659.010 provided, in pertinent part:

"As used in ORS 659.010 to 659.110 *** unless the context requires otherwise:

"(1) 'Bureau' means the Bureau of Labor and Industries.

"(2) 'Cease and desist order' means an order signed by the commissioner, taking into account the subject matter of the complaint and the need to supervise compliance with the terms of any specific order issued to eliminate the effects of any unlawful practice

found, addressed to a respondent requiring the respondent to:

"(a) Perform an act or series of acts designated therein and reasonably calculated to carry out the purposes of ORS *** 659.010 to 659.110 ***; eliminate the effects of an unlawful practice found, and protect the rights of the complainant and other persons similarly situated;

"(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 individuals *** [or] corporations ***.

"(13) 'Respondent' includes any person or entity against whom a complaint or charge of unlawful practices is filed ***

"(14) 'Unlawful employment practice' includes *** those unlawful employment practices specified in ORS 659.030 ***."

Respondent A.L.P. was an employer subject to ORS 659.010 to 659.110 at all times material herein.

2) At times material herein, ORS 659.040 (1) provided:

"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 person [or] 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) At times material herein, ORS 659.030 provided, in pertinent part:

"(1) 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 terms, conditions or privileges of employment.

"(g) For any person *** to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110 ***."

At times material herein, OAR 839-07-550 provided, in part:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

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

The activities of Respondent consisted of unwelcome verbal and physical conduct of a sexual nature directed toward Complainant because of her sex, created an intimidating, hostile, and offensive working environment, contrary to OAR 839-07-550, and became an explicit term or condition of Complainant's employment with Respondent A.L.P., in violation of ORS 659.030(1)(b).

4) 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 ***."

The actions, inactions, statements, and motivations of Respondent are properly imputed to Respondent A.L.P. herein, which was liable for the sexual harassment of Complainant in the workplace.

5) Under ORS 659.030(1)(g), Respondent aided and compelled Respondent A.L.P., a corporation, in the doing of acts forbidden under ORS 659.010 to 659.110.

6) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority to

issue a Cease and Desist Order requiring Respondents 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

The elements of the unlawful employment practice of sexual harassment are established where the Forum finds a preponderance of evidence showing:

1. The Respondent is an employer defined by statute;
2. The Complainant was employed by Respondent;
3. The Complainant is a member of a protected class (sex);
4. The Respondent, or respondent's agent, supervisory employee, employee, or non-employee in the workplace made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, directed at Complainant because of Complainant's sex;
5. The conduct had the purpose or effect of unreasonably interfering with Complainant's work performance or creating an intimidating, hostile, or offensive working environment, or submission to such conduct was made an explicit or implicit term or condition of employment;
6. If the conduct was directed at Complainant by Respondent's agent, supervisory employee, employee, or non-employee in the

workplace, the Respondent knew or should have known of the conduct;

7. The Complainant was harmed by the conduct.

OAR 839-05-010(1); 839-07-550; *In the Matter of Kenneth Williams*, 14 BOLI 16, 24 (1995); *In the Matter of Soapy's, Inc.*, 14 BOLI 86, 95 (1995).

In this case, the Agency has established by a preponderance of the evidence that Respondent A.L.P. was an employer employing Complainant, a female, and that Respondent A.L.P.'s supervisory employee, who was also its owner, engaged in unwelcome verbal and physical conduct of a sexual nature, directed at Complainant because of Complainant's sex. The evidence further established that the conduct had the effect of creating an intimidating, hostile, and offensive working environment, that submission to such conduct was made an explicit term or condition of employment, and that Respondent A.L.P. knew of the conduct of its owner and agent. Finally, the evidence established that Complainant suffered harm by way of extreme and ongoing mental suffering and emotional distress, characterized by tears, stomach aches, inability to sleep, and upset nerves.

By way of defense, Respondents attempted to establish that, before Complainant worked at Red-Eye Hut, she and her husband were aware of all of the merchandise offered for sale, including the "adult toys and gifts," and that Complainant did not indicate then or later that she found the merchandise offensive. Respondents also noted that Complainant continued with

the employment even after, according to her, she first learned of the nature of some of the merchandise. Apparently, the suggestion there was that Complainant was not initially as offended as she claimed. Respondent attempted to establish that even if he had said some of the things repeated by Complainant and her witnesses, his comments were not to or about Complainant and she had merely overheard conversations between himself and one of his cribbage companions.

Whether or not Complainant was offended by the sexually oriented merchandise is immaterial to the effect Respondent's speech and conduct had upon her. Certainly, she was offended by his reference to at least one of the items of merchandise in connection with her and her husband. There was other evidence that Respondent made comments derogatory to and demeaning of Complainant in particular and women in general. Respondent suggested that Complainant have more sex with her husband, that such activities put people in a good mood. He commented in her presence on particular parts of the bodies of women customers, including Complainant's sister-in-law, and spoke about his own sex life. He referred to Complainant as "a dumb blonde" or "dumb fucking blonde bitch."

Respondent's conduct and demeanor during her employment intimidated Complainant. He repeatedly threatened to "bitch slap" Complainant. He struck her on the top of the head and across the face. He grabbed her by the arms and applied pressure. She sought legal advice because of the way Respondent treated her. She

suffered stomach upset and nausea and loss of sleep. She dreaded going to work each day, and was reduced to tears frequently because she was convinced that the job was economically necessary. Finally, after enduring Respondent's actions toward her and their effects for several weeks, and after consulting an attorney, she ceased reporting to work, thus terminating her employment.

Damages

As noted in the ruling on Respondents' motion to dismiss, the Commissioner is authorized by statute to issue a cease and desist order designed to eliminate the effects of any unlawful practice found. Those effects in this instance included severe mental distress over a two month period. The evidence on this record suggests that those effects diminished once Complainant quit the job. Respondent pointed out that Complainant did not seek medical advice or counseling concerning the alleged effects of Respondent's behavior. This forum has repeatedly held that while failure to seek medical treatment may be one element in evaluating the severity of the effects of a discriminatory practice, it is not necessarily an indicator of whether or not the practice occurred. *In the Matter of Jerome Dusenberry*, 9 BOLI 173 (1991); *In the Matter of Portland General Electric*, 7 BOLI 253 (1988), *aff'd*, *Portland General Electric v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). The amount awarded in the Order below is a proper exercise of the Commissioner's authority.

Respondents' Exceptions

Respondents filed 12 exceptions to the Proposed Order or portions thereof. Some exceptions overlapped or repeated each other. Respondents' exceptions are summarized below into the groups, followed by the forum's response.

A. Respondents excepted to the ALJ's alleged bias, his concern with the nature of the business and its inventory, his conclusion that the business was a "head shop" selling "drug paraphernalia," and his failure to acknowledge that the items sold were not illegal (Exceptions 1, 5, 6, and 11). Respondents failed to demonstrate actual bias on this record. There is no suggestion that any of the merchandise for sale at Red-Eye Hut was illegal. The terms "head shop" and "drug paraphernalia" are quoted terms used by the witnesses. Finding of Fact (FOF) 13 has been revised slightly to make it even more clear that the term used was a quote. These exceptions are not well taken.

B. Respondents excepted to the ALJ's conclusion that there was sexually oriented merchandise and pointed out that Complainant was aware of the adult items for sale and of the working conditions, that she was advised by an aunt not to work there but knew what was sold, accepted the environment and continued to work there without objection to Respondent Pieper although free to quit (Exceptions 2, 7, 8, and 9). The record reflects that the "adult toys and gifts" were clearly sexually oriented (see FOF 12). Complainant's awareness of the merchandise, her acceptance of the working conditions, her continued employment, and

her failure to heed her aunt's warning do not prove that the merchandise was not offensive or unwelcome or justify the harassment and abusive treatment to which she was subjected. These exceptions are not well taken.

C. Respondents excepted to the damages as being unsupported and punitive in nature, to there being no medical evidence in support of Complainant's allegations of suffering, and suggested that Complainant failed to meet her burden in that her testimony was uncorroborated (Exceptions 1, 3, and 12). As indicated earlier in this opinion, this forum has previously ruled that medical evidence of the physical or psychological effects of an employer's behavior is not essential to finding that such effects resulted where there is credible testimony regarding the result of the employer's actions. *PGE, supra*; *Dusenberry, supra*. Witnesses Ramirez, Smith, and Randy Getman testified that they learned from Complainant about Respondent's actions and remarks, and about their effect on her, as they happened. Damages for mental suffering caused by discriminatory employment practices are actual damages for actual harm and are not punitive in nature. *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55 (1987), *aff'd, Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988). These exceptions are not well taken.

D. Respondents further excepted to the finding that employment was scarce and to Complainant's failure to seek replacement employment (Exceptions 8 and 10). There was witness testimony that employment was

not plentiful in Ontario at times material, and no evidence to the contrary. Because the Agency withdrew the claim for lost wages, no finding was made or was required regarding any post-employment job search. These exceptions are not well taken.

E. Finally, although admitting being unable to show actual bias, Respondents again excepted to the prosecutor and the fact-finder having the same employer, alleging that to be a violation of due process and equal protection (Exception 4). This point was covered adversely to Respondents' position in the Rulings on Motions and Objections, *supra*, which have been confirmed. The exception is without merit.

Agency Exceptions

The Agency, as it is permitted to do under *former* OAR 839-50-380(1) and (2),* excepted to the amount of compensatory damages for mental and emotional distress (\$10,000) as not being "commensurate with the ALJ's Proposed Ultimate Findings of Fact," (PUFOF). The Agency requested that the emotional distress award be increased to accurately reflect the harm suffered by Complainant. Citing PUFOF 6 through 9, the Agency pointed out that there were findings of demeaning, sexually offensive comment on a frequent basis, that Respondent put Complainant in fear by threats

and physically struck her on top of the head and across the face, and that intimidation and harassment based on her sex caused Complainant extreme and continuing emotional distress demonstrated by tears, stomach aches, sleeplessness, and upset nerves.

In the past, this forum has held that 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 Motel 6*, 13 BOLI 175 (1994). Awards have been made in recent sexual harassment cases in varying amounts based upon varying severity, frequency, and duration: *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183 (1992), *aff'd without opinion, JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993) (\$10,000, impaired personal dignity, no physical abuse); *In the Matter of Kenneth Williams*, 14 BOLI 16 (1995) (\$20,000, sexual comments and names, no physical abuse, no evidence distress was of long duration); *In the Matter of Fred Meyer, Inc.*, 15 BOLI 77 (1996) (\$20,000, over two months of derisive sexual comment and names, sexual touching, plus "long-lasting distress").

* "(1) Any participant may file specific written exceptions to the proposed order. ***

"(2) Exceptions filed by the agency may include factual summaries, statements of policy, corrections, prior agency decisions, but may not include legal argument as defined in OAR 839-05-230 unless the agency is represented by counsel."

Current OAR 839-050-0380, effective December 9, 1996, is exactly the same except for the number.

In this case, in addition to sexually offensive and derogatory comments, Complainant was subjected to threats and being physically struck, and there was a marked disparity in physical stature between Complainant and Respondent. While the effects of the discriminatory conduct were not found to be of long duration, the elements of severity, frequency and vulnerability were not adequately addressed by the ALJ's proposed award. I am persuaded by the Agency's reasoning and by precedent, as well as by the absence of any evidence that Respondent's conduct was based on any reason except Complainant's female sex, that an award of \$20,000 more closely serves to eliminate the effects of the unlawful practice.

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 A.L.P. INCORPORATED and ALLEN L. PIEPER are hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, State Office Building, Suite 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for TERESA GETMAN, in the amount of:

a) TWENTY THOUSAND DOLLARS (\$20,000), representing compensatory damages for the mental and emotional distress suffered by TERESA GETMAN as the result of Respondents' unlawful practices found herein, plus

b) Interest at the legal rate on the sum of \$20,000 from the date of this Final Order until Respondents comply herewith, and

2) Cease and desist from discriminatory conduct in the workplace directed toward any employee based upon that employee's sex.

**In the Matter of
SUSAN PALMER,
dba Sea Breeze Delivery,
Respondent.**

Case Number 24-97

Final Order of the Commissioner

Jack Roberts

Issued January 9, 1997.

SYNOPSIS

Respondent, who was in default for failing to appear at hearing, failed to pay three wage claimants all wages due upon termination, in violation of ORS 652.140(1) and (2). Respondent's failure to pay the wages was willful, and the Commissioner ordered Respondent to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(1) and (2), 652.150, 653.261, and OAR 839-20-030, 839-050-0330.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau

of Labor and Industries for the State of Oregon. The hearing was held on Thursday, December 19, 1996, 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 Judith Bracanovich, an employee of the Agency. Yahya "John" Farhat (Claimant Farhat), Mike Huntsinger (Claimant Huntsinger), and Connie Scott (Claimant Scott) were present throughout the hearing. Susan Palmer (Respondent), after being duly notified of the time and place of this hearing, failed to appear in person or through a representative.

The Agency called the following witnesses: Claimants Farhat, Huntsinger, and Scott; Lois Banahene and Sanford Groat, compliance specialists with the Wage and Hour Division of the Agency; and David Statchwick, a customer service agent with United Airlines in Portland. Administrative exhibits X-1 to X-16 and Agency exhibits A-1 to A-5 and A-7 to A-15 were offered and received into evidence. The Agency withdrew exhibit A-6. The record closed on December 19, 1996.

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

FINDINGS OF FACT – PROCEDURAL

1) On April 16, 1996, Claimant Scott 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. At the same time that she filed the wage claim, Claimant Scott assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

2) On May 2, 1996, Claimant Farhat filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him. At the same time that he filed the wage claim, Claimant Farhat assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

3) On June 24, 1996, Claimant Huntsinger filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him. At the same time that he filed the wage claim, Claimant Huntsinger assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

4) On August 30, 1996, the Agency served on Respondent an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination found that Respondent owed a total of \$2,397.14 in wages and \$5,040 in civil penalty wages. Respondent filed a timely answer through counsel in which she denied the allegations in the Order of Determination, denied that she was the employer, and alleged the affirmative defense that any non-payment of wages was as a

result of the financial inability of the actual employer to pay the wages at the time they accrued. The Administrative Law Judge later allowed the Order of Determination to be amended to allege that the total wages due was \$2,399.38.

5) On November 13, 1996, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimants indicating the time and place of the hearing on December 19, 1996. 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, *former* OAR 839-50-000 to 839-50-420.

6) On November 26, 1996, the Administrative Law Judge 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 *former* OAR 839-50-210 (1). The Administrative Law Judge also granted an Agency motion to compel discovery and ordered Respondent to provide certain documents to the Agency. The Agency submitted a timely summary of the case and later supplemented it.

7) On December 13, 1996, Respondent's attorney, Michael Kennedy, withdrew as attorney of record for Respondent.

8) At the time and place set forth in the Notice of Hearing for this matter,

Respondent did not appear or contact the Agency or the Hearings Unit. Pursuant to OAR 839-050-0330, the Administrative Law Judge waited 15 minutes before resuming the hearing. At that time, Respondent had still not appeared or contacted the Agency or the Hearings Unit. The Administrative Law Judge then found Respondent in default as to the Order of Determination, and proceeded with the hearing.

9) On December 20, 1996, the Hearings Unit issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT – THE MERITS

1) Oregon 101 Services, Inc., an Oregon corporation, was incorporated in December 1993. At the same time, the corporation registered the assumed business name (ABN) of "Sea Breeze Delivery." Respondent was the corporation's secretary and the authorized representative for the ABN registration. On December 24, 1994, the assumed business name became inactive due to an "ABN FAILUR [sic]". On February 16, 1996, the corporation was involuntarily dissolved by the state Corporation Division.

2) During all times material herein, that is, during the period January to April 1996 (both before and after February 16, 1996), Sea Breeze Delivery was a business that contracted with airline companies at the Portland International Airport to deliver lost luggage and baggage to its owners in Oregon and southwest Washington. Both before and after February 16, 1996, Respondent operated this same

business, using the same assumed business name, at the same location, using substantially the same workforce, providing the same service, and with substantially the same equipment (including office equipment and several vehicles). There was no lapse of time between the operation of the business by Oregon 101 Services, Inc. and the operation of the business by Respondent.

3) During all times material, Respondent held herself out as the owner and operator of the Sea Breeze Delivery business. She hired each Claimant, set their hours and rate of pay, directed their duties, and provided the equipment they needed to perform their duties (such as the office equipment and vehicles).

4) Claimant Scott was employed at Sea Breeze Delivery during the period January 29 to March 7, 1996. Her rate of pay was \$7.00 per hour. Her duties included office work, picking up baggage from United Airlines at the Portland International Airport, sorting the baggage, and dispatching drivers. During that period of time, she worked a total of 277 hours, 51 of which were hours worked in excess of 40 hours in a work week. She earned \$2,117.51 (226 hours times \$7.00 per hour equals \$1,582, plus 51 hours times \$10.50 (the statutory overtime rate of pay) equals \$535.51). Respondent paid Claimant Scott \$580.

5) Claimant Scott quit working for Respondent without notice on March 7, 1996. At that time, she was owed wages of \$1,537.51 (\$2,117.51 minus \$580). Respondent told Claimant that she (Respondent) did not have the money to pay Claimant's wages.

Claimant Scott has received no pay from Respondent since March 7, 1996.

6) Claimant Farhat was employed at Sea Breeze Delivery during the period November 1995 to March 1996. His rate of pay was \$7.00 per hour. His duties included picking up lost baggage from airlines at the Portland International Airport, sorting it, and delivering it to its owners in Oregon and southwest Washington. He drove a company vehicle. During the period February 8 to 25, 1996, he worked a total of 98.41 hours. He earned \$688.87 (98.41 hours times \$7.00 per hour equals \$688.87). Respondent paid Claimant Farhat \$100.

7) Respondent discharged Claimant Farhat. His last day of work was February 25, 1996. At that time, he was owed wages of \$588.87 (\$688.87 minus \$100). Respondent told Claimant that she did not have the money to pay Claimant's wages. Claimant Farhat has received no pay from Respondent since his discharge.

8) Claimant Huntsinger was employed at Sea Breeze Delivery during the period March 28 to April 4, 1996. His rate of pay was \$7.00 per hour. His duties included picking up lost baggage from airlines, sorting it, and delivering it to its owners in Oregon and southwest Washington. He drove a company vehicle. During that period of time, he worked a total of 39 hours. He earned \$273 (39 hours times \$7.00 per hour equals \$273). Respondent paid Claimant Huntsinger nothing.

9) Claimant Huntsinger quit working for Respondent without notice on April 4, 1996. At that time, he was owed wages of \$273. Respondent first told Claimant that she did not have the

money to pay Claimant's wages. In June 1996, when Claimant filed his wage claim, Respondent stated that she had sent Claimant's wages three or four weeks before. Claimant Huntsinger has received no pay from Respondent since April 4, 1996.

10) Respondent hired and fired additional employees and continued to operate the delivery business from April to November 1996. United Airlines' primary contract for delivering lost baggage in the Portland metro area and the north coast was with Sea Breeze Delivery through June 1996. Respondent signed the contract for Sea Breeze Delivery in April 1994. United Airlines continued to use Respondent's services until November 1996, when the airline company lost contact with Respondent.

11) Civil penalty wages for each Claimant, computed in accordance with Agency policy, are as follows: \$7.00 (each Claimant's hourly rate of pay) times eight (eight hours per day) times 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$1,680.

12) The testimony of each Claimant was found to be credible. They had the facts readily at their command and their statements were supported by other credible testimony and documentary records. There is no reason to determine the testimony of the Claimants to be anything except reliable and credible. The testimony of the other witnesses was credible.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent was a person who em-

ployed one or more persons in the State of Oregon.

2) From December 1993 to February 16, 1996, Oregon 101 Services, Inc. did business under the assumed business name of "Sea Breeze Delivery." Respondent was the corporate secretary. On February 16, 1996, the corporation was involuntarily dissolved. Thereafter, Respondent conducted essentially the same business as the corporation had. She used the same name, location, and substantially the same workforce; she offered the same services and used the same equipment as the corporation had used. There was no lapse in time in the operation of the business when the corporation dissolved.

3) Oregon 101 Services, Inc. employed Claimant Scott from January 29 to February 16, 1996. Thereafter, Respondent employed Claimant until she quit without notice on March 7, 1996. Her rate of pay was \$7.00 per hour. Claimant Scott earned \$2,117.51 in wages. Respondent paid her a total of \$580. Respondent owes Claimant Scott \$1,537.51 in earned and unpaid compensation.

4) Oregon 101 Services, Inc. employed Claimant Farhat from November 1995 to February 16, 1996. Thereafter, Respondent employed Claimant Farhat until she discharged him around February 25, 1996, his last day of work. His rate of pay was \$7.00 per hour. Claimant Farhat earned \$688.87 in wages during the period February 8 to 25, 1996. Respondent paid him a total of \$100. Respondent owes Claimant Farhat \$588.87 in earned and unpaid compensation.

5) Respondent employed Claimant Huntsinger from March 28 to April 4, 1996, when he quit. His rate of pay was \$7.00 per hour. Claimant Huntsinger earned \$273 in wages during this period. Respondent paid him nothing and owes Claimant Huntsinger \$273 in earned and unpaid compensation.

6) Respondent willfully failed to pay Claimants Scott and Huntsinger all of their earned and unpaid wages within five days, excluding Saturdays, Sundays, and holidays, after each claimant quit. More than 30 days have elapsed from the date Claimant Scott's and Huntsinger's wages became due and payable.

7) Respondent willfully failed to pay Claimant Farhat all of his earned and unpaid wages no later than the end of the first business day after his discharge. More than 30 days have elapsed from the date Claimant Farhat's wages became due and payable.

8) Civil penalty wages for each Claimant, computed pursuant to ORS 652.150 and Agency policy, equal \$1,680.

CONCLUSIONS OF LAW

1) Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and ORS chapter 653.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) Respondent is a "successor" within the meaning of ORS 652.310(1),

and therefore is subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and ORS chapter 653. *In the Matter of Anita's Flower & Boutique*, 2 BOLI 187 (1987); *In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68 (1988); *In the Matter of Tire Liquidators*, 10 BOLI 84 (1991).

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 forty (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 Scott one and one-half times her regular hourly rate for all hours worked in excess of 40 hours in

a week. Respondent failed to so pay Claimant Scott.

5) ORS 652.140(1) provides:

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

Respondent violated ORS 652.140(1) by failing to pay Claimant Farhat all earned and unpaid wages not later than the end of the first business day after Claimant's discharge.

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 Claimants Scott and Huntsinger all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after

Claimants 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 hourly rate for eight hours per day 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 to each 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 Claimants their earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

Default

Respondent failed to appear at the hearing and thus defaulted to the charges set forth in the amended

Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of the forum is to determine if a prima facie case supporting the Agency's amended Order of Determination has been made on the record. See *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); see also OAR 839-050-0330(2).

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

The Agency has established a prima facie case. A preponderance of the credible evidence on the whole record showed that Respondent employed Claimants during the wage claim period and willfully failed to pay them all wages, earned and payable, when due. That evidence was credible, persuasive, and the best evidence available, given Respondent's failure to

appear at the hearing. Having considered all the evidence on the record, the prima facie case has not been contradicted or overcome.

The record establishes that Respondent has violated ORS 652.140 as alleged and that she owes Claimants civil penalty wages pursuant to ORS 652.150.

Respondent Was An Employer

Respondent alleged in her answer that she was not the employer. The issue is whether Respondent was a successor employer to Oregon 101 Services, Inc. ORS 652.310(1) defines, in pertinent part, "Employer" as "any person who * * * engages personal services of one or more employees and includes any producer-promoter, and any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full." Thus, an employer includes:

A) any producer-promoter; and

B) 1) any successor to the business of any employer, so far as such employer has not paid employees in full; or

2) any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full.

As the language of the statute shows, a "successor" employer may be "any successor to the business of any employer," or "any lessee or purchaser of any employer's business property for the continuation of the same business." That language clearly

recognizes two kinds of "successor" employers. *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258, 267-68 (1987).

To decide whether an employer is a "successor," the test is whether it conducts essentially the same business as the predecessor did. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision. *Anita's Flowers*, 6 BOLI at 267-68; and see *N.L.R.B. v. Jefferies Lithograph Co.*, 752 F2d 459 (9th Cir 1985).

In brief, the evidence in this case revealed the following facts, which were undisputed. Following the involuntarily dissolution of the corporation, Respondent conducted the same business as the corporation had. She used the same name (Sea Breeze Delivery), location, equipment, and substantially the same workforce as the corporation had used. She offered the same services as the corporation had offered. There was no lapse in time between the corporation's operation of the business and when Respondent operated it.

I conclude from these facts that Respondent conducted essentially the same business that her predecessor, Oregon 101 Services, Inc., had conducted. Applying the facts found to the

test described above, I conclude that as a matter of law Respondent was a "successor" within the meaning of ORS 652.310(1).

Respondent employed all three Claimants after February 16, 1996, and so is liable for their wages earned after that time. Only Claimants Scott and Farhat earned wages before the corporation was dissolved. As the successor to the corporation, Respondent is also liable for these wages earned before February 16, 1996. She was the employer of all three Claimants on the dates when their employment terminated, and thus she is liable for the violations of ORS 652.140 and for civil penalty wages pursuant to ORS 652.150, which is discussed below.

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 West-em Corp.*, 276 Or 1083, 557 P2d 1344 (1976). The evidence established that Respondent knew she was not paying Claimants' wages and that she either claimed she did not have the money to pay the wages or claimed she had later sent the money. The evidence demonstrates that Respondent acted voluntarily and was a free agent. Under the circumstances, I conclude that Respondent acted willfully under the *Sabin* requirements and thus is liable for penalty wages under ORS 652.150.

Financial Inability

Respondent alleged in her answer that "the actual employer" was financially unable to pay Claimants. This forum has repeatedly held that it is a respondent's burden to show the respondent's financial inability to pay a claimant's wages. See ORS 652.150, 183.450(2), and OAR 839-050-0260 (3). See also *In the Matter of Jorion Belinsky*, 5 BOLI 1, 9-10 (1985); *In the Matter of Mega Marketing*, 9 BOLI 133, 138 (1990). Respondent failed to show that she was financially unable to pay Claimants' wages at the time they accrued and cannot escape penalty wage liability.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders SUSAN PALMER to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR YAHYA FARHAT in the amount of TWO THOUSAND TWO HUNDRED SIXTY EIGHT DOLLARS AND EIGHTY SEVEN CENTS (\$2,268.87), less appropriate lawful deductions, representing \$588.87 in gross earned, unpaid, due, and payable wages and \$1,680 in penalty wages; plus

a) Interest at the rate of nine percent per year on the sum of \$588.87 from April 1, 1996, until paid, plus

b) Interest at the rate of nine percent interest per year on the sum of \$1,680 from May 1, 1996, until paid.

2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR MIKE HUNTSINGER in the amount of ONE THOUSAND NINE HUNDRED AND FIFTY THREE DOLLARS (\$1,953), less appropriate lawful deductions, representing \$273 in gross earned, unpaid, due, and payable wages and \$1,680 in penalty wages; plus

a) Interest at the rate of nine percent per year on the sum of \$273 from May 1, 1996, until paid, plus

b) Interest at the rate of nine percent interest per year on the sum of \$1,680 from June 1, 1996, until paid.

3) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR CONNIE SCOTT in the amount of THREE THOUSAND TWO HUNDRED SEVENTEEN DOLLARS AND FIFTY ONE CENTS (\$3,217.51), less appropriate lawful deductions, representing \$1,537.51 in gross earned, unpaid, due, and payable wages and \$1,680 in penalty wages; plus

a) Interest at the rate of nine percent per year on the sum of \$1,537.51 from April 1, 1996, until paid, plus

b) Interest at the rate of nine percent interest per year on the sum of \$1,680 from May 1, 1996, until paid.

**In the Matter of
JEWEL SCHMIDT,
dba Bit of Country Care,
Respondent.**

Case Number 08-97
Final Order of the Commissioner
Jack Roberts
Issued February 4, 1997.

SYNOPSIS

Respondent, who operated an adult care home, failed to pay wage claimant all wages (including overtime) due upon termination, in violation of ORS 652.140(2). Contrary to Respondent's contentions, the Commissioner determined that claimant was an employee and that no deduction for meals, lodging, facilities, or other services was permitted because Respondent failed to establish the fair market value of those services or that they were provided for the claimant's private benefit. Respondent's failure to pay the wages was willful, and the Commissioner ordered her to pay civil penalty wages, pursuant to ORS 652.150, ORS 652.140(2), 652.150, 653.261, and OAR 839-20-025, 839-20-030, 839-050-0330.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on Tuesday, December 10, 1996, in the Bureau of Labor and Industries offices,

3865 Wolverine Street NE, Salem, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Wage Claimant Kristina Gorst (formerly Taylor) was present throughout the hearing. Jewel Schmidt (Respondent), after being duly notified of the time and place of this hearing, failed to appear in person or through a representative.

The Agency called the following witnesses: Charlene King, a claims adjuster with Midland Risk Insurance Company; Margaret Pargeter, a screener with the Wage and Hour Division of the Agency; Kristina Gorst (Claimant); Carol Smith, Claimant's mother in law; Nancy Warehime, Claimant's sister in law; and Wendy Taylor, Claimant's step mother. Administrative exhibits X-1 to X-21 and Agency exhibits A-1 to A-10 were offered and received into evidence. The record closed on December 10, 1996.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On October 10, 1995, 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. 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.

2) On May 29, 1996, the Agency 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 Claimant a total of \$3,725 in wages and \$1,200 in civil penalty wages. Respondent filed a timely answer in which she denied the allegations in the Order of Determination; denied that Claimant was her employee; alleged that she could charge Claimant for rent, food, and utilities; and alleged that she could not afford to pay Claimant any wages at the time Claimant worked for her.

3) On August 19, 1996, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and Claimant indicating the time and place of a hearing on September 19, 1996. 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, *former* OAR 839-50-000 to 839-50-420.

4) On August 28, 1996, the Administrative Law Judge 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 *former* OAR

839-50-210(1). The Administrative Law Judge also granted an Agency motion to compel discovery and ordered Respondent to provide certain documents to the Agency. The Agency submitted a timely summary of the case and later supplemented it.

5) On September 4, 1996, the Hearings Unit received Respondent's first request for a postponement of the hearing. Her reason for needing a postponement was that she had an adult care home and could not find a relief person for the date of hearing or successive days. The Agency opposed the request and said it was ready to proceed and had subpoenaed witnesses. The Administrative Law Judge denied Respondent's request, pursuant to *former* OAR 839-50-150 (5), because Respondent had not shown good cause for a postponement. The ALJ noted that there were over 30 days between the date the Notice of Hearing was issued and the date of the scheduled hearing, and this should have been ample time to find a relief person for the expected one-day hearing. The ALJ permitted Respondent to renew her request, but directed her to provide detailed information about her attempts to find a relief person or other information to establish good cause for a postponement.

6) On September 16, 1996, the Hearings Unit received Respondent's second request for a postponement of the hearing. She needed a postponement because she had been involved in a motor vehicle accident and was bedridden. She provided documentary and photographic evidence to support her request. The Agency did not oppose the request and the ALJ granted

it. The ALJ later issued an Amended Notice of Hearing resetting the hearing for December 10, 1996.

7) At the time and place set forth in the Amended Notice of Hearing, Respondent did not appear or contact the Agency or the Hearings Unit. Pursuant to OAR 839-050-0330, the Administrative Law Judge waited 30 minutes before resuming the hearing. At that time, Respondent had still not appeared or contacted the Agency or the Hearings Unit. The ALJ then found Respondent in default as to the Order of Determination and proceeded with the hearing. The next day, December 11, 1996, the ALJ received a voice mail message from Respondent saying that she mistakenly thought the hearing was set for December 13, 1996. The ALJ notified her by letter that she was in default, instructed her how to request relief from default, and set a deadline of December 20, 1996, for the request. The Hearing Unit received no request for relief from default from Respondent.

8) On January 17, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material, Respondent owned and operated an adult foster care home in Lafayette, Oregon, called "Bit of Country Care Home" (the home).

2) On June 5, 1995, Respondent was injured in a motor vehicle

accident. On that same day, Respondent hired Claimant as an alternate care provider. The agreed rate of pay was \$5.00 per hour.

3) Claimant's duties included cooking meals for the residents of the home, cleaning, doing laundry, helping some residents to dress and get in and out of beds and chairs, emptying bed pans, changing beds, and helping residents with their medications. At times, Claimant also cleaned Respondent's personal sections of the home and baby-sat Respondent's three children.

4) Throughout her employment with Respondent, Claimant, her year-old son, and (periodically for around a month and a half) her husband lived in the home. Living at the home was a condition of Claimant's employment since she had to be available at night and other hours to assist the residents. During meal breaks, Claimant was not relieved of all duties. While employed by Respondent, Claimant received food stamps, with which she bought food for herself and her son. Occasionally, Claimant contributed items of food for the residents when Respondent did not provide them. Claimant and her son also ate food provided by Respondent. Claimant asked Respondent whether she (Claimant) could contribute to the monthly food for the home, and Respondent told her not to worry about it. Respondent never asked Claimant to contribute or gave her a bill for food. Claimant often prepared her and her son's meals separately from those she prepared for the residents or for Respondent's children. She reimbursed Respondent for long distance telephone calls she made.*

* After Claimant's employment terminated, Respondent told her she owed

Respondent never charged Claimant, by way of deductions from wages or in the form of wages, for the value of meals, lodging, or other facilities or services furnished to Claimant. Claimant never authorized in writing any deduction from her wages.

5) Respondent kept no time records for Claimant. Claimant kept a contemporaneous record of her time worked and duties in a monthly planner. Claimant's records and testimony, which are accepted as fact, reveal that between June 5 and September 20, 1995, she worked a total of 686.5 hours, 117 of which were hours worked in excess of 40 hours per week. She earned \$2,847.50 in straight time wages (569.5 hours times \$5.00 per hour) and \$877.50 in overtime wages (117 hours times \$7.50 per hour, the overtime rate of pay), for total wages earned of \$3,725. Respondent paid Claimant nothing.* Throughout Claimant's employment, Respondent told her she would get paid when Respondent received money from her insurance company in a settlement from the motor vehicle accident.

6) On September 20, 1995, Claimant quit without notice.

7) Civil penalty wages were computed, in accordance with ORS 652.150 and Agency policy, as follows: \$5.00 (Claimant's hourly rate)

multiplied by 8 (hours per day) equals \$40.00. This figure of \$40.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$1,200. This figure is set forth in the Order of Determination.

8) Respondent did not provide any evidence for the record of a financial inability to pay Claimant's wages at the time they accrued.

9) Claimant's testimony 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.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person doing business as Bit of Country Care Home in the State of Oregon. She employed one or more persons in the operation of that business.

2) Respondent employed Claimant as an alternate care provider from June 5 to September 20, 1995. The agreed rate of pay was \$5.00 per hour.

3) Claimant quit without notice on September 20, 1995.

4) During the period June 5 to September 20, 1995, Claimant worked a total of 686.5 hours, 117 of which

Respondent money for a telephone bill. Claimant never saw the bill and was uncertain about how much it was. Respondent was withholding some of Claimant's property as collateral until Claimant paid the telephone bill. The forum has not considered these matters to be part of this wage claim case.

* On a few occasions, Respondent paid Claimant to work 24 hour shifts on weekends when Respondent went to the beach or to craft sales. At those times, Claimant took care of the residents and Respondent's home and children. Respondent paid Claimant in cash for each such 24 hour shift. None of these occasions is included in Claimant's wage claim.

were hours worked in excess of 40 hours per week. She earned \$3,725. Respondent has paid Claimant nothing for those hours of work.

5) Respondent willfully failed to pay Claimant all wages due 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.

6) Respondent made no showing that she was financially unable to pay Claimant's wages at the time they accrued.

7) Civil penalty wages, computed in accordance with ORS 652.150 and Agency policy, equal \$1,200.

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, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) 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 for all hours worked in excess of 40 hours per week. Respondent failed to so pay Claimant, in violation of OAR 839-20-030(1).

4) 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."

OPINION

Default

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.

5) 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 hourly rate for eight hours per day 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 to Claimant when due as provided in ORS 652.140.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries 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.

Respondent failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. See *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); see also OAR 839-050-0330(2).

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

The Agency has established a prima facie case. A preponderance of the credible evidence on the whole record showed that Respondent employed Claimant during the period of

the wage claim and willfully failed to pay her all wages, earned and payable, when due. That evidence, which established that Respondent owes Claimant \$3,725, was credible, persuasive, and the best evidence available, given Respondent's failure to appear at the hearing. Having considered all the evidence on the record, the prima facie case has not been contradicted or overcome.

The record establishes that Respondent has violated ORS 652.140 (2) as alleged and that she owes Claimant civil penalty wages pursuant to ORS 652.150.

Claimant Worked As An Employee

In her answer, Respondent denied that Claimant was her employee. Evidence to the contrary is persuasive and un rebutted.

"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 * * *." ORS 652.310(2); *Lamy v. Jack Jarvis & Co., Inc.*, 281 Or 307, 574 P2d 1107, 1111 (1978); *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 40-41 (1993).

The un rebutted evidence shows that Respondent hired Claimant to work at the home at the fixed rate of \$5.00 per hour. Respondent's own insurance claim form, signed by her on June 12, 1995, shows that she hired an employee to help her, beginning June 5, 1995, at \$5.00 per hour. It shows 62 hours worked by the employee between June 5 and 11. Based on the definition of "employee,"

the forum finds that Claimant worked for Respondent as an employee between June 5 and September 20, 1995, not as a copartner or independent contractor.

Hours Worked

This forum has ruled repeatedly that it is the employer's duty to maintain an accurate record of an employee's time worked. ORS 653.045; *In the Matter of Godfather's Pizzeria, Inc.*, 2 BOLI 279, 296 (1982) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946)). ORS 653.045 requires an employer to maintain payroll records. Where the forum concludes that an employee was employed and was improperly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise amounts involved. *Mt. Clemens Pottery Co.*; *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). Where the employer produces no records, the Commissioner may rely on the evidence produced by the Agency "to show the amount and extent of [the employee's] work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate." *Mt. Clemens Pottery Co.*, 328 US at 687-688.

Here, Respondent kept no records of Claimant's work. Based on the rulings cited above, the forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimant. The Agency has the burden of first proving that the employee "performed work for which [she] 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); *Dan's Ukiah Service*, 8 BOLI at 106. 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 and rate of pay for Claimant. Respondent did not 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.

Meals, Lodging, Facilities, or Other Services

In her answer, Respondent claimed that she agreed to let Claimant and her son live with her for free (that is, free rent, electricity, and food) in exchange for Claimant's help with the care of the residents. Respondent claimed she could charge Claimant \$2,925 for her rent, electricity, heat, and food. Credible evidence contradicts Respondent's claims and she presented no evidence to support them. Claimant denied that she had any such agreement with Respondent.

Former OAR 839-20-025 (BL 3-1992) provided that, under some circumstances, an employer could deduct from the minimum wage the fair market value of meals, lodging, and other facilities or services furnished by the employer to an employee for the private benefit of the employee.* Even if there were evidence that Respondent and Claimant had such an

* Former OAR 839-20-025 provided:

"(1) The fair market value of meals, lodging and other facilities or services furnished by the employer to the employee for the private benefit of the employee may be deducted from the minimum wage.

"(2) The provisions of section (1) of this rule do not prohibit the payment of wages as meals, lodging and other facilities or services furnished to employees either as additions to wages or as items for which deductions from wages will be made. These provisions apply to all facilities or services furnished by the employer as compensation to the employee regardless of whether the employer calculates charges for such facilities or services as additions to or deductions from wages.

"(3) Full settlement of sums owed to the employer by the employee because of meals, lodging and other facilities or services furnished by the employer shall be made on each regular payday.

"(4) The provisions of section (1) of this rule apply only when the following conditions are continuously met:

"(a) The employer has met the conditions of ORS 652.610(3); and

"(b) The employee actually receives the meals, lodging or other facilities or services; and

"(c) The meals, lodging or other facilities or services are furnished by the employer for the private benefit of the employee.

agreement, Respondent did not comply with the requirements of the law and therefore could not take advantage of its provisions. For example, she did not make a full settlement of sums owed to her by Claimant for meals, etc., on each regular payday.* OAR 839-20-025(3). There is no evidence that she complied with the statute regulating deductions from wages – ORS 652.610(3). OAR 839-20-025(4)(a). A key provision of the deductions statute provides that no employer may withhold, deduct, or divert any portion of an employee's wages unless the deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books. ORS 652.610(3)(b). Here, the un rebutted evidence is that Claimant never authorized in writing any deductions from her wages. Further, evidence shows that the lodging was not for Claimant's private benefit, as used in OAR 839-20-025, because Claimant lived in the home as a condition of employment. OAR 839-20-025(4)(c), (6); *In*

the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 72-73 (1991) (OAR 839-20-025 provides that facilities or services furnished by the employer as a condition of employment shall not be considered to be for the private benefit of the employee); *In the Matter of Ashlanders Senior Foster Care, Inc.*, 14 BOLI 54, 74-75, 81 (1995) (employee's presence as a caregiver during meals and at night was for the employer's benefit and not for the employee's private benefit, and therefore the value of lodging and meals would not constitute a setoff from wages owed). Finally, Respondent offered no evidence of the fair market value of any of the meals or other facilities or services provided to Claimant. The forum will not speculate about such values.

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

"(5) As used in this rule, meals furnished by the employer are regarded as being for the private benefit of the employee except when meal expenses are incurred by an employee while traveling away from the employee's home on the employer's business.

"(6) Lodging or other facilities or services are furnished for the private benefit of the employee when such lodging or other facilities or services are not required by the employer. For purposes of this rule, lodging or other facilities or services are required by the employer when:

"(a) They are a condition of the employee's employment; or

"(b) The employee must travel away from the employee's home on the employer's business; or

"(c) The acceptance of the lodging or other facilities or services is involuntary or coerced."

* ORS 652.120 requires every employer to establish and maintain a regular payday, at which date all employees must be paid the wages due and owing to them. The payday cannot extend beyond a period of 35 days from the time the employee started work. There is no evidence that Respondent established a regular payday for Claimant.

done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Westem Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to her 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 she 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.

Financial Inability

Respondent alleged that she was financially unable to pay Claimant. This forum has repeatedly held that it is a respondent's burden to show the respondent's financial inability to pay a claimant's wages. See ORS 652.150, 183.450(2), and OAR 839-050-0260(3). See also *In the Matter of Jorrion Belinsky*, 5 BOLI 1, 9-10 (1985); *In the Matter of Mega Marketing*, 9 BOLI 133, 138 (1990). Respondent failed to show that she was financially unable to pay Claimant's wages at the time they accrued and cannot escape penalty wage liability.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders JEWEL SCHMIDT to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street,

Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR KRISTINA GORST in the amount of FOUR THOUSAND NINE HUNDRED AND TWENTY FIVE DOLLARS (\$4,925), less appropriate lawful deductions, representing \$3,725 in gross earned, unpaid, due, and payable wages and \$1,200 in penalty wages; plus

a) Interest at the rate of nine percent per year on the sum of \$3,725 from October 1, 1995, until paid, plus

b) Interest at the rate of nine percent interest per year on the sum of \$1,200 from November 1, 1995, until paid.

**In the Matter of
PARKER-HANNIFIN
CORPORATION,
dba Atlas Cylinders, Respondent.**

Case Number 14-96

Final Order of the Commissioner

Jack Roberts

Issued March 5, 1997.

SYNOPSIS

As Complainant, who suffered from a mental impairment (post-traumatic stress disorder), did not have a record of a substantially limiting impairment and was not regarded by Respondent's management as having a

substantially limiting impairment, the Commissioner found that Complainant was not a member of a class of persons protected by ORS 659.425(1)(b) or (c). ORS 659.400(1) and (2), 659.425(1)(b), (c); OAR 839-06-205.

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 7, 1996, in the Conference Room of Suite 220, State Office Building, 165 E 7th, Eugene, Oregon.

The Bureau of Labor and Industries (Agency) was represented by Alan McCullough, an employee of the Agency. Arvard "Butch" Spurgeon (Complainant) was present throughout the hearing, and was not represented by counsel.

Parker-Hannifin Corporation (Respondent) was represented by Paul O. Wickline and Jens Schmidt, Attorneys at Law. John Kostenbauer was present throughout the hearing as Respondent's representative.

The Agency called the following witnesses (in alphabetical order): John Kostenbauer, Respondent's Human Resource Manager; Arvard "Butch" Spurgeon, Complainant; Mary Spurgeon, spouse of Complainant; and Bernadette Yap-Sam, Senior Investigator, Civil Rights Division of the Bureau of Labor and Industries.

Respondent called the following witnesses (in alphabetical order): Steven Jaques, Respondent's Materials Manager, John Kostenbauer,

Respondent's Human Resource Manager, and Bernadette Yap-Sam, Senior Investigator, Civil Rights Division of the Bureau of Labor and Industries.

Having fully considered the entire record in this matter, I, Jack 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 21, 1994, Complainant filed a verified complaint with the Agency, alleging that he was the victim of the unlawful employment practices of Respondent. After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of discrimination in the terms and conditions of employment based upon disability.

2) On January 18, 1996, the Agency prepared for service Specific Charges, alleging that Respondent discriminated against Complainant in the terms and conditions of his employment by requiring that he attend psychiatric counseling based upon a record of impairment or a perceived disability, in violation of ORS 659.425(1)(b) or 659.425(1)(c). With the Specific Charges, Respondent was served with 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 Oregon Administrative Rules (OAR) regarding the contested case process; and d) a

separate copy of the specific administrative rule regarding responsive pleadings. Both the Notice of Contested Case Rights and Procedures and the Bureau of Labor and Industries Contested Case Hearing Rules (OAR 839-50-130(1)) provide that an answer must be filed within 20 days of the receipt of the charging document.

3) On January 29, 1996, the ALJ issued a Discovery Order to the participants, directing them each to submit a Summary of the Case pursuant to OAR 839-50-210.

4) On February 9, 1996, Respondent's local attorney, Jens Schmidt, requested a postponement of the deadline for submission of Respondent's answer, a postponement of the deadline for submission of the Summary of the Case, and a postponement of the hearing, because counsel had been only recently retained, and would need a reasonable amount of time to review the matter in order to file an answer, conduct discovery, and prepare for hearing. The Agency did not oppose the postponements requested. The ALJ granted Respondent's requests for postponement and requested from the participants alternative dates that they would be available for hearing. The Agency and Respondent responded with available dates, and on February 29, 1996, the ALJ issued an Amended Notice of Hearing to the participants.

5) On February 23, 1996, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges and raised an affirmative defense.

6) On March 1, 1996, Respondent's local counsel, Jens Schmidt,

filed a motion for an order allowing corporate counsel, Paul O. Wickline, to appear *pro hac vice* in this matter. Mr. Wickline is licensed to practice law in Ohio. The Agency did not object to this motion. Pursuant to ORS 9.241 and UCR 3.170, the forum granted Respondent's motion and authorized Mr. Wickline to appear as joint counsel in this proceeding, effective March 6, 1996.

7) On March 4, 1996, local counsel filed a motion for a discovery deposition of Complainant, as well as a motion for a blanket discovery order allowing counsel to request unspecified documents from Complainant or the Agency Case Presenter, from anyone treating Complainant for post-traumatic stress disorder or the mental suffering alleged; counsel further requested an order allowing Respondent to request admissions from Complainant and the Agency Case Presenter. On March 5, 1996, the Agency filed a response to the foregoing discovery motions. The Agency did not oppose the motion for the deposition of Complainant or the motion for discovery of documents from anyone treating Complainant for the mental suffering alleged, with a proviso. The Agency agreed to Respondent's request to seek admissions from the Agency Case Presenter, with a proviso. The Agency opposed Respondent's request for production of documents from anyone treating Complainant for post-traumatic stress syndrome.

8) On March 6, 1996, the forum issued a ruling granting Respondent's motion for the discovery deposition of Complainant, granting Respondent's motion to request admissions, and

requiring that Complainant provide to the forum for an *in camera* inspection, records of anyone diagnosing or treating Complainant for post-traumatic stress disorder and records of anyone treating Complainant for the mental suffering alleged.

9) On March 18, 1996, the Agency filed a motion for an order allowing the taking of depositions of John Kostenbauer and Geri Comstock, witnesses for Respondent. Respondent did not oppose this motion. On March 22, 1996, the forum granted the Agency's motion.

10) On April 5, 1996, the Agency filed a motion to amend the Specific Charges to substitute the term "post-traumatic stress disorder" for "post-traumatic stress syndrome" throughout the Specific Charges. The motion was granted on April 15, 1996, without opposition from Respondent.

11) On April 10, 1996, the ALJ issued a Discovery Order to the participants, directing them each to submit a Summary of the Case pursuant to OAR 839-50-210.

12) Pursuant to the forum's order to produce certain treatment records for an *in camera* inspection, the Agency timely provided medical and counseling records on April 12, 1996. On April 16, 1996, following an *in camera* inspection of same, the forum released the Department of Veterans Affairs rating schedules for 1992 and 1994, in their entirety; the Roseburg Veterans Administration Medical Center psychiatric evaluation and psychosocial assessment, in their entirety; and the Eugene Vet Center intake assessment, in its entirety. On the same date, subject to argument of the

participants, the forum proposed to release Dr. Kjaer's notes in their entirety, and redacted copies of the Eugene Vet Center Group Counseling Record and Progress Notes. Neither participant objected to the release of the latter sets of documents as proposed, and on April 22, 1996, they were released, as proposed, to the participants.

13) On April 22, 1996, local counsel filed a request not to appear at hearing, and to allow Mr. Wickline to represent Respondent at hearing. On April 26, 1996, the forum denied the request, citing the forum's interpretation of the requirement of UTCR 3.170 – that associated local counsel participate meaningfully in the preparation and hearing of this matter in order for out-of-state counsel to continue to appear.

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

15) A pre-hearing conference was held on May 7, 1996, at which time the Agency and Respondent stipulated to facts which were admitted by the pleadings. Those facts were admitted into the record by the ALJ at the beginning of the hearing. Certain additional facts were stipulated, which facts were also read into the record at the beginning of the hearing.

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

17) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Administrative

Law Judge of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) During the hearing the ALJ requested that either the Agency or Respondent provide the forum with a replacement page for Exhibit R-27, page 8, by 5 p.m. on May 14, 1996. No replacement page was received. The record closed on May 14, 1996.

19) The proposed order, containing an exceptions notice, was issued November 15, 1996. Following an extension of time, the Agency timely filed exceptions on December 16, 1996. Following an extension of time, the Respondent timely filed its response to the exceptions of the Agency on January 24, 1997. The Agency's exceptions are dealt with in the Opinion section of the order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a foreign corporation registered to do business in the State of Oregon under the assumed business name of Atlas Cylinders, custom manufacturing large-bore pneumatic and hydraulic cylinders, and was an employer in this state that employed six or more persons, subject to the provisions of ORS 659.010 to 659.435.

2) Complainant has been employed by Respondent since September 3, 1987, when Respondent purchased the cylinder manufacturing plant known as Atlas Cylinders. Complainant had been employed at the

same location by Respondent's predecessor-in-interest since 1973.

3) Complainant was drafted into the US Army in 1967. While on a tour of combat duty in Vietnam, Complainant was severely injured when a land mine exploded. He sustained injuries to his abdomen, right leg, both arms, and left eye, and suffered tinnitus and impaired hearing. Following surgeries and prolonged hospitalization, Complainant was given a medical discharge in 1970. From 1970 through 1972, Complainant maintained a 100 percent service-connected medical disability rating through the Department of Veterans Affairs ("DVA"). During 1972, Complainant's disability rating was reduced to 70 percent, which rating was maintained until his diagnosis of post-traumatic stress disorder in 1992.

On January 23, 1992, in connection with an application for an upgraded DVA service-connected disability rating, Complainant was diagnosed with post-traumatic stress disorder (hereinafter "PTSD"). On May 5, 1992, Complainant's service-connected disability was upgraded to 80 percent, due to a 10 percent disability rating attributable to PTSD and an increase in Complainant's service-connected tinnitus to 10 percent. Complainant appealed the 10 percent rating for PTSD; on June 27, 1994, the disability rating for Complainant's PTSD was increased to 30 percent. Notwithstanding the increased rating for PTSD, Complainant's overall service-connected disability rating has

* The combined evaluation of disability for all service-connected conditions is not arrived at by adding percentages of the disabilities, but is determined by reference to a combined rating table.

remained at 80 percent. Complainant's disability rating for PTSD has remained at 30 percent.

4) PTSD is a mental impairment recognized by the American Psychiatric Association.

5) At all times material, John Kostenbauer was human resources manager for Respondent. The primary job duties of the human resources manager include administration of personnel policies, practices, and processes; examples include employee compensation and benefits, employee counseling, and affirmative action planning. At the time of employment by Respondent, in addition to personnel administration, Kostenbauer had a background in nursing, preventive health services, and public health, including mental health services.

6) At all times material, Geri Comstock was health care coordinator for Respondent. The primary duties of the health care coordinator include utilization review and case management for Respondent's group health plan, benefit interpretation for Respondent's employees, wellness program formulation, and workers' compensation case management.

7) At the time Respondent assumed ownership of Atlas Cylinders, Complainant was working in the storeroom. On March 1, 1988, Complainant received a classification change to stockroom handler/driver I. On March 19, 1990, Complainant was transferred into the Receiving Department as receiving clerk, a newly-created position.

Complainant was promoted to receiver on June 11, 1990; on May 6, 1991, he was demoted back to his previous position of storeroom clerk due to his failure to perform responsibilities. On March 1, 1993, Complainant received a classification title change to stockroom clerk.

8) Beginning in 1991, and continuing until Complainant's transfer to the tool crib in December 1994, Complainant received the following accommodations from Respondent due to his physical disabilities: the availability of a stool or chair to use as needed and rest periods as needed.

9) On June 7, 1993, retroactively effective May 10, 1993, Complainant was provided with a performance appraisal as storeroom clerk. Complainant was supervised in that position by Ben Ferguson. Ferguson rated Complainant below expected performance requirements in three categories: quality of work, quantity of work, and dependability. The specific deficiencies noted included repetitive errors in pulling parts for assembly, low productivity and need for supervision, and episodic resistance to following established methods and procedures for performing his job. As part of the appraisal, Complainant was provided with work performance guidelines to rectify the performance deficiencies. The work performance guidelines were the joint product of Ben Ferguson, Phil Hardman, and Steve Jaques. Complainant received no merit increase in pay.

* No evidence was submitted concerning the reason for reversion to storeroom clerk between March and May of 1993. Due to the short time frame and absence of an entry in Complainant's personnel file, the forum infers it was merely a title reversion.

10) On June 28, 1993, Complainant first approached Kostenbauer about co-worker Rick Lawson's confrontational and intimidating behavior toward Complainant. Complainant reported to Kostenbauer that Lawson criticized and made threats to Complainant concerning Complainant's work performance. On July 27, 1993, Complainant reported to Kostenbauer that Lawson was continuing his intimidation of Complainant and asked Kostenbauer to intervene. Complainant expressed concern that if Lawson were not stopped, Complainant might do something to Lawson that he might regret. Kostenbauer took Complainant's stated concern to mean that Complainant might beat up Lawson. Lawson was given a verbal warning to stop his confrontational conversations with Complainant.

11) On August 12, 1993, Phil Hardman met with Complainant concerning Complainant's repetitive errors. Complainant attributed the errors to an inability to stay focused due to delayed stress syndrome from his Vietnam experience. Complainant stated that the condition was getting worse. Hardman then went to Kostenbauer about this interaction and about a concern that Complainant might harm someone at the worksite, arising from a comment made at another time by Complainant intimating he could become a "postal worker".

12) Complainant had, at some point, a lunch time conversation with Ben Ferguson and Phil Hardman about a news story concerning a postal worker's violent assault in the workplace. Complainant stated that the assaultive postal worker was not a

combat veteran as the worker had not done the mission correctly, as he had involved outsiders in violence meant only for certain people.

13) Hardman made notes concerning his meeting with Complainant on August 12, 1993, which he gave to Kostenbauer. Hardman's notes do not contain a reference to a statement by Complainant that he could become a "postal worker".

14) Upon his return from vacation on August 16, 1993, Complainant was summoned by Kostenbauer to discuss the "postal worker" intimation. Complainant neither admitted nor denied that he made the statement. Complainant told Kostenbauer that he was under stress, felt his PTSD was getting worse, and that he had applied for more disability for PTSD; that he was attending a Vietnam support group on Mondays, which was helping; and that he had not been evaluated for two years. Kostenbauer had Complainant sign a release of information form authorizing Respondent to get Complainant's medical records. Complainant did not protest signing the release or Respondent's acquisition of his medical records.

15) Kostenbauer made notes of his conversation with Complainant on August 16, 1993. The notes do not reflect that Complainant acknowledged making the postal worker statement.

16) Comstock initiated a telephone conversation with Complainant in August 1993. Complainant gave Comstock some information regarding his background, told Comstock he was getting DVA disability benefits for physical disabilities and for PTSD, and

that he was going to the Veterans' Center for counseling.

17) On August 20, 1993, Comstock related to Kostenbauer that she had talked with the Eugene Vets' Center support group leader, and had learned that he was not a medical professional. Kostenbauer and Comstock decided during that conversation that they would have Complainant evaluated by a psychiatrist of Respondent's choosing, once Comstock had been able to talk to the DVA.

18) Comstock obtained a referral for a psychiatrist with a background in PTSD from the Eugene Vet Center. That psychiatrist, Dr. Reeves, was not available, but his office referred Comstock to Dr. Kjaer, who also was reported to have a background in PTSD. Arrangements were made to have Dr. Kjaer evaluate Complainant.

19) On September 3, 1993, Kostenbauer sent Complainant a memo setting out the provider and time and place of his psychiatric evaluation. The evaluation was to take place on September 13, 1993, at the office of Dr. Kjaer.

20) On September 13, 1993, Kostenbauer had Complainant sign a second release form, authorizing Respondent to obtain medical information. Complainant did not openly protest signing the release or being required to see Dr. Kjaer for evaluation.

21) At sometime between Complainant's appointment with Dr. Kjaer on September 13, 1993, and September 22, 1993, Comstock telephoned Dr. Kjaer to learn if Dr. Kjaer felt Complainant was a safety risk in the workplace. Comstock was informed that

Complainant had been unwilling to talk about PTSD or any issues in the workplace. On September 22, 1993, Comstock reported the substance of her conversation with Dr. Kjaer to Kostenbauer. Because their safety concern had not been addressed, Kostenbauer and Comstock thought it best to arrange for another evaluation with Dr. Kjaer. After consulting with the area human resources manager, Dennis Mitch [phonetic], Kostenbauer determined he would talk with Complainant to convince him that Respondent could not help Complainant without Complainant's cooperation, and that if Complainant did not cooperate, corrective action would be taken. Another appointment was made for Complainant to be evaluated by Dr. Kjaer on October 19, 1993.

Kostenbauer met with Complainant on September 23, 1993, and informed Complainant of the seriousness of the evaluation, the need to determine whether Complainant was a danger to himself or others, and that Complainant must either cooperate or face corrective action. Complainant agreed to keep the appointment. Complainant was told that Kostenbauer would get a report from Dr. Kjaer and that Kostenbauer and Complainant would discuss the report when received. Complainant informed Kostenbauer that he thought he would be getting more disability compensation for the PTSD as it was getting worse.

22) On September 24, 1993, Kostenbauer wrote a letter to Dr. Kjaer in which he outlined his perception of Complainant's history and problems at the workplace. Kostenbauer addressed Complainant's poor work

performance, interpersonal conflicts because of it, and his separate concern that Complainant could become violent at the work place. Kostenbauer noted that Complainant attributes his performance errors to a loss of concentration caused by PTSD and that Complainant reports experiencing moments of stress so great he must retreat to the back of the storeroom to collect his thoughts.

23) Complainant was being sent for a psychiatric evaluation in order to determine or confirm the condition they were dealing with, to learn whether Complainant was a danger to himself or others at the worksite, and to learn whether Complainant's condition was impacting his ability to do his job.

24) Complainant was seen by Dr. Kjaer for the renewed evaluation on October 19, 1993.

25) On October 22, 1993, Dr. Kjaer issued a report concerning his psychiatric evaluation of Complainant. Regarding the alleged "postal worker" statement, Dr. Kjaer recorded that Complainant indicated that he had not raised the topic in discussions, that others had. Complainant further indicated to Dr. Kjaer that he had had no violence in recent years, and did not believe that his capacity as a combatant had been activated. Complainant denied the allegations made by Respondent: that he had made veiled threats at work of creating mayhem; talked about his PTSD to people at work; and referenced potentially explosive behavior, particularly the post office murders which occurred as a result of conflict within the department. While observing mild disorganization of thought and speech, Dr. Kjaer noted

that Complainant displayed no indicia of impaired thought processes, reality testing, communication skill, or impulse control. After noting Complainant's evasiveness with him, Dr. Kjaer confirmed the diagnosis of PTSD; evaluated Complainant's stress level as moderate (due to difficulty at work, primarily); noted Complainant's moderate difficulty in socializing, problems with co-workers, and occupational difficulties; recommended that Complainant be seen on a regular basis; and discussed the possibility that mild doses of medication could facilitate Complainant's tolerance of his workplace conflicts.

26) On November 3, 1993, following his receipt and review of Dr. Kjaer's report, Kostenbauer felt that the report had not addressed the workplace violence issue well. Kostenbauer faxed a copy of the report to Comstock with a cover memo containing the following message:

"TO: GERI
FROM: JOHN H. KOSTENBAUER
DATE: NOVEMBER 3, 1993
SUBJECT: BUTCH SPURGEON'S
PSYCH EVALUATION

"HERE IS REPORT. WHAT DOES IT SAY TO YOU? DOESN'T SAY MUCH TO ME AND CERTAINLY DOES NOT RAISE THE ISSUES WE WERE CONCERNED ABOUT.

"SHOULD WE REQUIRE HIM TO BEGIN SEEING A PSYCHIATRIST ON A DAILY BASIS? BEHAVIOR CONTRACT?

"PLEASE ADVISE ON NEXT STEP. THANKS FOR ASSISTANCE."

27) Comstock entered a log note in Complainant's medical case management file on November 4, 1993, as follows:

"Date: 11/4/93

Contact: John Kostenbauer

Received report from Dr. Kjaer. Will continue to monitor employee performance. Discussed with J.M., no indication that pt is potentially violent."

28) "J.M." is Joyce Munsell, Comstock's supervisor.

29) On November 8, 1993, Kostenbauer met with Complainant to go over Dr. Kjaer's report and recommendations. Complainant told Kostenbauer that he was satisfied with the Vets' Center support group and did not want additional counseling. Kostenbauer advised Complainant that while he could continue with the support group, he needed to follow the recommendation for regular professional counseling and improve his work performance.

30) In early 1994, Respondent was reorganizing; Steve Jaques was transitioning into a position as head of the storeroom. During this time, Complainant's poor work performance continued. Respondent was documenting Complainant's performance. Complainant's co-workers complained about Complainant's errors and about having to do part of Complainant's job. Complainant had not entered into counseling with Dr. Kjaer.

31) On May 19, 1994, Kostenbauer and Jaques met with Complainant. Complainant was given a document titled "Corrective Action Form", a written warning. Recitations in the warning included a statement

that corrective action was being taken in order to improve Complainant's unsatisfactory work performance, identified steps previously taken to correct performance, specified conditions and corrective requirements for Complainant, and set out disciplinary consequences should the conditions not be met. The document contained a recitation that Complainant had been evaluated by a psychiatrist, which evaluation indicated a need for counseling, but no relevant impairment in Complainant's ability to do his job. Among other requirements, Complainant was directed to augment his support group activity with regular psychiatric visits to Dr. Kjaer, to make an appointment immediately to initiate those visits, and to sign a release in order that regular reports could be received by Kostenbauer concerning Complainant's progress in therapy sessions. The corrective action form was signed by Kostenbauer, Complainant, and Steve Jaques, the materials manager. All signatures were dated May 19, 1994. Effective May 1, 1994, and in conjunction with the corrective action, Complainant was denied a merit raise and profit sharing was terminated pending improvement in his work performance.

32) During the meeting of May 19, 1994, Complainant did not express opposition to the requirements imposed, including the requirement that Complainant see Dr. Kjaer for counseling on a regular basis.

33) During the summer of 1994, Complainant's work performance continued to be in need of improvement. Complainant received an annual wage adjustment, but no merit increase.

34) On September 26, 1994, Complainant was given a notice of violation of two provisions of the May 19, 1994, corrective action -- failure to receive regular psychiatric counseling and failure to present reports of progress of the counseling. Complainant was directed to begin psychiatric counseling sessions effective October 1, 1994, or be subject to suspension from the job without pay or to termination. The form was signed by Kostenbauer, Complainant, and Jaques.

35) Complainant did not outwardly protest the direction given on September 26, 1996.

36) In conjunction with the notification of violation of September 26, 1994, Complainant was assigned a review date of February 6, 1995.

37) Complainant continued to have problems with work performance. Between September 15, 1994, and September 29, 1994, Complainant filled in at the front desk of the storeroom due to the vacation of a co-worker. Complainant's performance problems during this time were partially attributable to his PTSD. On September 30, 1994, Jaques wrote a memo to Kostenbauer concerning the work performance of Complainant during this period. Jaques documented examples of a backlog of tasks left uncompleted, a lack of ability to perform all the tasks of a job that co-workers can perform, and a failure to inform anyone of the problems left unattended.

38) Due to a previously scheduled vacation, Complainant was absent from work between September 30 and October 14, 1994.

39) In a document dated October 17, 1994, and entitled "Work Performance Probation", Complainant was given a last chance agreement to improve his performance or be subject to suspension pending termination. Complainant was placed on 90 days probation with specific job task guidelines for improving his performance. To augment Complainant's improvement in performance, Respondent mandated that Complainant obtain psychiatric counseling, at Respondent's expense and with the psychiatrist assigned by Respondent. Complainant was directed to continue psychiatric counseling sessions until released from the psychiatrist's care. It was recited in this document that regular progress reports would be received by Respondent on Complainant's progress. This document was signed by Kostenbauer and Jaques on October 17, 1994.

40) On October 18, 1994, Kostenbauer and Jaques met with Complainant to highlight concerns with Complainant's performance. Complainant was told that his job was on the line; that he was capable of performing the job; that he had been given the opportunity for psychiatric counseling and had not taken advantage of it; that he would be on probationary status with the conditions of that probation as set out in the last chance agreement; and informed of the consequences of noncompliance with the conditions of probation. Complainant acknowledged that he was not doing all of his job, that he "slithers" away from his tasks without knowing why. The "Work Performance Probation"

was signed by Complainant at this meeting on October 18, 1994.

41) In a letter dated October 21, 1994, Dr. Kjaer informed Kostenbauer that Complainant had attended an appointment with Dr. Kjaer on October 20, 1994. Dr. Kjaer indicated further that Complainant had informed Dr. Kjaer that Respondent required regular reports on Complainant; Dr. Kjaer stated his assumption that Respondent wanted only the fact of attendance reported, and not the content of the visit.

42) In a memo to Complainant dated October 21, 1994, Kostenbauer notified Complainant that an appointment had been scheduled for Complainant with Dr. Kjaer on November 3, 1994. Complainant was directed to schedule all future appointments with Dr. Kjaer himself.

43) Between October 21 and December 5, 1994, Complainant was on a medical leave of absence due to cellulitis in his right leg.

44) During Complainant's absence, Kostenbauer consulted with his boss, Dennis, regarding Complainant and decided on trying a strategy of getting Complainant out on long term disability, if possible. Kostenbauer's log note of October 26, 1994, reads as follows:

"Discussed case with D. M[remainder of name not legible]. Butch not performing up to potential and about illness. Decided one strategy was to get Butch out on LTD if possible. Not sure it would be approved, but at least a more favorable way to leave the company. If it is not approved, need to continue with probation and goals & see if he meets the goals.

Discussed involving corporate attorney at some point if Butch does not meet expectation of probation."

45) On October 28, 1994, Kostenbauer and Jaques made a visit to Complainant's home. A discussion ensued concerning Complainant's options, including the viability of his leaving employment at Respondent on long term disability. The course of action at work was also discussed; Complainant was told that probation would continue and be evaluated for continued work. On October 31, 1994, Kostenbauer met with Complainant about possible compensation under long term disability, particularly if being off work were considered 100 percent disability for purposes of DVA disability benefits.

46) On November 3, 1994, Complainant attended his scheduled appointment with Dr. Kjaer. In a letter dated November 4, 1994, Dr. Kjaer informed Kostenbauer that Complainant had related to him Respondent's offer of "early retirement."

47) On November 28, 1994, Kostenbauer called Dr. Kjaer to learn if Complainant had enough mental illness to supplement the physical disabilities to arrive at a rating of 100 percent for long term disability, and was told that there was no presence of debilitating mental illness. Dr. Kjaer related that mental health was not a problem and that Complainant was coming to the sessions to fulfill the obligations of probation.

48) Toward the end of the time Complainant was on leave with cellulitis, Respondent began to look for a job within the company that Complainant could do successfully. Respondent

created a job as tool crib attendant for Complainant. Respondent determined that success was likely in such a position as it was a position with duties Complainant could do, and a position with insular responsibility, which remove Complainant from a centralized function, depended upon by co-workers (with the attendant friction arising from Complainant's errors and incomplete performance of his duties) and the distraction of noise and a crowd that co-workers represented to Complainant.

49) On December 2, 1994, Complainant called Jaques to inform him Complainant was able to come back to work on December 5, 1994. Complainant was informed that he would be coming back to a new position in the tool crib.

50) On December 2, 1994, Kostenbauer received a copy of Complainant's discrimination complaint. The complaint was the first clear indication to Kostenbauer that Complainant protested going to a psychiatrist. Complainant was not required to see a psychiatrist following receipt of the discrimination complaint.

51) On December 3, 1994, Complainant was transferred from the job of storeroom clerk to tool crib attendant, to be effective upon Complainant's return to work on December 5, 1994. Complainant was to receive the same rate of pay in the new position, even though the duties called for lesser pay.

52) On December 5, 1994, Complainant returned to work. Kostenbauer and Jaques met with Complainant to go over their expectations and his new job responsibilities. Complainant's period of probation was

adjusted due to his lengthy leave of absence.

53) Initially, Complainant had some difficulty with grinding tool bits in his new position, but with the aid of magnifying glasses brought from home he was able to solve the problem.

54) Phil Hardman, Complainant's supervisor in the tool crib, evaluated Complainant's performance on January 20, 1995. Issues at that time included data entry errors affecting the cycle count (which count affected the computerized ordering system) and duplicate order requests. On January 31 and February 17, 1995, Hardman again evaluated Complainant; the problems noted on the first evaluation had been resolved at the time of the February 17, 1995, evaluation.

55) On February 3, 1995, Kostenbauer sent a letter to Dr. Kjaer requesting certain information concerning Complainant, as follows:

"Currently, we are in the process of reviewing Butch's work performance and would like a follow-up regarding his progress with you.

"We would like you to address the following issues:

"1. Are there any underlying mental or emotional issues which would prevent Butch from working at Atlas Cylinders?

"2. Are there any underlying metal [sic] or emotional issues which would prevent Butch from performing the essential functions of his job? (The essential functions are attached for your review.)

"3. Are there any underlying mental or emotional issues which would cause Butch to be a danger to himself or others?"

"4. Would you project how long you feel Butch will be under your care?"

"Butch has signed a Release of Information form and we would appreciate your responses to our concerns at your earliest possible convenience."*

56) On March 1, 1995, Complainant was provided with a probationary performance review. Of eight categories of evaluation, Complainant was rated as being below expected performance in two categories: quantity of work and attitude. Guidelines for improving in these two areas were provided. Complainant's probation was extended for up to 90 days, with the next evaluation date set for June 1, 1995.

57) On June 1, 1995, Complainant was again evaluated, and, despite receiving a below expected performance rating in two categories, he was judged as having a satisfactory performance level overall. He received a merit increase in pay of \$0.30 per hour, and profit sharing was reinstated.

58) As of the date of hearing herein, Complainant continues to be employed by Respondent in the tool crib. Complainant's performance continues to be adequate.

59) Respondent paid for the required evaluation by and Complainant's sessions with Dr. Kjaer. Complainant was paid at his regular rate for the time he was required to spend with Dr. Kjaer.

60) Kostenbauer has made referrals for counseling for employees in three instances while at Respondent. Two referrals were for marriage counseling; one was for emerging mental illness. The referrals were to suggest providers; counseling was not required.

61) Prior to August 1993, Kostenbauer was unaware that Complainant had a non-physical problem of any kind. Complainant first mentioned the possibility of PTSD when he was scheduled to be evaluated by the DVA for receipt of benefits and needed to get permission to be away from work.

62) After August 1993, Complainant did not engage in any behavior which would have led Kostenbauer to believe that Complainant could be violent in the workplace

63) Kostenbauer interpreted Dr. Kjaer's 1993 report to mean that Complainant's PTSD did not impair Complainant's job performance; Kostenbauer never concluded that Complainant's job performance was not impacted by PTSD.

64) Complainant experienced the impact of his PTSD on his work as

varying with the level of stress he was experiencing.

65) Complainant's testimony was generally credible. The Administrative Law Judge observed his demeanor during the hearing, and found him to be genuine in the expression of his uncomfortable experience with the performance appraisals and required counseling. His testimony, however, was not believed in certain particulars. For example, Complainant testified that Dr. Kjaer was unable to be of any help to him as Dr. Kjaer had told Complainant all he knew about PTSD came from Life magazine. Since other credible evidence established that Dr. Kjaer was recommended to Respondent by another psychiatrist with expertise in PTSD, Complainant's representation was found to be incredible. Another example of testimony disbelieved was Complainant's statement that he did not see Dr. Kjaer between October 1993 and May 1994 because he thought the company would be setting up the next appointment. The forum finds it doubtful that Complainant could have maintained such a belief for seven months without checking in with Kostenbauer to confirm it. It seems more plausible to the forum that, given Complainant's distaste for counseling suggested by his employer, he simply ignored the advice of Kostenbauer.

Complainant was observed by the forum to be evasive about his conversation with Kostenbauer on August 16, 1993. When asked whether Kostenbauer had said he perceived that Complainant had made the statement that he might create a postal worker situation, Complainant answered that he did

not interpret John's comment as John perceiving he would do it.

Because of evasiveness or inherent unbelievability, Complainant's testimony was not believed in connection with the foregoing points.

66) The testimony of John Kostenbauer was generally credible. For the most part the Administrative Law Judge was impressed by his demeanor that his testimony was believable. However, on two important points his testimony was not believed. On the issue of Complainant's statement intimating he could become a postal worker, Kostenbauer testified that Phil Hardman had told him Complainant had made that statement on August 12, 1993, during a performance counseling session. Yet Hardman made notes of his conversation with Complainant on August 12, which he gave to Kostenbauer on the same date, which state only that Complainant raised PTSD as an explanation for poor work performance. Had Complainant made the postal worker comment in the same counseling session, or had Hardman told Kostenbauer Complainant had made the comment in the same session, it seems unlikely to the forum that Kostenbauer would not have required Hardman to correct the omission of such a threat when they discussed the situation on that date. It seems more likely, based on certain testimony by Complainant, which the forum has found to be credible, that Hardman told Kostenbauer that he had had a casual lunch time conversation on another occasion with Complainant, in which Complainant made statements concerning postal workers, which, when coupled with

* No evidence was submitted concerning the responses of Dr. Kjaer, if any, to the questions posed in Kostenbauer's letter of February 3, 1995. The forum infers that this request was made by Kostenbauer in connection with Complainant's probationary performance review under the terms of the last chance agreement. Complainant was in a different job, his performance was unsatisfactory, and one and one-half years had elapsed since Dr. Kjaer's last evaluation.

learning that Complainant had PTSD, caused Hardman concern that Complainant was intimating a capacity to become a postal worker. The forum found Kostenbauer's testimony on this point not believable.

Kostenbauer's testimony was inconsistent and vague on another important point – whether, on August 16, 1993, Complainant acknowledged making the postal worker statement when confronted by Kostenbauer. Kostenbauer testified twice that Complainant had just looked at him when confronted and had not denied making the statement, and later testified that Complainant had admitted making the statement. Based on Kostenbauer's inconsistent and somewhat evasive testimony on this point, the forum finds that his testimony on this point was also not credible.

67) The testimony of the other witnesses was credible. The Administrative Law Judge observed the demeanor of each witness and found each to be believable.

ULTIMATE FINDINGS OF FACT

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

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

3) Complainant was first diagnosed with PTSD on January 23, 1992, by the DVA.

4) PTSD is a mental impairment which weakened, diminished, restricted, or otherwise damaged Complainant's health or mental activity.

5) At times material, Complainant's mental impairment of PTSD did

not substantially limit one or more major life activities.

6) Complainant had a record of PTSD, an impairment, as of January 23, 1992, but such record was not of a substantially limiting impairment.

7) Complainant was experiencing serious work performance problems between Spring 1993 and February 1995.

8) Respondent required Complainant to enter counseling because of Complainant's ongoing performance problems.

9) In requiring psychiatric counseling, Respondent did not treat Complainant as if his impairment of PTSD substantially limited a major life activity without it.

10) Respondent's attitude toward PTSD did not include a belief or opinion that a person suffering from it was substantially limited in a major life activity, without ongoing, contemporaneous psychiatric counseling.

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.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over 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) The actions of employees John Kostenbauer, Phil Hardman, Steve Jaques, and Geri Comstock, described herein, and their perceptions and attitudes underlying those actions, are properly imputed to Respondent.

4) ORS 659.425(1) provides, in pertinent part:

"For the purposes of ORS 659.400 to 659.460, it is an unlawful employment practice for any employer to * * * discriminate * * * in terms, conditions or privileges of employment because:

"(b) An individual has a record of a physical or mental impairment; or

"(c) An individual is regarded as having a physical or mental impairment."

ORS 659.400 further provides, in pertinent 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.

"(2) As used in subsection (1) of this section:

"(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent, or maintain property.

"(b) 'Has a record of such an impairment' means has a history of, or has been misclassified as having such an impairment.

"(c) 'Is regarded as having an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment."

OAR 839-06-205 provides, in pertinent part:

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

"(2) 'The attitude of others toward such impairment' means an opinion, evaluation, or belief, held by another person or persons toward the individual's perceived or actual physical or mental impairment.

"(5) 'Medical' means authored by or originating with a medical * * * physician * * *.

"(7) 'Physical or mental impairment' means an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages an individual's health or physical or mental activity."

Complainant was not a disabled person at times material herein.

5) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of

Labor and Industries shall issue an order dismissing the charge and the complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

The pivotal issue in this case is whether Complainant is a "disabled person", as defined in ORS 659.400(1) and (2), entitled to protection from discrimination by ORS 659.425. ORS 659.425 prohibits discrimination against an individual based upon an actual disability, a record of disability, or a perceived disability.^{*} The Agency has alleged that Complainant was discriminated against by Respondent because he had a record of an impairment, PTSD, or because Respondent perceived him to be disabled. The Agency charged violations of ORS 659.425(1)(b) and (c).

1. ORS 659.425(1)(b)

ORS 659.425(1)(b) prohibits discrimination because an "individual has a record of a physical or mental impairment." When ORS 659.425(1)(b) is read in light of the definitions in ORS 659.400(1) and (2), "has a record of such an impairment" means that an individual has a history of, or has been misclassified as having an impairment which substantially limits one or more major life activities. ORS 659.400(2)(b); *Devaux v. State of Oregon*, 68 Or App 322, 326, 681 P2d 156, 158 (1984). The Agency did not allege that Complainant had a history of an impairment that substantially limited one or more major life activities and the

record does not support a finding that he did.

The evidence established that as of January 23, 1992, Complainant was diagnosed with PTSD. As of that date, Complainant had a history of PTSD, an impairment.^{**} There was insufficient evidence that PTSD substantially limited a major life activity of Complainant at any time before or after January 1992. There was evidence establishing that Complainant was initially awarded a 10 percent VA disability rating for PTSD on May 5, 1992, and that, on appeal, the rating was upgraded to 30 percent on June 27, 1994. The fact that an individual has a record of being a disabled veteran, or of disability retirement, or is classified as disabled for other purposes does not guarantee that the individual will satisfy the definition of "disabled person" under ORS 659.400. Other statutes, regulations, and programs may have a definition of "disability" or "disabled person" that is not the same as the definition set forth in ORS 659.400. Accordingly, in order for an individual who has been classified in a record as "disabled" for some other purpose to be considered disabled for purposes of ORS 659.425(1)(b), the impairment indicated in the record must be a physical or mental impairment that substantially limits one or more of the individual's major life activities.

A combat veteran's basic entitlement to compensation for disability resulting from personal injury suffered or disease contracted in line of duty, in

* ORS 659.425(1), when read in conjunction with ORS 659.400(1) and (2).

** There is no evidence that Respondent was aware of this diagnosis until August 1993.

the active military during a period of war, is set out at 38 USCA § 1110 (West Supp 1991). The term "disability", as used in the basic entitlement statute, refers to impairment of earning capacity. *Allen v. Brown*, Vet App 1995, 7 Vet App 439. Authority to adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries is delegated to the Secretary of Veterans Affairs at 38 USCA § 1155 (West Supp 1991). Section 1155 mandates that the ratings be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations, and that the schedule be constructed so as to provide no more than ten grades of disability upon which payments of compensation shall be based, in graduated increments of 10 percent (i.e., 10 percent, 20 percent, etc., to 100 percent).

Pursuant to its grant of authority to adopt a schedule of ratings of reductions in earning capacity, the Secretary of Veterans Affairs adopted a schedule for rating disabilities, codified at 38 CFR Ch. 1, Part 4 (1964) (amended 1994). In the evaluation of mental disorders, the severity of disability is based upon actual symptomatology, as it affects social and industrial adaptability. 38 CFR Ch. 1, § 4.130 (1994). The schedule of ratings for mental disorders is codified at 38 CFR Ch. 1, § 4.132 (1994). The general rating formula for psychoneurotic

disorders, which includes PTSD, contains descriptive formulas for each of six ratings – 0 percent, 10 percent, 30 percent, 50 percent, 70 percent, and 100 percent.

The descriptive formula for a disability rating of 10 percent for psychoneurotic disorders reads: "Less than criteria for the 30 percent, with emotional tension or other evidence of anxiety productive of mild social and industrial impairment". The descriptive formula for a disability rating of 30 percent for psychoneurotic disorders reads: "Definite impairment in the ability to establish or maintain effective and wholesome relationships with people. The psychoneurotic symptoms result in such reduction in initiative, flexibility, efficiency and reliability levels as to produce definite industrial impairment". In contrast, the descriptive formula for 50 percent disability refers to "considerable impairment" in ability to establish or maintain relationships, and to "considerable industrial impairment" by reason of psychoneurotic symptoms. For 70 percent disability, the ability to establish or maintain relationships is described as "severely impaired"; there is "severe impairment" in the ability to obtain and maintain employment due to severe and persistent psychoneurotic symptoms. On the record herein, the forum is unable to determine the level of DVA disability rating, if any, that correlates with a substantial limitation to one or more of the Complainant's major life activities.^{*}

* Even if the level of disability rating ascribed to Complainant was sufficient to establish that Complainant had a history of an impairment that substantially limited one or more of his major life activities, Respondent did not become aware of Complainant's diagnosis until August 1993, when Respondent's concern was with Complainant's current behavior and work performance, in relation to present effects from the impairment. There is no evidence in the record

As there is insufficient evidence on the record from which to conclude that Complainant has a record of a substantially limiting impairment or was misclassified in any respect, the forum finds that Complainant does not enjoy the protection of ORS 659.425(1)(b).

2. ORS 659.425(1)(c)

ORS 659.425(1)(c) prohibits discrimination because an individual is regarded as having a physical or mental impairment that substantially limits a major life activity. *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, 553, 780 P2d 743, 746 (1989). ORS 659.400(2)(c) provides:

"Is regarded as having [such] an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment;

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment."

The theory of perceived disability defined by ORS 659.400(2)(c)(C) is not applicable here, as Complainant has a mental impairment – PTSD. The Agency has alleged those theories of perceived disability defined by ORS 659.400(2)(c)(A) and (B).

ORS 659.400(2)(c)(A) "protects the person who has a nonsubstantial impairment that the employer erroneously treats as substantial[.]" *OSCI*, 98 Or App 553, 780 P2d at 746. For purposes of Paragraph III.B., the Agency has pled that PTSD does not substantially limit Complainant's major life activities. The treatment averred in this Paragraph was Respondent's imposition of mandatory psychiatric counseling. Of necessity, it is this regimen that must reflect that Respondent treated Complainant as if his PTSD substantially limited a major life activity. This requirement was imposed by Respondent's supervisory and management personnel, primarily by decision of John Kostenbauer.

Whether Respondent erroneously treated Complainant's impairment as substantially limiting a major life activity is a question of fact. *OSCI*, 98 Or App 555, 780 P2d at 747. No evidence was presented to suggest that the major life activity in question was other than the major life activity of employment. Thus, the question to be answered is whether Respondent, by requiring

that Respondent had access to the actual DVA record at any time. Respondent had Complainant evaluated independently in October 1993, and relied upon that record -- that diagnosis, evaluation of current functioning, and accompanying recommendations -- in responding to the concerns of management personnel. In this instance, when the gravamen of Complainant's allegations concern his current condition, the better theory of protected class membership is ORS 659.400(2)(c), protected from discrimination by ORS 659.425(1)(c). See, e.g., *In the Matter of Glenn Walters Nursery, Inc.*, 11 BOLI 32, 41 (1992).

psychiatric counseling, treated Complainant as substantially limited in the major life activity of employment without it. In order to be substantially limited in employment, one must be unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. See, e.g., *OSCI*, 98 Or App 554, 780 P2d at 747; *In the Matter of Oregon State Correctional Institute*, 9 BOLI 7, 25-26, 35 (1990), on remand, *OSCI*, supra; *Glenn Walters Nursery, Inc.*, supra, at 42; *Miller v. AT & T Network Systems*, 722 F Supp 633, 639-40 (D Or 1989), *aff'd mem*, 915 F2d 1404 (9th Cir 1990). In the present case, in order to have treated Complainant as substantially limited in employment because of PTSD, Respondent would have to have treated Complainant as if he was significantly restricted in the ability to safely and effectively perform either a class of jobs or a broad range of jobs in various classes, without ongoing, contemporaneous psychiatric counseling.

ORS 659.400(2)(c)(B) protects that individual whose impairment is substantially limiting only as a result of the "attitude of others toward such impairment." From the allegations of Paragraph III.C. and the evidence produced

at hearing, the forum infers that it is the attitude(s) of Complainant's direct supervisors and other managerial personnel, particularly that of John Kostenbauer, upon which the Agency relies. The thrust of the allegations of Paragraph III.C. is that the requirement of counseling imposed by Respondent was an action taken because of Respondent's attitude toward PTSD, which attitude substantially limited Complainant's major life activities. In the present case, in order to have been substantially limiting to employment, Respondent's attitude toward PTSD would have to have been that a person suffering from it was significantly restricted in the ability to safely and effectively perform either a class of jobs or a broad range of jobs in various classes, without ongoing, contemporaneous psychiatric counseling.

The forum must examine the events, motives, and attitudes toward PTSD which resulted in the requirement of counseling, in order to determine whether Complainant was treated as if his PTSD was substantially limiting to employment, without counseling, or whether Respondent's attitude toward PTSD rendered it substantially limiting.

* Clearly, it is not preclusion from or significant restriction in the ability to perform just any class of jobs that is significant; the individual must have some relevant connection to the identified class of jobs. One such connection might be to a class of jobs encompassing the individual's chosen field. *E.E. Black, Ltd. v. Marshall*, 497 F Supp 1088 (D. Haw. 1980). For an individual without a clear career direction or who is changing career paths, the connection could be to a class of jobs encompassing the type of labor sought or obtained (*i.e.*, manual labor requiring heavy lifting).

** OAR 839-06-205(2) reads: "The attitude of others toward such impairment" means an opinion, evaluation, or belief, held by another person or persons toward the individual's perceived or actual physical or mental impairment."

A. 1993 Medical Evaluation

From the time of Respondent's purchase of the Atlas Cylinders business in 1987 until Spring 1993, Complainant displayed intermittent periods of poor work performance. By the time of his performance evaluation on June 7, 1993 (retroactive to May 10, 1993), Complainant's performance had deteriorated to such an extent that Respondent began to invoke disciplinary measures to change it, including withholding raises, issuing work performance guidelines, and documenting performance deficiencies. On August 12, 1993, in a work performance counseling session with his supervisor, Phil Hardman, Complainant stated that his repetitive errors were due to an inability to stay focused caused by PTSD, and that his condition was getting worse. Hardman shared this information with John Kostenbauer on the same date. During the same conversation with Kostenbauer, Hardman shared a concern about potential workplace violence by Complainant. At the time of this conversation with Hardman, Kostenbauer was aware that Complainant, in complaining of harassment and intimidation by a co-worker, Rick Lawson, had expressed a concern that he might do something to Lawson he might regret if Kostenbauer did not remedy the situation.

On notice of Complainant's claim of PTSD, poor work performance allegedly attributable to a worsening of that condition, and a concern that Complainant could potentially become violent in the workplace, Kostenbauer, in consultation with Geri Comstock, decided to have a psychiatric examination performed to confirm that

Complainant suffered from PTSD and the extent thereof, to ascertain whether Complainant was a danger in the workplace, to determine whether Complainant was able to perform his job, and to determine whether PTSD was affecting Complainant's job performance. Under the circumstances existing in August 1993, a decision to require a psychiatric evaluation of Complainant for the reasons given was entirely appropriate. OAR 839-06-225 (1) and 839-06-235. The purpose of the medical examination was job related and the scope consistent with business necessity.

Following Complainant's initial evaluation appointment with Dr. Kjaer on September 13, 1993, Comstock and Kostenbauer learned from Dr. Kjaer that Complainant had been unwilling to discuss PTSD as it related to the workplace. In response, Kostenbauer informed Complainant of the need for Complainant's cooperation in the evaluation and warned Complainant that he faced corrective action if he failed to cooperate. A second appointment was scheduled for continuation of the evaluation. Pursuant to OAR 839-06-235(3)(a), an employee must cooperate in a medical inquiry or evaluation relating to the employee's ability to perform the work involved. An employer may exact an employee's cooperation by the means utilized by Respondent. Prior to the second appointment, Kostenbauer documented for Dr. Kjaer Respondent's continuing concern with Complainant's job performance, workplace conflicts, and with the possibility that Complainant could become violent in the workplace.

Following the second appointment, Dr. Kjaer issued a report concerning his evaluation of Complainant. Dr. Kjaer confirmed the diagnosis of PTSD, opined that Complainant was under a moderate level of stress due to difficulties at work and at home, and indicated that Complainant was functioning at a moderate level of symptomatology. Dr. Kjaer recommended that Complainant be seen on a regular basis and suggested that a mild dose of medication might assist Complainant. Unable to determine from the report whether Complainant represented a danger at the workplace, Kostenbauer sought the advice of Geri Comstock. After consulting with her supervisor, Comstock concluded that there was no indication that Complainant was potentially violent.* Following this determination, the record is devoid of any evidence of behavior by Complainant that would have caused management personnel at Respondent to again fear workplace violence at Complainant's hand. Complainant's job performance, however, continued to be a concern to management. On November 8, 1993, Kostenbauer reviewed Dr. Kjaer's report and recommendation with Complainant. Complainant indicated that he was content with the Vet Center support group and did not want additional counseling. Kostenbauer advised Complainant to follow the recommendation of counseling as Complainant's work performance had to improve.

B. 1994 Counseling Requirement

Complainant did not, however, avail himself of the counseling

opportunity. His performance continued to deteriorate in early 1994, and Respondent continued to document Complainant's performance problems. On May 19, 1994, Kostenbauer and Complainant's then-supervisor, Steve Jaques, met with Complainant to discuss his performance. Complainant was provided with a written warning, which documented his unsatisfactory performance and the steps taken by Respondent to correct it. In addition to other conditions and corrective actions, including the loss of profit sharing, Complainant was required to commence regular psychiatric visits to Dr. Kjaer and to execute a release of information such that Kostenbauer could receive regular reports on Complainant's progress. Complainant was informed that a failure to follow the conditions of the corrective action would result in further disciplinary action.

Within the written warning there is a recital which reads: "Butch has been evaluated by a psychiatrist, which indicated a need for counseling, but no relevant impairment in his ability to do his job..." From this statement, it is apparent that Respondent did not interpret Dr. Kjaer's report as expressing an opinion that Complainant was unable to perform his job because of his PTSD. According to Kostenbauer, this statement meant that Complainant should have been able to do his job. Despite his ability to perform, Complainant's work performance had continued to deteriorate. Dr. Kjaer's report had confirmed the presence of workplace difficulties and stress upon

* There is no evidence that this determination was relayed to Kostenbauer; nonetheless, this conclusion is attributable to Respondent.

Complainant, as well as occasional home stresses, and, in consideration of the interconnection between stress and the underlying condition, had indicated the need for counseling. Complainant had not taken advantage of counseling on his own. Because there had been no positive change in work performance, and because Kostenbauer felt Complainant needed counseling to help reduce the workplace stressors, as recommended by Dr. Kjaer, such counseling was made a requirement in order to improve Complainant's job performance by removing all known or potential barriers to it.

As Complainant had not fulfilled the counseling and release conditions of the corrective action taken on May 19, 1994, Respondent again issued a warning on September 26, 1994. Complainant was directed to begin psychiatric counseling by a date certain, or face disciplinary action. Further disciplinary measures were being suspended on the condition that Complainant fulfill the two requirements earlier imposed by the date indicated.

Following substantial documentation by Complainant's supervisor of abysmal performance by Complainant between September 15 and 29, 1994, Respondent placed Complainant on 90 days probation on October 18, 1994. At that time, Complainant was provided a last chance agreement, which he signed, to improve his performance or be subject to suspension pending termination. Complainant was given specific work guidelines, weekly work performance counseling sessions with his supervisor, and required to commence and maintain psychiatric

counseling sessions with Dr. Kjaer until released by Dr. Kjaer. Complainant was informed that his job was on the line -- that he now must improve his performance or lose his job. Complainant admitted that he was not doing all of his job, that he "slithers" away from his tasks without knowing why. At hearing, Complainant testified that his PTSD had affected his accuracy at work at times, including the period of time he filled in at the front desk in 1994 (September 15 to 29, 1994).

Complainant was off work with cellulitis between October 21 and December 5, 1994. During that time discussions were had with Complainant concerning the feasibility of his leaving the company on long term disability. Financially, this would require 100 percent disability. At that time, Complainant had a total disability of 80 percent, when the physical disabilities were combined with PTSD. Ultimately, Dr. Kjaer was consulted in this regard. Dr. Kjaer told Kostenbauer that Complainant did not have a debilitating mental illness, that mental health was not a problem. Without an increase in the overall disability rating, long term disability was not a viable option.

Toward the end of the time Complainant was on leave with cellulitis, Respondent began to look for a job within the company that Complainant could do successfully. Respondent created a job as tool crib attendant for Complainant. Respondent determined that success was likely in such a position as it was a position with duties Complainant could do, and a position with insular responsibility, which would remove Complainant from a centralized function, depended upon by co-

workers, and distractions provided by co-workers. Complainant was to be paid his former wage, although the duties of the position called for a lesser rate.

On December 2, 1994, Complainant notified Respondent that he was released to come to work as of December 5, 1994. During that conversation, Complainant was told he would be transferred to the tool crib upon his return. On this same date, Respondent received a copy of the present civil rights complaint. Complainant was not again required to attend counseling.

On December 5, 1994, Complainant returned to work and met with Phil Hardman and John Kostenbauer. Complainant was provided with a list of job responsibilities for his new position. His probation was extended to March 1, 1995, due to his intervening medical leave. During this interval of probation, Complainant was evaluated bi-monthly by his supervisor, Phil Hardman. On February 3, 1995, Kostenbauer sought an evaluative update from Dr. Kjaer.* After a rocky start, Complainant's performance had improved somewhat by his probation performance review of March 1, 1995. Because his performance was not yet satisfactory, Complainant was continued on probation for another 90 days. By

June 1, 1995, Complainant's performance level was satisfactory. On that date, Complainant received a merit increase in pay and profit sharing was reinstated. Complainant's performance continued at a satisfactory level until the date of hearing herein.

C. Motivation of Respondent

Beginning on April 14, 1994, and continuing thereafter, Complainant was being disciplined for poor work performance. Despite the documented absence of an inability to perform his job, Complainant continued to flounder; his work performance continued to deteriorate. Respondent was taking serious disciplinary actions; Complainant was not responding. Respondent knew of Complainant's impairment, knew that Complainant had earlier attributed his declining job performance to his worsening PTSD and the impact of increased stress upon it, and knew that Complainant did not understand and could not explain his lack of improvement as late as October 18, 1994. Respondent also knew that Dr. Kjaer had recommended counseling to ameliorate the impact of workplace stressors. The forum finds that the requirement of counseling was intended to assist Complainant with his performance problem by eliminating all known, potential barriers to improvement.**

* No evidence of Dr. Kjaer's response, if any, was introduced.

** Once Complainant relied upon his worsening PTSD to explain his deteriorating job performance, and Respondent, in connection with a medical evaluation confirming the diagnosis, received the recommendation for counseling, Respondent was, essentially, in a double bind. If, as time passed after October 1993, the worsening PTSD was impairing Complainant's ability to perform his job, as Complainant initially asserted, and Respondent did not accommodate with the recommended counseling, Respondent could be in violation of ORS 659.425(1)(a); if, on the other hand, the worsening PTSD was not impairing Complainant's ability to perform the job as time passed after October 1993,

Respondent did not treat Complainant as if he were substantially limited in employment without counseling. Complainant was not treated as unable to perform a class of jobs or broad range of jobs without counseling; indeed, he was not treated as unable to perform even one job – his own current job – without counseling. Following Dr. Kjaer's evaluation and recommendation of ongoing psychiatric counseling in October 1993, Complainant continued his employment with Respondent until May 1994 without a counseling mandate. Further, Complainant's employment was continued after Respondent learned of Complainant's failure to abide by the counseling requirement between May and September 1994. Finally, Complainant's employment was continued without a counseling requirement between December 5, 1994, and the present. For the same reasons, it has not been demonstrated that Respondent had an attitude toward PTSD which resulted in a substantial limitation to employment for Complainant in the absence of counseling. Counseling

as it apparently was not at the time of Dr. Kjaer's report in October 1993, Respondent could face a possible violation of ORS 659.425(1)(c) by requiring the counseling recommended in the same report. Respondent was presented with a Hobson's choice. Nothing in the statutes or the legislative history indicates that the legislature intended employers to face that kind of dilemma in seeking to comply with the provisions of ORS 659.425(1). See, e.g., *Braun v. American Intern. Health*, 315 Or 460, 472-73, 846 P2d 1151, 1158-59 (1993). In choosing to assist Complainant to keep his job, at a time when Complainant was not assisting himself, Respondent's acts should not be draped automatically in the cloak of discrimination. Indeed, the record is replete with evidence that Respondent went to great lengths to assist Complainant, even beyond the time he lawfully could have been fired. Even had Complainant been a "disabled person", entitled to protection by ORS 659.425(1), the forum would have been compelled to find that ORS 659.425(1) had not been violated by Respondent. ORS 659.425(1) requires an act of discrimination accompanied by discriminatory intent for a violation to occur. *Ammann v. Multnomah Athletic Club*, 141 Or App 546, 554, 919 P2d 504, 508 (1996).

was imposed as a condition of employment in May 1994, and thereafter, because of Complainant's performance problems, which Complainant had tied to his PTSD, and at the recommendation of the psychiatrist who had evaluated Complainant on Respondent's behalf.

As Respondent did not treat Complainant as substantially limited in employment because of his PTSD and did not have an attitude toward PTSD which substantially limited Complainant's major life activity of employment, Respondent did not regard Complainant as having a substantially limiting impairment. Complainant is not protected from discrimination by ORS 659.425(1)(c).

As Complainant did not have a record of a substantially limiting impairment, and was not regarded by Respondent's management personnel as having a substantially limiting impairment, Complainant was not a member of a class of persons protected by ORS 659.425(1)(b) or (c).

3. Agency's Exceptions

The Agency excepts, primarily, to the legal standard utilized by the forum to determine whether Respondent perceived Complainant to be substantially limited in the major life activity of employment, and to the legal conclusions flowing from the use of that standard. The Agency also excepts to certain of the proposed ultimate findings of fact, to which the legal standard was applied. Finally, the Agency excepted to material in a footnote that described both the "Hobson's choice" faced by employers like Respondent in a situation where a mental condition impacts, but does not impair, job performance; and the absence of discriminatory intent motivating Respondent's actions toward Complainant.

The Agency argues that the correct legal standard for determining whether an individual is substantially limited in employment, based on *Winnett v. City of Portland*, 118 Or App 437, 847 P2d 902 (1993), requires only that an impaired individual be substantially limited in the performance of a single, particular job to be considered substantially limited in "employment." In deciding *Winnett*, however, the Oregon Court of Appeals did not utilize

or announce the standard attributed to it by the Agency. In *Winnett*, the City of Portland appealed the trial court's refusal to give a jury instruction that would have defined a substantial limitation to employment as requiring limitation to employment in the work place at large – to employment in its broadest sense. *Winnett*, 118 Or App at 444-45, 847 P2d at 906. Finding that its earlier opinion in *Quinn v. Southern Pacific Transportation Co.*, 76 Or App 617, 711 P2d 139 (1985), *rev den* 300 Or 546, 715 P2d 93 (1986), ruled out the City's position, the court went on to affirm a more balanced standard." Citing *E.E. Black, Ltd. v. Marshall*, 497 F Supp 1088 (D Haw 1980), the court observed that the US District Court for the District of Hawaii had "weighed and rejected contentions that the term 'employment' meant 'employability generally' and 'the employment of one's choice with [a particular employer].'" *Winnett*, 118 Or App at 446, 847 P2d at 907. In following *E.E. Black, Ltd.*, the *Winnett* majority stated: "We are similarly persuaded that the meaning of the term 'employment' in ORS 659.400(2)(a) is not at either end of the spectrum." *Winnett*, 118 Or App at 446, 847 P2d at 907. In concluding that preclusion from the "work

* For the purpose of determining whether there is a substantial limitation to employment, the Agency suggests that it is Agency policy, based upon *Winnett, supra*, to construe "employment" to mean the particular job performed by the individual. *Winnett* does not support such a policy. Agency policy on this issue is better reflected by the OSCI Final Order on Remand, *In the Matter of Oregon State Correctional Institute*, 9 BOLI 7, 35 (1990), *on remand*, OSCI, *supra*, and, following March 12, 1996, by the adoption of OAR 839-006-0205(4).

** In OSCI, *supra*, the Oregon Court of Appeals had already interpreted *Quinn* as rejecting an interpretation of "employment" which would equate the inability to perform (or significant restriction in the ability to perform) a single, particular job with a substantial limitation in the major life activity of employment. 98 Or App at 554, 780 P2d at 747.

involved", firefighting, was a substantial limitation to employment, the *Winnett* court again cited, with approval, *Quinn, supra*, and *E. E. Black, Ltd., supra*. In both of these cases, a substantial limitation to employment was found because an individual was precluded from, or substantially limited in relation to, a class of jobs encompassing the individual's chosen field. *Quinn*, 76 Or App at 626, 711 P2d at 139; *E. E. Black, Ltd.*, 497 F Supp at 1099.

Regarding the particular exception presented, it is of particular significance that, in deciding *Winnett*, the Oregon Court of Appeals did not recant its earlier rejection of the standard now advanced by the Agency. In *OSCI, supra*, the Oregon Court of Appeals stated:

"The Bureau asks us to read *Quinn v. Southern Pacific Transportation Co., supra*, as holding that an employer treats a person

* Confusion over the meaning of *Winnett* may be the result of the court importing the language "the performance of the work involved" into its discussion of the meaning of a substantial limitation to employment for perceived disabilities. When the language "the performance of the work involved" is taken out of the context in which it was used by the court, it may mistakenly be understood to mean a single, particular job.

After observing that ORS 659.400 had been interpreted as a unit in *OSCI, supra*, such that "regarded as having a physical or mental impairment", in ORS 659.400(1), was construed to mean "the person must be regarded as having an impairment that substantially limits a major life activity," the court turned to ORS 659.425 to discern the limitation which must be present when the major life activity is employment. After observing that the provisions of ORS 659.425 also must be construed as a unit, despite minor variations in wording, the court engrafted the operative language of ORS 659.425(1)(a), concerning actual disability, onto the language of ORS 659.425(1)(c), to flesh out a parallel construction for perceived disabilities when the major life activity is employment. *Winnett*, 118 Or App at 447, 847 P2d at 907. ORS 659.425(1)(a) provides, in pertinent part, that an employer may not discriminate because an individual has a physical or mental impairment which does not prevent the performance of the work involved. ORS 659.425(1)(c), as written, provides that an employer may not discriminate because an individual is regarded as having a physical or mental impairment. Put into language parallel to ORS 659.425(1)(a), paragraph (c) would provide that an employer may not discriminate because an individual is regarded as having a physical or mental impairment which does not prevent the performance of the work involved. Put another way, into the context of substantial limitation to employment, which is what the court was aiming for, an individual who is regarded as having a physical or mental impairment that substantially limits the performance of the work involved is a person who is regarded as having an impairment that substantially limits employment. *Winnett*, 118 Or App at 447, 847 P2d at 907.

The court's intended purpose -- arriving at a definition for substantial limitation to employment for perceived disabilities which was parallel to a definition for substantial limitation to employment in cases of actual disabilities -- was met. Unfortunately, the court's reference to "the performance of the work involved" in its analysis has resulted in mistaken interpretations of *Winnett*.

as having an impairment that limits a major life activity, employment, whenever the employer refuses the person one job because of the impairment or alleged impairment. * * * The Bureau's reading would be inconsistent with ORS 659.400(2). It also is inconsistent with the federal cases under the regulations on which the Oregon statute is based." 98 Or App at 554, 780 P2d at 747.

The correct legal standard was applied by the forum. In order to be substantially limited in employment, an individual must be unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. The inability to perform, or a significant restriction in the ability to perform, a single, particular job does not constitute a substantial limitation in the major life activity of employment.

In an alternative argument, the Agency suggests that, even under the

standard used by the forum, Respondent perceived Complainant to be substantially limited in employment. The Agency bases its argument upon a factual conclusion that Respondent continued to perceive that Complainant's PTSD made him a potential danger in the workplace as late as February 1995. Because danger to oneself and others is substantially limiting in any job that involves working with others, the argument goes, Respondent's perception that Complainant's PTSD caused him to be a potential danger was necessarily a perception that Complainant was substantially limited in performing nearly all jobs. Without addressing other components of this argument, the failure of the factual premise alone defeats the argument. The factual premise for the argument is contrary to the facts as found by the forum, which findings were not challenged by the Agency. See Findings of Fact -- The Merits, 27 and 62. The forum has

* The Agency bases its premise on the fact that, as late as February 1995, Kostenbauer directed evaluative questions to Dr. Kjaer, which included one question about the existence of underlying mental or emotional issues which could cause Complainant to be a danger to himself or others. The Agency overlooks the central purpose of Kostenbauer's request for information. In February 1995, Complainant was nearing the end of a last chance probationary period. One and one-half years had elapsed since Dr. Kjaer's evaluation. Complainant was working in a different job, but was continuing to perform poorly. Prudently, Respondent was ruling out a change in Complainant's condition which may have required accommodation prior to judging and taking action on Complainant's probationary status. If such a change were present, termination, without exploration of the possibility of a reasonable accommodation, would have violated ORS 659.425(1)(a).

That a question concerning dangerousness was included in 1995 does not mean that Respondent regarded Complainant as a danger or potential danger at that time. Given employer liability for workplace violence and the mixed reasons prompting the initial evaluation, inclusion of such a question at a time of renewed evaluation does not seem unusual. The information sought in 1995 was parallel to that sought in the initial evaluation. See Findings of Fact -- The Merits, 23.

revised Finding of Fact – The Merits, 55, to clarify the forum's view of the evaluative request made in February 1995.

As further evidence of its theory that Respondent perceived Complainant's PTSD as a substantially limiting impairment, the Agency cites Kostenbauer's telephone call to Dr. Kjaer concerning long term disability in November 1994. The Agency suggests that the purpose of the call was to see if Complainant had enough mental illness to qualify for long term disability. In part, this comports with the evidence; it is however, taken out of the context of the pertinent evidence. At the time of the call, Complainant was away from work on short term disability for cellulitis. In the discussions that preceded the call to Dr. Kjaer, it was determined that, financially, 100 percent disability would be required for Complainant to leave employment on long term disability. In November 1994, Complainant had a DVA rating of 80 percent disability when the physical disability was combined with the PTSD disability rating. Kostenbauer called Dr. Kjaer to learn if any additional disability could be ascribed to PTSD to enable Complainant to go out on long term disability. When placed in context, there is no reason to believe that Kostenbauer perceived Complainant to be so impaired from PTSD that he could qualify for long

term disability because of it alone. Similarly, there is no reason to believe that Kostenbauer perceived that Complainant's PTSD, considered alone, substantially limited his ability to perform his job, a class of jobs, or a broad range of jobs. The forum has revised Finding of Fact – The Merits, 47, and its discussion of this point in the Opinion section at p. 268, to clarify the forum's view of the circumstances surrounding the discussion of the long term disability leave and the role Complainant's PTSD played in that discussion.

The Agency identifies changes it would have the forum make to Ultimate Findings of Fact – 8, 9, and 10, and proposes inclusion of an additional Finding of Ultimate Fact. In each instance, the proposed changes fail to comport with the forum's findings of basic fact and the inferences to be drawn therefrom. The Agency has not excepted to any of the forum's findings of basic fact. The Findings of Ultimate Fact are based on the forum's findings of basic fact, supported by the record. The inferences drawn from those findings of fact are permissible and reasonable; they will not be disturbed.

Next, the Agency contends that the mere fact that Respondent continued to employ Complainant does not establish, in and of itself, that Respondent did not perceive Complainant as being substantially limited in employment.*

* A violation of ORS 659.425 could occur with the imposition of a negative term or condition of employment even though the impaired employee was not suspended or terminated. One example would be removal of a job duty from an impaired employee because of a misperception of the existence or extent of limitation. It is also worth noting that not all protection from onerous or intrusive terms and conditions of employment for impaired employees reposes in ORS chapter 659. For example, privacy rights may be implicated in the requirement of counseling and disclosure, by report, of the contents of the counseling ses-

This, of course, is true. That Respondent continued to employ Complainant without in any way treating him as substantially limited is also true. Imposing counseling upon an employee who is experiencing severe and intractable performance problems is a permissible strategy for managing such a problem. This is so even in the case of a poorly-performing employee with an impairment which, while not substantially limiting, has some impact on performance. This strategy is particularly prudent where the psychiatrist called upon to evaluate the employee's impairment has noted the workplace stressors and has recommended counseling. Respondent's incorporation of Dr. Kjaer's counseling recommendation into its performance management strategy does not mean that Respondent must have regarded Complainant as substantially limited without it, as argued by the Agency. If the Agency's argument were accepted, an employer could do nothing to manage the performance of a poorly-performing employee with an impairment which, while not substantially limiting, has some impact on performance, because such performance management would automatically convert that individual into a disabled person under ORS 659.425(1), and make any further performance management an unlawful discriminatory act. Other than the imposition of counseling, no other act by Respondent has been identified by the Agency as reflecting treatment of Complainant's impairment as substantially limiting or an attitude

toward that impairment which renders it substantially limiting.

The Agency next disagrees with the forum's characterization of the double bind encountered by an employer in Respondent's situation. See Opinion, second footnote (***) on p. 269. While it is generally true that the accommodation process is initiated by an employee's request for accommodation, an awareness of a disabling impairment by the employer, substantiated by the employee, can trigger a duty to accommodate. See *Braun v. American Intern. Health*, 315 Or 460, 473 n.17, 846 P2d 1151, 1159 n.17 (1993). When considered in the light of the scenario posed in the footnote, this could be such a case.

Finally, the Agency excepts to the forum's observation, in the same footnote, that even had Complainant been a "disabled person," entitled to protection by ORS 659.425(1), the forum would have been compelled to find that ORS 659.425(1) had not been violated by Respondent, as ORS 659.425(1) requires an act of discrimination accompanied by discriminatory intent for a violation to occur. *Ammann v. Multnomah Athletic Club*, 141 Or App 546, 554, 919 P2d 504, 508 (1996). The Agency argues that the showing of discriminatory intent required by *Amman* was made by the Agency by way of evidence demonstrating Respondent's perception that Complainant had an impairment that substantially limited his ability to work, absent counseling, after April 1994. The Agency is mistaken. The forum has found, and the findings have not been challenged, that the

sions. See, e.g., *Pettus v. Cole*, 57 Cal Rptr 2d 46, 1996 WL 518068 (As Modified on Denial of Rehearing Oct. 15, 1996).

Complainant was sent to counseling in 1994 because of performance problems partially attributable to PTSD. At no time following the receipt of Dr. Kjaer's report did Respondent perceive Complainant to be a danger in the workplace, or act on such a perception. At no time did Respondent perceive erroneously that Complainant was substantially limited in employment because of PTSD, or act on such a perception. In sending Complainant to counseling, Respondent was not motivated by a discriminatory intent. See Findings of Fact – The Merits, 26 through 62; Opinion, pp. 267-70.

As the exceptions are not well taken, the ultimate findings of fact, conclusions of law, opinion, and order will stand.

ORDER

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

**In the Matter of
THOMAS E. HARRINGTON,
dba Harrington Property Management, Respondent.**

Case Number 36-96

Final Order of the Commissioner

Jack Roberts

Issued March 21, 1997.

SYNOPSIS

Respondent unlawfully terminated its resident apartment manager because of her age, 67, and disability, coronary artery disease. The Commissioner awarded complainant two year's pay and expenses plus emotional distress damages. ORS 659.030 (1); 659.425(1)(a).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on September 3, 4, and 5, 1996, in the hearings conference room of the Bureau of Labor and Industries, 1004 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. Thomas E. Harrington, dba Harrington Property Management (Respondent), was represented by Marianne Brams, Attorney at Law, Portland, and was present periodically throughout the hearing. Dorothy M. Kiefel (Complainant) was present throughout the hearing.

The Agency called the following witnesses: Complainant, cleaning contractor Jim R. Haas, Respondent's former employee Rosalyn Loft, Agency Senior Investigator Jane McNeill, current Allentowne Village (Allentowne) tenants Patricia Pham and Deborah Woods, and former tenant John Frizzell.

Respondent called the following witnesses: Respondent; Respondent's former employees Charles Buys, Fred Boyce, and Richard McConnell; Respondent's current employees Kent Carter, David Cone, Jo Criswell, Janna Erichsen, and Brent Melgaard; current Allentowne tenant Barbara Cochran; and former tenant Marge Klier.

Having fully considered the entire record in this matter, I, Jack 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 August 15, 1995, Complainant filed a verified complaint with the Agency, amended on January 23, 1996, alleging that she was the victim of the unlawful employment practices of Respondent. After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On June 20, 1996, the Agency prepared for service on Respondent Specific Charges, alleging that Respondent discriminated against Complainant in her employment with

Respondent by terminating her employment, based on her age, 67, and/or on her marital status of being unmarried, both in violation of ORS 659.030, and/or based on a disability, coronary artery disease, which Respondent had previously accommodated, in violation of ORS 659.425. 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.

3) A copy of those Charges, together with items a) through d) of Procedural Finding 2 above, was sent by US Post Office mail, postage prepaid, to Respondent on June 20, 1996. Both the Notice of Contested Case Rights and Procedures (item b) and the Bureau of Labor and Industries Contested Case Hearings Rules (item d) at OAR 839-50-130(1), provided that an answer must be filed within 20 days of the receipt of the charging document.

4) Respondent through counsel requested an extension of time in which to answer and on July 24, 1996, timely filed an answer wherein Respondent admitted employing Complainant, a female, in Oregon and denied any unlawful employment practices or damages to Complainant based on Complainant's age, marital status, or disability. Respondent alleged further that Complainant's

termination was performance based and that her unsatisfactory performance was Respondent's primary consideration. Respondent also alleged that Complainant had breached her employment contract and received notice of termination in accordance with that contract, and that she failed to mitigate any damage alleged by refusing an offer of an alternative position prior to her termination.

5) Respondent moved for postponement of the hearing to facilitate a discovery deposition and on August 8, 1996, after discussion of available dates with the participants, the ALJ authorized the deposition of Complainant, reset the hearing date, and ordered the participants to submit case summaries pursuant to OAR 839-50-200 and 839-50-210. The participants timely filed their respective summaries of the case in accordance with the order of the ALJ.

6) At the commencement of the hearing, counsel for Respondent stated that she had reviewed the Notice of Contested Case Rights and Procedures and had no questions about it.

7) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

8) At the close of testimony, due to prior commitments of the ALJ and the Agency Case Presenter, the ALJ ordered simultaneous written arguments from the participants due November 1, 1996. That schedule was later modified with the approval of the ALJ.

9) On September 24, 1996, Respondent's counsel requested verification of the exhibit numbers admitted at hearing and requested copies of the tapes of testimony taken in the afternoon of September 3. On September 26, the ALJ supplied the requested items and information, and requested readable copies of certain exhibits.

10) On November 12, 1996, Respondent filed and offered for admission clear copies of exhibits R-2 through R-10, and, in addition, R-12 through R-19, which were affidavits of eight individuals, four of whom had testified at hearing. In response, the Agency objected to the admission of affidavits of persons who were not called as witnesses at the hearing (R-12 through R-15) and to the affidavits of witnesses who were examined and cross-examined at hearing (R-16 to R-19). On November 22, 1996, the ALJ received in evidence the copies of R-2, R-3, R-4, R-5, and R-7, and accepted the copy of R-10 as an offer of proof. The ALJ did not receive in evidence the affidavits of persons who were not called as witnesses at the hearing (R-12 through R-15) because the Agency had no opportunity for cross-examination. The ALJ did not receive in evidence the affidavits of witnesses who testified at hearing (R-16 to R-19) because they were untimely. None of those exhibits (R-12 through R-19) have been considered in the formulation of this order. The respective final arguments of the participants having been timely received, the record herein closed on November 22, 1996.

11) The proposed order, containing an exceptions notice, was issued January 21, 1997, and an amendment

to the Order portion, also containing an exceptions notice, was issued on January 24, 1997. On January 29, 1997, the ALJ extended the due date for exceptions to February 28, 1997. Respondent timely filed exceptions which are dealt with in the Opinion section of this order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent owned several apartment complexes where he utilized the personal services of six or more persons within the State of Oregon. Respondent owned several similar properties in California. He managed his properties under the assumed business name of Harrington Property Management, headquartered in Los Altos, California.

2) Among the apartments owned by Respondent was Allentowne Village Apartments, Beaverton (Allentowne), which he purchased in approximately 1987 and which was his first Oregon property. Allentowne's 107 units were in two- and three-story buildings. Subsequently, Respondent acquired Country Club Estates (Country Club), Englewood Terrace Apartments (Englewood), Crestview Apartments (Crestview), and, for a time, Cornell Apartments (Cornell).

3) Complainant, born May 12, 1928, was the resident manager of Allentowne for Princeton Properties when Respondent acquired it and had been there about two years. Previous to that she had four years experience in resident management with CTL Properties. Before managing apartments, she had been a housewife and had been employed with Pendleton Woolen Mills. She had two adult sons,

had divorced in 1978, and had an eighth grade education.

4) Complainant's duties as resident manager were to show and rent apartments, collect rent, keep the books and oversee maintenance of the property. She generally had one or more assistants who did day-to-day maintenance and relieved her in the office. Major cleaning, painting, and landscaping were done by outside contractors ("vendors"). Her duties were substantially the same before and after Respondent became owner, and did not change in 1989 when Respondent acquired Country Club Estates in Gresham and made David Cone resident manager there and regional manager over the other Oregon properties, including Allentowne. Complainant received a salary of \$2,200 per month, rental of a three bedroom apartment, valued at \$550 per month, and utilities and telephone, valued at \$100 per month.

5) Complainant annually proposed a budget for Allentowne. The budget included the costs of herself and other staff and of painting, cleaning, and landscaping. It also included proposals for major maintenance, not always approved, such as paving the parking area. Respondent did not question the ongoing items, nor did Cone when he received them as regional manager. The bills from vendors, such as plumbing, contract cleaning, landscaping, and electrical were approved by Complainant and paid by the California office.

6) Complainant's assistant in 1988 was Richard McConnell, who did the day-to-day maintenance and relieved Complainant in the office. McConnell

went to Crestview as resident manager in 1989. He retired voluntarily from that position in 1995 at age 65. Due to a heart condition, he delegated cleaning and maintenance, but still inspected some apartments regularly himself.

7) When Complainant had difficulty replacing McConnell, she hired her son, Ben Beeler, as a maintenance person. He also helped in the office. He performed routine maintenance until April 1993, when a series of events prompted Respondent to order him off the property. Beeler was reported to have been responsible for a friend entering the wrong apartment, was reported to have gone through the property of a tenant while doing maintenance in the tenant's apartment, and had items discovered in his apartment, which included the ingredients of methamphetamine. Beeler denied knowledge of the drugs and claimed he was storing the boxes containing them for an acquaintance, who also used Beeler's car.

8) Beeler was not charged by the authorities, but the presence of the unlawful substances caused mandatory cleanup costs to Respondent. Cone told Beeler and Complainant in April 1993 that Respondent had barred Beeler from Allentowne for six months, after which he was allowed only to visit Complainant. Complainant was not to use Beeler for maintenance again. Respondent did not otherwise sanction or discipline Complainant concerning Beeler.

9) As resident manager, up to about 1993, Complainant walked the property in the early morning, checking the orderliness of the parking lot and

grounds. She checked and scheduled the cleanup and reconditioning of vacant apartments, showed apartments to prospective renters, and inspected routine maintenance and cleaning. She had no maintenance skills herself, but attempted to have tenants' maintenance concerns resolved within one to three days unless told by the tenant it was unimportant. She needed to give 24 hour notice to inspect an occupied apartment.

10) Vacancies appeared to be cyclical, occurring at the end of the school year and around Christmas time. Complainant used newspaper advertising when she had more vacancies than normal, which was seldom.

11) When Complainant had a large number of vacancies to get ready for rental or when she had no cleaning assistant, she hired a contractor. Jim Haas did contract apartment cleaning for Complainant between 1988 and 1995. He worked for her successors, but discovered he was getting only the most difficult jobs. Apartment cleaning was done on a flat rate for a particular sized apartment, regardless of how long or how difficult.

12) Rosalyn ("Rose") Loft was Ben Beeler's girlfriend. She met Complainant in 1992, when she lived with Beeler. When the regular cleaning contractor was not available, Complainant asked Loft to try it. The first apartment Loft cleaned was inspected by Complainant three times before Complainant passed it as satisfactory. She was paid the flat rate even though it took a good deal of time.

13) Complainant was diagnosed with breast cancer in about 1989, which affected her lungs by 1991. She

also had a heart problem, coronary artery disease, about 1990. By late 1992, Complainant was medically restricted from climbing more than one flight of stairs. She ceased personally showing or inspecting units on the second and third levels, except occasionally. She continued to personally view the lower level units and had her assistant inspect the others. She gave prospective renters the key in order that they might view a vacant apartment.

14) Loft learned Complainant's cleaning standards by working for her. She was paid as a vendor by the job for cleaning and as a vendor by the hour for office work until Beeler was terminated. Complainant occasionally went to the upper levels to check cleaning or maintenance when she was training Loft. Loft helped her get up the stairs. Complainant always checked the lower floors and when she was sure Loft knew what was wanted, she had Loft check the upper apartments. Loft also relieved Complainant on weekends, staying in Complainant's apartment. She did an evening walk around the grounds.

15) Loft learned the other aspects of assisting Complainant. She checked apartments and listed needs of cleaning and repair. She was eventually put on the payroll as assistant manager. Respondent acknowledged her at the 1994 Christmas party for outstanding work in renting three apartments in one day. She checked the work of cleaners and painters using the standards she had learned from Complainant.

16) Cleaning contractor Jim Haas was aware of Complainant's cancer and heart trouble. She couldn't go to the third level about 1992. By Haas's observation, the condition of Allentowne did not deteriorate after that. A woman named Rose was assistant manager.

17) Complainant had training in housing discrimination laws and was aware that such things as race and gender, among other protected statuses, could not be considered in accepting renters. In late 1993, Brenda Keith, a black female, asked to see a three bedroom apartment. Complainant gave her the key and described the apartment location allowing the prospective tenant to view the apartment unaccompanied. About a week later, Keith's daughter, Simone, came in and made a deposit. Complainant subsequently found that Simone's credit was not acceptable and returned the deposit.

18) At about the same month that Keith and her daughter were dealing with Allentowne, a third black woman, possibly a friend of Keith, was told by then assistant manager Mona Smith that Allentowne did not accept federal housing "Section 8" rentals. Smith was leaving Respondent's employ at the time. Allentowne did not accept section 8 only on three bedroom units which called for rent above the section 8 allowance.

19) Keith, her daughter, and the third woman filed complaints of housing discrimination with federal authorities against Respondent and

* While much of the testimony seemed to place this series of incidents in 1992, the forum infers from the whole record that 1993 was correct, since Mona Smith was involved and was not working at Allentowne in 1992.

Complainant, initiating a lengthy investigative and enforcement process. Complainant steadfastly denied discriminating against any of the three.

20) Complainant believed that Respondent and Cone never blamed her for the discrimination claims. She wanted to defend against the claims. She had attended anti-discrimination training and had sent her assistant managers to such training before the claims arose.

21) The tenants at Allentowne were generally on a month-to-month tenancy and gave 30 days written notice, either on a form or by an informal note. These were sometimes complimentary about Complainant. Of those submitted by the Agency as evidence, at least three came from black tenants.*

22) Respondent had insurance for defending the discrimination claims. The insurance company's attorney and the claimants' attorney worked out a no-fault settlement order requiring the payment of a total of \$10,000 among the three claimants. The money was paid by the insurance company.

23) Respondent had difficulty in believing that Complainant was guilty of discrimination. His insurance attorney advised settlement based on statements from the Smiths and the claimants which seemed to support the claims. The resulting consent order, while not finding liability, imposed certain reporting requirements on Allentowne which could be revised or eliminated if there was a change in managers.

24) Respondent visited Allentowne approximately monthly until acquiring Country Club. His visits were less frequent thereafter because Cone became regional manager.

25) As regional manager, Cone visited Allentowne every six to eight weeks. Through 1994, it appeared to him that Complainant was doing all right. He was aware of her earlier problems with cancer and her heart. He recalled that Complainant had several assistants or maintenance assistants after Beeler left, including Dan Gray and Mona and Shawn Smith. He knew there were gaps in time when there was no maintenance person.

26) Complainant had several assistants after Beeler, including Shawn and Mona Smith (who quit after three months), Dan Gray (whom Complainant terminated because of tenant complaints of noise), Dave Slagle (who didn't like having a female boss), James Mathews (who did a good job), and lastly, Brent Melgaard (who was slow but reliable). She also periodically called Cone for Chuck Buys, the regional maintenance person.

27) Complainant acknowledged that Respondent offered Complainant the resident manager position at Englewood, but placed the time about 1992. She knew he was aware of her cancer problem and he thought that the smaller complex might be easier. He did not tie it to any deficiency in her current performance. Complainant declined because it would pay less and because the smaller budget at Englewood would allow her less help.

28) Beeler visited Complainant in 1994, and also brought Loft's grand daughter to visit Loft. He did no maintenance work except for one occasion in an emergency when he was present and was given permission by Cone to deal with that one situation.

29) As resident manager of Country Club, Cone gave keys to prospective tenants, allowing the prospective tenant to view the apartment unaccompanied. Country Club was a long, spread out property and Cone was reluctant to be away from the office. Cone checked on cleaners, painters, and maintenance persons each job they did, at first. Once he considered the employee or vendor dependable, he checked less frequently. Cone denied a preference for married couples, but acknowledged that two employees under one roof was less expensive than providing an apartment for each of two employees.

30) Charles R. Buys was hired by Cone as regional maintenance person from March 1989 to October 1995, when a bad back forced him to find other work. Buys was responsible for capital improvement projects, such as decks and outside painting. In winter, he did vinyl floors and counter tops. When there was no maintenance person at Allentowne, Buys attempted to assist. He found it difficult when access to apartments hadn't been arranged. He saw Beeler on the property after 1993, but didn't see him working. He didn't think that Complainant had very good maintenance assistants.

31) Buys never discussed Complainant's performance with Respondent or Cone. He often saw her

driving the perimeter of the property. Cone assigned Buys's work. Neither Cone nor Respondent asked about Allentowne's condition. Buys noticed a badly deteriorated deck there and began replacing decks, doing 14 in all. He did 47 deck replacements at Crestview.

32) Janna Erichsen was Respondent's operations manager in Los Altos. She received the book work from the Oregon properties, including Allentowne. When the system changed from a simple receipts system of bookkeeping to a double entry 13 column system, it appeared to Erichsen that Complainant did not understand the system and could not balance. Erichsen did much of Complainant's book work herself. In December 1994, the system changed again, this time to computers, with the main computer in Erichsen's office and the various Oregon and California properties as satellites. It was an on-line system. Erichsen trained the Oregon property managers at Allentowne in December. Both Complainant and Loft attended.

33) After the initial computer training, Erichsen coached the Oregon managers from her computer, talking through any problems using a modem. Erichsen thought all except Complainant understood the system by January 31, 1995. Complainant was reluctant to give up her paper journal system. Erichsen did not think Complainant would master the computer bookkeeping. She reported the time she spent with Complainant to Respondent and that Complainant hadn't caught on. She never challenged Complainant or gave her a deadline. After March 15 it didn't matter. She was convinced that

* The forum has given little weight to the 30 day notice notes of various former tenants because, other than Frizzell, Respondent had no opportunity to cross examine the authors.

things were not getting done. She overheard one conversation between Respondent and Complainant in July 1994, when Respondent asked Complainant to think about it and Complainant said she would. She never discussed it with Complainant, but assumed Respondent had further conversations because she saw the March 16 letter.

34) On March 15, 1995, Respondent met with Complainant and mentioned that the McConnells were planning on retiring and asked her if she was going to do so. Complainant stated that she could not afford it and planned to work two more years. Respondent said she would be 67 in May. Complainant said she would think about it, check on her IRA, health insurance, and social security and that she must work until at least the end of 1995.

35) Loft was in the kitchen of Complainant's apartment and overheard the conversation of March 15 between Complainant and Respondent. It was a friendly conversation during which Respondent did not sound angry or upset. Respondent told Complainant they would talk about her plans again the next trip to Allentowne.

36) On March 16, 1995, Complainant received a letter by fax from Respondent which stated:

"Dear Dorothy:

"As we discussed on Tuesday, I would like you to retire as manager of Allentowne Village. Since you will be 67 on May 12, I would like May 15, 1995, to be your last day.

"This has been a difficult last couple of years for us at Allentowne. The discrimination lawsuit was an unpleasant thing to go through, and I think you did very well in defending yourself. You have certainly done a fine job in managing Allentowne for a number of years, of this there is no question. I truly appreciate your efforts on my behalf. I know trying to learn the computer has been a struggle.

"To make things easier for you, I will pay for your medical and life insurance now in effect for one year after May 15. I will also give you a bonus at that time of \$3,000.00, so you can use these figures in your financial planning. I am hopeful that by giving you 60 days notice, you will have plenty of time to find a new place to live.

"You will be missed by your tenants and all of us at Harrington properties. Please indicate that these arrangements are satisfactory to you by signing and faxing back a copy of this letter.

"Very truly yours,

"/s/

"Thomas E. Harrington"

37) In the conversation of March 15, Complainant did not resign. Respondent did not mention a bonus or paying for Complainant's insurance and did not mention the discrimination case.

38) Complainant was shocked, humiliated, and hurt when she received the March 16 letter. Not only was she losing her job, she was losing her residence of nine years. She lost sleep

and was hurt, nervous, and upset. She still resented the basis of her termination at the time of hearing. In 1991, when she was told that she had only a few months to live because of cancer, she had sold a house she owned in which she had a \$17,000 equity. She spent time in Reno and spent her money. She had acquired a large credit card indebtedness. In order to have a place to live, she bought a manufactured home which she moved into in late May 1995. Because of limited income and the large indebtedness, she eventually filed for bankruptcy. She was able to keep the manufactured home.

39) Complainant attempted to find other employment as a property manager. She inquired at Princeton (her old employer), C and R, Guardian and Norris and Stevens. There were no jobs available. She looked for similar positions in the newspaper. She became discouraged and felt due to her age and physical condition she might not find employment.

40) When Respondent did not receive the March 16 letter, he told Cone to assure that Complainant would move. Under date of March 30, 1995, Cone wrote to Complainant as follows:

"Dear Dorothy:

"This letter is a follow-up to discussions we have had on several occasions in the past couple of weeks. Specifically, it is our desire to move a different direction regarding the management of Allentowne Village and as such will no longer be in need of your services as of May 15, 1995. Whereas this was a difficult decision, we feel it's one we must make at this time.

What adds to the difficulty is knowing that, at your termination, you will be required to vacate your residence at Allentowne at the same time.

"Please sign, date, and return this letter (or a copy) which will signify your intent to comply with its terms, which are: 1. cease employment as of May 15, 1995; 2. Vacate your premises as of May 15, 1995.

"We appreciate the job you have done for us and wish you well in future endeavors.

"Sincerely,

"/s/

"Dave Cone

"Regional Manager

"Harrington Property Management"

Complainant ceased employment and vacated the apartment on May 15.

41) Complainant filed a discrimination complaint with the Agency after discussing her termination with friends, family, and former co-workers. She retained an attorney. In January 1996, Complainant's attorney received a letter from San Jose, California attorney John McBride which read as follows:

"The undersigned has been asked to respond to your letter to Tom Harrington dated January 2, 1996. My client of course is aware of the pending investigation based upon the complaint filed by Ms. Kiefel.

"In response to your inquiry concerning mediation, my client respectfully declines.

"You should be advised that Ms. Kiefel's employment was terminated because she no longer

could physically carry out the duties of the position. Specifically, it is my understanding that her doctor had ordered that she not attempt to climb to the third floor of the apartment, which was a necessary function of her position as manager. Indeed, her inability to go to the third floor appears to have been an instrumental fact which gave rise to a discrimination claim based upon her treatment of some prospective tenants.

"It is further my understanding that upon discussion, Ms. Kiefel asked that she be allowed to retire and indeed accepted some continued fringe benefits as well as a retirement bonus.

"Under the circumstances my client rightfully does not feel he has any legal obligation to Ms. Kiefel and thus there is nothing to mediate.

"I would be more than happy to discuss this matter further with you if you so desire."

The letter was signed by Mr. McBride with a copy to Respondent.

42) Fred Boyce was resident manager of Cornell Apartments for four years before Respondent sold them. Respondent offered Boyce a job in California, but Boyce didn't want to move. At the time of the offer, Boyce was past 65 years of age and had recovered from coronary bypass surgery. He did the minor maintenance at Cornell, and Buys did the major repairs.

43) Brent Melgaard became the maintenance person at Allentowne in September 1994. He did the day-to-

day maintenance and four or five "turn-overs" (reconditioning of vacant units) a month. At the time, Loft worked in the office. She or Complainant notified him of work. He is a perfectionist and saw some bad previous repairs and corrected them. He stated Complainant seemed frustrated with the computer; he saw her drive the property occasionally. The maintenance jobs were written down, then crossed off when they were done. He continued as maintenance person under Complainant's successors, the Carters.

44) Kent and Linda Carter, husband and wife, were the Allentowne resident managers at the time of the hearing. Kent Carter did maintenance and grounds work with Melgaard and Linda did the office work and showed apartments. Maintenance is done within three days. The garbage area, roofs, and gutters were redone by vendors. Carter did the landscaping with some help from his stepson, Roth, who was paid as a vendor. Other than Roth, there was no outside landscape contractor. It took Linda about one and one half months to master the computer. Since the Carters became managers, the rent scale has been raised and a system of refundable security deposits instituted. There is another employee who relieves the office on weekends.

45) Patricia Pham was a tenant at Allentowne during Complainant's entire tenure. She found Complainant friendly and reliable. Complainant forwarded her mail when requested. At Pham's request by telephone, Complainant went to Pham's second floor apartment in 1994 and turned off the stove. She saw Complainant out picking up

the grounds in 1993, and found her always available when needed. Pham noted that Complainant took care of emergency repairs immediately and took care of routine repairs in a timely manner.

46) John Frizzell lived at Allentowne from 1989 to 1994 and thought Complainant to be a good manager. He recalled seeing her on the grounds in the early morning. In his experience, repairs were accomplished in one day. He noted that the apartments did not deteriorate and were clean and well run. He recalled he had a black neighbor for a time.

47) Deborah Woods was an Allentowne tenant at the time of hearing. She testified that the current managers did not look at her maintenance concerns but rather sent Melgaard, who works extremely slow. She moved in in early October 1995 and was still dealing with maintenance problems in early 1996. She admitted that her apartment was not always available for repair because she works nights and sleeps days. She hasn't moved out because it is quiet for a day sleeper.

48) Jo Criswell was resident manager of a 140 unit apartment belonging to Respondent in Oceanside, California, at the time of the hearing. Her husband was not employed by Respondent. She had six employees and could do some maintenance herself. She denied that Respondent preferred couples as managers and at 60 years of age, she had not been pressured to retire. Her apartment was near a large military installation.

49) Not all of Respondent's testimony was credible. He testified that he was "duped" and deceived about

Complainant's physical ability, that he was unaware that she was not visiting second floor apartments until he saw her doctor's letter in 1994, and that he learned of the third floor restriction at the time of the hearing. But he admitted knowing her cancer and heart condition by 1991. He stated that he had tolerated "creeping incompetence" at Allentowne for five years, but acknowledged she had been manager of the year and that he had given her a cruise, money for Reno, and a trip to San Francisco within that period. He stated he could not discharge her during the discrimination claim because it would have been an admission of guilt. He testified that he began discussing retirement with Complainant in mid-1994, but admitted that he at no time told Complainant directly that her performance was not satisfactory. Nonetheless, he stated that it should have been clear to her. He denied any acquaintance with Rose Loft other than as an occasional contract cleaner and the roommate of Beeler. He denied knowing Loft was an employee, despite testimony from other witnesses, including his operations manager and Cone, establishing Loft's status. He claimed to be aware of Complainant's accounting deficiencies, but never confronted her with it. He denied that age was a factor in the termination and asserted that he had used "retire" because Complainant had asked him to. He stated that Complainant must have signed the March 16 letter or he would not have paid her \$3,000 and her insurance premium, but he could not produce a signed copy. He said that attorney McBride's letter was the result of a brief golf course conversation. He signed a note to Complainant thanking

her "sincerely for your many years of faithful and competent service" and testified at hearing that he did not mean "competent." He was resentful of these proceedings and while testifying became increasingly critical of Complainant. He said that it was increasingly apparent from bottom line figures on Allentowne that the complex was losing money, but the only evidence adduced was the comparative monthly expense of the Oregon properties, without the corresponding average intake. For the foregoing reasons, his testimony was viewed with caution and was accepted as establishing fact only where it was uncontroverted or was confirmed by other credible testimony.

50) Complainant's testimony was credible. She acknowledged she had difficulty with line 13 on the bookkeeping system. She believed she was understanding the computer when Respondent sent the termination letter. She insisted that Respondent never mentioned to her that her performance was wanting; he only mentioned cash flow from time to time and to watch her budget. She denied making a deal to retire and never signed Respondent's letter.

51) The testimony of both current Allentowne tenant Barbara Cochran and former tenant Marge Klier was unfocused and confused, was not credible, and was given no weight.

52) The testimony of David Cone was substantially credible. His tendency to equivocate detracted from the strength of his testimony, but the forum found him overall to be believable.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent was an individual who owned several apartment complexes within the State of Oregon, where he utilized the personal services of six or more persons.

2) Complainant, born May 12, 1928, worked as resident manager at Respondent's Allentowne Village from 1987 to May 15, 1995.

3) Initially, Respondent was Complainant's immediate supervisor; later David Cone acted as regional manager, but Respondent continued dealing with Complainant.

4) In 1991 and 1992, Complainant had severe health problems including breast cancer which affected her lungs and she had a heart condition, coronary artery disease. By 1993, she was medically restricted from climbing more than one flight of stairs.

5) Complainant coped with her health and adequately managed Allentowne.

6) While Complainant was resident manager of Allentowne, she and Respondent were sued for alleged race discrimination by three prospective tenants who alleged Complainant would not show or rent apartments to them.

7) The race discrimination case was settled in early 1995 by the payment of \$10,000 by Respondent's insurance company. There was no finding of liability, but there were compliance requirements in the resulting consent order.

8) Respondent urged Complainant to retire. When she did not, he sent

her a letter terminating her services as if she had agreed to retire at age 67.

9) Complainant did not agree to retire and did not acknowledge Respondent's requirement that she sign the termination letter.

10) Respondent later had his attorney explain Complainant's termination as due to her physical disability.

11) Respondent had not determined what accommodation, if any, could be made for Complainant's disability.

12) Complainant was replaced as resident manager by a married couple under 50 years of age without known physical disabilities.

13) Complainant had planned to work two more years as resident manager. Had she done so she would have earned \$35,200 in salary plus \$10,400 in rental and utilities up to the time of hearing.

14) Complainant was shocked, humiliated, and hurt by her termination, and suffered ongoing emotional distress from her inability to take care of her financial obligations and obtain other employment.

CONCLUSIONS OF LAW

1) At times material herein, ORS 659.010 provided, in part:

"As used in ORS 659.010 to 659.110 and 659.400 to 659.545, 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 or will be performed."

At times material herein, ORS 659.400 provided, in part:

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

"*****

"(3) 'Employer' means any person who employs six or more persons ***."

Respondent was an employer in this state.

2) At times material herein, ORS 659.040 provided, in part:

"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***"

At times material herein, ORS 659.435 provided, in part:

"Any person claiming to be aggrieved by an unlawful employment practice may file a complaint under ORS 659.040 * * *. The Commissioner of the Bureau of Labor and Industries may then proceed and shall have the same enforcement powers, and if the complaint is found to be justified the complainant shall be entitled to the same remedies, under ORS 659.050 to 659.085 as in the case of any other complaint filed under ORS 659.040 * * *."

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein.

3) The actions, inactions, statements, and motivations of David Cone, Janna Erichsen, and California attorney John McBride are properly imputed to Respondent herein.

4) At times material herein, ORS 659.030 provided, in part:

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

"(a) For an employer, because of an individual's * * * marital status or age if the individual is 18 years of age or older * * * to bar or discharge from employment such individual."

By terminating Complainant's employment because she was 67 years of age, Respondent violated ORS 659.030(1)(a).

5) Respondent did not terminate Complainant's employment due to her marital status.

6) At times material herein, ORS 659.425 provided, in part:

"(1) For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for any employer * * * to bar or discharge from employment * * * because:

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

By terminating Complainant's employment because of her physical impairment without seeking accommodation therefore, Respondent violated ORS 659.425(1)(a).

7) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), 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. The amounts awarded in the Order below are a proper exercise of that authority.

OPINION

It was apparent from the evidence presented in this case that Respondent wanted to get rid of Complainant as manager of Allentowne Village. Rather than attempt to document legitimate reasons for her termination, he chose to force her into retirement because she was 67 years of age. Respondent brought up the subject of retirement on more than one occasion and finally determined that she should retire under his terms. Complainant, on the other hand, had considered retirement but knew she could not do so financially. Because Respondent had never discussed with her any supposed inadequacies in her performance, she had no reason to believe that she could not continue working until she chose to retire. Respondent never told Complainant her performance was no longer satisfactory. Indeed, since she performed her job in the same manner for a number of years and received positive encouragement from Respondent and Cone, she had no reason to suspect that respondent was somehow dissatisfied.

She admittedly had difficulty with the bookkeeping, but neither Erichsen nor Respondent told her she was unsatisfactory. Erichsen redid her books and did not report any shortcomings to Respondent. Nothing in the termination letter sent to Complainant by Respondent suggested inadequate performance; rather it complimented her for "a fine job in managing Allentowne for a number of years."

Respondent's position that Complainant retired voluntarily was undercut by Cone's letter of March 30, 1995, and totally destroyed by attorney John McBride's letter of January 8, 1996, which Respondent authorized McBride to write. He attempted to establish through McBride that Complainant's physical disability had made her performance of her manager duties impossible. But Respondent was aware of her disabilities in 1992, and they remained substantially unchanged from that time to March 1995. In regard to disability, Respondent was obligated under Oregon law to 1) do an individualized assessment of Complainant's capabilities, and 2) determine whether he could reasonably accommodate Complainant's disability, without undue hardship. Complainant has selected as accommodation using her staff as her legs for those portions of Allentowne which were difficult for her to reach. She trained her staff to evaluate apartment conditions by the same standards she would use. Other managers delegated inspection duties or bypassed inspection and follow-up where a trusted employee or contractor was known to be reliable. As for showing apartments, Cone himself routinely gave prospective tenants a

key to vacant apartments so that he would be nearer the office. Respondent has not established that he was justified in terminating Complainant due to disability, if indeed that was the reason.

Respondent's counsel argues that the real reasons for replacing Complainant as resident manager were:

1. The substantial risk that she was making discriminatory housing decisions.
2. The regular presence of Beeler on the property in defiance of Respondent's order.
3. Complainant's failure to understand and implement the record-keeping systems.
4. An increasing concern about deterioration of the physical condition of the apartments.
5. The growing realization that active managers are more cost-effective than those who delegate substantial portions of management and maintenance tasks.

This record fails to substantiate those real reasons:

1. Complainant was accused in one series of supposed discriminatory activity, which was settled rather than tried. Even Respondent testified that he couldn't believe she would discriminate, nor could the other witnesses who testified. None of the supposed witnesses to her discriminatory acts or attitudes appeared in this forum, which will not give preclusive effect to mere allegations.
2. A few witnesses confirmed that Beeler was occasionally at Allentowne; none could establish that

he was working there or even that he stayed there, except in an emergency.

3. At the time Respondent first mentioned retirement to Complainant, it is not clear that he personally was aware of Complainant's bookkeeping problems; by the time of the computer he had already determined to force her retirement.

4. Many witnesses testified that Al-lentowne had not deteriorated.

5. Several of Respondent's other managers delegated tasks.

Respondent's counsel's other arguments regarding age and disability discrimination are answered above. This order finds in Respondent's favor regarding marital status since the Agency did not establish that the state of being married or single was necessarily a qualification for employment with Respondent.

Complainant suffered severe emotional distress as the result of her termination, and up to the time of hearing, lost sixteen months of the two years of employment she had come to expect. The forum orders Respondent to pay her the lost salary and expenses and, in addition, the sum of \$30,000 to compensate for her emotional distress.

Respondent's Exceptions

Respondent filed numerous exceptions to the proposed order. The forum has corrected the listing of the witness Buys to reflect that he was a former employee. The forum has revised finding of fact (FOF) 6 to more accurately reflect the evidence. Some of Respondent's other specific exceptions to individual FOF constitute comments

on the evidence rather than findings of historical fact (see exceptions to FOF 4, 12, 13, 14, 39, 42, 50). Other exceptions suggest revisions to the FOF which are unsupported by credible evidence (see exceptions to FOF 3, 28, 29, 42, 52). Still other exceptions suggest language for revising the individual FOF which says substantially the same thing, or adds irrelevant detail (see exceptions to FOF 16, 23, 30, 32). The exception to FOF 31 misstates the evidence. The suggested revision to FOF 48, regarding Ms. Criswell, is unnecessary in that Criswell was not an apt comparator to Complainant because she had a larger complex, several more assistants or maintenance people, and was located in an entirely different area with a large military base and its transient population nearby.

Respondent's exceptions to FOF 49 and the suggested revision thereto contains elements of each of the other exceptions: comment on the evidence, unsupported assertions, misstatements, and irrelevancies. Respondent's argument on this exception even points up Respondent's incredible tendency to interpret or revise the written word by suggesting that the written thanks "sincerely for your many years of faithful and competent service" was a reference to earlier years only, but his testimony was that it was written "after I asked her to leave," and that he didn't mean "competent." He also attempted to establish that his March 16 letter reference to Complainant's age didn't mean what it said and that his California attorney's letter regarding Complainant's disability also was misinterpreted. Overall, the record

in this matter suggests otherwise. Except as specifically detailed above, Respondent's exceptions to the findings of fact are disallowed. So too are the exceptions to the Ultimate Findings of Fact, since Respondent's suggested ultimate findings have no basis in the findings of fact on the merits.

Respondent also excepted to the Proposed Conclusions of Law and Proposed Opinion. Respondent correctly acknowledges that the real question is whether, but for Complainant's protected class membership, the harmful action would have occurred, OAR 839-05-015, and admits that Complainant's age was used as "a non-accusatory excuse" for insisting upon her retirement. Respondent states that the real reasons were the discrimination lawsuit, the defiance of Respondent's orders about Complainant's son, and her substandard performance. The increasing pressure on Complainant regarding retirement focused more on her age than on the alleged discrimination for which she was never criticized, or on Beeler, who was rarely mentioned, or on her performance. This forum is convinced that Complainant's age was a factor in her termination, regardless of the ages of some of Respondent's other employees.

Respondent also argues that he made reasonable efforts to accommodate Complainant's disability, but personal inspection of property is absolutely essential for adequate performance of a resident manager's job. Respondent suggests correctly that a person with a disability must be able to perform the essential functions of the job, with or without accommodation,

and that an accommodation is usually accomplished by "adjustments to the way a job customarily is performed." In essence, Respondent argues that Complainant was unable to perform that essential function, and that he did not illegally terminate her due to disability.

Whether a job duty is an essential function is a factual determination that must be made on a case by case basis, and all relevant evidence should be considered. In this case, not only was personal inspection not always done by other managers, it was delegated to trusted subordinates. Complainant did the "personal inspection" for a portion of the complex. Also, whether inspection was done by the manager or under the manager's direction, it did not appear to consume a large amount of the inspecting individual's time. Much more of the resident manager's time seemed to be spent in staffing the office and on other duties. Under the circumstances of this case, the "personal inspection" aspect was not essential within the meaning of the law, and the inability to perform it was not a legitimate reason for termination.

Finally, Respondent argued that he had no duty to inform Complainant of his dissatisfaction with her performance. That may well be true in the "employment at will" context, but employers expose themselves to the risk of discrimination claims or worse when they fail to document or otherwise note performance that could be a legitimate reason for discipline or termination. As in this case, the employer's after-the-fact evaluations and "non-accusatory" excuses fail to convince.

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 THOMAS E. HARRINGTON is hereby ordered to:

1) Deliver to the Fiscal 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 DOROTHY KIEFEL, in the amount of:

a) FORTY-FOUR THOUSAND SEVENTY-SIX DOLLARS (\$44,076), less lawful deductions, representing \$34,247 in wages lost by Complainant between May 15, 1995, and September 3, 1996, and \$9,829 in rental and utilities lost between those dates, plus

b) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory damages for the mental and emotional distress suffered by DOROTHY KIEFEL as a result of Respondent's unlawful practices found herein, plus

c) Interest at the legal rate from May 15, 1996, on the sum of \$26,400 until paid, plus

d) Interest at the legal rate from September 3, 1996, on the sum of \$7,847 until paid, plus

e) Interest at the legal rate on the sum of \$30,000 from the date of this Final Order herein until Respondent complies herewith, and

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