

**In the Matter of
LAMBERTUS SANDKER, dba
BLUE RIVER REFORESTATION**

Case Number 12-00
Final Order of the Commissioner
Jack Roberts
Issued January 28, 2000.

SYNOPSIS

Where the Agency proposed to refuse to renew Respondent's farm/forest labor contractor license, the forum granted the Agency's motion for summary judgment based on uncontroverted facts showing that Respondent had violated ORS 658.415(15), ORS 658.417(3), 658.440(1)(e), and had not paid anything towards satisfying the judgment from a prior Final Order entered by the Bureau against him. ORS 658.445.

The above-entitled case was scheduled for hearing on October 19, 1999, 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 scheduled in the Bureau of Labor and Industries' office, 165 E. 7th, Suite 220, Eugene, Oregon. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency. Respondent Lam-

bertus Sandker represented himself.

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.

**FINDINGS OF FACT –
PROCEDURAL**

1) On August 9, 1999, the Agency issued a Notice of Intent to Refuse to Renew Farm/Forest Labor Contractor License ("Notice") to Respondent. The Notice informed Respondent that the Commissioner intended to deny Respondent's application to renew his farm/forest labor contractor license. The Notice cited the following bases for the proposed action:

"1. On or about March 10, 1999, Respondent filed an application with the Bureau of Labor and Industries ("Bureau") to renew his farm labor contractors license with a for-estation endorsement.

"2. On May 7, 1999, the Commissioner issued a Final Order in case number 15-99 ("Final Order"). The Final Order found that Respondent had committed one violation each of ORS 658.440(1)(e), 658.417(3), 658.415(15) and 653.050. The Final Order assessed civil penalties of \$2,250 against Respondent.

"3. Respondent has not paid any amounts towards the civil penalties assessed in the Final Order.

"4. Respondent does not have the requisite character, reliability nor competence to receive a farm/forest labor contractors license as evidenced by the following (ORS 658.420, 658.445 and OAR 839-015-0140):

"1) Prior violations of ORS 658.405 to 658.485 as found in the Final Order. OAR 839-015-0520(3)(a);

"2) Failure to pay the civil penalties lawfully assessed in the Final Order. OAR 839-015-0520(3)(d);

"3) Failure to pay, in a timely manner, the civil penalties assessed in the Final Order. OAR 839-015-0520(3)(n); and

"4) Failure to promptly satisfy the Final Order, which was subsequently recorded in the County Clerk Lien Record for Lane County¹ and is enforceable as a judgment pursuant to ORS 652.332(5). OAR 839-015-0520(3)(o)."

2) On August 11, 1999, the Agency served the Notice on Respondent by certified mail.

3) On August 16, 1999, Respondent filed a request for hearing, in which he "den[ie]d admission of guilt to all allegations presented."

4) On August 18, 1999, the Agency sent Respondent a "Notice of Insufficient Answer to Notice of Intent to Refuse to Renew Farm/Forest Labor Contractor License" in which Respondent was advised that his **"Answer must include an admission or denial of each fact alleged in the Order and a statement of each relevant defense to the allegations."** (Emphasis in original)

5) On August 23, 1999, Respondent filed an answer to the Notice in which he denied the allegations of the Notice in the following language:

"1) Prior violation of ORS 658.405 to 658.485. Deny guilt as evidence by effort to obtain Performance Bond through Portland Insurance Companies. OAR 839-015-0520(3)(a).

"2) Failure to pay civil penalties lawfully assessed in the Final Order. OAR 839-015-0520(3)(d). Deny guilt as evidence by financial inability to pay penalty.

"3) Failure to pay civil penalties OAR 839-015-0520(3)(n). Deny guilt as evidence by financial inability to pay penalty.

"4) Failure to promptly satisfy the Final Order. ORS 652.323(s), OAR 839-015-

¹ The original Notice alleged the prior Final Order was recorded in "Marion County." This was corrected by amendment on October 7, 1999.

0520(3)(o). Deny quilt with evidence as to the financial inability of respondent to satisfy Final Order.”²

6) On September 8, 1999, the Agency sent the Hearings Unit a request for a hearing date, and on September 13, 1999, the Hearings Unit issued a Notice of Hearing setting forth the time and place of the hearing. The notice was served on Respondent together with the following: a) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a copy of the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0440.

7) On September 23, 1999, the Agency filed a motion to amend the Notice to indicate that the Final Order in contested case number 15-99 was recorded with the County Recorder of Lane County, not Marion County.

8) On September 23, 1999, the Agency filed a motion for summary judgment, with supporting documents as to paragraphs 1 through 4 of the notice, reciting that there was no genuine issue of material fact as to the violations alleged in those paragraphs and that the Agency was entitled to judgment on the violations as a matter of law.

9) In accordance with OAR 839-050-0150, Respondent had seven days within which to respond to the Agency’s motion. The Hearings Unit received no response.

10) On October 7, 1999, the ALJ granted the Agency’s September 23, 1999 motion to amend the Notice.

11) On October 7, 1999, the ALJ granted the Agency’s motion for summary judgment, ruling as follows, in pertinent part:

“A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The evidentiary burden on the participants in a motion for summary judgment as follows:

‘The moving party has the burden of showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. The record on summary judgment is viewed in the light most favorable to the party opposing the motion. *This is true even as to those issues upon which the opposing party would have the trial burden.*’

“*Jones v. General Motors Corp.*, 325 Or 404, 420 (1997) (quoting *Seeborg v. General Motors Corporation*, 284 Or

² Respondent’s answer has been reproduced exactly as it appears in the original document. Based on the context, the forum has interpreted “quilt” as meaning “guilt.”

695, 699 (1978)) (emphasis added by *Jones* court).

“The issues in this case are straightforward. BOLI received Respondent’s application to renew his farm/forest labor contractor license (‘license’) on March 10, 1999. The Agency seeks to refuse to renew Respondent’s license pursuant to ORS 658.445, alleging that Respondent’s character, reliability or competence makes Respondent unfit to act as a farm labor contractor.

“In its Notice of Intent, the Agency alleges that the following facts demonstrate Respondent’s lack of character, reliability or competence:

“(1) Respondent’s prior violations of ORS 658.405 to 658.485 as determined in the Commissioner’s Final Order in Case No. 15-99;

“(2) Respondent’s failure to pay the civil penalties lawfully assessed in the Final Order;

“(3) Respondent’s failure to pay, in a timely manner, the civil penalties assessed in the Final Order;

“(4) Respondent’s failure to promptly satisfy the Final Order, which was recorded in the County Clerk Lien Record for Lane County and is enforceable as a judgment pursuant to ORS 652.332(5).

“Respondent denies prior violations of ORS 658.405 to 658.485 as determined in the Commissioner’s Final Order in

Case No. 15-99 (‘Final Order’), alleging his ‘effort to obtain Performance Bond through Portland Insurance Companies.’

“Respondent also denies failing to pay the civil penalties lawfully assessed in the Final Order by reason of his financial inability to pay the penalties.

“The Facts and the Law

“Respondent’s prior violations of ORS 658.405 to 658.485.

“Subsequent to a contested case hearing held before this forum on March 23, 1999, the Commissioner issued a Final Order on May 7, 1999, in which he concluded that Respondent had violated ORS 658.440(1)(e), 658.415(15), 658.417(3), and 653.050 in 1998. The Commissioner ordered Respondent to pay \$2,250.00 in civil penalties based on those violations. The Agency alleges those identical violations as grounds for refusing to renew Respondent’s license, and contends that issue preclusion prevents Respondent from relitigating those violations. For issue preclusion to apply, five requirements must be met: (1) The issue(s) in the two proceedings must be identical; (2) The issue(s) must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) The party sought to be precluded must have had a full and fair

opportunity to be heard on that issue; (4) The party sought to be precluded must have been a party or in privity with a party in the prior proceeding; and (5) The prior proceeding was the type of proceeding to which this forum will give preclusive effect. *In the Matter of Scott Nelson*, 15 BOLI 168, 175-81 (1996). Here, all these requirements are met. Consequently, Respondent is precluded from relitigating the violations of ORS 658.440(1)(e), 658.415(15), 658.417(3), and 653.050 found by the Commissioner in his Final Order. The forum concludes, as a matter of law, that Respondent violated ORS 658.440(1)(e), 658.415(15), and 658.417(3) in 1998.

“Respondent’s failure to pay the civil penalties assessed in Commissioner’s Final Order.

“Respondent does not deny that he has failed to pay the civil penalties, but merely alleges he is financially unable to pay them. There is no dispute that the Final Order was recorded as a judgment on May 18, 1999, in Lane County. An affidavit by Steven McGlone, an Oregon Department of Revenue Agent assigned to collect the money owed by Respondent as a result as the judgment resulting from the Final Order in Case #15-99 confirms that Respondent had paid nothing towards the judgment as of September 20,

1999. Based on this evidence, the forum concludes that there is no genuine dispute that Respondent has failed to pay any of the debt arising from the civil penalties assessed against him in the Final Order, or the resulting judgment.

“Conclusion

“The Agency has, by administrative rule, clarified the types of actions that demonstrate that a farm labor contractor is unfit to obtain a license renewal based on the contractor’s character, reliability or competence. Those actions include:

“(1) ‘Violations of any section of ORS 658.405 to 658.485.’ OAR 839-15-520(3)(a).

“(2) ‘Failure to comply with federal, state or local laws * * * relating to the payment of * * * any fee or assessment of any sort.’ OAR 839-15-520(3)(d).

“(3) ‘Failure to pay all debts owed, including advances and wages, in a timely manner.’ OAR 839-15-520(3)(n).

“(4) ‘Failure to promptly satisfy any or all judgments levied against the applicant/licensee.’ OAR 839-15-520(3)(o).

“In this case, Respondent has violated OAR 839-15-520(3)(a) as a matter of law. There is no genuine dispute of fact that Respondent has also violated OAR 839-15-520(3)(d), (n), and (o). Respondent’s defense of financial

inability to pay is not applicable to this action.

"The forum concludes that Respondent's violations of the Agency's aforementioned administrative rules demonstrate that Respondent's character, reliability or competence make him unfit to act as a farm labor contractor.

"The Agency's motion for summary judgment is **GRANTED.**"

12) On January 7, 2000, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance.

13) On January 15, 2000, Respondent timely filed exceptions to the proposed order.

14) On January 28, 2000, the Commissioner issued a Final Order in which Respondent's exceptions were inadvertently not addressed or considered.

FINDINGS OF FACT – THE MERITS

1) On or about March 10, 1999, Respondent filed an application with the Bureau of Labor and Industries to renew his farm/forest labor contractor license.

2) On May 7, 1999, the Commissioner issued a Final Order in case number 15-99. The Final Order found that Respondent had committed one violation each of ORS 658.415(15), 658.417(3), 658.440(1)(e), and 653.050. The

Final Order assessed civil penalties of \$2,250.00 against Respondent.

3) The Final Order was recorded as a judgment in Lane County on May 18, 1999, Document No. 99044806, Reel No. 2549R.

4) As of September 20, 1999, Respondent had not made any payment towards satisfying the judgment. In addition, Respondent had not made any arrangements towards paying the judgment.

ULTIMATE FINDINGS OF FACT

1) On or about March 10, 1999, Respondent filed an application with the Bureau of Labor and Industries to renew his farm/forest labor contractor license.

2) On May 7, 1999, the Commissioner issued a Final Order in case number 15-99. The Final Order found that Respondent had committed one violation each of ORS 658.415(15), 658.417(3), 658.440(1)(e), and 653.050. The Final Order assessed civil penalties of \$2,250.00 against Respondent.

3) The Final Order was recorded as a judgment in Lane County on May 18, 1999, Document No. 99044806, Reel No. 2549R.

4) As of September 20, 1999, Respondent had not made any payment towards satisfying the judgment. In addition, Respondent had not made any

arrangements towards paying the judgment

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein, including provisions of Oregon law regarding licensing of farm and forest labor contractors, pursuant to ORS 658.407, 658.410, 658.435.

2) ORS 658.445 provides, in pertinent part:

“The Commissioner of the Bureau of Labor and Industries may * * * refuse to renew a license to act as a labor contractor upon the commissioner’s own motion * * * if:

“(1) The licensee * * * has violated or failed to comply with any provision of ORS 658.405 to 658.503 * * *; or

“* * * * *

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

OAR 839-015-0520(3) provides, in pertinent part:

“The following actions of a farm or forest labor contractor * * * licensee * * * demonstrate that the * * * licensee’s character, reliability or competence make the * * * licensee unfit to act as a farm or forest labor contractor:

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

“* * * * *

“(d) Failure to comply with federal, state or local laws or ordinances relating to the payment of * * * any tax, fee or assessment of any sort;

“* * * * *

“(n) Failure to pay all debts owed, including advances and wags, in a timely manner;

“(o) Failure to promptly satisfy any or all judgments levied against the applicant/licensee[.]”

Respondent’s violations of ORS 658.415(15), 658.417(3), 658.440(1)(e), and OAR 839-015-0520(3)(a), (d), (n), and (o) demonstrate that Respondent’s character, reliability or competence make Respondent unfit to act as a farm or forest labor contractor.

3) OAR 839-015-0520(4) provides:

“When a farm or forest labor contractor’s license application is denied or a license is revoked or when the commissioner refuses to renew a license, the commissioner will not issue the applicant or licensee a license for a period of three (3) years from the date of the denial, refusal to renew or revocation of the license.”

Under the facts and circumstances of this record, and according to the law applicable in

the matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may refuse to renew Respondent's farm/forest labor contractor license. Refusing to renew Respondent's farm/forest labor contractor license as specified in the Proposed Order below is an appropriate exercise of the Commissioner's authority.

OPINION

The ALJ granted the Agency's pre-hearing motion for summary judgment. That ruling is confirmed. Respondent chose not to oppose the Agency's motion and did not controvert the evidence that the Agency submitted in support of its motion. The Agency's evidence established the bases for refusing to renew Respondent's license set forth in the Conclusions of Law. It is clear that the character, reliability and competence of Respondent are such that Respondent's application to renew his farm labor contractor license should be denied.

ORDER

NOW, THEREFORE, as authorized by ORS 658.445, the Commissioner of the Bureau of Labor and Industries hereby refuses to renew Lambertus Sandker's license to act as a farm or forest labor contractor, effective on the date that the Final Order is issued.

**In the Matter of
ROSEBURG FOREST
PRODUCTS CO.**

Case Number 25-99
Final Order of the Commissioner
Jack Roberts
Issued February 11, 2000.

SYNOPSIS

Where the Agency failed to establish by a preponderance of the evidence that Complainant, who took OFLA leave, was discharged because she took OFLA leave, the commissioner dismissed the complaint and specific charges. ORS 659.470 to 659.494; ORS 659.103(1)(e); OAR 839-009-0320.

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 for the State of Oregon. The hearing was held on September 2 and 3, 1999, in the conference room of the Bureau of Labor and Industries, located at 165 E. 7th, Suite 220, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency. Complainant Yvette Sandusky was present throughout the hearing and was not represented by counsel. Respondent was represented by Caroline M.

Carey and Eve L. Logsdon, of the law firm Barran Liebman LLP. Prior to the hearing, Respondent was also represented by Nelson D. Atkin, II, of Barran Liebman, LLP. Hank Snow, Respondent's Director of Industrial Relations, was present throughout the hearing to assist Respondent's case, as permitted by OAR 839-050-0110(3).

The Agency called as witnesses, in addition to Complainant: Timothy A. Sandusky, Complainant's husband; Melissa Levin, Respondent's employee; Roger Bissonnette, Business Agent for the Western Council of Industrial Workers Local 2949; and Hank Snow, Respondent's Vice President of Human Resources.

Respondent called as witnesses: Dale E. Ingram, Safety and Personnel Manager for Respondent's Plant #4 in Riddle; Hank Snow; and Complainant.

The forum received into evidence:

a) Administrative exhibits X-1 through X-20 (submitted or generated prior to hearing) and X-21 to X-26 (documents submitted or generated on or after the day of hearing);

b) Agency exhibits A-1 through A-10, A-12 (submitted or generated prior to hearing), A-13 and A-14 (documents submitted on the day of hearing);

c) Respondent exhibits R-3 and R-4 (submitted or generated prior to hearing), R-6 through R-

14, and R-16 (documents submitted on the day of hearing);

d) Nine joint exhibits submitted by the Agency and Respondent prior to hearing, numbered AR-1 through AR-9.

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.

FINDINGS OF FACT – PROCEDURAL

1) On August 17, 1998, Complainant filed a verified complaint with CRD alleging that she was the victim of the unlawful employment practices of Respondent based on Respondent's termination of Complainant on May 22, 1998. After investigation and review, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations regarding Respondent's discharge of Complainant.

2) On January 29, 1999, the Agency submitted to the forum Specific Charges alleging that Respondent discriminated against Complainant by discharging her in retaliation for using the Oregon Family Leave Act ("OFLA"). The Agency also requested a hearing.

3) On February 22, 1999, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth May 11, 1999, in Roseburg, Oregon, as

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.

4) On March 10, 1999, Respondent, through counsel, filed an answer to the Specific Charges. In addition to its admissions and denials, Respondent alleged the following affirmative defenses:

(a) Failure to state a claim;

(b) Respondent's good faith attempt to follow guidelines provided in the federal Family Medical Leave Act ("FMLA");

(c) Respondent was required to follow its collective bargaining agreement with regard to terms and conditions for all subject employees, including Complainant;

(d) OFLA contemplates the controlling nature of a collective bargaining agreement;

(e) BOLI's request for mental suffering damages is barred in whole or in part because there is no evidence Complainant experienced any mental suffering.

5) On April 1, 1999, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses;

identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and any damages calculations (for the Agency only). The forum ordered the participants to submit case summaries by April 30, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

6) Pursuant to the ALJ's motion, and with the concurrence of the Agency and Respondent's counsel, the hearing was reset for May 12, 1999.

7) On April 29, 1999, Respondent and the Agency jointly filed cross-motions for summary judgment, accompanied by a motion requesting that the issue of Respondent's liability be determined based upon the participants' enclosed Joint Stipulation of Facts and the pleadings, with both sides being given an opportunity to submit written argument on how the law applies to the facts of the case.

8) On April 29, 1999, the ALJ held a pre-hearing conference with Mr. Gerstenfeld and Mr. Atkin. At the conclusion of the conference, the ALJ made an oral ruling granting the participants' joint motion that the issue of Respondent's liability be determined based on the participants' Joint Stipulation of Facts and the pleadings, with both sides being given an opportunity to submit written argument on how the law applies to the facts of the case. At the same time, the ALJ canceled the hearing set for May 12, 1999;

anceled the April 1, 1999, case summary order; and ruled that written argument on how the law applies to the facts was due June 1, 1999.

9) On May 3, 1999, the forum issued a written ruling confirming its oral rulings of April 29, 1999. The forum also requested clarification regarding Joint Stipulation of Fact #20.

10) On May 28, 1999, the Agency filed a Statement of Policy in response to the forum's May 3, 1999, ruling.

11) On May 28, 1999, Respondent filed its Brief in response to the forum's May 3, 1999, ruling.

12) On June 4, 1999, the Agency responded to the forum's May 3, 1999, request for a clarification of Joint Stipulation of Fact #20. The Agency indicated that Joint Stipulation of Fact #20 should read "Complainant's request for reinstatement * * *" instead of "Respondent's request for reinstatement * * *."

13) On June 22, 1999, the forum issued an order denying the Agency's and Respondent's joint cross-motions for summary judgment.

14) On July 1, the ALJ held a pre-hearing conference with Mr. Gerstenfeld and Mr. Atkin to determine a mutually convenient time for rescheduling the hearing. As a result of the conference, the hearing was rescheduled to begin September 2, 1999, in Eugene, Oregon. On July 2, 1999, the ALJ issued an amended notice of

hearing reflecting the new date and location.

15) On August 9, 1999, the forum issued an amended discovery order for case summaries in which the participants were required to submit case summaries containing the elements set out in the forum's April 1, 1999, order by August 20, 1999.

16) On August 10, 1999, Respondent filed a motion asking to take the deposition of Complainant, stating that absent a deposition, Respondent would be unable to effectively determine if the Agency's request for \$27,6570 in back wages and \$20,000 for mental suffering and reinstatement on behalf of Complainant was appropriate. The Agency did not object.

17) On August 16, 1999, the forum granted Respondent's motion requesting to take Complainant's deposition.

18) On August 16, 1999, the Agency filed its case summary. In the same document, the Agency moved to amend the request for damages in the Specific Charges to seek "\$35,297.99 plus full restoration of credits in the Lumber Employers & Western Council of Industrial Workers Pension Plan, from May 19, 1998, through the date Complainant is reinstated" instead of the "\$27,560 sought in the Specific Charges." The Agency represented that the amendment was based on recently obtained evidence concerning Complainant's pay rate at the date of her termination

and pay increases called for under the terms of a collective bargaining agreement ("CBA"). The Agency additionally sought to amend the Agency's request for damages to clarify that "the reinstatement sought is with full seniority as though there had been no interruption in Complainant's employment from May 19, 1999, through the date of her reinstatement."

19) On August 20, 1999, Respondent filed its case summary.

20) On September 1, 1999, Respondent sent a motion to dismiss the Agency's claim for damages for mental suffering to the ALJ and the Agency case presenter, via facsimile. In support of the motion, Respondent enclosed a portion of Complainant's deposition transcript. Respondent's motion contended that Complainant's deposition testimony established that she had not suffered any emotional distress as a result of her termination, that she only sought reinstatement as a remedy, that she was concurrently suffering emotional distress from a source unrelated to her termination, and that the Agency had failed to provide Respondent with Complainant's medical records showing treatment for prior mental conditions. Respondent also asked that Complainant's medical records be provided to Respondent if the Agency's request for mental suffering damages was not withdrawn or dismissed. On the same date, Respondent also filed

the motion by mailing it first class to the Hearings Unit.

21) At the commencement of the hearing, the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

22) Prior to opening statements, the ALJ granted the Agency's motion to amend the Specific Charges, stating that Respondent's denial of the new allegations in the amendment was presumed. Respondent did not object.

23) Prior to opening statements, the ALJ denied Respondent's motion to dismiss the Agency's claim for mental suffering damages. The ALJ informed the participants that his denial was based on the following:

(a) Complainant's failure to seek medical treatment for her mental suffering, the fact that she may have concurrently experienced mental suffering arising from a different source, and her confusion about any entitlement to mental suffering damages did not negate the Agency's claim for mental suffering damages;

(b) It was not clear from the deposition transcript excerpts submitted by Respondent that Complainant did not experience any mental suffering based on the alleged discriminatory termination; and

(c) Respondent had almost six months since filing its answer to move for a discovery order for the sought after medical records, but had not done so as of the date of the hearing.

This ruling is confirmed.

24) Prior to opening statements, Respondent moved for a discovery order requiring the Agency to produce Complainant's medical records that the Agency had not yet provided, consisting of handwritten notes from her counselor, John DeSmet. The Agency objected on the basis of timeliness and privilege. Respondent indicated the documents were sought in order to determine if they revealed other contemporaneous stresses in Complainant's life that might affect her potential mental suffering damages. Respondent and the Agency agreed that Respondent made an informal discovery request after Complainant's deposition on August 26, 1999, that the Agency had obtained the requested documents, and that most of them had already been provided to Respondent. The ALJ granted Respondent's motion, ruling that under the circumstances, the requirement of a "full and fair inquiry" under ORS 183.415 was controlling. The ALJ also noted that any claim of privilege Complainant may have had under OEC 504 (Psychotherapist-patient privilege) or OEC 504-4 (Clinical social worker-client privilege) was waived by the Agency's claim for mental suffering on her behalf. The ALJ ruled that he would conduct an *in camera* re-

view of the sought-after documents at the lunch break, and issue a protective order covering any documents that were released to Respondent. The ALJ ruled he would only release records created within a two year period prior to Complainant's discharge that contained information showing another potential cause for Complainant's post-discharge mental suffering.

25) After an *in camera* inspection of the medical records provided by the Agency, the ALJ released several pages of Complainant's medical records, some of which contained partial redactions, to Respondent at 2 p.m. on September 2, 1999, subject to a Protective Order. The records consisted of handwritten notes made by John L. De Smet, LCSW, during his counseling sessions with Complainant in fall 1997, regarding Complainant's conditions of depression, panic disorder, and post traumatic stress disorder, and a clinical note by A. Gordon Lui, M.D., dated 1/4/97, regarding Complainant's consultation with him over tobacco addiction and anxiety and the treatment he prescribed for those conditions. Thirty-three additional pages of records were not released to Respondent, but were sealed and placed in the official hearings file in the event of appellate review on the issue of the appropriate scope of discovery. The Protective Order issued by the ALJ contained the following restrictions:

(a) Only three copies would be made, with one provided to Respondent's counsel;

(b) None of the participants were to discuss or disclose any of the protected information or documents with non-participants outside of the hearings room;

(c) The forum would maintain and seal these documents in the official hearings file separately from documents subject to public disclosure under the Oregon Public Records law;

(d) The originals of any documents provided to Respondent and any copies made by Respondent to work from would be returned to the Agency after the hearing;

(e) When there was testimony in the hearing concerning these documents, all spectators except Hank Snow, Respondent's designated representative, would be asked to leave.

Copies of the medical records released to Respondent were provided to the Agency case presenter for inspection before releasing them to Respondent. After the medical records were released to Respondent, Respondent's counsel asked for and was given time to review the records before the hearing was continued.

26) Prior to opening statements, Respondent moved to amend its answer to include the affirmative defense that Com-

plainant failed to mitigate her back pay damages. The Agency objected on the grounds that failure to mitigate was an affirmative defense that is waived if not raised in a responsive pleading, and Respondent had not raised it in its answer. The ALJ reserved ruling on the motion for the proposed order and ruled that Respondent would be allowed to present evidence regarding Complainant's alleged failure to mitigate. The ALJ also granted the Agency a continuing objection to any evidence elicited on this issue. Respondent's motion is granted for reasons stated in the Opinion.

27) The ALJ issued a proposed order on November 16, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance.

28) On November 22, 1999, the Agency filed a motion for an extension of time in which to file exceptions, citing the case presenter's hearings schedule and pre-scheduled vacation plans as a basis for the extension.

29) On November 22, 1999, the ALJ granted the Agency's motion and extended the Agency's time for filing exceptions to December 10, 1999.

30) On December 10, 1999, the Agency filed exceptions to the proposed order.

31) On December 27, 1999, Respondent filed a response to the Agency's exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation that owned and operated wood products manufacturing facilities, including Plywood Plant #4 in Douglas County, Oregon, and was an employer in this state who employed 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which Complainant took her family leave or in the year immediately preceding the year in which Complainant took her family leave.

2) Complainant was hired by Respondent on or about May 11, 1996, at Respondent's Plywood Plant #4 in Douglas County, Oregon.

3) When hired, Complainant was a vacation relief skoog/raimann machine operator, eventually moving to a regular full-time position as a skoog/raimann operator, where she remained throughout the rest of her employment with Respondent.

4) During her employment with Respondent, Complainant was a member of Local 2949 of the Western Council of Industrial Workers.

5) Respondent discharged Complainant in 1997 for absenteeism and attendance problems. Complainant contested her discharge through second and third step grievance proceedings and was reinstated.

6) At all times material herein, Respondent maintained a health and welfare trust fund (the "fund") for the benefit of employees who miss more than three days of work due to non-occupational accidents or illness. In order to collect from the fund, a one-page form had to be completed. The top third was completed by the employee, the bottom third by the employee's attending physician, and the middle third by Respondent. In 1997, the fund paid benefits of \$250 per week. At the time of Complainant's discharge, Respondent was paying \$2.45 per hour into the fund for each employee covered by the collective bargaining agreement during medical leaves of absence.

7) On August 28, 1997, Complainant completed Respondent's form for requesting health and welfare benefits from the fund based on "Depression/anxiety attacks." Complainant indicated on the form that her "last date at work before disability" was "7-29-97." Complainant's attending physician completed the "Attending Physician's" part of the form on August 29, 1997, and Respondent's representative signed it on October 15, 1997, indicating that Complainant's "last date of work before disability" was "7-28-97" and "Date returned to work after disability" was "8-9-97."

8) In November 1997, Complainant received a check in the net amount of \$211.08 for time loss benefits related to her application for health and welfare

benefits for the period of August 1, 1997, through August 8, 1997.

9) On March 31, 1998, Complainant suffered a blackout (syncople episode) at work. Complainant's supervisor, Dennis Cunningham, removed her from the work floor and told her not to come back to work until she had a doctor's release.

10) On March 31, 1998, Complainant was seen by Dr. James Hoyne, DO, an osteopathic physician, regarding her syncople episode.

11) On April 3, 1998, Complainant was seen by Dr. James Falk, DO, who examined Complainant and scheduled tests to discover the reason for the syncople episode. Dr. Falk removed Complainant from work based on her syncople episode "until further notice."

12) On or about April 3, 1998, Respondent received a doctor's note removing Complainant from work until further notice. There was no light duty reference in the note.

13) On April 6, 1998, Respondent granted Complainant a leave of absence, beginning April 4, 1998, through May 3, 1998, after her physician removed her from work until further notice due to syncople episodes that interfered with her ability to perform the essential job functions of her position.

14) Complainant worked an average of 25 or more hours per week during the 180 days imme-

diately proceeding March 31, 1998.

15) On April 9, 1998, Complainant accepted a job with Safeway in Roseburg as a courtesy clerk and began work shortly thereafter. The job involved working with shopping carts and grocery bags in Safeway's parking lot. There was no heavy machinery involved in Complainant's job at Safeway.

16) On or about April 10, 1998, Complainant discussed her Safeway position with her treating physician, who released her for light duty work and authorized her to accept that position.

17) Subsequent to Complainant's syncople episode, Respondent provided Complainant with an application form for health and welfare benefits. Complainant took the form to Dr. Falk, who completed and signed it on April 17, 1998, noting that Complainant had been "continuously disabled" from April 3 through April 10, 1998, and that Complainant was "still unable to do regular job at mill. Found new job no * * * heavy machinery." Complainant did not submit this form to Respondent, and Respondent had no knowledge of it at any time during Complainant's employment or during the subsequent grievance process after she was discharged.

18) While employed at Safeway, Complainant earned \$6.00 per hour. She earned \$267.24 in gross wages. Her last day of work was on or about April

22, 1998. She stopped work at Safeway when she began experiencing lightheadedness again and Dr. Falk told her she should not be doing any work.

19) Complainant did not request or discuss the possibility of light duty work with Respondent before accepting the position at Safeway or at any time during her leave of absence.

20) On or about April 20, 1998, Respondent received a medical certification from Complainant's doctor stating that she could no longer drive and was unable to work around dangerous places or dangerous machinery. This information was provided on Respondent's form entitled "The Family and Medical Leave Act of 1993 – Certification of Health Provider." Respondent had requested this medical verification. Respondent did not ever request nor require any other medical verification regarding Complainant's serious health condition or its impact on her ability to work for Respondent.

21) On or about May 1, 1998, Respondent received additional medical documentation removing Complainant from work indefinitely.

22) Respondent did not ever request nor require Complainant to obtain the opinion of another health care provider regarding her serious medical condition or its impact on her ability to work for Respondent.

23) On May 6, 1998, Respondent extended Complainant's

leave of absence an additional 30 days, beginning May 4, 1998, and ending June 3, 1998.

24) On or about May 8, 1998, Dr. Falk approved Complainant's return to work without restrictions, effective May 9, 1998.

25) During Complainant's leave of absence, Respondent continued to contribute \$2.45 per hour, on Complainant's behalf, to its health and welfare trust fund. Respondent also held Complainant's job open for her by not filling her job permanently with another employee.

26) On May 9, 1998, Complainant reported to work, requested reinstatement, and was reinstated to her former position as skoog/raimann operator that same day.

27) After Complainant returned to work, Dale Ingram, Respondent's safety and personnel manager at Plywood Plant #4 since 1990, was told by one of Respondent's employees that Complainant had worked elsewhere during her leave of absence.

28) Ingram investigated the allegation regarding Complainant working elsewhere while on leave of absence and was informed by the store manager at Safeway that Complainant worked about two weeks at Safeway and resigned when she was no longer able to drive. The medical certification stating that Complainant was no longer able to drive was dated 4/20/98.

29) Based on the results of this investigation, Ingram discharged Complainant on May 20, 1998, based upon her having worked for another employer, without the express prior approval of Respondent, while on medical leave of absence from Respondent. Ingram cited Complainant's medical leave in an internal memorandum dated May 19, 1998, explaining the reason for Complainant's discharge as a historical fact supporting the discharge.

30) At all relevant times, Complainant's employment with Respondent was subject to the terms of a collective bargaining agreement ("CBA") between Respondent and the Western Council of Industrial Workers Local Union No. 2949 (June 1, 1996-June 1, 2000). The agreement prohibited employees from working for another employer while on a leave of absence without the express prior approval of the Respondent. This prohibition extended only to employees on a leave of absence. Prior CBAs contained the same provision. Local 2949 gives all of its members a copy of the contract book containing the CBA.

31) Complainant grieved her termination through the grievance procedure established in the CBA. This process involved two steps of review. Complainant's request for reinstatement was denied at each step of the grievance process. After the final meeting in the grievance process, Local 2949

took no action on behalf of Complainant.

32) Ingram believes it is unfair when any employee takes advantage of a policy set up by Respondent for the benefit of its employees, and believes that is what Complainant did when she worked at another job while on her leave of absence without obtaining Respondent's permission, during which time Respondent continued to make contributions to the health and welfare trust fund on her behalf, as well as hold her job open.

33) Complainant was paid the gross hourly wage of \$13.145 at the time she was discharged by Respondent.

34) Had Complainant not been discharged on May 20, 1998, she would have earned \$35,297.99 in gross wages and vacation pay while working for Respondent through August 31, 1999.

35) After Complainant was discharged, Complainant sought work through a temporary employment agency. Complainant was asked to provide the agency with additional documentation, either her driver's license or social security identification, but didn't return to the agency with the requested documentation and isn't sure why she didn't return. Complainant looked through the Roseburg News Review six days a week, 45 minutes a day, for work. She made a few phone calls to unspecified employers, but got no response. She called in

response to an ad for a maid service, but got no response. After she worked at Wildwood Nursery in March 1999,¹ she twice applied for work at the Purple Parrot, a restaurant or bar that paid \$7 or \$7.50 per hour. She made two applications for work at Fred Meyer. While she worked at Fred Meyer in the summer of 1999,² she applied for a job at Ray's Food Place. Sometime in 1999, she applied for work at DR Lumber in Riddle by signing their "sign in sheet" every day, except for Saturday and Sunday for "a week or two."

36) Complainant collected \$8,075 in unemployment compensation benefits in 1998 after her discharge from Respondent.

37) Subsequent to her discharge from Respondent, Complainant's employment has consisted of the following:

(a) Avon (salesperson): starting in July 1998, earning approximately \$1500 between July 1998 and the date of the hearing. Complainant sold Avon before she worked for Respondent, but quit selling Avon when she went to work for Respondent.

(b) Mary Kay Cosmetics (salesperson): starting in fall 1998. Complainant spent \$360 on a sales kit and things she needed for herself. There

was no evidence as to the amount of net profit she earned, if any.

(c) Wildwood Nursery from March 16-31, 1999, earning a total of \$322.00 in gross wages (46 hours of work at \$7.00 per hour). Complainant quit because she didn't enjoy working outside due to extreme weather conditions at the time and a sinus infection and headaches she experienced as a consequence.

(d) Fred Meyer in May, June, and July 1999, where she earned a total of \$1,571.67 in gross wages, earning \$6.63 per hour.

38) There are 11 other lumber and plywood mills in the Roseburg area that employ 80-300 employees. Some of them have considerable turnover. New employees at those mills earn \$6.50 to \$7.00 per hour, which is considerably less than what Respondent pays entry-level employees. Two of those mills have skoo operator positions.

39) Complainant became very upset and cried when Ingram discharged her. She was shocked and very angry. She felt defeated, hurt, and embarrassed. Three months earlier, she had just married her husband, Tim Sandusky, who also worked at Respondent's Plywood Plant #4. Complainant was concerned about what his reaction would be, now that he had to be the sole support of Complainant and her two children. Between the time Complainant re-

¹ See Finding of Fact – The Merits #37, *infra*

² *Id.*

turned to work after her syncople episode and her discharge, her stress level was a "4" on a scale of "1-10", with a "10" being the highest. After her discharge, her stress level rose to an "8" and stayed there for a month before returning to a "4" again.

40) Complainant also suffered embarrassment at the time of her termination based on her perception that "everyone" at Respondent was talking about her being fired because she was trying to steal from Respondent. This perception, in turn, was based on a single conversation her husband had with a co-worker, who told him she heard Complainant was terminated for trying to steal from Respondent.

41) Complainant and her husband have experienced financial stress since her discharge due to her reduced income. Although they had disagreements and arguments about family finances before her discharge, those disagreements and arguments have increased in number since her discharge. Complainant has experienced stress as a result of being primarily dependent on her husband for income. Since Complainant's discharge, she and her husband have had to severely curtail expenses for family entertainment. They have also had to spend less money than Complainant wanted for school clothes for Complainant's children.

42) Complainant has suffered from panic attacks since 1995. She still experiences them, but has been able to control them

since her discharge from Respondent's employ. Complainant experienced depression and anxiety in August 1997, for which she sought counseling from John De Smet, LCSW.³ De Smet diagnosed her as suffering from major depression, recurrent, and panic disorder, as well as post traumatic stress disorder. Complainant has not sought counseling for any conditions arising out of her discharge from Respondent's employ.

43) On March 16, 1998, Ingram discharged Tracy Gunn, a core grader employed at Respondent's Plywood Plant #4. Ingram discharged Gunn after learning that Gunn had been working at a bowling alley during the same period of time that he was on an authorized leave of absence from his job with Respondent, ostensibly to spend time helping his wife cope with grief over her father's death and recent funeral. Gunn filed a union grievance over his discharge. A step two grievance meeting was held, at the conclusion of which Gunn's discharge was upheld. Local 2949 took no further action with regard to Gunn's discharge.

44) In 1997, Gunn took one week of OFLA leave and was not discharged.

45) With the exception of Complainant and Tracy Gunn, Respondent has reinstated its other employees who have taken

³ See Finding of Fact – The Merits #7, *supra*.

FMLA/OFLA leave while employed at Plywood Plant #4.

46) Tim Sandusky, Roger Bissonette, Dale Ingram, and Hank Snow were credible witnesses.

47) Complainant's testimony was credible regarding the immediate circumstances that caused her to utilize OFLA, and the immediate circumstances of her discharge and subsequent grievance procedure. The forum also found her testimony concerning her mental suffering, and her mitigation efforts credible. However, Complainant's testimony in other areas was suspect. Based on the examples that follow, the forum has only credited the remainder of Complainant's testimony where it is corroborated by other credible evidence. First, the issue of her memory. Although she testified "I'm terrible with dates," her memory lapses on cross-examination on at least three issues potentially damaging to her case were too convenient for the forum to ignore. For example, she testified she couldn't recall what Exhibit AR-4 was, despite the fact that it was a joint exhibit consisting of a partially completed (but not submitted to Respondent) application for health and welfare benefits that her physician completed on April 17, 1998, indicating she had found "a new job."⁴ She was also unable to recall the date she was hired at Safeway, the date she quit, or whether she told Safeway

about her leave of absence from Respondent. Exhibit AR-3 contains a typed and handwritten notes from Dr. Falk that are similar in content and refer to Complainant's release to return to work on May 8, 1998. The handwritten note is undated and the typed note is dated May 22, 1998. When asked if she had asked Dr. Falk to write the letter after her discharge, Complainant again was unable to recall. Finally, her testimony in two areas was untrue. First, Complainant testified that she received approximately \$4700 in unemployment benefits after her discharge, yet her 1998 tax return unequivocally showed that she received \$8075 in that period of time. Second, she testified that she never got any money based on her 1997 application for health and welfare trust fund benefits and didn't know if she had even submitted it to Respondent, whereas credible evidence provided by the trust fund showed she had submitted the application and received benefits.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was an Oregon employer that utilized the personal services of 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in 1997 and 1998.

2) Complainant was employed by Respondent at Plywood Plant #4 on a full-time basis from May 11, 1996, until her discharge on May 20, 1998, and worked an average of 25 or more hours per

⁴ See Finding of Fact – The Merits #17, *supra*.

week during the 180 days immediately preceding March 31, 1998. Complainant's job as a skoog/raimann operator involved work around heavy machinery.

3) On March 31, 1998, Complainant suffered a blackout (syncople episode) at work and was instructed not to return to work until she obtained a doctor's release. Between March 31, 1998, and May 9, 1998, Complainant's health condition related to her blackout rendered her unable to work in dangerous places or around dangerous or heavy machinery, an essential function of her regular position as a skoog/raimann operator.

4) On April 6, 1998, Complainant submitted an application for OFLA leave to Respondent and was granted OFLA leave beginning April 4, 1998, through May 3, 1998.

5) On April 9, 1998, Complainant was hired as a courtesy clerk at Safeway. She began work shortly thereafter and worked until on or about April 22, 1998. Her duties as a courtesy clerk did not involve working in dangerous places or around heavy or dangerous machinery.

6) During her employment with Respondent, Complainant was a member of Local 2949 of the Western Council of Industrial Workers. As a result, her employment with Respondent was subject to the terms of a collective bargaining agreement between Respondent and the Western Council of Industrial Workers Lo-

cal Union No. 2949 (June 1, 1996-June 1, 2000). The agreement prohibited employees from working for another employer while on a leave of absence without the express prior approval of the Respondent. This prohibition extended only to employees on a leave of absence.

7) Complainant did not inform Respondent that she had accepted a job at Safeway until the May 20, 1998, meeting at which she was discharged.

8) On May 6, 1998, Respondent extended Complainant's leave of absence an additional 30 days, beginning May 4, 1998.

9) Complainant was released to return to work without restrictions effective May 9, 1998.

10) On May 9, 1998, Complainant reported to work, requested reinstatement, and was reinstated to her former position as skoog/raimann operator that same day.

11) After Complainant returned to work, Respondent learned through another employee that Complainant had worked at Safeway during her leave of absence.

12) On May 20, 1998, Respondent discharged Complainant for violating the collective bargaining agreement by working at Safeway without obtaining Respondent's permission while on a leave of absence.

13) On March 16, 1998, Respondent discharged Tracy Gunn, a core grader employed at Ply-

wood Plant #4, after Respondent learned he had been working at a bowling alley while off on an authorized leave of absence from Respondent, ostensibly to spend time helping his wife cope with grief over her father's death. In August 1997, Gunn took OFLA leave for five days and was not discharged.

14) With the exception of Complainant and Gunn, Respondent has reinstated its other employees who have taken FMLA/OFLA leave while employed at Plywood Plant #4.

15) Between the date of her discharge and August 31, 1999, Complainant lost \$31,904.32 in gross wages and vacation benefits that she would have earned, had she not been discharged by Respondent.⁵

16) Complainant experienced substantial mental suffering as a result of her discharge from Respondent's employ.

⁵ In arriving at this figure, the forum subtracts \$1500 for Avon earnings, \$322 for Wildwood earnings, and \$1571.67 for Fred Meyer earnings. Although Complainant spent \$360 on business expenses related to Mary Kay, her Mary Kay earnings were indeterminate and the forum has not deducted those expenses because she provided no evidence of her earnings. Complainant's unemployment earnings of \$8,075 have not been subtracted, based on the forum's prior rulings that unemployment earnings are not deductible from an award of back pay. See, e.g., *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61, 84 (1992).

CONCLUSIONS OF LAW

1) The Oregon family leave laws apply to "covered employers," which are defined as:

"employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken."

Respondent was a "covered employer." ORS 659.470(1); ORS 659.472(1).

2) The actions and motivations of Ingram, Respondent's safety and personnel manager at Plywood Plant #4, are properly imputed to Respondent.

3) ORS 659.474(1) provides that "[a]ll employees of a covered employer are eligible to take leave for one of the purposes specified in ORS 659.476(1)(b) to (d)" except in circumstances not applicable here. Complainant was an eligible employee.

4) ORS 659.492 (1) and (2) provide:

"(1) "A covered employer who denies family leave to an eligible employee in the manner required by ORS 659.470 to 659.494 commits an unlawful employment practice.

"(2) Any employee claiming to be aggrieved by a violation of ORS 659.470 to 659.494 may file a complaint with the Commissioner of the

Bureau of Labor and Industries in the manner provided by ORS 659.040. The Commissioner of the Bureau of Labor and Industries shall enforce the provisions of ORS 659.470 to 659.494 in the manner provided in ORS 659.010 to 659.110 for the enforcement of other unlawful employment practices.”

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.492(2); ORS 659.010 *et seq.*

5) ORS 659.476 specifies the purposes for which OFLA leave may be taken:

“(1) Family leave under ORS 659.470 to 659.494 may be taken by an eligible employee for any of the following purposes:

“* * * * *

“(c) To recover from or seek treatment for a serious health condition of the employee that renders the employee unable to perform at least one of the essential functions of the employee’s regular position.”

ORS 659.470(6) defines the term “serious health condition” as follows:

“(6) ‘Serious health condition’ means:

“(a) An illness, injury, impairment or physical or mental condition that requires inpatient care in a hospital, hospice or residential medical care facility;

“(b) An illness, disease or condition that in the medical judgment of the treating health care provider poses an imminent danger of death, is terminal in prognosis with a reasonable possibility of death in the near future, or requires constant care; or

“(c) Any period of disability due to pregnancy, or period of absence for prenatal care.”

ORS 659.494(2) provides:

“ORS 659.470 to 659.494 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Family and Medical Leave Act of 1993. Family leave taken under ORS 659.470 to 659.494 must be taken concurrently with any leave taken under the federal Family and Medical Leave Act of 1993.”

The Agency has interpreted these statutes and rules as follows:

“Under OFLA, a Serious Health Condition includes:

“1. an illness, injury, impairment, or physical or mental condition that requires inpatient care (ORS 659.470(6)(a));

“2. an illness, injury, impairment, or physical or mental condition that poses imminent

danger of death or is terminal with a reasonable possibility of death (ORS 659.470(6)(b));

“3. an illness, injury, impairment, or physical or mental condition that requires constant care (ORS 659.470(6)(b). Constant care means care wherever performed (OAR 839-009-0210(10)), including:

“a. care in a health care facility (OAR 839-009-0210(10));

“b. home care administered by health care professionals (OAR 839-009-0210(10)); or

“c. inability to work for more than three consecutive calendar days and 2 or more treatments by health care provider or one treatment plus continuing supervision by health care provider. (FMLA)

“i. includes ‘self-care,’ i.e. person taking care of themselves (BOLI interpretation)

“ii. excludes colds, flu, ear-aches, upset stomach, minor ulcer, headache (except migraine), routine eye or dental care (FMLA);

“4. any period of disability due to pregnancy, or period of absence for prenatal care. (ORS 659.470(6)(c);

“5. a chronic condition (like asthma, diabetes and epilepsy) that requires periodic visits for treatment by a health care provider, continues over an extended period of time, and may cause episodic rather than a continuing period of in-

capacity (OAR 839 Div. 009 App. B);

“6. a permanent longterm condition under continuing treatment (like Alzheimers, stroke), which:

“a. requires in-patient or constant care; or

“b. poses imminent danger of death.

“(OAR 839 Div. 009 App. B)”⁶

ORS 659.470(5) defines “health care provider,” in pertinent part, as follows:

“‘Health care provider’ means the person who is primarily responsible for providing health care to an eligible employee * * *, and who is a physician licensed to practice medicine and surgery, including a doctor of osteopathy * * *.”

Complainant’s syncople episode was a “serious health condition” for purposes of OFLA that rendered her unable to work for more than three consecutive calendar days, for which she received two or more treatments by a doctor of osteopathy, a “health care provider,” and that rendered her unable to perform at least one of the essential functions of her regular position.

6) ORS 659.103(1)(e) provides:

⁶ See *In the Matter of Centennial School District*, 18 BOLI 176, 191, 193 (1999), *appeal pending*.

“(1) In accordance with any applicable provision of ORS 183.310 to 183.550, the Commissioner of the Bureau of Labor and Industries may adopt reasonable rules:

“* * * *”

“(e) Establishing rules covering any other matter required to carry out the purpose of ORS 659.010 to 659.110 and 659.400 to 659.545.”

OAR 839-009-0320(2) provides:

“It is an unlawful employment practice for an employer to retaliate or in any way discriminate against an employee with respect to hire, tenure or any term or condition of employment because the employee has inquired about family leave, submitted a request for family leave or invoked any provision of the Oregon Family Leave Act.”

In discharging Complainant, Respondent did not retaliate or in any way discriminate against Complainant with respect to hire, tenure or any term or condition of employment because Complainant inquired about family leave, submitted a request for family leave or invoked any provision of the Oregon Family Leave Act.

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

OPINION

INTRODUCTION

The Agency alleges that Complainant took OFLA leave, and that Respondent reinstated Complainant following her OFLA leave, only to later discharge her for accepting another job while on OFLA leave. The Agency contends Complainant's discharge was caused by her OFLA leave, in that she would not have been discharged if she had taken the same job while not utilizing OFLA leave. The Agency seeks back pay and mental suffering damages to compensate Complainant for Respondent's alleged unlawful employment practice.

In response, Respondent contends that Complainant was discharged based on a legitimate, non-discriminatory reason (“LNDR”), i.e. her acceptance of another job, without Respondent's prior permission, while on a leave of absence, in violation of Respondent's collective bargaining agreement. Respondent also contends that it was entitled to rely on and did rely on FMLA and the collective bargaining agreement in discharging Complainant, that Complainant failed to mitigate her back pay loss, and that any mental suffering she experienced was primarily caused by other sources.

PRIMA FACIE CASE

The Agency's prima facie case consists of the following elements: (1) Complainant availed herself of a protected right under OFLA; (2) Respondent made an employment

decision that adversely affected Complainant; and (3) There is a causal connection between Complainant's protected OFLA activity and Respondent's adverse employment action. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 161 (1st Cir. 1998); *Morgan v. Hilti, Inc.*, 108 F.3d 1319 (10th Cir. 1997).⁷

The first element of the Agency's prima facie case is established by undisputed facts. Complainant, who had worked an average of 25 or more hours per week during the 180 days immediately preceding March 31, 1998, suffered from a serious health condition, a blackout that occurred at work, that required constant care. As a result, Complainant took a leave of absence from Respondent, her OFLA covered employer, from on or about March 31, 1998, through on or about May 9, 1998.

The second element likewise is established by an undisputed fact, namely, that Respondent discharged Complainant on or about May 20, 1998.

The third element, causal connection, is the primary subject of

dispute in this case and is analyzed at length in the next section.

CAUSAL CONNECTION

OFLA regulates two separate, distinct areas of employer behavior with regard to employee leaves of absence. First, OFLA establishes an entitlement providing that eligible employees working for covered employers are entitled to OFLA leave for the purposes set out in ORS 659.476, and job protection during that leave. Second, OFLA, through OAR 839-009-0320, prohibits retaliation or discrimination against any employee based on inquiry about or use of OFLA. This distinction is important because the analysis of whether or not unlawful discrimination occurred is different in each area.

The "entitlement" portion of OFLA is unequivocal as to what constitutes an unlawful employment practice. An unlawful employment practice occurs when a "covered employer * * * denies family leave to an eligible employee in the manner required by ORS 659.470 to 659.494." ORS 659.492(1). With limited exceptions,⁸ a violation occurs at the

⁷ This forum has previously taken guidance from federal court decisions interpreting federal laws analogous to Oregon law. *In the Matter of Wing Fong*, 16 BOLI 280, 292 (1998). As this is a case of first impression, the forum adopts the federal courts' formulation of a prima facie case of retaliation under the Family Medical Leave Act (FMLA) as its standard for OFLA retaliation cases.

⁸ See, e.g., ORS 659.484(3) (employer can require employee to provide certification from health care provider on ability to work and require employee to report periodically on employee's status during leave); OAR 839-009-0270 (reinstatement to "former" position not required if the position has in fact been eliminated; employer's obligations under OFLA

moment a covered employer denies an eligible employee any entitlement specifically set out in ORS 659.470 to 659.494. Essentially, ORS 659.492(1) is a strict liability statute. No motive or intent need be proven; the mere fact that the entitlement was denied, absent an applicable affirmative defense, constitutes a violation.

OAR 839-009-320, on the other hand, requires proof of motive or intent. When an employee inquires about, submits a request for family leave, or invokes any provision of OFLA, he or she becomes a member of the protected class created by this rule and satisfies the first element of the Agency's prima facie case. However, liability does not automatically follow when the employer takes an adverse action against an employee based on an action taken by that employee that bears a circumstantial relationship to that employee's protected class.⁹ Rather, the Agency must

cease if employee gives unequivocal notice of intent not to return to work).

⁹ Cf. *Ledesma v. Freightliner Corp.*, 97 Or App 379, 382-83 (1989) (Plaintiff alleged he was terminated in retaliation for utilizing the workers' compensation system in violation of ORS 659.410 based on his termination while off work on time loss. In discussing the necessity of a causal connection between plaintiff's termination and his use of the workers' compensation system, the court stated: "The facts show that plaintiff worked for defendant and that he was fired after he had applied for workers' compensation benefits. Apparently, according to plaintiff, all he need show

prove a causal connection between the employee's protected class (in this case, someone who utilized OFLA) and the employer's adverse action.

OAR 839-005-0010(2) sets out the two ways that causal connection can be established in a case alleging unlawful discrimination under ORS chapter 659:

"(a) Specific Intent Test: the Respondent knowingly and purposefully discriminates against an individual because of that individual's membership in a protected class. Unless the Respondent can show that an exception to the law allows its action, the Respondent has unlawfully discriminated.

"(b) Different or Unequal Treatment Test: the Respondent treats members of a protected class differently than others who are not members of the protected class. When the Respondent makes this differentiation because of the individual's protected class and not because of legitimate, non-

to recover under ORS 659.410 is that he filed a workers' compensation claim and that he was discharged sometime thereafter. That is not the law." See also OAR 839-005-0010(1)(d) which contains the Agency's generic description of a prima facie case and describes the necessity for proof of a causal connection as "proof [that] Respondent's [adverse] action was taken *because of the Complainant's protected class.*" (emphasis added)

discriminatory factors, unlawful discrimination exists.”

The Agency’s contention that Respondent committed a per se violation of OFLA by discharging Complainant in a manner that is neither specifically permitted nor prohibited by OFLA attempts to graft the strict liability standard imposed in “entitlement” cases onto a retaliation case that requires proof of discriminatory motive or intent. This argument lacks merit.

A. Specific Intent

Specific intent is generally established by direct evidence of a respondent’s discriminatory motivation. Respondent’s internal memorandum that cites Complainant’s medical leave in connection with her termination creates an inference that Complainant’s medical leave was a motivating factor in Respondent’s decision to terminate Complainant. Ingram’s testimony that Complainant was discharged based on working for another employer without Respondent’s permission, and that he felt it was unfair of Complainant to take advantage of Respondent’s policy set up to benefit its employees, gives rise to the same inference. However, in the face of Respondent’s LNDR and the forum’s finding that Complainant’s medical leave was mentioned in the memorandum to provide historical context, not cause,¹⁰ that evi-

dence is insufficient to establish specific intent. This evidence is also insufficient to establish that Complainant’s use of OFLA played “a substantial role” in her discharge, triggering a “mixed motive” analysis under OAR 839-005-015.¹¹ Consequently, the forum moves on to a different treatment analysis.

B. Different Treatment

Under the different treatment test, the Agency’s burden of proving that Complainant’s utilization of OFLA was the reason for Respondent’s alleged unlawful action can be met as follows:

“The Complainant begins this process [of proof] by showing harm because of an action of the Respondent which makes it appear that the Respondent

¹¹ OAR 839-005-0015 specifically provides:

“Frequently, the evidence indicates that several factors contribute to causing the Respondent’s action, of which only one factor is the Complainant’s protected class. The Division will apply the mixed motive analysis to determine whether the Complainant’s protected class membership played so substantial a part in the Respondent’s action to be said to have ‘caused’ that action. Under this analysis, the Complainant’s protected class membership does not have to be the sole cause of the Respondent’s action but must have played a substantial role in the Respondent’s action at the time the action was taken. A Respondent must prove that it would have made the same decision even if it had not taken Complainant’s protected class into account.”

¹⁰ See Finding of Fact – The Merits #29, *supra*.

treated Complainant differently than comparably situated individuals who were not members of the Complainant's protected class. The Respondent must then rebut this showing. If the Respondent fails to rebut this showing, the Division will conclude that substantial evidence of unlawful discrimination exists. If the Respondent does rebut the showing, the Complainant may then show that the Respondent's reasons are a pretext for discrimination." *OAR 839-005-0010(5)*.

The Agency contends that Complainant would not have been discharged if she had not been on OFLA leave when she took the job at Safeway. In rebuttal, Respondent provided an LNDR by producing clear and reasonably specific admissible evidence¹² that the collective bargaining agreement requires employees who take any kind of leave of absence to obtain prior permission from Respondent before taking a job elsewhere while on their leave, that Complainant was discharged based on that policy, and that the policy is uniformly applied to all

employees on leave of absence for any reason.

At this point, the Agency can still prevail by proving that Respondent's LNDR was a pretext for discrimination. The Agency's burden of showing pretext merges with the ultimate burden of persuading the forum that Complainant was the victim of intentional discrimination.¹³ Pretext may be established through credible evidence that similarly situated employees (comparators) outside of the Complainant's protected class received favored treatment or did not receive the same adverse treatment.¹⁴ Respondent's treatment of other members of Complainant's protected class, i.e. employees who took OFLA leave, is also relevant in a different treatment analysis.¹⁵

In this case, the appropriate comparators are other employees who took leaves of absence of any kind. The forum arrives at this conclusion based on the participants' joint stipulation that the CBA provision in question con-

¹² See *In the Matter of Clackamas County Collection Bureau*, 12 BOLI 129, 139 (1994). See also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981) (In order to successfully rebut the plaintiff's prima facie case in a disparate treatment case, the defendant must "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.")

¹³ *Burdine*, 450 U.S. at 256.

¹⁴ See *In the Matter of Howard Lee*, 13 BOLI 281, 290-91 (1994); *Clackamas County*, 12 BOLI at 138-40.

¹⁵ See, e.g., *Lee*, 13 BOLI at 291-92 (In a case in where a female alleged Respondent hit and pushed her because of her sex, the forum considered evidence that five other female employees were not hit or pushed by Respondent in arriving at the conclusion that the respondent did not discriminate against complainant because of her sex.)

tained a blanket prohibition of “employees [from] working for another employer while on a leave of absence without the express prior approval of the Respondent.” Therefore, the key question before the forum is how Respondent treated other employees on leaves of absence of any kind. A review of the findings of fact provides a decisive answer.

Complainant was employed at Respondent’s Plywood Plant #4. Employees at that plant regularly take OFLA and are reinstated to their former positions. Only one other person, Tracy Gunn, has taken another job without obtaining Respondent’s prior permission while on an “authorized” leave of absence.¹⁶ Gunn was fired when Respondent discovered he had taken another job. Complainant was reinstated after taking OFLA leave, then fired, like Gunn, as soon as Respondent discovered that she had worked at Safeway while on OFLA leave. In sum, the evidence shows that employees who take OFLA leave, including Complainant, have been reinstated to their former positions after taking leave, and that employees who work at other jobs while on leave, without obtaining Respondent’s prior permission, are discharged. Far from showing

pretext, this evidence validates Respondent’s LNDR.

CONCLUSION

Under either the Specific Intent or Different Treatment tests, the Agency has not met its burden of proof in showing that Complainant was subjected to retaliation or discrimination because she took OFLA leave.¹⁷

AMENDMENTS AND OBJECTIONS AT HEARING

At hearing, Respondent moved to amend its answer to include the affirmative defense that Complainant failed to mitigate her back pay damages. The Agency objected on the grounds that this affirmative defense must be pleaded and proved, and Respondent had waived it by not raising it in the answer. The ALJ reserved ruling on the motion to the proposed order and allowed Respondent to present evidence on this issue, subject to the Agency’s continuing objection.

In support of its objection, the Agency cited *In the Matter of Peggy’s Café*, 7 BOLI 281 (1989). In that case, the forum held that evidence concerning wages actually earned by Complainant during the period of time for which she sought back wages “is in the nature of an affirmative defense, which is the Respondent’s burden

¹⁶ The evidence did not establish whether or not Gunn was on OFLA or FMLA leave, merely that he was on an “authorized” leave to help his wife while she grieved for her father who had just died.

¹⁷ See *In the Matter of Wing Fong*, 16 BOLI 280, 289 (1998) (The Agency has the burden of proving unlawful discrimination.)

to plead and prove." *Id.*, at 288. The issue in this case is Complainant's diligence or lack thereof in seeking alternative work, not what she earned in the work she actually obtained through her successful mitigation effort. Consequently, *Peggy's* is inapplicable to this case.

In 1991, the Oregon Court of Appeals addressed this issue in *Marcoulier v. Umsted*, 105 Or App 260 (1991). The issue in *Marcoulier* was whether the trial court had erred in excluding evidence that the plaintiffs had failed to mitigate their damages "because of its conclusion that appellants were required to and had not pleaded mitigation of damages or avoidance of consequences as an affirmative defense." *Id.*, at 262. The Court held that failure to mitigate damages need not be affirmatively alleged, and that "evidence that plaintiff could reasonably have avoided all or part of the damages is admissible under a general denial." *Id.*, at 264, citing *Zimmerman v. Ausland*, 266 Or 427, 513 P2d 1167 (1973); *Blair v. United Finance Company*, 235 Or 89, 383 P2d 72, 91 (1963).

Based on *Marcoulier*, the forum concludes that failure to mitigate back pay loss does not have to be specifically pleaded by a respondent as a prerequisite to presenting evidence on that issue. Since Respondent would be entitled to present evidence on the issue of failure to mitigate regardless of the amendment, the Agency is not prejudiced by granting Respondent's motion to

amend at hearing. Respondent's motion to amend the answer to include the affirmative defense of failure to mitigate back pay damages is granted. OAR 839-050-0140(2)(b). Given the forum's holding, whether or not Respondent proved that Complainant actually failed to mitigate her back pay loss is moot.

RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent raised two additional affirmative defenses: (1) Based on the silence of OFLA, Respondent was entitled to rely on 29 C.F.R. § 825.312(h) in FMLA that specifically permits Respondent's action; and (2) that Respondent was required to follow the provisions of its collective bargaining agreement in discharging Complainant. Based on its determination that the Agency must prove a causal connection in this case and has not done so, the forum need not and does not reach either of these issues.¹⁸

EXCEPTIONS

The Agency filed a number of exceptions to the Proposed Order regarding the Findings of Fact. In response to those exceptions, the forum has modified the caption, changed Findings of Fact – The

¹⁸ The forum notes that an employer is prohibited from having a leave policy, whether part of a collective bargaining agreement or as part of a personnel policy, that contravenes a right expressly granted by OFLA or the administrative rules interpreting OFLA.

Merits ## 3, 12 and 13, Ultimate Findings of Fact ##5 and 7, and deleted footnote 1 (containing a reference to the number of hours Complainant worked at Safeway).

The Agency also filed two more lengthy exceptions. The first was to Proposed Finding of Fact – Procedural #24 and its conclusion that “any claim of privilege Complainant may have had under OEC 504 (Psychotherapist-patient privilege) or OEC 504-4 (Clinical social worker-client privilege) was waived by the Agency’s claim for mental suffering on her behalf.” The second was to the ALJ’s conclusions as to causation and the standard of proof applied by the ALJ.

A. Waiver of Privilege under OEC 504 or OEC 504-4.

In its exceptions, the Agency repeated its objection at hearing to the forum’s order that it turn over to Respondent, subject to a preliminary *in camera* review by the ALJ, medical records related to the diagnosis and treatment of Complainant’s mental or emotional condition.¹⁹ The Agency argued that the forum was required to give effect to the psychotherapist-patient and clinical social worker-client privileges set out in OEC 504 and OEC 504-4, respectively, correctly noting that the forum must give effect to privileges recognized by law. *ORS 183.450(1)*. The specific medical records consisted of

handwritten notes made by John L. De Smet, LCSW, during his counseling sessions with Complainant in the fall of 1997 for the conditions of depression, panic disorder, and post traumatic stress disorder, and a clinical note made by A. Gordon Lui, M.D., dated 1/4/97, regarding Complainant’s consultation with him over tobacco addiction and anxiety and the treatment he prescribed for those conditions. These medical records were offered into evidence by Respondent and received as Exhibit R-13.

OEC 504 provides, in pertinent part:

“(1) As used in this section, unless the context requires otherwise:

“(c) “Psychotherapist” means a person who is:

“(A) Licensed, registered, certified or otherwise authorized under the laws of any state to engage in the diagnosis or treatment of a mental or emotional condition; or

“(B) Reasonably believed by the patient so to be, while so engaged.

“(2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of the patient’s mental or emotional condition among the patient, the patient’s psychotherapist or

¹⁹ See Findings of Fact – Procedural ## 24 and 25, *supra*.

persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

"(4) The following is a non-exclusive list of limits on the privilege granted by this section.

"(b) There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient:

"(A) In any proceeding in which the patient relies upon the condition as an element of the party's claim or defense."

OEC 504-4 provides, in pertinent part:

"A clinical social worker licensed by the State Board of Clinical Social Workers shall not be examined in a civil or criminal court proceeding as to any communication given the clinical social worker by a client in the course of noninvestigatory professional activity when such communication was given to enable the licensed clinical social worker to aid the client, except:

"[Five exceptions are listed, none of which apply in this case.]"

In this case, the subject medical records were created by a licensed clinical social worker

("LCSW"), De Smet, and a medical physician, Lui.

Lui is an M.D. His report, though brief, deals specifically with Complainant's "tobacco addiction" and "anxiety," for which he prescribed medication and suggested counseling. Because Complainant specifically consulted him about her emotional condition, and he treated her for that condition, the forum infers that Complainant "reasonably believed" Lui was a "psychotherapist" under the definition contained in OEC 504(1)(c)(A). Consequently, the Complainant is entitled to OEC 504's psychotherapist-patient privilege regarding Lui's clinical note unless an exception applies. In this case, the exception contained in OEC 504(4)(b)(A) applies. The mental and emotional condition of Complainant became "an element of [the Agency's] claim" on Complainant's behalf the moment the Specific Charges, which sought \$20,000 in damages "for mental suffering," were served on Respondent. At that point, Lui's clinical note became discoverable.²⁰

De Smet's handwritten notes require a slightly more complex analysis. Standing alone, OEC 504-4 appears to provide an iron-

²⁰ The Legislative Commentary to OEC 504(4)(b) further explains that "An exception applies whenever the mental or emotional condition of the patient is put in issue." See LAIRD C. KIRKPATRICK, OREGON EVIDENCE (3d ed. 1996), at 239.

clad privilege to De Smet's notes under the facts of this case. In brief, De Smet is an LSCW as defined in OEC 504-4, and none of the five specifically enumerated exceptions in that evidentiary rule apply to the facts of this case. However, this is not the end of the inquiry. The Legislative Commentary that accompanies OEC 504 states, with regard to the definition of "psychotherapist" in paragraph (1)(c):

"The rule defines "psychotherapist" as a person authorized or thought to be authorized by the patient to engage in, while in fact engaged in, the diagnosis or treatment of a mental or emotional condition. The definition is broad enough to include not only psychiatrists and psychologists but other professionals who treat mental and emotional conditions. In appropriate circumstances such persons may be medical doctors, nurses or clinical social workers. The definition seeks to avoid needless refined distinctions concerning what is and what is not the practice of psychiatry."²¹

In this case, the contents of Exhibit A-12 clearly establish that De Smet was engaged in "the diagnosis or treatment of [Complainant's] mental or emotional condition."²² Complainant's

²¹ *Id.*, at 238.

²² Exhibit A-12 is a letter from De Smet to Respondent, dated September 22, 1997. In that letter, De Smet

testimony established that she voluntarily authorized De Smet to diagnose or treat her mental or emotional conditions. As a consequence, even though De Smet's notes may be privileged under OEC 504-4, they are not privileged under OEC 504(4)(b)(A) based on the same reasoning applied by the forum to Lui's clinical note. The Agency's exception on this point is overruled.

B. Causation and Standard of Proof.

In its exceptions, the Agency argues that three pieces of evidence -- Article XII, Paragraphs A and B, of the CBA, the actual circumstances of Gunn's discharge, and statements of Chris York, a management representative at Complainant's grievance process -- demonstrate that Respondent's proffered LNDR is pretextual. The forum disagrees for reasons already stated in the proposed opinion. The forum points out once more that Paragraphs A and B of the CBA were not separately analyzed because the forum accepted and has relied upon the participants' joint stipulation that the CBA prohibited "employees

states, in pertinent part: "I have been seeing Yvette [Complainant] since last month. I have assessed her as suffering from Major Depression, Recurrent, and a severe anxiety disorder, which is called Panic Disorder, without Agoraphobia. Yvette also suffers from Post Traumatic Stress Disorder * * *." This excerpt clearly qualifies as a "diagnosis" of Complainant's mental and emotional condition.

[from] working for another employer while on a leave of absence without the express prior approval of the Respondent.”¹ There is no evidence that Complainant sought or obtained prior approval; in fact, the evidence is that Complainant did not.

The Agency also argues that the forum applied the incorrect standard of proof in the proposed order, contending that the test should be whether “the underlying basis of Complainant’s leave was a substantial factor in her termination.” This is incorrect. If the evidence proved that Respondent’s LNDR and Complainant’s protected class status were both causative factors in Respondent’s discharge of Complainant, then the forum would apply the “mixed motive” test and decide if Complainant’s protected class status “played a substantial role in the Respondent’s action at the time the action was taken.”²

In this case, it is true that Complainant would not have been discharged, had she not taken OFLA leave. However, her membership in a protected class, that of individuals utilizing OFLA leave, is not enough. There must also be a causal connection between her membership in the protected class and Respondent’s action.³ Complainant’s protected class

was not a causative factor in Respondent’s discharge of Complainant. The Agency’s exception is overruled.

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
LAMBERTUS SANDKER, dba
BLUE RIVER REFORESTATION**

Case Number 12-00
Amended Final Order of the
Commissioner Jack Roberts
Issued February 11, 2000.

Ed.: The final order in this case was initially issued on January 28, 2000, and published at 20 BOLI 1 (2000). The commissioner later discovered that Respondent had filed timely exceptions that had inadvertently not been considered in the Final Order. On February 11, 2000, the commissioner issued an amended order identical to the original order except that two Procedural Findings of Fact and a paragraph in the Opinion addressing Respondent’s exceptions were added. The editors have decided only to publish the additions rather than reprinting the

¹ See Finding of Fact – The Merits #30, *supra*.

² See fn 11, *supra*.

³ See fn 9, *supra*.

entire order. The final order should be cited as: 20 BOLI 1, as amended 20 BOLI 37 (2000). Persons wishing a complete copy of the amended final order should contact the Hearings Unit of the Bureau of Labor and Industries.

The added Procedural Findings of Fact are:

“13) On January 15, 2000, Respondent timely filed exceptions to the proposed order.

“14) On January 28, 2000, the Commissioner issued a Final Order in which Respondent’s exceptions were inadvertently not addressed or considered.”

The paragraph added to the Opinion is:

“RESPONDENT’S EXCEPTIONS

In his exceptions, Respondent seeks to relitigate violations set out in the Final Order in Case #15-99 that resulted in the assessment of \$2,250 in civil penalties he now finds himself unable to pay because of economic circumstances. As noted in Finding of Fact – Procedural #11, Respondent is barred from relitigating these violations based on the doctrine of issue preclusion. The forum’s task is to enforce the law in an even-handed manner as directed by the legislature, its own administrative rules, and legal precedent. In this case, the forum applies the law in the same manner to Respondent as it has to prior similarly-situated Respon-

dents.¹ Respondent’s exceptions are overruled.”

**In the Matter of
NORTHWEST PERMASTORE
SYSTEMS, INC.**

Case Number 40-98
Final Order on Reconsideration of
the Commissioner

Jack Roberts
April 4, 2000

SYNOPSIS

Respondent, which operated a water tank construction business, failed to pay the prevailing wage rate to five employees for the work they performed on a public works contract. The Forum imposed civil penalties totaling \$1524.29 for the five violations of ORS 279.350. The Forum also found that Re-

¹ See, e.g., *In the Matter of Amalia Ybarra*, 10 BOLI 75, 82 (1991) (contractor denied a license based on misrepresentations on her application for a license); *In the Matter of Melvin Babb*, 14 BOLI 230, 239 (1995) (ignorance of the law does not constitute mitigation); *In the Matter of Efrain Corona*, 11 BOLI 44, 57 (1992), *aff’d without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993) (forum applied the doctrine of collateral estoppel - now referred to as issue preclusion - to prevent the relitigation of an issue that a respondent had a full and fair opportunity in a previous proceeding to litigate).

spondent committed a single violation of ORS 279.354, which requires the filing of accurate certified payroll records, and imposed a \$1000.00 penalty for that violation.

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 August 6, 1998, in the conference room of the Bureau of Labor and Industries, 3865 Wolverine Street, N.E., Suite E1, Salem, Oregon. The Wage and Hour Division ("WHD") of the Bureau of Labor and Industries ("the Agency") was represented by David Gerstenfeld, an employee of the Agency. Respondent was represented by Robert L. O'Halloran, Allen, Yazbeck, O'Halloran & Hanson, Portland. Alice Pender, Respondent's corporate representative, was present throughout the hearing.

The Agency called as witnesses: Alice Pender (Respondent's president, secretary/treasurer, and owner); Lora Lee Grabe (an Agency prevailing wage rate lead worker and compliance specialist); Robert Clerihew (business representative for Ironworkers Union Local 29); Steve Nelson (business manager for Boilermakers Union Local 500); and Lee Clinton (business manager of Laborers Union Local 121).

Respondent called as witnesses: Alice Pender and Michael Poole (Supervisor, field service operations, A.O. Smith Harvestore Products).

The ALJ admitted into evidence: Administrative Exhibits X-1 through X-17; Agency Exhibits A-1 through A-8, A-14 through A-16, A-18, and A-20; and Respondent's Exhibits R-1 through R-33.

On February 3, 1999, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, having fully considered the entire record in this matter, issued the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order in this case. Thereafter, Respondent sought judicial review in the Oregon Court of Appeals. On February 14, 2000, through counsel, the Agency filed its Notice of Withdrawal for Purposes of Reconsideration in the Court of Appeals.

On April 4, 2000, having reconsidered the record and the legal issues presented in this case, I make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Final Order on Reconsideration.

FINDINGS OF FACT – PROCEDURAL

1) On December 3, 1997, the Wage and Hour Division issued a Notice of Intent to Assess Civil Penalties. The Agency cited the following bases for the proposed penalties: failure to pay the prevailing wage rate ("PWR") (five

alleged violations) and misclassification of workers on certified statements of payroll record (two alleged violations). The Notice of Intent informed Respondent that it had 20 days in which to request a contested case hearing. The Notice of Intent was served on Robert L. O'Halloran, counsel for Respondent, on December 4, 1997. Six days later, the Notice of Intent also was served on Alice Pender, Respondent's registered agent.

2) Respondent filed a timely Answer on December 30, 1997. Respondent also requested a contested case hearing.

3) On January 7, 1998, the Forum received the Agency's first request for hearing. That request was revised on March 10, 1998, to indicate that the case would be presented by Agency employee Gerstenfeld.

4) On April 15, 1998, the Agency submitted a second request for hearing in this matter.

5) On April 16, 1998, the Forum issued a Notice of Hearing, which set July 28, 1998, as the first day for the contested case hearing. With the Notice of Hearing, the Forum served on Respondent the following: a) a Summary 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.

6) On April 24, 1998, ALJ Doug McKean ordered the

Agency and Respondent each to submit a summary of the case including: a list of witnesses to be called; the identification and description of any document or physical evidence to be offered, together with a copy of any such document or evidence; and a statement of any agreed or stipulated facts.

7) By order dated May 8, 1998, the case was reassigned to ALJ Warner W. Gregg. The hearing date was reset to commence on Thursday, August 6, 1998, and the deadline for case summaries also was reset. The participants filed timely case summaries.

8) On June 3, 1998, the Forum received the Agency's request for a discovery order. The participants later completed discovery through informal proceedings, and no formal discovery order was issued.

9) By motion dated June 9, 1998, Respondent requested a setover of the hearing "to accommodate the conclusion of a pending NLRB arbitration set for July 10, 1998 which bears on the matters in dispute in this proceeding." The Agency opposed the motion. On June 11, 1998, the ALJ issued an order denying the motion on the grounds that the Commissioner would not necessarily be bound by the result in the other matter, and that the pendency of another proceeding involving similar issues did not warrant a postponement of the hearing.

10) With a June 28, 1998, cover letter, Gerstenfeld provided O'Halloran with a cassette recording of an April 1997, meeting between Pender and Agency investigators. He also informed O'Halloran of the Agency's desire to amend the Notice of Intent to "make the civil penalty amounts more factually accurate."

11) On July 27, 1998, the Agency moved to amend the Notice of Intent. Respondent filed no opposition to the motion, which the ALJ granted at the hearing. The Amended Notice of Intent alleged eight bases for the assessment of civil penalties: seven alleged failures to pay the PWR and one misclassification of workers on certified statements of payroll record. Respondent filed an Answer to the Amended Notice on August 5, 1998.

12) On August 4, 1998, the participants submitted a statement of Stipulated Facts.

13) At the start of the hearing, counsel for Respondent stated that his client had received the Summary of Contested Case Rights and Procedures and said he had no questions about it.

14) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) On December 30, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing

exceptions to the proposed order. Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was a non-union contractor duly registered with the Oregon Construction Contractors Board and was authorized to perform construction in Oregon and several other states. Alice Pender was Respondent's president, secretary, treasurer, and owner.

2) The City of Yoncalla Standpipe and Waterline Extension Project ("the project") was a public works contract contracted for by the City of Yoncalla, a public agency, and was subject to Oregon's PWR laws (ORS 279.348, *et seq.* and the administrative rules adopted thereunder). The project involved installation of a 100,000 gallon water standpipe² and installation of waterline, sanitary sewer service line, fire hydrants, and appurtenances. Western Oregon Excavation was the prime contractor on the project.

3) Respondent was the sole bidder for the standpipe work on the project, which the bidding materials described, in pertinent part, as follows: "Furnish and erect a

² A standpipe is a water tank with a height greater than its diameter. Throughout this order, the terms "standpipe" and "tank" are used interchangeably.

glass-coated, bolted steel water storage tank, including foundation, tank structure and tank appurtenances as shown on the contract drawing and described herein." The contract specified a "model 20 56 Aquastore Tank systems manufactured by A.O. Smith Harvestore Products, Inc. of DeKalb, Illinois," or "[a]lternate glass-fused-to-steel tank products, as provided by other manufacturers * * * ." Respondent was awarded the \$92,096.79 subcontract for the standpipe portion of the project.

4) The contract documents for the project, which governed Respondent's work, included provisions requiring contractors and subcontractors to comply fully with ORS 279.348 through ORS 279.361, the Oregon PWR statutes.

5) The Aquastore tanks produced by A.O. Smith Harvestore Products ("AO Smith") are constructed of 5-foot by 9-foot panels that are made of glass fused to steel using a proprietary process. To build a tank, a concrete and rebar foundation first is laid. Pre-formed panels are then bolted together into a ring, with a sealant placed between the sheets. The first ring of panels is embedded into the concrete foundation. More rings of panels are then constructed. As each ring is completed, it is jacked vertically above the tank foundation and first embedded ring (using another proprietary process), so that another ring can be constructed beneath it. Those two rings are connected, jacked up, and an-

other ring is built beneath them. The process repeats until the tank has reached the specified height. Because of the jacking process, scaffolding is not needed, and the tank erection workers do not work higher than 10 feet off the ground. No welding is involved in the tank construction process. Instead, workers use impact wrenches and torque wrenches to bolt the tank panels together.

6) The AO Smith Aquastore tanks are water- and air-tight except for vents at the top.

7) AO Smith requires its tanks to be installed by "certified builders" who have attended its builders schools, where they learn how to care for and protect the glass-fused-to-steel panels. Many of Respondent's employees have successfully completed AO Smith's training. Respondent is the only licensed dealer of AO Smith products in Oregon and also has exclusive dealerships in all or part of several other states.

8) The opening date for bids on the project was August 23, 1996. Respondent's work on the subcontract commenced the week ending November 30, 1996, and was completed in January 1997. Consequently, the PWRs applicable to Respondent's work on the project are found in the July 1, 1996 Agency document titled "PREVAILING WAGE RATES for Public Works Contracts in Oregon" ("the July 1996 PWR Booklet"). That publication set the basic hourly rate for boilermakers at \$23.57 and the fringe benefits rate at \$8.76/hour. The PWR for

Laborers, Group 2 (or "Laborers 2") was \$17.44/hour plus \$7.05/hour fringe benefit and \$0.65/hour Zone 2 differential for sites (like this one) more than 30, but less than 40 miles from the nearest reference city.

9) During November and December 1996, some of Respondent's employees poured concrete and tied rebar for the foundation of the standpipe. Respondent did not start erecting the standpipe itself until sometime in January 1997, and the work was completed during the week ending January 25, 1997. Of the employees listed in the Notice of Intent, only those also listed on payroll records for January 1997 performed tank erection work. Steve Pender and Rick Hlavinka worked only on the foundation.

10) At all material times, Pender believed that tank erection work fell within the classification for Laborers 2 and that the PWR laws required Respondent only to pay Laborers 2 wages for such work. Some time ago, however, based on Pender's discussions with other AO Smith dealers and Respondent's own experience with the United States Department of Labor ("USDOL"),³ Respondent

³ Pender testified credibly that a USDOL inspector decided in 1993 that Respondent's tank erection workers on a City of Drain project should have been paid as ironworkers. The record includes no evidence of whether that finding was ever finalized or incorporated into any sort of binding legal determination. The Forum has, therefore, given no weight to the testimony

started compensating employees who work on tank erection by paying them Laborers 2 wages for 75% of their hours and the higher Ironworkers wages for the remaining 25% of their hours.⁴ Respondent referred to this method of compensating its employees, which has been its regular practice since about 1993, as the "split wage" system.

11) Respondent's employees generally did not indicate on their timecards the numbers of hours they had spent performing tank erection work, but denominated those hours (along with hours spent on other tasks) as "labor." Pender then determined, based on her knowledge of the sort of work that had been performed on any day, the days during which employees had done tank erection work, and paid the split wage for those hours.

12) During January 1997, Respondent's employees worked the following numbers of hours performing tank erection work on the project:⁵

on this point in determining whether Respondent paid the correct PWR to its tank erection workers on this project.

⁴ At least one other AO Smith dealer apparently had settled a dispute with the USDOL by agreeing to compensate its employees using this system. That agreement applied to work performed in some state other than Oregon.

⁵ Respondent's job number for this project was 9610, which is the project designation most commonly used on

<u>Employee</u>	<u>Straight Hours</u>	<u>Overtime Hours</u>
Holbrook	84.5	2.0
Keeshan	76.5	
Meier	40.0	
Janesofsky	8.0	
Rabe	48.0	

ployees' wages. She determined that Keeshan and Holbrook would have been entitled to additional pay under the split wage system and paid them those extra wages. The total wages Respondent eventually paid the five workers for tank erection work they performed in January 1997 (including fringe benefit and zone differential) are as follows:

For all this time, Respondent initially paid Holbrook, Keeshan, Janesofsky, and Meier \$17.44/hour plus \$7.70/hour fringe benefit and zone differential for their straight hours, and \$27.14/hour plus \$7.05/hour fringe benefit and zone differential for overtime. These wages are the prevailing wages for Laborers 2 listed in the July 1996 PWR Booklet. Rabe performed supervisory work, and Respondent paid him \$1.50/hour more than the other workers.

<u>Employee</u>	<u>Total wages paid</u>
Holbrook	\$2308.20
Keeshan	\$2027.33
Janesofsky	\$201.12
Meier	\$1060.40
Rabe	\$1275.72

13) As reflected in the previous paragraph, a relatively inexperienced payroll clerk of Respondent initially paid the workers (other than Rabe) on this project at the Laborers 2 rate for all of the time they had spent at tank erection, instead of compensating them according to the split wage system. Pender discovered the discrepancy after the Agency started its investigation of this matter, and recalculated the em-

14) At no time did Respondent compensate its employees on this project at the PWR for boilermakers.

15) By letter dated March 16, 1997, Peter Christensen, with the Oregon & Southwest Washington Fair Contracting Foundation, notified the Agency of his belief that Respondent had "paid laborers' wage rates for the erection of a water standpipe." Christensen further asserted that the "Index of Job Classifications to Supplement Prevailing Wage Rates for Public Works Contracts in Oregon" states that standpipe repair and construction is a boilermaker's classification." Christensen included a completed complaint form with his letter to the Agency.

the employees' timesheets. Another worker, Dornhecker, also may have performed tank erection work on the project, but was not identified in the Agency's Amended Notice of Intent.

16) By letter dated April 3, 1997, Agency investigator Sanford Groat informed Respondent that the Agency had received a PWR complaint. Groat asserted:

"The contract indicates that the project is an standpipe and waterline extension. Workers involved in the standpipe installation should be paid as Boilermakers. According to the certified payroll that we received from the contracting agency it appears that the workers on the project were paid as general laborers. There were no Boilermakers listed on the certified payrolls."

Groat asked Respondent to submit payroll records for all workers on the project and to explain why it believed the workers properly were classified as laborers. Groat also provided Respondent with a page from the Index of Prevailing Practice stating that "boilermaker" is the correct classification for standpipe repair and construction work.⁶ Before receiving Groat's letter, Pender never had seen the Index.

17) Pender responded to Groat's letter by a facsimile transmission dated April 14, 1997, stating that she would request a hearing on the matter.

18) The Agency's July 1996 PWR Booklet lists various classifications of workers, including boilermakers, ironworkers, and la-

borers, and specifies the PWR for each type of worker. The publication does not define what work comes within the "Boilermaker" classification. The publication states:

"These classification titles should be used according to common practice. Try to fit your workers into existing classifications. If you need residential construction rates, or if you have questions about how to classify workers, call the Prevailing Wage Rate Coordinator at (503) 731-4074."

19) At some point in March or April 1997, Pender called the telephone number provided in the July 1996 PWR Booklet. PWR Coordinator Hedera Trumbo informed her that the trade classification for standpipe erection was boilermaker.

20) On April 18, 1997, Groat sent Pender a copy of an Agency flier titled "Determination of Prevailing Wage Rate in Relation to the Prevailing Practice" (the "Prevailing Practice Flier"). That document states, in pertinent part:

"The practices of the majority of workers engaged in construction determine the wages to be paid for work performed in any particular classification on public works projects. If the majority of workers is found to be subject to a collective bargaining agreement, then the practices of those subject to the agreement will dictate the wage rates to be paid and worker classifications to be

⁶ See Factual Finding No. 34, *infra*, for further discussion of the Index of Prevailing Practice.

used for the type of work performed.

"Whether a particular type of work can be performed by workers in a particular classification is not the question when determining prevailing practice. The type of work that is performed by a worker in a particular classification, regardless of whether it can be performed by workers in another classification, is the relevant question.

* * *

"The Labor Commissioner is required to determine the prevailing wage rate, which is defined, in relevant part, as the wage rate paid to the majority of workers in any trade or occupation. To that end, the Commissioner may consider the findings of an appropriate federal agency which determines prevailing wages. The U.S. Department of Labor (USDOL) has determined that, with few exceptions, the majority of workers in every trade or occupation are covered by a collective bargaining agreement.

"The Commissioner avoids wasteful governmental duplication of existing survey information by accepting the findings of the USDOL. Those findings clearly state that the majority * * * of the workers engaged in heavy, highway or commercial construction work are union workers, and thus are covered by collective bar-

gaining agreements. Those agreements and the body of jurisdictional dispute resolutions which have evolved from them, thus become the logical source for making determinations as to which trade classification would, in the majority of instances, do a particular type of work. This would be, by definition, the Prevailing Practice. In those few cases where USDOL determines the majority rate is not a union rate, then the Prevailing Practice would be determined by the actual practice of the majority of employees of all contractors (both union and non-union) in the particular type of construction and area."

These policies are reiterated in a December 1993 policy statement in the Agency's field operations manual ("FOM").

21) On April 28, 1997, Pender met with Groat and Agency PWR lead worker Lora Lee Grabe to discuss classification of the standpipe erection work.⁷ Groat clarified that the Agency was concerned about only the erection of the glass-fused-to-metal tank itself, and not the construction of the cement and rebar foundation. The Agency agreed not to file against the prime contractor's bond for the wages it believed Respondent owed its employees if

⁷ At the time of hearing, Grabe had been the Agency's PWR lead worker since January 1997 and had been a compliance specialist for about nine years.

Respondent would give the Agency checks for the disputed amounts. Pender provided the Agency with checks made out in the employees' names, with the understanding that the Agency would retain those checks in lieu of filing against the bond.

22) After the meeting, Pender asked Groat to provide her with a copy of the FOM, which he and Grabe had referenced during their meeting. The Agency did not provide the FOM because it already had given Pender the Prevailing Practice Flier, which contains the same information as the portion of the FOM that Groat and Grabe had discussed at the meeting. The Agency also provided a copy of the applicable administrative rules.

23) On July 15, 1997, Pender informed Groat that other glass-fused-to-steel bolted tank erectors and other bolted steel tank erectors had told her that their employees generally were classified as laborers, not boiler-makers. She stated further:

"The exception is when they go on an all-union closed shop project, and they have to have at least one or two of the crew be union, then the classification is either SHEETMETAL WORKERS OR IRONWORKERS. At no time is it Boilermakers! And in those cases the employer chooses the classification which they deem to be most appropriate!

"With the exception of the pressure vessel tanks, the

Boilermakers gave jurisdiction in the mid-30's to the Ironworkers for bolted tanks, so when and if a classification other than Laborer is used, it is ironworker, and then only for a portion of the tank work.

* * *

" * * * And to avoid even any question we have always paid a portion of the work on the tank as Ironworkers. I went back to talk with Pamela Graham, our Payroll Clerk, regarding the information I had brought to you, since it only showed Laborers pay and not Ironworkers for tank work. She did not know how we missed paying that. I then had her check every other prevailing wage rate project we have done to insure that the split between classes were in fact paid, and they have been. I would not be adverse to making up the difference between the split wages for the crew * * * and will pay them regardless of the outcome of this dispute."

24) By letter dated July 16, 1997, Groat asked Pender to submit the names and telephone numbers of the people with whom she had spoken so the Agency could confirm the information in Pender's letter. On July 21, Pender responded that she would get back to Groat once she was able to consult with counsel, since she did not want to expose other contractors to Agency action. The next day, Groat sent a letter to Pender explaining that the Agency process is complaint-driven. He

also asked Pender to provide the name of the person who stated that the boilermakers union had given up jurisdiction over this type of work. Pender never provided that information to Groat, and the Forum has given no weight to her assertion that the boilermakers union had relinquished jurisdiction.

25) On July 28, 1997, Pender asked Groat to provide her with "a copy of the certified payrolls for each and every public works project in the last three (3) years on a project that included erection of a bolted tank" and "copies of each and every project the Boilermakers worked on in the State of Oregon for the last three (3) years." About a week later, Groat sent Pender a letter that stated, in pertinent part:

"The Bureau of Labor is not conducting an investigation of the classification which applies to the work performed by your employees on the subject public works project. The Bureau already has determined that the work in question is classified a [sic] boilermakers work. Since you have disputed that classification, the Bureau has requested that you supply any and all information which reflects that your workers were classified properly as laborer's group two. The burden of proving that another classification applies in any manner, is the employer's. As previously stated, you must submit information which substantiates that it is the prevailing practice

of the laborer's union to claim that work. As of this date we have not received any information from you that would substantiate your position."

Groat also explained that the Agency did not maintain certified payrolls for public works contracts. The letter stated further that the Agency would request, at an administrative hearing, liquidated damages and civil penalties in addition to the unpaid prevailing wages, in a total amount of \$6,214.50.

26) Sometime during the summer of 1997, Groat left the Agency to become a police officer and Grabe assumed responsibility for the investigation of Respondent.

27) By letters dated August 25, 1997, the Agency informed John Meier, Timothy Janesofsky, Erich Rabe, William Keeshan, Patrick Holbrook, Frank Janesofsky, Donald Barrow, and Richard Hlavinka that it would be taking legal action against Respondent, and asked the employees to complete and return wage assignment forms if they wished the Agency to pursue the unpaid wages and liquidated damages due them. The employees did not return those forms and did not pursue wage claims against Respondent. One employee may have told Grabe that he believed he had been compensated properly. Neither Grabe nor Groat interviewed any of the employees.

28) At some point, Pender issued a memorandum to em-

ployees stating that the boiler-makers classification applied only to work with pressurized vessels and, therefore, did not apply to the type of work that Respondents' employees performed in erecting the AO Smith standpipes. Pender issued the memorandum in response to questions from employees. She also told them that if they believed they were entitled to boilermakers' wages, they should pursue the wage claims. Pender told employees they could use letters from the Agency as toilet paper if they wished.

29) During an August 25, 1997, telephone conversation, Pender informed the Agency that Respondent did not accept the results of the Agency's investigation of the appropriate PWR. The Agency then returned the checks Respondent had provided for the amount of disputed wages.

30) At some point, Respondent submitted a certified payroll record ("CPR") for work done on the project during the week ending January 25, 1997. That record accurately reflected the hours that employees had worked on the project and the wages they initially had been paid. Because of the error in not paying the usual "split wage," however, the CPR stated that all work performed had been "laborer" work. As noted in Factual Finding No. 13, *supra*, Respondent later paid Keeshan and Holbrook additional wages they were due under Respondent's split wage system. Respondent did not file an amended CPR reflecting the pay-

ment of those additional wages, but did send the Agency a summary of wages paid. The Agency has accepted as fact Respondent's summary of the "corrected" wages it paid its workers.

31) In 1996 and early 1997, pursuant to then-applicable law, the Commissioner accepted US-DOL findings that the majority of workers involved in heavy, highway, and commercial construction were union workers. At that time, therefore, the prevailing wage rates and practices (such as labor classification) were determined to be the union practices. Accordingly, the Commissioner used local collective bargaining agreements and accompanying jurisdictional evidence to determine the appropriate classification for any given type of work.⁸

32) At all material times, the erection of a water storage standpipe was considered "heavy" construction in the City of Yoncalla area, meaning that union practices for that type of work were the prevailing practices. In addition, the wages and practices of boilermakers, ironworkers, sheetmetal workers, and laborer's unions were found to be the prevailing wages and practices for those trades.

33) The Commissioner's determination of PWRs and

⁸ PWRs now are based on state surveys, but the first rate book incorporating the results of a state survey was not published until February 1997.

prevailing practices are reflected in the July 1996 PWR Booklet and Index of Prevailing Practice. The underlying USDOL findings were not introduced into evidence at the hearing, and Grabe had not reviewed them.

34) Grabe explained that, in determining the appropriate classification for a particular type of work, her general practice was to rely on the PWR Booklet and prior precedent. If those sources did not address the work in question, she looked to the Index of Prevailing Practice, which lists worker classifications. The Index is not an internal Agency document and generally is made available to members of the public who request it. Grabe referred to the Index during this investigation and instructed Groat to refer to it.

35) The July 1996 PWR Booklet does not list a trade called "standpipe erection." Page 9 of the 1996/1997 Index of Prevailing Practice states that persons involved in "Standpipe Repair and Construction" should be classified within the trade of "Boilermakers." That portion of the 1996/1997 Index existed prior to July 1996 and remained in effect through 1997. The Index was produced by the Agency's PWR coordinator, Helena Trumbo.

36) The Index's classification of standpipe erection as boilermakers' work is consistent with union jurisdictional practice in the City of Yoncalla area. Boilermakers Union Local 500 has jurisdiction throughout Oregon, including the Yoncalla area. The

boilermakers claim jurisdiction over the erection of water tanks, including those that are bolted together and constructed of glass fused to steel. Those tanks fell within the boilermakers' jurisdiction throughout 1996 and 1997. In January 1997, the business manager of Local 500 (Steve Nelson) wrote a letter to Christensen confirming the boilermakers' jurisdiction over all vessels requiring "tight joint." He further stated that "[t]he type and method of construction you described makes no difference whatsoever," since "[t]he bolting of vessels has been around for over 100 years and the jacking process that allows the workman to remain on the ground has been in existence in excess of 25 years." At the hearing, Nelson testified credibly that anything that is waterproof is considered "tight-joint" and, therefore, is claimed by the boilermakers.

37) In about July 1997, Groat contacted the boilermakers union as part of his investigation and made the following notes regarding his conversation with Nelson:

"I called the union to discuss the water tanks that were built by Northwest PermaStore. I advised him of the information that I received and the glass to fused steel tanks. I described the process as described to me by the ER. Says that is all Boilermakers work, they are the ones who build the tanks and have built most of the municipal water tanks in the area and are in the process of build-

ing one in Camas right now. Says that the Ironworkers have been trying to claim this work but any time they are building storage container that is air, water, gas tight it is within the jurisdiction of the Boilermakers. I explained what the ER said and he indicated that is not true that type of work is always Boilermakers work."

In a letter to Groat, Nelson confirmed that the construction of standpipes is the work of boiler-makers.

38) Nelson's assertions regarding the boiler-makers' jurisdiction are consistent with a 1926 agreement between the international boiler-makers and ironworkers unions. The agreement specifies that the boiler-makers' jurisdiction includes "steam, air gas, oil, water, or other liquid tanks or containers requiring tight joint, including tanks of riveted, caulked or welded construction in connection with swimming pools." A later agreement clarified that ironworkers retained jurisdiction over the construction of certain catwalks, stairways, and ladders that were supported by something other than the tanks (such as the ground). These agreements are effective throughout Oregon and remained valid and in force during all of 1996 and 1997. The boiler-makers union does not have a similar agreement with the laborer's union.

39) Ironworkers Union Local 29 has jurisdiction throughout Oregon and some of southwest

Washington. Construction of water tanks and standpipes, including those constructed by bolting together glass-fused-to-steel panels, does not fall within the ironworkers' jurisdiction.

40) Laborers Union Local 121 has jurisdiction in 21 Oregon counties, including the county where Yoncalla is located. The construction of water tanks and standpipes, including those constructed by bolting together glass-or ceramic-fused-to-steel panels, is not within the laborers' jurisdiction and has not been for many years. Nor does the laborers' union claim that work in Oregon.

41) Since 1984, the boiler-makers have constructed potable water tanks on public works contracts in Oregon and southwest Washington. Nelson testified credibly that the boiler-makers have constructed many more than seven such tanks, and could not say whether they had worked on more or fewer than 100. Nelson was not aware of how many of those projects were performed in 1996, but knows that the boiler-makers built one water tank for the City of Seaside that year. He did not know what percentage of the Oregon market for municipal water tanks has been constructed utilizing boilermaker labor. The boiler-makers have not been employed on any of Respondent's projects in the last 10 years. They have worked on erection of at least two non-pressurized bolted-together water-storage tanks coated with enamel or epoxy. Those tanks were manufactured

by Peabody, a division of AO Smith. AO Smith does not require Peabody tanks to be constructed by certified builders, and the construction process does not incorporate the jacking system used to construct the AO Smith Aquastore tanks.

42) For a brief time in 1997, the Oregon Employment Department circulated a document that included the following definition of the work performed by boilermakers:

"Construct, assemble, maintain, and repair stationary steam boilers and boiler house auxiliaries. Align structures or plate sections to assemble boiler frame tanks or vats, following blueprints. Work involves use of hand and power tools, plumb bobs, levels, wedges, dogs, or turnbuckles. Assist in testing assembled fittings, such as safety valves, regulators, automatic-control mechanisms, water columns, and auxiliary machines."

That document also stated that ironworkers include workers "who erect metal storage tanks."

43) In some other states, the USDOL has determined that Ironworker and/or Laborer 2 is the correct PWR classification for erection of AO Smith Aquastore tanks. The Agency does not consider determinations from other jurisdictions to be persuasive evidence of the prevailing practice in Yoncalla, Oregon.

44) Respondent paid its workers at laborer's rates because Pender believed that was the common practice in the trade of constructing glass-fused-to-steel potable water tanks. Pender reached that conclusion through her conversations with other AO Smith dealers,⁹ her knowledge that she was the only AO Smith dealer in Oregon, and her belief that Respondent had constructed most of the bolted-together municipal water tanks constructed in Oregon during the last 10 years. Pender also believed that the type of work Respondent's employees performed was more like the work generally performed by laborers than it was the types of work generally performed by boilermakers or ironworkers.

45) The testimony of all witnesses was credible. Although each non-Agency witness had some sort of economic interest in the outcome of this dispute, none of their testimony was exaggerated or overly self-serving. Each witness gave straightforward testimony regarding matters of which they had personal knowledge, and frankly admitted when they could not answer certain questions.

46) The only significant factual dispute concerned Respondent's share of the Oregon market in the construction of water tanks over the last 10 years. The testimony on this point was somewhat unclear. Nelson, the

⁹ Pender testified credibly that no other AO Smith dealers pay boilermaker wages to their workers.

business manager of Boilermakers Union Local 500, testified that Respondent *had not* constructed virtually all of the municipal water tanks built in Oregon in the last 10 years. Pender at first appeared to give contrary testimony, suggesting that Respondent *had* erected all but one of the public works potable water tanks constructed in the last 10 years in Oregon. She then clarified her testimony, stating that, of the 30 to 40 tanks that are bid each year, 30% to 50% are welded tanks, 15% to 20% are concrete tanks, and Respondent builds the rest. The Forum finds only that Respondent built most of the *bolted-together municipal* tanks that were constructed in Oregon within the last 10 years and that Respondent built almost all of these bolted-together tanks that also were constructed of glass-fused-to-steel panels. The Forum makes no finding regarding Respondent's share of *all* water tanks built in Oregon during that time-frame. Although all the witnesses appeared to testify honestly, the Forum was not convinced that any witness had sufficient knowledge of the water-tank construction industry as a whole to make precise statements on that subject. Nor was there sufficient evidence for the Forum to make findings regarding the wages typically paid to workers who construct all types of water tanks.

ULTIMATE FINDINGS OF FACT

1) Respondent bid on and received a subcontract on a public works project, namely the City of

Yoncalla Standpipe and Waterline Extension Project.

2) Respondent's employees performed standpipe erection work on the project in January 1997. The Commissioner properly determined that the local prevailing practice at that time was to classify such work as boilermakers' work. In January 1997, the PWR for boilermakers was \$23.57/hour plus \$8.76/hour fringe benefit.

3) Respondent paid its employees less than the PWR for boilermakers.

4) Respondent filed at least one CPR that inaccurately classified its employees as laborers instead of as boilermakers.

5) Pender knew prevailing wages were required on the project and caused Respondent to pay the workers at wage rates under the appropriate PWR. If Pender had called the telephone number identified in the 1996 PWR Booklet as the number to call to discuss PWR classification questions, she would have discovered that the correct classification for standpipe erection workers was "boilermaker."

CONCLUSIONS OF LAW

1) Respondent employed workers upon public works in Oregon. The Commissioner of the Bureau of Labor and Industries has jurisdiction over

Respondent and the subject matter herein. ORS 279.348 to 279.365.

2) The actions, inactions, statements, and motivations of Pender, Respondent's president, secretary, treasurer, and owner, properly are imputed to Respondent.

3) *Former* ORS 279.348(1)¹⁰ provided:

"Prevailing rate of wage' means the rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries. In making such determinations, the commissioner may take into consideration findings of an appropriate federal agency which determines prevailing wages and bargaining agreements in force in the locality for particular trades or occupations. If there is not a majority in the same trade or occupation paid at the same rate, the

average rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to workers in the same trade or occupation shall be the prevailing rate. If the wage paid by any contractor or subcontractor to workers on any public work is based on some period of time other than an hour, the hourly wage shall be mathematically determined by the number of hours worked in that time period. If it appears to the commissioner data necessary to determine the prevailing rate of wage in a locality is not available or is not sufficient, the Commissioner of the Bureau of Labor and Industries may adopt the prevailing rate of wage as determined by the Secretary of Labor of the United States."

Former ORS 297.359(1)¹¹ provided:

"The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality under ORS 279.348 at least once each year and make this information available at least twice each year. The commissioner may amend the rate at any time."

The Commissioner properly determined that the prevailing

¹⁰ In 1997, the legislature made significant amendments to ORS 279.348(1), requiring the Commissioner to "rely on an independent wage survey to be conducted once each year" in determining the prevailing rate of wage. See 1997 Or Laws Ch. 810, sec. 1. Those amendments are not relevant to this matter, which involves wages paid prior to their effective date.

¹¹ The legislature also amended this statute in 1997. 1997 Or Laws Ch. 810, sec. 2.

practice in Yoncalla, Oregon, at all material times, was to classify tank erection workers as boilermakers. The Commissioner properly determined that the PWR for boilermakers was \$23.57/hour plus \$8.76/hour fringe benefit.

4) ORS 279.350(1) provides:

"The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash, by the making of contributions of a type referred to in ORS 279.348(4)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279.348(4)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs is not less than the prevailing rate of wage."

Respondent committed five violations of ORS 279.350(1) by failing to pay the prevailing rate of wage to five workers who performed tank erection work on the Yoncalla project. The Commissioner has the authority to impose civil penalties for these violations. ORS 279.370(1); *former* OAR 839-16-530(3)(a).

5) ORS 279.354(1) provides:

"The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract * * *. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid."

Respondent violated ORS 279.354(1) by submitting a CPR inaccurately stating that five workers on the project were laborers when, in fact, their correct classification was boilermakers. The Commissioner has the authority to impose a civil penalty for this violation. ORS 279.370(1); *former* OAR 839-16-530(3)(e).

OPINION

VIOLATIONS OF THE PWR LAWS

Respondent acknowledges that it did not pay boilermakers' wages to five workers who performed standpipe erection work on the Yoncalla standpipe project. Credible evidence in the record establishes that the Index of Prevailing Practice reflects the Commissioner's prevailing practice determinations. The 1996/1997 Index classified standpipe erection workers as boilermakers. The Forum infers that the prevailing practice at all material times was to classify standpipe erectors as boilermakers. Based on these facts, the Forum concludes that Respondent committed five violations of ORS 279.350(1).

Respondent's sole argument against this conclusion is that the Commissioner's classification of the workers as boilermakers was faulty because it was based on union jurisdictional agreements, rather than on a field survey of industry practices. Such an argument has no place in this forum.

The PWR laws explicitly prohibit the type of challenge respondent seeks to raise. ORS 279.350(2) provides:

"After a contract for a public works is executed with any contractor or work is commenced upon any public works, the amount of the prevailing rate of wage shall not be subject to attack in any legal proceeding by any

contractor or subcontractor in connection with that contract."

As found above, before the contract here was executed and work was commenced on that contract, the Agency had determined -- through its 1996-1997 Index of Prevailing Practice -- that the prevailing wage rate for the work at issue was the rate paid to boilermakers. Respondent argues that the Agency's determination was faulty. That is precisely the type of legal challenge foreclosed by ORS 279.350(2): After execution of a public works contract or the commencement of work on public works, the Agency's prevailing wage rate determination "shall not be subject to attack in any legal proceeding by any contractor or subcontractor in connection with that contract." *Id.*

Respondent does not avoid this bar by attacking the classification of the work rather than the determination of the prevailing wage rate for boilermakers. Classifying the work in its proper trade is equally central to the prevailing wage rate determination as the determination of the wage rate prevailing for that trade.

To the extent that the text and context of ORS 279.350(2) leave any room for debate, the legislative history supports interpreting the statute to preclude Respondent's challenge. That provision originally was proposed as part of SB 208 (1981). At the time SB 208 was proposed, the case that resulted in the opinion in *State ex rel Roberts v. Miller*, 50 Or App 423, 623 P2d 1081 (1981), was

pending in the Oregon Court of Appeals. The legislative history shows that the bill was introduced at the Department of Justice's request, to remove a persistent source of expensive litigation facing the Bureau of Labor and Industries. Contractors had signed contracts for public works and then used litigation to challenge the commissioner's determination of the prevailing wage rate. The bill was intended to "prohibit[] the rates determined by the commissioner from being attacked in connection with a particular contract after the contract is awarded." Testimony, Senate Labor Committee, SB 208, January 27, 1981, Tape 6, Side A at 10-36 (statement of Bruce Hugo, Executive Assistant to the Labor Commissioner).

Mr. Hugo offered the then-pending *Miller* case as an illustration of the type of lawsuit that the bill would preclude. *Id.* at 36-70, 210-23. Shortly after the January 27, 1981, hearing, the Court of Appeals decided *Miller*. In *Miller*, a contractor had successfully bid on a public works project. The contract provided that the prevailing wage rates determined by the commissioner were the minimum hourly wage rates applicable to work under the contract. The commissioner had previously determined and published those prevailing wage rates. The contractor, however, paid wages at lower rates, and was sued by the commissioner as assignee of an employee's wage claim. The contractor argued that the commissioner's prevailing wage

rate determination was invalid on the ground that it was not done in compliance with ORS 279.359. The court held that the contractor could not challenge the commissioner's prevailing wage rate determination. *Miller*, 50 Or App at 426. At the Senate Labor Committee's March 5, 1981, hearing on SB 208, Mr. Hugo told the committee about the *Miller* decision. See Testimony, Senate Labor Committee, SB 208, March 5, 1981, Tape 35, Side A at 42.

Later, in the Senate's floor debate on SB 208, Senator Hannon explained that the bill would "prohibit[] contractors from attacking the prevailing rate of wage after the contract is awarded * * * or work is commenced." Senate Floor Debate, SB 208, March 12, 1981, Tape 26, Side A at 362 (statement of Sen. Hannon). SB 208 passed the Senate. Ultimately, and with no substantive discussion, the House added SB 208 to SB 207 (also concerning the PWR laws) as section 19, and enacted that bill as Oregon Laws 1981, chapter 712.

Thus, the legislative history of ORS 279.352(2) plainly shows the legislature's intent to forbid a contractor or subcontractor from challenging the prevailing wage rate after signing a public works contract or beginning work. The statute's unambiguous terms reflect that intent.

One could argue that *Miller*, standing alone, would not prohibit all such legal challenges. *Miller* could be read to apply only to wage claims brought by an em-

ployee, or by the commissioner as assignee of a wage claim.

ORS 279.350(2), however, contains no such limitation. That statute prohibits contractors from challenging prevailing wage rates "in any legal proceeding." That phrase covers **all** types of proceedings, including this one: a civil penalty proceeding brought by the Agency against a contractor under ORS 279.370. Consequently, to the extent one might read *Miller* to apply only to wage claim proceedings, ORS 279.350(2) sweeps far more broadly.

In sum, ORS 279.350(2) bars Respondent from challenging the Commissioner's preexisting determination that the prevailing wage rate applicable to the work in question was the rate prevailing for boilermakers.

In any event, Respondent's argument misconstrues the nature of the Agency's burden of proof in this case. ORS 279.350 requires contractors and subcontractors on public works projects to pay at least "the prevailing rate of wage." *Former* ORS 279.348(1) defined "prevailing rate of wage" as "the rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, *as determined by the Commissioner of the Bureau of Labor and Industries.*" (Emphasis added). Thus, to prove five violations of ORS 279.350, the Agency had to prove only that Respondent

had not paid five workers the PWR *as determined by the Commissioner.* The Agency did that by demonstrating: 1) that the Index of Prevailing Practice classified standpipe erection workers as boilermakers; and 2) that Respondent had not paid five of its standpipe erection workers the PWR for boilermakers.

The Agency was not required to also prove that the Commissioner followed proper statutory procedure in determining the prevailing wage rate. Even if the Agency had that burden, however, it would be met by the evidence in this record, which demonstrates that the Commissioner acted within the scope of his authority. *Former* ORS 279.348 specifically permitted the Commissioner to "take into consideration findings of an appropriate federal agency which determines prevailing wages and bargaining agreements in force in the locality for particular trades or occupations" in determining the PWR and prevailing classification practice. The uncontroverted evidence demonstrates that the Commissioner did just that, by relying on USDOL findings that, in the City of Yoncalla area, the prevailing practices for heavy, highway, and non-residential construction work were the union practices.

Respondent asserted, as its first affirmative defense, that the Commissioner's classification was incorrect:

"It is not and has not been the 'prevailing practice' of the construction industry in Oregon to

classify as 'Boilermakers' workers engaged in the type of work carried out by Erich Rabe, Tim Janesofsky, Pat Keeshan, Patrick Holbrook, John Meier, Steve Pender and Richard Hlavinka on behalf of Respondent."

(Exhibit X-17).¹² Even assuming that ORS 279.350(2) and *Miller* allow such a defense, Respondent did not meet its burden of proving it. Respondent presented no credible evidence to controvert the Agency's evidence that the boilermakers' union claims jurisdiction over the erection of bolted-together water tanks in the Yoncalla, Oregon area, whether or not those tanks are air-tight or pressurized. Respondent's evidence regarding the union practices in other states simply has no relevance to the determination of the prevailing practices in Oregon. Nor does its evidence regarding a short-lived Employment Department definition of boilermakers' work, developed and distributed for some unknown purpose presumably unrelated to the PWR laws.

Respondent's real argument is that, whatever the union jurisdic-

¹² Respondent's sixth affirmative defense is similar, except that it incorrectly attempts to place the burden of proving the prevailing practice on the Commissioner. If Respondent may pursue this argument at all in this forum, it has the burden of proving that the Commissioner's determination of prevailing practice was incorrect.

tional practice may be, the actual industry practice in Oregon is to pay laborers' wages to standpipe erection workers. Even if this argument had legal merit,¹³ it would fail on the facts. As explained in Factual Finding No. 46, the Forum was not convinced by Pender's testimony regarding Respondent's share of the water storage tank construction business in Oregon. Because Respondent did not prove what percent of all water tanks it had built, the fact that it pays its workers the split laborers/ironworkers wage does not prove that is the prevailing (or majority) practice for tank erection work. This result is not changed by the fact that Respondent constructed most of the *bolted-together* municipal tanks built in Oregon within the last few years. The Commissioner has determined that *all* standpipe erection workers are boilermakers, and nothing in the record persuades the Forum that workers who erect bolted-together tanks should be classified differently.¹⁴ If Respondent believed its workers perform

¹³ Because *former* ORS 279.348 explicitly permitted the Commissioner to rely on union jurisdictional practices, Respondent's argument is misplaced as a matter of law. See *also* ORS 279.350(2); *Miller*.

¹⁴ Worker classifications necessarily are somewhat general. As Grabe testified, the Commissioner has not established a separate classification for workers who install oak doors using pneumatic nail guns and 8-pound nails -- those workers are classified as carpenters.

a function so unique that they should not be classified with other standpipe erection workers, it should have applied for the addition of a trade pursuant to OAR 839-016-0006.

In sum, the Agency proved that Respondent committed five violations of ORS 279.350(1) by failing to pay five standpipe erection workers the PWR for boilermakers. The Agency also proved that Respondent committed a single violation of ORS 279.354(1) by submitting a CPR inaccurately stating that five workers on the project were laborers when, in fact, their correct classification was boilermakers.

RESPONDENT'S OTHER AFFIRMATIVE DEFENSES

As its second affirmative defense, Respondent asserted that "the Commissioner has acted inconsistently with an established prior agency practice by proposing that civil penalties be assessed against respondent," because it has not been the prevailing practice of the construction industry to classify the type of work performed by Respondent's employees as boilermaker work. Respondent did not, however, identify any "prior agency practice" that would have permitted it to pay laborers' wages to its standpipe erection workers. Having pointed to no change in Agency practice, Respondent cannot prevail on this theory.

Respondent's third affirmative defense is merely a restatement of its first two affirmative defenses

and requires no further discussion. In its fourth affirmative defense, Respondent argued that the Commissioner may not rely on union jurisdictional assertions in determining prevailing practice. That argument fails for the reasons set forth above. Respondent's fifth and seventh affirmative defenses are that "the Commissioner has erroneously interpreted and applied a provision of law" and that "[t]he Commissioner has failed to state a claim for which relief may be granted." Respondent did not elaborate upon those defenses at the hearing and did not establish that the Agency's case suffered from any such defects.

CIVIL PENALTIES

The Commissioner has authority to impose a civil penalty not to exceed \$5000.00 for each violation of ORS 279.348 to 279.380 and the administrative rules adopted pursuant thereto. ORS 279.370(1). The Agency has promulgated a rule specifying the minimum penalties to be imposed for PWR violations:

"(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty shall be calculated as follows:

"(a) An equal amount of the unpaid wages or \$1,000, whichever is less, for the first violation[.]"

The Agency sought this minimum penalty, in an amount equal to the unpaid wages, for each of Respondent's failure to pay the PWR. Given Respondent's cooperation with the Agency and the fact that it has no prior violations, the Forum agrees that the minimum penalty is appropriate. See *former* OAR 839-16-520.

The Forum, therefore, orders Respondent to pay a civil penalty in an amount equal to the wages it failed to pay Holbrook, Keeshan, Janesofsky, Meier, and Rabe for tank erection work they performed in January 1997. Respondent should have paid each of those employees at the boilermakers rate of \$32.33/hour for straight time and \$44.12/hour for overtime.¹⁵ The following table shows the total wages Respondent should have paid the employees:

[Ed. note: the table located at this point in the text of the final order as issued is too large to print in double-column format and has been moved to an appendix at the end of the order (Table 1).]

The differences between what Respondent did pay, and what it should have paid, are as follows:

[Ed. note: the table originally located at this point in the text also has been moved to the appendix at the end of the order (Table 2).]

¹⁵ \$23.57/hour plus \$8.76/hour fringe benefit for straight time; \$35.36/hour plus \$8.76/hour fringe benefit for overtime.

The Forum assesses these unpaid wages as the civil penalty for Respondent's five violations of ORS 279.350(1), in a total amount of **\$1557.71**.

For the single violation of ORS 279.354(1), the Agency sought a penalty of \$1000.00. The Forum agrees that a **\$1000.00** penalty is appropriate under the circumstances of this case, taking into account the factors listed in *former* OAR 839-16-520.

RESPONDENT'S EXCEPTIONS

Respondent filed extensive exceptions to the factual findings in the proposed order. Many of those exceptions do not actually challenge the facts found, but rather argue that the Commissioner should not rely on those facts (exceptions to proposed factual findings 16, 19, 20, 31, 32, 33, 37, and 39). Except as noted below, these exceptions are rejected because the challenged findings are supported by substantial evidence in the record and provide ample support for the legal conclusions in this Final Order.

In response to Respondent's exceptions to proposed factual findings 16 and 35, finding 35 has been clarified to state explicitly that the portion of the Index of Prevailing Practice that is in the record existed prior to July 1996, remained in effect through 1997, and was produced by the Agency's PWR coordinator. There is no requirement for "formal adoption" of the Index.

Respondent takes exception to factual finding 31 on the ground

that substantial evidence does not support the findings that "[i]n 1996 and early 1997, pursuant to then-applicable law, the Commissioner accepted USDOL findings that the majority of workers involved in heavy, highway, and commercial construction were union workers" and that "the Commissioner used local collective bargaining agreements and accompanying jurisdictional evidence to determine the appropriate classification for any given type of work." To the contrary, Grabe testified to these precise facts. The Agency's Prevailing Practice Flier also provides support for these findings.

Respondent takes exception to factual finding 34 on the ground that "[t]here was nothing in the PWR Booklet nor did Grabe testify to any 'prior precedent' of classifying the work at issue as 'boilermakers' for PWR purposes." Finding 34 has been clarified to state that, in using the PWR Booklet and prior precedent, Grabe was merely describing her general practice, not necessarily what she did to determine the PWR for standpipe erection workers in this case.

In challenging factual finding 36, Respondent asserts that there is no evidence that any boilermakers union employees have erected any standpipes in Oregon within the last 10 years. That is not correct; as set forth in factual finding 41, boilermakers have erected standpipes during the relevant time period. The remainder of Respondent's challenge to factual finding 36 amounts to a

recitation of facts that either are already incorporated into the findings, or which the Forum finds have little significance. Respondent's exception to proposed factual finding 37 is misplaced, as it mischaracterizes a quote from a letter as a finding by the ALJ.

Respondent excepts to proposed factual finding 38 on the ground that the ironworkers' union representative conceded that he was unfamiliar with glass-fused-to-steel tanks and that he had no knowledge of actual practices in this state. Respondent further asserts that the union representative "conceded that union jurisdictional agreements do not govern PWR practices." The first two alleged concessions are not relevant to the material fact found in the paragraph -- the existence of a written jurisdictional agreement between the boilermakers and ironworkers that includes certain terms specified in the finding. The union representative's belief regarding the legal significance of jurisdictional agreements in relation to PWR matters simply carries no weight.

In purporting to challenge proposed factual finding 41, Respondent attacks facts that the ALJ did not find. The exception is denied.

In challenging proposed factual finding 43, Respondent asserts facts close to those found in the proposed order. The term "PWR" has been added to the finding to clarify its meaning. In challenging proposed factual finding 44, Respondent makes an assertion of

fact almost identical to the facts found in proposed finding 46 (on page 21, lines 1 and 2, of the proposed order). The exception is denied because the matters Respondent wishes the Forum to assert already are contained in the order.

Finally, in part of its challenge to factual finding 46, Respondent again attacks facts that the ALJ did not find. Respondent also asserts accurately, as the ALJ found, that Respondent constructed most of the bolted-together municipal water tanks built in Oregon during the last ten years. In response to the remainder of this exception, the Forum has added the finding that Respondent built almost all of the bolted-together, *glass-fused-to-steel* municipal water tanks built in Oregon during the last decade.

Respondent's challenges to the first proposed ultimate factual finding mirror its challenges to the proposed opinion, which are addressed later in this Final Order. Respondent takes exception to the second sentence of the fifth proposed ultimate finding, stating that it amounts to "sheer speculation." To the contrary, the finding is a fair inference from factual findings 16, 19, 34, and 35.

Without elaboration, Respondent challenges the third, fourth, and fifth proposed conclusions of law on the ground that there is insufficient evidence to support them. Those exceptions are denied.

As Respondent states correctly in its first exception to the proposed opinion, "the crux of the dispute" related to whether the Commissioner properly had determined that the PWR classification for the work at issue was "boilermaker." The proposed opinion has been changed to remove the suggestion that Respondent challenged only whether the Commissioner's classification determination was *correct*, and not whether the Commissioner had, in fact, made *any* determination regarding the appropriate classification.

In its second exception to the proposed opinion, Respondent questions the relevance of the decision in *State ex rel Roberts v. Miller*, 50 Or App 423, 623 P2d 1081 (1981). According to Respondent, *Miller* is inapposite because it dealt with the prevailing wage rates, not prevailing classification practices. The distinction between the cases has no legal significance. *Miller* stands for the proposition that an employer cannot collaterally challenge the Commissioner's determination of prevailing practices once it has agreed to abide by the PWR laws. It does not matter whether the challenged practice relates to wages or to trade classification.

In its third exception to the proposed opinion, Respondent challenges the burden of proof assigned to the Agency in this case. The opinion contains an adequate discussion of how the Agency met its burden, and the exception is denied.

Finally, Respondent incorporates its objections to the proposed factual findings and conclusions. Those exceptions have been dealt with earlier in this opinion.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370, and as payment of the civil penalty for its violations of ORS 279.350 and 279.354, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Northwest Permastore Systems, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND FIVE HUNDRED TWENTY-FOUR DOLLARS AND TWENTY-NINE CENTS (\$2524.29), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the February 3, 1999, Final Order and the date Respondent complies with the Final Order on Reconsideration.

Appendix to Final Order on Reconsideration in
Northwest Permastore

Table 1

<u>Employee</u>	<u>Hours Worked</u>	<u>Boiler- maker rate</u>	<u>Boilermaker wages</u>
Holbrook	84.5 straight hours	\$32.33/ hour	\$2731.89
	2.0 overtime hours	\$44.12/ hour	<u>\$88.24</u>
			\$2820.13
Keeshan	76.5 straight hours	\$32.33/ hour	\$2473.25
Janesofsky	8.0 straight hours	\$32.33/ hour	\$258.64
Meier	40.0 straight hours	\$32.33/ hour	\$1293.20
Rabe	48.0 straight hours	\$32.33/ hour	\$1551.84

Table 2

<u>Employee</u>	<u>Boilermaker wages</u>	<u>- Wages paid</u>	<u>= Unpaid wages</u>
Holbrook	\$2820.13	\$2308.20	\$511.93
Keeshan	\$2473.25	\$2027.33	\$445.92
Janesofsky	\$258.64	\$201.12	\$57.52
Meier	\$1293.20	\$1060.40	\$232.80
Rabe	\$1551.84	\$1275.72	\$276.12

**In the Matter of
NOVA GARBUSH dba NOVA
GARBUSH ADULT FOSTER
CARE**

Case Number 60-00

Final Order of the Commissioner
Jack Roberts
Issued April 14, 2000.

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 of the charges set forth in the charging document. Where the Agency made a prima facie case supporting the Agency's Order of Determination on the record, the commissioner found that Respondent willfully failed to pay Claimant all wages due after Claimant quit her employment, in violation of ORS 652.140(2). The commissioner ordered that Respondent pay \$441.00 in unpaid wages and \$1,680.00 in civil penalty wages. ORS 652.140(2); ORS 652.150.

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 for the State of Oregon. The hearing was held on March 8,

2000, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia Domas, an employee of the Agency. Krystyna Drozd ("Claimant") was present throughout the hearing. Also present throughout the hearing was Regina Popiel, an interpreter in Polish, who translated the proceedings in their entirety. Nova Garbush ("Respondent"), after being duly notified of the time and place of this hearing, failed to appear and no representative appeared on behalf of Respondent.

The Agency called the following witnesses: Claimant; Michael Wells, Wage & Hour Division Compliance Specialist; and Eugiezia Kaptur, Claimant's friend.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-7, and A-9 (submitted or generated prior to hearing).

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 or about August 24, 1999, Claimant filed a wage claim with the Agency. She alleged that Respondent employed her and failed to pay wages earned and due to her.

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

3) Claimant brought her wage claim within the statute of limitations.

4) On November 17, 1999, the Agency served Order of Determination No. 99-3303 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$441.00 in unpaid wages and \$1,680.00 in civil penalty wages, plus interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On December 7, 1999, the Agency issued a Notice of Intent to Issue Final Order by Default to Respondent, notifying Respondent that a Final order by Default would be issued unless the Agency received an Answer and Request for Hearing or Court Trial from Respondent by December 17, 1999.

6) On December 16, 1999, the Agency received a written request for hearing from Respondent.

7) On December 16, 1999, the Agency issued a Notice of Insufficient Answer to Order of Determination to Respondent stating that Respondent's Answer received on December 16, 1999 was insufficient because it did not include "an admission or denial of each fact alleged in the Order and a statement of each relevant defense to the allegations." The Agency stated that a Final Order on Default would be executed unless this information was received by "the extended date" of December 27, 1999.

8) On December 27, 1999, the Agency received an Answer from Respondent responsive to the Agency's Notice of Insufficient Answer. In the answer, Respondent admitted that Claimant had worked for her for almost five years, including the dates of February 7, 14, 21, and 28, 1999; admitted that Claimant had worked a total of 36 hours on February 7, 14, 21, and 28, 1999; alleged that Respondent paid Claimant in full for those hours in cash; denied that Claimant worked for Respondent in March 1999; and denied that she owed Claimant any money for unpaid wages.

9) On January 26, 2000, the Agency served a "BOLI Request for Hearing" on the forum.

10) On January 28, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, the

Agency, and the Claimant stating the time and place of the hearing as March 8, 2000, and successive days thereafter, at 9:00 a.m., at the Hearings Room, 10th Floor, State Office Building, 800 NE Oregon Street, Portland, Oregon. Together with the Notice of Hearing, the forum sent a document entitled "Summary 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 839-050-000 to 839-050-0440.

11) On February 3, 2000, BOLI mailed a copy of the forum's amended contested case hearings rules, effective January 27, 2000, to Respondent.

12) On February 7, 2000, the ALJ issued a case summary order requiring the Agency and Respondent each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, and a statement of any agreed or stipulated facts. The Agency was additionally ordered to submit wage and penalty calculations and a brief statement of the elements of the claim. Respondent was additionally ordered to submit a brief statement of any defenses to the claim. The ALJ ordered the participants to submit case summaries by February 29, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

13) The Agency timely filed its case summary, with attached exhibits, on February 29, 2000.

Respondent did not file a case summary.

14) On March 2, 2000, the Agency filed a motion for a discovery order requiring Respondent to provide documents relevant to the Claimant's wage claim.

15) On March 2, 2000, the forum granted the Agency's motion, finding that the relevance of the documents sought was apparent. Given the uncertainty of whether Respondent would even receive the forum's interim order prior to March 6, 2000, the date by which the Agency sought to obtain the documents, the forum ordered Respondent to hand deliver the requested documents to the Agency no later than the time and date that the hearing was scheduled to begin.

16) On March 6, 2000, the Agency submitted an addendum to its case summary enclosing one additional exhibit.

17) At the time set for hearing, Respondent had not appeared and had not previously announced that she would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondent did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondent in default at 9:30 a.m. and commenced the hearing.

18) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be ad-

dressed, the matters to be proved, and the procedures governing the conduct of the hearing.

19) On March 22, 2000, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Nova Garbush, an individual person, did business under the assumed business name of Nova Garbush Adult Foster Care.

2) Respondent hired Claimant in 1995 to care for disabled patients in Respondent's home, located at 11721 S.E. Powell Blvd., Portland, Oregon. Respondent offered Claimant the wage of \$7.00 per hour and Claimant accepted Respondent's offer. Respondent paid Claimant \$7.00 per hour throughout her employment with Respondent.

3) Claimant worked continuously for Respondent until March 1999. She worked one shift a week, beginning at 11 p.m. each Saturday night and ending at 8 a.m. each Sunday morning.

4) Respondent's normal practice was to pay Claimant twice a month, at the middle and end of each month.

5) Claimant maintained a contemporaneous record of the dates and hours she worked during her employment with Respondent, including the months of January, February, and March 1999.

6) In February and March 1999, Claimant worked the following shifts for Respondent, working nine hours each shift: February 6-7, 13-14, 20-21, 27-28; March 6-7, 13-14, 20-21. During that time, Claimant cared for a paralyzed adult in Respondent's home.

7) Claimant stopped working for Respondent after her March 20-21, 1999 shift because Respondent had not paid her for any of the work Claimant had performed in February and March 1999 and avoided Claimant whenever Claimant made one of numerous attempts to ask Respondent for her wages.

8) Calculated at the wage rate of \$7.00/hr., Claimant earned a total of \$441.00 between February 6, 1999 and March 21, 1999.

9) At the time of Claimant's termination, Respondent owed Claimant \$441.00 in unpaid wages.

10) Prior to Claimant's termination, Respondent had not paid her anything for her work between February 6, 1999 and March 21, 1999. Since Claimant's termination, Respondent has not paid Claimant any wages.

11) Civil penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: \$7.00/hr. multiplied by 8 hours per day equals \$56.00; \$56.00 multiplied by 30 days equals \$1,680.00.

12) Wells, a Compliance Specialist employed by the Agency for the previous ten

months before the hearing, investigated Claimant's wage claim. During his investigation, he wrote to Respondent and asked Respondent to provide copies of payroll and time records regarding Claimant. Respondent did not respond to his request. Wells also attempted unsuccessfully to contact Respondent by phone.

13) Claimant testified in Polish through Popiel, the forum's interpreter. She responded to questions in a straightforward manner. Her testimony was consistent with statements on her wage claim, the calendar submitted with her wage claim, the calendar of hours worked that she contemporaneously maintained while working for Respondent, and with Kaptur's testimony. The forum finds her testimony credible.

14) The testimony of Wells was credible.

15) Eugiezia Kaptur also testified in Polish through Popiel, the forum's interpreter. Her testimony was direct, to the point, and consistent with Claimant's testimony. The forum has found her testimony credible.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an individual person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent employed Claimant in Oregon from 1995 through March 21, 1999.

3) Claimant earned \$441.00 in wages during her employment

with Respondent in February and March, 1999.

4) Respondent has not paid Claimant any wages for the work she performed in February and March 1999.

5) Claimant voluntarily terminated her employment with Respondent on March 21, 1999 because Respondent had not paid her any wages for the work she performed in February and March 1999. Claimant did not give Respondent prior notice of her intent to quit.

6) Respondent willfully failed to pay Claimant \$441.00 in earned, due, and payable wages no later than March 26, 1999, five days after Claimant quit, and more than 30 days have elapsed from the date Claimant's wages were due.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Nova Garbush 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. During all times material herein, Respondent employed Claimant.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414.

3) At times material, ORS 652.140(2) provided:

"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 schedule payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid not later than March 26, 1999, five business days after Claimant quit. Those wages amount to \$441.00.

4) 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 \$1,680.00 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

5) OAR 839-050-0330(1) and (2) provide, in pertinent part:

"(1) Default can occur in four ways:

" * * * *

"(d) Where a party fails to appear at the scheduled hearing.

"(2) When a party notifies the agency that it will not appear at the specified time and place for the contested case hearing or, without such notification, fails to appear at the specified time and place for the contested case hearing, the administrative law judge shall take evidence to establish a prima facie case in support of the charging document and shall then issue a proposed order to the commissioner and all participants pursuant to OAR 839-050-0370. Unless notified by the party, the administrative law judge shall wait no longer than thirty (30) minutes from the time set for the hearing in the notice of hearing to commence the hearing."

Respondent did not appear at the hearing at all and did not notify the forum that it would not appear at the hearing. Respondent was properly found in default when 30 minutes had elapsed after the specified time for the contested case hearing.

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.

OPINION

INTRODUCTION

The Agency alleged in its Order of Determination that Claimant was not paid for 63 hours of work she performed for Respondent in February and March 1999. The Agency further alleged that Claimant was entitled to the agreed-upon rate of \$7.00 per hour and is owed a total of \$441.00 in unpaid wages and \$1680.00 in civil penalty wages.

DEFAULT

Respondent filed an answer and request for hearing, but failed to appear at hearing and was held in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Leslie and Roxanne DeHart*, 18 BOLI

199, 206 (1999). The task of this forum, therefore, is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. *DeHart*, at 206.

PRIMA FACIE CASE

In this wage claim case, the elements of a prima facie case consist of proof of the following: (1) Respondent employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which she was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

In her answer and request for hearing, Respondent alleged, in relevant part, that she paid Claimant in full for the 36 hours Claimant worked in February 1999, and denied that Claimant worked for Respondent in March 1999 or that she owed Claimant any money for unpaid wages. Respondent provided no supporting documentation. Where a respondent has submitted an answer but defaults by not appearing at hearing, the forum may consider its contents when making factual findings. However, unsworn and unsubstantiated assertions in the answer are overcome wherever they are controverted by other credible evidence on the record. *DeHart*, 18 BOLI at 206.

In this case, it is undisputed that Respondent employed

Claimant in February 1999. The credible testimony of Claimant and Kaptur overcome Respondent's unsworn denial that Claimant did not work for Respondent.

The forum concludes that Claimant's agreed upon rate of pay was \$7.00 per hour based on Claimant's credible testimony and Respondent's failure to deny that allegation, contained in the Order of Determination, in the answer. See OAR 839-050-0130(2).

Respondent alleges in its answer that Claimant was paid for her work in February 1999, did not work in March 1999, and was paid in full for her work. However, those unsworn and unsubstantiated assertions are overcome by Claimant's and Kaptur's credible testimony that Claimant worked for Respondent in February and March 1999 and was not paid for any of that work.

The final element of the Agency's prima facie case requires proof of the amount and extent of work performed by Claimant. The Agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be drawn." *In the Matter of Graciela Vargas*, 16 BOLI 246, 254 (1998). A claimant's credible testimony may be sufficient evidence. *In the Matter of David Creager*, 17 BOLI 102, 109 (1998). Claimant credibly testified that she worked from 11 p.m. until 8 a.m. on seven occasions in February and March 1999, for a total of 63 hours, and produced a contemporaneous

written record supporting her testimony.¹ That testimony was bolstered by Kaptur's credible testimony regarding her awareness of Claimant's work schedule. Respondent's unsworn and unsubstantiated assertions to the contrary are insufficient to overcome this evidence. The forum concludes that Claimant worked 63 hours for Respondent for which she has not been compensated, earning a total of \$441.00 gross wages.

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. *In the Matter of Norma Amezola*, 18 BOLI 209, 219 (1999). Respondent, as an employer, had a duty to know the amount of wages due her employees. *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 285 (1999). The forum infers that Respondent knew the hours Claimant was working from the

¹ See Finding of Fact – The Merits #11 for the exact dates.

fact that Claimant was caring for a paralytic patient in Respondent's house. The forum also infers that Respondent knew she owed Claimant wages based on her intentional avoidance of Claimant whenever Claimant tried to collect her wages. There is no evidence that Respondent acted other than voluntarily or as a free agent. The forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$1,680.00, the amount sought in the Order of Determination. This figure is computed by multiplying \$7.00 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages she owes as a result of her violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **NOVA GARBUSH** 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 Krystyna Drozd in the amount of TWO THOUSAND TWENTY-ONE DOLLARS (\$2,021.00), less appropriate lawful deductions, representing \$441.00 in gross earned, unpaid, due, and payable wages and \$1,680.00 in penalty wages, plus interest at the legal rate on the sum of

\$441.00 from April 1, 1999, until paid and interest at the legal rate on the sum of \$1,680.00 from May 1, 1999, until paid.

In the Matter of

**LABOR READY, INC., GLEN
WELSTAD and
LABOR READY NORTHWEST,
INC.,**

Case No. 70-99

Final Order of the Commissioner
Jack Roberts

Issued June 1, 2000

SYNOPSIS

Respondent Labor Ready, Inc., violated ORS 279.355 and OAR 839-016-0025 by failing to make and maintain records of the daily hours worked by its employees on a public works project. Labor Ready, Inc., also violated those laws by failing to make and maintain records of the daily compensation paid to each of its employees on the project. Labor Ready, Inc., violated ORS 279.354 by filing certified payroll reports that stated inaccurately the projects on which two employees had worked. The commissioner imposed civil penalties totaling \$13,000.00 for these violations.

After the Agency began investigating these violations, Labor Ready,

Inc., formed a subsidiary corporation, LRNW. Subsequently, Labor Ready, Inc., failed to comply with the Agency's requests for certain payroll documents. The Agency initially charged all respondents with having violated OAR 839-016-0030, which requires public works contractors and subcontractors to provide documents at the Agency's request. However, the Agency later amended the Notice of Intent to charge only LRNW with those violations. Because LRNW was not a subcontractor on the public works project and had not been asked to supply the documents, LRNW could not be held responsible for any violations of OAR 839-016-0030 that Labor Ready, Inc., may have committed. ORS 279.354, ORS 279.355, ORS 279.370, OAR 839-016-0025, OAR 839-016-0030, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 January 11 and 12, and February 4, 2000, in the hearings room of the Oregon Bureau of Labor and Industries, 800 N.E. Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Respondents appeared through their

counsel, David J. Sweeney, of Brownstein, Rask, Arenz, Sweeney, Kerr & Grim. Tim Adams, the director of legal services for Respondent Labor Ready, Inc., was present as Respondents' corporate representative on the first day of hearing.

The Agency called two witnesses: former compliance specialist Melissa Marks and Tim Adams, Labor Ready's director of legal services. Respondents called employees Jill Carter, Lauri Montano-Griffin, Steve Bevins, and Adams as their witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 to X-8 (generated or filed prior to hearing) and exhibits X-9 to X-19 (generated or filed during or after the hearing).

b) Agency exhibits A-1, A-5 to A-16 (submitted prior to hearing with the Agency's case summary) and A-17 to A-19 (submitted during the hearing).

c) Respondents' exhibits R-1 through R-6 (submitted prior to hearing with Respondents' case summary) and R-7 and R-8 (submitted during the hearing).

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 22, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties in which it made the following charges against Respondents, referred to collectively as "Contractor":

a) Between about October 12, 1998, and November 13, 1998, Contractor failed to make and maintain records of the daily and weekly compensation paid to each of its employees on the Oregon Department of Corrections Columbia River Correctional Institute public works contract, upon which Contractor was a subcontractor, in violation of OAR 839-016-0025(2)(e);

b) Between about October 12, 1998, and November 13, 1998, Contractor failed to make and maintain records of the daily and weekly hours worked by each of its employees on the Oregon Department of Corrections Columbia River Correctional Institute public works project, upon which Contractor was a subcontractor, in violation of OAR 839-016-0025(2)(f);

c) Between about October 12, 1998, and November 13, 1998, Contractor filed inaccurate and incomplete certified statements by failing to report workers, hours and dates of work on the Oregon Department of Corrections Columbia River Correctional Institute public works contract, upon which Contractor was a subcontractor, in violation of ORS 279.354; and

d) Contractor failed to provide certified copies of all of Contractor's time and payroll records upon the written requests of the Wage and Hour Division made on February 8, February 24, March 26, and April 29, 1999, in violation of OAR 839-016-0030(3).

The Agency alleged as an aggravating circumstance that the Agency issued Contractor a warning letter in December 1997 citing Contractor for violations of the Prevailing Wage Rate ("PWR") laws, including failure to pay workers the prevailing wage, that resulted in the collection of unpaid wages. The Agency sought a \$5000.00 civil penalty for each alleged violation, for a total of \$20,000.00 in penalties. The Agency argued that enhanced penalties were warranted "by Contractor's knowledge of the current violations, the magnitude and seriousness of the violations and the ease of opportunity in complying with the law."

2) The Notice of Intent instructed Respondents that if they wished to exercise their right to a contested case hearing, they were required to make a written request within 20 days of the date on which they received the Notice.

3) The Agency served the Notice on Respondent Welstad on or about July 30, 1999. The Agency served the Notice on Respondents Labor Ready, Inc., and Labor Ready Northwest, Inc., on or about August 2, 1999.

4) On August 24, 1999, the Agency issued a Notice of Intent

to Issue Final Order by Default stating that if the Agency did not receive an answer and request for hearing by September 3, 1999, it would issue a Final Order by Default.

5) Respondents, through counsel, filed an answer and request for hearing on August 31, 1999. In their answer, Respondents denied all substantive allegations in the Notice of Intent to Assess Civil Penalties.

6) On September 29, 1999, the Agency filed a request for hearing with the Hearings Unit.

7) On October 5, 1999, the Hearing Unit served Respondents with: a) a Notice of Hearing that set the hearing for December 14, 1999; b) a Summary 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 hearing process; and d) a copy of the Notice of Intent.

8) On October 14, 1999, Respondents filed an unopposed request for postponement based on their attorney's need to be present at another contested case hearing on December 14, 1999. The ALJ granted the motion and reset the hearing to commence on January 11, 1999.

9) On December 6, 1999, the forum ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into

evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondents only); a statement of any agreed or stipulated facts; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by December 28, 1999, and notified them of the possible sanctions for failure to comply with the case summary order. The Agency and Respondents both filed timely case summaries on December 28. The Agency filed a supplement to its case summary, including a document labeled Exhibit A-16, on January 7, 2000.

10) At the start of the hearing, counsel for Respondents stated that he had received the Summary of Contested Case Rights and Procedures and had no questions about it.

11) 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.

12) At the beginning of the hearing, the participants informed the ALJ that they had stipulated to certain facts, which the Agency case presenter read into the record:

"The CRCI project * * * was a covered project covered by the Oregon PWR statutes.

"Respondents employed workers on the CRCI project during the material times.

"Respondents knew that they were obliged to keep records in accordance with the PWR statutes and rules."

13) During the hearing, the Agency moved to dismiss the Notice of Intent as to Respondent Glen Welstad. Respondents did not oppose the motion, which the ALJ granted.

14) After presenting its rebuttal case, the Agency moved to amend the Notice of Intent to add an alleged violation of ORS 839-016-0030(1) based on evidence that came into the record without objection, as follows:

"Contractor failed to provide to representatives of the Wage and Hour Division records necessary to determine if the prevailing wage rate has been or is being paid to workers."

The Agency did not seek additional penalties for this new alleged violation. The ALJ granted the motion, ordered that Respondents were deemed to have denied the new allegation, and granted Respondents a continuance to present evidence regarding the new charge.

15) Counsel for Respondents later notified the ALJ that he would not be presenting any additional evidence, and the ALJ set Friday, February 4, 2000, as the date on which the participants would present closing arguments.

The participants made closing statements on that date.

16) On February 3, 2000, the Agency's Legal Policy Advisor sent Respondents a complete copy of the Hearings Unit's amended rules for contested case hearings.

17) By order dated February 14, 2000, the ALJ asked the Agency to submit a legal brief or statement of Agency policy answering two questions:

"1) Is Labor Ready Northwest, Inc., liable for any violations committed prior to December 1998? If so, under what theory? If the Agency believes Labor Ready Northwest, Inc., may be held liable as a successor corporation for any violations committed by Labor Ready, Inc., what is the source for the commissioner's authority to hold successor businesses liable for PWR violations committed by their predecessors?

2) Which Respondent committed any violations that occurred in early 1999? Which Respondent is liable for any such violations, or are both Respondents liable? Under what theory or theories?"

The ALJ ordered the Agency to file its brief or policy statement by March 15, 2000, and gave Respondents two weeks after the Agency filed its brief in which to file a response.

18) The Agency later requested and received an

extension of time until March 31, 2000, in which to file its brief or policy statement. On that date, the Agency filed a letter "[i]n lieu of a statement of agency policy," in which it moved to amend the Notice of Intent as follows:

"The Agency is requesting civil penalties for any violations committed by Respondent Labor Ready, Inc. prior to December 1998. The Agency is also requesting civil penalties for any violations committed by Respondent Labor Ready Northwest, Inc. in early 1999. The Agency is not seeking to hold either Respondent responsible for any violations committed by the other. This motion is made to the extent that it explains the Agency's position regarding each Respondent's liability for civil penalties in this matter."

Respondent did not oppose the Agency's motion to amend, which the ALJ granted by order dated April 17, 2000.

19) The ALJ issued a proposed order on May 9, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent filed timely exceptions. The Agency did not file exceptions.

FINDINGS OF FACT – THE MERITS

(findings related to the violations)

1) Labor Ready, Inc. ("Labor Ready") is a Washington corporation headquartered in Tacoma, Washington, and has several hundred branch offices located throughout the United States. Labor Ready is in the business of supplying temporary workers. At all material times, Respondent Glen Welstad was Labor Ready's president.

2) Labor Ready filed as a foreign corporation doing business in Oregon in February 1995. In late 1998, Labor Ready formed ten wholly owned subsidiary companies, each responsible for an area of the United States. One of those subsidiaries is Labor Ready Northwest, Inc. ("LRNW"), which covers Oregon, Washington, Idaho, Montana and Alaska. All of the subsidiaries are incorporated in Washington and are registered as foreign corporations in the states in which they do business. In December 1998, LRNW registered as a foreign corporation doing business in Oregon. At that point, there was no need for Labor Ready to be registered in this state. Consequently, in January 1999, Labor Ready voluntarily withdrew its Oregon registration.

3) At the time of hearing, LRNW was the only Labor Ready entity doing business in the state of Oregon. LRNW operated the same branches Labor Ready operated when it did business in Oregon. All of Labor Ready's assets were transferred to LRNW at or about the time LRNW regis-

tered in Oregon. For the most part, LRNW retained the employees that Labor Ready had employed.

4) At all material times, Labor Ready or LRNW had branch offices throughout Oregon, including several in the Portland metropolitan area. One of those offices was referred to as the Parkrose branch.

5) From about 1995 until late 1999, Steve Bevins was a director of operations for different Labor Ready districts. About one month before hearing, Bevins was appointed LRNW's director of operations.

6) Lauri Montano-Griffin has worked for Labor Ready since 1996. At the time of hearing, she was Labor Ready's district manager for northern Oregon and was responsible for operations of the Labor Ready branches in that area.

7) At all material times, Frankie Sander was an administrative assistant in Labor Ready's Tacoma headquarters and supervised the administrative services department, which was responsible for compliance with prevailing wage rate ("PWR") laws. Sander generally supervised the preparation of certified payroll reports ("CPRs") required by the PWR laws and personally handled CPRs with which there were difficulties.

8) Jill Carter worked as a customer service representative at the Parkrose branch of Labor Ready/LRNW from December

1997 until August 1999. At the time of hearing, she worked in Labor Ready's Vancouver office.

9) In the summer and fall of 1998, Lee Hartfield was manager of Labor Ready's Parkrose branch.

10) Typically, Labor Ready kept track of the hours its employees worked by using work tickets. Each employee took a work ticket to the job site to which he or she had been assigned and gave it to Labor Ready's customer. The customer wrote the number of hours the employee worked on the ticket and signed it. The employee then returned the work ticket to the Labor Ready branch office, which faxed the tickets and related invoices to Labor Ready's corporate office each Friday evening. Employees in the corporate office prepared the corresponding CPRs. For this process to work correctly, a Labor Ready customer service representative needed to mark each ticket on a PWR job to indicate that it related to a public works contract.

11) In the summer and fall of 1998, the Oregon Department of Corrections ("ODOC") made physical improvements to portions of the Columbia River Correctional Institute ("CRCI"), located in Portland, Oregon. The CRCI project was a covered project subject to the Oregon PWR laws.

12) Oregon Welding Service ("OWS") and Central Oregon Mechanical ("COM") contracted for some of the work on the CRCI job. During the same time period,

OWS and COM performed work on another project subject to Oregon PWR laws at Eastern Oregon University. Lyle Holden owns both OWS and COM.

13) Labor Ready contracted with OWS and COM to supply some of the workers that OWS and COM used on the CRCI and Eastern Oregon University projects during 1998 and, therefore, was a subcontractor on the CRCI project. Labor Ready's Parkrose branch had the accounts for at least two of those employees -- Jason Metz and Travis Henderson. LRNW did not yet exist in 1998 and was not a subcontractor on the CRCI project during that year.

14) Respondents knew that they were obliged to keep records in accordance with the PWR statutes and rules.

15) Labor Ready did not follow its usual practice of using work tickets to record daily hours for the employees it supplied to OWS and COM. Rather, OWS and COM supervisors called or faxed the Labor Ready Parkrose office each week to report the total number of hours each employee had worked that week. Labor Ready customer service representatives then completed work tickets reflecting the total number of hours the employees had worked during the week. The customer service representatives did not record the number of hours the employees had worked each day. Hartfield authorized this procedure.

16) The week ending October 16, 1998, Metz worked about 32 hours for OWS on the CRCI project and Henderson worked about 8 hours on that project, in addition to their work at Mt. Tabor.¹ Respondent Labor Ready completed a CPR stating incorrectly that Henderson and Metz had worked only on the Mt. Tabor project that week.

17) The following week, Metz worked 24 hours for OWS on the CRCI project and also worked at Mt. Tabor. Labor Ready completed a CPR stating incorrectly that Metz had worked only on the Mt. Tabor project that week.

18) The week ending November 6, 1998, Henderson and Metz each worked 22 hours at CRCI and 18 hours at Mt. Tabor. On November 7, 1998, an OWS supervisor called Labor Ready to report the hours that Henderson and Metz had worked. Labor Ready's answering service for-

¹ The record includes at least two daily timesheets from OWS purporting to cover this period. One states that Henderson and Metz worked 8 and 32 hours at CRCI, respectively. The other states that Henderson and Metz worked 7 and 33.5 hours at CRCI, respectively. There is a third timesheet in the record that has slightly different hours and that may relate to the same week (Exhibit A-6 at 2). For purposes of this case, it is not important which of these reports prepared by OWS is correct. The significant fact is that Labor Ready certified incorrectly that Henderson and Metz had worked exclusively on the Mt. Tabor project.

warded the following message regarding that report to Labor Ready:

"Re: Calling in hours for Jason Metz

18 hrs at Mt Tabor & 22 hors [sic] at

Columbia Rive [sic] Correction. Travis

Henderson had the same hours."

Despite this report, Labor Ready completed a CPR stating incorrectly that Henderson and Metz had worked only on the Mt. Tabor project.

19) Henderson worked at CRCI for six hours on Saturday, November 7, 1998. Metz also worked at CRCI the week ending November 13, 1998. An OWS or COM supervisor called a Labor Ready customer service representative to report the total number of hours the two employees had worked that week. The customer service representative recorded that information on work tickets but did not ask how many hours the employees had worked each day, as the representatives had not been instructed to request that information. The representative also reported on the work tickets that Henderson and Metz had worked on some project other than CRCI. These work tickets were not introduced into evidence at the hearing.

20) At some later point, Labor Ready issued corrected work tickets related to the invoices it had sent to OWS for the work performed by Henderson and Metz

the week beginning November 7 and ending November 13² to reflect that the work was performed at CRCI. In addition, on the corrected work tickets, Carter noted that Henderson and Metz "were both at the wrong pay." Carter verified at hearing that Henderson and Metz initially had not been paid correctly for the work they performed that week. According to Carter, the correction of the work tickets and related invoices resolved that difficulty.

21) The corrected work tickets state only the total hours Henderson and Metz worked on the CRCI project ending November 13 -- they do not reflect the hours worked each day. The corrected work ticket for Henderson does not indicate that he performed the six hours of work on a Saturday and was, therefore, entitled to overtime pay.

² Under Labor Ready's record-keeping system, each work week started on a Saturday. The forum takes official notice of the fact that November 7, 1998, was a Saturday. The earning history sheets labeled as exhibits R-2 and R-4 make sense only if the "Tk Date" - November 7 - is the date of the Saturday on which the week *began*, not the day on which the week ended, as Carter testified. With this understanding, the last entry on page 2 of exhibit R-4 shows that Henderson worked 6 hours the week starting November 7 and ending November 13, which corresponds to the CPR located at page 13 of exhibit A-5. The corrected work tickets (exhibits R-1 and R-3) also relate to the week *beginning* November 7, not a week ending on that date.

Indeed, Henderson's earning history report for that week shows that he was paid only at the straight hourly rate.

22) At some point, Labor Ready completed a CPR for the week ending November 13 showing that Metz worked a total of 30 hours at CRCI, all on weekdays, and that Henderson worked 6 hours at CRCI on Saturday. Nothing in the record establishes how Labor Ready learned the days on which Henderson and Metz performed their work.³ According to the CPR, Henderson was paid at the straight time rate, not the overtime rate, for the work he did on Saturday.

23) At the time of hearing, Sander did not know whether she ever had corrected the problem with Henderson not having been paid overtime for his Saturday work.

24) The CPRs described in Findings of Fact -- the Merits 15, 16, 17, and 21, *supra*, are reports that Labor Ready completed and submitted to Jim Poore with ODOC, the contracting public agency on the CRCI project.

25) On December 7, 1998, Kevin Taal, an OWS supervisor,

filed a claim with the Agency's Wage and Hour Division in which he claimed that OWS had failed to pay him \$800.00 in wages he earned during his last week of employment on the CRCI and Eastern Oregon University jobs. Wage and Hour Division compliance specialist Melissa Marks investigated Taal's claim. During her investigation, Marks received copies of CPRs from the CRCI project from Poore at ODOC. From those documents, Marks determined that Labor Ready had employed workers on the project, because Nicole Meyer at Labor Ready had completed the CPRs. Taal, however, had been employed solely by OWS and COM, and Marks' resolution of his wage claim did not involve Labor Ready.

26) On January 6, 1999, Holden (the owner of OWS and COM) notified Poore by fax of changes that needed to be made to the November 6, 1998, payroll records on the CRCI project.

27) That same day, Holden faxed a letter to Labor Ready in which he pointed out that Henderson's and Metz's hours for the week ending November 6, 1998 needed to be split between the CRCI and Mt. Tabor projects. He asked Labor Ready to "assist us in completing our certified payroll requirements as payment for our services is being withheld and our reserves are exhausted."⁴

³ Sander testified that the original work tickets showed the days on which Henderson and Metz had worked. The forum has not credited Sander's testimony on this point because of the inherent unreliability of much of her testimony and because Labor Ready did not produce either of the original work tickets at hearing.

⁴ This fax and several of the other documents in the record originally were printed in all capital letters. The

28) In a January 15, 1999, fax to "Nicole" at Labor Ready, Holden pointed out the problems with the two CPRs for October 1998. Holden specifically noted that Henderson and Metz had worked at CRCI during the weeks covered by the CPRs, which stated incorrectly that the two employees had worked only on the Mt. Tabor project.⁵ On January 18, Holden sent a fax to Poore pointing out the same difficulties.

29) On January 22, 1999, Poore sent Marks a fax that included copies of the correspondence between Holden and Labor Ready regarding CPRs.

30) After Marks resolved Taal's wage claim, she continued to investigate whether OWS, COM, and Labor Ready had complied with the PWR laws on the CRCI and Eastern Oregon University projects. To determine whether the prevailing wage had been paid, Marks needed to know at least:

a) The number of hours worked each day, because employees on PWR jobs must be paid overtime for any work they perform in excess of eight hours per day;

b) The total number of hours worked per week, because employees on PWR jobs must

be paid overtime for any work they perform in excess of 40 hours per week;

c) Whether work was performed on a weekday or the weekend, because employees on PWR jobs must be paid overtime for any work they do on weekends;

d) The job classification (i.e., Laborer or Carpenter) and group (i.e. Laborer group 1 or Laborer group 2) of the work performed, because each job classification and group has a different rate of pay;

e) The project on which the work was done, because pay rates can differ between projects, depending on the regions of the state in which the projects are located and the dates on which contracts for the projects were advertised for bid; and

f) The wage rate paid.

31) On February 4, 1999, Marks wrote a letter to Holden outlining the issues on both the CRCI and Eastern Oregon University projects. With regard to CRCI, Marks stated, in pertinent part:

"On this project, the certified payroll reports seem to accurately reflect the number of people working on the job, although as we discussed, it is improper for Labor Ready to report two projects on the same set of certified payroll reports. However, for the purposes of my calculations I did

forum has changed the quoted text to lower case for easier reading.

⁵ See Findings of Fact - the Merits 16 and 17, *supra*.

use the hours worked you indicated on the certified payroll to determine the amount of wages paid for the CRCI project. There were three people working on the project, and I've determined the wages due as follows:

"Travis Henderson \$88.66

"* * *

"Jason Metz No wages due

"I've included the wage calculation sheets I used to determine the amounts owed on both projects, please look them over and call if you have any questions. I am sending this information to the appropriate public agencies and to Labor Ready, as well. Please call when you get a chance to review this information and we can discuss the next step. I'll expect to hear from you by next **Thursday, February 11th**. I look forward to speaking with you."

Marks sent a copy of this letter to either Labor Ready or LRNW.

32) Jill Carter, of LRNW's Parkrose branch, called Marks on February 8, 1999, in response to Marks' February 4 letter. Carter said everything related to prevailing wage projects was handled at Labor Ready's Tacoma headquarters, and told Marks to call Frankie Sander in that office. Marks made a contemporaneous written record of this contact with Carter.

33) Later that day, Marks faxed a letter to Nicole Meyer at

Labor Ready's Tacoma headquarters.⁶ Marks contacted Meyer, rather than Sander, because Meyer had signed the CPRs. In her letter, Marks stated that the Wage and Hour Division had received a PWR complaint on the CRCI project. She also stated that there were problems with the CPRs that Labor Ready had submitted to ODOC. Marks specifically noted that the reports improperly included information for more than one project, explained that "each project must have a separate set of CPRs containing hour and wage information for all employees," and asserted that "[t]his is contrary to Oregon's law[.]" She continued: "I need you to file amended certified payroll reports for the period in question with this office."

34) Neither Labor Ready nor LRNW ever provided the amended CPRs that Marks requested.

35) In the same letter, Marks also asked Labor Ready "to send [her] all time and payroll records for all employees working on the project in question" no later than Friday, February 12, 1999. Neither Labor Ready nor LRNW provided any documents to Marks by that date.

36) At some point, Marks had a conversation with Meyer. In a February 24, 1999, letter to Meyer, Marks stated:

⁶ Marks also mailed the letter to Carter, but sent it to the wrong address.

"RE: Prevailing wage investigation: [CRCI] project and Eastern Oregon State College/Ackerman Hall project

"Dear Ms. Meyer;

"Enclosed is a copy of the notice of claim I filed on the bond issued for these projects. Please be aware that you are jointly responsible for the wages of any employees you provided for work on the projects. I look forward to the records you told me you were in the process of compiling. I'll expect to hear from you sometime in the next week, by March 3rd. Thank you for your cooperation."

Marks received no response to this letter by March 3rd.

37) On March 16, 1999, Marks received a package of documents from Sander in Labor Ready's Tacoma office. The cover letter from Sander stated, in pertinent part:

"Enclosed are the earning histories and work tickets for the employee's [*sic*] in question for the jobs with Oregon Welding (Central Oregon Mechanical [*sic*]). * * *

"Once you have reviewed the wages please let me know if we need to reimburse any of the employees, and we will take care of it immediately."

The package included work tickets and earnings histories for several Labor Ready employees. Those documents did not indicate on what projects the employees had

worked or how many hours the employees had worked each day.

38) The package of documents Sander sent included work tickets and earning histories for Henderson (covering the period June 15 through August 28, 1998) and Metz (for the period August 14 through August 28, 1998). Although Henderson and Metz worked on the CRCI project during October and November 1998, the documents Sander provided related only to their work on some other unidentified project not covered by the PWR laws.

39) On March 25, 1999, Marks received a telephone call from a Mr. Jacob Ryan, who said he was a representative of Labor Ready and was involved with the CRCI and Eastern Oregon University projects. Marks believed Ryan was Labor Ready's attorney.⁷ Marks told Ryan that the records she had received were insufficient.

40) The next day, Marks faxed a letter to Ryan stating, in pertinent part:

"Labor Ready is the joint employer, along with [OWS and

⁷ In fact, Ryan was employed by a firm named Clovis and Roche, which was a combination private investigation/collections agency that Labor Ready often used on large accounts. Somebody at Labor Ready or LRNW apparently contacted Ryan about Marks' inquiries, and he attempted to respond on Labor Ready's behalf. Marks was not aware that Ryan worked primarily on collection matters.

COM], of several employees working on the Eastern Oregon University project in La Grande and the Columbia Rivers [sic] Correctional Institute project in Portland. Both Labor Ready and OWS had a statutory duty to keep accurate time and payroll information for all employees working on the jobs. Labor Ready, as far as I know, did not keep separate time records for its employees, and instead relied on the daily time records submitted by OWS. I used those time records to calculate the hours worked and wages owed, documents of which you now have copies. Those documents show the hours worked according to the weekly time sheets sent to Labor Ready by OWS, and the pay information, if any, which I found on the certified payroll reports filed by Labor Ready.

"However, there are several Labor Ready employees who appear on OWS's timesheets, and consequently on my documents, who do not appear at all on Labor Ready's certified payroll reports. I therefore have no pay information for them, and am working under the assumption that they received no pay at all for the time they spent working.

"I am offering you the chance to refute that assumption, and prove to me that the employees I've determined are due wages have actually been paid for some or all of the time they

spent working on the projects in question. Perhaps you can do that by showing me weekly paychecks, or perhaps you have some other method. I do not know, nor do I have a preference. I'll examine any information you want to give me, but I need to get some resolution on this case quickly. If I have any information you need to help you respond, I'd be glad to give it to you. I look forward to hearing from you, which I'd like to do no later than next **Tuesday, March 30th**. Thank you for your attention."

41) On March 29, 1999, Marks received a fax from Ryan to which were attached two pages of payroll data related only to the Eastern Oregon University project. Ryan also had attached a copy of part of a letter Marks had written to somebody other than Ryan, on which someone had written notes related only to the Eastern Oregon project. Nothing in the fax assisted Marks in determining whether Labor Ready employees had been paid the prevailing wage on the CRCI project.

42) Marks again spoke to Ryan on the phone and told him that the documents he had sent were not sufficient. Ryan stated that additional documents would be forthcoming. On April 21, 1999, Marks received copies of Labor Ready paychecks to Henderson and Metz that she had been asking for. Marks does not know whether Ryan or somebody

at Labor Ready's corporate office sent the documents.

43) The paychecks Marks received on April 21, 1999, show the net amount paid to each employee during each week. They do not state the number of hours worked each day, the project(s) worked on, or the deductions taken.

44) On April 29, 1999, Marks sent a letter to Ryan in which she stated:

"I have not yet received the daily time cards for the seven employees working on the Eastern Oregon University and Columbia Rivers [sic] Correctional Institute projects, and frankly, I doubt you will be able to provide them for me. It appears to me that Labor Ready field offices did not keep independent time records for its employees, and instead relied on the time records provided by Oregon Welding Service and Central Oregon Mechanical, the same records on which I based my calculations. I believe those records to be accurate as to the number of hours worked by each man on the projects. The question remaining, as I've explained repeatedly, is the amount of wages paid to each man for the hours worked.

"Thus far I have not received any satisfactory answer to that question. You've sent me paychecks, and some kind of computer printout, but the paychecks do not delineate the

amount of the check which represents payment for work on the projects in question and the amount which is for work at other sites. The computer records do not make such a differentiation either. ***I must receive that information immediately.*** Please be aware that the Bureau of Labor and Industries has the ability to assess civil penalties or liquidated damages, among other penalties, against your company because of Labor Ready's repeated failure to follow Oregon's prevailing wages laws, and is considering taking such action. Please respond upon receipt of this letter."

45) Marks received no answer to her April 29, 1999, fax to Ryan. On May 4, 1999, Marks spoke to Sander, who stated, without explanation, that Labor Ready would not be providing any additional records. Sander did indicate that Labor Ready would pay the wages Marks believed were due to Henderson for his work on the CRCI project. Marks made a contemporaneous written record of her conversation with Sander. Shortly thereafter, Labor Ready did pay the wages it owed Henderson.

46) At this point, Marks had been told by Taal and another OWS supervisor that, at the end of each week, they either sent a fax to Labor Ready stating the number of hours each employee had worked on each project during that week or called Labor Ready with that information. They

stated specifically that they did not report the number of hours each employee had worked on each day, but just the total number of hours they had worked during the week. Sander confirmed to Marks that Labor Ready received information regarding the hours worked from these supervisors and stated that Labor Ready relied on that information to complete the CPRs. Holden also corroborated the supervisors' statements regarding how hours were reported. From this, Marks concluded that Labor Ready knew only the total number of hours the employees worked per week but had not made or maintained records regarding hours worked per day.

47) The forum infers that Labor Ready did not make or maintain records of the daily hours Henderson and Metz worked on the CRCI project during the weeks ending October 16, October 23, and November 6, 1998. The forum bases this finding on: the statements of OWS and COM supervisors that they reported only total weekly hours worked to Labor Ready; Labor Ready's failure to produce any documents other than CPRs showing hours worked each day and the inaccuracy of those CPRs with respect to the jobs on which Henderson and Metz had worked; the fact that the "corrected" work tickets for the week ending November 13 show only total hours worked for the week; and Carter's testimony that customer service representatives were instructed to obtain information regarding only total hours

employees worked, not hours they worked each day.

48) The CPRs Labor Ready completed for the weeks of October 16, October 23, and November 6, 1998, did purport to indicate the number of hours Henderson and Metz worked each day. Given that Labor Ready had not recorded those daily hours, the forum finds it probable that Labor Ready engaged in speculation to complete the CPRs -- for example, by assuming that when employees worked a total of 40 hours in a week, they worked eight hours on each of five days.

49) Based on the evidence described in the previous two Findings, and the complete absence of any evidence stating the employees' daily wages, the forum also infers that Labor Ready failed to make and maintain records of the daily compensation paid each employee.

50) Marks never received any additional documents from Labor Ready regarding the CRCI project. Marks did not see the documents admitted as Respondents' exhibits R-1, R-2, R-3, and R-4 until the day before hearing.

51) The November 13, 1999, CPR Marks received from Poore was the only one she received that showed the daily hours worked by each employee at CRCI. Labor Ready had prepared that document, but Marks did not know what it was based on.

(findings regarding mitigation and aggravation of the violations)

52) In March 1998, at Labor Ready's request, the Agency provided PWR training to Labor Ready employees, including instruction on how to complete CPRs. In December 1998, the Agency performed a second training for Labor Ready employees, again at the company's request. All Labor Ready customer service representatives are required to take annual PWR training. Montano-Griffin also has attended a PWR training session presented by the Agency. In addition, new Labor Ready branch managers receive some training on PWR laws from Adams, Labor Ready's director of legal services.

53) In about June 1999, Montano-Griffin informed Hartfield that his job would be terminated if he did not leave voluntarily, in part because he had violated Labor Ready's record-keeping requirements. Shortly prior to that, Hartfield had been demoted from his position as manager of the Parkrose branch. Hartfield left Labor Ready voluntarily.

54) Sometime after November 1998, Labor Ready implemented a new computerized record-keeping system. Customer service representatives using that system no longer have to separately flag each work ticket on a PWR job and fax copies of PWR work tickets to the Tacoma office. Instead, the customer service representative needs to make only one computer entry indicating that

any particular job is a PWR job. Respondents' utilization of this system lessens the risk that work on PWR jobs will not be designated and treated as such.

55) For some time prior to November 1999, Labor Ready's operations manuals included about a page of material relating to compliance with PWR laws. That material was revised and expanded in November 1999. However, neither version of the manual referred to the importance of recording the number of hours worked each day, as opposed to the total number of hours worked each week, or to the various circumstances under which employees on PWR projects are entitled to overtime pay. Nor did the documents refer to the importance of identifying the specific project or projects on which employees had worked.

56) At the time she testified, customer service representative Carter was aware only that PWR employees were entitled to overtime pay if they work more than 40 hours per week. She did not know that employees on PWR jobs were entitled to "daily overtime" under certain circumstances.

57) In 1997, the Agency investigated Labor Ready in relation to work its employees performed on a public works contract unrelated to this case. The Agency compliance specialist concluded that Labor Ready had failed to pay the appropriate prevailing wage rate, had failed to provide complete payroll and certified

statements, and had failed to pay overtime for all hours worked in excess of eight hours per day, as required by law. The Agency sent a letter to one of Labor Ready's Portland offices warning Labor Ready that the Agency would consider taking action to place the company on the List of Ineligibles if it failed to pay the prevailing wage rate in the future. The letter further warned that "[s]ubstantial civil penalties may also be imposed for any violations of the Prevailing Wage Rate Law."

58) The Agency investigated Labor Ready several other times prior to 1999 for PWR violations. Wages were collected in several of those investigations.

59) At the time of hearing, Labor Ready had ongoing difficulty ensuring that employees were paid overtime for all hours they worked on Saturdays. This problem persisted because Labor Ready's bookkeeping system used Saturday as the first day of the work week.

(credibility findings)

60) The testimony of Carter was not entirely credible. She was very defensive about the errors in Henderson's and Metz's payroll records. In addition, she testified that she never had spoken to Marks or anybody else at the Agency regarding any PWR matters. Marks testified far more credibly that it was Carter who initially referred her to Frankie Sander in Labor Ready's Tacoma office. Because of the unreliability of at least portions of Carter's tes-

timony, the forum has disbelieved that testimony whenever it was contradicted by other credible evidence.

61) Sander's testimony regarding the Agency's investigation of CRCI records was not reliable. Sander denied ever having spoken to Marks or any other Agency employee about records for work on the CRCI project. Instead, she said she had spoken only to an Agency employee named Susan, and only about another job, the Mt. Tabor project. Sander denied ever having been asked to provide payroll records related to anything other than the Mt. Tabor project and also said the only time she provided records to the Agency was when she gave Susan records related to that job. Marks testified credibly to the contrary that she spoke to Sander about the CRCI project in May 1999 and made a contemporaneous record of that contact. In addition, the record includes a letter from Sander to Marks.

62) At the time of hearing, Sander seemed remarkably uninformed about the problems involving CPRs for the CRCI project. She testified that her records indicated that Henderson and Metz worked at CRCI only during the week that ended November 13, 1998. It is true that Meyer prepared only one CPR showing that Henderson and Metz had worked at CRCI. Nonetheless, Holden repeatedly had notified Meyer, one of the people Sander supervised, that Henderson and Metz had worked additional hours

at CRCI during other weeks. Either that information never made its way to Sander, or Sander forgot or chose not to remember it. Because of Sander's apparent lack of knowledge regarding the problems with the CRCI records and the unreliability of her testimony regarding contacts with the Agency, the forum has given her testimony little weight except where it was corroborated by other credible evidence or was an admission against Respondents' interests.

63) The testimony of all other witnesses was credible.

ULTIMATE FINDINGS OF FACT

1) The CRCI project was a public works project subject to ORS 279.348 to 279.380.

2) Labor Ready was a subcontractor on the CRCI project and employed workers on that project during 1998. LRNW was not a subcontractor on the CRCI project during 1998.

3) Labor Ready did not make and maintain records of the daily compensation paid to its employees on the CRCI project during the weeks ending October 16, October 23, and November 6, 1998.

4) Labor Ready did not make and maintain records of the daily hours worked by its employees on the CRCI project during the weeks ending October 16, October 23, and November 6, 1998.

5) Labor Ready filed certified payroll reports incorrectly stating that employees Henderson and Metz had worked only on the Mt.

Tabor project during the weeks ending October 16, October 23, and November 6, 1998. In fact, Henderson and Metz had worked on the CRCI project during each of those weeks.

6) Labor Ready's certified payroll records included assertions of the hours Henderson and Metz had worked each day. Labor Ready had no records on which to base those assertions.

7) Labor Ready did not pay Henderson \$88.66 in overtime pay to which he was entitled for working on Saturday, November 7, 1998, until about May 1999.

8) On February 8, 1999, the Wage and Hour Division informed Labor Ready that it had received a PWR complaint on the CRCI project and believed there were problems the CPRs Labor Ready had submitted to ODOC. The Wage and Hour Division asked Labor Ready to file amended CPRs for the CRCI project. Labor Ready never filed the amended CPRs.

9) On February 8, 1999, the Wage and Hour Division asked Labor Ready to submit "all time and payroll reports for all employees working on the project in question [CRCI]" no later than February 12, 1999. Labor Ready provided no documents to the Agency by that date.

10) On February 24, 1999, the Wage and Hour Division again asked Labor Ready to provide records related to the CRCI project, this time by March 3, 1999. Labor

Ready submitted no documents by that date.

11) Labor Ready later sent some documents to the Wage and Hour Division, none of which provided information regarding the daily hours worked by the employees on the CRCI project or the daily compensation paid to those employees.

12) The Wage and Hour Division must know the daily hours worked by employees on PWR projects and the specific projects those employees worked on to determine whether the prevailing rate of wage and overtime has been or is being paid to the employees.

CONCLUSIONS OF LAW

1) ORS 279.348(3) defines "Public works" as follows:

"Public works' includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

OAR 839-016-0004 further provides:

"(17) 'Public work,' 'public works,' or 'public works project' includes but is not limited to roads, highways, buildings, structures and improvements of all types, the construction,

reconstruction, major renovation or painting of which is carried on or contracted for by any public agency the primary purpose of which is to serve the public interest regardless of whether title thereof is in a public agency but does not include the reconstruction or renovation of privately owned property which is leased by a public agency.

"(18) 'Public works contract' or 'contract' means any contract, agreement or understanding, written or oral, into which a public agency enters for any public work."

The CRCI project was a public works project subject to the Oregon prevailing wage rate laws.

2) OAR 839-016-0025 provides, in pertinent part:

"(1) All contractors and subcontractors performing work on public works contracts shall make and maintain for a period of three (3) years from the completion of work upon such public works records necessary to determine whether the prevailing rate of wage and overtime has been or is being paid to workers upon public works.

"(2) In addition to the Payroll and Certified Statement, Form WH-38, records necessary to determine whether the prevailing wage rate and overtime wages have been or are being paid include but are not limited to records of:

"(e) Total daily and weekly compensation paid to each employee[.]"

OAR 839-016-0510 provides:

"Each violation is separate and distinct. In the case of continuing violations, each day's continuance is a separate and distinct violation."

In failing to make and maintain records of the daily compensation paid to each employee on the CRCI project for the weeks ending October 16, October 23, and November 6, 1998, Labor Ready violated OAR 839-016-0025.

3) OAR 839-016-0025 provides, in pertinent part:

"(1) All contractors and subcontractors performing work on public works contracts shall make and maintain for a period of three (3) years from the completion of work upon such public works records necessary to determine whether the prevailing rate of wage and overtime has been or is being paid to workers upon public works.

"(2) In addition to the Payroll and Certified Statement, Form WH-38, records necessary to determine whether the prevailing wage rate and overtime wages have been or are being paid include but are not limited to records of:

"(f) The daily and weekly hours worked by each employee[.]"

In failing to make and maintain records of the daily hours worked by each employee on the CRCI project for the weeks ending October 16, October 23, and November 6, 1998, Labor Ready violated OAR 839-016-0025.

4) ORS 279.354 provides, in pertinent part:

"(1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor's knowledge. **The certified statements shall set out accurately and completely the payroll records for the prior week including**

the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid."

"(2) Each certified statement required by subsection (1) of this section shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. * * *"

(Emphasis added). Labor Ready violated ORS 279.354 by filing CPRs stating inaccurately that employees had worked only on the Mt. Tabor project during three weeks that they also had worked at CRCI.

5) ORS 279.355(2) provides:

"Every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection during normal business hours and, upon request made a reasonable time in advance, any payroll or other records in the possession or under the control of the contractor or subcontractor that are deemed necessary by the commissioner to determine if the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works."

OAR 839-016-0030(1) and (2) provide:

"(1) Every contractor and subcontractor performing work on a public works contract

shall make available to representatives of the Wage and Hour Division records necessary to determine if the prevailing wage rate has been or is being paid to workers upon such public work and records showing contract prices and sums paid as fees to the bureau. Such records shall be made available to representatives of the Wage and Hour Division for inspection and transcription during normal business hours.

"(2) The contractor or subcontractor shall make the records referred to in section (1) of this rule available within 24 hours of a request from a representative of the Wage and Hour Division or at such later date as may be specified by the division."

The Wage and Hour Division asked only Labor Ready to provide it with PWR payroll records by certain dates. LRNW, which was not a contractor or subcontractor on the CRCI project and was not asked to provide PWR records to the Wage and Hour Division, did not violate ORS 279.355(2) or OAR 839-016-0030(1) by failing to provide those records.

6) OAR 839-016-0030(3) provides:

"When a prevailing wage rate claim or complaint has been filed with the Wage and Hour Division or when the division has otherwise received evidence indicating that a

violation has occurred and upon a written request by a representative of the Division a public works contractor or subcontractor shall send a certified copy of such contractor's or subcontractor's payroll records to the Division within ten days of receiving such request. The Division's written request for such certified copies will indicate that a prevailing wage rate claim has been filed or that the division has received evidence indicating that a violation has occurred."

The Wage and Hour Division asked only Labor Ready to provide amended CPRs within ten days of its request for the documents. LRNW, which was not a contractor or subcontractor on the CRCI project and was not asked to provide the amended CPRs, did not violate OAR 839-016-0030(3) by failing to provide the documents.

7) ORS 279.370(1) provides:

"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 \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto."

See also OAR 839-016-0530 (similar). OAR 839-016-0540 provides, in pertinent part:

"(1) The civil penalty for any one violation shall not exceed \$5,000. The actual amount of

the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances."

"* * * * *

"(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530."

OAR 839-016-0520 provides:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules.

"(b) Prior violations, if any, of statutes and rules.

"(c) The opportunity and degree of difficulty to comply.

"(d) The magnitude and seriousness of the violation.

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commis-

sioner with evidence of any mitigating circumstances set out in subsection (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

The commissioner's decision to assess a civil penalty of \$4000.00 for each of Labor Ready's two charged violations of OAR 839-016-0025 and a civil penalty of \$5000.00 for Labor Ready's single charged violation of ORS 279.354(1) is an appropriate exercise of his discretion.

OPINION

THE VIOLATIONS

A. Failure to Make and Maintain Records of the Daily and Weekly Hours Worked by Each Employee

To establish that a respondent violated OAR 839-016-0025(2)(f), the Agency must prove: 1) that the respondent was a contractor or subcontractor on a public works contract subject to the Oregon prevailing wage rate laws; and 2) that the respondent failed to make and maintain records of the total daily and weekly hours worked by each employee. In this case, the participants agree both that Respondent Labor Ready was a subcontractor on the Oregon Department of Correction's CRCI project and that the CRCI project was a public works project subject to Oregon prevailing wage rate laws. The only remaining issue is whether Labor Ready failed to make and maintain the required records.

The Agency presented compelling evidence that Labor Ready did not make or maintain records of the hours Henderson and Metz worked each day on the CRCI project during the weeks ending October 16, October 23, and November 6, 1998.⁸ A Labor Ready supervisor instructed customer service representatives to accept OWS and COM supervisors' reports of the total hours employees worked each week. He did not in-

⁸ See Findings of Fact - the Merits 15, 19 and 47, *supra*.

struct them to also determine the number of hours the employees had worked each day, and the supervisors did not provide that information.

The CPRs Labor Ready filed did purport to state the daily hours worked by its employees. Given the fact that Labor Ready did not obtain or record that information, the forum has inferred that the CPRs are based on nothing more than assumptions by the person completing them. For example, Labor Ready may have assumed that an employee who worked a total of 40 hours in a week must have worked eight hours on each weekday. In any event, the CPRs do not constitute accurate records of the daily hours worked by each employee on the CRCI project.

By failing to make and maintain records of the daily hours worked by each employee during each of three weeks, Labor Ready arguably committed multiple violations of OAR 839-016-0025(2)(f).⁹ However, the Agency charged Labor Ready with having violated the rule only once. Accordingly, the forum finds only that Labor Ready committed a single violation of OAR 839-016-0025(2)(f).

B. Failure to Make and Maintain Records of the Daily

⁹ See OAR 839-016-0510 ("Each violation is separate and distinct. In the case of continuing violations, each day's continuance is a separate and distinct violation").

and Weekly Compensation Paid to Each Employee

The Agency also alleged that Labor Ready violated OAR 839-016-0025(e) by failing to make and maintain records of the daily compensation paid each employee. Based on Labor Ready's failure to record daily hours worked, and the complete absence of any evidence indicating the wages Labor Ready paid its employees each day, the forum concludes that Labor Ready failed to make and maintain records of the daily compensation paid each employee during the weeks ending October 16, October 23, and November 6, 1998. The forum finds that Labor Ready committed a single violation of OAR 839-016-0025(e), as charged in the Notice of Intent.¹⁰

C. Filing Inaccurate or Incomplete Certified Statements

Contractors and subcontractors on PWR jobs are required to file certified statements -- CPRs -- that "set out accurately and completely the payroll records for the prior week." ORS 279.354(1). Labor Ready violated this law by filing CPRs that contained inaccurate information regarding the projects on which its employees had worked. Again, in accordance with the one violation charged in the Notice of Intent, the

¹⁰ It could be argued that, under these circumstances, multiple violations were committed. See note 9, *supra*.

forum finds that Labor Ready committed a single violation of ORS 279.354(1).¹¹

D. Failure to Submit Certified Copies of Payroll Records Upon Request

The Agency initially charged all Respondents with violating OAR 839-016-0030(3) by failing to provide the Wage and Hour Division with payroll records it required on several occasions during early 1999. However, after the hearing, the Agency amended the Notice of Intent to clarify that it was charging only LRNW -- not Labor Ready -- with any violations that occurred in 1999. But LRNW was not a subcontractor on the CRCI project, the Wage and Hour Division asked only Labor Ready -- not LRNW -- for the amended CPRs, and only Labor Ready was responsible for supplying those documents. The Agency, therefore, failed to prove the violation of OAR 839-016-0030(3) charged in the amended Notice of Intent.

E. Failure to Provide Records Necessary to Determine if the PWR Has Been Paid

Near the conclusion of the hearing, the ALJ granted the Agency's motion to amend the Notice of Intent to add an allegation that Respondents violated OAR 839-016-0030(1) by failing to provide the Wage and Hour Division with records necessary to

determine if the PWR was paid. However, the Agency's later amendment of the Notice of Intent resulted in it charging only LRNW with this violation. Again, because LRNW was not a subcontractor on the CRCI project and was not asked to provide records to the Wage and Hour Division, it cannot be held responsible for any violation of OAR 839-016-0030(1).

PENALTIES

The forum has concluded that Labor Ready committed two violations of OAR 839-016-0025(2) by failing to make and maintain records of daily hours worked by, and daily compensation paid to, each of its employees on the CRCI project. The commissioner is authorized to assess a civil penalty of up to \$5000.00 for each of these violations, the amount sought by the Agency. In considering the appropriate magnitude of penalty to impose, the commissioner must consider any underpayment of wages in violation of statute or rule and:

"(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules.

"(b) Prior violations, if any, of statutes and rules.

"(c) The opportunity and degree of difficulty to comply.

"(d) The magnitude and seriousness of the violation.

"(e) Whether the contractor, subcontractor or contracting

¹¹ Again, it could be argued that multiple violations were committed. See note 9, *supra*.

agency knew or should have known of the violation."

OAR 839-016-0520(1); see OAR 839-016-0520(3).

Several aggravating factors demand a heavy penalty in this case. This is not the first time that the Agency has investigated Labor Ready for violations of the PWR laws. Labor Ready's response to those investigations was less than impressive. Although Labor Ready did arrange for its staff to receive PWR training, serious problems persisted at the time of hearing. For example, when she testified, Carter still was unaware that employees on PWR projects could be entitled to overtime if they worked more than eight hours in one day, even if they worked less than 40 hours that week.¹² Sander admitted that Labor Ready still had problems ensuring that PWR employees were paid at the overtime rate for work they performed on Saturdays.

In addition, because of Labor Ready's failure to record daily hours worked and compensation paid, Henderson did not receive all the wages he was due for working on Saturday, November 7, 1998, until about May 1999. This failure to pay the prevailing wage demonstrates the seriousness of Labor Ready's violations. If a company does not record daily hours worked and daily compensation paid, neither it nor the Agency can determine whether

employees have been paid any overtime wages to which they may be entitled under the PWR laws. Moreover, Labor Ready could have easily complied with the law by instructing its staff to determine and record the number of hours employees worked each day.

Labor Ready argues that several factors militate against the \$5000.00 penalty the Agency seeks for each violation. Labor Ready points out that it has requested and received PWR training; it no longer employs the manager who instructed employees to accept reports of total weekly hours worked on the CRCI project; it implemented a new computer system; and it has revised the PWR materials in its training manual.

The forum does not find these facts persuasive. First, the PWR training Labor Ready employees received does not appear to have had much practical effect, given Sander's testimony that Labor Ready still had difficulty paying overtime for work on Saturdays at the time of the hearing. Second, although Montano-Griffin testified that she encouraged the manager to leave because of his problems with record keeping, there is no evidence that her decision to get rid of him was related to the specific events that gave rise to the violations at issue. Third, Labor Ready's new computer system may help track which jobs are subject to the PWR laws, but there is no evidence suggesting that the computer has anything to do with whether Labor Ready staff

¹² See ORS 279.334(1)(a)(A).

actually record the specific number of hours employees work each day. Nor is there any evidence that the computer will help ensure that employees are paid any overtime to which they may be entitled for working on weekends or for working more than a certain number of hours each day or week. Finally, Labor Ready's revised PWR materials do not discuss the importance of recording daily hours worked, the various circumstances under which employees may be entitled to overtime pay, or the importance of identifying the specific project or projects upon which employees work.

This forum has not previously had occasion to determine the appropriate penalty for failure to make and maintain records of the daily hours worked by, and compensation paid to, employees on PWR projects. The forum has imposed the maximum \$5000.00 penalty per violation where respondents deliberately avoided compliance with the PWR laws. See *In the Matter of Larson Construction Co., Inc.*, 17 BOLI 54, 79-80 (1998). In this case, it appears that Labor Ready's failure to make and maintain the required records was not a deliberate attempt to circumvent the law. However, the shocking inadequacy of the record-keeping system at the company's Parkrose Branch, together with the fact that some problems remained with the company's ability to track compliance with Oregon PWR laws at

the time of hearing,¹³ convince the forum that large penalties are appropriate. The forum hereby imposes a penalty of **\$4000.00** for Labor Ready's violation of OAR 839-016-0025(e) and a **\$4000.00** penalty for Labor Ready's violation of OAR 839-016-0025(f).

The same aggravating factors weigh in favor of a large penalty for Labor Ready's filing of CPRs that inaccurately reflect the jobs on which each employee worked. Because the prevailing wage rates may differ from one job to another, neither the Agency nor the employer can determine whether the prevailing wage rate has been paid in the absence of accurate information on this point. However, the problems with Labor Ready's CPRs are even more serious than the problems with its records of hours worked. As discussed above, Labor Ready knew only the total number of hours Henderson and Metz had worked during each of three weeks. Nonetheless, Labor Ready filed CPRs for those weeks that included assertions regarding the number of hours the two employees had worked each day. There is no credible evidence in the record that anything other than sheer speculation or assumptions led Labor Ready staff to decide how many hours to report for each worker each day. The deliberate nature of Labor Ready's decision to include possibly inaccurate information regarding daily hours

¹³ See Findings of Fact – the Merits 23 and 59, *supra*.

worked leads the forum to impose a **\$5000.00** penalty for its violation of ORS 279.354(1).

RESPONDENTS' EXCEPTIONS

Respondents filed exceptions taking issue with two statements in the ALJ's Proposed Opinion. First, Respondents excepted to the ALJ's use of the phrase "shocking inadequacy of the company's record-keeping system," on the ground that a reader might infer, incorrectly, that Labor Ready had difficulties with its record-keeping system on a nation-wide basis. The exception is well taken. As Respondents point out, the evidence demonstrates only that one manager, in a single Labor Ready office, abandoned the company's usual practice of requiring employees to complete daily work tickets and, instead, relied on weekly reports of hours. No evidence suggests that managers in other offices instructed their staff to accept weekly reports of hours. The phrase to which Respondents objected has been changed to state more accurately that the inadequacies in record keeping existed at Labor Ready's Parkrose branch.

Respondents also excepted to the phrase in the Proposed Opinion stating that the inadequacies in record-keeping "had not been effectively remedied by the time of hearing." That phrase was, in fact, somewhat misleading as it implied that the problems at the Parkrose branch had not been corrected by the time of hearing. In fact, it was another problem that Labor Ready had in comply-

ing with Oregon's PWR laws that had not been corrected – the difficulty the company had in ensuring that workers were paid overtime for work they performed on Saturdays. The phrase has been changed to state more accurately that "some problems remained with the company's ability to track compliance with Oregon PWR laws at the time of hearing."

ORDER

NOW, THEREFORE, as authorized by ORS 279.370(1), OAR 839-016-0530 and OAR 839-016-0540, and as payment of the penalty assessed as a result of Respondent Labor Ready, Inc.'s violations of ORS 279.354(1) and OAR 839-016-0025(e) and (f), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Labor Ready, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of THIRTEEN THOUSAND DOLLARS (\$13,000.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order in this case until Labor Ready, Inc., complies with the Final Order.

In the Matter of
F.R. CUSTOM BUILDERS, INC.

Case Number 82-00
 Final Order of the Commissioner
 Jack Roberts
 Issued June 1, 2000.

SYNOPSIS

Respondent failed to return BOLI's 1999 prevailing wage rate survey by the date BOLI had specified. The commissioner imposed a \$500.00 civil penalty for this violation of ORS 279.359(2). ORS 279.359, ORS 279.370, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 April 14, 2000, in the conference room of the Oregon Bureau of Labor and Industries, 1250 N.E. 3rd, #B-105, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency. Respondent was represented by its president and authorized representative, Frank Ring.

The Agency called Frank Ring as its sole witness. Ring also testified on Respondent's behalf.

Respondent called no other witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 to X-10 (generated or filed prior to hearing) and X-11 (generated after hearing).

b) Agency exhibits A-1 to A-6 (submitted prior to hearing with the Agency's case summary).

c) Respondent exhibits R-1 to R-3 (submitted prior to hearing with Respondent's case summary).

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 January 14, 2000, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent unlawfully failed to complete and return the 1999 Construction Industry Occupational Wage Survey by September 15, 1999, in violation of ORS 279.359(2). The Agency sought a civil penalty of \$500.00 for the single alleged violation.

2) The Notice of Intent instructed Respondent that it was required to make a written request for a contested case hearing within 20 days of the date on

which it received the Notice, if it wished to exercise its right to a hearing.

3) The Agency served the Notice of Intent on Respondent's registered agent on or about January 21, 2000.

4) On January 28, 2000, Frank Ring, Respondent's president, sent the Agency a letter that included the following allegations:

"Our company sent the completed survey in September 1999. We received another copy late December stating you hadn't received the original copy. We then sent the second completed survey in early January 2000. We have since received a notice stating we are being penalized for failure to respond. Please relieve us from this penalty as we did respond twice."

5) On February 7, 2000, the Agency sent a letter notifying Respondent that its answer was insufficient because it did not include a request for hearing.

6) On February 14, 2000, the Agency received Respondent's request for hearing, which included a statement authorizing Ring to appear as Respondent's authorized representative.

7) The Agency filed a request for hearing with the Hearings Unit on March 1, 2000, and served it on Respondent.

8) On March 10, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for April 14, 2000;

b) a Summary 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 hearing process; and d) a copy of the Notice of Intent.

9) On March 7, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by March 30, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form that Respondent could use to prepare a case summary.

10) The Agency filed a motion for partial summary judgment on March 17, 2000. Respondent filed no response to that motion by the deadline set by the ALJ. On March 28, 2000, the ALJ denied the Agency's motion for partial summary judgment in an interim order that stated:

"The Agency alleged in the Notice of Intent to Assess Civil Penalty that Respondent unlawfully failed to complete and return the 1999 Wage Survey by September 15, 1999, as required by ORS 279.359(2). In its answer, Respondent asserted that it 'sent the

completed survey in September 1999.'

"The Agency has filed a motion for partial summary judgment on the issue of whether Respondent violated ORS 279.359(2), to which Respondent has not responded.¹ According to the Agency, Respondent's statement that it 'sent the completed survey in September 1999' is insufficient to create a dispute regarding whether the survey was filed by September 15, because Respondent did not explicitly deny that it failed to return the survey by that date.

"A participant in a BOLI contested case hearing is entitled to summary judgment only if the participant demonstrates that '[n]o genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law * * *.' OAR 839-050-0150(4)(B). In reviewing a motion for summary judgment, this forum 'draw[s] all inferences of fact from the record against the participant filing the motion for summary judgment * * * and in favor of the participant opposing the motion * * *.' *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff'd without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993). In considering summary judgment motions, this forum gives some evidentiary weight to unsworn assertions contained in the participants'

pleadings and other filings. *Cf. In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997) (considering contents of the Respondent's answer in making factual findings in a default hearing).

"As noted above, the Agency contends that no material facts remain in dispute because Respondent did not specifically deny that it failed to return the wage survey by September 15, 1999. The forum disagrees. Respondent has asserted that it 'sent the complete survey in September 1999.' Drawing all reasonable inferences in favor of Respondent, the forum finds that the statement leaves open the possibility that Respondent sent the survey before September 15, 1999. That material fact, therefore, remains in dispute.

"In further support of its argument, the Agency points out that in default hearings, 'this forum has found unsworn assertions in an answer overcome whenever they are controverted by other credible evidence on the record.' The Agency argues that the forum should apply that reasoning in this case, to find that Respondent's unsworn assertion that it sent the survey in September 1999 is overcome by Wood's sworn statement that the Agency received no 1999 survey from Respondent until January 21, 2000.

"The difficulty with the Agency's argument is that it re-

lates to the *weighing* of evidence that the forum conducts when ruling in a default situation. In addition, the default analysis involves a determination of whether the 'other * * * evidence on the record' is credible, which also requires an assessment of the weight the evidence will be given. By contrast, in ruling on a summary judgment motion, the forum's role is not to weigh or assess the credibility of the evidence, but to determine whether the moving participant has proved the absence of *any* material dispute -- *i.e.*, that *no* reasonable fact-finder could rule in favor of the other participant. *Cf. Jones v. General Motors Corp.*, 325 Or 404, 414, 939 P2d 608, 614 (1997) ('the court must deny summary judgment if a hypothetical objectively reasonable *factfinder* could resolve a material dispute as to the facts in favor of the adverse party'; emphasis in original). In this case, evidence creating a material dispute exists, in the form of Respondent's statement that it sent the completed survey in September 1999. Because that statement leaves open the possibility -- however slim -- that Respondent could prove that it returned the survey by September 15, 1999, the forum must rule against the Agency's motion for partial summary judgment.

"The Agency's motion for partial summary judgment is **DENIED.**"

"¹ The forum does not automatically rule in favor of a participant moving for summary judgment where the other participant fails to file a response, just as it does not automatically rule in favor of the Agency in default cases, but must first consider the record to determine whether the Agency has established a *prima facie* case supporting its claim."

11) Respondent and the Agency filed timely case summaries. Respondent's case summary did not include a statement certifying that Respondent had served it on the Agency. The ALJ contacted the Agency case presenter, verified that he had received a copy of Respondent's case summary, and issued an order disclosing this *ex parte* contact and reminding Respondent that it was required to include a certificate of service with each document it filed with the Hearings Unit.

12) The Agency filed a supplement to its case summary on April 5, 2000.

13) At the start of the hearing, the ALJ confirmed that Respondent's authorized representative had received the Summary of Contested Case Rights and had no questions about it.

14) Pursuant to ORS 183.415(7), the ALJ verbally ad-

vised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) Before the Agency began presenting its case, the participants stipulated to one fact: that the Employment Department received Respondent's completed wage survey on January 21, 2000. The participants also stipulated to admission of all the exhibits attached to the case summaries.

16) The ALJ issued a proposed order on May 4, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was a construction contractor based in Redmond, Oregon, and employed workers on construction projects. Respondent was engaged primarily in residential construction during 1999, but also built one non-residential structure that year. That non-residential structure is a small office building that is owned either by Respondent or by Respondent's president, Frank Ring.

2) The Research and Analysis section of the Oregon Employment Department ("Employment Department") contracted with BOLI in 1998 and 1999 to conduct a Construction Industry Occupational Wage Survey ("wage survey"). The BOLI Commis-

sioner planned to, and did, use the survey to aid in the determination of the prevailing wage rates in Oregon.

3) On or about August 16, 1999, the Employment Department sent Respondent a wage survey packet, which included a postage paid envelope for return of the survey. The phrase "FILING DEADLINE: September 15, 1999" was displayed prominently on the front of the survey form. The form asked contractors to "provide wage data for all types of non-residential construction projects," including both "Private" and "Public" construction. A letter included with the survey form notified contractors that "[f]ailure to return a completed survey form [might] result in a monetary fine." The letter also stated that persons who worked only on residential construction during the survey period should "FILL OUT THE FIRM INFORMATION ON THE SURVEY FORM, AND WRITE IN THE WAGE DATA GRID THAT YOUR FIRM *ONLY* PERFORMED RESIDENTIAL WORK" and return the survey in the provided envelope.

4) Respondent received the survey packet.

5) Ring testified that his payroll clerk told him that she returned the completed wage survey sometime prior to September 15, 1999. However, Ring also stated that he might have not seen the survey before it was sent and that the clerk could have mailed it in the wrong envelope.

6) By about September 20, 1999, the Employment Department had not received a completed survey from Respondent, so it sent Respondent a "survey past due" post card. The card reminded Respondent that it was required by law to provide the requested information and that filing fraudulent or incomplete information could result in civil penalties.

7) By about October 18, 1999, the Employment Department still had not received a completed survey from Respondent, so it sent Respondent a second "survey past due" card, this time with the words "Final Notice" stamped on it.

8) On December 15, 1999, the Agency sent Respondent a letter stating that it had not received Respondent's 1999 wage survey report. The letter continued:

"Pursuant to ORS 279.359, you are hereby required to provide the information requested on the attached form and return it to this office by December 30, 1999.

"Failure to provide the requested information by this date may result in an audit of your firm's records by a Wage and Hour Compliance Specialist and/or the assessment of a civil penalty.

"If you have any questions regarding this matter, please contact Lois Banahene, Wage and Hour Compliance Leadworker, at (503) 731-4692."

Nancy Ring, Respondent's corporate secretary, received the letter on December 21, 1999.

9) On January 14, 2000, the Agency issued the Notice of Intent to Assess Civil Penalty against Respondent for its failure to return the 1999 wage survey. In a cover letter accompanying the Notice, the Agency stated that it still had not received the completed survey. The letter further stated that if Respondent "fail[ed] to complete and return the 1999 survey, after the initiation of this action, the Bureau [would] move to amend the Notice of Intent to substantially increase the amount of civil penalty."

10) The Employment Department received a completed 1999 wage survey from Respondent on January 21, 2000. It had not received a completed survey from Respondent before that date.

11) The Employment Department and the Agency sent all the above-mentioned documents to Respondent's correct address by first-class or certified mail.

12) From the foregoing facts, the forum infers that Respondent did not return the completed 1999 wage survey at any time prior to January 2000.

13) A single contractor's failure to return the wage survey may adversely affect the accuracy of the Agency's prevailing wage rate determinations.

ULTIMATE FINDINGS OF FACT

1) Respondent is an Oregon employer.

2) The commissioner conducted a wage survey in 1999 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) Respondent received the commissioner's 1999 wage survey.

4) Respondent failed to return the completed survey by September 15, 1999, the date specified by the commissioner.

5) There is no evidence in the record that Respondent has committed previous violations of the prevailing wage rate laws.

6) Respondent could easily have returned the survey by September 15, 1999, and knew or should have known of its failure to do so.

CONCLUSIONS OF LAW

1) ORS 279.359 provides, in pertinent part:

"(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

** * * * *

"(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2). Respondent's failure to return a completed 1999 wage survey by September 15, 1999, violated ORS 279.359(2).

2) ORS 279.370 provides, in pertinent 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 \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto."

OAR 839-016-0520 provides:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor, or contracting agency in responding to previous violations of statutes and rules.

"(b) Prior violations, if any, of statutes and rules.

"(c) The opportunity and degree of difficulty to comply.

"(d) The magnitude and seriousness of the violation.

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in subsection (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

OAR 839-016-0530 provides, in pertinent part:

"(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"* * * * *

"(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

"* * * * *

"(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]"

OAR 839-016-0540 provides, in pertinent part:

"(1) The civil penalty for any one violation shall not exceed \$5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"* * * * *

"(5) The civil penalty for all * * * violations [other than violations of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530."

The commissioner has exercised his discretion appropriately by imposing a \$500.00 civil penalty for Respondent's violation of ORS 279.359(2).

OPINION

To prove a violation of ORS 279.359(2), the Agency must show that:

- (1) Respondent is a "person;"
- (2) The commissioner conducted a survey in 1999 that

required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;

(3) Respondent received the commissioner's 1999 survey; and

(4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

Ring's testimony that Respondent had employees during 1999 establishes that Respondent was a "person" for purposes of ORS 279.359. The Agency's uncontested evidence establishes that the commissioner conducted a wage survey in 1999 requiring people to return completed survey forms by September 15, 1999. Ring admits that Respondent received the survey form. Thus, the only question at issue is whether Respondent failed to make the required reports or returns by September 15, 1999.

Ring testified that his payroll clerk told him that she returned the survey before September 15, 1999. However, he also testified that he may not have seen the survey before it was mailed and he admitted that his payroll clerk could have sent the survey in the wrong envelope. Moreover, Respondent did not contest the Agency's assertion that it did not receive a completed survey from Respondent until January 21, 2000.

The forum finds Ring's testimony unpersuasive in light of the

uncontested evidence that the Employment Department sent the survey to Respondent's correct address, that the survey packet was not returned to the Department as undeliverable, and that the Department did not receive a completed survey until January 21, 2000. From these facts, the forum infers that it is more likely than not that Respondent did not return the survey at any point prior to January 2000. By failing to return a completed survey by September 15, 1999, Respondent violated ORS 279.359(2).

Respondent raised two additional defenses at hearing. First, Respondent argued that the survey required responses only from contractors that performed non-residential construction and that, because Respondent had performed only residential construction in 1999, it was not required to return the survey. That argument fails on both the facts and the law. First, Respondent did build one commercial structure in 1999, an office building. The fact that Respondent built the office for its own use is immaterial -- the construction still was non-residential. Second, even persons who did only residential construction were required to return the survey form, even though their completed surveys would not include wage data.¹

¹ See ORS 279.359(5) (defining "persons" required to respond); Exhibit A-2 at 13 (providing instructions on how persons who performed only residen-

Respondent's final argument was that it was not required to complete the survey because it does not do prevailing wage work or pay the prevailing wage. Contrary to Respondent's belief, all persons who received the survey were required to complete it, whether their work was on private contracts, public contracts, or both.²

The commissioner may impose a penalty of up to \$5000.00 for Respondent's violation of ORS 279.359(2). In determining the appropriate size of the penalty, the forum must consider the factors set out in OAR 839-016-0520. In this case, two factors weigh in favor of a relatively light penalty. First, there is no evidence that Respondent previously has violated the prevailing wage rate laws. Second, although the accuracy of the Agency's prevailing wage rate determinations depends on receiving completed surveys from all contractors, Respondent's violation is not as serious as violations like failure to pay or post the prevailing rate of wage. On the other hand, it would have been relatively easy for Respondent to comply with the law by returning the wage survey, and the Agency gave Respondent

several opportunities to comply before issuing the Notice of Intent. Moreover, because it received warnings from the Agency, Respondent knew or should have known of the violation. Under these circumstances, the forum finds that the \$500.00 penalty proposed by the Agency is appropriate.

Ring's declarations that he supports the Agency's mission do not persuade the forum to lower the penalty. Although Respondent may pay its employees more than the law requires, and may be an excellent employer, that has little relationship to the need for it to timely return wage surveys. Indeed, workers may suffer substantial financial harm if the prevailing wage rates set by the commissioner do not accurately reflect wages paid in the community because employers who pay their employees well do not return the surveys.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **F.R. Custom Builders, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of FIVE HUNDRED DOLLARS (\$500.00), plus any

tial construction should respond to the survey).

² See ORS 279.359(5) (defining "persons" required to respond); Exhibit A-2 at 4 (stating that wage data should be provided for "all types of non-residential construction," including "Public & Private").

interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

**In the Matter of
KEITH TESTERMAN, dba
TESTERMAN MASONRY**

Case Number 43-00
Final Order of the Commissioner
Jack Roberts
Issued June 1, 2000.

SYNOPSIS

Respondent, a subcontractor on a project subject to Oregon's prevailing wage rate laws, intentionally failed to pay three employees the wages they were due under those laws. Respondent also filed three inaccurate and incomplete certified payroll reports. The commissioner imposed penalties totaling \$6000.00 for these six violations of the prevailing wage rate laws. The commissioner also ordered that Respondent and any firm, corporation, partnership or association in which Respondent has a financial interest, be placed on the list of those ineligible to receive public works contracts or subcontracts for a period of three years. ORS 279.350, ORS 279.354, ORS 279.361, ORS 279.370, OAR 839-016-0010, OAR 839-016-0035, OAR 839-016-0085, 839-016-0090, OAR 839-016-0520, OAR

839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 April 12, 2000, in the conference room of the Oregon Bureau of Labor and Industries, 1250 N.E. 3rd, #B-105, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency. Respondent did not appear at the hearing.

The Agency called BOLI compliance specialist Rhoda Briggs and Keeton-King Construction, Inc., employee Carl Adkins as its witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 to X-19 (generated or filed prior to hearing) and X-20 (generated after the hearing).

b) Agency exhibits A-1 through A-17 (submitted prior to hearing with the Agency's case summary) and A-18 and A-19 (submitted during the hearing).

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 November 23, 1999, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in which it made the following charges against Respondent:

a) Between approximately August 10 and 23, 1997, Respondent provided manual labor on a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay \$2711.91 in prevailing wages to three employees, in violation of ORS 279.350 and OAR 839-016-0035.

b) Respondent filed three inaccurate and incomplete certified payroll reports covering the periods August 10 through 16, August 17 through 23 and August 24 through 30, 1997, in violation of ORS 279.354 and OAR 839-016-0010.

The Agency sought a \$1000.00 civil penalty for each of the six alleged violations. The Agency also asked that Respondent and any firm, corporation, partnership or association in which he had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works for a period of three years.

2) The Notice of Intent instructed Respondent that he was

required to make a written request for a contested case hearing within 20 days of the date on which he received the Notice, if he wished to exercise his right to a hearing.

3) The Agency served the Notice of Intent on Respondent on or about November 30, 1999, together with a document providing information on how to respond to a notice of intent.

4) Respondent mailed a request for hearing on December 1, 1999, which the Agency received on December 6. In that request, Respondent alleged that he had filed for bankruptcy in April 1998 and "was discharged in October, 1998."

5) On December 7, 1999, Agency case presenter Gerstenfeld sent a letter notifying Respondent that his request for hearing did not constitute an answer. Gerstenfeld stated that if Respondent did not file an answer including an admission or denial of each alleged fact by December 20, 1999, a final order on default would be issued. Gerstenfeld sent another letter on December 21, 1999, informing Respondent that a final order on default would be issued unless the Agency received an answer by December 30, 1999.

6) The Agency received an answer from Respondent on December 30, 1999. In his answer, Respondent admitted that he was a subcontractor on the "6 Workbay OMS Shop" in La Grande, Oregon, and that the 6 Workbay

OMS Shop project was a public works project conducted by the Oregon Military Department that consisted of construction, reconstruction and/or major renovation. Respondent also admitted that the 6 Workbay OMS project was not regulated under the federal Davis-Bacon Act, cost more than \$25,000.00, and was subject to regulation under Oregon's prevailing wage rate laws. Respondent denied the alleged violations.

7) The Agency filed a request for hearing with the Hearings Unit on January 5, 2000, and served that request on Respondent the same day.

8) On January 12, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for April 12, 2000; b) a Summary 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 hearing process; and d) a copy of the Notice of Intent.

9) On January 31, 2000, the Agency moved for a discovery order requiring Respondent to produce six categories of documents. Respondent filed no objections to the Agency's motion, and the ALJ issued an order requiring Respondent to produce all requested documents.

10) On February 3, 2000, the Agency's Legal Policy Advisor sent Respondent a copy of the Agency's recently amended ad-

ministrative rules for contested case proceedings.

11) On March 7, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by March 30, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form that Respondent could use to prepare a case summary.

12) Each of the above-described letters from the Agency and the Hearings Unit to Respondent, including the Notice of Hearing, were sent to Respondent at 1940 NE Sams Loop #4, Bend, Oregon 97701, except the Notice of Intent, which was served on Respondent at the Deschutes County Sheriff's Office.

13) On or about March 16, 2000, the Hearings Unit received notice from the United States Postal Service that Respondent's address had changed to 20641 Mary Way, Bend, Oregon 97701-8519. The ALJ issued an order on March 17, 2000, requiring Respondent to provide the Hearings Unit and the Agency with his correct mailing address by March 24, 2000. The order was sent to both of Respondent's addresses (Sams Loop and Mary Way). The Hearings Unit never received any

notification from Respondent regarding his correct mailing address.

14) The Agency filed a timely case summary on March 30, 2000. Respondent did not file a case summary.

15) Respondent did not appear at the time set for hearing and nobody appeared on his behalf. Respondent had not notified the forum that he would not be appearing at the hearing. Pursuant to OAR 839-050-0330(2), the ALJ waited thirty minutes past the time set for hearing. When Respondent still did not appear, the ALJ declared Respondent to be in default and commenced the hearing.

16) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) The ALJ issued a proposed order on May 4, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) In August 1996, the Oregon Military Department's "6 Workbay OMS Shop" project in La Grande, Oregon ("the Project") was advertised for bid. The Project was a public works project, was not regulated under the federal Davis-Bacon Act, cost in excess of

\$25,000.00, and was subject to regulation under Oregon's prevailing wage rate laws. Because the Project was first bid in August 1996, the Agency's July 1996 prevailing wage rate book set forth the prevailing wage rates that were to be paid on the project.

2) Keeton-King Construction, Inc., was the general contractor on the Project. Respondent was a subcontractor of Keeton-King and performed masonry work on the Project. Carl Adkins was Keeton-King's payroll clerk at material times and dealt with Respondent's certified payroll reports.

3) Steve Schroeder, Michael Lovato, and Peter Aragon all were employees of Respondent and worked as tenders to masons on the Project during the summer of 1997. The applicable prevailing wage rate for tenders to masons was \$18.09 per hour plus \$5.60 per hour for fringe benefits, for a total of \$23.69 per hour.

4) Carl Gonzalez was Respondent's foreman on the Project and kept records of the hours Respondent's employees worked. Respondent employed several other people on the Project, including Dave Hartsfield.

5) On September 12, 1997, Schroeder filed a wage claim with the Agency claiming that Respondent failed to pay him wages for the period August 11 through 26, 1997. Rhoda Briggs, a BOLI compliance specialist, was assigned to investigate that claim.

6) In his wage claim, Schroeder alleged that Respondent owed

him several hundred dollars he earned working both on the Project and on a project for Albertson's that was not governed by the prevailing wage rate laws. Schroeder also completed a complaint form on which he indicated more specifically that Respondent had not paid him wages for five hours of overtime work he had performed on the Project. Schroeder stated that Respondent had said he would pay Schroeder in cash for those hours, but never did.

7) On September 29, 1997, Aragon and Lovato filed wage claims in which each asserted that Respondent had failed to pay him \$1156.31 in wages he earned for over 40 hours he worked from August 17 through 23, 1997.

8) Briggs met with the three employees soon after they filed their claims against Respondent. Aragon provided documents supporting his claim, including a pay stub for the week of August 11 through 16, 1997. That pay stub stated that Aragon worked a total of 40 hours. Aragon asserted that he actually had worked 47 hours that week and told Briggs that Respondent had paid him in cash for the seven hours of overtime that were not recorded on the pay stub. Aragon did not claim that Respondent had underpaid him for the work he performed during the week of August 11 through 16.

9) Lovato also provided documents supporting his claim, including a pay stub for the week

of August 11 through 16, 1997.¹ That pay stub stated that Lovato had worked a total of 40 hours. Lovato asserted that he actually had worked 47 hours that week and told Briggs that Respondent had paid him in cash for the seven hours of overtime that were not recorded on the paystub. Lovato did not claim that Respondent had underpaid him for the week of August 11 through 16.

10) Briggs concluded that Lovato's and Aragon's claims were credible, in part because they could have denied that Respondent paid them cash for the overtime they worked between August 11 and 16, but did not.

11) Briggs contacted Respondent, who said that he had paid Schroeder, Aragon and Lovato the wages they were due. Briggs asked Respondent to provide documents supporting that assertion, including canceled paychecks. Respondent gave Briggs some documents, but they did not relate to the three workers. Briggs never heard from Respondent again.

12) Briggs calculated that Respondent owed Aragon \$1229.79, owed Lovato

¹ Lovato's pay stub got washed and some numbers on it became unreadable. Lovato wrote the numbers back in before giving the pay stub to Briggs. The forum has no reason to believe that Lovato's notations are inaccurate.

\$1229.79,² and owed Schroeder \$252.33 in unpaid wages for work they had performed on the Project.

13) For the reasons set forth in Findings of Fact – the Merits 23 and 24, *infra*, the forum finds credible the claims of Aragon, Schroeder, and Lovato that Respondent failed to pay their wages. The forum concludes that Respondent failed to pay Aragon, Lovato, and Schroeder the prevailing rate of wage for all the hours they worked on the Project, as calculated by Briggs.

14) On December 1, 1997, the Agency filed a notice of claim against the bond posted by Keeton-King for these wages and additional wages the Agency then believed Respondent may not have paid other employees on the Project.³ Briggs sent a copy of the notice of claim to Respondent.

15) On January 8, 1998, Briggs sent Respondent a letter asking him to provide the Agency with paychecks for the wages due

Schroeder, Aragon and Lovato. She stated that if Respondent failed to supply the paychecks by January 18, 1998, “we will request payment from the prime contractor, Keeton-King Construction, Inc.” In that letter, Briggs also informed Respondent of the possibility that he could be placed on the list of ineligible. Respondent did not respond to the letter.

16) The forum infers that Respondent’s failure to pay the prevailing wage rate to Schroeder, Lovato and Aragon was intentional. Had Respondent inadvertently failed to pay the wages, he could have responded to Briggs’ inquiries by making belated payments. Instead, Respondent responded by providing irrelevant documents, then ignoring Briggs’ attempts at communication. Moreover, nothing in the record suggests that Respondent’s failure to pay the wages was a mere oversight or the result of an innocent bookkeeping error.

17) On February 3, 1998, Briggs notified Keeton-King that the Agency’s attempts to collect the unpaid wages from Respondent had been unsuccessful. Briggs asked that Keeton-King pay the wages.

18) Adkins, Keeton-King’s payroll clerk, believed the workers’ claims that Respondent had not paid them, in part because Keeton-King had received informal complaints that Respondent was not paying all wages due his employees. Consequently, Keeton-King supplied the Agency with paychecks for Schroeder, Aragon,

² Briggs’ calculation sheet actually shows that Respondent owed Lovato \$1229.80, but her communications with Respondent and Keeton-King all state the amount owed as \$1229.79, consistent with the amount owed Aragon.

³ Briggs later sent a letter to each of Respondent’s other employees on the Project asking them to contact her if they had not been fully paid. None of those employees responded, so the Agency concluded that Respondent owed back wages only to Schroeder, Lovato, and Aragon.

and Lovato covering all of the wages Respondent had failed to pay them for their work on the Project. The Agency forwarded those checks to the three workers.

19) Respondent never reimbursed Keeton-King for the wages Keeton-King paid Schroeder, Aragon and Lovato on Respondent's behalf. Keeton-King suffered a financial loss as a result of paying the wages because it previously had advanced money to Respondent to pay his employees. In effect, Keeton-King paid twice for the three workers' services.

20) During the Agency's investigation of the prevailing wage claims, Keeton-King supplied Briggs with three certified payroll reports ("CPRs") Respondent had given the contractor for work his employees performed on the Project. Respondent's CPR for the week of August 10 through 16, 1997, reports the total amount of money deducted from each employee's wages, but does not describe the nature of those deductions as required by BOLI's Form WH-38, the payroll/certified statement form. In addition, this CPR states that only 13 of Respondent's employees worked on the Project during the week of August 10 through 16. Gonzalez's records, which the forum finds more reliable than Respondent's,⁴ state that 14 employees worked on the Project that week, including Hartsfield, who is not mentioned on the CPR.

⁴ See Findings of Fact – the Merits 25 and 26, *infra*.

21) Respondent's CPR for the week of August 17 through 23, 1997, states that Respondent paid Aragon and Lovato for the work they performed on the Project that week. In fact, Respondent did not pay Aragon and Lovato for that work.⁵ In addition, the CPR does not describe the nature of the deductions taken from employee's wages.

22) Respondent's CPR for the week of August 24 through August 30, 1997, does not specify the trade classification for one of the employees listed, John Zarr. In addition, the CPR does not describe the nature of the deductions taken from employees' wages.

23) The forum finds the wage claims of Aragon and Lovato to be credible. Aragon and Lovato both stated they had worked 47 hours during the week of August 11 through 16, 1997. The records of foreman Gonzalez confirm that the two employees did work several hours of overtime that week.⁶ Aragon and Lovato

⁵ See Findings of Fact – the Merits 5-7, 12 and 13, *supra*.

⁶ Gonzalez's records show hours worked for seven employees identified by first and last names, which do not include Aragon or Lovato. The records also show hours worked by seven employees identified only by their first names, including a "Mike," whom the forum infers is Michael Lovato, and a "Pete," whom the forum infers is Peter Aragon. Gonzalez's records state that Mike and Pete worked only six hours of overtime each, not seven, as Aragon and Lo-

easily could have claimed that Respondent never paid them for those overtime hours, but did not. In addition, Aragon's and Lovato's claims regarding the hours they worked during the week of August 18 through 22 – for which they were not paid – roughly match the hours recorded by Gonzalez.

24) The forum finds Schroeder's wage claim to be credible. Schroeder claimed he was not paid for five hours of overtime he worked during the week of August 11 through 16, 1997. Gonzalez's records for that week confirm that claim, stating that Schroeder worked 45.5 hours, in contrast with Respondent's pay-stub, which states that Schroeder worked only 40 hours.

25) The forum gives little weight to Respondent's records and the unsworn assertions in his answer except where his statements are consistent with other credible evidence. The forum has several reasons for finding Respondent not to be credible. First, the pay stubs Respondent issued to Aragon and Lovato falsely state that they worked only 40 hours during the week of August 10 through 16, 1997. Second, Respondent has a 1994 felony conviction for tampering with drug

vato asserted in their wage claims. The forum does not regard this one-hour discrepancy as significant – the important fact is that the employees freely admitted they had been paid for the overtime, when they easily could have claimed that Respondent owed them wages for those hours.

records by knowingly uttering a forged prescription for a controlled substance. Finally, Respondent's assertion that he paid Aragon, Schroeder and Lovato in full is undercut by his failure to provide the Agency with any payroll records or canceled checks supporting that claim.

26) The forum finds Gonzalez's records of hours worked by the employees to be reliable because they generally correspond to the claims made by the three unpaid employees.

27) The testimony of witnesses Briggs and Adkins was credible.

28) Respondent's failure to pay all wages due on the Project was not the first time he had run afoul of Oregon's prevailing wage rate laws. In February 1996, Briggs investigated Respondent and concluded that he had failed to pay the prevailing wage rate on a public works project, had failed to pay overtime, and had failed to post the prevailing wage rates in a conspicuous and accessible place. Briggs sent Respondent a warning letter that stated:

"The Prevailing Wage Rate Law * * * allows the Commissioner of the Bureau of Labor and Industries to place contractors or subcontractors who intentionally fail or refuse to pay the prevailing wage rate on a list of persons ineligible to receive public works contracts * * *. Persons on this list may not receive a contract or sub-

contract for a public work for up to three years.

"This will advise you that the Bureau of Labor and Industries will consider taking action to place Keith E. Testerman, Authorized Rep. and Registrant, Testerman Masonry and any business in which you have a financial interest on the list of Ineligibles should you or your company be found to have failed or refused to pay the prevailing wage rate in the future."

The forum has no reason to disbelieve Briggs' uncontroverted conclusion that Respondent failed to pay and post the prevailing wage and finds that Respondent did commit those previous violations.

ULTIMATE FINDINGS OF FACT

1) The Project was a construction, reconstruction or major renovation project carried out by the Oregon Military Department, a public agency, to serve the public interest. The Project was not regulated under the federal Davis-Bacon Act and had a cost of more than \$25,000.00.

2) Respondent was a subcontractor on the Project.

3) Schroeder, Aragon and Lovato worked on the Project as Respondent's employees. Respondent failed to pay Schroeder \$252.33 in wages he earned for five hours of overtime work he performed on the Project. Respondent failed to pay Aragon and Lovato \$1229.79 in wages each of

them earned for a week of work they performed on the Project.

4) Respondent's failure to pay Schroeder, Aragon and Lovato at the prevailing wage rate for each hour of work they performed on the Project was intentional. It would not have been difficult for Respondent to pay the employees all wages they were owed.

5) As a result of Respondent's failure to pay the prevailing wage rate to Schroeder, Aragon and Lovato for all the hours they worked on the Project, Keeton-King paid those wages on Respondent's behalf. Keeton-King suffered a financial loss because of Respondent's failure to pay the prevailing rate of wage.

6) Respondent submitted three CPRs for the Project. The CPR for the week of August 10 through 16, 1997, did not include a report of the hours that Hartsfield worked that week. The CPR also failed to describe the nature of the deductions made from the employees' wages.

7) The CPR for the week of August 17 through 23, 1997, falsely stated that Respondent had paid Aragon and Lovato the wages they earned that week. The CPR also failed to describe the nature of the deductions made from the employees' wages.

8) The CPR for the week of August 24 through 30, 1997, did not specify the trade classification for one of Respondent's employees on the Project. The CPR also failed to describe the nature of the

deductions made from the employees' wages.

9) Respondent knew or should have known of the inaccuracies and omissions in the CPRs. It would not have been difficult for Respondent to file accurate and complete CPRs.

10) Respondent previously committed violations of Oregon's prevailing wage rate laws by failing to pay the prevailing wage and failing to post the prevailing wage rates.

CONCLUSIONS OF LAW

1) ORS 279.348(3) provides:

"Public works' includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

See also OAR 839-016-0004(17) (similar). ORS 279.348(5) provides:

"Public agency' means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter."

See also OAR 839-016-0004(16) (same). The Project was a public works project.

2) ORS 279.357 provides, in pertinent part:

"(1) ORS 279.348 to 279.380 do not apply to:

"(a) Projects for which the contract price does not exceed \$25,000.

"(b) Projects regulated under the Davis-Bacon Act (40 U.S.C. 276a). * * *"

The Project did not fall within the exemptions created by ORS 279.357.

3) ORS 279.350 provides, in pertinent part:

"(1) The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash, by the making of contributions of a type referred to in ORS 279.348(4)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279.348(4)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs

is not less than the prevailing rate of wage.”

OAR 839-016-0035 provides, in pertinent part:

“(1) Every contractor or subcontractor employing workers on a public works project shall pay to such workers no less than the prevailing rate of wage for each trade or occupation, as determined by the Commissioner, in which the workers are employed.

“(2) Every person paid by a contractor or subcontractor in any manner for the person’s labor in the construction, reconstruction, major renovation or painting of a public work is employed and must receive no less than the prevailing rate of wage, regardless of any contractual relationship alleged to exist. Thus, for example, if partners are themselves performing the duties of a worker, the partners must receive no less than the prevailing rate of wage for the hours they are so engaged.”

Respondent was required to pay the prevailing rate of wage to all workers he employed on the Project. Respondent committed three violations of ORS 279.350 and OAR 839-016-0035 by failing to pay Schroeder, Aragon and Lovato the prevailing wage rate for each hour they worked on the Project.

4) ORS 279.354(1) provides:

“The contractor or the contractor’s surety and every

subcontractor or the subcontractor’s surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the contractor or the contractor’s surety or subcontractor or the subcontractor’s surety that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor’s knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker’s correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.”

OAR 839-016-0010 provides, in pertinent part:

“(1) The form required by ORS 279.354 shall be known as the Payroll and Certified

Statement, Form WH-38. The Form WH-38 shall accurately and completely set out the contractors or subcontractor's payroll for the work week immediately preceding the submission of the form to the public contracting agency by the contractor or subcontractor."

The three CPRs Respondent filed all were incomplete because they did not describe the nature of the deductions taken from employees' wages. In addition, the CPR for August 10 through 16, 1997, inaccurately stated that only 13 employees had worked on the Project, omitting Hartsfield's hours. The CPR for August 17 through 23 inaccurately stated that Respondent had paid Aragon and Lovato the wages they earned that week. The CPR for August 24 through 30 was incomplete because it did not specify one employee's trade classification. Respondent committed three violations of ORS 279.354 and OAR 839-016-0010 by submitting these three inaccurate and incomplete CPRs.

5) ORS 279.370 provides, in pertinent 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 \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto."

OAR 839-016-0520 provides:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor, or contracting agency in responding to previous violations of statutes and rules.

"(b) Prior violations, if any, of statutes and rules.

"(c) The opportunity and degree of difficulty to comply.

"(d) The magnitude and seriousness of the violation.

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in subsection (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the

commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

OAR 839-016-0530 provides, in pertinent part:

"(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"(2) Civil penalties may be assessed against any contractor, subcontractor or contracting agency regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

"(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

"(a) Failure to pay the prevailing rate of wage in violation of ORS 279.350;

"* * * * *

"(e) Filing inaccurate or incomplete certified statements in violation of ORS 279.354[.]"

OAR 839-016-0540 provides, in pertinent part:

"(1) The civil penalty for any one violation shall not exceed \$5,000. The actual amount of

the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) For purposes of this rule "repeated violations" means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.

"(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty shall be calculated as follows:

"(a) An equal amount of the unpaid wages or \$1,000, whichever is less, for the first violation;

"(b) Two times the amount of the unpaid wages or \$3,000, whichever is less, for the first repeated violation;

"(c) Three times the amount of the unpaid wages or \$5,000, whichever is less, for second and subsequent repeated violations.

"* * * * *

"(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.

"(6) The civil penalties set out in this rule shall be in addi-

tion to any other penalty assessed or imposed by law or rule.”

The commissioner’s imposition of a \$1000.00 civil penalty for each of Respondent’s six violations of Oregon’s prevailing wage rate laws is an appropriate exercise of the commissioner’s discretion.

6) ORS 279.361 provides, in pertinent part:

“(1) When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS 183.310 to 183.550, determines that a contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works, a subcontractor has failed to pay to its employees amounts required by ORS 279.350 and the contractor has paid those amounts on the subcontractor’s behalf, or a contractor or subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. The commissioner shall maintain a written list of

the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies.”

OAR 839-016-0085 provides, in pertinent part:

“(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that for a period not to exceed three years, a contractor, subcontractor or any firm, limited liability company, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for a public work:

“(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on public works as required by ORS 279.350;

“(b) The subcontractor has failed to pay its employees the prevailing rate of wage required by ORS 279.350 and the contractor has paid the employees on the subcontractor’s behalf[.]

“* * * * *

“(4) The Wage and Hour Division shall maintain a written

list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts and subcontracts. The list shall contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest. Except as provided in OAR 839-016-0095, such names will remain on the list for a period of three (3) years from the date such names were first published on the list.”

OAR 839-016-0090 provides, in pertinent part:

“(1) The name of the contractor, subcontractor or other persons and the names of any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest whom the Commissioner has determined to be ineligible to receive public works contracts shall be published on a list of persons ineligible to receive such contracts or subcontracts.

“(2) The list of persons ineligible to receive contracts or subcontracts on public works shall be known as the List of Ineligibles.”

Respondent intentionally failed to pay the prevailing wage rate to Schroeder, Aragon and Lovato for all the work they did on the Project. In addition, because of

Respondent’s failure to pay the prevailing wage rate to these employees, Keeton-King, the general contractor on the Project, paid those wages on Respondent’s behalf. For both of these reasons, the commissioner must place Respondent on the List of Ineligibles for a period not to exceed three years. The commissioner’s decision to place Respondent on the list for the entire three-year period is an appropriate exercise of his discretion.

OPINION

DEFAULT

Respondent failed to appear at hearing and the forum held him in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Belanger General Contracting*, 19 BOLI 17, 25 (1999). The Agency met that burden in this case, as discussed *infra*.

FAILURE TO PAY THE PREVAILING RATE OF WAGE

A. The violations

To establish a violation of ORS 279.350(1), which requires payment of the prevailing rate of wage on public works contracts, the Agency must prove:

- 1) The project at issue was a public work, as that term is defined in ORS 279.348(3);
- 2) The respondent was a contractor or subcontractor that employed workers on the pub-

lic works project whose duties were manual or physical in nature⁷;

3) The respondent failed to pay those workers at least the prevailing rate of wage for each hour worked on the project.

In this case, only the third element is in dispute.

The Agency met its burden of proving that Respondent failed to pay Schroeder for several hours of overtime work he performed on the Project and failed to pay Aragon and Lovato for a full week of work they did on the Project. For the reasons set forth in Findings of Fact -- the Merits 23 and 24, *supra*, the forum finds credible the workers' assertions that Respondent failed to pay them all the wages they were due. The forum's conclusion is bolstered by Respondent's failure to provide compliance specialist Briggs with any documentation supporting his claim that he paid the workers in full. This evidence is sufficient to establish a prima facie case that Respondent committed three vio-

lations of ORS 279.350(1) by failing to pay Schroeder, Aragon and Lovato the prevailing rate of wage for each hour they worked on the Project.

In his answer, Respondent asserted as a defense that he had declared bankruptcy in April 1998 and "was discharged in October, 1998." In a default situation, the forum may give some weight to unsworn assertions contained in the respondent's answer. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 206 (1999). Such assertions are overcome whenever they are controverted by other credible evidence. *Id.* Moreover, the forum need not give any weight to the assertions, even if they are uncontroverted, if it finds that the respondent is not credible.

Here, the forum gives no weight to Respondent's declaration that he declared bankruptcy and "was discharged" because it finds Respondent's claims not to be credible. First, Respondent issued pay stubs falsely stating that Lovato and Aragon worked only 40 hours the week of August 10, 1997, even though he knew they had worked additional hours, as demonstrated by the fact that he paid them in cash for that overtime work. Second, Respondent was convicted of a felony involving forgery only three years before the events at issue. Because the forum is not persuaded that Respondent "was discharged" in bankruptcy, it need not decide whether a subcontractor's bankruptcy would have any bearing on

⁷ The Agency's administrative rules limit coverage of the prevailing wage rate laws to workers "whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental, professional or managerial." OAR 839-016-0004(27). See also OAR 839-016-0035(3) (regarding workers whose time is divided between manual/physical and mental/managerial duties).

the commissioner's ability to assess a civil penalty against it for violations of the prevailing wage rate laws.

B. Civil Penalties

The commissioner may impose a civil penalty up to \$5000.00 for each violation of the prevailing wage rate laws. OAR 839-016-0540(1). For violations of ORS 279.350(1), which requires payment of the prevailing wage, the minimum civil penalty is \$1000.00 or the amount of unpaid wages, whichever is less. OAR 839-016-0540(3). In this case, the Agency seeks a \$1000.00 penalty for each of Respondent's three violations of ORS 279.350(1).

Respondent failed to pay Aragon and Lovato each \$1229.79 in prevailing wages he owed them for their work on the Project. For those two violations of ORS 279.350(1), the minimum penalty is \$1000.00, which is what the Agency seeks. In accordance with the Agency's request and OAR 839-016-0540(3), the forum imposes a \$1000.00 civil penalty for each of these two violations of ORS 279.350(1).

Respondent failed to pay Schroeder only \$252.33 in prevailing wages, which means that the minimum civil penalty for his third violation of ORS 279.350(1) is \$252.33. The Agency, however, seeks a \$1000.00 civil penalty based on Respondent's prior violations of the prevailing wage rate laws, the fact that it would have been simple for Respondent to comply with the law by paying all

wages due, the fact that workers went unpaid for a period of time and Keeton-King suffered a financial loss from paying the workers on Respondent's behalf, and the fact that the Agency gave Respondent an opportunity to rectify his error by paying the missing wages. For all of these reasons, the forum agrees with the Agency that a \$1000.00 penalty is appropriate for Respondent's third violation of ORS 279.350(1).

FILING INACCURATE AND INCOMPLETE CPRS

The Agency submitted convincing evidence that Respondent filed three CPRs that did not include all required information and, in one case, falsely certified that Aragon and Lovato had been paid all the wages they earned.⁸ By submitting these three incomplete and inaccurate CPRs, Respondent committed three violations of ORS 279.354(1), which requires the reports to "set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid."

The Agency seeks a \$1000.00 civil penalty for each of these violations. The forum agrees that \$1000.00 per violation is appropriate for three reasons. First, the Agency previously had warned

⁸ See Findings of Fact -- the Merits 20-22, *supra*.

Respondent about other violations of the prevailing wage rate laws. Second, it would not have been difficult for Respondent to complete the CPR forms accurately. Third, each CPR contained a relatively serious misstatement or omission: the CPR for August 10 through 16 did not report the wages paid to one employee, depriving the Agency of the ability to determine whether that employee was paid at the prevailing rate; the CPR for August 17 through 23 included a false statement that Respondent had paid the wages earned by Lovato and Aragon that week; and the CPR for August 24 through 30 did not specify the trade classification for one worker, which deprived the Agency of the ability to determine whether Respondent had paid that employee at the correct rate. For all of these reasons, the forum imposes a \$1000.00 penalty for each of Respondent's three violations of ORS 279.354(1).

PLACEMENT ON THE LIST OF INELIGIBLES

When the commissioner determines that a contractor or subcontractor has intentionally failed to pay the prevailing rate of wage, the commissioner must place the contractor or subcontractor and any firm, corporation, partnership or association in which the contractor or subcontractor has an interest on the list of those ineligible to receive public works contracts or subcontracts (the "List of Ineligibles") for a period not to exceed three years. ORS 279.361(1); *In the Matter of*

Southern Oregon Flagging, 18 BOLI 138, 169 (1999). The commissioner must also place on the List of Ineligibles any subcontractor that has failed to pay the prevailing rate of wage, whether or not that failure was intentional, if the contractor has paid the wages on the subcontractor's behalf. ORS 279.361(1).

In this case, Respondent must be placed on the List of Ineligibles for both of these reasons. First, based on the credible testimony of both Briggs and Adkins, the forum has found that Keeton-King paid the wages due Schroeder, Aragon and Lovato on Respondent's behalf. Second, the forum has found that Respondent's failure to pay the prevailing wages was intentional.⁹

Although the commissioner must place a contractor or subcontractor who commits such violations on the List of Ineligibles for a period not to exceed three years, he may consider mitigating factors in determining whether the debarment should last less than the entire three-year period. See *Southern Oregon Flagging*, 18 BOLI at 169. In this case, there are no mitigating factors. Respondent has previously violated the prevailing wage rate laws, the current violations were blatant and not the result of some misunderstanding between Respondent and the Agency, Respondent did not cooperate with the Agency's

⁹ See Finding of Fact -- the Merits 16, *supra*.

investigation, and Respondent made no attempt to rectify the underpayment of wages.¹ Under these circumstances, the forum finds it appropriate to place Respondent and any firm, corporation, partnership or association in which he has an interest on the List of Ineligibles for the entire three years permitted by law.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violations of ORS 279.350, ORS 279.354, OAR 839-016-0010 and OAR 839-016-0035, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Keith Testerman dba Testerman Masonry** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of SIX THOUSAND DOLLARS (\$6000.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order in this

case and the date Respondent complies with the Final Order.

FURTHERMORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondent **Keith Testerman dba Testerman Masonry** and any firm, corporation, partnership or association in which he has an interest shall be ineligible to receive any contract or subcontract for public work for a period of three years from the date of publication of his name on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

**In the Matter of
MURRAYHILL THRIFTWAY,
INC.**

Case Number 69-97

Final Order on Reconsideration of
the Commissioner Jack Roberts
Issued June 6, 2000.

SYNOPSIS

Where Complainant, an African American male, was subjected to repeated racial insults from his white immediate supervisor, the forum relieved Respondent of liability based on its exercise of reasonable care to prevent and correct promptly any harassing behavior and Complainant's unreasonable failure to take advantage of any preventive

¹ Compare *Southern Oregon Flagging*, 18 BOLI 138, 163 (1999) (debarment period limited to one month where the respondent cooperated with the Agency throughout its investigation, the respondent attempted to comply with the law, and the underpayment of prevailing wages resulted from implementation of a fringe benefits plan that three agencies, including BOLI, had approved).

or corrective opportunities provided by Respondent. Respondent was not liable for racial insults made to Complainant by a customer because the Agency did not prove that Respondent knew or should have known of the insults. Complainant's discharge was not due to his race or in retaliation for his opposition to the racial harassment. Accordingly, the commissioner dismissed the complaint and specific charges. ORS 659.030(l)(a)(b)(f).

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 November 12, 13, and 14, 1997, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Anthony Burks (Complainant) was present throughout the hearing and was not represented by counsel. Respondent Murrayhill Thriftway, Inc. was represented by Craig R. Berne, Attorney at Law. Thomas Calcagno was present as Respondent Murrayhill's representative on November 12th and 13th. Matthew Marcott, Respondent Murrayhill's president, was present as Respondent Murrayhill's representative on

November 14th. Respondent George Canfield failed to appear in person or through a representative.

The Agency called as witnesses, in addition to Complainant, Respondent Murrayhill's former employees Dora Sweet, Keith Glackin, Robert Hesla, Tiffany Cardwell (by telephone), Tony Pittman (by telephone), and Caroline Majchrzak; Respondent Murrayhill's current employees Charles Sweet, Hollie Prescott, and Thomas Calcagno; Respondent Murrayhill's customer Timothy Repp; and Agency Senior Investigator Jane MacNeill.

Respondent Murrayhill called as witnesses current employees Alexandra Maughan and Barbara Rosenberger (by telephone); former employees Jennifer Maughan, Michael Bushey, Katherine McGregor, and Douglas Bryant; and Murrayhill's corporate president, Matthew Marcott.

Administrative exhibits X-1 to X-15 and Agency exhibits A-1, A-3, A-7 through A-17, A-20 and A-21, A-23 through A-26, and A-30 through A-32 were offered and received into evidence. Respondent exhibits RM-1 through RM-10, and RM-12 through RM-15 were offered and received into evidence. The record closed on May 15, 1998. Before the record closed, administrative exhibits X-16 through X-30 were received into evidence.

On May 12, 1999, I, Jack Roberts, Commissioner of the Bureau

of Labor and Industries, having fully considered the entire record in this matter, issued the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order in this case. Thereafter, Complainant (Petitioner on Appeal), sought judicial review in the Oregon Court of Appeals. On July 20, 1999, through counsel, the Agency filed its Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals for the specific purpose of correcting a typographical error in the order, specifically, the incorrect agency number on the order.

On July 28, 1999, having revised the order to include the correct agency case number originally assigned to this case, I issued an Amended Final Order correcting the agency number on the order from 57-98 to 69-97.

On April 10, 2000, through counsel, the Agency filed its Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals.

On June 6, 2000, having reconsidered the record and the legal issues presented in this case, I make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Final Order on Reconsideration.

1) On March 27, 1996, Complainant, an African American,² filed a verified complaint with CRD alleging that he was the victim of the unlawful employment practices of Respondent Murrayhill Thriftway, Inc. (hereinafter "Murrayhill") in terms and conditions and termination from employment. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations regarding terms and conditions of employment.

2) On July 16, 1997, the Agency prepared for service on Respondents Specific Charges alleging that Murrayhill discriminated against Complainant in his employment based on his race in terms and conditions of employment in violation of ORS 659.030(l)(b) and that George Canfield, an employee of Murrayhill, had aided and abetted Murrayhill in the commission of the alleged unlawful employment practice. Both Murrayhill and Canfield were named as Respondents.

3) With the Specific Charges, the forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules

FINDINGS OF FACT -- PROCEDURAL

² Complainant identified himself on the administrative complaint as "African American."

regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On August 4, 1997, counsel for Murrayhill filed an answer in which it denied the allegation mentioned above in the Specific Charges, and stated numerous affirmative defenses.

5) On August 7, 1997, the Agency moved to amend the Specific Charges. The amendment was based on "newly acquired evidence." Specifically, the Agency sought to add new allegations that Complainant had been subject to discriminatory terms and conditions of employment based on his race in violation of ORS 659.030(l)(b) and that Complainant had been terminated in violation of ORS 659.030(l)(a) based on his race and in violation of ORS 659.030(l)(f) in retaliation for Complainant's opposition to unlawful employment practices. The Agency also sought to increase the damages sought to \$40,000 for mental suffering and \$7,000 for back pay.

6) On August 11, 1997, counsel for Murrayhill moved that the Agency's motion to amend be denied based on the Agency's failure to identify the newly acquired evidence or explain why such evidence could not have been found before.

7) On August 26, 1997, the ALJ granted the Agency's motion to amend based on OAR 839-050-0140. The ALJ postponed the hearing date from September 16,

1997, to a later date to be agreed upon by the participants based on the anticipated need for additional discovery. In the same Order, the ALJ issued a Discovery Order requiring Respondents and the Agency to submit a case summary pursuant to OAR 839-050-0200 and 839-050-0210 ten days prior to the new hearing date.

8) On September 3, 1997, the ALJ issued an Amended Notice of hearing resetting the hearing date to November 12, 1997.

9) On September 18, 1997, counsel for Murrayhill filed an answer to the Amended Specific Charges in which it denied the allegations mentioned above in the Amended Specific Charges and added a new affirmative defense.

10) On October 31 and November 3, 1997, respectively, Murrayhill and the Agency timely filed case summaries.

11) At the start of the hearing, the attorney for Murrayhill stated that he had read 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 verbally advised the Agency and Murrayhill 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 the hearing, on November 12, the Agency moved for an order finding Canfield in default on the

grounds that he had been avoiding service but had apparently been served with the Specific Charges and had not filed an answer, and that he was not present at the hearing.

14) In response to the Agency's motion, the ALJ ruled Canfield provisionally in default, subject to proof by the Agency that he had been served with the Specific Charges and proof from Canfield concerning the reason for his alleged default.

15) On November 14, 1997, the ALJ withdrew the provisional order of default against Canfield on the basis that he had not been served with the Specific Charges until November 12, 1997.

16) On November 17, 1997, the ALJ received a telephone call from a person identifying himself as George Canfield who inquired what to do regarding the hearing notice he had apparently received. The ALJ advised Canfield he must file a written answer within 20 days of receiving the notice and notified the other participants, in writing, of the ex parte contact.

17) On December 1, 1997, Canfield filed a written answer responding to the Amended Specific Charges.

18) On January 7, 1998, the ALJ issued an interim order stating that the hearing would be reconvened on May 20, 1998, to allow Canfield to present his defense, and that supplementary case summaries were due on May 10, 1998.

19) On February 17, 1998, the Hearings Unit received a letter from attorney David J. Hollander stating that he had been retained by Canfield with regard to this case. Hollander enclosed an answer to the Amended Specific Charges. The answer denied that Canfield had engaged in or aided and abetted any unlawful employment practices as alleged and raised two affirmative defenses.

20) On March 4, 1998, the ALJ, on his own motion, allowed substitution of the answer filed by Hollander for the *pro se* answer filed on December 1, 1997, by Canfield.

21) On May 8, 1998, counsel for Canfield filed a pre-hearing statement of proof as a case summary.

22) On May 13, 1998, counsel for Canfield filed a motion to dismiss the charges against Canfield based on the Agency's failure to state a claim within the applicable statute of limitations.

23) On May 8, 1998, counsel for Murrayhill filed a supplementary case summary.

24) On May 12, 1998, the Agency moved to delete Canfield as a Respondent and to dismiss the allegations pertaining to Canfield's aiding and abetting Murrayhill.

25) On May 13, 1998, the ALJ issued an order deleting Canfield as a Respondent, dismissing the allegations pertaining to Canfield's aiding and abetting

Murrayhill, and canceling further hearing.

26) The proposed order, which contained an exceptions notice, was issued on November 23, 1998. Under a timely requested extension of time, Respondent filed exceptions on January 11, 1999. Respondent's exceptions are addressed in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) Complainant is an African American male.

2) At all times material herein, Respondent Murrayhill Thriftway, Inc. was an Oregon corporation engaged in the operation of a grocery store in Beaverton, Oregon, and was an employer in Oregon utilizing the personal services of one or more persons. The Marcott family controlled Murrayhill and several other grocery stores in the Portland area.

3) George Canfield was employed by Murrayhill as a grocery manager from March 1995 until shortly after a robbery that occurred on or about October 27, 1995. He was Complainant's immediate supervisor during Canfield's employment.

4) Complainant was hired by Respondent Murrayhill on or about October 10, 1993 and worked until March 1995 on the night crew.

5) On October 10, 1993, Complainant signed Respondent Murrayhill's two page "Harassment Policy" as an

acknowledgment of having read and understood it. In relevant part, the Policy read as follows:

" * * * Decisions involving every aspect of the employment relationship will be made without regard to an employee's race, color, creed, sex, * * *. Discrimination or harassment based upon these or any other factors is totally inconsistent with our philosophy and will NOT be tolerated.

"Any employee who believes that they have been the subject of harassment should report the alleged conduct immediately to the store manager and/or store owner. A Harassment Complaint Form is available for this purpose. A confidential investigation of any complaint will be undertaken immediately.

"Retaliating or discriminating against an employee for complaining about harassment is against the policies of this company and prohibited by law. Employees are encouraged to come forward with information pertaining to this type of behavior with the assurance that there will be NO RETALIATION PERMITTED.

"The Company recognizes that the issue of whether harassment has occurred requires a factual determination based on all the evidence received. The Company further recognizes that false accusations of harassment can have serious effects on innocent people.

We trust that all employees will act in a responsible and professional manner to establish a pleasant working environment free of harassment and/or discrimination.

"SEXUAL HARASSMENT

"Sexual harassment is illegal and against the policies of this company.

"Sexual harassment is defined by OAR 839-07-550³ as:

"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 of and (sic) individual's employment, or

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

(3) Such conduct is of such frequency and/or severity that it has the purpose or effect of unreasonably interfering with an individual's work performance or creating an

intimidating, hostile or offensive working environment.'

"The following are examples of sexual harassment:

"VERBAL

"Sexual innuendo, suggestive comments, insults, threats, jokes about gender-specific traits or sexual propositions

"NONVERBAL

"Suggestive or insulting noises, leering, whistling or making obscene gestures

"PHYSICAL

"Touching, pinching, brushing the body, coercing sexual activities or assault"

6) Walt Souther was Respondent Murrayhill's store manager from the date of Complainant's hire until the second week in July 1995, when Tom Calcagno replaced Souther.

7) In March 1995 Complainant was promoted to daytime grocery clerk. His immediate supervisor was Canfield.

8) During his employment at Murrayhill, Canfield's supervisory responsibilities included instructing Complainant and others as to their duties, as well as general responsibility for the operation of the store when all other supervisors ranked above him were gone. When he was responsible for the operation of the store, Canfield was called a person in charge (PIC). There was no evidence placed in the record to establish that Canfield had the authority to

³ OAR 839-07-550 is a Bureau of Labor and Industries rule on sexual harassment, here quoted in part as it appeared in Oregon Administrative Rules at times material. The current rule is OAR 839-007-0550.

hire, fire, discipline or promote, or participate in or recommend such actions.

9) Shortly after Complainant's promotion to daytime grocery clerk, Canfield, in Complainant's presence, made a remark about "how awful" a black man and a white woman who were together in the store appeared to him. In response, Complainant told Canfield that he has a daughter who is of mixed race and that he found Canfield's remarks offensive.

10) A week later, Complainant told Canfield that he was going to be married to a Caucasian woman and showed him a picture of his fiancée. Canfield asked Complainant how he thought people would "perceive" Complainant "married to a white woman." Complainant told Canfield skin color shouldn't matter.

11) Complainant then took ten days off work to get married and honeymoon in the Caribbean Islands. When he returned, Canfield asked him how people felt about him "being married to a white woman on a cruise ship with predominately Caucasian people?"

12) Canfield's remarks intimidated Complainant and caused him to believe that Canfield, his superior, was a racist and had some kind of hatred towards mixed race couples.

13) Complainant did not complain to any other supervisor at Murrayhill about the remarks cited in Findings of Fact – The Merits ##9-11.

14) Shortly after Complainant's honeymoon, Canfield began addressing Complainant as "Toby." Complainant told Canfield that his name was "Tony" and that he objected to being called "Toby" because "Toby" was a character in "Roots." Canfield then told Complainant "Come here, boy." After that, Canfield called Complainant "Toby" and "boy" one or two times a week until Canfield left Murrayhill. Canfield often called Complainant these names at the front end of the store by the checkstands.

15) Canfield's racial remarks and name calling intimidated Complainant because he believed Canfield, his superior, was a racist. Complainant felt nervous when Canfield called him "Toby" and told him "Come here, boy." He felt "chained and whipped," like his "ancestors felt sometime years ago."

16) During the summer of 1995, Keith Glackin heard Canfield refer to Complainant as "Toby" and understood it as a reference to Complainant's race based on a remark Complainant made to Canfield. Glackin observed that Complainant did not like being called "Toby." There was no evidence placed on the record that Glackin ever brought these remarks to the attention of any other supervisors, managers, or owners of Murrayhill.

17) Glackin started work at Murrayhill sometime between March and May 1995. Glackin worked as a supervisor/person-in-charge (PIC) in the grocery sec-

tion. Glackin's duties were similar to those of Canfield. There was no evidence placed in the record to establish that Glackin had the authority to hire, fire, discipline or promote.

18) Complainant did not complain to anyone except Canfield about Canfield calling him "Toby" and "boy."

19) Complainant did not file a Harassment Complaint Form regarding Canfield's racial remarks and name calling.

20) In late October or early November 1995, Canfield resigned from Murrayhill following an incident in which Murrayhill was allegedly robbed by a male African American.

21) Canfield's departure from Murrayhill's employ left the store in need of another supervisor, and Glackin "initially suggested" that Complainant be promoted. Complainant was subsequently promoted to a supervisory/PIC position and given a raise to \$13.25/hr. Complainant's new responsibilities were essentially the same ones that Canfield had. There was no evidence placed in the record to establish that Complainant had the authority to hire, fire, discipline or promote, or participate in or recommend such actions.

22) During the first week of January 1996, a woman came into Respondent Murrayhill's store with her dog. Complainant approached her and stated it was against a city health ordinance for her dog to be in the store. At the

checkout stand, she swore at Complainant and told him "niggers don't belong in Oregon" and that she would "have your [Complainant's] job." The customer and Complainant then went outside the store, where she told Complainant "Niggers don't belong in Beaverton; I'm going to have your job, you motherfucker."

23) After the customer left, Complainant went back inside the store and described the incident in detail to Robert Hesla, a cashier, who advised him to talk to the store manager. The next day, Complainant described the incident in detail to Doug Bryant, Murrayhill's grocery manager. Bryant advised Complainant to point out the customer the next time she came into the store.

24) Within two days, the woman returned to the store with her dog inside her coat. She glared at Complainant, but did not speak to him. Bryant was not in the store, so Complainant went to Calcagno and told him that the woman who had brought the dog inside the store and who had "made these complaints" and was "saying these things" was in the store again. Complainant told Calcagno this because he believed Murrayhill should make sure a similar incident didn't happen again and because he feared the woman's threats about his job.

25) Calcagno did not talk to the woman.

26) The woman came into Murrayhill's store after that but did

not speak to Complainant or make any more racial remarks.

27) Complainant felt "devastated" that Bryant and Calcagno took no action after he complained about the woman. He believed that Canfield's previous racial remarks and Bryant's and Calcagno's failure to respond to his complaints about the woman showed that Murrayhill "tolerates this type of harassment."

28) On January 12, 1996, Tom Calcagno met with Complainant and discussed complaints by fellow workers regarding Complainant's management style. Calcagno made a written record of the meeting, which states as follows:

"Met with Tony and discussed complaints by fellow workers w/regards to his management style. Complaints from Tiffany, Hollie, Charlie, Tony P., Shannon, Jennifer, Courtney. In General - rudeness, abrasiveness, and lack of respect shown to workers. Recommended changing approach and attitude. Verbal warning about women employees being asked out on dates."

29) On January 22, 1996, Cindy Rose, a courtesy clerk employed by Murrayhill who was under 21 years of age, filed a written complaint with Tom Calcagno alleging that, at work, Complainant had "pinched her butt," put his arms around her, asked her to party with him. Rose told Calcagno that she was afraid of working with Complainant. Ear-

lier, Rose had told Tony Pittman, another PIC/supervisor employed at Murrayhill, that Complainant had inappropriately touched her and Jennifer Maughan, tried to ask them out for dates, and touched their butts.

30) On January 23, 1996, Calcagno met with Complainant and informed him that allegations of sexual harassment had been made against him that generally involved touching, rubbing, and asking individuals out on dates. Complainant asked who had made the allegation, and Calcagno would not disclose their names. Complainant denied sexually harassing anyone at Murrayhill.

31) Calcagno instructed Complainant to take some time off while Calcagno investigated the complaints. Complainant took off January 24th and 25th.

32) Calcagno instructed Complainant to take time off from work because he did not want minor girls working under Complainant another day.

33) When a complaint of harassment is filed, Murrayhill's policy is to conduct a confidential investigation and keep the names of the complaining parties as confidential as possible during the investigation.

34) On January 24, 1996, Jennifer Maughan, a 17-year-old courtesy clerk employed by Murrayhill, filed a written complaint with Calcagno alleging that, at work, Complainant had brushed by her, kissed her, and invited her

to go to a dance/bar for persons over 21 years of age. Maughan also reported that she was in fear of working with Complainant because of Complainant's sexual behavior towards her. Earlier in the month, Maughan had verbally complained to Tony Pittman that Complainant intimidated her and had inappropriately touched her.

35) In response to the complaints of Rose and Maughan, Calcagno conducted an investigation by interviewing Mike Bushey, Debbie Gabel, Barbara Rosenberger, and Tiffany Duong (now Tiffany Caldwell).

36) Bushey told Calcagno that he saw Complainant kiss Jennifer Maughan in a way that was unwelcome. Gabel told Calcagno that she had seen Complainant walk around with his arms around the neck of Jennifer Maughan and Courtney, another female employee. Rosenberger told Calcagno that she had seen Complainant touching Jennifer Maughan around her waist and putting his face into her neck area, "coming on to" a female Oriental customer, and touching and rubbing Rose in an inappropriate manner.

37) Calcagno discussed the sexual harassment allegations against Complainant and his investigation with Matthew Marcott, Murrayhill's president, and Pam Garcia, Marcott's sister. Calcagno recommended that Complainant be terminated because he would not be able to effectively supervise any longer due to the sexual harassment and due to the sever-

ity of the harassment, in that it involved minor females and other females who felt they could no longer work with Complainant.

38) On January 26, 1996, Calcagno informed Complainant that he was terminated due to sexual harassment.

39) Complainant earned \$13.25/hr. at the time of his termination.

40) Complainant's next employment after his termination from Respondent Murrayhill was at Safeway in March 1996. At Safeway, Complainant earned \$14.00/hr.

41) In March 1997, Art Majchrzak brought a letter to Matthew Marcott detailing sexual harassment allegations against John Smolders, the director of baking for the multiple stores owned by the Marcott family. Marcott referred the matter to Calcagno and instructed him to investigate. Majchrzak, Caroline Reid, Dora Sweet, and Linda Evans, all employees of Murrayhill's bakery, completed Harassment Complaint Forms and submitted them to Calcagno. In the Forms, they alleged that Smolders had engaged in sexual harassment consisting of the following: (a) Asking Majchrzak "How does it feel to fuck your own boss?;" (b) Saying that he and his wife only had sex twice a year but he was still happy; and (c) Lifting his apron up and telling Sweet "This will get you five dollars" in response to her joking inquiry about when she would get a raise.

There were no allegations that Smolders had touched anyone or that anyone was in fear of him.

42) Calcagno investigated the incident by speaking with Reid, Sweet, Evans, and Majchrzak. He did not speak to Smolders because Smolders was not his employee and was "in some ways above me [Calcagno] as far as his participation in the company." Calcagno reported back to Marcott, who informed Smolders of the allegations without disclosing the identity of the complainants. Smolders denied the allegations, and Marcott warned him that any future remarks of the type alleged would be grounds for disciplinary action up to and including termination. Subsequently, Calcagno followed up by asking Reid and the others on two occasions about Smolders' behavior.

43) Smolders was not terminated because the allegations against him did not involve allegations of touching or harassment of minor females, and the complaining employees did not express that they were intimidated by or in fear of Smolders.

44) In early 1995, Robert Hesla was employed as store manager of Baseline Thriftway, another grocery store in the Portland area owned by the Marcotts. Hesla received a complaint alleging that a white male employee had commented to a cashier "Linda, you shouldn't bend over like that; it really turns me on." Hesla suspended the employee while investigating the complaint.

During his investigation, Hesla received a second complaint that the same employee, in front of three witnesses, had lifted his apron and invited a deli clerk to "Take a break on this." Hesla fired the employee after confirming the allegations of the complaints.

45) On December 19, 1995, Alexandra Maughan, a checker at Murrayhill and Jennifer Maughan's mother, completed a Harassment Complaint form alleging that Dennis Normoyle, a supervisor, had told her that he hadn't had sex since his wife left, asked Maughan about her sexual activity, then subsequently suggested that they should "take care of each other's needs" and that Maughan should "come up with a plan." Maughan told Calcagno that she felt she could keep working with Normoyle as long as he did not bother her again. Calcagno questioned Normoyle about the allegations on December 29, 1995, and followed up by asking Maughan a month later if Normoyle had bothered her again. Normoyle, who is about the same age as Maughan, did not bother Maughan again.

46) Normoyle was not terminated because the allegations against him did not involve allegations of touching or harassment of minor females, and the complaining employees did not express that they were intimidated by or in fear of Normoyle.

47) In the spring of 1996, John Atterberry, a male employed in Murrayhill's health and beauty aids department, brought the back

of his hand in contact with Dora Sweet. Sweet complained to Caroline Reid (now Majchrzak), head of the bakery department, about this. Two other women also complained to Matthew Marcott about Atterberry invading their personal space. There were no complaints that anyone was afraid of or intimidated by Atterberry. Either Linda Harris or Pam Garcia, Marcott's sisters, talked to Atterberry about this complaint, and no more complaints were received about Atterberry.

48) Atterberry was not terminated because Calcagno and the Marcott family were not aware that he had touched anyone and the complaining employees did not express that they were intimidated by or in fear of Atterberry.

49) In the summer of 1997, Calcagno fired Kyle, a learning disabled white male, after Calcagno observed that Kyle had been touching female employees after Calcagno warned him not to. No one had complained to Calcagno about Kyle's behavior before Calcagno terminated him.

50) Complainant's testimony was not wholly credible. His recollection of dates and time frames was confused, and at times, clearly in error. For example, he testified that he was hired in October 1993, then worked on night crew six months to a year before his promotion to daytime grocery clerk, at which time Canfield became his supervisor for the next seven months. He testified that Canfield made racially harassing comments to him in March and

April 1994, just prior to and after his marriage, whereas his complaint clearly states the harassing comments began in March 1995. Complainant also testified that he told Calcagno about these comments in March 1995, but the evidence clearly shows that Calcagno did not become the store manager until July 1995. He testified that he was made a supervisor in November 1994 before being reminded that it was actually in 1995. Regarding the woman/dog incident, Complainant testified that he walked out of the store so the woman couldn't see him, whereas another credible witness testified that Complainant followed the woman out of the store. Testimony by a different credible witness established that if Complainant really wanted to avoid the woman, he could have done it by going to the back of the store or upstairs in the store, instead of going outside where he was bound to encounter the woman again when she left the store. Finally, Complainant's blanket denial of all the allegations of sexual harassment is simply not credible, given the number of credible witness statements to the contrary. Accordingly, the forum gave Complainant's testimony less weight whenever it conflicted with other credible evidence on the record.

51) Thomas Calcagno's testimony was not wholly credible. His ability to recall events was suspect, but not selective. For example, he was unable to recall whether or not Complainant complained to him about the woman

with the dog. He made statements to a representative of the Employment Department that were at odds with his testimony at the hearing. Based on Calcagno's statements, the Employment Department issued an administrative decision with findings of fact stating that "During the year 1995, employer [Respondent Murrayhill] received verbal complaints from female employees regarding your [Complainant's] sexual behavior" and "On November 11, 1995, your employer [Respondent Murrayhill] held a meeting with you [Complainant] to discuss your behavior regarding female employees and a memo was issued." In contrast, Calcagno stated at the hearing that no one complained about Complainant before January 12, 1996. He testified he thought Tony Pittman told him that he had seen Cindy Rose and Complainant physically touching, but could not explain why he did not write this down. He also wrote down that Shannon Viera stated she had been subject to verbal harassment from Complainant and witnessed him touching others from behind, a statement that was contradicted by his written notes. Accordingly, the forum gave Calcagno's testimony less weight whenever it conflicted with other credible evidence on the record.

52) The testimony of Robert Hesla, Keith Glackin, Hollie Prescott, and Charles Sweet was credible.

53) The testimony of Jennifer Maughan was not entirely credible. Her testimony was in-

consistent on several points. She testified on direct that Complainant had intentionally brushed against her "maybe 10 times," then on cross-examination testified that all the brush-ups except for one were unintentional. She testified on direct that Complainant kissed her on January 23rd, then on cross testified the incident actually occurred a day earlier. She also testified that she signed Murrayhill's sexual harassment policy in October 1995, when she in fact signed it on January 21, 1996. Accordingly, the forum gave Maughan's testimony less weight whenever it conflicted with other credible evidence on the record.

54) The testimony of Alexandra Maughan was not entirely credible, in that her memory was suspect. Relative to the time in which Complainant was terminated, she testified "Could be right around six months, could be less" as the amount of time that Jennifer, her daughter, reported Complainant's first inappropriate touching to her. In contrast, Jennifer's testimony established that she did not start working for Murrayhill until three months before Complainant was terminated. Accordingly, the forum did not believe her testimony as to specific times and dates and gave her testimony less weight whenever it conflicted with other credible evidence on the record.

55) The testimony of Tiffany Caldwell was not credible. She was biased against Jennifer Maughan because Maughan

touched Pittman, Caldwell's boyfriend. In an apparent attempt to help Complainant, she also testified that she heard Jennifer Maughan invite Complainant to a party and that Jennifer and Alexandra Maughan told her they had invited Complainant to their house for dinner. In contrast, Complainant did not mention these incidents, despite the fact that they would have bolstered his case.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Murrayhill was an employer in the state of Oregon utilizing the personal services of one or more persons.

2) Respondent Murrayhill employed Complainant.

3) Complainant is an African American male.

4) Respondent George Canfield was employed by Respondent Murrayhill between March and October 1995 and was Complainant's immediate supervisor in that period of time.

5) Canfield engaged in verbal conduct, consisting of racial remarks referring to mixed racial marriages and addressing Complainant as "Toby" and "boy," directed at Complainant because of his race between March and October 1995.

6) Canfield's racial remarks were unwelcome to Complainant and were sufficiently severe to have created an intimidating, hostile, and offensive working environment for Complainant.

7) Complainant did not complain to Calcagno, Murrayhill's store manager, about any racial remarks made to him by Canfield.

8) At all times material, Respondent Murrayhill had in place a written Harassment Policy that prohibited harassment in the workplace based on race, color, sex, and other protected classes. The Policy specified that employees who believed they had been harassed should report the harassment immediately to the store manager and/or store owner and stated that a confidential investigation would be undertaken immediately, with "**NO RETALIATION PERMITTED.**" (*emphasis in original*)

9) Respondent Murrayhill's Harassment Policy was effectively used by employees to file sexual harassment complaints against Complainant and other males.

10) Complainant was aware of Respondent Murrayhill's Harassment Policy, but unreasonably failed to utilize it to complain about Canfield's racial remarks or the racial remarks directed at him by the woman who came into the Murrayhill store with her dog. Complainant did describe the latter incident to Respondent Murrayhill's grocery manager.

11) Canfield's racial remarks caused Complainant to experience mental suffering.

12) Respondent Murrayhill informed Complainant of the general nature of the sexual harassment allegations made against him, and Complainant de-

nied engaging in any sexual harassment.

13) Prior to Complainant's termination, Respondent Murrayhill reasonably believed that Complainant had sexually harassed minor females employed by Respondent Murrayhill through physical touching and verbal conduct.

14) Complainant was discharged based on Respondent Murrayhill's good faith belief that Complainant had sexually harassed minor females employed by Respondent Murrayhill through physical touching and verbal conduct.

15) Complainant was not treated differently than non-African American males who were the subject of sexual harassment complaints by Respondent Murrayhill's female employees.

16) Complainant's race was not a factor in his discharge.

17) Complainant's complaints of racial harassment were not a factor in his discharge.

CONCLUSIONS OF LAW

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

2) The actions, statements, and motivations of Thomas Calcagno, Matthew Marcott, and Pam Garcia are properly imputed to Respondent Murrayhill Thriftway, Inc. herein.

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

4) ORS 659.010(l) provides, in part:

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

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

Respondent Murrayhill Thriftway, Inc. did not discharge Complainant due to his race, African American, and did not violate ORS 659.030(l)(a).

5) ORS 659.010(l) provides, in part:

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

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

Former OAR 839-050-01 0 provided, in part:

"(3) Harassment on the basis of protected class is an unlawful employment practice if the employer knew or should have known both of the harassment and that it was unwelcome. Unwelcome conduct of a verbal or physical nature relating to an employee's protected class is unlawful when such

conduct is directed toward an individual because of the individual's protected class and

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

"(d) The standard for determining harassment will be what a reasonable person would conclude if placed in the circumstances of the person alleging harassment."

Current OAR 839-005-0010⁴ provides, in relevant part:

"(4) Harassment in employment based on an employee's protected class is a type of intentional unlawful discrimination. In cases of unlawful sexual harassment in employment see OAR 839-007-0550.

"(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when:

"(A) Substantial evidence of the four elements of OAR 839-005-001 0 (1) is shown; and

"(B) Such conduct is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with an individual's work perform-

ance or creating an intimidating, hostile or offensive working environment, * * *

"(b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complainant would so perceive it.

"(d) Harassment by Supervisor, No Tangible Employment Action: Where harassment by a supervisor with immediate or successively higher authority over the individual is found to have occurred but no tangible employment action was taken:

"(A) The employer is liable if the employer knew of the harassment unless the employer took immediate and appropriate corrective action.

"(B) The employer is liable if the employer should have known of the harassment. The Civil Rights Division will find that the employer should have known of the harassment unless the employer can demonstrate:

"(i) That the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and

"(ii) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities

⁴ Current OAR 839-005-001 0 became effective on October 23, 1998.

provided by the employer or to avoid harm otherwise."

"(f) Harassment by Non-Employees: An employer is liable for harassment by non-employees in the workplace, where the employer or its agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases, the Civil Rights Division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees."

Under ORS 659.030(l)(b) and OAR 839-005-0010, Respondent Murrayhill Thriftway, Inc. is not liable for Respondent Canfield's racial remarks about "mixed marriages" and "Toby" and "boy" that were directed at Complainant based on his race/color, African-American.⁵ Respondent Murrayhill Thriftway, Inc. did not subject Complainant to discriminatory terms and conditions of employment, in violation of ORS 659.030(l)(b), through a customer who made insulting and demeaning remarks based on Complainant's race, African American. Respondent Murrayhill Thriftway, Inc. did not subject Complainant to disparate terms and conditions of employment in the enforcement of their Harass-

ment Policy in violation of ORS 659.030(l)(b).

6) ORS 659.030(l) provides, in part:

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

"(f) For an employer, because of an individual's race * * * to discharge any person because the person has opposed any practices forbidden by this section * * *."

Respondent Murrayhill Thriftway, Inc. did not discharge Complainant because of Complainant's opposition to racial harassment and did not violate ORS 659.030(l)(f).

7) ORS 659.010(1) provides, in part:

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

" * * * * *

"(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110 * * * or attempt to do so."

The Specific Charges alleging aiding and abetting on the part of Respondent Canfield have been dismissed.

8) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the specific charges

⁵ A detailed discussion of how this conclusion was reached is contained in the Opinion, *infra*.

and the complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

1. INTRODUCTION.

In this case, the Agency charged that Respondent Murrayhill unlawfully discriminated against Complainant in terms and conditions of employment and discharge from employment. The Agency further charged that Respondent George Canfield, an employee of Respondent Murrayhill, aided and abetted Respondent Murrayhill by calling Complainant racially derogatory names.

The charges against Respondent Canfield were dismissed before the record closed and will not be discussed in this Opinion. Accordingly, this Opinion will hereafter refer to Respondent Murrayhill as "Respondent."

2. RESPONDENT'S LIABILITY FOR CANFIELD'S RACIAL REMARKS.

Credible testimony by Complainant, Prescott, Glackin, and Charles Sweet establishes that Canfield was Complainant's supervisor with immediate authority over Complainant, and made racial remarks toward Complainant between March 1995 and October 1995. Specifically, Canfield made three remarks to Complainant concerning "mixed marriages" and Complainant's marriage to a white woman in March and April, then repeatedly addressed Complain-

ant as "Toby" and "boy" from May through October. Under the circumstances, there can be no question that these remarks were directed at Complainant because of his race. Likewise, the history of race relations in this country, common sense, and Complainant's reaction to Canfield's remarks establishes that the remarks were sufficiently severe to create a hostile, intimidating or offensive working environment for a reasonable person in the circumstances of Complainant, and in fact did so for Complainant.⁶ OAR 839-050-0010(4)(a)-(c).

The evidence did not show, and that Agency did not allege, that Canfield took, or caused to be taken, a tangible employment action against Complainant as a result of these remarks. Where actionable harassment occurs, but no tangible employment action is taken as a result, the forum ap-

⁶ See, e.g. *In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 252-53(1995) (The word "boy," when applied to a black employee, constitutes racial harassment because it "implies an inherent inferiority" because of race. Respondent's posting of a Confederate flag in front of a black employee's work station and requiring him to salute it daily, given the historical significance of race relations in this country, makes it difficult to imagine how anyone could not perceive this action as a racial insult.) Canfield's use of the name "Toby," a black slave from the movie "Roots," carries a similar connotation.

plies the provisions of *current* OAR 839-005-0010(4)(d).⁷

The first level of analysis under OAR 839-005-0010(4)(d) is to determine whether Respondent "knew" of the harassment. If so, then Respondent's only available defense is that it took "immediate and appropriate corrective action." *OAR 839-005-0010(4)(d)(A)*. In this case, the evidence is undisputed that no one but Canfield and Complainant knew of the "mixed marriage" remarks. Only one supervisory employee, Keith Glackin, a supervisor/PIC on the same level as Canfield, heard Canfield call Complainant "Toby." There is no credible evidence that Calcagno or Bryant, Respondent's manager and assistant manager, or the storeowners, were aware of it. The issue, then is whether, under subsection (4)(d)(A), knowledge by Canfield and Glackin is imputed to Murrayhill. The analysis begins with the rule's text. OAR 839-005-0010(4)(d) expressly distinguishes between an employer and a supervisor. Subsection (4)(d) begins with the premise that a supervisor has harassed a subordinate employee. Under subsection (4)(d)(A), the employer is liable "if the employer knew of the harassment." The conjunction "if" shows that the rule does not automatically impute to an employer knowledge of all instances of har-

assment committed by its supervisors.

The context – most notably, subsection (4)(d)(B) – confirms that interpretation. Subsection (4)(d)(B) makes an employer liable for a supervisor's harassing behavior if the employer "should have known" about the harassment. As with subsection (4)(d)(A), that language shows that knowledge of a supervisor's harassing behavior will not automatically be imputed to the employer.

Another aspect of the context bolsters this construction. ORS 659.030 was modeled on Title VII, and decisions interpreting Title VII are instructive in construing and applying the similar state law. *See, e.g., Mains v. Il Morrow, Inc.*, 128 Or App 625, 634, 877 P2d 88 (1994) (federal cases construing Title VII are "instructive" in interpreting ORS 659.030). OAR 839-005-0010(4)(d), a rule implementing ORS 659.030, was adopted against the backdrop of two 1998 decisions under Title VII: *Faragher v. City of Boca Raton*, 524 US 775, 118 S Ct 2275, 141 L Ed 2d 662 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 US 742, 118 S Ct ___, 141 L Ed 2d 633 (1998). In *Faragher* and *Ellerth*, the Court reiterated its holding in *Meritor Savings Bank v. Vinson*, 477 US 57, 106 S Ct 2399, 91 L Ed 2d 49 (1986), that in applying Title VII, courts should look for guidance in common-law principles of agency, as outlined in the *Restatement (Second) of Agency*. *See, e.g., Ellerth*, 141 L

⁷ All subsequent references to *OAR 839-005-0010(4)(d)* refer to the current version of the rule.

Ed 2d at 648-49. The Court stated the “general rule that sexual harassment by a supervisor is not conduct within the scope of employment.” *Id.* at 650. Consequently, section 219(1) of the *Restatement* – making a master liable for the torts of its servants committed while acting in the scope of their employment – will not apply to workplace harassment. *Ellerth*, 141 L Ed 2d at 649-50. The Court also analyzed *Restatement* section 219(2), setting forth principles under which an employer may be liable for an employer’s torts committed outside the scope of employment. Section 219(2)(a) renders a master liable in those circumstances where “the master intended the conduct or the consequences.” The Court explained that section 219(a) “addresses direct liability, where the employer acts with tortious intent, and indirect liability, where the agent’s high rank in the company makes him or her the employer’s alter ego.” *Ellerth*, 141 L Ed at 651 (emphasis added). Thus, under the agency principles that inform Title VII, only the knowledge of certain high-ranking employees will be automatically imputed to the employer. OAR 839-005-0010(4)(d) was adopted in response to *Faragher* and *Ellerth*. Those agency principles thus bear on the rule as well.

Thus, the text and context of that rule show that the supervisor’s knowledge will be imputed to the employer only where the supervisor’s high rank in the company makes him or her the employer’s alter ego. Although

Canfield and Glackin were supervisors, they occupied such a low level in the corporate structure – lacking the authority to hire, fire, discipline, or promote – that they cannot realistically be viewed as Murrayhill’s alter egos. This forum concludes, therefore, that because neither Murrayhill’s owners nor any members of upper management knew of Canfield’s harassment, that the “employer” did not know of the harassment.

The next level of analysis is set out in OAR 839-005-0010(4)(d)(B), which states that when a supervisor with immediate authority over an individual harasses that individual, but no tangible employment action is taken against the individual as a result of the harassment, the employer is liable if the employer “should have known” of the harassment.⁸ There is a presumption that the employer “should have known,” unless the employer can prove a two-pronged affirmative defense by a preponderance of the evidence. First, the employer must prove that it “(i) * * * exercised reasonable care to prevent and correct promptly any harassing behavior.” Second, that “(ii) * * * [Complainant] unreasonably failed to take advantage of any preventive or corrective opportuni-

⁸ This dovetails with *former* OAR 839-005-0010(3), which made employers liable for harassment on the basis of protected class unlawful “if the employer knew or should have known both of the harassment and that it was unwelcome.”

ties provided by [Respondent] or to avoid harm otherwise."

In order to prevail on the affirmative defense contained in OAR 839-005-0010(4)(d)(B), Respondent has the burden of proving that it "exercised reasonable care to prevent and correct promptly any harassing behavior" and that Complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." In *Faragher and Burlington*, the Supreme Court further explained the requirements of the two necessary elements of the affirmative defense:⁹

"While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to

avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Faragher*, at 2293; *Burlington* at 2270.

In analyzing whether the City of Boca Raton, the employer in *Faragher*, had presented evidence establishing the affirmative defense, the Court noted that an employer's dissemination of the antiharassment policy, assurances in the antiharassment policy that supervisors could be bypassed in registering complaints, and efforts to keep track of the conduct of its supervisors were all relevant avenues of inquiry. *Id.*

In this case, the first prong of Respondent's defense is established by credible evidence of the existence of an effective written Harassment Policy which provided a viable means for a harassed individual to bring harassment based on race, color, sex, and other protected classes to Respondent's attention. The Policy provided that complaints could be made to the store manager or Respondent's owner, insuring that a harassing supervisor or manager could be bypassed in registering a complaint. Ironically, the effectiveness of the Policy is most clearly shown by the fact that Complainant was discharged as a

⁹ See also *Burrell v. Star Nursery, No. 97-17370*, slip op. (9th Cir., March 25, 1999) (summary judgment absolving employer from liability in an actionable sex harassment case reversed and remanded, with instructions to apply the *Faragher and Burlington* affirmative defense, and quoting the Court's explanation of the requirements of the two necessary elements of the affirmative defense.)

result of written harassment complaints filed against him.

The second prong turns on whether or not Complainant "unreasonably failed" to utilize Respondent's complaint procedure. Three examples of the type of evidence that would defeat this defense would be Complainant's ignorance of the procedure, credible testimony from Complainant that he was intimidated from filing a complaint based on retaliatory threats or his reasonable belief that Calcagno or Respondent's owners would not take any action on his complaint.¹⁰

There is no question that Complainant was aware of Respondent's Harassment Policy. He signed it at the time of his hire.¹¹ Even though an employee

is aware of an employer's policy in this regard, there may be circumstances where it would nonetheless not be unreasonable for an employee not to use such a policy. In this case, however, there is no evidence that, during Canfield's employment, Complainant was discouraged or intimidated from filing a complaint by such things as threats of retaliation, personal knowledge that other harassed employees had filed complaints upon which no action was taken, or pervasiveness in the workplace of the type of harassment suffered by the harassed employee. Complainant did testify that he believed Canfield's remarks, coupled with the later incident where the customer directed racially harassing insults at Complainant, showed the Respondent "tolerated" harassment; however, there is no evidence that at the time of Canfield's remarks any other such incidents, or any failure of Respondent to take corrective action, had occurred. Consequently, the forum concludes that Complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by Respondent to complain of Canfield's remarks and that Respondent has met its burden of proving the affirmative defenses set out in OAR 839-005-0010(4)(d)(B). Therefore, Respondent is not liable for Canfield's racial remarks.¹²

¹⁰ Examples of how a victim of actionable harassment could acquire a reasonable belief that an employer would not take any action on his/her complaint include, but are not limited to, personal knowledge that other harassed employees had filed complaints upon which no action was taken, and pervasiveness in the workplace of the type of harassment suffered by the harassed employee, indicating tacit approval of the harassment by the employer. The latter type of evidence could, in some cases, also defeat the first prong of the affirmative defense by demonstrating that the employer had not exercised reasonable care to prevent and promptly correct harassment.

¹¹ See, e.g. *Broad v. Kelly's Olympian Co.*, 156 Or 216, 229, 66 P2d 485, 490 (1937) (a person is presumed to be familiar with the contents of any document that bears his signature.)

¹² Employers should not view this order as holding that liability for harassment by low-level supervisors

3. RESPONDENT'S FAILURE TO TAKE ACTION ABOUT THE WOMAN AND HER DOG.

A different test applies when harassment is from a non-employee. An employer can be held liable for racial harassment by a non-employee, a customer in this case, if the employer knew or should have known¹³ of the conduct and fails to take immediate and appropriate corrective action. Unlike the case where an immediate supervisor is the harasser, there is no presumption that the

can be avoided by the mere adoption of a harassment policy. Whether or not an employer exercised reasonable care to prevent and correct promptly any harassing behavior and whether a complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer is dependent on the facts in each case.

¹³ "Should have known" includes "constructive knowledge" and "constructive notice." These terms were defined by the forum in *In the Matter of Wing Fong*, 16 BOLI 280, 292 (1998). "Constructive knowledge" was defined as "if one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such a fact; e.g. matters of public record."

"Constructive notice" was defined as "Such notice as is implied or imputed by law | | *. Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing. That which the law regards as sufficient to give notice and is regarded as a substitute for actual notice."

employer "should have known." OAR 839-001-0010(4)(f); *In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 252(1995); *In the Matter of United Grocers, Inc.*, 7 BOLI 1, 35 (1987).

First, a review of the facts. Credible testimony from Complainant, Hesla, and Repp established that a customer made racially insulting remarks toward Complainant. After consulting Hesla, the next day Complainant complained about the racial insults to Respondent's assistant store manager, Bryant, who told him to point the customer out the next time she came into the store. When the customer came in again a day or two later, Bryant wasn't in the store, so Complainant followed Bryant's instructions and told Calcagno that the customer was in the store. However, Complainant failed to specifically report to Calcagno that the customer had racially harassed him. Calcagno took no action, and the customer did not speak to Complainant or make any more racial remarks during that visit or subsequent visits to the store.

Under these circumstances, the forum finds that the customer's remarks were directed at Complainant because of his race, that a reasonable person in Complainant's circumstances would have perceived that the remarks were sufficiently severe to create a hostile, intimidating or offensive working environment, and that Complainant had the same perception. The next question is whether Respondent knew or

should have known of the customer's conduct, and if so, whether Respondent took immediate and appropriate corrective action.

Bryant, the assistant store manager, had knowledge of the harassment because Complainant told him. In contrast to Glackin, his position as second in command at Respondent's store justifies imputing knowledge of the customer's harassment to Respondent. However, at the time Complainant reported the incident to him, there was no corrective action he could take, as the incident had occurred the day before and the customer was no longer in the store. Instead, he instructed Complainant to point out the customer the next time she came into the store. When the customer came back two days later, Complainant reported to Calcagno that the woman who had "made these complaints" and was "saying these things" was in the store again, but did not explain that she had racially harassed him. The woman came back to the store after that, but never harassed Complainant again. As a result, there is no evidence Calcagno was made aware the woman had racially harassed Complainant or that it occurred again so that he could correct it. Bryant, having directed Complainant to point the customer out the next time she came in to the store, and not being informed of any further harassment, likewise had no reason to take any further action. Finally, there is no evidence that the harassment became pervasive

through the customer or other non-employees making racial remarks again in Complainant's presence.¹⁴

Under these circumstances, even though the harassment was unarguably hostile, intimidating and offensive, Respondent cannot be held liable for the harassment inflicted upon Complainant by Respondent's customer.

4. WAS COMPLAINANT'S DISCHARGE BASED ON RETALIATION?

In order to prevail on a retaliation claim, the Agency must establish that Calcagno and/or Matthew Marcott and Pam Garcia, the individuals responsible for discharging Complainant, were aware of his opposition to the racial harassment that occurred and that Complainant's opposition motivated them, at least in part, to discharge him. There was no credible evidence presented that established that Calcagno, Marcott, or Garcia had actual knowledge of any racial harassment or that Complainant opposed it. Without actual knowledge by these individuals, the Agency's retaliation claim fails.

¹⁴ In prior harassment cases before this forum, "should have known" has been equated as having constructive knowledge or notice, which can be shown through evidence of pervasiveness of conduct. *Id.*, at 292-94 (1998).

5. WAS COMPLAINANT TREATED DIFFERENTLY IN TERMS AND CONDITIONS OF EMPLOYMENT THAN WHITE CO-WORKERS WHO WERE ACCUSED OF SEXUAL HARASSMENT?

The Agency alleged that Complainant was not given notice of the specific sexual harassment allegations made against him, interviewed, or given the opportunity to respond to the allegations prior to his termination, whereas white males accused of sexual harassment were given notice, interviewed, and given an opportunity to respond. The evidence portrays a different story. Although Calcagno did not disclose all the specific allegations to Complainant and did not identify his accusers, Complainant was told that he had been accused of touching and rubbing female employees and asking them out on dates. In response, Complainant denied having sexually harassed anyone at Respondent. When Calcagno investigated, he obtained credible evidence from four more employees describing additional sexual harassment they had observed by Complainant. Since Complainant had already denied sexually harassing any employees, there was little to be gained from asking Complainant to respond to the new allegations.

Evidence was presented of sexual harassment complaints against five white males employed by grocery stores owned and operated by the Marcott family. There was no evidence that any of

them were informed of the identities of the individuals filing complaints against them. John Smolders, the Marcott's director of baking, was informed of the allegations and denied them. Dennis Normoyle, a supervisor at Respondent, was questioned by Calcagno about the allegations. John Atterberry was talked to about the allegations. The details in which the allegations were discussed with Smolders, Normoyle, and Atterberry were not brought out in the testimony related to their situations. Kyle, the learning disabled male, was fired before anyone filed a complaint against him based on Calcagno's observations. There was no evidence presented to show whether or not Robert Hesla's employee, referred to in Finding of Fact - The Merits #43, was talked to at any stage of Hesla's investigation prior to his termination. In conclusion, Complainant was not discriminated against in the investigation process on the basis of his race.

6. WAS COMPLAINANT TREATED DIFFERENTLY IN HIS DISCHARGE THAN WHITE CO-WORKERS WHO WERE ACCUSED OF SEXUAL HARASSMENT?

The previous paragraph discussed the procedural aspects surrounding investigations of sexual harassment complaints brought against Complainant and five white males. In this discussion, the forum compares the substantive outcomes of these sexual harassment complaints to determine if Complainant was

treated differently and unlawfully discharged based on his race.

The decision-makers in Complainant's discharge were Calcagno, Marcott, and Harris. When Complainant was discharged, they had credible evidence that he had inappropriately touched and asked out two minor females, kissed one of them, and touched another female employee, and that the two minor females were afraid of working with him. Two other white males who touched female employees, Robert Hesla's employee and Kyle, were also discharged. Smolders and Normoyle, who were not discharged, were not alleged to have touched anyone, did not make sexual remarks to minor females, and no one alleged they were afraid of working, with them. No more complaints were received against Normoyle and no more against Smolders after the March 1997 complaints. Atterberry was alleged to have touched a female employee's bottom, but this complaint never reached Calcagno or the Marcott family. The complaint against Atterberry that did reach the Marcott family did not involve touching, but "invading personal space," no one alleged they were afraid of working with him, and no more complaints were received against him.

In summary, three of the four males (including Complainant) who touched females were all discharged. The complaint against the fourth, Atterberry, never went beyond a low-level manager, and he has not repeated his behavior.

The two males who were not alleged to have touched females were not discharged, and have not repeated their behavior. This shows a consistent pattern of discipline, rather than different treatment and unlawful discrimination based on Complainant's race.

7. RESPONDENT'S AFFIRMATIVE DEFENSES.

Respondent raised a number of affirmative defenses in its Answer that the forum need not address, given its disposition of the case.

8. RESPONDENT'S EXCEPTIONS

Respondent correctly points out that the only witnesses who testified that they heard Canfield call Complainant "Toby" or "Boy" were Sweet, Prescott, and Glackin. Although this is accurately reflected in Finding of Fact - - The Merits #14, the Opinion included Tony Pittman's name in paragraph 2(b). Accordingly, Pittman's name has been deleted from that section of that Opinion.

Respondent's remaining exceptions to the Proposed Order are addressed in the body of the Opinion.

ORDER ON RECONSIDERATION

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the Complaint and Specific Charges filed against Respondent Murrayhill Thriftway, Inc. are hereby dismissed ac

ording to the provisions of ORS 659.060(3).

**In the Matter of
ROBERT N. BROWN dba Café
Rosemary,**

Case Number 62-00
Final Order of the Commissioner
Jack Roberts
Issued June 8, 2000.

SYNOPSIS

Respondent employed Claimant as a food server and failed to pay Claimant all wages due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful, and Respondent was ordered to pay civil penalty wages. ORS 652.140(2), 652.150.

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 for the State of Oregon. The hearing was held on April 19, 2000, in the Bureau of Labor and Industries office at 1250 N.E. 3rd, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Jaymie L. Turner, the wage claimant ("Claimant"), was present throughout the hearing and was

not represented by counsel. Respondent Robert N. Brown was present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses: Claimant and Rhoda Briggs, Wage & Hour Division Compliance Specialist. Respondent called himself as a witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-11 (submitted or generated prior to hearing) and A-12 (submitted at hearing).

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 or about April 1, 1999, Claimant filed a wage claim with the Agency. She alleged that Respondent employed her and failed to pay wages she earned between January 18, 1999 and February 4, 1999.

2) At the time she filed her wage claim, Claimant assigned to the Commissioner of Labor and

Industries, in trust for Claimant, all wages due from Respondent.

3) Claimant brought her wage claim within the statute of limitations.

4) On August 13, 1999, the Agency served Order of Determination No. 99-1116 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$442.50 in unpaid wages and \$1,560.00 in civil penalty wages, plus interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On August 31, 1999, the Agency received a written request for hearing and answer from Respondent. In his answer, Respondent acknowledged that Claimant had worked for him for "59.5" hours "according to time records" from January 18, 1999 through February 4, 1999. Respondent alleged that penalty wages were inappropriate because of missing funds associated with Claimant's employment.

6) On January 28, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as April 11, 2000, and successive days thereafter, at 9:00 a.m., at the Bend office of the Bureau of Labor and Industries. Together

with the Notice of Hearing, the forum sent a document entitled "Summary 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 839-050-000 to 839-050-0440.

7) On February 3, 2000, BOLI mailed a copy of the forum's amended contested case hearings rules, effective January 27, 2000, to Respondent.

8) On February 7, 2000, the ALJ issued a case summary order requiring the Agency and Respondent each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, and a statement of any agreed or stipulated facts. The Agency was additionally ordered to submit wage and penalty calculations and a brief statement of the elements of the claim. Respondent was additionally ordered to submit a brief statement of any defenses to the claim. The ALJ ordered the participants to submit case summaries by April 3, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On March 13, 2000, the ALJ, on his own motion, reset the hearing for April 19, 2000 at the same location, at the same time extending the due date for case summaries to April 10, 2000.

10) The Agency timely filed its case summary, with attached exhibits, on April 10, 2000. Re-

spondent did not file a case summary.

11) On April 13, Respondent left a voice mail message with the ALJ requesting a postponement. On April 14, after notifying the Agency case presenter of this message, the ALJ contacted Respondent and advised that he needed to file his request in writing and that it could be filed by facsimile transmission directly to the ALJ and served in the same manner on the Agency. At 11:47 a.m. on April 14, Respondent filed a motion for postponement via facsimile and served a copy on the Agency. The stated basis for Respondent's motion was that he had been in California dealing with unforeseen urgent family business – his brother's serious illness - the prior two weeks and it appeared he would be again called away the date of the hearing. In response, the ALJ conducted a pre-hearing conference at 2:35 p.m. on April 14. At that time, the Agency objected to Respondent's motion on the basis that it was untimely and did not show good cause. During the conference, Respondent stated that the circumstance that would require his absence was a prospective, presently unscheduled meeting with his brother's estranged wife's attorneys in California. The ALJ denied Respondent's motion on the basis that it was untimely and that Respondent had failed to show good cause. At the hearing, the ALJ confirmed that ruling.

12) At the start of the hearing, pursuant to ORS 183.415(7),

the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) At the hearing, the Agency moved to amend the Order of Determination to conform to the evidence to seek \$385 in unpaid wages instead of \$422.50. Respondent did not object and the motion was granted.

14) At the hearing, Respondent sought to testify concerning the contents of documents labeled R-2 and R-3 and further sought to have those documents admitted as exhibits. Both documents consisted of handwritten statements by two of Respondent's employees, created in November 1999, that discussed Respondent's policy for retaining guest checks. The Agency objected to Respondent's testimony and admission of the documents on the bases of lack of relevancy, that they had not been provided as required by the ALJ's case summary order, that Respondent had not disclosed the authors as potential witnesses pursuant to the same order, and that Respondent did not have a satisfactory reason for failing to previously provide the documents. Respondent did not articulate a satisfactory reason for not providing them as part of a case summary. The ALJ further concluded that excluding the evidence would not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), based on their lack of relevance to the

issue of whether Claimant was owed wages,¹ and refused to admit them or to allow Respondent to testify concerning their contents. However, Respondent was allowed to submit the exhibits and describe their contents as an offer of proof.

15) The ALJ issued a proposed order on May 4, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Robert N. Brown, an individual person, did business under the assumed business name of Café Rosemary.

2) Respondent hired Claimant in December 1998 as a food server. Claimant's usual hours were 10:30 a.m. to 3:30 p.m., Monday through Friday. Claimant was paid minimum wage, which was \$6.00 per hour in 1998 and \$6.50 per hour in 1999.

3) Claimant was employed by Respondent through February 4, 1999.

4) During Claimant's employment, Respondent had bi-monthly payroll periods, from the first to the fifteenth day, and the sixteenth to the last day of each month. Respondent paid employees on the fifth and twentieth days of each month.

5) Claimant worked 59.25 hours for Respondent between January 18, 1999 and February 4, 1999. Respondent has not paid Claimant for any of these hours.

6) Respondent has not paid Claimant for these hours based on an unspecified amount of "missing funds" and his perception that Claimant was stealing from him by not putting all the cash she received from customers in payment of their guest checks in Respondent's cash register.

7) Respondent reported Claimant's suspected theft to the police in the week prior to the hearing, but had initiated no legal action against her prior to that time.

8) On February 2, 1999, Claimant gave Respondent notice that February 4 would be her last day of work. Claimant worked February 3 and 4, 1999.

9) Calculated at the wage rate of \$6.50/hr., Claimant earned a total of \$385.13 between January 18, 1999 and February 4, 1999.

10) At the time of Claimant's termination, Respondent owed Claimant \$385.13 in unpaid wages.

11) Civil penalty wages are computed as follows for Claimant,

¹ The issue of guest checks was relevant only to Respondent's defense that Claimant had stolen money from Respondent and that Respondent was therefore entitled to offset Claimant's wages by the amount purportedly stolen. As discussed in the Opinion, *infra*, this is not an available defense under Oregon law.

in accordance with ORS 652.150: \$6.50/hr. multiplied by 8 hours per day equals \$52.00; \$52.00 multiplied by 30 days equals \$1,560.00.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an individual person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent employed Claimant in Oregon from December 1998 through February 4, 1999.

3) Claimant earned \$385.13 in wages during her employment with Respondent between January 18, 1999 and February 4, 1999.

4) Respondent has not paid Claimant any wages for the work she performed between January 18, 1999 and February 4, 1999.

5) Claimant voluntarily terminated her employment with Respondent effective February 5, 1999, giving Respondent prior notice on February 2, 1999.

6) Respondent willfully failed to pay Claimant \$385.13 in earned, due, and payable wages no later than February 4, 1999, Claimant's last day of employment, and more than 30 days have elapsed since that date.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Robert N. Brown 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. During all times material herein, Respondent employed Claimant.

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) At times material, ORS 652.140(2) provided:

“When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs.”

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid by February 11, within five days, excluding Saturdays, Sundays and holidays, after Claimant quit.. Those wages amount to \$385.13.

4) ORS 652.150 provides:

“If an employer willfully fails to pay any wages or compen-

sation 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 \$1,560.00 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

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

OPINION

INTRODUCTION

The Agency alleged in its Order of Determination that Claimant was not paid for 65 hours of work she performed for Respondent be-

tween January 18 and February 4, 1999. The Agency alleged that Claimant was entitled to \$6.50 per hour, the statutory minimum wage, and was owed a total of \$442.50 in unpaid wages and \$1560.00 in civil penalty wages. At hearing, the forum granted the Agency’s unopposed motion to amend the Order of Determination downward to seek \$385.00 in unpaid wages instead of \$442.50.

PRIMA FACIE CASE

To establish a prima facie case for wage claims, the Agency must establish the following elements: (1) Respondent employed Claimant; (2) Claimant’s agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which she was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Majestic Construction, Inc.*, 19 BOLI 59, 67 (1999).

All of these elements are undisputed, with Respondent and the Agency stipulating that Claimant worked 59.25 hours for which she was entitled to be paid \$6.50 per hour, the statutory minimum wage, and for which she was not compensated. The only issue is whether Respondent’s perception that Claimant was responsible for “missing funds” entitled Respondent to deduct any or all of the wages Claimant earned for working those 59.25 hours.

Oregon law in this matter is set forth in ORS 652.610. This statute severely limits the circumstances under which an

employer may take deductions from an employee's wages. None of those circumstances applies here. The forum has previously held that an employer may not withhold an employee's wages based on allegations, even if confirmed, that the employee stole money from the employer. *In the Matter of Ken Taylor*, 11 BOLI 139, 144 (1992). Consequently, Respondent owes Claimant the \$385.00 in unpaid wages sought in the Order of Determination, as amended at hearing.

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. *In the Matter of Barbara Coleman*, 19 BOLI 230, 265 (2000). Respondent, as an employer, had a duty to know the amount of wages due his employees. *Id.* Respondent testified that he knew the specific number of hours worked by Claimant and that he voluntarily chose not to pay Claimant, based on his perception that she was stealing from him. There is no evidence that Respondent acted other than voluntarily or as a free agent. The forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$1,560.00, the amount sought in the Order of Determination. This figure is computed by

multiplying \$6.50 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages he owes as a result of his violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Robert N. Brown** 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 Jaymie L. Turner in the amount of ONE THOUSAND NINE HUNDRED FORTY-FIVE DOLLARS (\$1,945.00), less appropriate lawful deductions, representing \$385.00 in gross earned, unpaid, due, and payable wages and \$1,560.00 in penalty wages, plus interest at the legal rate on the sum of \$385.00 from March 1, 1999, until paid and interest at the legal rate on the sum of \$1,560.00 from April 1, 1999, until paid.

**In the Matter of
ENTRADA LODGE, INC., dba
BEST WESTERN ENTRADA
LODGE**

Case No. 25-00

Final Order of the Commissioner
Jack Roberts

June 8, 2000

SYNOPSIS

Where Respondent failed to restore Complainant to her former housekeeping position, which had been filled by replacement workers, for two and one-half weeks after she took OFLA leave and attempted to return to work, the forum awarded Complainant \$262.50 in lost wages and \$15,000 damages for mental suffering that Complainant experienced as a result of Respondent's unlawful employment practice. The forum found that Complainant had not been constructively discharged when she quit Respondent's employ to go to work for another inn that offered more hours. ORS 659.470 *et seq.*, OAR 839-009-0270.

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 for the State of Oregon. The hearing was held on February 8

and 9, 2000, at the Bureau of Labor and Industries office located at 1250 N.E. 3rd, #B-105, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Complainant Cheryl Buxton was present throughout the hearing, and was not represented by counsel. Respondent was represented by Gregory P. Lynch, trial attorney, and co-counsel Stanley D. Austin, of the law firm Hurley, Lynch & Re, P.C. Douglas F. Ritchie was present throughout the hearing as Respondent's representative.

The Agency called as witnesses, in addition to Complainant: Douglas Ritchie, Respondent's general manager; Christina (Crain) Delong and Kimberly Ford, formerly employed as housekeepers for Respondent; Richard Buxton, Complainant's husband; Jeffrey Carlson, accounting coordinator for BOLI; and Jane MacNeill, Civil Rights Division senior investigator.

Respondent called Ritchie and Complainant as witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-19 (submitted prior to hearing), X-20 (submitted at hearing), and X-21 (issued by ALJ after hearing);

b) Agency exhibits A-1 through A-7 (submitted prior to hearing with the Agency's case

summary), and A-8 through A-14 (submitted at hearing);

c) Respondent's exhibits R-1 (submitted prior to hearing with Respondent's case summary), R-2 through R-9, R-13 and the first four pages of R-14 (submitted at hearing).

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 28, 1998, Complainant filed a verified complaint with Agency's Civil Rights Division ("CRD") alleging that she was the victim of the unlawful employment practices of Respondent in that Respondent failed to return her to her former housekeeper position upon returning to work from parental leave. On July 16, 1999, BOLI amended Complainant's complaint to correct Respondent's name and add the name of Respondent's registered agent. After investigation and review, the CRD issued an Administrative Determination finding substantial evidence supporting the allegation that Respondent did not return Complainant to her former job following her medical leave.

2) On November 8, 1999, the Agency submitted to the forum Specific Charges alleging that Re-

spondent discriminated against Complainant by: (a) failing to restore her to the position she held at the time she commenced family leave after she was ready to return to work; and (b) constructively discharging her by reducing her hours so that it was necessary for her to find other employment, both in violation of ORS 659.492. The Agency also requested a hearing.

3) On November 18, 1999, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth February 8, 1999, in Bend, Oregon, as the time and place of the hearing in this matter; b) a Summary 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.

4) On December 6, 1999, Respondent, through Gregory P. Lynch, filed an answer to the Specific Charges.

5) On January 6, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any damage calculations (for the Agency only); and a brief statement of any defenses to

the claim (for Respondent only). The forum ordered the participants to submit case summaries by January 28, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On January 20, 2000, Respondent filed a motion for a postponement in which it alleged that the Agency would not cooperate in arranging discovery depositions that Respondent needed to conduct "to ensure that respondent has a full and fair opportunity to present its case at the contested hearing."

7) On January 20, 2000, Respondent also filed a motion for a discovery order to be allowed to take the deposition of Complainant.

8) On January 25, 2000, the Agency filed objections to Respondent's motion to postpone, arguing that the Agency had not impeded Respondent's efforts to seek a deposition or obtain discovery of documents and that Respondent's failure to make adequate efforts to complete discovery before the scheduled hearing date did not constitute good cause for granting a postponement.

9) On January 25, 2000, the Agency filed objections to Respondent's request to take Complainant's deposition, arguing that Respondent's request was untimely and failed to demonstrate why a deposition rather than informal or other means of discovery was necessary.

10) On January 25, 2000, the forum issued an interim order denying Respondent's motion to take Complainant's deposition on the basis that Respondent had failed to seek discovery through an informal exchange of information before requesting a discovery order to take Complainant's deposition. The forum noted that an informal attempt to arrange for a deposition did not constitute an attempt to seek discovery through an informal exchange of information. In the same order, the forum denied Respondent's motion for a postponement on the basis that Respondent's inability to make an informal arrangement to take Complainant's deposition did not meet the good cause requirement of OAR 839-050-0020(10).

11) On January 28, 2000, Respondent filed a motion for reconsideration of the forum's rulings on its motions for postponement and to take Complainant's deposition.

12) On January 28, 2000, the Agency and Respondent timely filed their case summaries.

13) On January 28, 2000, the forum denied Respondent's motion for reconsideration of the forum's rulings on Respondent's motions to postpone and to take Complainant's deposition.

14) At the commencement of the hearing, the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) Prior to opening statements, Respondent objected to the ALJ's receipt of the Agency's case summary, marked as Exhibit X-15, into evidence on the basis that Respondent had just received it at 3 p.m. on February 7, the previous day. Respondent alleged that it was prejudiced by the Agency's failure to provide Respondent with the case summary in a timely manner. At the ALJ's request, Respondent provided the forum with the manila envelope that the Agency's case summary was mailed in, bearing the postmark of "Jan 28'00," and it was marked and received as Exhibit X-20. The ALJ admitted Exhibit X-15 because: (1) Exhibit X-20 demonstrated it was timely filed pursuant to the requirements of OAR 839-050-0040(1); and (2) testimony by Jeffrey Carlson, BOLI's accounting coordinator who is responsible for internal controls regarding BOLI's mail-room procedures, established that Exhibit X-20 was in fact postmarked and placed in a U. S. Postal Service receptacle on January 28, 2000, in the normal course of business.

16) On May 4, 2000, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) In 1998, Respondent was an Oregon corporation providing commercial lodging in and around

Bend, Oregon, under the assumed business names of Best Western Entrada Lodge ("Entrada") and Best Western Inn & Suites.

2) Respondent employed 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in both 1997 and 1998.

3) Douglas Ritchie, Entrada's general manager, hired Complainant as a housekeeper at Entrada on January 16, 1998. Complainant's first day of work was January 17, 1998. When Complainant was hired, her last name was Schulze.

4) When Complainant was hired, Ritchie did not promise Complainant a specific schedule or number of hours she would work per week.

5) Complainant was paid the state minimum hourly wage throughout her employment with Entrada. In 1998, the state minimum wage was \$6.00 per hour.

6) Complainant's present husband, Richard Buxton, interviewed with Ritchie on the same day as Complainant and was hired as Entrada's maintenance person. He began work at the same time as Complainant. Complainant and Buxton were married on April 7, 1998.

7) Buxton's wages were garnished for child support payments throughout the time he worked for Entrada. His bi-monthly net earnings while employed by Entrada

were \$300 after taxes and the child support garnishment.

8) Complainant had five children at the time she married Buxton.

9) Respondent's business is dependent on the tourist industry and occupancy rates fluctuate considerably during the course of the year. Summer is Respondent's busiest season. The hours worked by housekeepers vary considerably depending on occupancy rates, ranging in 1998 from a low of 98.5 hours between November 1-15, 1998, to a high of 647.5 hours between July 15-31, 1998.¹ The hours worked by housekeepers are directly proportionate to Respondent's occupancy rates.

10) Ritchie was responsible for the scheduling of housekeeper's hours throughout Complainant's employment with Respondent.

11) Complainant's housekeeping duties involved cleaning rooms. Specifically, she made beds, vacuumed, washed bathrooms, cleaned up "stayovers," did some "deep cleaning," and occasionally worked as a leadperson when she was the most senior housekeeper scheduled to work, during which time she assigned rooms to other housekeepers and did laundry.

¹ Ritchie testified, and Respondent's timecards reflect, that housekeeper hours were tracked on a semi-monthly basis for payroll purposes.

12) During Complainant's employment, her supervisors filled out semi-monthly time cards showing the hours she and other housekeepers worked. Complainant maintained a contemporaneous record of her own hours on her calendar at home.

13) Complainant's daughter made Complainant's 1998 home calendar. On that calendar, Complainant wrote down significant events as they occurred or were scheduled,² as well as her hours at work. Based on an inspection of the calendar and Complainant's testimony, the forum finds that Complainant's handwritten entries on the calendar are an accurate, contemporaneous account of events in Complainant's life during the time she worked for Entrada.³ Where Complainant's testimony concerning dates conflicted with those written on the calendar, the

² For example, February's calendar contains numerous entries showing the specific dates and time Complainant worked for Respondent, as well as other entries, such as a reference to a legal notice in "The Bulletin," a note to "pay Farmer's Insurance \$66.46," a note that Complainant "mailed off tax papers & phone bill payment 83.83," and a note that she had "side" and "back pain" on the 12th and 13th.

³ Another significant indicator of the calendar's reliability is the fact that the total number of hours recorded on it by Complainant as worked prior to July 27, 1998, is 630.25 hours, whereas the total number of hours on her time cards for that period was 627.50 hours.

forum has relied on the calendar to determine accurate dates.

14) Ritchie does very little documentation concerning Respondent's housekeepers because there is such a high turnover. Ritchie did not contemporaneously document any of his conversations with Complainant.

15) When Complainant was hired, Entrada already employed four other housekeepers – Jennifer Bliss, Karla Henley, Laurie Knox and Nikke Standley.

16) Complainant learned she was pregnant on January 17, 1998, her first day of work for Entrada, and told Standley, the housekeeping supervisor, that she was pregnant.

17) Sometime in the spring of 1998, Ritchie learned Complainant was pregnant. He assumed she would take 12 weeks of leave when her baby was born.

18) From January 16-31, 1998, Entrada's five⁴ housekeep-

ers worked the following hours, for a total of 219.25⁵ hours:

Complainant:	51.75
L. Knox:	52.75
J. Bliss:	37.25
N. Standley:	49.75
K. Henley:	27.75

19) Prior to February 1, 1998, Bliss, Henley, and Standley left Entrada's employ. Knox replaced Standley as housekeeping supervisor. Between February 1 and February 15, 1998, Entrada employed two new housekeepers – Ramona Lopez and Angela Rodgers. In that time period, Entrada's four housekeepers worked the following hours, for a total of 110.5 hours:

Complainant:	36.25
L. Knox:	46.75
A. Rodgers:	17
R. Lopez:	10.5

20) Between February 16 and February 28, 1998, Entrada employed three new housekeepers - Lynn Cornell, Holly Luckins and Bobbie Mitchell. In that time period, Entrada's seven house-

⁴ In this and subsequent Findings of Fact, the forum has listed the number of housekeepers who actually worked during the specified time period, based on the time cards in Exhibits A-5, A-7, and R-1. In some instances, this total differs from Respondent's summary entitled "Number of Housekeeping Employees Working Per Pay Period (1998)" (Exhibit R-9).

⁵ In this and subsequent Findings of Fact, the total number of hours worked by housekeepers was derived from adding together the specific hours listed after each housekeeper. In some instances, this total differs from Respondent's summary of "Total Housekeeper Hours" (Exhibit R-7). The forum has used this method of calculation instead of relying on the hours listed in Exhibit R-7 based on Ritchie's testimony that the hours in Exhibit R-7 were derived from housekeeper's time records in Exhibits A-5, A-7, and R-1.

keepers worked the following hours, for a total of 262 hours:

Complainant: 64.25
 L. Knox: 56.25
 A. Rodgers: 34.75
 R. Lopez: 24
 B. Mitchell: 37
 L. Cornell: 14.5
 H. Luckins: 31.25

21) Prior to March 1, 1998, Cornell and Lopez left Entrada's employ. Between March 1 and March 15, 1998, Entrada employed three new housekeepers - Kimberly Ford, Sammie Garrett, and Jennifer Rafford. In that time period, Entrada's eight housekeepers worked the following hours, for a total of 201.5 hours:

Complainant: 56.75
 L. Knox: 73.75
 K. Ford: 18.25
 A. Rodgers: 2.75
 B. Mitchell: 16.5
 H. Luckins: 5.5
 S. Garrett: 15.25
 J. Rafford: 12.75

22) Prior to March 16, 1998, Garrett, Luckins, Rafford, and Rodgers left Entrada's employ. Between March 16 and March 31, 1998, Entrada employed six new housekeepers - Tempie Davis, Wynona Grilley, Darcie Ingram, Tamara Keck, Alicia Lopez and Anna Mort. In that time period, Entrada's 10 housekeepers worked the following hours, for a total of 326.25 hours:

Complainant: 61.5
 L. Knox: 52.5
 K. Ford: 60.25
 B. Mitchell: 31.5
 T. Davis: 28.25
 D. Ingram: 18.75

A. Lopez: 11.75
 W. Grilley: 49
 T. Keck: 3.5
 A. Mort: 9.25

23) Prior to April 1, 1998, Keck, A. Lopez, Mitchell, and Mort left Entrada's employ. Between April 1 and 15, 1998, Entrada re-employed one housekeeper - Ramona Lopez. In that time period, Entrada's seven housekeepers worked the following hours, for a total of 231.25 hours:

Complainant: 46.25
 L. Knox: 61
 K. Ford: 50.75
 T. Davis: 26.25
 D. Ingram: 25.25
 R. Lopez: 12
 W. Grilley: 9.75

24) Prior to April 16, 1998, Davis and Grilley left Entrada's employ. Between April 16 and 30, 1998, Entrada's five housekeepers worked the following hours, for a total of 192.75 hours:

Complainant: 46.75
 L. Knox: 67.25
 K. Ford: 53.5
 D. Ingram: 19
 R. Lopez: 6.25

25) Prior to May 1, 1998, R. Lopez left Entrada's employ. Between May 1 and 15, 1998, Entrada's four housekeepers worked the following hours, for a total of 176.25 hours:

Complainant: 48.5
 L. Knox: 59.75
 K. Ford: 52.25
 D. Ingram: 15.75

26) Between May 16 and 31, 1998, Entrada employed one new housekeeper - Christie

Hammell. In that time period, Entrada's five housekeepers worked the following hours, for a total of 228.75 hours:

Complainant: 54.25
L. Knox: 65
K. Ford: 75
D. Ingram: 17.75
C. Hammell: 16.75

27) Prior to June 1, 1998, Hammell and Ingram left Entrada's employ. Between June 1 and 16, 1998, Entrada employed two new housekeepers – Josh Price and Kevin Seibert. In that time period, Entrada's five housekeepers worked the following hours, for a total of 207.75 hours:

Complainant: 48
L. Knox: 60.5
K. Ford: 67.25
K. Seibert: 26
J. Price: 6

28) On June 9, 1998, Complainant's doctor restricted her to light duty. On or about the same day, Complainant presented her light duty note to Ritchie. For the rest of June, Ritchie assigned lighter duty work to Complainant. Starting on June 13, Ritchie assigned laundry duties to Complainant, which Complainant performed through July 26, 1998. The lighter duty and laundry work assigned to Complainant were an accommodation of her light duty restrictions due to her pregnancy.

29) Between June 16 and 30, 1998, Entrada employed four new housekeepers – Reba Balcomb, Janelle Grant, Tara Hunter and Lance Robbins. In that time period, Entrada's nine house-

keepers worked the following hours, for a total of 416.50 hours:

Complainant: 53.25
L. Knox: 58.75
K. Ford: 61.75
K. Seibert: 53
J. Price: 63.25
R. Balcomb: 14
J. Grant: 20.5
T. Hunter: 46
L. Robbins: 46

30) Between July 1 and 15, 1998, Entrada employed two new housekeepers – Michelle Miller and Brittney Richman. In that time period, Entrada's 11 housekeepers worked the following hours, for a total of 526.5 hours:

Complainant: 40.75
L. Knox: 75
K. Ford: 62
K. Seibert: 73.75
J. Price: 54
R. Balcomb: 56.25
J. Grant: 50.75
T. Hunter: 48.75
L. Robbins: 58.25
B. Richman: 3.5
M. Miller: 3.5

31) Between July 15 and 31, 1998, Entrada employed one new housekeeper – Jennifer Carroll. In that time period, Complainant worked 6.25 hours on July 18, 6.75 hours on July 19, and 7.25 hours on July 26. In the same time period, Entrada's 12 housekeepers worked the following hours, for a total of 646.75 hours:

Complainant: 20.25
L. Knox: 94.75
K. Ford: 79.45
K. Seibert: 85.75
J. Price: 71.5
R. Balcomb: 64.5

J. Grant: 61.25
 T. Hunter: 21
 L. Robbins: 21
 B. Richman: 68.5
 M. Miller: 50.5

32) On July 27, 1998, Complainant stopped working due to her pregnancy, based on the advice of her physician. Prior to July 27, Complainant told Ritchie that she would be taking maternity leave until her six week checkup after her baby was born and planned to return to work for Respondent at that time. When Complainant told Ritchie she was beginning her leave, Ritchie told her to contact him when she was ready to come back to work.

33) Between January 17, 1998 and July 26, 1998, Complainant worked an average of 23 hours per week.⁶

34) Ritchie considered Complainant to be a "fine" employee at the time her leave commenced.

35) At the time Complainant's leave commenced, Complainant and her husband were behind in paying their bills.

36) During Complainant's entire period of employment with

Respondent, Ritchie said nothing negative regarding Complainant's pregnancy or her anticipated maternity leave. Complainant and Ritchie had a good working relationship.

37) Prior to August 1, 1998, Hunter and Robbins left Entrada's employ. Between August 1 and 15, 1998, Entrada employed one new housekeeper – Robin Rynniewicz. In the same time period, Entrada's 10 housekeepers worked the following hours, for a total of 555.5 hours:

L. Knox: 81.5
 K. Ford: 76.75
 K. Seibert: 71.5
 J. Price: 79
 R. Balcomb: 79.75
 J. Grant: 38.25
 B. Richman: 58.25
 M. Miller: 32.25
 J. Carroll: 21.5
 R. Rynniewicz: 16.75

38) Complainant's child was born on August 20, 1998. Complainant visited Entrada several times to show off her baby.

39) Prior to August 1, 1998, Carroll, Grant and Rynniewicz left Entrada's employ. Between August 16 and 31, 1998, Entrada's seven housekeepers worked the following hours, for a total of 414.75 hours:

L. Knox: 61.75
 K. Ford: 85.25
 K. Seibert: 73.75
 J. Price: 75.25
 R. Balcomb: 40.5
 B. Richman: 52.25
 M. Miller: 26

⁶ This figure was reached at by dividing 191 (the number of days in the period of time beginning January 17, 1998 and ending July 26, 1998) by 7 to determine the number of weeks worked by Complainant, then dividing 27.3 (the number of weeks worked by Complainant) into 627.5 (the total number of hours worked by Complainant).

40) Prior to September 1, 1998, Balcomb, Miller, and Richman left Entrada's employ. Between September 1 and 15, 1998, Entrada employed one new housekeeper – Korissa Garfield, whose first day of work was September 15, 1998. Garfield was hired on an as-needed basis. In the same time period, Entrada's five housekeepers worked the following hours, for a total of 239.75 hours:

L. Knox: 13.5
 K. Ford: 62.25
 K. Seibert: 92.75
 J. Price: 65
 K. Garfield: 6.25

41) Prior to September 16, 1998, Knox left Entrada's employ. Some time prior to that, Seibert had replaced Knox as housekeeping supervisor. As housekeeping supervisor, he was paid more than Entrada's housekeepers. Between September 16 and 30, 1998, Entrada employed one new housekeeper – Cristina Crain.⁷ In the same time period, Entrada's five housekeepers worked the following hours, for a total of 245.25 hours:

K. Ford: 62.25
 K. Seibert: 94.25
 J. Price: 19
 K. Garfield: 30.25
 C. Crain: 59.5

⁷ Crain has since married and identified herself as "Christina Marie Crain Delong" during the hearing. To avoid confusion, this Order refers to her by Crain, her name at the time of the alleged discrimination.

42) Garfield's last day of work was September 25, 1998. On September 24, she worked 3.5 hours, and on September 25, she worked 5 hours.

43) Crain started work on September 17, 1998. She was hired as an "on-call" employee who telephoned Respondent each day to see if work was available. From September 25 to September 30, she worked the following schedule: September 25 – 5 hours; September 26 – 5 hours, September 27 – 5.5 hours, September 28 – 3.5 hours, September 29 – 4 hours, September 30 – 4 hours, for a total of 27 hours. Complainant could have worked these hours.

44) Complainant received no income during the period of her leave, which placed an additional financial stress on her family.

45) On September 21, 1998, Complainant and her husband received a 72-hour eviction notice from their landlord, based on their failure to pay rent, which was due on September 1, 1998. In the same period of time, their electricity was almost shut off. Complainant and her husband called several churches to inquire about financial assistance and eventually got rent assistance from "AFS." There was no evidence presented regarding the amount of rent paid by Complainant and her husband.

46) On September 24, 1998, Complainant visited the office of Dr. Weeks, who had cared for her during her pregnancy and deliv-

ery. Complainant was unable to see Dr. Weeks, but told his nurse that she needed to go back to work. Dr. Weeks' nurse told her it was all right for her to return to work. Complainant felt she needed to go back to work at this time because of the financial needs of her family.

47) Later in the day on September 24, 1998, Complainant called Ritchie and told him she was ready to come back to work. Ritchie told her to report back to work on September 26, a Saturday. Ritchie did not ask Complainant to provide a medical release on this or any subsequent occasion.

48) When Complainant told Ritchie that she was ready to come back to work, she anticipated and expected that she would be given the same number of hours she had averaged before going on leave, which she believed was 25 to 30 hours per week.

49) On September 26, Ritchie phoned Complainant and told her not to come to work because he had enough housekeepers for the day.

50) On September 29, Complainant called Ritchie again and asked about work. He told her that business was slow, that he would use her on an as-needed basis, and that he would not take hours away from Siebert and Ford. By this time, Complainant was aware that another housekeeper besides Siebert and

Ford was working who had been hired after she went on leave.

51) In September 1998, Ritchie knew that Complainant and her husband had six children, that they needed money, and that any hours assigned to Complainant or her husband would help them.

52) Complainant completed and filed an application for unemployment benefits on October 5, 1998.

53) Prior to October 1, 1998, Price left Entrada's employ. On October 10, 1998, Entrada restored Complainant to a housekeeper position. Between October 1 and 15, 1998, Complainant worked 4.5 hours on October 10 and 5.75 hours on October 11, for a total of 10.25 hours. In the same time period, Entrada's other three housekeepers worked the following hours, for a total of 151.75 hours:

K. Ford:	44.75
K. Seibert:	80.0
C. Crain:	16.75

54) Crain's last day of work for Entrada was October 7, 1998. Between October 1 and 7, 1998, Crain worked the following schedule: October 2 – 4.5 hours, October 3 – 4.25 hours, October 4 – 3.75 hours, October 7 – 4.25 hours. Complainant could have worked these hours.

55) Between October 16 and 31, 1998, Complainant worked 5 hours on October 17 and 2.75 hours on October 18, for a total of 7.75 hours. In the same time period, Entrada's two other housekeepers worked the follow-

ing hours, for a total of 123.5 hours:

K. Ford: 45
K. Seibert: 70.75

56) Complainant would have worked an additional 43.75 hours if she had been assigned the work that Crain performed on September 25-30, October 2-4, and October 7, 1998. Complainant would have earned \$262.50 in gross wages for this work. This would have enabled Complainant and her husband to pay some, but not all, of their outstanding bills.

57) Between September 24 and October 20, 1998, Complainant and her family were under considerable financial stress. Complainant was very worried and scared, and experienced considerable stress because of the lack of hours Ritchie scheduled her to work at Entrada. During this time period, Complainant cried on a number of nights because of her stress, worry and fear. Because of that stress and the financial needs of her family, Complainant began looking for other work after she started back to work for Entrada.⁸ On October

20, 1998, Complainant was hired as a housekeeper at the Inn of the Seventh Mountain, working 40 hours per week. Complainant actually started work at the Inn of the Seventh Mountain on October 23, 1998.

58) During her leave from Entrada, Complainant had reserved childcare for her baby at the Growing Tree, a local child care facility. She lost her reservation because she was unable to give the Growing Tree a definite date when she could bring the baby in because of her uncertainty as to when she would be returning to work at Entrada and inability to pay their fee. There was no evidence presented regarding the amount of the fee.

59) Between November 1 and 15, 1998, Ford and Seibert were Entrada's only housekeepers. In that time period, they worked the following hours, for a total of 98.5 hours:

K. Ford: 44.75
K. Seibert: 53.75

60) Between November 16 and 31, 1998, Ford and Seibert were Entrada's only housekeepers. In that time period, they worked the following hours, for a total of 132.75 hours:

K. Ford: 54
K. Seibert: 78.75

61) Respondent did not hire another housekeeper until December 9, 1998.

⁸ Complainant did not testify as to the specific date that she began actively seeking other employment. However, Exhibit A-10, which is the "Work Search Record" Complainant completed for the Employment Department after filing her claim for unemployment benefits, shows that she first began searching for other employment on October 15, when she used the Employment Department's computer to look for work and that she applied for two jobs, including a

housekeeper position at the Inn of the Seventh Mountain, on October 16.

62) No evidence was presented concerning the availability of work at Respondent's other Bend facility at material times, except for the fact that housekeepers employed at Entrada sometimes worked there.

63) Respondent had no written policies regarding leaves of absence during Complainant's employment with Respondent. Respondent's general practice was that anyone who left was welcome to come back.

64) Jeffrey Carlson's testimony concerning the operation and procedures of BOLI's mail room was credible in its entirety.

65) Richard Buxton's testimony was not entirely credible. As Complainant's husband, he had an inherent bias. He demonstrated a tendency to exaggerate by testifying that Complainant had worked 37 to 38 hours per week before beginning her leave, and that he and Complainant could have paid their bills, had she worked her regular hours after September 24. In contrast, Respondent's time records, which the forum has found reliable, established that Complainant had worked only 23 hours per week before beginning her leave, and Complainant herself testified that all their bills could not have been paid, even if Complainant had worked her former hours after September 24. His memory was not totally accurate as to dates, as shown by his testimony that Complainant returned to work for Entrada before she applied for unemployment benefits and did

not work for Entrada after she filed for unemployment benefits. Consequently, the forum has relied on his testimony only where it is not controverted by other credible evidence.

66) Doug Ritchie's testimony was not entirely credible. He did not contemporaneously document any of his conversations with Complainant. His testimony that Complainant did not contact him to ask about returning to work before October 3, and that he immediately offered Complainant work on October 4, which she declined, is simply not believable. To begin with, his testimony on this point is contrary to the credible testimony of Complainant and her husband. Secondly, it makes no sense that he would offer Crain's October 4 hours to Complainant, but not Crain's October 7 hours. Finally, in a letter to the Agency dated November 10, 1998, in which Ritchie initially responded to Complainant's complaint, Ritchie made no mention of scheduling her to work on October 4. Ritchie's claim that he had problems with Complainant's job performance likewise was not supported by any evidence other than his own testimony, and was partially controverted by Ritchie's own testimony that Complainant was a "fine employee" and his written statement in the same November 10, 1998 letter to the Agency that he would "love to put her back to work." In addition, Ritchie testified that he had given Kim Ford a raise because she was one of Respondent's better employees, but Ford

testified credibly that she was never given a raise. Finally, Ritchie appeared extremely nervous as he was being questioned by Ms. Lohr and his voice frequently cracked during her cross-examination. As a result, the forum has discredited Ritchie's testimony concerning his testimony that Complainant never asked him to return to work before October 3 and that he scheduled her to work on October 4. The forum has also discredited Ritchie's testimony concerning Complainant's alleged performance problems. The forum has credited the remainder of Ritchie's testimony except where it is controverted by other credible evidence, such as Complainant's calendar.

67) Complainant's testimony was not entirely credible. Like her husband, she showed a tendency to exaggerate. She testified that she sometimes showed up as early as "6:30 to 7:30 a.m." to do laundry, contrary to her time cards and the contemporaneous entries on her calendar. She testified she believed she was a "supervisor" because she sometimes assigned rooms, did laundry, and trained new employees when the house-keeping supervisor was absent, and told the Employment Department in her application for unemployment benefits that she was an "assistant supervisor." However, she also testified that no one ever told her she was a supervisor and that she never got a raise indicating she had been promoted, and her husband testified she was not a supervisor.

Her estimate that she worked an average of 25 to 30 hours per week, with the average being closer to 30, was substantially more than the 23 hours per week she actually averaged. Her answers were non-responsive to a number of questions asked on both direct and cross-examination, and she did not seem to understand the substance of a number of questions put to her. On cross-examination, she was defensive, argumentative, and had to be instructed by the ALJ to listen carefully and respond directly to the questions asked of her. On the other hand, her testimony regarding the dates that she contacted Ritchie asking to return to work after her doctor's appointment on September 24 was supported by contemporaneous entries on her calendar that the forum has found to be reliable. The forum has credited Complainant's testimony except where it conflicts with her calendar entries and Respondent's time cards, and has credited her calendar entries in full.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was an Oregon employer that utilized the personal services of 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in both 1997 and 1998.

2) Complainant was employed by Respondent at the Best Western Entrada Lodge from January 17, 1998, through October 19, 1998.

3) Complainant learned she was pregnant on January 17, 1998.

4) On July 27, 1998, Complainant left work due to her pregnancy, based on the advice of her physician. Complainant did not work again for Respondent prior to the birth of her child. More than 180 days elapsed between January 17, 1998, and July 27, 1998. Prior to July 27, Complainant worked an average of 23 hours per week for Respondent.

5) Complainant's child was born on August 20, 1998. She did not immediately return to work, but remained on leave.

6) During Complainant's absence, Respondent hired two housekeepers, Korissa Garfield and Christina Crain, on an as-needed basis to perform work that Complainant would have performed, had she not been off work on parental leave.⁹

7) On September 24, 1998, Complainant called Douglas Ritchie, Respondent's general manager, and told him she was ready to come back to work.

8) Complainant anticipated being scheduled for 25 to 30 hours of work per week upon her return to work.

9) Respondent did not assign any work hours to Complainant between September 25 and September 30, 1998. During that period, Garfield and Crain worked a total of 27 hours that Complainant could have worked.

10) Between October 1 and October 15, 1998, Crain worked a total of 16.75 hours that Complainant could have worked. Complainant worked only 10.25 hours in that time. Had Respondent restored Complainant to her former position, she would have worked a total of 27 hours during that two-week period.

11) Complainant lost \$262.50 in gross wages as a result of Respondent's failure to restore her to a housekeeping position immediately after she attempted to return to work on September 24, 1998.

12) Complainant experienced mental suffering as a result of Respondent's failure to immediately restore her to a housekeeping position between September 24, 1998, when she attempted to return to work, and October 10, 1998, when Respondent restored her to a housekeeping position.

13) Respondent's occupancy rates fluctuate dramatically during the course of a year. The record indicates that the 1998 occupancy rate ranged from a high in the last half of July 1998 to a low in the first half of November 1998. The hours worked by Respondent's housekeepers are directly proportionate to Respon-

⁹ The forum refers to Complainant's leave after the birth of her child on August 20, 1998 as "parental" leave, noting that "parental" leave is a particular type of "family" leave. See OAR 839-009-0200(1).

dent's occupancy rate, ranging from a high in the last half of July 1998 of 646.75 hours worked by eleven housekeepers to a low in the first half of November 1998 of 98.5 hours worked by two housekeepers.

14) After July 31, the number of hours worked by housekeepers per bi-monthly payroll period dropped steadily until November 16, 1998, when they begin increasing again, as indicated below:

August 1-15:	555.5 hours
August 16-31:	414.75 hours
September 1-15:	239.75 hours
September 16-30:	245.25 hours
October 1-15:	151.75 hours
October 16-31:	123.5 hours
November 1-15:	98.5 hours
November 16-31:	132.75 hours

15) Respondent did not hire any new housekeepers between September 25, 1998, and October 7, 1998, Garfield's and Crain's respective last dates of employment, and December 9, 1998.

16) Respondent's failure to schedule Complainant to work the number of hours she anticipated upon her eventual restoration to her position was due to Respondent's low occupancy rate, not unlawful discrimination.

17) Complainant left Respondent's employment on October 20, 1998, to take a full-time job as a housekeeper,

earning more than she would have earned had she continued to work for Respondent. She left because of financial hardship that she and her family were experiencing and additional financial stress she anticipated based on Respondent's failure to schedule her to work 25 to 30 hours per week. Some of this financial hardship was caused by her loss of \$262.50 in gross wages that she would have earned between September 25 and October 7, 1998, had Respondent restored her to her former position upon her request. A significant part of the financial hardship was due to the fact that Complainant earned no wages during her leave.

CONCLUSIONS OF LAW

1) The Oregon family leave laws apply to "covered employers," which are defined as:

"employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken."

Respondent was a "covered employer." ORS 659.470(1); ORS 659.472(1).

2) The actions and motivations of Douglas Ritchie, Respondent's general manager, are properly imputed to Respondent.

3) ORS 659.474(1) provides in pertinent part:

“All employees of a covered employer are eligible to take leave for one of the purposes specified in ORS 659.476(1)(b) to (d) except: * * * (b) An employee who worked an average of fewer than 25 hours per week for the covered employer during the 180 days immediately preceding the date on which the family leave would commence.”

OAR 839-009-0210(2)(a) further explains that “Eligible employee” means:

“(a) For the purpose of parental leave, an employee who has worked for a covered employer for at least 180 calendar days immediately preceding the date on which family leave begins.

“(b) For all other leave purposes, an employee who has worked for a covered employer for an average of at least 25 hours per week for the 180 calendar days immediately preceding the date on which family leave begins.”

OAR 839-009-0200 provides in pertinent part:

“The 1995 Oregon Family Leave Act, hereinafter referred to as OFLA, provides leave:

“(1) To care for an employee’s newborn * * * child. These rules refer to this type of leave as parental leave.

“(2) For an employee’s own serious health condition or to care for a family member with a serious health condition, in-

cluding pregnancy related conditions. These rules refer to this type of leave as serious health condition leave.”

Complainant worked at least 180 calendar days immediately preceding July 27, 1998, the date on which she stopped working because of her pregnancy-related serious health condition leave began on July 27, 1998, but did not work an average of at least 25 hours per week for Respondent immediately prior to that date and was therefore not eligible for serious health condition leave. Complainant did work for Respondent at least 180 calendar days immediately preceding August 20, 1998, the date her parental leave commenced, and was an “eligible employee” for parental leave.

4) ORS 659.476(1)(a) provides:

“(1) Family leave under ORS 659.470 to 659.494 may be taken by an eligible employee for any of the following purposes:

“(a) To care for an infant * * *

ORS 659.478 provides, in pertinent part:

“(1) Except as specifically provided by ORS 659.470 to 659.494, an eligible employee is entitled to up to 12 weeks of family leave within any one-year period.”

Complainant was entitled to take up to 12 weeks of family leave to care for her infant.

5) ORS 659.484 provides, in pertinent part:

“(1) After returning to work after taking family leave under the provisions of ORS 659.470 to 659.494, an eligible employee is entitled to be restored to the position of employment held by the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave. If the position held by the employee at the time family leave commenced no longer exists, the employee is entitled to be restored to any available equivalent position with equivalent employment benefits, pay and other terms and conditions of employment. If any equivalent position is not available at the job site of the employee’s former position, the employee may be offered an equivalent position at a job site located within 20 miles of the job site of the employee’s former position.

“* * * * *

“(3) This section does not entitle any employee to:

“* * * * *

“(b) Any right, benefit or position of employment other than the rights, benefits and position that the employee would have been entitled to had the employee not taken the family leave.”

OAR 839-009-0270 provides, in pertinent part:

“(1) The employer must return the employee to the employee’s former position if the job still exists even if it has been filled during the employee’s family leave unless the employee would have been bumped or displaced if the employee had not taken leave. The former position is the position held by the employee when family leave began, regardless of whether the job has been renamed or reclassified. * * *

“(2) If the position held by the employee at the time family leave began has in fact been eliminated and not merely renamed or reclassified, the employer must restore the employee to any available, equivalent position.

“(a) An available position is a position which is vacant or not permanently filled.

“(b) An equivalent position is a position which is the same as the former position in as many aspects as possible. If an equivalent position is not available at the employee’s former job site the employee may be restored to an equivalent position within 20 miles of the former job site.”

“* * * * *

(10) An employer may not use the provisions of this section as a subterfuge to avoid

the employer's responsibilities under OFLA."

During Complainant's family leave, Respondent hired two housekeepers, Garfield, and Crain, to perform work that Complainant would have performed, had she not been on leave. Respondent violated ORS 659.484 by failing to give Complainant the opportunity to work the shifts worked by Garfield and Crain, beginning September 25, 1998, after Complainant's request to return to work on September 24, 1998.

6) ORS 659.492 (1) provides:

"(1) "A covered employer who denies family leave to an eligible employee in the manner required by ORS 659.470 to 659.494 commits an unlawful employment practice."

Respondent committed an unlawful employment practice in violation of ORS 659.492(1) by failing to restore Complainant to the position of employment she held when her leave commenced. Respondent did not constructively discharge Complainant.

7) ORS 659.492(2) provides:

"(2) Any employee claiming to be aggrieved by a violation of ORS 659.470 to 659.494 may file a complaint with the Commissioner of the Bureau of Labor and Industries in the manner provided by ORS 659.040. The Commissioner of the Bureau of Labor and Industries shall enforce the provisions of ORS 659.470 to 659.494 in the manner pro-

vided in ORS 659.010 to 659.110 for the enforcement of other unlawful employment practices."

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.492(2); ORS 659.010 *et. seq.*

OPINION

INTRODUCTION

In its Specific Charges, the Agency alleged that Respondent violated Oregon's Family Leave Act by: (1) failing to restore Complainant to the position she held at the time she commenced her family leave, and (2) constructively discharging Complainant. The Agency prayed for \$1,000 in back pay and \$15,000 mental suffering damages to compensate Complainant for Respondent's unlawful acts.

FAILURE TO RESTORE COMPLAINANT TO THE POSITION SHE HELD AT THE TIME SHE COMMENCED HER PARENTAL LEAVE

To establish a prima facie case that an employer committed an unlawful employment practice by failing to restore an employee to the position she held at the time she commenced her family/parental leave, the agency must prove:

1. The employer was a "covered employer" as defined in

ORS 659.470(1) and ORS 659.472;

2. The employee was an “eligible employee” for family/parental leave – *i.e.*, she was employed by a “covered employer” and worked for the employer at least 180 calendar days immediately preceding the date on which her parental leave began [ORS 659.474; OAR 839-009-0210(2)(a)];

3. The employee took up to 12 weeks of family/parental leave [ORS 659.476(1)(a), ORS 659.478];

4. The employee attempted to return to work after taking family/parental leave and was denied or refused restoration to the position of employment held by the employee when the leave commenced [ORS 659.484(1); OAR 839-009-0270(1) & (2)].

The first and third elements of the Agency’s *prima facie* case are undisputed.

The second element, although undisputed regarding whether or not Complainant had worked 180 days for Respondent prior to taking parental leave, requires additional discussion because of the particular circumstances of Complainant’s leave. When Complainant left work on July 27, she had worked for Respondent for 180 days “immediately preceding” her leave, but only worked an average of 23 hours per week, two hours less than the minimum average of 25 hours per week required for eligibility for the purpose

of taking a “serious health condition” leave due to her pregnancy related condition. See OAR 839-009-0210(2)(b). Eligibility for parental leave, on the other hand, requires only that the employee worked for the employer at least 180 calendar days immediately preceding the date on which her parental leave began. There was no evidence presented showing that Complainant’s employment relationship with Respondent was in any way severed between July 27 and August 20, 1998. In contrast, Ritchie’s testimony was that he expected Complainant to return to her housekeeping duties after her leave. Consequently, because Complainant never stopped being Respondent’s employee, the forum concludes that Complainant satisfied the requirement of working for Respondent “at least 180 calendar days immediately preceding” August 20, 1998 and was an “eligible employee” for parental leave as defined in ORS 659.474(2) and OAR 839-009-0210(2)(a). This satisfies the second element of the Agency’s *prima facie* case.

As for the fourth element, credible testimony from the Complainant, corroborated by her calendar notes, establishes that Complainant attempted to return to work from her parental leave on September 24, 1998 and was not rescheduled for work until October 10. Respondent’s time cards and Complainant’s credible testimony establish that employees who were hired after Complainant went on leave, Garfield and Crain, worked 43.75 hours between Sep-

tember 24, 1998 and October 7, 1998 that Complainant could have worked. This evidence is sufficient to establish the fourth element of the Agency's prima facie case.

Once the Agency has established the four elements of its prima facie case, there is a rebuttable presumption that Respondent refused to give effect to Complainant's entitlement to job restoration. *In the Matter of TJX Companies, Inc.*, 19 BOLI 97, 102 (1999). No motive or intent need be proved. *Cf. In the Matter of Roseburg Forest Products*, 20 BOLI 1, 28 (2000). Respondent may negate that presumption by coming forward with evidence of one or more of the following:

1. The position of employment held by the employee when the leave commenced no longer existed when the employee attempted to return to work; and no available equivalent position existed [ORS 659.484(1); OAR 839-009-0270(1) & (2)];
2. The employee gave unequivocal notice of intent not to return to work [OAR 839-009-0270(8)];
3. The employee would have been bumped or displaced if the employee had not taken leave [OAR 839-009-0270(1)].

In this case, Respondent's primary proffered defense relates to the undisputed temporal nature of its housekeeping positions. It runs something like this: (1) All housekeeping positions are temporary and all housekeepers work

on an as-needed basis, subject to hours that fluctuate based on occupancy rates; (2) Because housekeeping positions are temporary, there are no distinctive, identifiable positions – merely an as-needed, variable amount of work to be performed; (3) Complainant was a housekeeper and therefore did not occupy an identifiable position; (4) Because Complainant did not occupy an identifiable position, it is impossible that her "former" position could still exist for the reason that she never had a "position" to start with; (5) Because Complainant did not occupy an identifiable position, Respondent could not have filled her position, during her family leave, with a replacement worker; (6) Because Complainant did not occupy an identifiable position, Respondent was not obligated to schedule Complainant, after her request to return to work, for any additional hours other than the as-needed hours that she actually worked.

The forum rejects Respondent's argument. ORS 659.484 entitles a worker to be restored "to the position of employment held by the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave." In this case, Complainant held the position of housekeeper when her leave commenced. During the last weeks of Complainant's leave, Respondent hired two new housekeepers, Garfield and Crain, to perform work on an "as-

needed” basis. Before and after September 24, 1998, they performed exactly the same type of housekeeping work that Complainant had performed before her leave commenced. Between September 25 and October 7, they performed 43.75 hours of work that Complainant could have performed. Under these circumstances, where an “eligible” employee such as Complainant occupies a position involving non-supervisory, unskilled labor in which the hours worked vary considerably and turnover is high, making it virtually impossible to “track” any one position, the forum holds: (1) Any worker hired during an eligible employee’s leave to perform the same work that the eligible employee performed before commencing leave meets the definition of “replacement worker” under ORS 659.484(1); and (2) After the eligible employee attempts to return to work, the employer must give that employee the opportunity to work any hours that the replacement worker would have otherwise been scheduled to work. The practical application of this rule in this case is that Respondent should have given Complainant the opportunity to work the hours worked by Garfield and Crain, beginning September 25, 1998. Had Respondent done so, Complainant would have worked an additional 43.75 hours. Respondent violated ORS 659.484 and ORS 659.492 in failing to give Complainant this opportunity.

The forum additionally notes that adoption of Respondent’s ar-

gument would have the practical effect of stripping the restoration provisions of OFLA from every employee who, like Complainant, works for a “covered” employer in an unskilled minimum wage position in which hours vary considerably and turnover rates are high. The language of OFLA contains no suggestion that the ORS 659.484 should be interpreted in this manner.

Respondent presented three other defenses that merit minimal discussion. First, that Complainant never presented a medical release to return to work. Second, that Complainant was given all the work that was available. Third, that Complainant did not attempt to return to work until October 3 and turned down Ritchie’s offer of work on October 4. None of these defenses have any merit. First, the medical release is a red herring, in that it is undisputed that Ritchie never asked Complainant to present such a release.¹⁰ Second, the argument that Complainant was given all available work has already been resolved in favor of the Agency. Third, based on an assessment of Ritchie’s credibility, the forum has rejected Ritchie’s claim that Complainant failed to contact him about work until October 3 and that she subsequently turned down his offer for work on October 4.

¹⁰ See OAR 839-009-0270(5).

BACK PAY

The Agency prayed for \$1,000 in back pay in the Specific Charges. The forum has found that Complainant would have worked an additional 43.75 hours, earning an additional \$262.50 in gross wages, had she been properly restored to her housekeeper position after attempting to return to work on September 24, 1998.

CONSTRUCTIVE DISCHARGE

A prima facie case of constructive discharge resulting from an unlawful employment practice consists of the following elements:

(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.

In the Matter of James Breslin, 16 BOLI 200, 217 (1997), *aff'd without opinion*, *Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999).

A. Did Respondent intentionally create or intentionally maintain discriminatory working condition(s) related to Complainant's protected class status?

Complainant's protected class was that of a worker returning from family leave who was entitled to be restored to her former position of housekeeper, which included being scheduled for any hours that a "replacement worker" would otherwise perform. The evidence shows that Ritchie intentionally failed to schedule Complainant for the hours that Garfield and Crain worked between September 25 and October 7, 1998, in violation of ORS 659.484(1).¹¹ Ritchie's intentional

¹¹ After October 7, 1998, Ritchie did not use Crain again and scheduled Complainant for all the hours not worked by Ford, a housekeeper hired in March 1998, and Siebert, the housekeeping supervisor. However, Complainant was not entitled to work any of the hours worked by Ford or Siebert. The Agency implied, during the presentation of its case, that Complainant should have been entitled to a prorated share of Ford's and Siebert's hours after she attempted to return to work. Complainant was not entitled to Siebert's hours because he was the housekeeping supervisor and occupied a position different than Complainant's position at the time she commenced her leave. See Finding of Fact – The Merits #41, *supra*. Ford

and discriminatory failure to schedule Complainant for any hours between September 25 and October 7 satisfies the first element of the Agency's prima facie case.

B. Were the discriminatory working conditions so intolerable that a reasonable person in the Complainant's position would have resigned because of them?

The forum has found that Complainant's discriminatory working conditions ended on October 7, 1998, Crain's last day of work. After October 7, Complainant was scheduled to work but the number of hours clashed with her expectation that she would be assigned to work 25 to 30 hours per week. However, the low number of hours that she worked was directly attributable to Respondent's low occupancy rate, not unlawful

performed the same work as Complainant, but was not a "replacement worker" because Ford was hired before Complainant went on her leave. If the evidence had established an objective, quantifiable methodology consistently used by Ritchie to determine the specific number of hours he assigned individual housekeepers to work and the Agency proved that use of that methodology would have resulted in Complainant being scheduled for some of Ford's hours after October 7, the result may have been different. Absent such evidence, the forum will not speculate as to what portion of Ford's hours, if any, Complainant would have been scheduled to work, had she not taken family leave.

discrimination. Because of her economic need, she began seeking alternative employment on October 15, a week *after* her discriminatory working conditions had ceased to exist. On October 20, she effectively resigned from employment with Respondent by accepting a higher paying, fulltime job.

Based on the fact that discriminatory working conditions no longer existed when Complainant made her decision to seek alternative employment or when she resigned, the Agency has failed to satisfy the second element of its prima facie case. Consequently, the forum need not consider whether the third and fourth elements are satisfied, and the Agency's claim of constructive discharge must fail.

MENTAL SUFFERING

The Agency sought an award of \$15,000 to compensate Complainant for the mental suffering she experienced due to Respondent's unlawful discrimination. The forum has concluded that Respondent unlawfully discriminated against Complainant by failing to give Complainant the opportunity to work the hours worked by Garfield and Crain, two "replacement workers," between September 25 and October 7, 1998. Therefore, Complainant is entitled to damages to compensate her for any mental suffering she experienced as a result of Respondent's failure to schedule her to work those hours.

In determining mental distress awards, the commissioner considers a number of things, including the type of discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. *In the Matter of James Breslin*, 16 BOLI 200, 219 (1997), *aff'd without opinion, Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999). Awards for mental suffering damages depend on the facts presented by each complainant. A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999).

In this case, Complainant attempted to return to work on September 24, 1998, after taking family leave. At the time, her family was experiencing acute financial distress, largely as a result of her lack of earnings while on family leave. This financial situation, which caused Complainant and her husband to experience considerable stress, is the primary reason she attempted to return to work on September 24, several days earlier than planned. Although Respondent is not responsible for Complainant's distress caused by her lack of earnings during her family leave, this forum has held that "employers must take employees as they find them." *In the Matter of Loyal Order of Moose*, 13 BOLI 1, 12-13 (1994); *In the Matter of Allied Computerized Credit & Collections*, 9 BOLI 206, 217-18

(1991). Here, Complainant was already experiencing considerable stress at the time of Respondent's discriminatory conduct. However, Complainant and her husband credibly testified that Complainant experienced a heightened stress level between September 25 and October 20, 1998, which manifested itself in the form of Complainant being very worried and scared, and crying frequently because Ritchie had not scheduled her for any hours for the first two and one-half weeks after she attempted to return to work, further exacerbating her family's financial distress.

This forum has previously held that financial insecurity and anxiety caused by an unlawful employment practice is compensable. *In the Matter of Katari, Inc.*, 16 BOLI 149, 161 (1997), *aff'd without opinion, Katari, Inc. v. Bureau of Labor and Industries*, 154 Or App 192, 957 P2d 1231, *rev den* 327 Or 583 (1998). In *Katari*, the commissioner awarded Complainant \$15,000 in mental suffering damages based on circumstances equivalent to what Complainant experienced in this case. Accordingly, the forum concludes that the \$15,000 sought by the Agency to compensate Complainant for her mental suffering is an appropriate award. In making this award, the forum is mindful that the Agency prayer for \$15,000 was based on a failure to restore Complainant to her position, which was proven, and constructive discharge, which was not proven. However, the commissioner's authority to award

monetary damages is only limited as to the total amount sought in the Specific Charges or subsequent amendments. *In the Matter of Kenneth Williams*, 14 BOLI 16, 26 (1995). For the reasons discussed, the forum finds that \$15,000 is an appropriate award for Complainant's mental suffering for the violation found.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and to eliminate the effects of Respondent's violation of ORS 659.484(1) and ORS 659.492(1), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **ENTRADA LODGE, INC.** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in trust for Complainant Cheryl Buxton in the amount of:

a) FIFTEEN THOUSAND DOLLARS (\$15,000.00), representing compensatory damages for mental suffering suffered by Cheryl Buxton as a result of Respondent's unlawful practices found herein, plus

b) TWO HUNDRED SIXTY-TWO DOLLARS AND FIFTY CENTS (\$262.50), less lawful deductions, representing wages lost by Cheryl Buxton between September 25, 1998 and October 7, 1998, as a re-

sult of Respondent's unlawful practices found herein, plus

c) Interest at the legal rate on the sum of \$262.50 from October 8, 1998, until paid, plus

d) Interest at the legal rate on the sum of \$15,000 from the date of the Final Order until Respondent complies herewith.

2) Cease and desist from discriminating against any employee based upon the employee's use of the Oregon Family Leave Act.

**In the Matter of
BARRETT BUSINESS
SERVICES, INC.**

Case Number 25-98

Final Order on Reconsideration
of the Commissioner Jack Roberts
Issued June 21, 2000.

SYNOPSIS

Claimant, who did not have a physical impairment, applied for work with Respondent as a timber faller. Respondent hired Complainant, then violated ORS 659.425 by refusing to refer him to a job as timber faller based on Respondent's erroneous perception that he had a physical impairment to his back that prevented him from doing strenuous labor using his back. Respondent also required Complainant to pay

for a medical examination and/or the cost of providing a health certificate as a condition of continued employment in violation of ORS 659.330. The forum awarded Complainant \$7,797.60 in back pay and \$20,000 in mental suffering. ORS 659.330; ORS 659.425.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (hereinafter "ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon (hereinafter "BOLI"). The hearing was held on May 27 and May 28 at BOLI's office at 700 E. Main Street, Suite 105, Medford, Oregon, and on June 17, 1998, in room 1004 of the Portland State Office Building, 800 NE Oregon, Portland.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Kelley E. Robbins (hereinafter "Complainant") was present throughout the Medford hearing and was not represented by counsel. Respondent Barrett Business Services, Inc. (hereinafter "Respondent") was represented by Scott H. Terrall, Attorney at Law. James Hardt was present as Respondent's representative during the Medford portion of the hearing.

The Agency called as witnesses, in addition to Complainant, John Abgeris, logging contractor, and Dale Deboy, employee, Occupational Health Dept., Rogue Valley Medical Cen-

ter. Respondent called as witnesses current employees Lisa Van Wey and James Hardt; Wayne Gamby, occupational health technician; and former employee Heidi Beck.

Administrative exhibits X-1 to X-18 and Agency exhibits A-1 through A-3, A-4, pp.3-22, A-5, A-6, A-7, p.3, A-8, and A-11 through A-13 were offered and received into evidence. Respondent exhibit R-2, p.4, was offered and received into evidence. The record closed on June 17, 1998.

On February 22, 1999, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, having fully considered the entire record in this matter, issued the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order in this case. Thereafter, Respondent sought judicial review in the Oregon Court of Appeals. On July 20, 1999, through counsel, the Agency filed its Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals for the specific purpose of correcting a typographical error in the order, specifically, the incorrect agency number on the order.

On July 28, 1999, having revised the order to include the correct agency case number originally assigned to this case, I issued an Amended Final Order correcting the agency number on the order from 57-98 to 25-98.

On June 19, 2000, through counsel, the Agency filed its Notice of Withdrawal of Order for

Purposes of Reconsideration in the Court of Appeals.

On June 21, 2000, having reconsidered the record and the back pay computation, I make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Final Order on Reconsideration.

**FINDINGS OF FACT –
PROCEDURAL**

1) On June 27, 1996, Complainant filed a verified complaint with CRD alleging that he was the victim of the unlawful employment practices of Respondent in denial of employment based on his perceived physical disability. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On November 10, 1997, the Agency prepared for service on Respondent Specific Charges alleging that Respondent discriminated against Complainant in refusing to hire him based on perceived physical impairment and record of a physical impairment, and by requiring Complainant to pay for medical records and a medical evaluation as a condition of employment.

3) With the Specific Charges, the forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of

the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On December 1, 1997, counsel for Respondent filed an answer in which it denied the allegations mentioned above in the Specific Charges, and stated numerous affirmative defenses. At the same time, counsel moved for a postponement on the basis that he was scheduled to be out of state on vacation at the time set for hearing.

5) On December 1, 1997, Douglas A. McKean, the ALJ initially assigned to hear the case, sent a letter to Respondent's counsel requesting an affidavit or other documentation indicating when the vacation was scheduled.

6) On December 29, 1997, Respondent's counsel indicated that after the Christmas holidays he would be filing an affidavit concerning when his spring vacation was scheduled.

7) On February 6, 1998, the ALJ issued a Discovery Order requiring Respondent and the Agency to submit a case summary pursuant to OAR 839-050-0200 and 839-050-0210 by March 13, 1998, thirteen days before March 26, the date set for hearing.

8) On February 13, 1998, Respondent's counsel submitted an Affidavit in support of his motion for postponement stating that in September 1997 he had made plans for a vacation with his family during the time set for hearing.

9) On February 20, 1998, the ALJ granted Respondent's motion for postponement on the basis that Respondent's counsel had a previously scheduled vacation that conflicted with the hearing date and had provided documentary evidence of that fact. The ALJ issued an amended notice resetting the hearing for May 27, 1998, and modified the Case Summary due date to May 15, 1998.

10) On March 9, 1998, the ALJ granted Respondent's motion of March 4 to depose Complainant. The ALJ noted that Respondent had not made a showing of the materiality of Complainant's testimony, gave no explanation of why a deposition rather than informal or other means of discovery was necessary, and did not request that the witness's testimony be taken before a notary public or other person authorized by law to administer oaths, as required by OAR 839-050-0200(4), but granted the motion on the bases that the Agency did not object and that a Complainant's testimony is normally material.

11) On May 6, 1997, the forum issued an order changing the ALJ from Douglas A. McKean to Warner W. Gregg and advancing the hearing date to May 26, 1998. On May 12, 1998, Respondent's counsel advised the forum that he could not attend the hearing on May 26.

12) On May 14, 1998, the ALJ reset the hearing date to its previous setting of 9:00 a.m. May 27, and on May 15 the Agency

and Respondent timely filed their respective Case Summaries.

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

14) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) During the course of the hearing, Respondent moved to dismiss the Specific Charges based on lack of jurisdiction, asserting that all individuals employed by Respondent to work for James Abgeris dba Hilltop Logging in 1996 were California employees because they performed all their work in the state of California. Respondent's motion was denied. That ruling is confirmed, for reasons stated in the Opinion section herein.

16) During the course of the hearing, the Agency moved to amend the Specific Charges to include as damages expenses incurred by Complainant in obtaining alternative employment in Alaska and transporting his wife and children there, noting that the amount of back pay sought by the Agency would be reduced by the same amount. This motion reflected evidence and issues that had already been presented without objection from Respondent.

Respondent objected to the motion on the basis that the motion was untimely, thereby prejudicing Respondent. The ALJ advised he would take the matter under advisement and rule on the Agency's motion in the proposed order. The Agency's motion is granted, for reasons stated in the Opinion section herein.

17) After the Agency called Complainant as a rebuttal witness, the hearing was recessed on May 28 because of the unavailability of Bernadette Yap Sam, the Agency's final rebuttal witness, due to a medical emergency. After consulting the participants, the ALJ set June 12 at 1 p.m. as the time for the hearing to reconvene in room 1004 of the Portland State Office Building, 800 NE Oregon, Portland, Oregon, with the Agency having the option to present Ms. Yap Sam's testimony in person or by affidavit, subject to Respondent objection. The participants were instructed to be prepared to present closing arguments after Ms. Yap Sam's testimony.

18) On June 12, 1998, the hearing reconvened at 1 p.m. in room 1004 of the Portland State Office Building, 800 NE Oregon, Portland. The ALJ and Ms. Lohr were present, but Respondent's counsel did not appear. The ALJ sent counsel a letter on June 12 informing him that the Agency had suggested it would present no further evidence and scheduling closing argument for June 17, 1998 at 4 p.m. in the same location. The ALJ further informed counsel that he or an associate

must be present unless Respondent wished to waive closing argument.

19) On June 17, 1998, the hearing reconvened at 4 p.m., at which time the Agency and Respondent presented closing arguments.

20) The proposed order was issued on December 23, 1998. An exceptions notice was issued on January 6, 1999, and the participants were given an extension of time until January 18, 1999, to file exceptions. Respondent filed exceptions that were postmarked January 19, 1999. These exceptions were timely because January 18 was a holiday.

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 and was an employer in this state that utilized the personal services of and employed six or more persons, subject to the provisions of ORS 659.010 to 659.435. Respondent's business consists of providing temporary employees to other employers and leasing employees to other employers.

2) Complainant began working in the logging industry in 1974 and has worked almost exclusively in the industry since then. Since 1981, he has worked as a timber faller. From 1987 to July 15, 1995, Complainant worked as a timber faller in Alaska.

3) Timber falling is an extremely strenuous physical occupation. Among other things, it requires repetitive use of the upper and lower back, walking and working on uneven surfaces, repetitive lifting of a 20-25 pound chain saw to waist height, and frequent twisting, reaching, squatting and bending. The other types of logging jobs, e.g. choker setter, are also extremely strenuous.

4) In 1988, Complainant sprained his lower back while working as a timber faller in Alaska. Complainant received several treatments from a chiropractor in Alaska, who told Complainant he thought there was evidence of degenerative disc disease in Complainant's x-rays, that Complainant might be getting degenerative disc disease with age, and that Complainant probably shouldn't be doing hard work or eventually he would get arthritis in his back. Complainant was then examined by a medical doctor, who prescribed 30 days of rest. Complainant rested for 30 days, returned to work as a timber faller, and has not experienced any subsequent related back problems since that time that caused him to see a physician or lose work.

5) In 1992, Complainant injured his neck and upper back while working as a timber faller in Alaska. Complainant visited another chiropractor in Alaska, who took x-rays, treated him five times over a period of several days, and told him that the cause of his pain was two vertebrae that were

twisted slightly. Complainant missed only a few days of work as a result of this injury, returned to work as a timber faller, and has not experienced any subsequent related back problems since that time that caused him to see a physician or lose work.

6) In 1991 or 1992, after his neck and upper back injury, Complainant injured his right knee while working as a timber faller in Alaska when a tree limb struck his knee. Complainant had surgery on his knee, missed about five weeks of work in total, and has not experienced any subsequent related knee problems since that time that caused him to see a physician or lose work.

7) In 1995, Complainant decided to move back to Oregon in order to provide a better education for his high school age children. Complainant had been living on an island in Alaska with limited educational opportunities for his children. Before leaving Alaska, he made numerous phone calls to Oregon in an attempt to locate work.

8) John Abgeris, who owns and operates a logging business called Hilltop Logging, told Complainant he was interested in hiring him as a timber faller, but that Complainant would have to go through Respondent to come to work for him. Abgeris' practice was to refer all job applicants to Respondent, who then screened applicants. If Respondent decided to hire the applicant, Respondent would then lease the applicant to Abgeris.

9) On July 29, 1995, Complainant made application for employment at Respondent's Medford office. Complainant was interviewed by Lisa Van Wey, personnel placement coordinator for Respondent since January 1995. Complainant completed forms describing his employment and medical history, an I-9, W-4, and other standard forms used by Respondent. Complainant took and passed a urinalysis and underwent Respondent's orientation before being referred out to work as a timber faller for John Abgeris at Hilltop Logging immediately afterwards. During Complainant's employment with Respondent in 1995, Respondent paid unemployment tax and carried workers compensation insurance for Complainant in Oregon.

10) Complainant disclosed the injuries listed in Findings of Fact 4-6 on a form entitled "Medical History Information" that he completed for Respondent as part of his application process.

11) Complainant worked for Hilltop Logging as a timber faller through November 12, 1995, working six days a week, and being paid for six hours of work per day at the rate of \$30/hr. Hilltop Logging, in turn, paid Respondent \$42.90/hr. for Complainant's services. Complainant commuted an average of 70-120 miles round-trip each day to work for Hilltop. All of the work Complainant did for Hilltop was performed in the state of California.

12) Because of environmental conditions, timber fallers in

Oregon (and northern California) work a limited season that extends from spring until mid-November. Complainant stopped working for Hilltop Logging on November 12, 1995, because Hilltop's logging season ended.

13) Complainant experienced no physical problems of any kind while working for Hilltop Logging in 1995. Abgeris had no problems with Complainant's work performance. Respondent was Complainant's employer while he worked at Hilltop Logging.

14) Between November 12, 1995, and April 3, 1996, Complainant collected unemployment benefits and also worked cutting timber in Powers, Oregon for one or two weeks. During this time, Respondent considered him to be an "inactive" employee.

15) In early April 1996, Abgeris called all of his leased employees from 1995, including Complainant, and asked them to visit Respondent and complete the drug screen and physical if they wanted to work at Hilltop again in 1996.

16) On April 3, 1996, Complainant visited Respondent's office in Medford to "update" his paperwork. While at Respondent's office, Complainant initially completed Respondent's standard employment forms, then took and passed a urinalysis that was administered by Van Wey. Respondent considered applicants to be hired at the moment they pass a urinalysis and consid-

ered Complainant to be hired at that time.

17) After Complainant passed the urinalysis, he was sent downstairs in Respondent's office to undergo a "Back Strength and Flexibility Evaluation" and an "Upper Extremity Evaluation."

18) In 1996, Wayne Gamby contracted with Respondent to conduct physical evaluations of all applicants for jobs classed as physically strenuous. This covered, among other jobs, every job in the logging industry, truck drivers, and reforestation workers.

19) In 1996, Gamby was administrative director of Occupational Services. He had previously worked in the medical field for 26 years as an orderly, a paramedic, and an occupational health technician. He received professional training for all three of these jobs, including training as an occupational health technician by supervisors on how to look for certain things and how to evaluate findings in certain categories. He went to a conference in Seattle on cumulative trauma disorders and injuries to the back and upper extremities. He was not an audiologist or medical doctor and held no current licenses or certificates related to the medical field or certificates except for one authorizing him to perform Audiometric Hearing Testing. The authority he had to perform physical evaluations for job applicants was under the license of Dr. Theodore Kruse, a medical doctor whom Gamby consulted as necessary. Dr. Kruse also prescribed

criteria for Gamby to use in his physical evaluations and "signed off" on the policies and procedures that Gamby used in his business.

20) Gamby conducted the "Back Strength and Flexibility Evaluation" and an "Upper Extremity Evaluation" with Complainant by requiring him to perform various flexibility and strength tests. Based solely on the results of these evaluations, Gamby would not have restricted or limited Complainant's ability to perform physical work in any way.

21) Gamby also went over Complainant's medical history with Complainant. Besides the information contained on the "Medical History Information" form Complainant completed for Respondent in 1995, Complainant also told Gamby the following:

a) The chiropractor who treated him in 1988 told Complainant he thought there was evidence of degenerative disc disease in Complainant's x-rays and that Complainant probably shouldn't be doing hard work or eventually he would get arthritis in his back.

b) The chiropractor who treated him in 1992 told him that the cause of his pain was two vertebrae that were twisted slightly. Complainant couldn't recall if he had been given a release but told Gamby that Ben Thomas, his employer at

the time would not let him return to work without a release.¹

c) He has not experienced any subsequent related back problems since that time that caused him to see a physician or lose work.

d) He had experience soreness in his upper extremities after clearing ground for his garden.

e) He occasionally experiences pains going down his legs.

f) He experienced pain in his arms while cutting brush in 1995 that was resolved after two or three days of rest.

22) Based on Complainant's stated medical history, Gamby assumed that Complainant had a sciatic nerve impingement. Based on Complainant's stated medical history, Gamby recommended Complainant should "LIMIT EXERTIONAL\REPETITIVE USE OF BACK 2⁰ TO HISTORY WITHOUT A FULL RELEASE."²

Gamby's primary concern centered around Complainant's 1988 injury. Gamby documented the findings and conclusions from his evaluation of Complainant.

23) After Gamby completed his evaluation, Complainant and

Gamby went back upstairs and met with Van Wey and Heidi Beck, the personnel coordinators in Respondent's Medford office.

24) At the meeting, Gamby stated that Complainant's back was "a ticking time bomb". Van Wey or Beck³ stated to Complainant that he would never work out of any of Respondent's offices that included any kind of strenuous work with his back.

25) At the conclusion of the meeting, Van Wey or Beck⁴ gave Complainant Respondent's "doctor's release packet" along with a detailed job description for the job of timber faller. Complainant was told by Van Wey or Beck⁵ that he could not be put to work as a timber faller until he got an "evaluation/release" from a doctor, and that his medical history was the reason for this condition. Van Wey or Beck told Complainant they were concerned about his 1992 injury.⁶ Had Complainant

³Complainant was confused about the identity of Beck and Van Wey and thought Beck was Van Wey and vice-versa based on a statement made Bernadette Yap-Sam, the Agency's investigator, that misidentified Beck as Van Wey. In addition, it was not clear from the testimony of Beck and Van Wey which one of them said or did what. However, based on Complainant's credible testimony, the forum has concluded that this statement was made by one of the two.

⁴See, *supra*, previous footnote.

⁵*Id.*

⁶*Id.*

¹Complainant's 1995 application with Respondent shows that he worked for Ben Thomas from 1990-95.

²Gamby explained in his testimony that "2⁰" in his handwritten note was his shorthand for "secondary".

been referred to Hilltop Logging in 1996, he would have worked in California again and Respondent would have paid unemployment tax and carried workers compensation insurance for Complainant in Oregon.

26) The "doctor's release packet" given to Complainant consisted of a cover letter, a two page document entitled "Physical Capacities Evaluation," a job description for timber faller for Hilltop Logging, a job analysis, and a job analysis for "position modifiers."

27) The cover letter referred to in Finding of Fact – The Merits #26 reads as follows:

"Date: 4-3-96 (date handwritten)

"Dear Doctor,

"Kelly Robbins has been offered employment by our firm based on an assessment of his/her physical capabilities as they relate to the intended Job Description. We have enclosed that document as well as a copy of the Medical history and the Physical Capacities Evaluation form. We would appreciate a description of the evaluation criteria that you utilize for this assessment. (emphasis added)

"Sincerely,

"Heidi Pozarich (signature handwritten)

"Personnel Coordinator"

28) The Physical Capacities Evaluation form referred to in

Finding of Fact – The Merits #26 is entitled "PHYSICAL CAPACITIES EVALUATION" and requested the following information regarding Complainant:

"1. Frequency and hours per day" [that Complainant was] "able to perform the following activities": "sitting, walking, lifting, bending, squatting, climbing, kneeling, twisting, and standing."⁷

"2. Maximum weight that [Complainant] could lift/carry/push/pull repetitively for ____ hours per day."⁸

"3. Any "restrictions of function, Range of Motion or position that [Complainant] has in a work setting."⁹

"4. Any "environmental restrictions (heat, cold, dust fumes, etc.) applicable to [Complainant]."¹⁰

"5. If you are not currently treating this worker, when did they become medically stationary for the condition that is indicated on the enclosed medical history."¹¹

"5. If you are currently treating this worker, what is the condition that you are treating

⁷The numeral "1" is circled and all activities are highlighted on the original document.

⁸The numeral "2" is circled.

⁹The numeral "3" is circled.

¹⁰The numeral "4" is circled.

¹¹The numeral "5" is circled.

and when do you anticipate that the worker will be medically stationary?"¹²

"6. Can you fully release this worker for the enclosed job description, without restriction or qualification?"¹³

29) No medical history was attached to the Evaluation.

30) The job description referred to in Finding of Fact – The Merits #26 lists in detail all the physical activities performed by a timber faller for Hilltop Logging, including shift, % of day different physical movements such as "twisting" are performed, maximum weight lifted, tools/equipment, actual jobs performed, e.g. "falling timber", and safety hazards.

31) The job analysis referred to in Finding of Fact – The Merits #26 specifies the "physical strength level" and "activity level" that corresponds to the job description in Finding of Fact – The Merits #30. "Physical strength level" is rated at "moderate" with "lifting/carrying/pushing/pulling" minimums and maximums listed and "activity level" is rated at "moderate to heavy", with relevant activities and their intensity listed. It also specifies parts of the body

for which "repetitive action" and "maximum strength, endurance & flexibility" are required.¹⁴

32) The job analysis with "position modifiers" referred to in Finding of Fact – The Merits #26 specifies particular "condition[s] or apparatus" required for the job of timber faller, e.g. "**WILL** be exposed to excessive noise levels (above 85 decibels, routinely.)" (emphasis in original). Eight out of 17 modifiers are indicated by circling and/or highlighting the modifier.

33) At the conclusion of the meeting, Complainant believed he was required to provide Respondent with a written release from the chiropractor who had treated him in 1992 and have the "Physical Capacities Evaluation" completed by a physician before Respondent would refer him to Hilltop Logging.

34) Shortly after April 3, Complainant attempted to obtain a release from Dr. Hediger, the chiropractor who had treated him in 1992.

35) Complainant also began calling physician's offices in an attempt to schedule a physical capacities evaluation. Complainant was unable to make an appointment for an evaluation. Complainant called the Rogue Valley Medical Center ("RVMC") in Medford, a facility that conducts work performance evaluations. In

¹²The numeral "5" is circled and should have been "6", based on its sequential placement on the Evaluation.

¹³The numeral "6" is circled and should have been "7", based on its sequential placement on the Evaluation.

¹⁴The specific parts of the body are indicated by highlighting on the original.

1996, RVMC charged \$582 for a medical evaluation like the one contemplated by the "Physical Capacities Evaluation" form provided to Complainant by Respondent and would not conduct such an evaluation without a physician's referral¹⁵ or a referral through the Occupational Health Department at RVMC. Either Dale Deboy or Debbie McQueen from RVMC's Work Performance Center telephoned Respondent in response to Complainant's inquiry, asked who would pay for the evaluation, and was told by someone in Respondent's office that Respondent would not pay for it.

36) Neither Beck nor Van Wey told Complainant or anyone else at any time that Respondent would pay for the cost of obtaining a medical release or for a physician to complete the "Physical Capacities Evaluation."

37) Gamby consulted Dr. Kruse not long after April 3, 1996 because he thought there might be problems arising from his evaluation. On November 1, 1996, Dr. Kruse noted that he concurred with Gamby's evaluation of Complainant. Kruse never examined Complainant.

38) Complainant got "pretty upset" when he was told in the

meeting with Beck, Van Wey, and Gamby that he wouldn't be referred to Hilltop Logging because of his medical history. Afterwards, he went home and was "very upset."

39) Complainant had just purchased a manufactured home in February 1996 and was supporting five children who lived at home with Complainant and his wife in April 1996. He was aware that the work "season" for timber fallers in Oregon had just started and was extremely concerned about finding work.

40) Complainant began a search for other timber faller jobs in the southern Oregon/northern California area after April 3, 1996. From April 3 to April 15, Complainant contacted a minimum of four local sources -- John Abgeris, Estremeda Logging, JMW Logging, and a saw shop -- in an unsuccessful attempt to find work.

41) Complainant, as a last resort, then decided to seek work in Alaska. Complainant did this as a last choice to avoid the severe financial consequences he and his family would have experienced if they had remained in Oregon and Complainant had been unable to find work. When he decided to leave, his wife already had a firm job offer as a cook in a logging camp in Whitestone, Alaska. Complainant left for Alaska on or about April 20 with his wife and two of his five children, aged four and 11, all driving in his crew cab pickup. He left three other children at home in Grants Pass. One was a freshman in high

¹⁵Dale Deboy, the Agency's witness who testified about this matter, used the term "prescription", not "referral", but the forum infers from the context of his testimony that the term he meant to use was "referral".

school; the second was a sophomore; and the third was his 18-year-old stepdaughter who was seven or eight months pregnant.

42) Leaving for Alaska was a traumatic experience for Complainant. He had originally left Alaska because of his children and was now having to leave three of them at home, one of whom was in the late stages of pregnancy, in order to meet his financial obligations. He felt devastated at having to make this decision. He would not have gone to Alaska if he had found work in Oregon or California.

43) Prior to leaving for Alaska, Complainant did not provide Respondent with a release or the Physical Capacities Evaluation completed by a physician.

44) To get to Alaska, Complainant drove 1500 miles to Prince Rupert, with expenses of approximately \$500. Complainant then took the ferry to Juneau, at a cost of \$602 for the basic fare and about \$100 for food. He arrived at Whitestone on or about April 27. His wife then began working as camp cook and Complainant immediately began working as a timber faller in the same camp. Complainant and his wife paid \$180 for rent for the first month at the Whitestone camp. After about one week, Complainant determined that the camp was an unfit place for his children based on aggressive and out of control behavior of other camp children towards his children. He obtained work in a logging camp near Ketchikan where he had hoped to

work when and his wife first came to Alaska. On May 7, Complainant flew alone to Ketchikan, with documented air fare costing him \$128, and two connecting charter flights of undetermined cost. Because of the logging camp's policy on trial service, Complainant's wife and children could not join him for three weeks. Complainant paid \$12/day room and board for three weeks in Ketchikan. On May 28, his wife and children took the ferry to Ketchikan to join Complainant, with ferry fare costing him \$126. Complainant and his wife then rented a trailer for one month, at a cost of \$280. Complainant's wife worked very little in Ketchikan. While in Ketchikan, there were no public phones, and Complainant had to hitch rides on a boat to get to a phone he could use to call his children in Oregon. On June 21, Complainant and his family left Ketchikan for home. They left because they could no longer stand being separated from the rest of the family. On the way home with his family, Complainant spent \$94.50 for one night's motel lodging. Complainant spent \$346 for ferry fare from Hollis to Ketchikan and from Ketchikan to Prince Rupert. Complainant drove from Prince Rupert back to Grants Pass, another 1500 mile drive.

45) Complainant's total earnings in Alaska were \$7400 gross. Complainant's wife earned a total of \$3265 while working as a camp cook in Alaska. \$2965 of this was earned in Whitestone.

46) Complainant arrived back in Grants Pass in late June and immediately began looking for work. On July 1, 1996, Complainant went to work as a timber faller in Quincy, California. He worked one week in Quincy, then went to work for BMR, who called him in response to his earlier application. Complainant earned \$653.90 working in Quincy. Complainant started work for BMR on July 8, 1996, earning \$200/day.

47) In 1996, timber fallers employed by John Abgeris worked Monday through Saturday, six hours a day, and were paid \$30/hr., for a total of \$180/day. The timber fallers were responsible to pay for their own travel, equipment and fuel expense. This expense amounted to about twenty percent of their wages.

48) Complainant's testimony was generally credible. He testified forthrightly about his medical history, perhaps the most significant issue in the case from his point of view. He did not deny making statements about pain in different parts of his body to Wayne Gamby during Gamby's evaluation and was straightforward with Gamby when it would have been in his best interests to omit items of his medical history or shade the truth. He did not try to minimize his prior injuries in his testimony before the forum, but attempted to explain the specific circumstances of each injury and the treatment he received. He did not try to exaggerate the extent of his job search between April 3 and late April 1996 when he made his

decision to go to Alaska. Although the figures he provided in his testimony concerning his wage loss and the cost of going to Alaska and back to obtain work differed between earlier statements and the testimony he provided at hearing, the forum believes that any inconsistent testimony in this regard was a result of his confusion in trying to compare different sets of figures or not having the specific figures available to him. He testified convincingly about the emotions he experienced as a result of Respondent's failure to refer him to Hilltop Logging and was visibly upset at the hearing when he testified about the April 3 post-evaluation meeting and not being referred to Hilltop. He did not try to embellish his mental suffering. He was candid in admitting that he sometimes gets confused when angry, that he might not hear things right when angry, and that he might say something that might not quite be accurate when angry.

49) Dale Deboy's recollection was somewhat vague. The forum credited his testimony regarding Rogue Valley Medical Center's policies, procedures, and costs. Because of his vague recollection, his testimony regarding contacts with Complainant and Respondent was credited where it was corroborated by other credible evidence.

50) John Abgeris' testimony was credible in its entirety.

51) Heidi Beck was not a credible witness. Important parts of her testimony were inconsistent

and, in some cases, simply unbelievable. For example, she claimed that Respondent did not use the terminology "physical capacities evaluation," but signed a one paragraph form cover letter created by Respondent referring specifically to a "Physical Capacities Evaluation" form and enclosed the form, which is clearly titled "Physical Capacities Evaluation," with the letter. She testified that Respondent never required anyone to have a formal physical capacities evaluation other than Gamby's assessment, but gave Complainant the above-mentioned "Physical Capacities Evaluation" form and form cover letter with instructions to get a "release/evaluation". She testified it would have been sufficient if Complainant had brought back a release from a physician stating Complainant could do unrestricted work, yet the letter and forms she gave Complainant clearly call for an evaluation and specific responses to specific questions regarding Complainant's ability to utilize different parts of his body in performing physical labor. She referred to Gamby's evaluation both as an "evaluation" and a "medical assessment". She testified that her handwritten notes were made contemporaneous with her phone conversations, yet a conversation with Complainant that clearly took place on April 8, 1996, is dated "4/9/96", with no explanation from Beck as to the reason for the difference.

Regarding Respondent's requirement that Complainant obtain a release/evaluation, she testified or

wrote variously regarding Complainant's referral to Hilltop that: (1) Complainant was asked to get a release from a physician he had seen that released him for full duty work; (2) Complainant was not told that he had to get a medical exam or physical capacities evaluation (hereinafter "PCE"); (3) She was not requiring an evaluation, but a release; (4) Complainant needed to get an "evaluation/release" from a doctor to be referred; and (5) Complainant was not required "to get a release but that he was welcome to have someone else evaluate him." Consequently, the forum has credited Beck's testimony only where it was corroborated by other credible evidence.

52) Lisa Van Wey's testimony was colored by her present employment with Respondent. It was rendered suspect by her admission that she discussed Heidi Beck's testimony with Beck after Beck had testified and before Van Wey testified. Like Beck, her testimony was inconsistent. Unlike Beck, who claimed that "PCE" was a term foreign to her, Van Wey thought a PCE was what Gamby did for Respondent. She testified that Exhibit A6, pp.3-5, were Respondent's "release packet", yet claimed she didn't associate PCE with the packet and never noticed page 4 was titled "Physical Capacities Evaluation". She testified that Respondent requires applicants who have seen a doctor "*in the last year*" (emphasis added) for anything but the "common cold" to get a doctor's release stating if they have any

limits, but that Complainant was required to get a release because he said he hadn't been released by a chiropractor or chiropractors who saw Complainant either four or eight years earlier. Like Beck, Van Wey's testimony was credited only where it was corroborated by other credible evidence.

53) James Hardt's testimony on critical issues was disingenuous and seemed to be crafted specifically for the hearing. For example, he testified that Respondent sometimes requires applicants to undergo physical exams by physicians and Respondent pays for it. This contradicted Beck's and Van Wey's testimony that Respondent never required applicants to have a physical exam other than Gamby's PCE, and no evidence was offered to support this assertion. Hardt testified that Respondent may FAX requests for a release to a treating physician's office, but there was no evidence that this was ever done in Complainant's case. Notably, neither Van Wey nor Beck mentioned this gratuitous policy in their testimony. He testified that if an applicant can't get a release, Respondent might find a doctor, have the applicant examined, and pay for it. Again, it is noteworthy that neither Van Wey nor Beck testified to this policy, and no evidence was offered to support this assertion. Finally, Hardt testified that, "with rare exceptions," if there is a problem with employees, he "knows about it almost immediately," and he would make it a top priority to do what he could

to put that person to work. Although Hardt was absent from work on April 3, 1996, his subordinates Van Wey and Beck, as well as Gamby, clearly perceived Complainant's situation as a problem. Yet there was no testimony that Hardt was aware that Complainant had even come in to apply, much less that there was a problem with Complainant getting a release. Given Hardt's testimony concerning his awareness of problems in the office, it is simply not believable that he was not aware of Complainant's problem. If he was aware, he clearly did not apply the proactive procedures described earlier in this paragraph. Accordingly, the forum has discredited Hardt's testimony regarding Respondent's gratuitous procedures towards applicants whom Respondent believes need post-hire medical evaluations or releases.

54) The Agency did not challenge Wayne Gamby's testimony regarding the physical evaluation he performed on Complainant and the results of that evaluation, and the forum finds that testimony credible because the evaluation was based on objective physical criteria. However, the forum finds his opinion regarding Complainant's limitations, based solely on Complainant's self-described medical history, not credible based on Gamby's lack of a medical license or any relevant certification. Although Gamby testified that Dr. Kruse verified his opinion, more significant to Gamby's credibility was the conspicuous absence of Dr. Kruse

from the witness stand to verify his stamp of approval and the basis on which he granted that stamp of approval.

ULTIMATE FINDINGS OF FACT

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

2) At all times material, Respondent's business was leasing employees to other businesses and providing temporary employees to other businesses.

3) Complainant applied for employment with Respondent on April 3, 1996 as a timber faller after being referred to Respondent by Hilltop Logging, an employer who desired to use Complainant's services as a timber faller.

4) Complainant passed a drug screen and was considered hired by Respondent before Respondent's agent conducted a Physical Capacities Evaluation on Complainant.

5) After Complainant underwent the Physical Capacities Evaluation, Respondent informed Complainant that he was restricted from strenuous activity requiring the use of his back, and that he would not be referred to Hilltop Logging unless he obtained a medical release/evaluation.

6) Based on the Physical Capacities Evaluation, Respondent perceived that Complainant had a physical impairment to his back that prevented him from performing any strenuous physical labor requiring the use of his back, including all jobs in the logging

industry, the occupation Complainant had worked in his entire adult life.

7) At all times material, Complainant had no physical impairment to his back.

8) Complainant would have been referred to Hilltop Logging as a timber faller except for Respondent's erroneous perception that Complainant had a physical impairment to his back that prevented him from performing any strenuous physical labor requiring the use of his back, including all jobs in the logging industry, the occupation Complainant had worked in his entire adult life.

9) Although Respondent required Complainant to obtain a medical release/evaluation as a condition of continuation of his employment, Respondent would not pay the cost of the release/evaluation.

10) Complainant lost wages of \$7,797.60 between April 4 and July 7, 1996.

11) Complainant was very upset about Respondent's failure to refer him to Hilltop Logging. He diligently sought work thereafter and moved to Alaska to obtain employment in order to ensure the financial well being of his family. The move devastated him because of the separation of his family.

CONCLUSIONS OF LAW

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

659.010 to 659.110 and 659.330 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 Lisa Van Wey and Heidi Beck and agent Wayne Gamby, described herein, and their perceptions and attitudes underlying those actions, are properly imputed to Respondent.

4) At times material herein, ORS 659.425 provided, in pertinent part:

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

" * * * * *

"(b) An individual has a record of a mental or physical impairment; or

"(c) An individual is regarded as having a physical or mental impairment."

At times material herein, ORS 659.400 provided, 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.

"(3) 'Employer' means any person who employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard."

At times material herein, OAR 839-06-205 provided, in pertinent part:

" * * * * *

"(2) 'Disability' means a physical or mental (including emotional or psychological) impairment which substantially limits one or more major life activities. Disability does not include the current use of illegal drugs.

"(3) 'Duly licensed health professional', in addition to physicians and osteopathic physicians, includes psychologists, occupational therapists, clinical social workers, dentists, audiologists, speech pathologists, podiatrists, optometrists, chiropractors, naturopaths, physiotherapists, and radiologic technicians insofar as any opinion or evaluation within the scope of the relevant license applies or refers to the individual's physical or mental impairment.

"(4) 'Major life activity' includes but is not limited to: walking, speaking, breathing, performing manual tasks, hear-

ing, learning, caring for oneself and working in general, considering the person's experience and education, as opposed to performing a particular job.

"(5) 'Medical' means authored by or originating with a medical or osteopathic physician or duly licensed health professional.

"(6) 'Misclassified', as used in ORS 659.400(2)(b), means an erroneous or unsupported medical diagnosis, report, certificate, or evaluation, including an erroneous or unsupported evaluation by a duly licensed health professional.

"(7) 'Perceived disability' is:

"(a) A physical or mental condition which does not limit a major life activity but which is thought to be disabling (example: flu thought to be AIDS); or

"(b) The perception of a disability where no condition exists (example: a person who speaks slowly is thought to be mentally impaired); or

"(c) A condition disabling only because of the attitude of others (example: disfigurement because of burns).

"(8) 'Physical or mental impairment' means an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages a person's health or physical or mental activity."

Complainant was not a disabled person at times material herein. Respondent perceived Complainant as having a physical impairment to his back that substantially limited Complainant in the major life activity of employment. Respondent violated ORS 659.425 by refusing to refer Complainant to the position of timber faller based on this perception.

5) At times material herein, OAR 839-06-235 provided, in pertinent part:

"(1) An employer may inquire whether an individual has the ability to perform the duties of the position sought or occupied.

"(2) An employer may require a post offer medical evaluation of a person's physical or mental ability to perform the work involved in a position:

"(a) The person seeking or occupying a position must cooperate in any medical inquiry or evaluation, including production of medical records and history relating to the person's ability to perform the work involved; and

"(b) If the employer requires a medical evaluation as a condition of hire or job placement and the evaluation verifies a physical or mental impairment affecting the ability to perform the work involved, or verifies a present risk of probable incapacitation, the employer may not refuse to hire or place a person based on the person's impairment unless no reason-

able accommodation is possible.

"(c) The employer shall pay the cost of a medical evaluation or the production of medical records it has requested as provided in ORS 659.330.

" * * * * *

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

At times material herein, ORS 659.330 provided, in pertinent part:

"(1) It is an unlawful employment practice for any employer to require an employee, as a condition of continuation of employment, to pay the cost of any medical examination or the cost of furnishing any health certificate.

" * * * * *

"(3) Complaints may be filed by employees, and this section shall be enforced by the Commissioner of the Bureau of Labor and Industries in the same manner as provided in ORS 659.040 to 659.110 and 659.121 for the enforcement of an unlawful employment practice. Violation of subsection (1) of this section subjects the violator to the same civil * * * remedies * * * as provided in ORS 659.010 to 659.110 * * *."

Respondent violated ORS 659.330 by requiring Complainant to pay the cost of a medical examination or furnishing a health certification as a condition of continuation of employment.

OPINION

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. *In the Matter of Parker Hannifin Corporation*, 15 BOLI 245, at 262, citing ORS 659.400 (2)(b); *Devaux v. State of Oregon*, 68 Or App 322, 326, 681 P2d 156, 158 (1984).

The initial issue is whether the medical history available to Respondent at the time Complainant was told he could not be referred as a timber faller qualifies as a "record". The medical history under scrutiny here was provided by Complainant to Respondent in 1995 and 1996. In 1995, Complainant provided a written medical history to Respondent stating, in relevant part: (1) He suffered a lower back sprain in 1987,¹⁶ was treated by a chiropractor and a physician and had

"30 days rest" as treatment; (2) He threw vertebrae out in his neck and upper back in 1991 or 1992, went to the chiropractor five times; and (3) He had scar tissue removed from his right knee in 1991¹⁷ or 1992. Complainant indicated he had no current physical restrictions or limitations as a result of these injuries. In 1996, Complainant told Gamby that the 1988 chiropractor told him he thought there was evidence of degenerative disc disease and Complainant shouldn't be doing hard work, that the 1992 chiropractor told him he had two vertebrae that were slightly twisted, that he had experienced soreness in his upper extremities after clearing ground for his garden, that he occasionally experiences pains going down his legs, and that he experienced pain in his arms while cutting brush in 1995 that was resolved after two or three days of rest.

Complainant's medical history does not disclose any condition that substantially limited any major life activity. The only major life activity even referenced is employment. 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. *Former OAR 839-06-205(4)*; *Parker-Hannifin Corporation, supra*, at 265. The medical

¹⁶Testimony by Complainant indicated this injury was actually in 1988.

¹⁷Complainant's medical record showed this injury was actually in 1992.

history shows that Complainant missed some work because of his injuries, but there is nothing indicating anything more than a temporary impairment. *Former OAR 839-06-240(1)*. The forum concludes that Complainant's medical history acted upon by Respondent does not constitute a "record" of any impairment that substantially limits any major life activity or misclassification of such impairment, and as a result, Complainant did not enjoy the protection of *former* 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, 780 P2d 743 (1989); *Parker-Hannifin Corporation*, *supra*. *Former* ORS 659.400(2)(c) provided:

"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."

An individual must have an "impairment" to come under the protection of *former* ORS 659.400(2)(c)(A) and (B). "Impairment" is defined as "an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages a person's health or physical or mental activity." *Former OAR 839-06-205(8)*. There was no evidence presented in this case, other than Gamby's evaluation of Complainant's medical history, that established that Complainant had any condition that weakened, diminished, restricted, or otherwise damaged his health or physical or mental activity. Complainant had spent his entire adult life working as a logger, and the previous 15 years working as a timber faller. Since Respondent's refusal to refer him to Hilltop Logging, he has worked continuously as a timber faller without injuring himself or losing work due to problems with his back, or having to consult a doctor about his back. The injuries Gamby was concerned about occurred four and eight years prior to 1996, and there is no evidence whatsoever, other than Gamby's opinion, that Complainant was in any way impaired from working as a timber faller or doing any job in the logging industry. In addition, Gamby's objective evaluation of Complainant concluded that Complainant was physically capa-

ble of working as a timber faller. Consequently, the forum must conclude that Complainant did not have an "impairment," and that he was not protected by the provisions of former ORS 659.400(2)(c)(A) and (B).

The remaining subsection, former ORS 659.400(2)(c)(C), was explicitly designed to protect individuals in Complainant's circumstances -- individuals who do not have an impairment but are treated adversely by an employer or potential employer as though they had an impairment which substantially limits one or more major life activities. *OSCI v. Bureau of Labor and Industries, supra* at 746. The question was whether Respondent treated Complainant adversely and whether that adverse treatment was based on Respondent's perception that Complainant was substantially limited in one or more major life activities.

Respondent's refusal to refer Complainant clearly fulfills the adverse treatment requirement of the statute. Whether or not Respondent took this action based on a perception that Complainant had an impairment that substantially limited one or more major life activities requires a further analysis of the facts and applicable law.

The major life activity under scrutiny is employment. 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. *Former*

OAR 839-06-205(4); *Parker-Hannifin Corporation, supra*, at 265.

Complainant applied for a job as a timber faller. His chosen field of employment since high school had been the logging industry, and he had worked almost exclusively as a timber faller since 1981. Pursuant to Respondent's standard hiring procedure, which involved having Gamby evaluate everyone who applied for any job in the logging industry, Gamby evaluated Complainant for the job of timber faller. Gamby did that and recommended that Complainant should "limit exertional/repetitive use of back". All jobs in the logging industry that Complainant was qualified to perform require strenuous, repeated use of the back, and the effect of this recommendation was to foreclose Complainant from working in any job in the logging industry, so far as Respondent was concerned. In doing this, Respondent clearly perceived Complainant as "unable to perform" a class of jobs as contemplated by former OAR 839-06-205(4) and violated ORS 659.425(1)(c).

3. Was Complainant "barred" or "refused hire?"

The Agency alternatively alleges that Complainant was either "barred" or "refused hire" by Respondent. ORS 659.425 prohibits both actions. The question is what label to put on Respondent's action. Respondent claims that Complainant was never "barred" or "refused hire", based on their contentions that Complainant was

"hired" after passing the drug screen and that Respondent would have referred him to any job for which he was qualified after that.

A review of the facts is in order. Complainant sought Respondent as an employer solely because it was the only way he could be referred to Hilltop Logging, a company that wanted Complainant to work for them as a timber faller for a second consecutive year. If Complainant had applied at Hilltop Logging directly and been turned down because of a negative PCE, he would not have been considered "hired". Respondent may have "hired" Complainant, but Complainant did not stay "hired" after Respondent refused to refer him to the very job he sought. Respondent's position is without merit. Likewise, Respondent's argument that Complainant was not "barred" because Respondent would have referred him to a lesser paying, non-logging job, is purely one of semantics, lacks substance, and is not supported by credible facts. ORS 659.405, which sets out the public policy of the state of Oregon with regard to disabled persons and employment, is instructive as to the correct approach to this issue. It reads, in relevant part:

"(1) It is declared to be the public policy of Oregon to guarantee disabled persons the fullest possible participation in the social and economic life of the state, to engage in remunerative employment * * *.

"(2) The right to otherwise lawful employment without discrimination because of disability where the reasonable demands of the position do not require such a distinction * * * are hereby recognized and declared to be the rights of all the people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights and ORS 659.400 to 659.460 shall be construed to effectuate such policy."

The policy behind Oregon's disability statutes make it clear that disabled persons are not to be denied rights guaranteed by the legislature based on legal artifice. There is no doubt that Complainant was not referred to Hilltop based on a perceived physical impairment. The "adverse action" necessary for establishing a prima facie case of discrimination occurred when Complainant was denied referral. Even if Complainant stayed "hired", any subsequent actions of Respondent related to other potential referrals only go to mitigation, and not to whether or not unlawful discrimination occurred.

4. ORS 659.330.

The preponderance of credible evidence showed that Respondent required Complainant to provide a "release/evaluation" as a condition of job placement in the logging industry, that Complainant sought to obtain such a "release/evaluation" through the Rogue Valley Medical Center in

order to comply with Respondent's directive, and that Respondent refused to pay the \$500+ prospective cost of Rogue Valley's evaluation. The type of "release/evaluation" contemplated by Respondent, as evinced by the paperwork provided to Complainant, clearly required a "medical examination"¹⁸ Based on the testimony of Respondent's witnesses, Complainant was in fact "hired" when this condition was placed on him, so there can be no doubt that it was "a condition of continuation of employment." The fact that Complainant did not actually undergo the examination and pay for it out of his own pocket is irrelevant. He was required to undergo a medical examination as a condition of continuation of employment and was required to pay for the examination if he chose to undergo the examination.¹⁹ Under these circumstances, Respondent's ac-

tions constituted a violation of ORS 659.330.

5. The Agency's motion to amend the Specific Charges to include the expenses of Complainant's move to Alaska as an element of damages.

During the course of the hearing, the Agency sought to amend the specific charges to include Complainant's moving expenses to and from Alaska as an element of damages. Respondent opposed it on the grounds that damages of this sort were not authorized by law and because Respondent was prejudiced by not having prior knowledge of the Agency's intent.

OAR 839-050-0140 governs amendments in BOLI's contested case hearings. In relevant part, it reads as follows:

" * * * * *

"(2)(a) After commencement of the hearing, issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is expressed or implied consent of the participants. Consent will be implied where there is no objection to the introduction of such issues and evidence or where the participants address the issues. The administrative law judge may address and rule upon such issues in the proposed order. Any participant raising new issues must move the administrative law judge to amend its pleading to conform

¹⁸The "Physical Capacities Evaluation" form given to Complainant requires answers to questions about Complainant's physical condition that can only be answered by someone who has examined Complainant, and there is a line at the bottom of the form for a "Physicians Signature."

¹⁹Even if Complainant was only required to obtain a release, which could be considered a "health certificate" under ORS 659.330, there is no credible evidence that Respondent intended to pay any of the cost of obtaining one from Complainant's former treating physicians or chiropractors in Alaska, and the same analysis would apply. Either way, Respondent violated ORS 659.330.

to the evidence and to reflect issues presented.

" * * * * *

"(2)(c) Charging documents may be amended to request increased damages * * * to conform to the evidence presented at the contested case hearing."

Complainant's out of pocket expenses related to his trip to Alaska were not prayed for in the Specific Charges. Evidence concerning those expenses came into the record without objection, implying consent on the part of Respondent. In past cases before the forum, the Commissioner has consistently granted amendments under these circumstances. *In the Matter of Benn Enterprises, Inc.*, 16 BOLI 69, 71 (1997), *In the Matter of Yellow Freight System, Inc.*, 13 BOLI 201, 203 (1994). The forum follows its own precedent in this case and grants the Agency's amendment.

6. Respondent's motion to dismiss the Specific Charges on the grounds that Hilltop Logging, the employer Respondent have leased Complainant to, did all of its work in California in 1996.

This motion was denied during the hearing. This ruling is affirmed. The evidence is clear that Respondent hired Complainant, an Oregon resident, through their office in Medford, Oregon, and that all of Complainant's workers compensation insurance and unemployment tax was paid in Oregon in 1995 and would have

been paid the same in 1996. Under these circumstances, the fact that Complainant would have been sent to work out of state does not convert Respondent into a non-employer for the purposes of ORS 659.400(3).

7. Damages.

Complainant seeks two types of damages, back pay and compensation for mental suffering.

a. Back Pay.

If Complainant had been referred to Hilltop, he would have started work on April 4, 1996, working six days a week, six hours a day, and earning \$180 a day. Through July 7, he would have worked 76 days, earning gross wages in the amount of \$13,680. On July 8, 1996, he obtained a job that paid \$200 a day, cutting off any further back pay award.

In contrast, Complainant's actual gross earnings during this period of time were \$8,053.90 (\$7,400 in Alaska; \$653.90 in Quincy). These wages must be counted as an offset against the back pay to which he is entitled.

Complainant also incurred expenses getting to and from the logging camps he worked at in Alaska. Since he would not have earned the \$7400 without incurring these expenses, they must be counted as a set-off against the \$7400. The forum has allowed those expenses for which there is documentary evidence or a reasonable estimate of expenses. Expenses allowed include \$1,000

for 3,000 miles round-trip from Grants Pass to Prince Rupert in Complainant's crew cab pickup, \$602 for the ferry ride from Prince Rupert to Juneau, \$128 for Complainant's plane flight to Ketchikan, \$94.50 for motel expenses on the way home to Grants Pass, and \$346 for the ferry ride from Hollis to Prince Rupert, for a total of \$2170.50. Expenses for food are not included, as Complainant and his family would have had to eat anyway. Complainant's rent and room and board is not included, as the forum considers that they offset the estimated "20%" expense reflected in Finding of Fact - The Merits #47.

Based on this analysis, Complainant's back pay can be computed as follows: \$13,680 (gross back pay) *minus* \$8,053.90 (gross wages earned in mitigation) *plus* \$2170.50 (expenses) *equals* gross pay loss of \$7,797.60.

b. Mental Suffering

Awards for mental suffering damages depend on the facts presented by each Complainant. A Complainant's testimony about the effects of a Respondent's unlawful conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Jerome Dusenberry*, 9 BOLI 173 (1991).

Complainant testified credibly as to the extent of his mental suffering attributable to Respondent's unlawful employment practices. Complainant, who had been a timber faller for the previous 14

years, including the previous year with Respondent, was understandably "very upset" when Respondent told him he could not do that job based on the opinion of Wayne Gamby. He was aware that the work season for timber fallers in Oregon had just begun and was "extremely concerned" about finding work. This concern was heightened by the fact that he had recently purchased a manufactured home in which to house his family, which he had moved from Alaska to Oregon for his children's sake the previous summer. He tried to find work in Oregon and northern California, but soon realized he would have to move back to Alaska to maximize his chances of finding employment. He made that move, taking his wife and two youngest children with him, and found work immediately. However, the separation from his three high school aged children, including one who was seven months pregnant, was "devastating" to him. While in Alaska, he worked continually, finally leaving when he could no longer stand the separation from his family.

Based on all of the above, the forum concludes that \$20,000 is an appropriate award of mental suffering damages in this case.

8. Respondent's Exceptions to the Proposed Order.

a. ALJ Bias and Witness Credibility

Respondent contends that Barrett's witnesses were credible and believable, that Complainant's

story was not believable, and that the ALJ's assessment of credibility was based on the ALJ's bias. Specifically, Respondent notes "what they believe to be a prejudice and bias by the Judge who was hired by the Commissioner and travels with and dines with the BOLI representatives, agents and case presenters while trying the Commissioner's cases." In prior cases, the question of ALJ bias has typically arisen in the context of a motion to disqualify the ALJ or hearings referee.²⁰ A 1993 BOLI case illustrates the rationale used by this forum in deciding questions of ALJ bias. In that case, Respondent contended that the hearings referee was incapable of giving Respondent a fair hearing and decision because he was an employee of the Agency. The forum observed:

"The mere fact that the Hearings Referee is an employee of the Agency is insufficient to prove bias or prejudice. In addition, administrative agencies typically investigate, prosecute, and adjudicate cases within their jurisdiction. This combination of functions by itself does not violate the due process clause. *Withrow v. Larkin*, 421 US 35, 54, 95 SCt 1456, 43 LEd2d 712 (1975); *Fritz v OSP*, 30 Or App 1117, 569 P2d 654, 656-67 (1977); *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 34,

514 P2d 888 (1973), *rev den* (1974)." *In the Matter of Clara Perez*, 11 BOLI 181, 182-83 (1993)

In the same case, the forum held that Respondent has the burden of showing actual prejudice or bias. *Id.*, at 183.²¹ Here, there is no evidence on the record demonstrating actual prejudice or bias as alleged by Respondent. The ALJ's assessments of witness credibility are supported by substantial evidence in the record. Accordingly, Respondent's exceptions on this point are overruled.

b. Failure to Call Complainant's Wife as a Witness

Respondent argues that the ALJ's bias is further demonstrated by the language in Finding of Fact – The Merits #48 noting that "It was equally within Respondent's power to call Complainant's wife as a witness to impeach Complainant, and Respondent did not do so." That portion of Finding of Fact – The Merits #48 has been deleted, but the forum's assessment of Complainant's credibility stands.

c. Testimony of John Abgeris

Respondent contends that the ALJ should have commented on John Abgeris' testimony that he would want to have a medical release before hiring a timber faller who was stating he had prior back

²⁰Administrative law judges (ALJs) employed by BOLI were referred to as "hearings referees" until mid-1995.

²¹See also *Boughan v. Board of Engineering Examiners*, 46 Or App 287, 611 P2d 670, *rev den* 289 Or 588 (1980).

problems and had radiating pain down his legs. Abgeris had no medical background that would entitle his opinion on this subject to any weight. Respondent's exception is overruled.

d. The Release

Respondent argues that it was reasonable to request a release and that the ALJ should have commented on the fact that Complainant stated he contacted his chiropractor for a release. The issue of reasonableness has been adequately covered in the proposed order. The issue of whether or not Complainant contacted his chiropractor for a release is irrelevant to the outcome of this case, given that Respondent's act of requiring a "release/evaluation" violated ORS 659.330.

e. Damages and Amendment.

Respondent generally excepts to the damages allowed and the amendment granted. The damages are supported by a preponderance of the evidence. The basis for granting the amendment is based on the administrative rules governing procedures in this forum and the forum's precedent. These exceptions are without merit and are overruled.

ORDER

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

2) Cease and desist from discriminating against any employee

practices found in violation of ORS 659.330 and ORS 659.425 and as payment of the damages awarded, Respondent **BARRETT BUSINESS SERVICES, INC.** 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 KELLY ROBBINS, in the amount of:

a) SEVEN THOUSAND SEVEN HUNDRED NINETY-SEVEN DOLLARS AND SIXTY CENTS (\$7,797.60), less lawful deductions, representing wages lost by Complainant between April 4 and July 7, 1996, as a result of Respondent's unlawful practices found herein, plus

b) TWENTY THOUSAND DOLLARS (\$20,000), representing compensatory damages for the mental and emotional distress suffered by KELLY ROBBINS as a result of Respondent's unlawful practices found herein, plus,

c) Interest at the legal rate from July 7, 1996, on the sum of \$7,797.60 until paid, and

d) Interest at the legal rate on the sum of \$20,000 from the date of the February 22, 1999 Final Order until Respondent complies with this Final Order on Reconsideration.

based upon the employee's disability and cease and desist from

requiring a medical examination or health certificate at the employee's expense as a condition of continued employment.

In the Matter of

**GOODMAN OIL COMPANY,
INC.,**

Final Order of the Commissioner
Jack Roberts

Case No. 69-00

Issued July 25, 2000

SYNOPSIS

Respondent violated ORS 652.610(3) by withholding \$105.00 from its employee's wages pursuant to an agreement the employee had signed, which provided that if he accepted a check from a customer without a check guarantee card, and that resulted in "return of an unpaid check," the amount of the check would be deducted from his wages. ORS 652.610(3) does not allow such deductions. The commissioner found that Respondent acted willfully in withholding the wages and ordered Respondent to pay \$1560.00 in penalty wages in addition to the \$105.00 in unpaid wages, plus interest. ORS 652.140, ORS 652.150, ORS 652.610(3).

The above-entitled case was scheduled for hearing on May 31, 2000, before Erika L. Hadlock, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia Domas, an employee of the Agency. Respondent was represented by its president, Charles D. Conley. Before the date scheduled for hearing, the ALJ granted the Agency's motion for summary judgment and canceled the hearing.

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 or about December 1, 1999, the Agency issued an Order of Determination in which it alleged that employer "Michael J. McConville and Charles D. Conley, dba Goodman Oil Company," had employed Claimant and failed to pay him \$105.00 in earned wages. The Agency further alleged that the failure to pay wages was willful and the employer, therefore, owed Claimant \$1560.00 in penalty wages. The Order of Determination required the employer, within 20 days, either to pay these sums, plus

interest, in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

2) On or about December 30, 1999, Respondent filed an Answer and Request for Hearing through its president and authorized representative, Charles D. Conley. In that Answer, Respondent denied it had committed the alleged violations and asserted:

“In response to paragraph II of the Order of Determination, Goodman Oil Company admits that it employed the Wage Claimant from on or about November 19, 1998, to on or about October 23, 1999. Goodman Oil Company admits that during the Wage Claimant’s employment, Wage Claimant was paid \$6.50 per hour. Goodman Oil Company admits that at the time of Wage Claimant’s employment, Goodman Oil Company paid Wage Claimant all compensation due and owing to Wage Claimant. Goodman Oil Company admits that during Wage Claimant’s employment, Goodman Oil Company deducted from Wage Claimant’s wages the amount of \$105.00 for shortages of assets caused by Wage Claimant’s violation of an employment contract voluntary [*sic*] signed by Wage Claimant. Goodman Oil Company denies that deduction of the amount of \$105.00 from Wage Claimant’s wages was in violation of ORS 652.610(3),

and denies all other allegations set forth in paragraph II not specifically admitted in this Answer.”

3) On March 6, 2000, the Hearings Unit received the Agency’s request for hearing and the Agency’s motion to amend the caption.

4) The Hearings Unit issued a Notice of Hearing on March 9, 2000, setting forth the time and place of hearing. The Notice was served on Respondent together with: a) a copy of the Order of Determination; b) Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; and c) a copy of the forum’s contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

5) The same day, the forum issued an order granting the Agency’s motion to amend the caption of the Order of Determination to name Goodman Oil Company, Inc., as the sole Respondent.

6) The Agency filed a motion for summary judgment on May 15, 2000. The forum issued an interim order notifying Respondent that its response to the summary judgment motion was due on May 22, 2000. Respondent did not file a response to the motion.

7) On May 23, 2000, the ALJ issued an order granting the Agency’s motion for summary judgment and canceling the contested case hearing. That order stated:

"The Agency alleged in the amended Order of Determination that Respondent employed Claimant in Oregon from October 17, 1998, through August 15, 1999, and unlawfully failed to pay Claimant \$105.00 of his wages. The Agency further alleged that 30 days had elapsed since the wages became due and owing, that Respondent's failure to pay the wages was willful, and that Respondent, therefore, owed Claimant \$1560.00 in penalty wages. In response to the Order of Determination, Respondent's secretary-treasurer requested a contested case hearing and made the following assertion:

'While employed with Goodman, the claimant voluntarily signed a legally binding contract with his employer in which he agreed to be responsible for shortages of assets caused by his failure to adhere to company policy. This contract is necessary to ensure that employees of Goodman do not collude with third parties to defraud Goodman of company property entrusted to their care. Goodman does not believe your agency has authority to deny Goodman the right to contract as guaranteed by the United States Constitution.'

"(Summary Judgment Motion, Exhibit A-4).

"Respondent later filed a formal Answer and Request for Hearing, in which it admitted: that it employed Claimant from about November 19, 1998, to about October 23, [1999]; that it paid Claimant \$6.50 per hour during his employment; and that it 'deducted from Wage Claimant's wages the amount of \$105.00 for shortages of assets caused by Wage Claimant's violation of an employment contract voluntary [sic] signed by Wage Claimant.' Respondent denied the Agency's allegation that the deduction from wages was unlawful and denied that it willfully failed to pay any wages due. Respondent also asserted the following defenses:¹

"1. 'ORS 652.610(3) and the Order of Determination * * * unconstitutionally deprive [Respondent] of its right to contract with its employees, in violation of Art. I, Section 10, cl. 1 of the Constitution of the United States.'

"2. 'The imposition of a civil penalty in the amount of \$1560 pursuant to ORS 652.150 is excessive and unconstitutional under the Eighth Amendment to the Constitution of the United States.'

"(Summary Judgment Motion, Exhibit A-3 at 2).

"On May 15, 2000, the Agency filed a motion for summary judgment, claiming that no

genuine issues of material fact remained in dispute. The forum issued an order stating that Respondent's response to the summary judgment motion was due on Monday, May 22, 2000. By the afternoon of May 23, the forum had received no response from Respondent.²

"A participant in a BOLI contested case hearing is entitled to summary judgment only if the participant demonstrates that '[n]o genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law * * *.' OAR 839-050-0150(4)(B). In reviewing a motion for summary judgment, this forum 'draw[s] all inferences of fact from the record against the participant filing the motion for summary judgment * * * and in favor of the participant opposing the motion * * *.' *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff'd without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993). In considering summary judgment motions, this forum gives some evidentiary weight to unsworn assertions contained in the participants' pleadings and other filings. *Cf. In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997) (considering contents of the Respondent's answer in making factual findings in a default hearing).

"In a typical wage claim case, the Agency has the burden of proving:

"1. that the respondent employed the claimant;

"2. any pay rate upon which the respondent and the claimant agreed, if other than minimum wage;

"3. that the claimant performed work for the respondent for which he or she was not properly compensated; and

"4. the amount and extent of work claimant performed for the respondent.

"*In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). In this case, only the third element is disputed: Respondent admits that it employed Claimant,³ that it paid Claimant \$6.50 per hour,⁴ and that it deducted \$105.00 from the wages Claimant had earned.⁵ Consequently, the only issue in dispute is whether Respondent properly compensated Claimant for the work he performed – *i.e.*, whether Respondent's deduction of \$105.00 from Claimant's wages was lawful. That is a legal question that properly may be resolved by summary judgment.

"ORS 652.610(3) provides:

'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;

'(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party; or

'(e) The deduction is made from the payment of wages upon the termination of employment and is authorized pursuant to a written agreement between the employee and employer for the repayment of a loan made to the employee by the employer if [certain conditions are met].'

"Here, Respondent and the Agency agree that Respondent withheld the \$105.00 from Claimant's wages pursuant to a company policy signed by Claimant, which provided, in pertinent part:

'8. [Respondent] has no alternative but to assume that

if an employee accepts a check without a check guarantee card, the employee is working as an accomplice with the person passing the check to defraud the company.

'9. If an employee fails to follow company policy and it results in the 'return of an unpaid check', the amount will be withheld from the employee's pay check.'⁶

"The undisputed nature of the \$105.00 deduction from Claimant's wages establishes that Respondent violated ORS 652.610(3) by making that deduction. Respondent was not legally required to withhold the wages; the deduction was not for Claimant's benefit; Respondent was the ultimate recipient of the money withheld; there has been no suggestion that the deduction was authorized by a collective bargaining agreement; and the deduction was not made to repay a loan from Respondent to Claimant. Because the deduction did not fall within any of the categories of deductions authorized by ORS 652.610(3), it was impermissible as a matter of law. Consequently, there is no genuine dispute of fact regarding Respondent's obligation to pay the \$105.00 in unpaid wages, plus interest. See ORS 652.320(9); 652.330(1).

"The Agency also seeks \$1560.00 in penalty wages. A respondent must pay penalty

wages when it has 'willfully fail[ed] to pay any wages or compensation of any employee whose employment ceases * * *.' ORS 652.150. An employer acts 'willfully' when it 'knows what [it] is doing, intends to do what [it] is doing, and is a free agent.' *Vento v. Versatile Logic Systems Corp.*, ___ Or App ___ (May 17, 2000); see *Wyatt v. Body Imaging*, 163 Or App 526, 531-32, 989 P2d 36 (1999), *rev den* 320 Or 252 (2000).

"In this case, Respondent denies that it willfully failed to pay wages. However, the undisputed evidence establishes that Respondent intentionally withheld \$105.00 from Claimant's paycheck pursuant to Respondent's company policy. That evidence proves that Respondent acted knowingly, intentionally, and as a free agent in making the deduction and, therefore, acted willfully. It makes no difference that Respondent may have acted with a good faith belief that it was entitled to make the deduction. See *Wyatt*, 163 Or App at 531. The undisputed evidence also establishes that more than 30 days have passed since Respondent made the unlawful deduction from Claimant's wages. Under these circumstances, 'as a penalty for such nonpayment,' Claimant's wages 'shall continue' as a matter of law. ORS 652.150. The amount of penalty wages owing is calculated pursuant to statute and Agency rule as fol-

lows: 30 days x 8 hours/day x \$6.50/hour = \$1560.00. See ORS 652.150; OAR 839-001-0470(1).

"Respondent raised two arguments in its Answer that must be addressed at this time. First, Respondent claims that ORS 652.610(3) and the Order of Determination alleging a violation of that statute unconstitutionally deprive Respondent of its right to contract with its employees, in violation of Article I, section 10 of the United States Constitution. This argument has no merit. The Contract Clause provides:

'No State shall * * * pass any * * * Law impairing the Obligation of Contracts[.]'

"U.S. Const. art I, sec. 10. The Contract Clause relates only to statutes that limit obligations under contracts that already exist. It has no application to statutory provisions enacted before formation of the contract in question. See *General Motors Corp. v. Romein*, 503 U.S. 181, 186-87, 112 S Ct 1105, 117 L Ed 2d 328 (1992); *Thoren v. Builder's Board*, 21 Or App 148, 153, 533 P2d 1388 (1975).

"ORS 652.610(3), which prohibits the type of deduction Respondent made here, was first enacted in 1977 and has existed in its present form since 1995. See 1995 Or Laws ch 594, sec 5; 1977 Or Laws ch 618, sec 1. The undisputed evidence shows that

Respondent first employed Claimant in 1998 and that Claimant signed the contract authorizing the deductions when he was employed.⁷ Because the relevant provisions of ORS 652.610(3) existed before Respondent and Claimant entered the contract, the statute could not impermissibly impair any obligations of that contract in violation of the Contract Clause.

“Moreover, even if the statute did substantially impair an existing contract, its operation would not violate the Contract Clause because it ‘imposed a generally applicable rule of conduct designed to advance a broad societal interest[.]’ *Exxon Corp. v. Eagerton*, 462 US 176, 190 (1983) (citation omitted); see *In re Seltzer*, 104 F3d 234, 236 (9th Cir 1996).

‘The Contract Clause does not deprive the States of their ‘broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.’ As Justice Holmes put it: ‘One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.’”

“*Exxon*, 462 US at 190. As an example of a permissible exercise of police power that would not violate the Contract

Clause, the Supreme Court has identified: ‘a workmen’s compensation law * * * applied to employers and employees operating under pre-existing contracts of employment that made no provision for work-related injuries[.]’ *Id.* at 191 (citation omitted).

“ORS 652.610(3), like the workers’ compensation laws, serves the state’s broad interest in protecting workers – in this case, from unscrupulous employers who wish to shift the risks of doing business from themselves to their employees. The statute is a reasonable exercise of the state’s police power and its operation – even as applied to pre-existing contracts – does not violate the Contract Clause.

“Respondent also argues that the imposition of \$1560.00 in penalty wages ‘is excessive and unconstitutional under the Eighth Amendment to the Constitution of the United States.’ This claim lacks merit for several reasons. First, the United States Supreme Court has not yet decided whether corporations are protected by the Eighth Amendment to the United States Constitution. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 482 US 257, 109 S Ct 2909, 2920 n. 22, 106 L Ed 2d 219 (1989). Second, it is not clear that the Excessive Fines Clause of the Eighth Amendment has any application in cases where, as

here, the government seeks to collect a fine only on behalf of a private party, and will not retain any of the money itself. See *id.* at 2914 (Excessive Fines Clause does not apply to damages in civil suits ‘when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded’). Third, the Excessive Fines Clause applies to civil penalties, fines and forfeitures only where those measures are punitive, at least in part. See *U.S. v. Bajakajian*, 524 US 321, 118 S Ct 2028, 2033, 141 L Ed 2d 314 (1998). An argument can be made that penalty wages imposed pursuant to ORS 652.150 are remedial, not punitive, in nature.

“However, assuming *arguendo* that the penalty wages in this case are subject to scrutiny under the Excessive Fines Clause, the forum finds that the penalty is constitutionally permissible. The United States Supreme Court recently decided the first case in which it determined whether a ‘fine’ (in this case, a forfeiture) was unconstitutionally excessive. In *U.S. v. Bajakajian*, the Court stated:

‘The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principal of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is de-

signed to punish * * *. [A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.’

“*Bajakajian*, 118 S Ct at 2036; see *U.S. v. \$273,969.04 U.S. Currency*, 164 F3d 462, 466 (9th Cir 1999). In determining whether a forfeiture or fine is grossly disproportionate, a forum should consider that ‘judgments about the appropriate punishment for an offense belong in the first instance to the legislature.’ *Bajakajian*, 118 S Ct at 2037. The forum also should consider whether the magnitude of the forfeiture or fine bears some correlation to the harm suffered. *Id.* at 2038-39.

“In this case, the penalty wages of \$1560.00 are not ‘grossly disproportional’ to Respondent’s offense of unlawfully withholding \$105.00 from Claimant’s wages. In drafting ORS 652.150, the legislature defined what it considered to be a reasonable penalty for failure to pay wages when due – continuation of the wages, on a full-time basis, for a maximum period of 30 days. The legislature’s decision to cut off the penalty wages at 30 days placed a reasonable limitation on the size of penalty that could be imposed, avoiding imposition of a penalty ‘grossly disproportional’ to the offense committed.⁸ This forum sees no reason to reject

the legislature's determination regarding the appropriate limits on penalty wages. In addition, the magnitude of the \$1560.00 in penalty wages does correlate to the offense Respondent committed – failure to pay wages due -- because it is based on the hourly wage that Claimant earned but Respondent failed to pay. Consequently, the penalty wages assessed in this case do not constitute an unconstitutionally excessive fine.

“The Agency's motion for partial summary judgment is **GRANTED**. The hearing scheduled to commence on May 31, 2000, is **anceled**. Within the next few weeks, the undersigned ALJ will issue a proposed order based on this interim order granting the Agency's summary judgment motion.”

¹ The Order of Determination originally was issued against the ‘Employer,’ identified as ‘Michael J. McConville and Charles D. Conley, dba Goodman Oil Company.’ In answer to the Order of Determination, Conley asserted another defense – that the Order of Determination was not issued against an ‘employer’ because Goodman Oil Company was the employer, not Michael McConville or Charles Conley. To correct this defect, the Agency later filed a motion to correct the caption to name Goodman Oil Company, Inc.,

as the Respondent. The forum granted that motion.

² If the forum later receives any response from Respondent, the forum will consider it to be a motion for reconsideration of this order if Respondent timely filed the response by mailing it on or before May 22, 2000. If the forum were to decide, upon reconsideration, not to grant summary judgment to the Agency, it would reschedule the hearing for a later date.

³ Summary Judgment Motion, Exhibits A-3 at 1, A-4.

⁴ Summary Judgment Motion, Exhibit A-3 at 1.

⁵ Summary Judgment Motion, Exhibit A-3 at 1.

⁶ Summary Judgment Motion, Exhibit A-1 at 2 (original in all upper case); see *id.*, Exhibit A-1 at 1 (fax cover sheet from Respondent to BOLI identifying the above-quoted policy as “signed company policy agreement for the above identified claimant”); *id.*, Exhibit A-3 at 1 (Respondent's admission that it deducted the \$105.00 “for shortages of assets caused by Wage Claimant's violation of an employment contract voluntary [*sic*] signed by Wage Claimant”); Exhibit A-4 at 1 (Respondent's admission that “claimant voluntarily signed a legally binding contract with his employer in which he agreed to be responsible for shortages of assets caused by his failure to adhere to company policy”).

⁷ Summary Judgment Motion, Exhibits A-3 at 1, A-4 at 1, A-1 at 4.

⁸ For example, assuming Claimant's wages were due no later than October 28, 1998, Respondent now would owe over \$27,000.00 in penalty wages if ORS 652.150 did not include the 30-day limit.

The procedural findings made in the interim order granting summary judgment are incorporated in this Final Order.

8) By letter dated May 24, 2000, case presenter Domas pointed out that the word "partial" should not have been included in the first sentence of the last paragraph of the interim order granting the Agency's motion for summary judgment. On May 25, the forum issued an order amending the interim order granting the Agency's motion for summary judgment, so that the first sentence of the last paragraph states: "The Agency's motion for summary judgment is **GRANTED**."

9) The ALJ issued a proposed order on June 2, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On June 12, 2000, Respondent moved for an extension of time through June 23, 2000, in which to file exceptions. The forum granted that motion, which the Agency did not oppose.

10) At approximately 4:55 p.m. on June 23, 2000, the forum

received a faxed second request for extension of time from Respondent's authorized representative. Respondent sought an additional week in which to file its exceptions. Respondent indicated that it needed "additional time for Oregon counsel to review, file, and prepare legal arguments in support of the exceptions" and further asserted that its Oregon counsel was "Craig D. Armstrong of Miller-Nash." The request included no indication that Respondent had served the request on the Agency, so the ALJ telephoned case presenter Domas to ascertain her position regarding the request. Domas stated that she objected to a one-week extension but would not oppose extending the deadline through June 28, 2000.

11) On Monday, June 26, the ALJ issued an interim order disclosing the ex parte contacts described above. The ALJ found that Respondent had not shown good cause for needing a one-week extension and extended the deadline for filing exceptions only to June 28, 2000. The ALJ also asked Craig Armstrong to inform the Agency and the Hearings Unit immediately regarding whether he represented Respondent in this matter.

12) On June 28, 2000, the forum received a letter from Armstrong stating that, except for a conversation he had with case presenter Domas on June 26, he would not be representing Respondent in this matter.

13) Neither Respondent nor the Agency filed exceptions to the proposed order.

FINDINGS OF FACT – THE MERITS

AND ULTIMATE FINDINGS OF FACT

The forum decides no factual issues in ruling on a summary judgment motion. The following are the undisputed material facts in the record, construed favorably to Respondent:

1) Respondent employed Claimant in Oregon from the fall of 1998 to no later than about October 23, 1999.

2) Respondent paid Claimant \$6.50 per hour.

3) During his employment, Claimant signed an agreement stating that if Claimant failed to follow Respondent's policy requiring customers paying by check to produce a check guarantee card, and that resulted in "return of an unpaid check," the amount of the check would be withheld from Claimant's wages.

4) Respondent withheld \$105.00 from Claimant's wages "for shortages of assets caused by Wage Claimant's violation of an employment contract voluntary [sic] signed by Wage Claimant," in accordance with the agreement Claimant had signed.

firmed for the reasons set forth in the ALJ's interim order granting the motion, quoted above.

ORDER

CONCLUSIONS OF LAW

1) Respondent was Claimant's employer for purposes of ORS Chapter 652.

2) ORS 652.610(3) prohibits employers from withholding or deducting any portion of an employee's wages except in limited circumstances, none of which were present in this case. Respondent violated ORS 652.610(3) by withholding \$105.00 from Claimant's wages.

3) Respondent acted willfully in withholding the \$105.00 from Claimant's wages.

4) Because Claimant's last day of work was no later than October 23, 1999, his wages would have been due no later than October 29, 1999. ORS 652.140. More than 30 days have passed since that date. Consequently, Respondent owes penalty wages in the amount of \$1560.00 (30 days x 8 hours/day x \$6.50/hour). ORS 652.140, ORS 652.150.

5) The Commissioner of the Bureau of Labor and Industries has jurisdiction over this case and the authority to order Respondent to pay the wages, penalty wages and interest awarded herein. ORS 652.330, 652.332.

OPINION

The ALJ granted the Agency's pre-hearing motion for summary judgment. That ruling is con

NOW, THEREFORE, as authorized by ORS 652.150 and ORS 652.332, and as payment of the unpaid wages and civil penalty

wages it owes as a result of its violations of ORS 652.610(3), the Commissioner of the Bureau of Labor and Industries hereby orders **Goodman Oil Company, Inc.**, 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 Robert Stewart in the amount of ONE THOUSAND SIX HUNDRED SIXTY-FIVE DOLLARS (\$1665.00), less appropriate lawful deductions, representing \$105.00 in gross earned, unpaid, due, and payable wages and \$1560.00 in penalty wages, plus interest at the legal rate on the sum of \$105.00 from November 1, 1999, until paid and interest at the legal rate on the sum of \$1560.00 from December 1, 1999, until paid.

In the Matter of

**ENTRADA LODGE, INC., dba
BEST WESTERN**

Amended Final Order of the
Commissioner

Jack Roberts

Case No. 25-00

August 2, 2000

SYNOPSIS

Where Respondent failed to restore Complainant to her former housekeeping position, which had been filled by replacement workers, for two and one-half weeks after she took OFLA leave and attempted to return to work, the forum awarded Complainant \$262.50 in lost wages and \$15,000 damages for mental suffering that Complainant experienced as a result of Respondent's unlawful employment practice. The forum found that Complainant had not been constructively discharged when she quit Respondent's employ to go to work for another inn that offered more hours. ORS 659.470 *et. seq.*, OAR 839-009-0270.

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 for the State of Oregon. The hearing was held on February 8 and 9, 2000, at the Bureau of Labor and Industries office located at 1250 N.E. 3rd, #B-105, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency.

Complainant Cheryl Buxton was present throughout the hearing, and was not represented by counsel. Respondent was represented by Gregory P. Lynch, trial attorney, and co-counsel Stanley D. Austin, of the law firm Hurley, Lynch & Re, P.C. Douglas F. Ritchie was present throughout the hearing as Respondent's representative.

The Agency called as witnesses, in addition to Complainant: Douglas Ritchie, Respondent's general manager; Christina (Crain) Delong and Kimberly Ford, formerly employed as housekeepers for Respondent; Richard Buxton, Complainant's husband; Jeffrey Carlson, accounting coordinator for BOLI; and Jane MacNeill, Civil Rights Division senior investigator.

Respondent called Ritchie and Complainant as witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-19 (submitted prior to hearing), X-20 (submitted at hearing), and X-21 through X-30 (issued or submitted after hearing);

b) Agency exhibits A-1 through A-7 (submitted prior to hearing with the Agency's case summary), and A-8 through A-14 (submitted at hearing);

c) Respondent's exhibits R-1 (submitted prior to hearing with Respondent's case summary), R-2 through R-9, R-13 and the first

four pages of R-14 (submitted at hearing).

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 28, 1998, Complainant filed a verified complaint with Agency's Civil Rights Division ("CRD") alleging that she was the victim of the unlawful employment practices of Respondent in that Respondent failed to return her to her former housekeeper position upon returning to work from parental leave. On July 16, 1999, BOLI amended Complainant's complaint to correct Respondent's name and add the name of Respondent's registered agent. After investigation and review, the CRD issued an Administrative Determination finding substantial evidence supporting the allegation that Respondent did not return Complainant to her former job following her medical leave.

2) On November 8, 1999, the Agency submitted to the forum Specific Charges alleging that Respondent discriminated against Complainant by: (a) failing to restore her to the position she held at the time she commenced family leave after she was ready to return to work; and (b) constructively

discharging her by reducing her hours so that it was necessary for her to find other employment, both in violation of ORS 659.492. The Agency also requested a hearing.

3) On November 18, 1999, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth February 8, 1999, in Bend, Oregon, as the time and place of the hearing in this matter; b) a Summary 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.

4) On December 6, 1999, Respondent, through Gregory P. Lynch, filed an answer to the Specific Charges.

5) On January 6, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any damage calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The forum ordered the participants to submit case summaries by January 28, 2000, and notified them of the possible sanctions for

failure to comply with the case summary order.

6) On January 20, 2000, Respondent filed a motion for a postponement in which it alleged that the Agency would not cooperate in arranging discovery depositions that Respondent needed to conduct "to ensure that respondent has a full and fair opportunity to present its case at the contested hearing."

7) On January 20, 2000, Respondent also filed a motion for a discovery order to be allowed to take the deposition of Complainant.

8) On January 25, 2000, the Agency filed objections to Respondent's motion to postpone, arguing that the Agency had not impeded Respondent's efforts to seek a deposition or obtain discovery of documents and that Respondent's failure to make adequate efforts to complete discovery before the scheduled hearing date did not constitute good cause for granting a postponement.

9) On January 25, 2000, the Agency filed objections to Respondent's request to take Complainant's deposition, arguing that Respondent's request was untimely and failed to demonstrate why a deposition rather than informal or other means of discovery was necessary.

10) On January 25, 2000, the forum issued an interim order denying Respondent's motion to take Complainant's deposition on the basis that Respondent had

failed to seek discovery through an informal exchange of information before requesting a discovery order to take Complainant's deposition. The forum noted that an informal attempt to arrange for a deposition did not constitute an attempt to seek discovery through an informal exchange of information. In the same order, the forum denied Respondent's motion for a postponement on the basis that Respondent's inability to make an informal arrangement to take Complainant's deposition did not meet the good cause requirement of OAR 839-050-0020(10).

11) On January 28, 2000, Respondent filed a motion for reconsideration of the forum's rulings on its motions for postponement and to take Complainant's deposition.

12) On January 28, 2000, the Agency and Respondent timely filed their case summaries.

13) On January 28, 2000, the forum denied Respondent's motion for reconsideration of the forum's rulings on Respondent's motions to postpone and to take Complainant's deposition.

14) At the commencement of the hearing, the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) Prior to opening statements, Respondent objected to the ALJ's receipt of the Agency's case summary, marked as Exhibit X-15, into evidence on the basis

that Respondent had just received it at 3 p.m. on February 7, the previous day. Respondent alleged that it was prejudiced by the Agency's failure to provide Respondent with the case summary in a timely manner. At the ALJ's request, Respondent provided the forum with the manila envelope that the Agency's case summary was mailed in, bearing the postmark of "Jan 28'00," and it was marked and received as Exhibit X-20. The ALJ admitted Exhibit X-15 because: (1) Exhibit X-20 demonstrated it was timely filed pursuant to the requirements of OAR 839-050-0040(1); and (2) testimony by Jeffrey Carlson, BOLI's accounting coordinator who is responsible for internal controls regarding BOLI's mail-room procedures, established that Exhibit X-20 was in fact post-marked and placed in a U. S. Postal Service receptacle on January 28, 2000, in the normal course of business.

16) On May 4, 2000, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions, and a Final Order was issued on June 8, 2000.

17) On June 27, 2000, Respondent's attorney Respondent's attorney, Gregory P. Lynch, notified the Agency's case presenter that neither the Proposed Order nor the Final Order had been served on him. After confirming this fact, on July 10, 2000, the commissioner issued an order en-

titled "Order Withdrawing Final Order For Purpose of Reconsideration." The commissioner ordered that the ALJ reissue the Proposed Order and serve it on Mr. Lynch so that Respondent would have the opportunity to file exceptions pursuant to OAR 839-050-0380. On July 12, 2000, an amended¹ Proposed Order was reissued pursuant to that Order.

18) On July 20, 2000, Respondent filed exceptions to the Amended Proposed Order. Those exceptions are addressed in the Opinion section of this Amended Final Order.

FINDINGS OF FACT – THE MERITS

1) In 1998, Respondent was an Oregon corporation providing commercial lodging in and around Bend, Oregon, under the assumed business names of Best Western Entrada Lodge ("Entrada") and Best Western Inn & Suites.

2) Respondent employed 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in both 1997 and 1998.

3) Douglas Ritchie, Entrada's general manager, hired Complainant as a housekeeper at Entrada on January 16, 1998. Complainant's first day of work was January 17, 1998. When

Complainant was hired, her last name was Schulze.

4) When Complainant was hired, Ritchie did not promise Complainant a specific schedule or number of hours she would work per week.

5) Complainant was paid the state minimum hourly wage throughout her employment with Entrada. In 1998, the state minimum wage was \$6.00 per hour.

6) Complainant's present husband, Richard Buxton, interviewed with Ritchie on the same day as Complainant and was hired as Entrada's maintenance person. He began work at the same time as Complainant. Complainant and Buxton were married on April 7, 1998.

7) Buxton's wages were garnished for child support payments throughout the time he worked for Entrada. His bi-monthly net earnings while employed by Entrada were \$300 after taxes and the child support garnishment.

8) Complainant had five children at the time she married Buxton.

9) Respondent's business is dependent on the tourist industry and occupancy rates fluctuate considerably during the course of the year. Summer is Respondent's busiest season. The hours worked by housekeepers vary considerably depending on occupancy rates, ranging in 1998 from a low of 98.5 hours between November 1-15, 1998, to a high of 647.5 hours between July 15-31,

¹ There were no substantive changes in the Amended Proposed Order.

1998.² The hours worked by housekeepers are directly proportionate to Respondent's occupancy rates.

10) Ritchie was responsible for the scheduling of housekeeper's hours throughout Complainant's employment with Respondent.

11) Complainant's housekeeping duties involved cleaning rooms. Specifically, she made beds, vacuumed, washed bathrooms, cleaned up "stayovers," did some "deep cleaning," and occasionally worked as a leadperson when she was the most senior housekeeper scheduled to work, during which time she assigned rooms to other housekeepers and did laundry.

12) During Complainant's employment, her supervisors filled out semi-monthly time cards showing the hours she and other housekeepers worked. Complainant maintained a contemporaneous record of her own hours on her calendar at home.

13) Complainant's daughter made Complainant's 1998 home calendar. On that calendar, Complainant wrote down significant events as they occurred or were scheduled,³ as well as her hours

² Ritchie testified, and Respondent's timecards reflect, that housekeeper hours were tracked on a semi-monthly basis for payroll purposes.

³ For example, February's calendar contains numerous entries

at work. Based on an inspection of the calendar and Complainant's testimony, the forum finds that Complainant's handwritten entries on the calendar are an accurate, contemporaneous account of events in Complainant's life during the time she worked for Entrada.⁴ Where Complainant's testimony concerning dates conflicted with those written on the calendar, the forum has relied on the calendar to determine accurate dates.)

14) Ritchie does very little documentation concerning Respondent's housekeepers because there is such a high turnover. Ritchie did not contemporaneously document any of his conversations with Complainant.

15) When Complainant was hired, Entrada already employed four other housekeepers – Jennifer Bliss, Karla Henley, Laurie Knox and Nikke Standley.

showing the specific dates and time Complainant worked for Respondent, as well as other entries, such as a reference to a legal notice in "The Bulletin," a note to "pay Farmer's Insurance \$66.46," a note that Complainant "mailed off tax papers & phone bill payment 83.83," and a note that she had "side" and "back pain" on the 12th and 13th.

⁴ Another significant indicator of the calendar's reliability is the fact that the total number of hours recorded on it by Complainant as worked prior to July 27, 1998, is 630.25 hours, whereas the total number of hours on her time cards for that period was 627.50 hours.

16) Complainant learned she was pregnant on January 17, 1998, her first day of work for Entrada, and told Standley, the housekeeping supervisor, that she was pregnant.

17) Sometime in the spring of 1998, Ritchie learned Complainant was pregnant. He assumed she would take 12 weeks of leave when her baby was born.

18) From January 16-31, 1998, Entrada's five⁵ housekeepers worked the following hours, for a total of 219.25⁶ hours:

Complainant:	51.75
L. Knox:	52.75
J. Bliss:	37.25
N. Standley:	49.75

⁵ In this and subsequent Findings of Fact, the forum has listed the number of housekeepers who actually worked during the specified time period, based on the time cards in Exhibits A-5, A-7, and R-1. In some instances, this total differs from Respondent's summary entitled "Number of Housekeeping Employees Working Per Pay Period (1998)" (Exhibit R-9).

⁶ In this and subsequent Findings of Fact, the total number of hours worked by housekeepers was derived from adding together the specific hours listed after each housekeeper. In some instances, this total differs from Respondent's summary of "Total Housekeeper Hours" (Exhibit R-7). The forum has used this method of calculation instead of relying on the hours listed in Exhibit R-7 based on Ritchie's testimony that the hours in Exhibit R-7 were derived from housekeeper's time records in Exhibits A-5, A-7, and R-1.

K. Henley: 27.75

19) Prior to February 1, 1998, Bliss, Henley, and Standley left Entrada's employ. Knox replaced Standley as housekeeping supervisor. Between February 1 and February 15, 1998, Entrada employed two new housekeepers – Ramona Lopez and Angela Rodgers. In that time period, Entrada's four housekeepers worked the following hours, for a total of 110.5 hours:

Complainant:	36.25
L. Knox:	46.75
A. Rodgers:	17
R. Lopez:	10.5

20) Between February 16 and February 28, 1998, Entrada employed three new housekeepers - Lynn Cornell, Holly Luckins and Bobbie Mitchell. In that time period, Entrada's seven housekeepers worked the following hours, for a total of 262 hours:

Complainant:	64.25
L. Knox:	56.25
A. Rodgers:	34.75
R. Lopez:	24
B. Mitchell:	37
L. Cornell:	14.5
H. Luckins:	31.25

21) Prior to March 1, 1998, Cornell and Lopez left Entrada's employ. Between March 1 and March 15, 1998, Entrada employed three new housekeepers - Kimberly Ford, Sammie Garrett, and Jennifer Rafford. In that time period, Entrada's eight housekeepers worked the following hours, for a total of 201.5 hours:

Complainant:	56.75
L. Knox:	73.75
K. Ford:	18.25

A. Rodgers: 2.75
 B. Mitchell: 16.5
 H. Luckins: 5.5
 S. Garrett: 15.25
 J. Rafford: 12.75

22) Prior to March 16, 1998, Garrett, Luckins, Rafford, and Rodgers left Entrada's employ. Between March 16 and March 31, 1998, Entrada employed six new housekeepers - Tempie Davis, Wynona Grilley, Darcie Ingram, Tamara Keck, Alicia Lopez and Anna Mort. In that time period, Entrada's 10 housekeepers worked the following hours, for a total of 326.25 hours:

Complainant: 61.5
 L. Knox: 52.5
 K. Ford: 60.25
 B. Mitchell: 31.5
 T. Davis: 28.25
 D. Ingram: 18.75
 A. Lopez: 11.75
 W. Grilley: 49
 T. Keck: 3.5
 A. Mort: 9.25

23) Prior to April 1, 1998, Keck, A. Lopez, Mitchell, and Mort left Entrada's employ. Between April 1 and 15, 1998, Entrada re-employed one housekeeper - Ramona Lopez. In that time period, Entrada's seven housekeepers worked the following hours, for a total of 231.25 hours:

Complainant: 46.25
 L. Knox: 61
 K. Ford: 50.75
 T. Davis: 26.25
 D. Ingram: 25.25
 R. Lopez: 12
 W. Grilley: 9.75

24) Prior to April 16, 1998, Davis and Grilley left Entrada's employ. Between April 16 and 30, 1998, Entrada's five housekeepers worked the following hours, for a total of 192.75 hours:

Complainant: 46.75
 L. Knox: 67.25
 K. Ford: 53.5
 D. Ingram: 19
 R. Lopez: 6.25

25) Prior to May 1, 1998, R. Lopez left Entrada's employ. Between May 1 and 15, 1998, Entrada's four housekeepers worked the following hours, for a total of 176.25 hours:

Complainant: 48.5
 L. Knox: 59.75
 K. Ford: 52.25
 D. Ingram: 15.75

26) Between May 16 and 31, 1998, Entrada employed one new housekeeper - Christie Hammell. In that time period, Entrada's five housekeepers worked the following hours, for a total of 228.75 hours:

Complainant: 54.25
 L. Knox: 65
 K. Ford: 75
 D. Ingram: 17.75
 C. Hammell: 16.75

27) Prior to June 1, 1998, Hammell and Ingram left Entrada's employ. Between June 1 and 16, 1998, Entrada employed two new housekeepers - Josh Price and Kevin Seibert. In that time period, Entrada's five housekeepers worked the following hours, for a total of 207.75 hours:

Complainant: 48
 L. Knox: 60.5
 K. Ford: 67.25

K. Seibert: 26
J. Price: 6

28) On June 9, 1998, Complainant's doctor restricted her to light duty. On or about the same day, Complainant presented her light duty note to Ritchie. For the rest of June, Ritchie assigned lighter duty work to Complainant. Starting on June 13, Ritchie assigned laundry duties to Complainant, which Complainant performed through July 26, 1998. The lighter duty and laundry work assigned to Complainant was an accommodation of her light duty restrictions due to her pregnancy.

29) Between June 16 and 30, 1998, Entrada employed four new housekeepers – Reba Balcomb, Janelle Grant, Tara Hunter and Lance Robbins. In that time period, Entrada's nine housekeepers worked the following hours, for a total of 416.50 hours:

Complainant: 53.25
L. Knox: 58.75
K. Ford: 61.75
K. Seibert: 53
J. Price: 63.25
R. Balcomb: 14
J. Grant: 20.5
T. Hunter: 46
L. Robbins: 46

30) Between July 1 and 15, 1998, Entrada employed two new housekeepers – Michelle Miller and Brittney Richman. In that time period, Entrada's 11 housekeepers worked the following hours, for a total of 526.5 hours:

Complainant: 40.75
L. Knox: 75
K. Ford: 62
K. Seibert: 73.75

J. Price: 54
R. Balcomb: 56.25
J. Grant: 50.75
T. Hunter: 48.75
L. Robbins: 58.25
B. Richman: 3.5
M. Miller: 3.5

31) Between July 15 and 31, 1998, Entrada employed one new housekeeper – Jennifer Carroll. In that time period, Complainant worked 6.25 hours on July 18, 6.75 hours on July 19, and 7.25 hours on July 26. In the same time period, Entrada's 12 housekeepers worked the following hours, for a total of 646.75 hours:

Complainant: 20.25
L. Knox: 94.75
K. Ford: 79.45
K. Seibert: 85.75
J. Price: 71.5
R. Balcomb: 64.5
J. Grant: 61.25
T. Hunter: 21
L. Robbins: 21
B. Richman: 68.5
M. Miller: 50.5

32) On July 27, 1998, Complainant stopped working due to her pregnancy, based on the advice of her physician. Prior to July 27, Complainant told Ritchie that she would be taking maternity leave until her six week checkup after her baby was born and planned to return to work for Respondent at that time. When Complainant told Ritchie she was beginning her leave, Ritchie told her to contact him when she was ready to come back to work.

33) Between January 17, 1998 and July 26, 1998, Com-

plainant worked an average of 23 hours per week.⁷

34) Ritchie considered Complainant to be a "fine" employee at the time her leave commenced.

35) At the time Complainant's leave commenced, Complainant and her husband were behind in paying their bills.

36) During Complainant's entire period of employment with Respondent, Ritchie said nothing negative regarding Complainant's pregnancy or her anticipated maternity leave. Complainant and Ritchie had a good working relationship.

37) Prior to August 1, 1998, Hunter and Robbins left Entrada's employ. Between August 1 and 15, 1998, Entrada employed one new housekeeper – Robin Rynniewicz. In the same time period, Entrada's 10 housekeepers worked the following hours, for a total of 555.5 hours:

L. Knox:	81.5
K. Ford:	76.75
K. Seibert:	71.5
J. Price:	79
R. Balcomb:	79.75
J. Grant:	38.25

⁷ This figure was reached at by dividing 191 (the number of days in the period of time beginning January 17, 1998 and ending July 26, 1998) by 7 to determine the number of weeks worked by Complainant, then dividing 27.3 (the number of weeks worked by Complainant) into 627.5 (the total number of hours worked by Complainant).

B. Richman:	58.25
M. Miller:	32.25
J. Carroll:	21.5
R. Rynniewicz:	16.75

38) Complainant's child was born on August 20, 1998. Complainant visited Entrada several times to show off her baby.

39) Prior to August 1, 1998, Carroll, Grant and Rynniewicz left Entrada's employ. Between August 16 and 31, 1998, Entrada's seven housekeepers worked the following hours, for a total of 414.75 hours:

L. Knox:	61.75
K. Ford:	85.25
K. Seibert:	73.75
J. Price:	75.25
R. Balcomb:	40.5
B. Richman:	52.25
M. Miller:	26

40) Prior to September 1, 1998, Balcomb, Miller, and Richman left Entrada's employ. Between September 1 and 15, 1998, Entrada employed one new housekeeper – Korissa Garfield, whose first day of work was September 15, 1998. Garfield was hired on an as-needed basis. In the same time period, Entrada's five housekeepers worked the following hours, for a total of 239.75 hours:

L. Knox:	13.5
K. Ford:	62.25
K. Seibert:	92.75
J. Price:	65
K. Garfield:	6.25

41) Prior to September 16, 1998, Knox left Entrada's employ. Some time prior to that, Seibert had replaced Knox as housekeeping supervisor. As housekeeping

supervisor, he was paid more than Entrada's housekeepers. Between September 16 and 30, 1998, Entrada employed one new housekeeper – Cristina Crain.⁸ In the same time period, Entrada's five housekeepers worked the following hours, for a total of 245.25 hours:

K. Ford: 62.25
 K. Seibert: 94.25
 J. Price: 19
 K. Garfield: 30.25
 C. Crain: 59.5

42) Garfield's last day of work was September 25, 1998. On September 24, she worked 3.5 hours, and on September 25, she worked 5 hours.

43) Crain started work on September 17, 1998. She was hired as an "on-call" employee who telephoned Respondent each day to see if work was available. From September 25 to September 30, she worked the following schedule: September 25 – 5 hours; September 26 – 5 hours, September 27 – 5.5 hours, September 28 – 3.5 hours, September 29 – 4 hours, September 30 – 4 hours, for a total of 27 hours. Complainant could have worked these hours.

44) Complainant received no income during the period of her

leave, which placed an additional financial stress on her family.

45) On September 21, 1998, Complainant and her husband received a 72-hour eviction notice from their landlord, based on their failure to pay rent, which was due on September 1, 1998. In the same period of time, their electricity was almost shut off. Complainant and her husband called several churches to inquire about financial assistance and eventually got rent assistance from "AFS." There was no evidence presented regarding the amount of rent paid by Complainant and her husband.

46) On September 24, 1998, Complainant visited the office of Dr. Weeks, who had cared for her during her pregnancy and delivery. Complainant was unable to see Dr. Weeks, but told his nurse that she needed to go back to work. Dr. Weeks' nurse told her it was all right for her to return to work. Complainant felt she needed to go back to work at this time because of the financial needs of her family.

47) Later in the day on September 24, 1998, Complainant called Ritchie and told him she was ready to come back to work. Ritchie told her to report back to work on September 26, a Saturday. Ritchie did not ask Complainant to provide a medical release on this or any subsequent occasion.

48) When Complainant told Ritchie that she was ready to come back to work, she antici-

⁸ Crain has since married and identified herself as "Christina Marie Crain DeLong" during the hearing. To avoid confusion, this Order refers to her by Crain, her name at the time of the alleged discrimination.

pated and expected that she would be given the same number of hours she had averaged before going on leave, which she believed was 25 to 30 hours per week.

49) On September 26, Ritchie phoned Complainant and told her not to come to work because he had enough housekeepers for the day.

50) On September 29, Complainant called Ritchie again and asked about work. He told her that business was slow, that he would use her on an as-needed basis, and that he would not take hours away from Siebert and Ford. By this time, Complainant was aware that another housekeeper besides Siebert and Ford was working who had been hired after she went on leave.

51) In September 1998, Ritchie knew that Complainant and her husband had six children, that they needed money, and that any hours assigned to Complainant or her husband would help them.

52) Complainant completed and filed an application for unemployment benefits on October 5, 1998.

53) Prior to October 1, 1998, Price left Entrada's employ. On October 10, 1998, Entrada restored Complainant to a housekeeper position. Between October 1 and 15, 1998, Complainant worked 4.5 hours on October 10 and 5.75 hours on October 11, for a total of 10.25 hours. In the same time period, Entrada's other three housekeep-

ers worked the following hours, for a total of 151.75 hours:

K. Ford: 44.75
K. Seibert: 80.0
C. Crain: 16.75

54) Crain's last day of work for Entrada was October 7, 1998. Between October 1 and 7, 1998, Crain worked the following schedule: October 2 – 4.5 hours, October 3 – 4.25 hours, October 4 – 3.75 hours, October 7 – 4.25 hours. Complainant could have worked these hours.

55) Between October 16 and 31, 1998, Complainant worked 5 hours on October 17 and 2.75 hours on October 18, for a total of 7.75 hours. In the same time period, Entrada's two other housekeepers worked the following hours, for a total of 123.5 hours:

K. Ford: 45
K. Seibert: 70.75

56) Complainant would have worked an additional 43.75 hours if she had been assigned the work that Crain performed on September 25-30, October 2-4, and October 7, 1998. Complainant would have earned \$262.50 in gross wages for this work. This would have enabled Complainant and her husband to pay some, but not all, of their outstanding bills.

57) Between September 24 and October 20, 1998, Complainant and her family were under considerable financial stress. Complainant was very worried and scared, and experienced considerable stress because of the lack of hours Ritchie scheduled

her to work at Entrada. During this time period, Complainant cried on a number of nights because of her stress, worry and fear. Because of that stress and the financial needs of her family, Complainant began looking for other work after she started back to work for Entrada.⁹ On October 20, 1998, Complainant was hired as a housekeeper at the Inn of the Seventh Mountain, working 40 hours per week. Complainant actually started work at the Inn of the Seventh Mountain on October 23, 1998.

58) During her leave from Entrada, Complainant had reserved childcare for her baby at the Growing Tree, a local child care facility. She lost her reservation because she was unable to give the Growing Tree a definite date when she could bring the baby in because of her uncertainty as to when she would be returning to work at Entrada and inability to pay their fee. There was no evidence presented regarding the amount of the fee.

⁹ Complainant did not testify as to the specific date that she began actively seeking other employment. However, Exhibit A-10, which is the "Work Search Record" Complainant completed for the Employment Department after filing her claim for unemployment benefits, shows that she first began searching for other employment on October 15, when she used the Employment Department's computer to look for work and that she applied for two jobs, including a housekeeper position at the Inn of the Seventh Mountain, on October 16.

59) Between November 1 and 15, 1998, Ford and Seibert were Entrada's only housekeepers. In that time period, they worked the following hours, for a total of 98.5 hours:

K. Ford: 44.75
K. Seibert: 53.75

60) Between November 16 and 31, 1998, Ford and Seibert were Entrada's only housekeepers. In that time period, they worked the following hours, for a total of 132.75 hours:

K. Ford: 54
K. Seibert: 78.75

61) Respondent did not hire another housekeeper until December 9, 1998.

62) No evidence was presented concerning the availability of work at Respondent's other Bend facility at material times, except for the fact that housekeepers employed at Entrada sometimes worked there.

63) Respondent had no written policies regarding leaves of absence during Complainant's employment with Respondent. Respondent's general practice was that anyone who left was welcome to come back.

64) Jeffrey Carlson's testimony concerning the operation and procedures of BOLI's mail room was credible in its entirety.

65) Richard Buxton's testimony was not entirely credible. As Complainant's husband, he had an inherent bias. He demonstrated a tendency to exaggerate by testifying that Complainant had

worked 37 to 38 hours per week before beginning her leave, and that he and Complainant could have paid their bills, had she worked her regular hours after September 24. In contrast, Respondent's time records, which the forum has found reliable, established that Complainant had worked only 23 hours per week before beginning her leave, and Complainant herself testified that all their bills could not have been paid, even if Complainant had worked her former hours after September 24. His memory was not totally accurate as to dates, as shown by his testimony that Complainant returned to work for Entrada before she applied for unemployment benefits and did not work for Entrada after she filed for unemployment benefits. Consequently, the forum has relied on his testimony only where it is not controverted by other credible evidence.

66) Doug Ritchie's testimony was not entirely credible. He did not contemporaneously document any of his conversations with Complainant. His testimony that Complainant did not contact him to ask about returning to work before October 3, and that he immediately offered Complainant work on October 4, which she declined, is simply not believable. To begin with, his testimony on this point is contrary to the credible testimony of Complainant and her husband. Secondly, it makes no sense that he would offer Crain's October 4 hours to Complainant, but not Crain's October 7 hours. Finally,

in a letter to the Agency dated November 10, 1998, in which Ritchie initially responded to Complainant's complaint, Ritchie made no mention of scheduling her to work on October 4. Ritchie's claim that he had problems with Complainant's job performance was likewise not supported by any evidence other than his own testimony, and was partially controverted by Ritchie's own testimony that Complainant was a "fine employee" and his written statement in the same November 10, 1998 letter to the Agency that he would "love to put her back to work." In addition, Ritchie testified that he had given Kim Ford a raise because she was one of Respondent's better employees, but Ford testified credibly that she was never given a raise. The forum has discredited Ritchie's testimony concerning his testimony that Complainant never asked him to return to work before October 3 and that he scheduled her to work on October 4. The forum has also discredited Ritchie's testimony concerning Complainant's alleged performance problems. The forum has credited the remainder of Ritchie's testimony except where it is controverted by other credible evidence, such as Complainant's calendar.

67) Complainant's testimony was not entirely credible. Like her husband, she showed a tendency to exaggerate. She testified that she sometimes showed up as early as "6:30 to 7:30 a.m." to do laundry, contrary to her time cards and the contemporaneous entries

on her calendar. She testified she believed she was a "supervisor" because she sometimes assigned rooms, did laundry, and trained new employees when the housekeeping supervisor was absent, and told the Employment Department in her application for unemployment benefits that she was an "assistant supervisor." However, she also testified that no one ever told her she was a supervisor and that she never got a raise indicating she had been promoted, and her husband testified she was not a supervisor. Her estimate that she worked an average of 25 to 30 hours per week, with the average being closer to 30, was substantially more than the 23 hours per week she actually averaged. Her answers were non-responsive to a number of questions asked on both direct and cross-examination, and she did not seem to understand the substance of a number of questions put to her. On cross-examination, she was defensive, argumentative, and had to be instructed by the ALJ to listen carefully and respond directly to the questions asked of her. On the other hand, her testimony regarding the dates that she contacted Ritchie asking to return to work after her doctor's appointment on September 24 was supported by contemporaneous entries on her calendar that the forum has found to be reliable. The forum has credited Complainant's testimony except where it conflicts with her calendar entries and Respondent's time cards, and has

credited her calendar entries in full.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was an Oregon employer that utilized the personal services of 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in both 1997 and 1998.

2) Complainant was employed by Respondent at the Best Western Entrada Lodge from January 17, 1998, through October 19, 1998.

3) Complainant learned she was pregnant on January 17, 1998.

4) On July 27, 1998, Complainant left work due to her pregnancy, based on the advice of her physician. Complainant did not work again for Respondent prior to the birth of her child. More than 180 days elapsed between January 17, 1998, and July 27, 1998. Prior to July 27, Complainant worked an average of 23 hours per week for Respondent.

5) Complainant's child was born on August 20, 1998. She did not immediately return to work, but remained on leave.

6) During Complainant's absence, Respondent hired two housekeepers, Korissa Garfield and Christina Crain, on an as-needed basis to perform work that Complainant would have per-

formed, had she not been off work on parental leave.¹⁰

7) On September 24, 1998, Complainant called Douglas Ritchie, Respondent's general manager, and told him she was ready to come back to work.

8) Complainant anticipated being scheduled for 25 to 30 hours of work per week upon her return to work.

9) Respondent did not assign any work hours to Complainant between September 25 and September 30, 1998. During that period, Garfield and Crain worked a total of 27 hours that Complainant could have worked.

10) Between October 1 and October 15, 1998, Crain worked a total of 16.75 hours that Complainant could have worked. Complainant worked only 10.25 hours in that time. Had Respondent restored Complainant to her former position, she would have worked a total of 27 hours during that two-week period.

11) Complainant lost \$262.50 in gross wages as a result of Respondent's failure to restore her to a housekeeping position immediately after she attempted to return to work on September 24, 1998.

12) Complainant experienced mental suffering as a result of Respondent's failure to immediately restore her to a housekeeping position between September 24, 1998, when she attempted to return to work, and October 10, 1998, when Respondent restored her to a housekeeping position.

13) Respondent's occupancy rates fluctuate dramatically during the course of a year. The record indicates that the 1998 occupancy rate ranged from a high in the last half of July 1998 to a low in the first half of November 1998. The hours worked by Respondent's housekeepers are directly proportionate to Respondent's occupancy rate, ranging from a high in the last half of July 1998 of 646.75 hours worked by eleven housekeepers to a low in the first half of November 1998 of 98.5 hours worked by two housekeepers.

14) After July 31, the number of hours worked by housekeepers per bi-monthly payroll period dropped steadily until November 16, 1998, when they begin increasing again, as indicated below:

August 1-15:	555.5 hours
August 16-31:	414.75 hours
September 1-15:	239.75 hours
September 16-30:	245.25 hours
October 1-15:	151.75 hours
October 16-31:	123.5 hours
November 1-15:	98.5 hours
November 16-31:	132.75 hours

15) Respondent did not hire any new housekeepers between September 25, 1998, and October

¹⁰ The forum refers to Complainant's leave after the birth of her child on August 20, 1998 as "parental" leave, noting that "parental" leave is a particular type of "family" leave. See OAR 839-009-0200(1).

7, 1998, Garfield's and Crain's respective last dates of employment, and December 9, 1998.

16) Respondent's failure to schedule Complainant to work the number of hours she anticipated upon her eventual restoration to her position was due to Respondent's low occupancy rate, not unlawful discrimination.

17) Complainant left Respondent's employment on October 20, 1998, to take a full-time job as a housekeeper, earning more than she would have earned had she continued to work for Respondent. She left because of financial hardship that she and her family were experiencing and additional financial stress she anticipated based on Respondent's failure to schedule her to work 25 to 30 hours per week. Some of this financial hardship was caused by her loss of \$262.50 in gross wages that she would have earned between September 25 and October 7, 1998, had Respondent restored her to her former position upon her request. A significant part of the financial hardship was due to the fact that Complainant earned no wages during her leave.

CONCLUSIONS OF LAW

1) The Oregon family leave laws apply to "covered employers," which are defined as:

"employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in

which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken."

Respondent was a "covered employer." ORS 659.470(1); ORS 659.472(1).

2) The actions and motivations of Douglas Ritchie, Respondent's general manager, are properly imputed to Respondent.

3) ORS 659.474(1) provides in pertinent part:

"All employees of a covered employer are eligible to take leave for one of the purposes specified in ORS 659.476(1)(b) to (d) except: * * * (b) An employee who worked an average of fewer than 25 hours per week for the covered employer during the 180 days immediately preceding the date on which the family leave would commence."

OAR 839-009-0210(2)(a) further explains that "Eligible employee" means:

"(a) For the purpose of parental leave, an employee who has worked for a covered employer for at least 180 calendar days immediately preceding the date on which family leave begins.

"(b) For all other leave purposes, an employee who has worked for a covered employer for an average of at least 25 hours per week for the 180 calendar days immediately

preceding the date on which family leave begins.”

OAR 839-009-0200 provides in pertinent part:

“The 1995 Oregon Family Leave Act, hereinafter referred to as OFLA, provides leave:

“(1) To care for an employee’s newborn * * * child. These rules refer to this type of leave as parental leave.

“(2) For an employee’s own serious health condition or to care for a family member with a serious health condition, including pregnancy related conditions. These rules refer to this type of leave as serious health condition leave.”

Complainant worked at least 180 calendar days immediately preceding July 27, 1998, the date on which she stopped working because of her pregnancy-related serious health condition leave began on July 27, 1998, but did not work an average of at least 25 hours per week for Respondent immediately prior to that date and was therefore not eligible for serious health condition leave. Complainant did work for Respondent at least 180 calendar days immediately preceding August 20, 1998, the date her parental leave commenced, and was an “eligible employee” for parental leave.

4) ORS 659.476(1)(a) provides:

“(1) Family leave under ORS 659.470 to 659.494 may be taken by an eligible employee

for any of the following purposes:

“(a) To care for an infant * * *

.”
ORS 659.478 provides, in pertinent part:

“(1) Except as specifically provided by ORS 659.470 to 659.494, an eligible employee is entitled to up to 12 weeks of family leave within any one-year period.”

Complainant was entitled to take up to 12 weeks of family leave to care for her infant.

5) ORS 659.484 provides, in pertinent part:

“(1) After returning to work after taking family leave under the provisions of ORS 659.470 to 659.494, an eligible employee is entitled to be restored to the position of employment held by the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave. If the position held by the employee at the time family leave commenced no longer exists, the employee is entitled to be restored to any available equivalent position with equivalent employment benefits, pay and other terms and conditions of employment. If any equivalent position is not available at the job site of the employee’s former position, the employee may be offered

an equivalent position at a job site located within 20 miles of the job site of the employee's former position.

“(3) This section does not entitle any employee to:

“(b) Any right, benefit or position of employment other than the rights, benefits and position that the employee would have been entitled to had the employee not taken the family leave.”

OAR 839-009-0270 provides, in pertinent part:

“(1) The employer must return the employee to the employee's former position if the job still exists even if it has been filled during the employee's family leave unless the employee would have been bumped or displaced if the employee had not taken leave. The former position is the position held by the employee when family leave began, regardless of whether the job has been renamed or reclassified. * * *

“(2) If the position held by the employee at the time family leave began has in fact been eliminated and not merely renamed or reclassified, the employer must restore the employee to any available, equivalent position.

“(a) An available position is a position which is vacant or not permanently filled.

“(b) An equivalent position is a position which is the same as the former position in as many aspects as possible. If an equivalent position is not available at the employee's former job site the employee may be restored to an equivalent position within 20 miles of the former job site.”

(10) An employer may not use the provisions of this section as a subterfuge to avoid the employer's responsibilities under OFLA.”

During Complainant's family leave, Respondent hired two housekeepers, Garfield, and Crain, to perform work that Complainant would have performed, had she not been on leave. Respondent violated ORS 659.484 by failing to give Complainant the opportunity to work the shifts worked by Garfield and Crain, beginning September 25, 1998, after Complainant's request to return to work on September 24, 1998.

6) ORS 659.492 (1) provides:

“(1) “A covered employer who denies family leave to an eligible employee in the manner required by ORS 659.470 to 659.494 commits an unlawful employment practice.”

Respondent committed an unlawful employment practice in violation of ORS 659.492(1) by failing to restore Complainant to

the position of employment she held when her leave commenced. Respondent did not constructively discharge Complainant.

7) ORS 659.492(2) provides:

“(2) Any employee claiming to be aggrieved by a violation of ORS 659.470 to 659.494 may file a complaint with the Commissioner of the Bureau of Labor and Industries in the manner provided by ORS 659.040. The Commissioner of the Bureau of Labor and Industries shall enforce the provisions of ORS 659.470 to 659.494 in the manner provided in ORS 659.010 to 659.110 for the enforcement of other unlawful employment practices.”

The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.492(2); ORS 659.010 *et. seq.*

OPINION

INTRODUCTION

In its Specific Charges, the Agency alleged that Respondent violated Oregon’s Family Leave Act by: (1) failing to restore Complainant to the position she held at the time she commenced her family leave, and (2) constructively discharging Complainant. The Agency prayed for \$1,000 in back pay and \$15,000 mental suffering damages to compensate Com-

plainant for Respondent’s unlawful acts.

FAILURE TO RESTORE COMPLAINANT TO THE POSITION SHE HELD AT THE TIME SHE COMMENCED HER PARENTAL LEAVE

To establish a prima facie case that an employer committed an unlawful employment practice by failing to restore an employee to the position she held at the time she commenced her family/parental leave, the agency must prove:

1. The employer was a “covered employer” as defined in ORS 659.470(1) and ORS 659.472;
2. The employee was an “eligible employee” for family/parental leave – *i.e.*, she was employed by a “covered employer” and worked for the employer at least 180 calendar days immediately preceding the date on which her parental leave began [ORS 659.474; OAR 839-009-0210(2)(a)];
3. The employee took up to 12 weeks of family/parental leave [ORS 659.476(1)(a), ORS 659.478];
4. The employee attempted to return to work after taking family/parental leave and was denied or refused restoration to the position of employment held by the employee when the leave commenced [ORS 659.484(1); OAR 839-009-0270(1) & (2)].

The first and third elements of the Agency's prima facie case are undisputed.

The second element, although undisputed regarding whether or not Complainant had worked 180 days for Respondent prior to taking parental leave, requires additional discussion because of the particular circumstances of Complainant's leave. When Complainant left work on July 27, she had worked for Respondent for 180 days "immediately preceding" her leave, but only worked an average of 23 hours per week, two hours less than the minimum average of 25 hours per week required for eligibility for the purpose of taking a "serious health condition" leave due to her pregnancy related condition. See OAR 839-009-0210(2)(b). Eligibility for parental leave, on the other hand, requires only that the employee worked for the employer at least 180 calendar days immediately preceding the date on which her parental leave began. There was no evidence presented showing that Complainant's employment relationship with Respondent was in any way severed between July 27 and August 20, 1998. In contrast, Ritchie's testimony was that he expected Complainant to return to her housekeeping duties after her leave. Consequently, because Complainant never stopped being Respondent's employee, the forum concludes that Complainant satisfied the requirement of working for Respondent "at least 180 calendar days immediately preceding" August 20, 1998 and was an "eligible

employee" for parental leave as defined in ORS 659.474(2) and OAR 839-009-0210(2)(a). This satisfies the second element of the Agency's prima facie case.

As for the fourth element, credible testimony from the Complainant, corroborated by her calendar notes, establishes that Complainant attempted to return to work from her parental leave on September 24, 1998 and was not rescheduled for work until October 10. Respondent's time cards and Complainant's credible testimony establish that employees who were hired after Complainant went on leave, Garfield and Crain, worked 43.75 hours between September 24, 1998 and October 7, 1998 that Complainant could have worked. This evidence is sufficient to establish the fourth element of the Agency's prima facie case.

Once the Agency has established the four elements of its prima facie case, there is a rebuttable presumption that Respondent refused to give effect to Complainant's entitlement to job restoration. *In the Matter of TJX Companies, Inc.*, 19 BOLI 97, 102 (1999). No motive or intent need be proved. *Cf. In the Matter of Roseburg Forest Products*, 20 BOLI 1, 28 (2000). Respondent may negate that presumption by coming forward with evidence of one or more of the following:

1. The position of employment held by the employee when the leave commenced no longer existed when the employee attempted to return to work; and

no available equivalent position existed [ORS 659.484(1); OAR 839-009-0270(1) & (2)];

2. The employee gave unequivocal notice of intent not to return to work [OAR 839-009-0270(8)];

3. The employee would have been bumped or displaced if the employee had not taken leave [OAR 839-009-0270(1)].

In this case, Respondent's primary proffered defense relates to the undisputed temporal nature of its housekeeping positions. It runs something like this: (1) All housekeeping positions are temporary and all housekeepers work on an as-needed basis, subject to hours that fluctuate based on occupancy rates; (2) Because housekeeping positions are temporary, there are no distinctive, identifiable positions – merely an as-needed, variable amount of work to be performed; (3) Complainant was a housekeeper and therefore did not occupy an identifiable position; (4) Because Complainant did not occupy an identifiable position, it is impossible that her "former" position could still exist for the reason that she never had a "position" to start with; (5) Because Complainant did not occupy an identifiable position, Respondent could not have filled her position, during her family leave, with a replacement worker; (6) Because Complainant did not occupy an identifiable position, Respondent was not obligated to schedule Complainant, after her request to return to work, for any additional hours other than the as-

needed hours that she actually worked.

The forum rejects Respondent's argument. ORS 659.484 entitles a worker to be restored "to the position of employment held by the employee when the leave commenced if that position still exists, without regard to whether the employer filled the position with a replacement worker during the period of family leave." In this case, Complainant held the position of housekeeper when her leave commenced. During the last weeks of Complainant's leave, Respondent hired two new housekeepers, Garfield and Crain, to perform work on an "as-needed" basis. Before and after September 24, 1998, they performed exactly the same type of housekeeping work that Complainant had performed before her leave commenced. Between September 25 and October 7, they performed 43.75 hours of work that Complainant could have performed. Under these circumstances, where an "eligible" employee such as Complainant occupies a position involving non-supervisory, unskilled labor in which the hours worked vary considerably and turnover is high, making it virtually impossible to "track" any one position, the forum holds: (1) Any worker hired during an eligible employee's leave to perform the same work that the eligible employee performed before commencing leave meets the definition of "replacement worker" under ORS 659.484(1); and (2) After the eligible employee attempts to return to work, the

employer must give that employee the opportunity to work any hours that the replacement worker would have otherwise been scheduled to work. The practical application of this rule in this case is that Respondent should have given Complainant the opportunity to work the hours worked by Garfield and Crain, beginning September 25, 1998. Had Respondent done so, Complainant would have worked an additional 43.75 hours. Respondent violated ORS 659.484 and ORS 659.492 in failing to give Complainant this opportunity.

The forum additionally notes that adoption of Respondent's argument would have the practical effect of stripping the restoration provisions of OFLA from every employee who, like Complainant, works for a "covered" employer in an unskilled minimum wage position in which hours vary considerably and turnover rates are high. The language of OFLA contains no suggestion that the ORS 659.484 should be interpreted in this manner.

Respondent presented three other defenses that merit minimal discussion. First, that Complainant never presented a medical release to return to work. Second, that Complainant was given all the work that was available. Third, that Complainant did not attempt to return to work until October 3 and turned down Ritchie's offer of work on October 4. None of these defenses have any merit. First, the medical release is a red herring, in that it is undisputed that

Ritchie never asked Complainant to present such a release.¹¹ Second, the argument that Complainant was given all available work has already been resolved in favor of the Agency. Third, based on an assessment of Ritchie's credibility, the forum has rejected Ritchie's claim that Complainant failed to contact him about work until October 3 and that she subsequently turned down his offer for work on October 4.

BACK PAY

The Agency prayed for \$1,000 in back pay in the Specific Charges. The forum has found that Complainant would have worked an additional 43.75 hours, earning an additional \$262.50 in gross wages, had she been properly restored to her housekeeper position after attempting to return to work on September 24, 1998.

CONSTRUCTIVE DISCHARGE

A prima facie case of constructive discharge resulting from an unlawful employment practice consists of the following elements:

- (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

¹¹ See OAR 839-009-0270(5).

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.

In the Matter of James Breslin, 16 BOLI 200, 217 (1997), *aff'd without opinion*, *Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999).

A. Did Respondent intentionally create or intentionally maintain discriminatory working condition(s) related to Complainant's protected class status?

Complainant's protected class was that of a worker returning from family leave who was entitled to be restored to her former position of housekeeper, which included being scheduled for any hours that a "replacement worker" would otherwise perform. The evidence shows that Ritchie intentionally failed to schedule Complainant for the hours that Garfield and Crain worked between September 25 and October 7, 1998, in violation of ORS

659.484(1).¹² Ritchie's intentional and discriminatory failure to schedule Complainant for any hours between September 25 and October 7 satisfies the first element of the Agency's prima facie case.

¹² After October 7, 1998, Ritchie did not use Crain again and scheduled Complainant for all the hours not worked by Ford, a housekeeper hired in March 1998, and Siebert, the housekeeping supervisor. However, Complainant was not entitled to work any of the hours worked by Ford or Siebert. The Agency implied, during the presentation of its case, that Complainant should have been entitled to a prorated share of Ford's and Siebert's hours after she attempted to return to work. Complainant was not entitled to Siebert's hours because he was the housekeeping supervisor and occupied a position different than Complainant's position at the time she commenced her leave. See Finding of Fact – The Merits #41, *supra*. Ford performed the same work as Complainant, but was not a "replacement worker" because Ford was hired before Complainant went on her leave. If the evidence had established an objective, quantifiable methodology consistently used by Ritchie to determine the specific number of hours he assigned individual housekeepers to work and the Agency proved that use of that methodology would have resulted in Complainant being scheduled for some of Ford's hours after October 7, the result may have been different. Absent such evidence, the forum will not speculate as to what portion of Ford's hours, if any, Complainant would have been scheduled to work, had she not taken family leave.

B. Were the discriminatory working conditions so intolerable that a reasonable person in the Complainant's position would have resigned because of them?

The forum has found that Complainant's discriminatory working conditions ended on October 7, 1998, Crain's last day of work. After October 7, Complainant was scheduled to work but the number of hours clashed with her expectation that she would be assigned to work 25 to 30 hours per week. However, the low number of hours that she worked was directly attributable to Respondent's low occupancy rate, not unlawful discrimination. Because of her economic need, she began seeking alternative employment on October 15, a week *after* her discriminatory working conditions had ceased to exist. On October 20, she effectively resigned from employment with Respondent by accepting a higher paying, fulltime job.

Based on the fact that discriminatory working conditions no longer existed when Complainant made her decision to seek alternative employment or when she resigned, the Agency has failed to satisfy the second element of its prima facie case. Consequently, the forum need not consider whether the third and fourth elements are satisfied, and the Agency's claim of constructive discharge must fail.

MENTAL SUFFERING

The Agency sought an award of \$15,000 to compensate Complainant for the mental suffering she experienced due to Respondent's unlawful discrimination. The forum has concluded that Respondent unlawfully discriminated against Complainant by failing to give Complainant the opportunity to work the hours worked by Garfield and Crain, two "replacement workers," between September 25 and October 7, 1998. Therefore, Complainant is entitled to damages to compensate her for any mental suffering she experienced as a result of Respondent's failure to schedule her to work those hours.

In determining mental distress awards, the commissioner considers a number of things, including the type of discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. *In the Matter of James Breslin*, 16 BOLI 200, 219 (1997), *aff'd without opinion*, *Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999). Awards for mental suffering damages depend on the facts presented by each complainant. A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999).

In this case, Complainant attempted to return to work on September 24, 1998, after taking family leave. At the time, her fam-

ily was experiencing acute financial distress, largely as a result of her lack of earnings while on family leave. This financial situation, which caused Complainant and her husband to experience considerable stress, is the primary reason she attempted to return to work on September 24, several days earlier than planned. Although Respondent is not responsible for Complainant's distress caused by her lack of earnings during her family leave, this forum has held that that "employers must take employees as they find them." *In the Matter of Loyal Order of Moose*, 13 BOLI 1, 12-13 (1994); *In the Matter of Allied Computerized Credit & Collections*, 9 BOLI 206, 217-18 (1991). Here, Complainant was already experiencing considerable stress at the time of Respondent's discriminatory conduct. However, Complainant and her husband credibly testified that Complainant experienced a heightened stress level between September 25 and October 20, 1998, which manifested itself in the form of Complainant being very worried and scared, and crying frequently because Ritchie had not scheduled her for any hours for the first two and one-half weeks after she attempted to return to work, further exacerbating her family's financial distress.

This forum has previously held that financial insecurity and anxiety caused by an unlawful employment practice is compensable. *In the Matter of Katari, Inc.*, 16 BOLI 149, 161 (1997), *aff'd without opinion, Katari, Inc. v.*

Bureau of Labor and Industries, 154 Or App 192, 957 P2d 1231, *rev den* 327 Or 583 (1998). In *Katari*, the commissioner awarded Complainant \$15,000 in mental suffering damages based on circumstances equivalent to what Complainant experienced in this case. Accordingly, the forum concludes that the \$15,000 sought by the Agency to compensate Complainant for her mental suffering is an appropriate award. In making this award, the forum is mindful that the Agency prayer for \$15,000 was based on a failure to restore Complainant to her position, which was proven, and constructive discharge, which was not proven. However, the commissioner's authority to award monetary damages is only limited as to the total amount sought in the Specific Charges or subsequent amendments. *In the Matter of Kenneth Williams*, 14 BOLI 16, 26 (1995). For the reasons discussed, the forum finds that \$15,000 is an appropriate award for Complainant's mental suffering for the violation found.

RESPONDENT'S EXCEPTIONS

Respondent filed numerous exceptions to the Amended Proposed Order. The forum addresses them by section.

A. Proposed Findings of Fact – The Merits.

Finding of Fact 33. Respondent objects to this finding as "irrelevant and misleading." This finding is relevant to the forum's conclusion of law that Complainant was not eligible for "serious

health condition" leave beginning July 27, 1998. Respondent's objection is overruled.

Finding of Fact 48. Respondent objects to the relevance of this finding. This finding regarding Complainant's state of mind is relevant to the forum's conclusion that Complainant was not constructively discharged. Respondent's exception is overruled.

Findings of Fact 47, 49, 50, 51, 56, and 66. Respondent objects to these findings on the basis that they are in direct conflict with the testimony of and letter written by Doug Ritchie. Based on reasons stated in this Order, the forum determined that Ritchie was not a credible witness and has not relied on his testimony or letter. However, the forum has deleted the reference to Ritchie's voice in Finding 66. Respondent's exceptions are overruled.

B. Proposed Ultimate Findings of Fact.

Ultimate Finding 4. Respondent objects to the relevance of this finding. This finding has the same relevance as Finding of Fact – The Merits 33. Respondent's exception is overruled.

Ultimate Finding 6. Respondent objects to the finding that Garfield and Crain performed work that Complainant would have performed, based on reasoning that has been rejected in this Order. Respondent's exception is overruled.

Ultimate Finding 7. Respondent objects to this finding on the basis that it relies on the Complainant's testimony, not Ritchie's. Again, the forum has determined that Ritchie was not a credible witness and overrules Respondent's exception.

Ultimate Finding 8. Respondent objects to this finding for the reasons cited in its objection to Finding of Fact – The Merits 48. Respondent's exception is overruled for the reason cited earlier in the forum's response to Respondent's objection to Finding 48.

Ultimate Finding 9. Respondent objects to this finding because it assumes Complainant requested a return to work in September. The forum has determined that Complainant did request a return to work in September. Respondent's exception is overruled.

Ultimate Finding 10. Respondent objects to this finding on the basis that Complainant "was never promised any number of hours." This finding is not predicated on a "promise" of a specific number of hours, but on the premise that Complainant was available to work the 16.75 hours worked by Crain. Respondent's exception is overruled.

Ultimate Finding 11. Respondent objects to the forum's finding that Complainant lost \$262.50 as a result of Respondent's failure to restore her to a housekeeping position after September 24, 1998. This finding is supported by substantial evidence

in the record. Respondent's exception is overruled.

Ultimate Finding 12. Respondent objects to the forum's finding that Complainant experienced mental suffering. This finding is supported by substantial evidence in the record. Respondent's exception is overruled.

C. Proposed Conclusions of Law.

Conclusion 5. Respondent objects to the forum's conclusion that Complainant would have performed work that Garfield and Crain performed. This conclusion is supported by substantial evidence and substantial reason explained elsewhere in the Order. Respondent's exception is overruled.

Conclusion 6. Respondent objects to the forum's conclusion that Respondent failed to restore Complainant to the position of employment she held when her leave commenced. This conclusion is supported by substantial evidence and substantial reason explained elsewhere in the Order. Respondent's exception is overruled.

D. Proposed Opinion.

Respondent objects that the Agency did not satisfy the fourth element of its prima facie case, that Complainant was awarded back pay, and to Complainant's mental suffering award. Respondent's exceptions were adequately addressed in the Proposed Opinion and are overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and to eliminate the effects of Respondent's violation of ORS 659.484(1) and ORS 659.492(1), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **ENTRADA LODGE, INC.** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in trust for Complainant Cheryl Buxton in the amount of:

a) FIFTEEN THOUSAND DOLLARS (\$15,000.00), representing compensatory damages for mental suffering suffered by Cheryl Buxton as a result of Respondent's unlawful practices found herein, plus

b) TWO HUNDRED SIXTY-TWO DOLLARS AND FIFTY CENTS (\$262.50), less lawful deductions, representing wages lost by Cheryl Buxton between September 25, 1998 and October 7, 1998, as a result of Respondent's unlawful practices found herein, plus

c) Interest at the legal rate on the sum of \$262.50 from October 8, 1998, until paid, plus

d) Interest at the legal rate on the sum of \$15,000 from the date of the Final Order until

Respondent complies here-with.

2) Cease and desist from discriminating against any employee based upon the employee's use of the Oregon Family Leave Act.

653.025, ORS 653.055, ORS 653.261, OAR 839-001-0470, OAR 839-020-0005, OAR 839-020-0030.

In the Matter of

CONTRACTORS PLUMBING SERVICE, INC.,

Case No. 61-00

Final Order of the Commissioner
Jack Roberts

Issued August 2, 2000

SYNOPSIS

Respondent employed Claimant as an office worker and paid her a weekly salary, with no additional pay for overtime hours worked. The commissioner rejected Respondent's argument that Claimant was an exempt "administrative employee." Claimant's primary duties were bookkeeping and payroll, functions that are not exempt from the overtime requirement. The commissioner found that Respondent's failure to pay the overtime wages was willful and ordered Respondent to pay Claimant \$2407.50 in unpaid wages, \$4453.68 in penalty wages, and interest on both amounts. ORS 652.140, ORS 652.150, ORS 653.020, ORS

The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 June 6, 2000, at the Eugene office of the Bureau of Labor and Industries, located at 165 East Seventh Street, Eugene, Oregon.

Linda Lohr, an employee of the Bureau of Labor and Industries ("BOLI" or "the Agency") represented the Agency. Wage claimant Rhonda Ralston was present during the hearing and was not represented by counsel. Respondent was represented at hearing by its attorney, Nick E. Rauch. Thomas Ryder, Respondent's president, was present throughout the hearing as Respondent's corporate representative.

The Agency called Claimant Rhonda Ralston and BOLI compliance specialist Irene Zentner as witnesses. Respondent called Thomas Ryder as its witness.

The forum received:

- a) Administrative exhibits X-1 through X-9 (received or generated by the Hearings Unit prior to hearing) and X-10 and X-11 (received or generated by the Hearings Unit after the hearing).

b) Agency exhibits A-1 through A-12 (filed with the Agency's case summary) and A-13 and A-14 (submitted at hearing).

c) No Respondent exhibits.

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 or about March 5, 1999, Claimant completed and filed a wage claim form in which she stated that Respondent had employed her from April 1997 until March 5, 1999. Claimant asserted that Respondent paid her overtime wages "at first" and then stopped paying them. She claimed unpaid overtime wages from June 1, 1998, to February 26, 1999, in the amount of \$2388.00. Claimant filed an assignment of wages along with her wage claim form.

2) On April 2, 1999, the Agency sent Respondent a notice that Claimant had filed a wage claim for unpaid wages and overtime wages of \$2388.00. Respondent filed a response to the Notice of Claim later in April, in which it denied that wages were due.

3) On or about October 8, 1999, the Agency served Re-

spondent with an Order of Determination. The Agency alleged that Respondent had employed Claimant from June 1, 1998, through February 28, 1999, at the regular rates of \$2064.00 and \$3096.00 per month, and that Claimant had worked a total of 96 hours that were hours worked over 40 in a given work week. The Agency further alleged that Respondent was required to, but did not, pay Claimant one and one-half times her regular rate of pay for each of those 96 hours. The Agency concluded that Respondent owed Claimant \$963.50 in unpaid overtime wages, plus interest. Finally, the Agency alleged that Respondent's failure to pay the overtime wages was willful and that Respondent, therefore, owed Claimant \$4212.00 as penalty wages, plus interest. The Order of Determination required Respondent, within 20 days, either to pay these sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) Respondent filed a timely Answer and Request for Hearing in which it admitted it had employed Claimant, but denied "that portion [of the Order of Determination] pertaining to hours worked in excess of 40 hours per week and pay." Respondent also denied that it owed any unpaid or penalty wages to Claimant. In its defense, Respondent asserted that Claimant was employed as its office manager "and was paid on a salary basis and as such was exempt from overtime requirements." Respondent further asserted that it

paid Claimant for all hours she reported, "as she prepared all payroll checks including her own."

5) On February 15, 2000, the Agency requested a hearing. On February 22, 2000, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 9:00 a.m. on May 3, 2000. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) On April 6, 2000, the forum issued a case summary order requiring the Agency and Respondent to submit summaries of the case that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by April 24, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The Agency filed a timely case summary. Respondent did not file a case summary even though its counsel received the case summary order.

7) On April 7, 2000, the Agency notified the forum that

case presenter Linda Lohr would be handling the case on the Agency's behalf. The Agency also moved to postpone the hearing based on the unavailability of the Agency's key witness.

8) ALJ McCullough initiated a pre-hearing conference the next day and confirmed that Respondent's counsel did not oppose the Agency's motion for postponement. The participants agreed that June 6, 2000, would be a convenient date for the hearing and the ALJ reset the hearing to commence on that day. The ALJ also changed the deadline for filing case summaries to May 26, 2000.

9) On May 23, 2000, the Agency moved for an order requiring Respondent to produce 12 categories of documents.

10) On May 24, 2000, the hearing was reassigned to ALJ Erika Hadlock. That day, ALJ Hadlock granted the Agency's motion for discovery order as to 11 of the 12 categories of requested documents. The ALJ ordered Respondent to produce the documents to case presenter Lohr no later than 5:00 p.m. on Thursday, June 1, 2000.

11) At the start of the hearing, counsel for Respondent stated that he had received the Summary of Contested Case Rights and Procedures and had no questions about it.

12) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the

matters to be proved, and the procedures governing the conduct of the hearing.

13) After the Agency presented its case, Respondent sought to introduce the evidence of Ryder and Respondent's current office manager, Sandy. Respondent's counsel acknowledged that he had received the ALJ's case summary order, which required him to identify witnesses and documentary evidence he planned to introduce at hearing, and that he had not filed a case summary. Respondent's counsel did not offer a satisfactory reason for having failed to file the case summary. The ALJ refused to allow Respondent to call Sandy as a witness because Respondent's failure to file a case summary meant that the Agency had no notice that Sandy might testify and no opportunity to prepare to meet her testimony. The ALJ did allow Respondent to call Ryder as a witness because: the forum has permitted individual Respondents to testify on their own behalf even when they were not identified as witnesses in a case summary; Ryder was the president of Respondent, a small corporation with only two shareholders; Ryder was in charge of Respondent's operations; and the Agency suffered only minimal prejudice, as Ryder's involvement in the events at issue and his desire to testify could not have come as a surprise.

14) Respondent also sought to introduce certain documents even though it had not filed a case summary. The Agency case pre-

sender had received copies of those documents prior to hearing, but had not chosen to include them in her own case summary and did not have them with her at hearing. Respondent also did not have the documents and asked the ALJ to leave the record open so the Agency's copies of the documents could be entered into evidence after the hearing. The ALJ denied Respondent's request because introducing the documents after the end of the hearing would deprive both the Agency and the ALJ of the opportunity to question witnesses about the documents.

15) The ALJ issued a proposed order on June 21, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed timely exceptions, which are addressed in this Final Order. The Respondent filed untimely exceptions, which are also addressed in this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent operated a plumbing business in Eugene, Oregon, employing plumbers to work on residential and commercial construction. From 1997 through early 1999, the number of plumbers employed by Respondent fluctuated between about 5 and 25.

2) Thomas Ryder is Respondent's president and is in charge of the company's operations.

3) In March 1997, Ryder hired Claimant to work as Respondent's office manager. Claimant spent the majority of her time doing bookkeeping and paperwork associated with payroll. She also answered telephones, ordered supplies, relayed messages to Ryder and plumbers working in the field, and did general secretarial and clerical work.

4) Respondent initially paid Claimant \$10.00 per hour and paid her overtime wages when she worked more than 40 hours per week. Every week that Claimant worked for Respondent, she completed a time card that she submitted to Ryder along with time cards for Respondent's other employees.

5) Ryder spent relatively little time at Respondent's office and Claimant frequently was the only person working there. On a few occasions, Claimant told Ryder that she had too much work to do and Ryder authorized her to get temporary clerical employees through an agency. These temporary employees worked for Respondent for very short periods of time and received lower wages than Claimant. Claimant did not interview the temporary employees before they started working for Respondent.

6) Claimant did not have hiring, firing or disciplinary authority, and did not interview prospective employees on Respondent's behalf. Claimant did not supervise any of Respondent's employees, except for giving instructions to

temporary workers on such things as how to do filing.

7) Respondent was a subcontractor on some public works projects and Claimant signed some of the certified payroll reports for those projects. Claimant also was authorized to sign certain payroll documents. In addition, she signed for materials delivered to Respondent's office. It is common practice in Oregon for bookkeepers and payroll clerks to complete certified payroll reports.

8) Claimant once attended a meeting with Ryder and Respondent's attorney regarding whether Respondent's business should become a union shop. Claimant did not attend that meeting as part of Respondent's management team. Rather, she accompanied Ryder because he felt uncomfortable going to that meeting alone because of his physical condition. Claimant offered Respondent her opinion on whether the business should "go union," but only as one of Respondent's several employees, not as part of the decision-making team.

9) Claimant sometimes attended lunches and other events with Ryder during which they would socialize with other people in the construction or plumbing industries. Claimant did not attend those meetings to negotiate deals or to form management-level business relationships on Respondent's behalf. Rather, she attended those events merely to become acquainted with the peo-

ple with whom Respondent did business.

10) Claimant's primary duties remained essentially the same throughout her employment by Respondent, except that her payroll duties increased after Respondent stopped using an outside firm to issue payroll checks.

11) At no time did Claimant have authority to make independent decisions regarding the operation of Respondent's business. Although Ryder did not closely oversee her work on a day-to-day basis, Claimant performed her work according to his instructions and pursuant to his direction. Claimant made no significant judgment calls and exercised no significant discretion in carrying out her duties. Rather, when substantive questions arose, Claimant looked to Ryder for direction.

12) Respondent periodically gave Claimant \$2.00 per hour raises. By June 1, 1998, Respondent had agreed to pay Claimant at the rate of \$16.00 per hour. Respondent called this wage a "salary" and based Claimant's weekly pay of \$640.00 on a 40-hour work week, although Claimant frequently worked more than 40 hours per week and sometimes worked fewer hours. At some time near June 1, 1998, Ryder discovered that Claimant had included overtime pay in her paycheck. Ryder told Claimant that he did not pay overtime to "salaried" workers and said that if she wanted overtime pay, she

could go back to working for a lower hourly wage. Claimant deducted the overtime wages from her paycheck at Ryder's instruction.

13) From June 1, 1998, through October 9, 1998, Claimant worked a total of 754.5 hours, 48 of which were hours worked in excess of 40 per week. Respondent did not pay Claimant one and one-half times her regular rate of pay for those overtime hours. Rather, Respondent paid Claimant a salary of \$640.00 per week, regardless of number of hours she worked.

14) Starting on October 12, 1998, Respondent agreed to pay Claimant at the rate of \$18.00 per hour, again on a "salary" basis that assumed a 40-hour work week. From October 12, 1998, through February 27, 1999, Claimant worked a total of 806.5 hours, 46.5 of which were hours worked in excess of 40 per week. Respondent paid Claimant \$720.00 (\$18.00 x 40) for each work week in this time period, regardless of the number of hours Claimant actually worked.

15) The forum infers that Respondent knew that Claimant was working overtime because Respondent had paid Claimant overtime wages for working similar hours in the past, Claimant gave Ryder her weekly time cards, and Ryder told Claimant that she would not receive overtime wages once she started earning \$16.00 per hour. Respondent made a deliberate

decision not to pay Claimant overtime wages after June 1, 1998.

16) Throughout her employment with Respondent, the amount Claimant earned on an hourly basis was less than the wage earned by many, if not all, of the plumbers who worked for Respondent.

17) Claimant quit work on March 5, 1999, and filed her wage claim with BOLI the same day.

18) Claimant provided BOLI with copies of the time cards she had completed each week she worked for Respondent, starting on June 1, 1998. Claimant completed BOLI wage claim calendars based on those time cards.

19) Claimant's testimony was sufficiently credible to establish the Agency's prima facie case. Claimant testified credibly regarding the nature of her duties, the hours she worked, and the fact that she completed a time card each week she worked for Respondent. However, Claimant was uncertain about dates and was a bit slow to admit facts that she appeared to believe might support Respondent's defense that she was an exempt employee. In addition, Claimant harbored some hostility toward Ryder and several times made gratuitous negative statements about him, although she also acknowledged ways in which Ryder had treated her well. Overall, Claimant's animosity toward Ryder did not appear to have influenced her testimony in material respects.

20) Ryder's testimony, on the other hand, was not credible at all and the forum has given it no weight except where it was corroborated by other credible evidence. Ryder exaggerated certain aspects of Claimant's job duties in an effort to show both that she was an exempt employee and that she had not performed her job well. For example, Ryder repeatedly called Claimant his "right-hand person" and said that he had hired her to teach her the plumbing business. In support of that claim, Ryder stated that one of Claimant's job duties was helping him bid on projects. When questioned more specifically, however, Ryder was able to identify only one project on which Claimant had worked on a bid. He also acknowledged that all Claimant had done was measure some lines on blueprints so Ryder could determine how much pipe would be used in the plumbing. In another instance, apparently believing that having independent purchasing authority would make an employee exempt, Ryder asserted that Claimant had such authority. Upon further questioning, he stated that she had purchased several staplers and had decided what type of pens to order. At another point in his testimony, Ryder said that because of bookkeeping mistakes Claimant had made, Respondent was getting fined "up the kazoo." On cross-examination, Ryder was able to identify only one type of mistake Claimant had made and only one fine that had been imposed as a result.

21) Respondent produced no time cards for Claimant to the Agency during its investigation, despite the requests of Irene Zentner, an Agency compliance specialist. A few days before hearing, Respondent produced some original time cards for Claimant. Ryder testified that his employees had just located those time cards in a box in a warehouse where they should not have been located. He asserted that he had not previously known that any time cards for Claimant existed and insinuated that Claimant had completed the cards and hidden them without his knowledge. The Agency then introduced evidence that on July 29, 1999, during the Agency's investigation, an employee of Respondent's attorney faxed a note to Carol, an employee of Respondent, attaching a note stating "No time cards April, May Jan – Mar. Time cards June 98 forward." Later that day, Carol faxed a note to Respondent's attorney's employee stating "there are no time cards for the month of April 1998, May 1998. (none for Jan. thur [sic] Mar. 1998) **There seem to be time cards from June on. Copy attached: Time cards June[,] Payroll stud detail June[,] Form 132 1998 2/98 qtr**" (emphasis added). Attached to that fax were copies of some time cards for Claimant from June 1998. Despite these fax communications, neither Respondent nor Respondent's attorney informed the Agency that time cards for Claimant had been located. The forum finds that the Agency proved by a preponderance of the

evidence that Respondent had at least constructive knowledge of the existence of Claimant's time cards and failed to produce those time cards to the Agency during its investigation. The forum disbelieves Ryder's testimony that he was unaware of the existence of any time cards until a few days before hearing.¹

22) Ryder also made several accusations against Claimant that were not substantiated by any other evidence in the record. He claimed at hearing that Claimant ran her husband's business out of Respondent's office. In an earlier communication to the Agency, he asserted that Claimant had taken her payroll files with her when she left Respondent's employ. Ryder also claimed that Claimant had falsified time cards, kept them hidden from him, and somehow spirited the time cards into a warehouse where Respondent did not discover them until shortly before the hearing. These accusations were uncorroborated, they conflict with Claimant's credible testimony and pre-hearing statements, and the forum does not believe them. The fact that Ryder made accusations he could not back up further detracts from his credibility.

23) Finally, Ryder was extremely hostile toward Claimant and the Agency case presenter

¹ The forum notes that it would find Ryder's testimony not to be credible even if it did not take into account the dispute about the "missing" time cards.

during the hearing. He glared at both women during much of the hearing and, during the Agency's closing argument, held up a sign to the Agency case presenter that read: "You are a liar." From all the facts described in Findings of Fact – the Merits 20, 21, 22 and 23, the forum concludes that Ryder's anger and frustration about Claimant's wage claim influenced his testimony in material respects. Because of that influence, the forum finds Ryder's testimony to be far less credible than Claimant's.

24) As part of her investigation, Zentner calculated the unpaid wages and penalty wages she believed Respondent owed Claimant. In performing those calculations, Zentner decided that Claimant was entitled to pay only for hours she actually worked because she was not an exempt employee. Accordingly, Zentner determined that Claimant had earned a total of \$12,588.00 (712.5 hours x \$16.00/hour + 49.5 overtime hours x \$24.00/overtime hour) during the time that her regular wage was \$16.00 per hour. Because Respondent had paid her only \$12,160.00, \$428.00 was due and owing. Zentner also calculated that, during the time that Claimant's regular wage was \$18.00 per hour, she had earned a total of \$14,935.50 (760 hours x \$18.00/hour + 46.5 overtime hours x \$27.00/overtime hour), of which Respondent had paid only \$14,400.00, leaving \$535.50 due and owing. Thus, Zentner calculated that Respondent owed Claimant a total of \$963.50 in unpaid wages.

25) The forum disagrees with Zentner's damage figures for two reasons. First, Zentner determined that Claimant had worked 712.5 regular hours and 49.5 overtime hours from June 1 through October 9, 1998. In fact, Claimant worked only 706.5 regular hours and 48 overtime hours during that period. Second, Zentner's calculations are based on her determination that Respondent paid Claimant strictly on an hourly basis. Accordingly, she decided that Claimant was entitled to be paid only for the hours she actually worked and was not entitled to 40 hours of pay for weeks during which she worked fewer than 40 hours, despite the fact that Respondent paid her as if she had worked a full week. The forum has concluded, to the contrary, that Respondent paid Claimant on a salary basis regardless of the number of hours she actually worked. Consequently, pursuant to OAR 839-020-0030(3)(d), Claimant was entitled to her full salary for each week she worked, *plus* additional wages for her overtime hours. The forum finds that Respondent owes Claimant an additional \$1152.00 for the 48 overtime hours she worked from June 1 through October 9, 1998 (48 hours x 1.5 x \$16.00/hour). Respondent also owes Claimant \$1255.50 for the 46.5 overtime hours she worked from October 12, 1998, through February 27, 1999 (46.5 x 1.5 x \$18.00/hour), for a total of \$2407.50 in unpaid wages.

26) The forum calculates penalty wages in accordance with

ORS 652.150, OAR 839-001-0470, and Agency policy 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.' * * * Statement of Agency Policy, July 23, 1996."

In the Matter of Belanger General Contracting, 19 BOLI 17, 26 (1999). In this case, Claimant earned a total of \$28,967.50 during the claim period (including the overtime wages she earned but was not paid) and she worked a total of 1561 hours. Accordingly, the penalty wages due Claimant are \$28,967.50/1561 x 8 x 30 = \$4453.68.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent owned and operated a plumbing business in Eugene, Oregon. Respondent employed Claimant as an office worker from March 1997 until March 5, 1999, when Claimant quit her job.

2) At all material times, Claimant's primary job duties were bookkeeping and doing payroll. Claimant spent most of the remainder of her time at work performing clerical tasks.

3) Claimant did not customarily and regularly exercise discretion and independent judgment in her job. Rather, the decisions Claimant made in carrying out her duties involved the

application of procedures prescribed by Ryder.

4) From June 1 through October 9, 1998, Respondent paid Claimant a salary of \$640.00 per week, based on a 40-hour work week, regardless of the number of hours she actually worked. During this time period, Claimant worked 754.5 hours, 48 of which were hours in excess of 40 per week. Respondent paid Claimant only \$12,160.00 for this work.

5) From October 12, 1998, through February 27, 1999, Respondent paid Claimant a salary of \$720.00 per week, based on a 40-hour work week, regardless of the number of hours she actually worked. During this time period, Claimant worked 806.5 hours, 46.5 of which were overtime hours. Respondent paid Claimant only \$14,400.00 for this work.

6) Respondent's failure to pay overtime wages to Claimant was willful and more than 30 days have passed since those wages became due.

7) Civil penalty wages, calculated in accordance with ORS 652.150, OAR 839-001-0470, and Agency policy, equal \$4453.68.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

"(3) 'Employ' includes to suffer or permit to work * * *.

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

Respondent was Claimant's employer.

2) ORS 653.261(1) provides:

"The Commissioner of the Bureau of Labor and Industries 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 839-020-0030 provides, in pertinent part:

"(1) Except as provided in OAR 839-020-0100 to 839-020-0135 all 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 benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1). * * *

** * * * *

"(3) Methods for determining amount of overtime payment under different compensation agreements:

"(a) Compensation based exclusively on hourly rate of pay:

"(A) Where the employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate". For hours worked in excess of forty (40) hours in a work week the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of forty (40);

** * * * *

"(d) Compensation based upon a weekly salary agreement for a regular work week of 40 hours:

"(A) Where the employee is employed on a weekly salary, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate;

"(B) For example, where an employee is hired at a salary of \$280 and it is understood that this weekly salary is compensation for a regular work week of 40 hours, the employee's regular rate of pay is \$7 per hour and such employee must be compensated at the rate of \$10.50 per hour for each hour

worked in excess of 40 hours in such work week."

From June 1, 1998, through October 9, 1998, Claimant's regular rate of pay was \$16.00 per hour, based on a salary of \$640.00 for a 40-hour work week. Respondent was required to pay Claimant one and one-half times \$16.00 – or \$24.00 – for each hour Claimant worked over 40 in a week. During this period, Respondent did not pay Claimant any wages in addition to her weekly salary for the 48 hours she worked that were hours in excess of 40 per week. Consequently, Respondent owes Claimant \$1152.00 in unpaid overtime wages for the period June 1 through October 9, 1998.

From October 12, 1998, through February 27, 1999, Claimant's compensation was \$18.00 per hour, based on a salary of \$720.00 for a 40-hour work week. Respondent was required to pay Claimant one and one-half times \$18.00 – or \$27.00 – for each hour Claimant worked over 40 in a week. During this period, Respondent did not pay Claimant any wages in addition to her weekly salary for the 46.5 hours she worked that were hours in excess of 40 per week. Consequently, Respondent owes Claimant \$1255.50 in unpaid overtime wages for the period October 12, 1998, through February 27, 1999.

3) ORS 653.055(1) provides:

"(1) Any employer who pays an employee less than the

wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:

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

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

Respondent owes Claimant a total of \$2407.50 in unpaid wages.

4) ORS 652.140 provides, in pertinent part:

"(2) 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."

Because Claimant quit work on March 5, 1999, her wages were due and payable no later than March 12, 1999. Respondent violated ORS 652.140 by not paying Claimant all wages she was due by that date.

5) ORS 653.020 provides, in pertinent part:

“ORS 653.010 to 653.261 does not apply to any of the following employees:

“* * * * *

“(3) An individual engaged in administrative, executive or professional work who:

“(a) Performs predominantly intellectual, managerial or creative tasks;

“(b) Exercises discretion and independent judgment; and

“(c) Earns a salary and is paid on a salary basis.”

OAR 839-020-0005 provides, in pertinent part:

“(2) ‘Administrative Employee’ means any employee:

“(a) Whose primary duty consists of either:

“(A) The performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his/her employer’s customers; or

“(B) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein.

“(b) Who customarily and regularly exercises discretion

and independent judgment; and

“(c)(A) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or

“(B) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

“(C) Who executes under only general supervision special assignments and tasks; and

“(d) Who earns a salary and is paid on a salary basis pursuant to ORS 653.025 exclusive of board, lodging, or other facilities.”

“* * * * *

“(5) ‘Independent Judgment and Discretion’ means the selection of a course of action from a number of possible alternatives after consideration of each, made freely without direction or supervision with respect to matters of significance. It does not include skill exercised in the application of prescribed procedures.”

Respondent did not meet its burden of proving that Claimant was an administrative employee exempt from overtime pay requirements.

6) ORS 652.150 provides:

“If an employer willfully fails to pay any wages or compensation of any employee whose

employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same 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."

OAR 839-001-0470 provides:

"(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

"(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

"(b) The rate at which the employee's wages shall continue shall be the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid;

"(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee's hourly rate of pay times 8 hours per day times 30 days.

"(2) The wages of an employee that are computed at a rate other than an hourly rate shall be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period."

Calculated pursuant to Agency rule and policy, Respondent owes Claimant \$4453.68 in penalty wages.

OPINION

RESPONDENT FAILED TO PAY CLAIMANT ALL WAGES SHE EARNED

To establish a prima facie case supporting a wage claim, the Agency must prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for Respondent for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230 (2000). In this case, only the third and fourth elements are disputed.

The amount of work Claimant performed for Respondent is easily determined by examining her time cards, which the forum finds reliable. Those time cards show that Claimant worked a total of 754.5 hours, 48 of which were hours in excess of 40 per week, from June 1 through October 9, 1998, when Respondent was paying her \$640.00 per week. The time cards also show that Claimant worked a total of 806.5 hours, 46.5 of which were hours in excess of 40 per week, from October 12, 1998, through February 27, 1999, when Respondent was paying her \$720.00 per week.

The remaining question is whether Claimant was improperly compensated for the work she performed. The participants agree that Respondent did not pay Claimant overtime wages during the period in question. Respondent raises the affirmative defense that it was entitled to pay Claimant on a salary basis, without additional payment for overtime hours, because she was an exempt "administrative employee."

A person may be an "administrative employee" exempt from the overtime wage requirements if the person meets each of several criteria set forth in ORS 653.020(3) and OAR 839-020-0005(2). Two of those criteria are central to this case, and require the forum to examine:

1) Whether Claimant's "primary duty" consisted of the "performance of office or non-manual work directly related to

management policies or general business operations of his/her employer or his/her employer's customers[.]" OAR 839-020-0005(2)(a)(A).

2) Whether Claimant "customarily and regularly exercise[d] discretion and independent judgment[.]" OAR 839-020-0005(2)(b).

This forum has not previously discussed the type of "primary duties" that are typical of an exempt "administrative employee." There are no reported Oregon cases on point. Consequently, the forum looks for guidance to the federal regulations interpreting the federal exemption statute, which is nearly identical to ORS 653.020(3).² Those regulations, which include a definition of "administrative employee" very similar to the one in the Oregon regulation,³ provide a helpful discussion of the types of duties typically performed by exempt white-collar employees. They include: advising management, planning, negotiating, representing the company, pur-

² See 29 USCS § 213(1), which makes exempt:

"(1) any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *)[".]"

³ See 29 CFR § 541.2.

chasing, promoting sales, and business research and control. 29 CFR sec. 541.205(b). Claimant did not perform any of these types of duties.⁴ The rules further state that "it is clear that *bookkeepers, secretaries, and clerks of various kinds* hold the run-of-the-mine positions in any ordinary business and *are not performing work directly related to management or general business operations.*" 29 CFR sec 541.205(c)(1) (emphasis added). Moreover,

"[a]n employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks."

29 CFR § 541.205(c)(2).

Claimant's primary duties were taking care of bookkeeping and payroll. She spent the majority of the remainder of her time engaged in various clerical tasks. In keeping with the guidance provided by the federal regulations, the forum concludes that Claimant's primary duties were not sufficiently related to "management policies or general business

operations" to make Claimant an exempt administrative employee.

Respondent also failed to prove that Claimant "customarily and regularly exercise[d] discretion and independent judgment," as required by OAR 839-020-0005(2)(b). "Independent Judgment and Discretion" is defined as "the selection of a course of action from a number of possible alternatives after consideration of each, made freely without direction or supervision with respect to matters of significance." OAR 839-020-0005(5). Importantly, the phrase "does not include skill exercised in the application of prescribed procedures." The only decisions Claimant made as part of her job involved choosing the particular way in which she would carry out procedures prescribed by Ryder. For example, Ryder told Claimant to file documents, and she determined how the documents were to be filed. Claimant seldom, if ever, made independent choices – free from Ryder's direction or supervision --- among alternative courses of action. For this reason, too, Claimant was not an exempt administrative employee.⁵

Because Claimant was not an exempt employee, Respondent was required to pay her one and one-half times her normal rate of

⁴ Claimant did place purchase orders after being instructed by Ryder regarding what supplies to buy. That type of activity, which is merely following specific instructions given by a supervisor, is not the type of independent "purchasing" authority contemplated by the rule.

⁵ The fact that Claimant did not customarily and regularly exercise discretion also precludes a finding that she was an exempt executive employee. See OAR 839-020-0005(d).

pay for all hours worked in excess of 40 per week. OAR 839-020-0030(1). BOLI has implemented regulations setting forth several different methods by which overtime pay may be calculated, depending on the compensation scheme under which the employee works. In this case, the Agency compliance specialist calculated Claimant's overtime pay pursuant to the rule applicable to "[c]ompensation based exclusively on hourly rate of pay," OAR 839-020-0030(3)(a). The compliance specialist determined that Respondent was required to pay Claimant one and one-half times her hourly wage for all hours worked in excess of 40 per week. However, because the compliance specialist deemed Claimant to be an hourly employee, she also concluded that Respondent was required to pay Claimant only for hours she actually worked. Because Respondent had paid Claimant for 40 hours of work even during weeks that she worked fewer than 40 hours, the compliance specialist essentially concluded that Respondent had overpaid Claimant during those weeks, and gave Respondent credit for those overpayments against the amount of overtime pay it owed Claimant. Consequently, the compliance specialist concluded that Respondent owed Claimant only \$963.50 in unpaid wages.

The forum disagrees with the compliance specialist's method of calculating Claimant's wages. Respondent and Claimant both understood that Respondent was

paying Claimant a weekly salary calculated by multiplying a certain hourly rate by 40 hours per week. The appropriate method of calculating overtime wages for a non-exempt salaried employee under these circumstances is set forth in OAR 839-020-0030(3)(d). Under that rule, the employee is entitled to one and one-half the regular hourly rate of pay *in addition to* the salary he or she is paid weekly. Thus, Claimant was entitled to be paid overtime wages for all hours she worked in excess of 40 per week, without any deduction for the weeks during which she worked fewer than 40 hours. Using this calculation method, the forum has determined that Respondent owes Claimant \$2407.50 in unpaid wages.

In the proposed order, the ALJ stated that Claimant would be awarded only the smaller amount of damages (\$963.50) the Agency had requested in the Order of Determination. The Agency filed exceptions asserting that the commissioner has authority to award damages in excess of those sought in the charging document and should not "penaliz[e] Claimant for the Agency's calculation error." The forum agrees that the commissioner has authority to award monetary damages exceeding those sought in the charging document, at least where, as here, the damages are awarded as compensation for statutory violations that the Agency did allege in the charging document. This Final Order, therefore, awards Claimant the entire \$2407.50 in unpaid wages.

The Respondent filed exceptions untimely; therefore the forum need not consider them. In its exceptions, filed through different counsel than that representing Respondent in the hearing, Respondent asserts that counsel representing it in hearing failed to prepare or present its case. Respondent further asserts that had it known the Agency would file exceptions asserting the commissioner should award the claimant the entire amount of unpaid wages, Respondent would have filed timely exceptions. Finally, Respondent argues against the substance of the Agency's exceptions.

As stated, the forum is not obligated to consider the Respondent's untimely exceptions. However, in light of factors creating an unusual circumstance, the forum has nonetheless reviewed Respondent's exceptions, but is unpersuaded by them. Each party is presumed to recognize that, inasmuch as both the Agency and Respondent are entitled to file exceptions, the proposed order may be modified either for or against the interests of either party. Therefore, neither party is entitled to rely upon the terms of the proposed order as a defense to failing to adequately assert or protect its own interests.

**RESPONDENT MUST PAY
CLAIMANT PENALTY WAGES**

The forum may award penalty wages where the respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral

delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

In this case, Ryder, Respondent's president, made a conscious decision not to pay Claimant overtime wages even though he knew that Claimant was working more than 40 hours during some weeks. Indeed, Ryder explicitly told Claimant that he would not pay her overtime wages once her salary reached a certain level. Respondent's failure to pay Claimant's overtime wages was willful and it is required to pay penalty wages. As explained in Finding of Fact – the Merits 26, *supra*, the forum calculates penalty wages to be \$4453.68.

In the proposed order, the ALJ stated that Claimant would be awarded only the lesser amount of penalty wages (\$4212.00) the Agency had sought in the Order of Determination. In accordance with the Agency's exceptions, which point out that the commissioner may award damages in excess of those sought in the charging document, the forum awards Claimant the entire \$4453.68 in civil penalty wages that Respondent owes her as a result of its failure to pay all her wages when due.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages hereby orders Respondent **Contractors Plumbing Service, Inc.**, 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 Rhonda Ralston in the amount of SIX THOUSAND EIGHT HUNDRED SIXTY-ONE DOLLARS AND EIGHTEEN CENTS (\$6861.18), less appropriate lawful deductions, representing \$2407.50 in gross earned, unpaid, due, and payable wages and \$4453.68 in penalty wages, plus interest at the legal rate on the sum of \$2407.50 from April 1, 1999, until paid and interest at the legal rate on the sum of \$4453.68 from May 1, 1999, until paid.

In the Matter of

**MARTHA MORRISON dba
American Temporary Personnel**

Case No. 84-00

Final Order of the Commissioner
Jack Roberts

Issued August 28, 2000

SYNOPSIS

Respondent failed to return BOLI's 1998 and 1999 prevailing wage rate surveys by the dates specified. The commissioner imposed a \$250.00 civil penalty for Respondent's 1998 violation and a \$500.00 civil penalty for Respondent's 1999 violation of ORS 279.359(2). ORS 279.359, ORS 279.370, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

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 for the State of Oregon. The hearing was held on June 12, 2000, at the Medford office of the Bureau of Labor and Industries, located at 700 East Main, Suite 105, Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency, who participated via speakerphone. Respondent Martha Morrison ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called no witnesses. Martha Morrison called herself as Respondent's sole witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-7 (generated or filed prior to hearing).

b) Agency exhibit A-1 (submitted prior to hearing with the Agency's case summary).

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 December 20, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") in which it alleged that Respondent received, and unlawfully failed to complete and return: (a) the 1998 Construction Industry Occupational Wage Survey, within two weeks of receipt, as required by the commissioner, in violation of ORS 279.359(2), and (b) the 1999 Construction Industry Occupational Wage Survey by September 15, 1999, as required by the commissioner, also in violation of ORS 279.359(2). The Agency sought a civil penalty of \$500.00 for each alleged violation, for a total of \$1,000.

2) The Notice instructed Respondent that she was required to file an answer and written request for a contested case hearing within 20 days of the date on which she received the Notice, if she wished to exercise her right to a hearing.

3) The Agency served the Notice on Respondent on January 4, 2000.

4) On January 24, 2000, the Agency sent a Notice of Intent to Issue Final Order by Default to Respondent notifying her that she had not yet filed an answer or request for hearing, and that a Final Order on Default would be issued if no answer and request for hearing were received by February 3, 2000.

5) On January 31, 2000, Respondent filed a letter with the Agency requesting a hearing.

6) On February 8, 2000, the Agency sent a letter to Respondent notifying her that her request for hearing was insufficient because it did not contain an answer, and that a Final Order on Default would be issued if the Agency did not receive an answer by February 18, 2000.

7) On February 18, 2000, the Agency received Respondent's answer. In her answer, Respondent stated that her company "inadvertently failed to compete (sic) and return the 1998 Survey within two weeks as required," and that her company also "inadvertently failed to complete and return the 1999 Survey by September 15, 1999, as required."

8) The Agency filed a request for hearing with the Hearings Unit on February 29, 2000, and served it on Respondent.

9) On March 10, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that

set the hearing for June 12, 2000; b) a Summary 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 hearing process; and d) a copy of the Notice of Intent.

10) On March 14, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim and penalty calculations (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); and a statement of any agreed or stipulated facts. The forum ordered the participants to submit their case summaries by June 1, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form for Respondent's use in preparing a case summary.

11) The Agency filed a motion for partial summary judgment on March 17, 2000. Respondent filed no response to that motion. On April 6, 2000, the ALJ granted the Agency's motion for partial summary judgment in an interim order that stated:

Introduction

"This is a proceeding in which the Agency seeks to assess \$1,000 in civil penalties against Respondent based on Re-

spondent's two alleged violations of ORS 279.359(2).

"The Agency's Motion

"On March 17, 2000, the Agency filed a motion for partial summary judgment on the issue of 'whether Respondent violated ORS 279.359(2) by failing to make required reports and returns to the Commissioner in 1998 and 1999.' The Agency asserted that, based on the pleadings, there is no genuine issue of any material fact and the Agency is entitled to judgment as a matter of law. Respondent has not filed a response to the Agency's motion, and the time period for filing a responsive pleading has elapsed. OAR 839-050-0150.

"Standard For Summary Judgment

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The evidentiary burden on the participants in a motion for summary judgment is as follows:

'The moving party has the burden of showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. The record on summary judgment is viewed in the

light most favorable to the party opposing the motion. *This is true even as to those issues upon which the opposing party would have the trial burden.* *Jones v. General Motors Corp.*, 325 Or 404, 420 (1997) (quoting *Seeborg v. General Motors Corporation*, 284 Or 695, 699 (1978) (emphasis added by Jones court).

The Issue

"The allegations in the Agency's Notice of Intent that are relevant to the present motion can be summarized as follows:

"(a) In 1998 and 1999, the commissioner, consistent with ORS 279.359(1), established a survey to collect data for use in determining the prevailing rate of wage for workers in trades or occupations in the localities designated in ORS 279.348;

"(b) The 1998 survey included forms that survey recipients, including Respondent, were required to complete and return within two weeks of receiving the 1998 survey;

"(c) The 1999 survey included forms that survey recipients, including Respondent, were required to complete and return by September 15, 1999; and

"(d) Respondent received the forms but never completed or returned them.

"The Agency alleged that these facts, if proven, establish two violations of ORS 279.359(2) by Respondent. ORS 279.359 provides, in pertinent part:

'(1) The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality under ORS 279.348 at least once each year by means of an independent wage survey and make this information available at least twice each year. The commissioner may amend the rate at any time.

'(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rate of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.'

"To prevail on its motion, the Agency must show:

"(1) Respondent is a 'person';

"(2) The commissioner conducted surveys in 1998 and 1999 that required persons receiving the surveys to make reports or returns to the

Agency for the purpose of determining the prevailing rates of wage;

“(3) Respondent received the commissioner’s 1998 and 1999 surveys; and

“(4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

“Was Respondent a ‘person’ at times material?”

“ORS 279.359(5) defines ‘person’ as including ‘any employer, labor organization or any official representative of an employee or employer association.’ In Respondent’s answer, she refers to herself as the ‘owner’ who hired employees during times material. Based on her admission that she was an ‘employer,’ the forum concludes that Respondent was a ‘person’ within the meaning of ORS 279.359(5).

“Did the commissioner conduct surveys in 1998 and 1999 that required persons receiving the surveys to make reports or returns to the Agency that were for the purpose of determining the prevailing rates of wage?”

“In its Notice of Intent, the Agency alleged that the commissioner conducted surveys in 1998 and 1999 that required persons receiving the surveys to make reports or returns to the Agency that were for the purpose of determining the

prevailing rates of wage. In her answer, Respondent did not deny this allegation. Consequently, the forum deems this allegation to be admitted. OAR 839-050-0130(2).

“Did Respondent receive the commissioner’s 1998 and 1999 surveys?”

“In its Notice of Intent, the Agency alleged that Respondent received both surveys. In her answer, Respondent did not deny receipt of the commissioner’s surveys in 1998 and 1999, with their enclosed reports or returns. OAR 839-050-0130(2) provides that ‘Except for good cause shown to the administrative law judge, factual matters alleged in the charging document and not denied in the answer, shall be deemed admitted by the party.’ Respondent has not made a showing of good cause. Consequently, the Agency’s allegation that Respondent received the commissioner’s surveys is deemed admitted.

“Did Respondent fail to make the required reports or returns within the time prescribed by the commissioner?”

“In its Notice of Intent, the Agency alleged that the 1998 survey sent to Respondent included reports or returns that Respondent was required to complete and return within two weeks of receiving the survey. In her answer, Respondent admitted her failure to ‘com-

pete¹ and return the 1998 Survey within two weeks as required.' The Agency alleged that the 1999 survey sent to Respondent included reports or returns that Respondent was required to complete and return by September 15, 1999. In her answer, Respondent admitted her failure to 'complete and return the 1999 Survey by September 15, 1999 as required.' The Agency has demonstrated that there is no genuine dispute regarding the fact that Respondent failed to make the required reports or return them within the required period of time.

Conclusion

"Based on the specificity of the Agency's pleadings and the admissions in Respondent's answer, the forum concludes that there is no genuine issue of any material facts necessary to establish Respondent's 1998 and 1999 violations of ORS 279.359(2). Consequently, the Agency is entitled to judgment as a matter of law regarding these two alleged violations.

"The Agency's motion for partial summary judgment is **GRANTED.**"

12) The Agency timely filed its case summary. Respondent did not file a case summary.

13) On June 8, 2000, the ALJ received a telephone message from Mr. Gerstenfeld indicating the possible need for a postponement in a case set for hearing in Medford on June 13 due to a family emergency. The ALJ contacted Mr. Gerstenfeld, who indicated he did not plan to seek a postponement in this case, that he planned to represent the Agency via speakerphone and would not produce any witnesses or offer any exhibits other than those attached to the case summary, and that he would conduct cross-examination over the telephone. That same morning, the ALJ called Respondent's office. Respondent was unavailable, so the ALJ conveyed Mr. Gerstenfeld's message to Respondent's husband, James Morrison. Pursuant to OAR 839-050-0310, the ALJ issued a written disclosure of these communications to the Agency and Respondent.

14) At the start of the hearing, the ALJ confirmed that Respondent had received the Summary of Contested Case Rights and had no questions about it.

15) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

¹ In the context of the Notice of Intent, Respondent's answer, and the sentence in which it appears, the forum infers that Respondent intended this word to be "complete."

16) During the hearing, Respondent sought to call her husband as a witness. The Agency objected on the basis that Respondent had not submitted a case summary listing witnesses she intended to call, and that the Agency would be prejudiced by its inability to prepare for cross-examination of Mr. Morrison. Respondent was unable to articulate a satisfactory reason for not submitting a case summary. After determining that excluding Mr. Morrison's testimony would not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), the ALJ excluded him from testifying.

17) The ALJ issued a proposed order on July 24, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was an employer who operated American Temporary Personnel, a temporary employment agency, in Medford, Oregon. Respondent primarily employs mill and clerical workers.

2) The Research and Analysis section of the Oregon Employment Department ("Employment Department") contracted with BOLI in 1998 and 1999 to conduct Construction Industry Occupational Wage Surveys ("wage surveys"). The BOLI Commissioner planned to, and did, use

the surveys to aid in the determination of the prevailing wage rates in Oregon.

3) On or about September 2, 1998, the Employment Department mailed a form letter to Respondent and a number of other contractors informing them of the upcoming 1998 wage survey and their legal obligation to complete the survey. The form letter stated that the survey covered **"all non-residential construction work performed in Oregon during a specified period, including BOTH private work and prevailed or public improvement work."** (emphasis in original)

4) On or about September 15, 1998, the Employment Department mailed Respondent a wage survey packet, which included a postage paid envelope for return of the survey. Printed on the cover sheet of the packet was a map of Oregon divided into 14 numbered districts, along with the title "BOLI – Construction Industry Occupational Wage Survey 1998." The second page was a one-page form letter to construction contractors that included statements that any information provided was confidential, that contractors' "timely response and cooperation are essential for determining accurate and fair wage rates for Oregon's contractors and workers," a request that recipients **"Please return your completed survey form in the enclosed postage-paid envelope within two weeks,"** and the statement that **"Failure to return a completed**

survey form may result in a monetary fine.” (emphasis in original) The form asked contractors to provide wage data for all types of non-residential construction projects, including both “prevailing wage and non-prevailing wage work. An instruction sheet enclosed with the packet included the following statement printed in bold typeface:

“RESIDENTIAL CONSTRUCTION

PLEASE NOTE: THIS PREVAILING WAGE SURVEY DOES NOT COVER RESIDENTIAL CONSTRUCTION WORKERS. IF ALL OF YOUR WORK FOR THE SELECTED REPORTING PERIOD WAS DONE ON RESIDENTIAL CONSTRUCTION, PLEASE CHECK ‘RESIDENTIAL ONLY’ IN QUESTION IV ON THE SURVEY FORM, THEN FILL OUT ONLY THE FIRM INFORMATION ON THE FORM, AND RETURN IT TO OUR OFFICE IN THE POSTAGE-PAID ENVELOPE.”

5) On or about October 5, 1998, the Employment Department mailed a reminder card to Respondent and other contractors from whom completed 1998 wage surveys had not yet been received. On or about October 19, 1998, a second reminder card was mailed to Respondent and other contractors from whom completed 1998 wage surveys had not yet been received, with “Final Notice” stamped on its front.

6) Respondent received the 1998 wage survey packet, but did not return it to the Employment Department.

7) Respondent did not employ any construction workers in 1998.

8) On or about August 18, 1999, the Employment Department mailed a wage survey packet to Respondent, which included a postage paid envelope for return of the survey. The phrase “FILING DEADLINE: September 15, 1999” was prominently displayed on the front of the survey form. The packet asked contractors to provide wage data for “all [non-residential] construction work performed for the survey period – both prevailing wage and non-prevailing wage work.” A letter included with the wage survey packet notified contractors that “[f]ailure to return a completed survey form may result in a monetary fine.” (emphasis in original) An instruction sheet enclosed in the wage survey packet included the following statement printed in bold typeface:

“RESIDENTIAL CONSTRUCTION

PLEASE NOTE: THIS PREVAILING WAGE SURVEY DOES NOT COVER RESIDENTIAL CONSTRUCTION WORKERS. IF ALL OF YOUR WORK FOR THE SELECTED REPORTING PERIOD WAS DONE ON RESIDENTIAL CONSTRUCTION, PLEASE FILL OUT THE FIRM INFORMATION ON THE SURVEY FORM, AND

WRITE IN THE WAGE DATA GRID THAT YOUR FIRM ONLY PERFORMED RESIDENTIAL WORK. RETURN IT TO OUR OFFICE IN THE POSTAGE-PAID ENVELOPE."

9) On or about September 20, 1999, the Employment Department mailed a "Survey Past Due" card to Respondent and other contractors who had been sent a 1999 wage survey but had not yet returned it. On or about October 18, 1999, another "Survey Past Due" card was mailed to Respondent with "Final Notice" stamped on it. 10) Respondent received the 1999 wage survey packet, but did not return it to the Employment Department.

11) The Employment Department mailed the 1998 and 1999 wage survey packets and all other notices related to those wage surveys to Respondent at PO Box 1484, Medford, Oregon 97501, the mailing address printed on Respondent's letterhead. 12) The 1998 and 1999 wage survey packets were received by Respondent at Respondent's office and set aside by Respondent's bookkeeper/controller. Respondent did not become personally aware of their existence until after receipt of the Agency's Notice, when Respondent's current bookkeeper, at Respondent's direction, searched for and located both wage survey packets in a large pile of unopened mail. Previously, Respondent had delegated the responsibility of informing Re-

spondent of mailings such as the wage survey packet to her bookkeeper/controller.

13) In 1999, Respondent employed two workers who performed non-residential construction work. The total non-residential construction work performed by these workers was 45 hours.

14) Respondent's bookkeeper/controller who failed to inform Respondent of receipt of the 1998 wage survey packet left Respondent's employ in August 1999. Respondent subsequently employed an interim bookkeeper/controller for two months to take care of payroll, followed by a bookkeeper who quit on December 3, 1999, after having given 3 ½ days notice.

15) A single contractor's failure to return the wage survey may adversely affect the accuracy of the Agency's prevailing wage rate determinations.

ULTIMATE FINDINGS OF FACT

1) Respondent is an Oregon employer.

2) The commissioner conducted wage surveys in 1998 and 1999 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) Respondent received the commissioner's 1998 and 1999 wage surveys.

4) Respondent failed to return either survey.

5) There is no evidence in the record that Respondent has committed other violations of the prevailing wage rate laws.

6) Respondent employed no construction workers in 1998.

7) Respondent could easily have returned the 1998 wage survey, and should have known of her failure to do so.

8) Respondent employed construction workers in 1999 on non-residential construction projects.

9) Respondent could have easily returned the 1999 wage survey, and should have known of her failure to do so.

CONCLUSIONS OF LAW

1) ORS 279.359 provides, in pertinent part:

"(1) The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality under ORS 279.348 at least once a year by means of an independent wage survey * * * .

"(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the

accuracy of the reports and returns.

* * * * *

"(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2). Respondent's failures to return completed 1998 and 1999 wage surveys constitute two separate violations of ORS 279.359(2).

2) ORS 279.370 provides, in pertinent 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 \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto."

OAR 839-016-0520 provides:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor, or contracting agency in respond-

ing to previous violations of statutes and rules.

"(b) Prior violations, if any, of statutes and rules.

"(c) The opportunity and degree of difficulty to comply.

"(d) The magnitude and seriousness of the violation.

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in subsection (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

OAR 839-016-0530 provides, in pertinent part:

"(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and

for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"* * * * *

"(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

"* * * * *

"(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]"

OAR 839-016-0540 provides, in pertinent part:

"(1) The civil penalty for any one violation shall not exceed \$5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"* * * * *

"(5) The civil penalty for all * * * violations [other than violations of ORS 279.350 regarding payment of the prevailing wage and ORS 279.375 regarding fees to be paid to BOLI by the contractor] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530."

The Commissioner of the Bureau of Labor and Industries is authorized to impose civil penalties for the violations found herein, and the commissioner's imposition of the penalties assessed in the Proposed Order below is a proper exercise of that authority.

OPINION

The Agency alleges that Respondent violated ORS 279.359(2) in 1998 and 1999. The forum granted the Agency's motion for partial summary judgment with regard to whether or not the violations occurred. The only issue is the amount of civil penalties to be assessed against Respondent.

The commissioner may impose penalties of up to \$5000.00 each for Respondent's violations of ORS 279.359(2). In determining the appropriate size of the penalties, the forum must consider the factors set out in OAR 839-016-0520.

With regard to Respondent's 1998 violation, two factors weigh in favor of a relatively light penalty. First, there is no evidence that Respondent violated the prevailing wage rate laws prior to 1998. Second, even if Respondent had completed and returned the 1998 survey in a timely manner, it would have had no impact on the accuracy of the Agency's prevailing wage rate determinations for the reason that Respondent employed no construction workers in 1998. However, this lack of impact does not excuse Respondent's failure to comply with the law, something Respondent could have easily done by checking the appropriate box and providing some information about her firm before returning the wage survey. Respondent was sent two reminders of her failure to comply and still failed to return the wage survey.

Based on her company's receipt of the wage survey packet and subsequent reminders from the Agency, Respondent knew or should have known of the violation, and Respondent's delegation of authority to her bookkeeper to open Respondent's mail does not relieve Respondent of that burden. Under these circumstances, the forum finds that the \$250.00 is an appropriate civil penalty.

Respondent's 1999 violation is more serious. First, it was Respondent's second violation. Second, Respondent had the same opportunity to comply as in 1998, and again failed to do so, even after receiving reminder notices in 1998 and 1999. Third, given the fact that Respondent only employed two construction workers in 1999 for a total of 45 reportable hours, it would have been relatively simple for Respondent to complete the wage survey and return it. Fourth, Respondent employed construction workers in 1999 whose wages would have been included in the commissioner's calculation of prevailing wage rates in the Medford area and would have potentially affected those rates. Consequently, Respondent's failure to complete and return the 1999 wage survey was of greater magnitude and seriousness than Respondent's 1998 violation. Finally, Respondent should have known of the violation and her lack of contemporaneous personal knowledge, based on her delegation of authority to her bookkeepers, does not excuse her lack of knowledge. Under these

circumstances, the forum finds that the \$500.00 sought by the Agency is an appropriate civil penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalties assessed as a result of Respondent's two violations of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Martha Morrison** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of SEVEN HUNDRED AND FIFTY DOLLARS (\$750.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.
